CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Child and youth friendly justice for the climate crisis: relying on the UN convention on the rights of the child
Authors	Daly, Aoife
Publication date	2024
Original Citation	Daly, A. (2024) 'Child and youth friendly justice for the climate crisis: relying on the un convention on the rights of the child', The International Journal of Children's Rights, 32(3), pp. 632–661. https://doi.org/10.1163/15718182-32030002.
Type of publication	Article (peer-reviewed)
Link to publisher's version	10.1163/15718182-32030002
Rights	© Aoife Daly 2024. This is an open access article distributed under the terms of the CC BY 4.0 license. https://creativecommons.org/licenses/by/4.0/. - https://creativecommons.org/licenses/by/4.0/
Download date	2026-11-01 07:00:20
Item downloaded from	https://hdl.handle.net/10468/16622



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

BRILL

THE INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS
32 (2024) 632–661

brill.com/chil

Child and Youth Friendly Justice for the Climate Crisis: Relying on the UN Convention on the Rights of the Child

Aoife Daly
Professor of Law, School of Law, University College Cork, Cork, Ireland
aoife.daly@ucc.ie

Published online 24 October 2024

Abstract

The climate crisis is a human rights crisis, and one of the worst affected groups is children and youth. This same group has been key to climate action in and outside of the courts. As well as engaging in numerous consultative fora such as COP, and in the introduction of a General Comment on the right of children to a healthy environment, they have gone on to become key litigators in climate cases/applications at both national and international level. These justice processes are, however, notoriously ill suited to the particular needs of children and youth. Child friendly justice is a concept which has been elaborated in recent years by the Council of Europe. Yet climate litigation is very different to the cases (e.g. in family law) in which children have traditionally been parties – amongst other things it can involve very public campaigns. This article considers child and youth friendly justice in the context of the climate crisis through the UN Convention on the Rights of the Child, and through the concepts of access, participation, interests, and judgments.

Keywords

Convention on the Rights of the Child – youth climate activism – climate crisis – intergenerational justice – environmental rights

Published with license by Koninklijke Brill BV | DOI:10.1163/15718182-32030002
© AOIFE DALY, 2024 | ISSN: 0927-5568 (print) 1571-8182 (online)
This is an open access article distributed under the terms of the CC BY 4.0 license.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

1 Introduction

The climate crisis is undoubtedly a human rights crisis. A recent IPCC report outlined that the failure of humanity to curb global heating has already guaranteed irreversible damage, and that an additional 1.7 billion people will be exposed to severe heat (IPCC, 2022). Children will be the worst and longest affected by the climate crisis, and therefore children's rights are an important framework through which to seek climate mitigation. A 2019 Lancet Report predicted that a child born today will be impacted by climate change in their lifetime in relation to everything from food security to disease to poverty (Watts *et al.*, 2019). It is unsurprising then that "intergenerational justice" is probably the most significant term in human rights in this century. Children and youth have been driving activism and litigation against climate change for the past three years. Although the outcomes can be perhaps described as mixed in terms of legal success, there is no doubt that these actions are dramatically altering the landscape of international human rights law (Daly, 2022). Despite their prominence in climate justice however, there is little indication that those frameworks are well suited to the needs of children and youth as actors.

The climate crisis creates an intensely unjust situation whereby children and youth will pay dearly for the unfettered carbon emissions of this and previous generations. Brown Weiss defined "intergenerational equity" in 1989 as equity of resource options, quality and access from one generation to the next (Brown Weiss, 1989). Yet much of the focus has been on those 'yet to be born', and the interests of children may or may not be taken together with those of 'future generations' (Daly, 2023). One of many differences in the interests between children and those yet to be born in climate cases is that children are increasingly the actual litigants. Although children's rights are sometimes invoked in litigation, there is little academic analysis of the experiences of children themselves in relation to this, or consideration of the procedural rights children have during these cases (and what obligations adults might have to them). Close examination of these points will be necessary for adequate elaboration of child friendly justice in the climate crisis. The UN Convention on the Rights of the Child (CRC) 1989 is the most ratified human rights instrument. A children's rights approach requires adaptations to justice proceedings to accommodate the distinct needs and vulnerabilities of children, so that they can participate meaningfully in the legal process (Stalford and Hollingworth, 2020). The question of how to make sure justice systems are suited to children/youth is becoming increasingly important as child/youth-led climate cases proliferate.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

