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Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights

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ABSTRACT

Around the world, young activists are demanding stronger action from governments to address the climate emergency and to ensure intergenerational climate justice. An emerging strategy in this fight has been the use of litigation, particularly within human rights frameworks. This article analyses two current human rights-based climate cases brought by children and young people, *Sacchi et al. v Argentina, Brazil, France, Germany and Turkey*, a petition to the Committee on the Rights of the Child, and *Duarte Agostinho & Ors v Portugal & Ors*, a case pending before the European Court of Human Rights. It argues that these cases have the potential to advance the frontiers of both children's rights and environmental rights, as they offer an opportunity for human rights bodies to clarify a number of issues relevant to rights-based approaches to climate change. The cases also show the potential of climate litigation to empower young people and elevate their voices within climate decision-making.



KEYWORDS

Climate change; children's rights; environmental rights; climate justice; intergenerational justice

1. Introduction

The long-term consequences of our past and current greenhouse gas (GHG) emissions represent a significant injustice to future generations, who will bear the brunt of climate change despite having contributed little to its causes. The issue of intergenerational climate justice has been highlighted by young climate activists who – individually and through local, national, and international cooperation – are demanding stronger action from governments to address the threats that the climate crisis poses to their futures. Children and young people have employed various strategies in this cause, from the well-publicised activism of Greta Thunberg and Luisa Neubauer to the more localised efforts of the thousands of young people who have participated in their Fridays for Future school strike movement and other collective action.¹

An emerging strategy for children and young people to pursue intergenerational climate justice is litigation in national and international courts and tribunals. Recently, several successful cases have used constitutional rights or domestic human rights law

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¹'FridaysForFuture' (online) <<https://www.fridaysforfuture.org/>> accessed 28 September 2021.

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to challenge climate policies, such as the case Neubauer led in the Federal Constitutional Court of Germany.² Other human rights-based claims have been or are being pursued in places such as Colombia, Canada, India, and Australia.³

More recently, climate litigation has been gaining momentum within international human rights frameworks. One current example is the complaint brought by Thunberg and 15 other young people to the Committee on the Rights of the Child, in which they allege numerous violations of the *Convention on the Rights of the Child* by five states who have failed to take stronger action to reduce GHG emissions.⁴ A case is also underway in the European Court of Human Rights, *Duarte Agostinho & Ors v Portugal & Ors*, which names 33 European countries as respondents, and alleges violations of rights to life and private and family life under the *European Convention on Human Rights* (ECHR).⁵ While national human rights law and jurisprudence can help shape international approaches (and vice versa), international cases are an important opportunity to advance specific doctrines and principles within international human rights law through the rulings of authoritative international bodies. Furthermore, and perhaps more significantly in the fight for climate justice, international litigation is better able to address the reality that all states share responsibility for climate change and that the emissions of developed states in particular are having damaging impacts on the lives of children beyond their borders.

This new wave of climate litigation is helping to advance two related frontiers of human rights law, namely children's rights and environmental rights.⁶ In seeking to

²*Neubauer et al. v. Germany*, Bundesverfassungsgericht [Federal Constitutional Court] (Apps No 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021) ('*Neubauer et al. v. Germany*').

³*Demanda Generaciones Futuras v Minambiente*, Corte Suprema de Justicia de Colombia [Supreme Court of Justice of Colombia] (App No 11001-22-03-000-2018-00319-01, 5 April 2018); *ENvironnement JEUnesse v Procureur General du Canada* [2019] QCCS 2885 (Superior Court of Québec); *Mathur v Ontario* [2020] ONSC 6918 (Ontario Superior Court of Justice); *La Rose v Her Majesty the Queen* [2020] FC 1008 (Federal Court of Canada); *Pandey v India* (National Green Tribunal of India, App. No. 187/2017, 15 January 2019); *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33 (Queensland Land Court) ('*Waratah Coal*'). These cases build on a growing body of climate jurisprudence that includes landmark cases such as *Stichting Urgenda v Government of the Netherlands* (Ministry of Infrastructure and the Environment) [2015] Case C/09/00456689/HA ZA 13-1396, ECLI:NL:RBDHA:2015:7145 (24 June 2015, Hague District Court) ('*Urgenda* (District Court)') and *Milieudefensie v Royal Dutch Shell* [2021] HA ZA C/09/571932, Case 19-379 (26 May 2021, Hague District Court).

⁴Sacchi et al., 'Communication to the Committee on the Rights of the Child submitted under Article 5 of the *Third Optional Protocol to the United Nations Convention on the Rights of the Child*', Communication to the Committee on the Rights of the Child in Sacchi et al. v. Argentina et al., 23 September 2019 ('*Sacchi et al* (Petition)').

⁵Claudia Duarte Agostinho and others, Application to the European Court of Human Rights in *Claudia Duarte Agostinho & Ors v Portugal & Ors*, 2 September 2020, App No 39371/20 ('*Duarte Agostinho*').

⁶There is a growing body of scholarship in these fields, as well as significant literature exploring their intersection. See, for example, Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 244; Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37; Keina Yoshida and Joana Setzer, 'The Trends and Challenges of Climate Change Litigation and Human Rights' [2020] (2) *European Human Rights Law Review* 140; Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, Singapore 2018); Sumudu Atapattu, *Human Rights Approaches to Climate Change* (Routledge, New York 2016); Brian J Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2(2) *Chinese Journal of Environmental Law* 131; David Boyd, *Environmental Rights Revolution A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press, Vancouver 2014); James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, Cambridge 2014); John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477; Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press, Cambridge 2019); Evadne Grant, 'International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms' (2015) 6(2) *Journal of Human Rights and the Environment* 156; John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge 2018); Elizabeth D Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16(1) *Health and Human Rights* 19; Karin Arts, 'Children's Rights and Climate Change' in

litigate the long-term and global human rights impacts of climate change, these cases challenge the temporal and territorial constraints of the existing framework of rights protections at the international level. Along with narrow approaches to standing and responsibility, these have traditionally been seen as barriers to successful climate action within international human rights law. While the environmental dimensions of some human rights are recognised within the body of children's rights law, the climate crisis pushes the limits of our previous understandings and forces us to contemplate how children's rights, and human rights law more broadly, ought to apply in the context of long-term, potentially catastrophic, environmental change.

The young litigants in these cases present several creative arguments to overcome existing barriers in the legal frameworks. Among these is a call for greater integration of children's rights and environmental principles, such as intergenerational equity and the precautionary principle, to interpret states' substantive and procedural obligations in the context of climate change. This article argues that, in doing so, the cases can advance new frontiers of both children's and environmental rights. Should they succeed, their novel interpretations will be strengthened by judicial endorsement and contribute to the evolution of the law. Even if these cases are not successful, they may highlight potential strategies that future litigants can refine, thereby shaping the development of both areas of law. Furthermore, given the influence that international human rights law has on domestic law, advancements at the international level have the potential to shape national approaches beyond the jurisdictions of respondent states.

These cases also demonstrate how litigation through human rights bodies can empower young climate activists to have their voices heard and recognised through legal processes. What is more, children's empowerment is a crucial part of addressing the intergenerational impacts of climate change and other environmental harms. For cases like these to contribute to durable change, human rights legal frameworks will need to develop a more nuanced and flexible understanding of states' obligations in the context of climate change. This article argues that children's rights-based climate litigation may lead to exactly the sort of evolution needed to ensure that international human rights law remains useful and relevant to the climate emergency facing both current and future generations.

This article focuses on the two current international cases, *Sacchi* and *Duarte Agostinho*. While the cases are yet to be decided at the time of writing, the article examines the arguments presented in the two petitions against the backdrop of existing scholarship and jurisprudence to evaluate their potential contribution to the evolution of international human rights law and to intergenerational climate justice. There are acknowledged limits to the conclusions that can be reached from a study of just two cases, but the complaints analysed here represent a very significant moment in the development of climate litigation generally and children's rights-based litigation in particular. The cases confront issues that are relevant to contemporary human rights in a variety of ways and therefore have the potential to contribute not only to the success of children's

climate litigation specifically, but also to the development of children's and human rights law more broadly.

This article begins by briefly explaining the many ways in which climate change threatens the human rights of children and young people. It then shows how children's rights-based climate litigation sits at the intersection of children's rights and environmental rights discourses, before analysing the two current cases in more detail. It examines how the young claimants are addressing legal issues relating to standing and admissibility, the content of states' duties, and proving shared responsibility. The article concludes with some comments on the likely outcome of the cases and the contributions they might make to children's empowerment and the advancement of human rights law.

2. Children's Rights and Environmental Rights in the Context of Climate Change

Children's climate litigation contributes to the intersecting discourses of children's rights and environmental rights. Together, these fields provide the legal rights and procedures for children to pursue climate litigation while also shaping the arguments and reasoning within those cases. They also provide a theoretical basis for assessing both the prospects of success for individual cases and the possibility that these cases might lead to meaningful, durable climate action.

Before considering how climate litigation is advancing these legal frontiers, it is helpful to understand the various ways that climate change affects children's lives, and this Section will begin by giving a brief overview of these impacts and of children's participation in climate policy. It will then provide an outline of the international legal framework of children's rights within which climate litigation can be advanced, drawing attention to the recognised links between children's rights and the environment. This relationship will then be expanded upon through discussion of select aspects of environmental rights scholarship and jurisprudence to help explain the challenges children face in winning these cases. Together, these intersecting fields of human rights provide a framework for analysing the specific climate cases in Section 3.

2.1. The impacts of climate change on children

Climate change threatens children's rights in a range of ways. Rising temperatures and changes to rainfall patterns will impact on food security and the availability of fresh water, with the latter also affected by rising sea levels and saltwater inundation.⁷ Children are particularly susceptible to the health effects of climate change, notably water- and vector-borne diseases and heat stress, not only because of their physical development but also because they typically lack agency to change their surroundings to avoid

⁷John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Report to the Human Rights Council, UNGA 37th sess, Agenda item 3, UN Doc No A/HRC/37/58, 24 January 2018) 8 ('*Children's Rights Report*'); Human Rights Council, *Resolution 35/20 on Human Rights and Climate Change* (UNGA 35th sess, Agenda item 3, UN Doc A/HRC/RES/35/20, 7 July 2017) 4–5 ('*HRC Resolution 35/20*').

risks.⁸ Children's mental health is also of significant concern, with evidence of increased anxiety among children relating to climate change and future social, economic, and environmental conditions.⁹

Increasingly frequent and severe natural disasters such as heatwaves, floods, storms and bushfires not only threaten children's physical safety and well-being, but disrupt children's education and can lead to relocation or separation from families, increasing risks of trafficking, exploitation, and abuse.¹⁰ Generally the increasing pressures caused by climate change are likely to exacerbate tensions that can lead to conflict, child labour, and early marriage.¹¹ Moreover, climate change amplifies existing socio-economic inequalities, with children from marginalised groups more likely to endure serious impacts.¹² Least developed countries face the greatest impacts of climate change but are also the countries with the highest proportion of children in their populations.¹³

On current trajectories, the Earth is on track to overshoot the internationally-agreed target of keeping warming to 'well-below 2°C', let alone the more ambitious goal of 1.5°C or below set out in the Paris Agreement.¹⁴ Moreover, the lifespan of carbon dioxide means the planet will continue to warm for decades to come, even if emissions ceased now.¹⁵ Thus, today's children and young people are already locked into at least some global heating and the associated impacts on human rights. Given children's negligible contribution to GHG emissions this represents a significant intergenerational injustice.¹⁶

Despite children's vulnerability to climate change, their rights have remained relatively invisible in international climate change law and policy.¹⁷ The *United Nations Framework Convention on Climate Change* (UNFCCC) includes protecting the climate for the benefit of future generations among its guiding principles.¹⁸ However, as scholars

⁸*Convention on the Rights of the Child* 1989, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 24(2)(c), (e) ('CRC'); UNICEF, *Unless We Act Now: The Impact of Climate Change on Children* (Report, November 2015) 40 <https://www.unicef.org/publications/index_86337.html>; Knox, 'Children's Rights Report' (n 7) 7.

⁹Gibbons (n 6) 21; Makuch (n 6) 388, 390, 396.

¹⁰Knox, 'Children's Rights Report' (n 7) 7; Gibbons (n 6) 21–22.

¹¹Office of the High Commissioner for Human Rights, *Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment of the Rights of the Child: Report to the Human Rights Council* (Report to the UNHCHR, UNGA 35th sess, Agenda items 2 and 3, UN Doc A/HRC/35/13, 4 May 2017) 7 ('OHCHR Analytical Study'); Knox, 'Children's Rights Report' (n 7) 7.

¹²Committee on the Rights of the Child, *Report of the 2016 d of General Discussion: Children's Rights and the Environment* (Report, 23 September 2016) 4 <<https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2016/DGDiscussionReport-May2017.pdf>> ('CRC 2016 Day of General Discussion'); OHCHR Analytical Study (n 11) 6–8.

¹³Committee on the Rights of the Child, 'CRC 2016 Day of General Discussion' (n 12) 5.

¹⁴*Paris Agreement on Climate Change*, opened for signature 12 December 2015, entered into force 4 November 2016, art 2.1(1); Valérie Masson-Delmotte and others, *Summary for Policymakers* in Intergovernmental Panel on Climate Change, 'Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (Report, 7 August 2021) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf>.

¹⁵Masson-Delmotte and others (n 14) 5, [A.2]; Thorsten Mauritsen and Robert Pincus, 'Committed Warming Inferred from Observations' (2017) 7(9) *Nature Climate Change* 652.

¹⁶Sumudu Atapattu, 'Intergenerational Equity and Children's Rights: The Role of Sustainable Development and Justice' in Claire Fenton-Glynn (ed), *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (1st edn Cambridge University Press, Cambridge 2019) 167, 171, 189; OHCHR Analytical Study (n 11) 10; Henry Shue, 'Changing Images of Climate Change: Human Rights and Future Generations: Choosing a Future' (2014) 5 *Journal of Human Rights and the Environment* 50; Gibbons (n 6); Arts (n 6); Knox, 'Children's Rights Report' (n 7).

¹⁷Gibbons (n 6) 26.

¹⁸*United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 3(1).

such as Gibbons, Makuch and Arts have identified, this has not been operationalised satisfactorily to address the significant impacts of climate change on children.¹⁹ The Preamble of the Paris Agreement says that states should ‘respect, promote and consider’ their existing human rights obligations – including with respect to the rights of children – and have regard to intergenerational equity.²⁰ There is no mention of children’s rights or intergenerational equity in the operative (i.e. legally binding) sections of the Agreement, however.

Furthermore, opportunities for children to participate in climate policy at the global level have been extremely limited to date, compounding the injustice they experience.²¹ As Gibbons says, ‘children’s voices are scarcely heard, and their concerns are strangely invisible in climate policy dialogues’.²² Some progress has been made in more recent years, and at the domestic and local levels children’s climate activism has advanced significantly.²³ However, very few national action plans for climate change specifically enrol children and young people as actors, despite the demonstrated positive contributions that they can make when empowered to do so.²⁴ Gibbons includes this in the discriminatory effects of climate change on children: ‘*de facto* discrimination against children is compounded by *de jure* exclusion of their concerns from global UNFCCC instruments and policy processes, and from national policies and instruments’.²⁵ These shortcomings could be alleviated by promoting a child rights-based approach to climate action, ultimately enforced through litigation using the legal framework of children’s rights, discussed below.²⁶

2.2. Children’s rights

The international legal framework which advances the protection of children’s human rights is centred on the *Convention on the Rights of the Child* (CRC).²⁷ All nations except the United States are parties to the CRC, and they are obliged to ‘respect and ensure’ the rights of all children within their jurisdictions.²⁸ States’ compliance is monitored by the Committee on the Rights of the Child (the Committee).²⁹ Where states have ratified the Third Optional Protocol to the CRC (CRC-OPIC), the Committee also has

¹⁹Gibbons (n 6) 28; Arts (n 6); Makuch (n 6) 388; Deva M Prasad and Suchithra C Menon, ‘Children’s Rights and Climate-Change Policy: Addressing the Concerns of Children and Future Generations’ (2018) 48 (3–4) *Environmental Policy and Law* 157, 159.

²⁰*Paris Agreement* (n 14) Preamble; Arts (n 6) 226.

²¹Arts (n 6) 232.

²²Gibbons (n 6) 23.

²³*Ibid.*, 24; see e.g. ‘YOUNGO – Children and Youth Constituency to United Nations Framework Convention on Climate Change’ (Website) <<http://www.youngo.uno/>> accessed 28 September 2021; United Nations Framework Convention on Climate Change, ‘United Nations Joint Framework Initiative on Children, Youth and Climate Change’ (Website, 2018) <<https://unfccc.int/topics/education-youth/youth-engagement/youth-engagement/partnerships>>; Children’s Environmental Rights Initiative and UNICEF, ‘Declaration on Children, Youth and Climate Action’ (Website, 9 December 2019) <<https://www.childenvironment.org/declaration-children-youth-climate-action>>.

²⁴Gibbons (n 6) 24.

²⁵Gibbons (n 6) 27; see also Makuch (n 6) 388.

²⁶Arts (n 6); Gibbons (n 6); see also Prasad and Menon (n 19); Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (UN Doc CRC/GC/2003/5, 34th sess, 27 November 2003) (‘General Comment No. 5’); OHCHR Analytical Study (n 11) 9.

²⁷CRC (n 8).

²⁸*Ibid.*, art 2. Under article 1, a ‘child’ is defined as a person under the age of 18, unless the age of majority is set at a younger age under the relevant domestic law.

²⁹*Ibid.*, ii.

competence to hear complaints against them from children (either directly or through their guardians).³⁰ To date, 46 states have ratified the CRC-OPIC. As will be discussed below, the CRC-OPIC offers a valuable means of empowering children to bring a legal challenge when their rights have been violated.

The CRC gives flesh to the bones of many rights which are guaranteed to children under other human rights treaties, such as the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and the *European Convention on Human Rights* (ECHR). These include rights to health, adequate food, water and housing, education, and freedom of expression. International human rights law also protects the right to build and maintain connections with family, community, and culture, particularly for Indigenous persons and members of other minority groups. The CRC gives specific guidance for how these broad rights must be approached for the benefit of children. It also sets out a number of specific rights to which children are entitled, including the right to survival and development as an accompaniment to the right to life, and rights to play and to be protected from exploitation, trafficking and abuse.³¹

Underpinning the rights in the CRC are a number of principles which form the elements of a child rights-based approach to policymaking, namely non-discrimination, participation, and the best interests of the child.³² The requirement to put the best interests of the child first in all actions concerning children is widely considered to be a fundamental norm of children's rights, and is arguably part of customary international law.³³ Children's participation in decision-making is key to achieving this overarching objective, as the best interests of the child can be best appreciated when children themselves are able to articulate their preferences and concerns. The importance of participation is articulated in the CRC in specific contexts, such as in relation to children's living arrangements or where they are involved in any judicial or administrative proceedings.³⁴ Beyond these specific contexts however, children generally are entitled to participate in all decisions which affect them.³⁵ Together, participation and the best-interests principle empower children, ensure respect for their agency and dignity, and lead to decision-making which is consistent with their rights. A third overarching principle is non-discrimination, which highlights the importance of not discounting children's interests and ensuring they receive equitable treatment. The principle is also essential in ensuring that all children enjoy their human rights equally, without discrimination on the basis of wealth, race, religion, gender, age, or any other factor.³⁶

³⁰Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, opened for signature 19 December 2011, entered into force 14 April 2014, UN Doc A/RES/66/138, art 5 ('Optional Protocol to CRC').