This article aims to provide academic analysis for academics and others of some of the main points which require examination in relation to child and youth friendly justice in the climate crisis. Fraser and Henderson argue that in the context of the climate crisis, lawyers have a responsibility to those such as children who are traditionally excluded from politics and law. They also urge scholars to design interpretive practices and methodologies to support these groups in pursuit of helping the environment (Fraser and Henderson, 2022). This article aims to do this through focusing on the 'child friendly justice' framework, and through consideration of some recent and ongoing child/youth climate litigation. It does not provide an exhaustive list of solutions as to how to ensure that climate justice is suited to children and youth. For one thing, only further research with children and youth as partners can provide this.[1] Rather this article aims to provoke and support reflection on how to ensure that climate justice efforts are positive for children and youth, and that they are underpinned by children's rights principles.

It must be acknowledged that justice is much broader than UN complaints mechanisms and litigation, and such actions are part of a much broader picture of youth climate action in protest, policy and numerous other arenas (Bowman *et al.*, 2021). Many countries have Ombudspersons specifically for children, see, for example (Liefaard, 2019). Yet little is known about available mechanisms for children to access climate justice at local and national level (Child Rights Connect, 2022; Daly and Lundy, 2022).[2] This article will, however, focus on more "legal" and international law types of access to justice, that is, courts and complaints mechanisms such as the Committee on the Rights of the Child. It should also be noted that this article will understand children/youth to mean under-18s unless otherwise specified, not least because "children" is understood by the CRC to mean those under 18 years (Article 1). Yet the boundaries are not clear cut, of course – the term "youth" is used colloquially to refer to children/youth from age 12 but can be understood to extend to those in their mid-20s (UN, n.d.).

In section 1, children/youth are placed in the context of climate justice, and the extent to which children desire climate justice is outlined. In section 2, the concept and standard of "child friendly justice" – first elaborated by the

1 The Youth Climate Justice Project, funded by the European Research Council 2023–2028 aims to consult children from a number of countries, including those taking climate litigation, on what constitutes child friendly climate justice in the coming years. Further information can be found at: https://www.ucc.ie/en/youthclimatejustice/.

2 See further https://childrightsconnect.org/child-rights-connect-in-action-responding-to-the-unprecedent-mobilization-of-children-on-the-right-to-a-healthy-environment-in-a-context-of-escalating-climate-crisis/. Accessed 6 December 2022.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Council of Europe – is considered. In section 3, the characteristics of child friendly justice are considered in relation to the specifics of the climate crisis. It is outlined that it is crucial to view child friendly climate justice through the lens of the UN Convention on the Rights of the Child. Within this, four concepts are suggested. Children should have *access* to justice, for example to have their applications heard on their merits wherever possible. Children should enjoy *participation* rights such as information and support. Children's *interests* should be properly considered both by their adult representatives as well as by judges. Finally, it should be ensured that *judgments* take account of the children's rights framework, and that they are delivered in a child friendly way.

2 Children/Youth and Climate Justice

2.1 *Child and Youth Activism*

Children and youth have been notably prominent in climate activism in recent years. In 2018, Greta Thunberg made history as a lone protester outside the Swedish parliament, sparking the global *Fridays for Future* movement. Youth had long been prominent in climate activism however. US environmental activist, Xiuhtezcatl Martinez, has been advocating for conservation since early childhood (Martinez, 2021). In 2016, young people from Standing Rock launched efforts to stop the Dakota Access Pipeline. Children and youth are also becoming more visible in international efforts and standards in relation to the climate crisis. UN and other documents are gradually turning to the interests of children – the *Report of the Special Rapporteur on Human Rights and the Environment* (2018), for example, outlines that States must do more to uphold the rights of children in relation to environmental harm. The UN Committee on the Rights of the Child released in 2023 a General Comment on *Children's Rights and the Environment with a Special Focus on Climate Change*, informed by extensive consultations with children themselves.[3]

These new developments are exciting and ground-breaking, and bode well for the involvement of children in setting standards in relation to the climate crisis. However, problems abound. There can be particular difficulties in some countries for children and youth in relation to finding the opportunity to seek climate justice. Hung-Chieh outlines, for example, cultural disadvantages in Taiwan including undue emphasis on academic performance, low levels of awareness of assembly rights, and parental intervention. This has the effect of

3 See at project website: https://childrightsenvironment.org/consultation/. Accessed 3 April 2022.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

'preventing any attempt for young activists to freely participate in the climate movement. This cultural oppression can be manifested as tangible school regulations and laws, or as intangible social norms'(Chang, 2022).