³¹CRC (n 8) arts 6(2), 31, 34–36.

³²Committee on the Rights of the Child, 'General Comment No. 5' (n 26) 4; OHCHR Analytical Study (n 11) 32; Arts (n 6) 220; Gibbons (n 6).

³³CRC (n 8) art 3; Committee on the Rights of the Child, *General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3(1))* (UN Doc CRC/C/GC/14, 62nd sess, 29 May 2013) ('CRC Committee General Comment 14') 2; Rachel Hodgkin and Peter Newell (eds), *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007) 35–42; Geraldine van Bueren, 'New Challenges for the Convention on the Rights of the Child upon Reaching Middle Age' [2020] (1) European Human Rights Law Review 38, 40.

³⁴CRC (n 8) arts 12(2), 15.

³⁵Ibid., art 12(1); Arts (n 6) 220; Gibbons (n 6) 23–25.

³⁶CRC (n 8) art 2; Gibbons (n 6) 27; Arts (n 6) 220.

Overall, the framework of rights and principles in the CRC, in conjunction with the ICCPR and ICESCR, establishes important obligations and standards that governments must adhere to with respect to environmental regulation.³⁷ However, while the interdependent relationship between the environment and human rights has been recognised in general terms, the specific dimensions of this relationship as it pertains to children have only recently gained greater attention.³⁸ The importance of the environment to children's health is recognised in article 24 of the CRC, which requires states to reduce environmental pollution.³⁹ The right to education also has a recognised environmental dimension, with states obliged to ensure that children receive education 'directed to the development of respect for the natural environment'.⁴⁰ Children's vulnerability to environmental degradation owing to their physical and emotional development, their social status and degree of agency remains otherwise under-recognised in human rights law, though it has been the subject of recent discussions within human rights bodies and the Committee recently resolved to make the environment and climate change the focus of its next General Comment to provide guidance on how the CRC must be implemented to protect children from environmental and climate-related harms.⁴¹

A child rights-based approach using these rights and principles has potential to enhance climate action in a number of ways.⁴² Primarily, it can highlight and address the significant impacts of climate change on children by placing their best interests at the centre of policymaking. It also elevates children's participation, empowering them to contribute to important policy discussions and helping to ensure that their opinions and interests are considered. Gibbons highlights the essential role of environmental education in this respect, which equips children to participate fully in climate action and decision-making.⁴³ A child rights-based approach also requires disaggregated data to provide a detailed understanding of the impacts of climate change on children.⁴⁴ As Gibbons has said, 'education and information provide the scaffolding for effective and sustainable child participation, building their capacity to innovate and adapt to the coming drastic changes'.⁴⁵

³⁷OHCHR Analytical Study (n 11) 9; Committee on the Rights of the Child, 'General Comment No. 5' (n 26) 4.

³⁸Committee on the Rights of the Child, 'CRC 2016 Day of General Discussion' (n 12); Knox, 'Children's Rights Report' (n 7); Children's Environmental Rights Initiative, 'Realising Children's Right to a Healthy Environment: A Joint Call to Action for the HRC Annual Full-Day Meeting on the Rights of the Child June 2020' (June 2020) <https://sgi-ouna.org/wp-content/uploads/2021/05/ADRC_Call-for-action_final-for-endorsement.pdf> accessed 28 September 2021; UNICEF (n 8); UNICEF Office of Research, 'The Challenges of Climate Change: Children on the Front Line', *Innocenti Insight* (Report, UNICEF, 2014) <https://www.unicef.org/publications/index_74647.html>; World Health Organization, *Don't Pollute My Future! The Impact of the Environment on Children's Health* (Report, 2017) <<http://www.who.int/ceh/publications/don-t-pollute-my-future/en/>>; World Health Organization, *Inheriting a Sustainable World: Atlas on Children's Health and the Environment* (Report, 2017) <<https://www.who.int/publications-detail-redirect/inheriting-a-sustainable-world>>; Makuch (n 6) 388; Prasad and Menon (n 19); Gibbons (n 6) 20; Arts (n 6); Atapattu (n 16).

³⁹CRC (n 8) art 24(2)(c).

⁴⁰*Ibid.*, art 29(1)(e).

⁴¹Committee on the Rights of the Child, 'CRC 2016 Day of General Discussion' (n 12) 4; OHCHR Analytical Study (n 11) 4; HRC Resolution 35/20 (n 7); Knox, 'Children's Rights Report' (n 7); Committee on the Rights of the Child, 'The UN Committee on the Rights of the Child commits to a new General Comment on Children's Rights and the Environment with a Special Focus on Climate Change' (Press Release, 4 June 2021).

⁴²Gibbons (n 6); van Bueren (n 33); Arts (n 6); Makuch (n 6); Prasad and Menon (n 19).

⁴³Arts (n 6) 225; Gibbons (n 6) 24; Makuch (n 6) 391; Committee on the Rights of the Child, *General Comment No. 1: The Aims of Education (Article 29 (1))* (UN Doc CRC/GC/2001/1, 26th sess, 17 April 2001) 13.

⁴⁴Gibbons (n 6) 27; Arts (n 6) 228; Committee on the Rights of the Child, 'CRC 2016 Day of General Discussion' (n 12) 15; Knox, 'Children's Rights Report' (n 7) 12.

⁴⁵Gibbons (n 6) 24; OHCHR Analytical Study (n 11) 11.

The framework of children's rights also offers an enforcement avenue for children to take action when climate policies are inadequate. To date, climate litigation has used different legal instruments, including regional human rights treaties such as the ECHR,⁴⁶ national constitutions,⁴⁷ and domestic human rights legislation,⁴⁸ in addition to using the complaints procedure under the CRC.⁴⁹ Most of the successful cases so far have been pursued within domestic legal systems but this trend is beginning to expand to international regimes. Where regional or international frameworks are engaged, children can be empowered to take their grassroots activism to the international stage, amplifying their concerns about the climate crisis and highlighting the responsibility of all states for global climate change.

The long-term, transboundary, and cumulative impacts of greenhouse gas emissions present challenges in arguing that climate change is a breach of human rights, however. This is true in all legal settings, but can be most pronounced when international or regional human rights are engaged. As explained below in Section 3, the challenges relate to issues of standing and admissibility, the content of rights and obligations, and establishing causation and responsibility. The jurisprudence and scholarship of environmental rights can be instructive in finding ways to overcome these challenges and conceptualise climate change as a human rights violation and the influence of this emerging field can be seen in children's litigation.

2.3. Environmental rights

The mutually supportive relationship between the environment and human rights is recognised in a body of law known as environmental rights.⁵⁰ It encompasses the environmental preconditions of human rights like the rights to life, health, self-determination, culture, and an adequate standard of living, and acknowledges that civil and political rights, such as freedom of information and democratic participation, are crucial to effective environmental protection. In some jurisdictions, this takes the form of a distinct right to a healthy environment,⁵¹ while in others it manifests in recognising the environmental dimensions of existing rights, a process commonly referred to as the 'greening' of human rights.⁵² Applied to children's rights, an environmental rights perspective means that the rights in the CRC implicitly guarantee the environmental quality necessary to safeguard and fulfil them, even where no dedicated right to the environment exists.⁵³

⁴⁶Duarte Agostinho (n 5).

⁴⁷*Demanda Generaciones Futuras v Minambiente* (n 3); see also *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173.

⁴⁸*Waratah Coal* (n 3).

⁴⁹*Sacchi et al. (Petition)* (n 4).

⁵⁰See, e.g. John H Knox, *Framework Principles on Human Rights and the Environment* (Report, United Nations Human Rights Special Procedures, 2018) <<https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>>; Lewis (n 6); Boyd (n 6); Turner and others (n 6); Knox and Pejan (n 6); Dinah Shelton, 'Environmental Issues and Human Rights: Multilateral Treaties Adopted between 1991 and 2001' (paper presented at the Joint UENP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, 14 January 2002); Dinah Shelton, 'Whiplash and Backlash – Reflections on a Human Rights Approach to Environmental Protection' (2015) 13(1) *Santa Clara Journal of International Law* 11; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law* 613.

⁵¹May and Daly (n 5); Erin Daly and James May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge: Cambridge University Press, 2018); Turner and others (n 6); Boyd (n 6); Joshua C Gellers, *The Global Emergence of Constitutional Environmental Rights* (London: Routledge, 2017); Lewis (n 6); Knox and Pejan (n 6).

⁵²Boyle (n 50).

Scholarship and jurisprudence on environmental rights identify several considerations which impact how they can be enforced, particularly with respect to long term and future environmental harm like that caused by climate change. These factors can be relevant in assessing the strengths and weaknesses of children's climate cases. In analysing these cases, we can also see how the evolution of environmental rights in these areas has shaped the arguments presented, and the potential for the cases to advance that evolution in turn.

The first consideration is the extent to which environmental rights can be defined in ecocentric or anthropocentric terms. The approach of 'greening' existing rights is generally anthropocentric, with the environment framed as instrumental to the enjoyment of specific rights. This is the usual approach in the European Court of Human Rights (ECtHR), which has confirmed that no standalone right to a healthy environment exists,⁵⁴ but which has nonetheless found numerous breaches of other specific Convention rights based on environmental harm.⁵⁵ The African Charter on Human and Peoples' Rights guarantees the right of all peoples to a generally satisfactory environment that is 'favourable to their development'.⁵⁶ This shares an anthropocentric framing but through a more collective lens.

In contrast, the Inter-American Court of Human Rights (IACtHR) has recently recognised an autonomous right to a healthy environment as a corollary of the protection of economic, social, and cultural rights.⁵⁷ This right protects components of the environment such as forests, rivers and seas, and exists for the benefit of all living beings that share the planet.⁵⁸ This more ecocentric view can be found in national constitutions as well.⁵⁹ The Ecuadorian constitution, for example, protects not only human rights but also the rights of nature itself (*Pacha Mama*) 'to integral respect for its existence

⁵³ John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (UNGA, UN Doc A/HRC/31/52, 31st sess, Agenda item 3, 1 February 2016) <<https://digitallibrary.un.org/record/831230?ln=en>>; Knox, 'Children's Rights Report' (n 7); Makuch (n 6).

⁵⁴ *Kyrtatos v Greece* [2005] 40 Eur Court HR 16 (App. No. 41666/98).

⁵⁵ *Lopez Ostra v Spain* [1994] ECHR 46 (App. No. 16798/90, 9 December 1994); *Taskin v Turkey* (European Court of Human Rights, Grand Chamber, App. No. 46117/99, 10 November 2004); *Guerra v Italy* [1998] ECHR 7 (App. No. 14967/89, 19 February 1998); *Tatar v Romania* (European Court of Human Rights, Chamber, App. No. 67021/01, 27 January 2009); *Dubetska v Ukraine* (European Court of Human Rights, Fifth Section, App. No. 30499/03, 10 February 2011).

⁵⁶ *African Charter on Human and Peoples' Rights* 1981, opened for signature 1 June 1981, entered into force 21 October 1986, 21 ILM 58, art 24.

⁵⁷ *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Merits, reparations and costs)* (Inter-American Court of Human Rights, Ser. C No. 400, 6 February 2020) 203 ('Lhaka Honhat') citing *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights (Advisory Opinion)* (Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017) (Official summary issued by the Inter-American Court, 15 November 2017) <http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf> ('IACtHR Advisory Opinion on Environment and Human Rights'); Maria Antonia Tigre, 'Lhaka Honhat Association vs. Argentina: The Human Right to Environment in the Inter-American Court', *Global Network for the Study of Human Rights and the Environment* (Blog post, 4 April 2020) <<https://gnhre.org/2020/04/10/lhaka-honhat-association-vs-argentina-the-human-right-to-environment-in-the-inter-american-court/>> accessed 28 September 2021; Stéphanie de Moerloose, 'The Lhaka Honhat Case of the Inter-American Court of Human Rights: The Long-Awaited Granting of 400,000 Hectares Under Communal Property Rights', *European Journal of International Law: Talk!* (Blog Post, 16 July 2020) <<https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights/>>; note, the San Salvador Protocol to the American Convention includes a right to a healthy environment in article 11, but this is not justiciable: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: 'Protocol of San Salvador', San Salvador, opened for signature 17 November 1988, 18th sess., UN Doc OEA/Ser.A/44, OAS Treaty Series No 69 (entered into force 16 November 1999) art 19(6).

⁵⁸ *Lhaka Honhat* (n 57) 203.

⁵⁹ See, for example, the constitutions of Brazil, Lithuania, Uzbekistan, Bhutan, Ecuador.

and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes'.⁶⁰

This distinction between anthropocentric and ecocentric rights becomes important for children's climate litigation because of another feature of environmental rights: standing to bring a claim and proving a violation usually require a direct impact on rights that either has already occurred or is imminent.⁶¹ In a recent communication, *Teitiota v New Zealand*, the Human Rights Committee (which enforces the ICCPR) considered whether sea-level rise caused by global heating could constitute a violation of the right to life of people in Kiribati.⁶² While the Committee accepted that rising sea levels threaten the lives of i-Kiribati, it concluded that no violation had occurred because the risk to life was not imminent and could be prevented, clarifying that such a risk 'must be, at least, likely to occur'.⁶³ In the ECtHR, a similar test is used for admissibility, and a claim will usually be held to be inadmissible unless the applicant faces a 'serious, specific and imminent danger'.⁶⁴

For children's rights-based climate litigation these standards may be problematic because, while there is compelling evidence that climate change will cause environmental problems in the future, individualised and imminent impacts are more difficult to demonstrate.⁶⁵ The anthropocentric, individualised approach also tends to exclude considerations of the structural, cumulative and complex factors that often cause environmental harm.⁶⁶ The recognition of ecocentric rights would likely make these claims easier to substantiate, because harm could be established based on damage to the environment more generally.

A third emerging area of environmental rights scholarship relates to the geographic and temporal scope of state obligations. Traditionally, countries have been understood only to owe obligations to persons within their jurisdiction or under their control. However, some of the recent cases pursue foreign governments for their failures to reduce GHG emissions, raising questions about the extraterritorial application of

⁶⁰*Constitution of the Republic of Ecuador* (2008): Ch 7, Art 71.

⁶¹*E.W. et al. v. The Netherlands (Decision)*, Human Rights Committee, Communication No. 429/1990, UN Doc. No. CCPR/C/47/D/429/1990, 47th sess., 8 April 1993; *Beydon v. France (Decision)*, Human Rights Committee, Communication No. 1400/2005, 85th sess., UN Doc. No. A/61/40 642 Vol 2, p. 642, 31 October 2005. The HRC stated that an individual 'must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such effect is imminent' (para 4.3).

⁶²*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6.

⁶³*Ioane Teitiota v. New Zealand (Views adopted by the Committee under article 5(4) of the Optional Protocol)*, Human Rights Committee, Communication No. 2728/2016, UN Doc CCPR/C/127/D/2728/2016, 24 October 2019.

⁶⁴*Balmer-Schafroth and others v Switzerland*, App. No. 22110/93 (Eur Court HR, 26 August 1996); See also, *Fadeyeva v Russia*, App. No. 55723/00 (Eur Court HR, 2005); Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejani (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge 2018) 86; Ole W Pedersen, 'European Court of Human Rights and Environmental Rights' in James May and Erin Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar Publishing, Cheltenham 2019) chapter 35; Natalia Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia Ltd, Cambridge 2018) 99.

⁶⁵Atapattu (n 16) 174; Meinhard Doelle, 'Climate Change and Human Rights: The Role of the International Human Rights in Motivating States to Take Climate Change Seriously' (2004) 1(2) *Macquarie Journal of International and Comparative Environmental Law* 179, 203–5; Knox, 'Linking Human Rights and Climate Change at the United Nations' (n 6) 489; Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* (UNGA, 10th sess, Agenda item 2, UN Doc A/HRC/10/61, 15 January 2009) 70 ('OHCHR 2009 Report').

⁶⁶Shelton 2002 (n 50).

states' obligations.⁶⁷ Even where claimants are taking action against their own governments, the cumulative and transnational nature of climate change presents challenges for proving that the government's actions caused (or are likely to cause) particular human rights impacts.⁶⁸

Recently we have begun to see a shift within environmental rights scholarship and jurisprudence towards a more expansive understanding of states' obligations which recognises at least a duty to prevent the foreseeable and/or direct consequences of their actions, even when those consequences occur within the territory of another state.⁶⁹ In its recent Advisory Opinion, the IACtHR adopted a standard of 'effective control', concluding that when a State exercises effective control over environmentally damaging activities, a duty to respect and ensure human rights will attach to those actions, even where the damage occurs in a foreign state.⁷⁰ Under this approach, a state's jurisdiction, and therefore its human rights obligations, extend to the foreseeable consequences of any act or omission over which the state had effective control, regardless of where the consequences occur.⁷¹

Five of the United Nations human rights committees have issued a joint statement on human rights and climate change in which they assert that states have obligations to prevent foreseeable human rights harms arising from climate change, and that this extends to extraterritorial obligations.⁷² To date, this broader understanding of states' obligations has not been applied in any complaints process and, as discussed below, establishing the existence of extraterritorial obligations will be one of the key challenges for multistate climate litigation.⁷³ The potential of these ideas to extend obligations to future generations has also not been tested. However, understanding these features of environmental rights helps us to appreciate the creative arguments that children are advancing in climate litigation and the possibility that they will cement these emerging interpretations.

⁶⁷ *Sacchi et al. (Petition)* (n 4); *Duarte Agostinho* (n 5).

⁶⁸ See, for example, the petition currently before the Human Rights Committee from a group of Torres Strait Islander people against Australia. The Australian government has denied responsibility on the basis that climate impacts have not yet materialised. Katharine Murphy, 'Australia Asks UN to Dismiss Torres Strait Islanders' Claim Climate Change Affects Their Human Rights', *The Guardian* (online, 14 August 2020) <<http://www.theguardian.com/australia-news/2020/aug/14/australia-asks-un-to-dismiss-torres-strait-islanders-claim-climate-change-affects-their-human-rights>>; ClientEarth, 'Torres Strait FAQ' (online) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf> accessed 28 September 2021.

⁶⁹ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (HRC, 80th sess., UN Doc No CCPR/C/21/Rev.1/Add.13, adopted 29 March 2004, published 26 May 2004).

⁷⁰ IACtHR Advisory Opinion on Environment and Human Rights (n 57).

⁷¹ *Ibid.*, paras 102, 104; *Sacchi et al (Petition)* (n 4) para 248.

⁷² Office of the High Commissioner for Human Rights, 'Five UN Human Rights Treaty Bodies Issue a Joint Statement on Human Rights and Climate Change' (Media Release, 16 September 2019) ('OHCHR Media Release'); *Sacchi et al (Petition)* (n 4) para 177.

⁷³ The case of *Luciano Lliuya v RWE* (Case No. 2 O 285/15, Essen Regional Court, 15 December 2016), in which a Peruvian national and resident is suing the German electricity company, RWE, in the German courts, is a potentially significant example of cross-border climate litigation. While the case has yet to be determined, the Court has confirmed that it will proceed to hear arguments from the parties and will receive scientific evidence to help establish the contribution of the defendant to the risk of flooding in the plaintiff's village. The challenge of extending states' human rights obligations beyond national borders has been the subject of much discussion in human rights literature in various contexts, but more recent cases relating to environmental rights and climate change suggest that barriers to extraterritoriality could be overcome. See, for example, Savaresi and Auz (n 6); Boyle (n 50); Christopher Campbell-Duruffé and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8(3–4) *Climate Law* 321.

3. Children's Climate Litigation at the Frontiers

The trend of children's rights-based climate litigation is an exciting development for both environmental rights and children's rights. Drawing on the discussion of jurisprudence and scholarship above, this section will analyse this emerging body of case law to identify key issues relevant to the children's prospects of success, indicating the relative strengths and weaknesses of different models of litigation. It will also highlight some of the creative arguments presented by young claimants and consider how these might advance specific aspects of the law in both areas.

The analysis in this part is focused on two current cases, the *Sacchi* complaint before the Committee on the Rights of the Child and *Duarte Agostinho*, a recent Application to the ECtHR. The two cases are still before the relevant body, but the analysis presented here is based on information that is current at the time of writing.⁷⁴ Where relevant, references will also be made to other climate litigation by children and young people in domestic courts.

3.1. Standing, admissibility and actionable harms

Children's climate litigation raises a number of crucial questions about the enforceability of human rights in the context of environmental harm, starting with when children will have standing to bring a claim, how that claim needs to be framed in order to be admissible, and who can be named as respondents. As will be seen, particular issues arise when a complaint has a cross-border dimension or where it seeks a remedy for future harms.

To begin with, standing will generally be based on whether the complainant is an 'injured party' or 'victim' and whether they are owed enforceable obligations by the respondent. In most human rights regimes, claims can be ruled inadmissible if either of these factors cannot be established.⁷⁵ Demonstrating an 'injury' is obviously challenging in relation to climate change, where much of the harm is predicted to occur in the future but may not yet have materialised. The current crop of children's climate litigation seeks to get around this issue in various ways.

⁷⁴On 30 November 2020, the ECtHR officially communicated the case to the defendant states and asked them to respond to the claim by the end of February 2021. These responses have not yet been made publicly available. Since the writing of this article, the CRC has dismissed the *Sacchi* complaint for failure to exhaust domestic remedies. Office of the High Commissioner for Human Rights, 'Open Letter to the Authors: Re: *Sacchi et al. v Argentina* and four similar cases' <https://www.ohchr.org/Documents/HRBodies/CRC/Open_letter_on_climate_change.pdf>.

⁷⁵*Optional Protocol to CRC* (n 30) art 5(1). Article 5(1) reads: 'Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State party, claiming to be victims of a violation by that State party'. See, also, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, entered into force 3 September 1953, arts 34, 35(3)(b) ('ECHR'). Article 34 of the ECHR reads: 'The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right'. In *Balmer-Schafroth v Switzerland* [1997] ECHR 46 (App. No. 22110/93, 26 August 1997), the European Court articulated the test for admissibility as circumstances in which the application faces a 'serious, specific and imminent' danger. See also, *Fadeyeva v Russia* (n 64). This strict test has been softened somewhat in more recent jurisprudence, but applicants still need to demonstrate that the threat to their rights is neither too general nor too remote: *Tatar v Romania* (n 55); *Budayeva and others v Russia* [2008] ECHR 216 (App. Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008); *Ahumnay and others v Turkey* (European Court of Human Rights, Chamber, App. No. 6080/06, 21 February 2019). See Kobylarz (n 64) 110–1; Pedersen 2018 (n 64) 87.

In 2020, six young people from Portugal commenced an action in the ECtHR against 33 European countries claiming that their failure to take stronger action to cut GHG emissions constitutes a violation of their rights guaranteed in the ECHR, specifically the rights to life (article 2) and to enjoyment of home, private, and family life (article 8).⁷⁶ In particular they point to the impact of severe bushfires which killed over 100 people in Portugal in 2017 and which have been linked to climate change.⁷⁷ By focusing on recent climate change-related disasters, the case is anchored in actual, rather than purely anticipated, harms. The petitioners argue they have therefore been directly affected as victims of the respondents' breaches.⁷⁸

The Portuguese case does not limit itself to claims for past harms, however. The petitioners also argue breaches based on states' failures to prevent anticipated climate harms, claiming that 'potential victimhood' is sufficient if there is reasonable and convincing evidence that a violation will occur.⁷⁹ In this respect the case is similar to *Sacchi*, a claim brought by 16 children to the Committee on the Rights of the Child.⁸⁰ The children claim that the five respondent states have breached their rights to life (article 6), health (article 24) and culture (article 30) under the CRC by their failure to take stronger action to curb GHG emissions. As their basis for standing under article 5 of CRC-OPIC, the children claim to be foreseeable victims of the respondent states' acts and omissions because 'their present injuries and exposure to risks are precisely the life-threatening harms that the respondents knew would happen if they failed to use all available means to reduce emissions and cooperate internationally to prevent global warming'.⁸¹

In addition to showing they are 'injured parties' entitled to standing, the applicants in *Sacchi* and *Duarte Agostinho* face a further challenge in establishing that the foreign states they name as respondents owe them legal obligations. This issue has ramifications for our understanding of states' human rights obligations in relation to climate change, and has frequently been noted as one of the principal barriers to successful human rights-based climate litigation.⁸² As noted above, human rights law typically obliges states to protect the rights of people within their jurisdiction, based on either territory or control.⁸³ If an applicant cannot demonstrate that the respondent owes them duties, complaints will normally be ruled inadmissible.⁸⁴

In *Sacchi*, some of the children are nationals of respondent states, but most do not have that relationship of nationality and they therefore need another basis for showing that they fall within the jurisdiction of the respondent states.⁸⁵ Relying on some of the legal authorities and expert opinions noted above, in Section 2, the petition argues that the children are within the states' jurisdiction because they are victims of the

⁷⁶*Duarte Agostinho* (n 5); ECHR (n 75) arts 2 and 8.

⁷⁷*Duarte Agostinho* (n 5) paras 16–22; Marco Turco and others, 'Climate Drivers of the 2017 Devastating Fires in Portugal' (2019) 9(1) *Scientific Reports* 13886.

⁷⁸ECHR (n 75) art 34; *Duarte Agostinho* (n 5) para 8 of Annex to Application.

⁷⁹*Duarte Agostinho* (n 5) para 8 of Annex to Application.

⁸⁰*Sacchi et al. (Petition)* (n 4). All 16 petitioners were aged under 18 years at the time the complaint was lodged in 2019.

⁸¹*Ibid.*, para 253.

⁸²Peel and Osofsky (n 6) 46; Dinah Shelton, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38(1/2) *Environmental Policy and Law* 41, 46; Knox, 'Linking Human Rights and Climate Change at the United Nations' (n 6); Boyle (n 50).

⁸³ECHR (n 75) art 1; CRC (n 8) art 2.

⁸⁴ECHR (n 75) art 34; *Optional Protocol to CRC* (n 30) art 5(1).

⁸⁵*Optional Protocol to CRC* (n 30) art 5(1). The Convention on the Rights of the Child does not limit obligations to territory, but rather states owe obligations to all children within their jurisdiction (art 2).

foreseeable consequences of the states' inaction on climate change.⁸⁶ Particular weight is placed on the IACtHR's 'effective control' approach, arguing that all five respondents are aware of the damage which climate change will cause to the rights of people outside their territory, yet they continue to allow the emission of GHGs within their control.⁸⁷ Those emissions will 'directly and foreseeably' impact the rights of children, both within and outside the states' territories, bringing all victims within their jurisdictions.⁸⁸

The young petitioners in *Duarte Agostinho* rely on similar reasoning, though predictably with greater emphasis on the jurisprudence of the ECtHR. They argue that, given the foreseeability of climate change's extraterritorial impacts, when the respondent states allow the emission of GHGs they are exercising a significant degree of control over the petitioners' interests.⁸⁹ Furthermore, this control is exerted in circumstances where the territorial state (in this case Portugal) has a limited ability to protect those interests itself.⁹⁰ On this basis, the petition argues that the young people fall within the jurisdiction of the respondent states who therefore owe them obligations under the ECHR.

Both *Duarte Agostinho* and *Sacchi* face a further challenge in going directly to an international body, rather than attempting to resolve their dispute at the national level. The European and United Nations systems both require applicants to pursue potential domestic remedies first before they can approach the Court or Committee.⁹¹ Both groups of young people have raised similar arguments to seek an exemption from this requirement. They argue that sovereign state immunity prevents them from being able to pursue claims against foreign governments in their own national courts, and that it would be unreasonably burdensome (both in terms of cost and time) to require them to pursue separate cases in each of the respondents' legal systems.⁹² The Portuguese petitioners further note the urgent need for climate action, claiming that there is insufficient time to pursue domestic cases if the global community is to meet internationally-agreed targets and encouraging the Court to admit the case as a means of motivating states to take stronger action domestically.⁹³

These various issues will need to be resolved by the Committee and the ECtHR, offering an important opportunity for clarification on admissibility of cross-border complaints and anticipated harms. The existing approach to jurisdiction and extraterritorial obligations may be one of the reasons that climate litigation has to date been so uncommon within international and regional human rights bodies. As discussed below, the

⁸⁶*Sacchi et al. (Petition)* (n 4) para 242. The petition relies on a number of sources, including: Committee on the Rights of the Child, *General Comment No. 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights* (62nd sess, UN Doc CRC/C/GC, 17 April 2013); OHCHR Media Release (n 72); Human Rights Committee, *General Comment No. 36: Article 6 (the Right to Life)* (124th sess, UN Doc CRC/C/GC/36, 3 September 2019); *Andreou v Turkey* (European Court of Human Rights, App. No 45653/99, 3 June 2008).

⁸⁷IACtHR Advisory Opinion on Environment and Human Rights (n 57) paras 102, 104; *Sacchi et al. (Petition)* (n 4) para 248.

⁸⁸*Sacchi et al. (Petition)* (n 4) para 252.

⁸⁹*Duarte Agostinho* (n 5) para 18; citing *Andreou v Turkey* (n 84); and *Kovačić et al. v Slovenia* (European Court of Human Rights, Grand Chamber, App Nos 44574/98, 45133/98 and 48316/99, 3 October 2008).

⁹⁰*Duarte Agostinho* (n 5) paras 19–21.

⁹¹ECHR (n 75) art 35(1); *Optional Protocol to CRC* (n 30) art 7(e).

⁹²*Sacchi et al. (Petition)* (n 4) paras 312–8; *Duarte Agostinho* (n 5) para 32 and paras 35–40 of Annex to Application. See comments of Annalisa Savaresi reported in Chloé Farand, 'Six Portuguese Youth File "unprecedented" Climate Lawsuit against 33 Countries', *Climate Home News* (News site, 3 September 2020) <<https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/>>; Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!', *European Journal of International Law: Talk!* (Blog post, 22 September 2020) <<https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/>>.

⁹³*Duarte Agostinho* (n 5) para 32.

global nature of climate change can make it difficult to establish a causal link between a single state's policies and human rights impacts, yet the limitations of human rights regimes have constrained complaints against multiple states. Consequently, successful climate litigation so far has typically been in cases where specific policies are challenged in domestic courts, often using constitutional rights.⁹⁴ These have great potential to bring about change in individual countries, but the scale of the climate emergency arguably demands a broader scale of action, and it is in this respect that the children's climate litigation may prove to be most influential. A ruling that these cases are admissible would also empower other children and young people to pursue similar claims, offering an expanded avenue for their participation in climate policymaking and their activism for climate justice.

3.2. Interpreting rights and duties

Assuming that their claims are permitted to proceed, what might the children's climate cases tell us about the content of rights and duties in the context of climate change? What do previous judgments and scholarly discourse tell us about the relative strengths and weaknesses of the children's arguments, or how we might build stronger cases in the future?

From analysing previous cases, it seems that cases based on ecocentric rights are more likely to succeed than those based on other, 'greened' human rights. In examining the 'rights turn' in climate litigation, Peel and Osofsky have noted the potential of the right to a healthy environment found within the *African Charter* and the *San Salvador Protocol to the American Convention*, though they point to the relatively small take-up of the Protocol by American states and the fairly scant number of environmental claims under the African Charter.⁹⁵ One of the principal advantages of using ecocentric rights is that the arguments which claimants need to make and the corresponding evidentiary challenges are simplified. Claimants only need to show that the state's act or omission has caused (or will foreseeably cause) harm to the environment, without needing to show an impact on a particular right for an identified individual.

An example of this is *Demanda Generaciones Futuras v Minambiente*, a recent judgment of the Colombian Supreme Court. In that case, 25 young people aged 7–25 years brought a claim against the state for failing to address climate change, particularly by allowing deforestation of the Amazon rainforest.⁹⁶ They relied on the *acción de tutela*, a special communication procedure established in the Colombian Constitution which allows citizens to commence an action quickly and cheaply when they feel their fundamental rights have been abused.⁹⁷ The Court held that the government's failure to protect the Amazon rainforest and the resulting contribution to global heating constituted a breach of the right to a healthy environment, which was interpreted broadly to extend to non-human species and ecosystems.⁹⁸

⁹⁴Peel and Osofsky (n 6) 61–62.

⁹⁵*Ibid.*, 65.

⁹⁶*Demanda Generaciones Futuras v Minambiente* (n 3).

⁹⁷*Constitution of Colombia* (1991), art 86.

⁹⁸*Demanda Generaciones Futuras v Minambiente* (n 3) para 34.

Where an ecocentric right is available, a claim could be based on the change to the climate itself or other environmental changes, such as biodiversity loss, desertification, coral bleaching, or bushfires. If such a right was available to the claimants in *Duarte Agostinho*, for example, the Portuguese bushfires could be sufficient to establish a breach of a right to a healthy environment, without having to show consequential impacts on the individual children's rights to life or private and family life. Similarly, a dedicated right to a healthy environment in the CRC would enable the *Sacchi* petitioners to argue directly that the loss of sea ice or coral reefs is a breach of their rights, without needing to establish consequential impacts on their rights to life or culture.

As the cases show, in the absence of a standalone right to a healthy environment, the next best option is to base a claim on the state's duty to take preventative action in the face of a risk of foreseeable future harm. Given the weight of evidence about the impacts of climate change on children, a compelling argument could be made that states are obliged to implement adaptation, if not also mitigation, measures in order to prevent or minimise those impacts.⁹⁹ Within the European human rights regime, it is recognised that states have a positive obligation to put in place appropriate legislative and other measures to manage the risk of environmentally harmful activities, including natural disasters such as mudslides and floods.¹⁰⁰ Where states have failed to take adequate preventive measures, the Court has identified violations of the Convention.¹⁰¹ Pedersen has argued that the strong evidence of climate impacts in Portugal, specifically increasingly frequent heatwaves and bushfires, suggests that the risk to the young claimants reaches the necessary threshold of severity to trigger states' duties to take preventative action.¹⁰² The child claimants in *Sacchi* also argue that states are under a duty to prevent foreseeable human rights harms caused by climate change. They rely heavily on the fact that states know what the consequences of their GHG emissions will be, and characterise the respondent states' continued contribution to GHG emissions as 'recklessly causing and perpetuating life-threatening climate change'.¹⁰³ By framing states' obligations in these preventative terms, the young claimants arguably have an easier task than proving a positive interference with their individual rights.

Another point to note is that, because *Sacchi* and *Duarte Agostinho* are being pursued in international and regional human rights systems, they face a number of additional challenges not present in domestic cases. To begin with, international and regional human rights bodies tend to adopt a supervisory role, consistent with the doctrine of subsidiarity within international human rights law.¹⁰⁴ Under this approach, states are considered the primary guarantors of human rights and, while treaty bodies will assess the general compatibility of states' actions with human rights obligations, they are often reluctant to make recommendations about the specific details of national

⁹⁹Peel and Osofsky (n 6) 63–64.

¹⁰⁰*Tatar v Romania* (n 55); *Budayeva and Others v Russia* (n 75); *Kolyadenko and others v Russia* (European Court of Human Rights, App Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 12 February 2012); *Taskin v Turkey* (n 55).

¹⁰¹See, for example, *Lopez Ostra v Spain* (n 55); *Taskin v Turkey* (n 55); *Budayeva and Others v Russia* (n 75); *Tatar v Romania* (n 55); *Dubetska v Ukraine* (n 55).

¹⁰²Pedersen 2020 (n 92).

¹⁰³*Sacchi et al. (Petition)* (n 4) para 328.

¹⁰⁴Gerald L Neuman, 'Subsidiarity' in Dinah L Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford 2015) 360; Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97(1) *The American Journal of International Law* 38.

policy.¹⁰⁵ In the European system this approach manifests as the margin of appreciation doctrine, under which the Court will defer to states' judgment on matters of policy.¹⁰⁶ In its environmental jurisprudence, the ECtHR tends to defer to the laws and processes that states already have in place to regulate environmental risks and is less willing to import environmental standards from elsewhere.¹⁰⁷ This recognises that, through democratic processes, national governments are the best placed to determine how to balance conflicting interests, a task which can be particularly complex in environmental matters. States' obligations have consequently become highly proceduralised and essentially consist of due diligence duties to conduct appropriate impact assessments, provide publicly-available information and allow people to participate in decision-making and seek a remedy if negatively affected.¹⁰⁸ The Court will usually find that the state has discharged its obligation to prevent environmental harm as long as it has mechanisms in place to facilitate these procedural steps.¹⁰⁹ While the margin of appreciation is a particularly European doctrine, other human rights regimes also afford some degree of discretion to states in determining the details of their human rights protections.¹¹⁰ The *Sacchi* and *Duarte Agostinho* cases are both attempting to hold multiple states responsible for breaches of rights and it is questionable whether the Committee or Court would be likely to impose judgment about the details of each national regime.

Domestic courts, on the other hand, are better positioned to assess the substance and implementation of state environmental and climate policies. For example, in the groundbreaking case of *Urgenda v The Netherlands*, the Hague District Court held that the Netherlands' climate policy was inadequate to achieve necessary reductions in GHG, assessed against international obligations and scientific evidence.¹¹¹ The decision was upheld on appeal by both the Hague Court of Appeal and the Supreme Court of the Netherlands.¹¹² The decision was ultimately based on a breach of the state's duty of care to prevent climate change-related harm, but the Court accepted that human rights duties under the ECHR, specifically relating to the rights to life and to private and family life, represented important standards for interpreting what that duty of care entails.¹¹³ While

¹⁰⁵Neuman (n 104) 364.

¹⁰⁶*Hatton and Others v the United Kingdom* [2003] ECHR 338 (App No 36022/97, 8 July 2003); *Handyside v the United Kingdom* [1976] ECHR 5 (App No. 5493/72, 7 December 1976); Pedersen 2019 (n 64) 468; Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 Cambridge Yearbook of European Legal Studies 381; Hana Müllerová, 'Environment Playing Short-Handed: Margin of Appreciation in Environmental Jurisprudence of the European Court of Human Rights' (2015) 24(1) Review of European, Comparative & International Environmental Law 83.

¹⁰⁷Pedersen 2019 (n 64) 467; Pedersen 2018 (n 64) 87–89.

¹⁰⁸Procedural duties are commonly considered to be those set out in the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447, entered into force 30 October 2001.

¹⁰⁹*Hatton and Others v the United Kingdom* (n 106); *Hardy and Maile v the United Kingdom* [2012] ECHR 261 (App No 31965/07, 14 February 2012); *Giacomelli v Italy* [2006] 45 ECHR 38 (App No. 59909/00, 2 November 2006); cf. *Fadeyeva v Russia* (n 64); *Lopez Ostra v Spain* (n 55); see Müllerová (n 106); Spielmann (n 106).

¹¹⁰Carozza (n 104); Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, Oxford 2012) 64–65.

¹¹¹*Urgenda (District Court)* (n 3).

¹¹²*State of the Netherlands v Urgenda Foundation* [2019] Supreme Court of The Netherlands Civil Div, Case 19/00135, ECLI:NL:RBDHA:2015:7145 ('*Urgenda (Supreme Court)*').

¹¹³*Urgenda (District Court)* (n 3) 4.46ff; *State of the Netherlands v Urgenda Foundation* [2018] HA ZA C/09/456689, Case 13–1396 (Hague Court of Appeal, ECLI:NL:RBDHA:2015:7145, 9 October 2018), 40–43 ('*Urgenda (Court of Appeal)*'); *Urgenda (Supreme Court)* (n 112) 5.1–5.10; Peel and Osofsky (n 6) 51; Jonathan Verschuuren, 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions' (2019) 28(1) Review of European, Comparative & International Environmental Law 94.

the Court accepted that governments exercise discretion in formulating specific policies, their decisions are susceptible to judicial oversight.¹¹⁴ In determining the limits of the law, the Court drew on a wide range of standards, including climate science, environmental principles and human rights law. It concluded that existing policies were inadequate and directed the State to implement policies capable of achieving a reduction in GHG emissions that represented 25% of 1990 levels, by the end of 2020.¹¹⁵ This ruling provides considerably more detailed guidance for the performance of government obligations than would be expected from an international court or tribunal.

The use of international law and principles to flesh out governments' obligations also occurred in *Demanda Generaciones Futuras*, where the Colombian Supreme Court drew on a range of international instruments in articulating the state's duties with respect to the environmental rights of future generations.¹¹⁶ The Court pointed to the fact that the Colombian government had agreed to reduce deforestation in the Amazon as part of its obligations under the Paris Agreement, and had accepted the importance of protecting the rainforest as a necessary climate mitigation measure.¹¹⁷ International obligations under the Paris Agreement were also central to the German Federal Constitutional Court's decision in *Neubauer*, which held not only that the legislature must implement emissions reduction policies capable of meeting Paris targets, but also that the responsibility for making such reductions must be fairly distributed between current and future generations.¹¹⁸

The children's climate cases will test the potential for this kind of integrative interpretation at the international and regional levels. The *Sacchi* and *Duarte Agostinho* petitions interpret the CRC and ECHR respectively in light of the Paris Agreement, arguing that states' human rights obligations must be read in light of the overall international objective of keeping global heating to well below 2°C.¹¹⁹ They rely on the fact that all respondent states have committed to addressing climate change by being parties to the UNFCCC and the Paris Agreement, and then use the Paris targets to argue that states' actions to date have been inadequate.¹²⁰

Drawing more explicitly on norms of environmental law, the *Sacchi* petition also argues that states are under a duty to 'apply the precautionary principle and prevent life-threatening consequences even in the face of uncertainty'.¹²¹ *Duarte Agostinho* similarly argues that the precautionary principle should inform the Court's interpretation of states' duties.¹²² The principle is commonly defined to require that, where there is a threat of serious and irreparable environmental harm, states cannot use the lack of scientific certainty as a reason not to take reasonable precautions.¹²³ The Committee

¹¹⁴*Urgenda (Supreme Court)* (n 112) para 8.3.2.

¹¹⁵*Ibid.*, 7.5.1.

¹¹⁶*Demanda Generaciones Futuras v Minambiente* (n 3) para 34.

¹¹⁷*Ibid.*, para 11.3.

¹¹⁸*Neubauer et al. v Germany* (n 2), paras 183, 192–4.

¹¹⁹*Paris Agreement* (n 14) art 4.

¹²⁰*Sacchi et al. (Petition)* (n 4) paras 15, 171–6; *Duarte Agostinho* (n 5) paras 20, 30–31.

¹²¹*Sacchi et al. (Petition)* (n 4) paras 189–92.

¹²²*Duarte Agostinho* (n 5) para 8 of Annex to Application.

¹²³The most well-known definition of the precautionary principle is found in the Rio Declaration on Environment and Development (Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc A/CONF.151/26): 'lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to

has recognised the relevance of the precautionary principle in upholding children's rights, noting that the best-interests principle requires an assessment of risks to children's safety not just at the current time but also into the future.¹²⁴ However, while widely recognised as part of international and domestic environmental law, the precautionary principle has not been commonly applied in environmental rights jurisprudence and human rights law lacks a suitably developed equivalent principle for dealing with uncertainty.

The ECtHR at one time appeared willing to use the precautionary principle to inform states' duties. In *Tatar v Romania*, the Court stated that the precautionary principle had become a binding norm within European law. It held that Romania had breached the principle by failing to address the risks posed by the operation of a gold mine near the petitioners' home and, consequently, had violated their rights to home and family life.¹²⁵ However, in more recent cases the Court appears to have moved back from this position, and recently declined to consider the precautionary principle in its decision of *Hardy and Maile v UK*, potentially signalling a retreat from the Court's previously progressive approach on environmental rights.¹²⁶ The *Duarte Agostinho* petition represents an important opportunity for the ECtHR to clarify its position on the role of the precautionary principle in interpreting states' obligations and, if applied, would be a welcome development in the Court's environmental jurisprudence. An application of the principle by the Committee in *Sacchi* would be a significant result for the interpretation of environmental rights at the international level.

For child plaintiffs, the principles of participation and the best interests of the child could be influential in interpreting both domestic climate commitments and international human rights obligations. Questions of participation may be particularly relevant in Europe, given that states' obligations already involve procedural duties along these lines. Further, the overarching principle of the best interests of the child could be used by the judicial bodies as a standard for assessing the states' due diligence processes – if not also the specific adaptation and mitigation measures adopted. This is mostly likely to influence the approach of the Committee, given the central place of the best interests principle within the CRC, but it may also inform the interpretations of the ECtHR and other bodies. In this respect, the petitioners in *Duarte Agostinho* argue that the ECtHR must assess states' responses to the risks of climate change guided by the best interests of the child and the environmental principles of intergenerational equity and the precautionary principle.¹²⁷ Should the Court and Committee take up the invitation to interpret states' obligations in this fashion, it could be an important way of developing a more integrated approach to environmental rights. It would also contribute to the further empowerment of children by reinforcing their

prevent environmental degradation' (principle 15). However, there are a number of variations on the principle, some of which impose more positive obligations on states. See Daniel Bodansky, 'Deconstructing the Precautionary Principle' in David D Caron and Harry N Scheiber (eds), *Bringing New Law to Ocean Waters* (M. Nijhoff Publishers, Leiden 2004) 381; Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (The Federation Press, Sydney 2005).

¹²⁴CRC Committee General Comment 14 (2013) (n 33), para 74.

¹²⁵*Tatar v Romania* (n 55); Kobylarz (n 64) 111; Pedersen 2018 (n 64).

¹²⁶*Hardy and Maile v the United Kingdom* (n 109); Pedersen 2018 (n 64) 90; Kobylarz (n 64) 111.

¹²⁷*Duarte Agostinho* (n 5) para 8 of Annex to Application.

role in climate policy discussions. Not only would this ensure that their interests are given due weight, but it would also enable them to contribute innovative ideas and continue the leadership and advocacy already demonstrated by so many young climate activists.

3.3. Proof and responsibility

Children's human rights-based climate actions confront a long-recognised challenge that faces most climate litigation: how to prove that a state's actions/omissions have caused a human rights harm when their emissions are only one part of a much larger cumulative problem which is unfolding over time. When human rights-based climate litigation was first emerging, it was commonly thought that cases would fail because it was impossible to trace specific harms back to the emissions of a particular state.¹²⁸ Further, states could point to the contributions of other states and argue that, using a 'but for' test of causation, their individual emissions were not the cause of global heating.¹²⁹ Even if a causative contribution was accepted, a challenge remained in apportioning responsibility among all the states whose actions have collectively caused climate change.¹³⁰ The children's climate cases deal with the issues of causation and attribution of responsibility in a range of ways, influenced by advances in both legal reasoning and scientific understandings of climate change evident in domestic case law.

Recent domestic cases have shown that states can be held responsible for their contribution to the global problem, even if only relatively small. In *Urgenda*, the Hague Court of Appeal had rejected the 'drop in the ocean' argument put forward by the Netherlands, emphasising that, as a developed nation that has built its wealth on the use of fossil fuels, the Netherlands must play its part in addressing the global problem of climate change.¹³¹ The Court said: 'if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not do so either. That is a consequence that cannot be accepted ...'¹³² Similar reasoning has been applied in Australia¹³³ and Germany¹³⁴, where courts have emphasised that all states' emissions count towards the global 'carbon budget' and therefore must be addressed, no matter how small.

This shift of focus towards cumulative contributions offers an alternative way of thinking about causation and responsibility which is growing in influence, and which may prove crucial for the success of children's litigation. In *Sacchi*, respondent states France and Germany have argued that they should not be singled out as responsible for any human rights violations because climate change is a global problem to which

¹²⁸Verschuuren (n 113) 96; Ole Pedersen, 'Climate Change and Human Rights: Amicable or Arrested Development?' (2010) 1(2) *Journal of Human Rights and the Environment* 236, 246; Doelle (n 65) 213–4; OHCHR 2009 Report (n 65).

¹²⁹For example, see the argument of the government in *Urgenda (Court of Appeal)* (n 113) 64–66.

¹³⁰Peel and Osofsky (n 6) 63.

¹³¹*Urgenda (Court of Appeal)* (n 113) 64–66.

¹³²*Ibid.*, 64; Verschuuren (n 113) 96–97.

¹³³*Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Sharma by her Litigation Representative Sr Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560.

¹³⁴*Neubauer et al. v Germany* (n 2) para 202.

all states contribute.¹³⁵ In reply, the children rely on article 47 of the *Articles on State Responsibility*, which allows for states to be held responsible for an internationally wrongful act where their individual acts have together contributed to causing the same harm.¹³⁶ They explicitly refute the ‘others do it too’ defence, arguing that each state can be held individually responsible based on their own conduct, regardless of the fact that other states have also contributed.¹³⁷

The Portuguese young people before the European Court of Human Rights have an arguably larger challenge of establishing the responsibility of all 33 respondents. They also reject the argument that states cannot be said to have caused climate change when their contribution to global emissions is relatively small. Their petition argues that ‘it would be no defence to assert that each Respondent’s contribution to global emissions, taken in isolation, would not cause such interference. There is no “but for” test for causation in the jurisprudence of the ECtHR’.¹³⁸ Instead they argue that all 33 respondents share responsibility because they have contributed collectively to the causes of global heating.¹³⁹ The petitioners point to scientific evidence of the world’s current trajectory, which will lead to at least 1.5°C of warming, arguing that this creates a presumption that states’ actions to date have been inadequate.¹⁴⁰ The respondents must therefore be presumed to be in breach of the ECHR by failing to prevent climate-related harms, unless they can justify their actions by showing that they have met relevant international expectations.¹⁴¹ The petitioners argue that this essentially involves a question of whether the respondents have taken on a ‘fair share’ of the collective burden of addressing global heating. They recognise that there is some uncertainty surrounding what constitutes a ‘fair share’, but argue that this flows from states’ own inability to agree on more detailed obligations and that children and young people should not be disadvantaged by states’ political failings in this respect. Each respondent should, it is argued, be required to demonstrate that its contribution to climate action represents a ‘fair share’.¹⁴² To assist the Court in assessing what is fair, the petition recommends it has regard to independent analysis such as that published by Climate Action Tracker, which considers a range of factors, including states’ economic capacity, historic emissions, and publicised commitments to emissions reduction.¹⁴³

These arguments signify an important shift towards more collective understandings of responsibility and away from narrow approaches which gave undue weight to issues of causation that have stymied climate litigation in the past. Our understanding of climate change has grown significantly since the earliest attempts at rights-based legal action, and we have now reached a point where arguments about ‘drops in the ocean’

¹³⁵Sacchi and others, ‘Petitioners’ Reply to the Admissibility Objections of Brazil, France, and Germany’, Communication to Committee on the Rights of the Child in *Sacchi et al. v. Argentina et al.*, 4 May 2020, para. 31 (*‘Sacchi et al (Reply)’*) citing Response of France, para 53.

¹³⁶*Ibid.*, 32; *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex.

¹³⁷*Sacchi et al. (Reply)* (n 135) paras 31–35.

¹³⁸*Duarte Agostinho* (n 5) para 9 of Annex to Application.

¹³⁹*Ibid.*, paras 10–13 of Annex to Application.

¹⁴⁰*Ibid.*, paras 26–27 of Annex.

¹⁴¹*Ibid.*, paras 26–28 of Annex; citing *Dubetska v Ukraine* (n 55); *Fadeyeva v Russia* (n 64).

¹⁴²*Ibid.*, paras 29–30 of Annex.

¹⁴³*Ibid.*, paras 31–34 of Annex; Climate Action Tracker, ‘The Climate Action Tracker’ (website, last accessed 28 September 2021) <<https://climateactiontracker.org/about/>>.

and claims that ‘others do it too’ no longer reflect the reality of the problem and can no longer be considered a responsible approach to a global human rights catastrophe. If the judicial bodies take up the young litigants’ invitation to recognise more innovative modes of responsibility decoupled from narrow notions of causation of harm then the cases could have an influential effect on future actions for climate justice at the international level.

4. Conclusion

The emerging body of children’s climate litigation spans a range of legal regimes and causes of action, but all seek to achieve stronger climate action through the enforcement of human rights. After initially emerging in domestic courts, these cases are starting to appear in international and regional human rights bodies, where plaintiffs emphasise the transnational, long-term and collective impacts of states’ failure to tackle climate change. The two cases considered in detail above argue that the future impacts of climate change on the lives of the young litigants must be addressed through reductions in GHG emissions and adaptation action. As has been shown, there are several barriers which must be overcome on the path to success for these cases, but in their attempts to overcome these hurdles we can see creative arguments that promise to advance new frontiers of both children’s rights and environmental rights, and in so doing to further empower young people to tackle the climate crisis and correct intergenerational climate injustice.

In the international and regional human rights regimes, the *Sacchi* and *Duarte Agostinho* claims face similar issues establishing extraterritorial obligations owed to them by the respondent states and securing an exemption from the requirement to exhaust local remedies. Success on these grounds would open up enforcement options for children around the world who are affected by the emissions of foreign states, which could be an especially significant gain for empowering children in the Global South. The widespread attention which comes with launching a multistate claim in an international human rights tribunal also promises to amplify children’s voices, which have long been excluded or ignored within climate policy discussions, and helps strengthen their demands for increased participation in those conversations.

Should either case succeed it would likely help soften the effect of international human rights law’s traditionally state-centric focus, allowing it to approach a version of environmental rights which better reflects the reality of many of the world’s most pressing environmental problems. The cases also show the potential of a more integrated understanding of children’s rights and environmental law, in which principles of intergenerational equity, the precautionary principle and the best interests of the child can all be considered in interpreting states’ obligations with respect to environmental harms.

Like the climate litigants that have come before them, the young claimants must confront the challenge of proving a human rights violation in the context of harms which are caused by the cumulative effect of many (if not all) states’ actions over a long period of time. While this may have seemed insurmountable in the past, the children’s cases take a more confident perspective, relying on advances in climate science and the growing recognition that preventing global heating is a shared responsibility which all states must act upon.

There are reasons to be optimistic about the prospects of the children's cases. The success of other rights-based cases in recent years has chipped away at many of the barriers that might have once stood in their way. While these victories have mostly been at the domestic level, they ought to have primed international and regional bodies for the inevitable climate cases that would come their way. Currently, neither case has been determined, but whichever decision comes first is likely to influence the other, and a successful outcome could open up untold potential for other children to follow suit.

The fact that these plaintiffs are children makes the reality of their claims irrefutable, as we can no longer deny that climate change will impact their lives. Yet these cases are not addressing purely future harms. It is a sad reflection of our failure to take stronger climate action that the most recent cases target actual harms that children are already experiencing. This not only strengthens their legal case but, perhaps more powerfully, increases the urgency of their claims and the moral imperative to accept them.

Even without a victory, these cases can make significant strides in changing the ways of thinking that previously inhibited human rights-based climate litigation. Further, the advocacy potential of climate litigation is not limited strictly to the question of whether plaintiffs win or lose. These cases are powerful vehicles for telling the stories of children and young people affected by climate change, and they have the ability to sway public opinion and prompt political action regardless of the outcome of particular cases. The task of addressing climate injustice belongs to all of us. Let us take inspiration from the children and young people who have been courageous enough to call us to account.

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