Added to this, countries frequently do not include children and youth in climate policy – making. UNICEF found in 2020 that only 34 per cent of 103 countries with new or revised climate plans (Nationally Determined Contributions) could be classed as "child sensitive" and in only 12 per cent were children actually consulted (UNICEF, 2021). Where children and youth *do* access processes, they can be left disappointed and disillusioned following their involvement. As Thew *et al.* point out, participation of children and youth in climate governance can be tokenistic and lack meaningful consideration of their views and wishes. Decision-makers and other adults can hold discriminatory views about children and young people, assuming them to be apathetic, lacking in insight and solely in need of education. This can result in feelings of frustration and lead to the disengagement of children and youth from formal climate politics (Thew *et al.*, 2020).

2.2 *Climate Justice*

Climate justice is a "flexible umbrella" which can be understood to mean using law and human rights to tackle the climate crisis (Aliozi, 2021). Climate justice literature is a new frontier, and the position of children with in it is almost entirely absent. There have been calls for 'enrichment' of the international literature 'with scholarly studies of the highest possible standards, aimed to develop a better, stronger and more effective climate justice field' (Aliozi, 2021). There are access to justice issues particular to children which have yet to be theorised in academia.

In a particularly exciting development in climate justice access, young activists have begun to access courts and other complaints mechanisms. This is likely related to the difficulties that children face in accessing other justice processes such as participation in policy-making. It is also part of a package of climate advocacy efforts across different spheres. Greta Thunberg, for example, was one of the petitioners in what was probably the highest profile international climate petition to date (*Sacchi,* outlined below). Climate-related applications to numerous national courts involved children, including Canada (*Environment Jenesse v. Attorney General of Canada*, 2019), Australia (*Sister Marie Brigid Arthur v. Minister for the Environment*, 2021), and Columbia (*Corte Suprema de Justicia*, 2018).There have been some significant successes – a French court found that the state had failed fully to meet its goals in reducing emissions (*Association Oxfam France et ors v. France*, 2021), and the Supreme Constitutional Court in Germany held that the government's measures in the

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Climate Protection Act 2019 were insufficient to protect future generations, and therefore violated their human rights (*Neubauer et al. v. Germany*).

In many cases, efforts continue. The *Juliana v. United States* (2020) case involves a lawsuit filed by 21 youth plaintiffs against the US government. They assert that the government knowingly violated their rights as well as the duty to protect public grounds (based on the public trust doctrine). In 2020, a Ninth Circuit panel held that the plaintiffs lacked standing to sue and the case continues through further applications. In 2023 the landmark ruling in the US case of *Held v. Montana* could perhaps be described as the first big win for youth-led climate litigation in the US. There are also cases which do not specifically tackle climate policies, but nevertheless are very relevant to the climate crisis, such as the attempts to prevent coal mining in Australia taken by teenagers in *Sharma and others v. Minister for the Environment* (2021). In this case, the federal Court of Australia agreed with the applicants that the government had a duty of care to avoid causing climate harm to children, though this was overturned on appeal.

There has therefore been 'a rights turn in climate litigation' (Peel and Osofsky, 2018) with Setzer and Higham identifying over 2,660 climate cases globally by June 2023, many of them invoking human rights (Setzer and Higham, 2023). It is difficult to identify exact figures on how many cases exactly involve children/youth, children's rights arguments, or intergenerational equity arguments, though efforts are underway to engage in this work, and it appears that over 100 climate applications involve children/youth (Youth Climate Justice, 2024).[4]

One of the most striking elements of children and youth litigation is that cases have been taken at regional and international level. In 2020 six youths submitted a petition to the European Court of Human Rights (*Duarte*) arguing that the inadequate climate policies of 33 European states violate their human rights (Global Legal Action Network, 2021). In 2019 youth activists took a petition to the UN Committee on the Rights of the Child (*Sacchi*) under the Optional Protocol to the Convention on the Rights of the Child on a Complaints Procedure (OPIC), targeting the five largest carbon emitter signatories.[5] Both petitions were deemed inadmissible due to the failure to exhaust domestic remedies yet both nevertheless were groundbreaking petitions with exciting

4 At the Youth Climate Justice Project, funded by the European Research Council 2023–2028, one of our programmes of work is to identify and analyse child/youth climate applications and cases. We have established a children's rights climate case law database for this purpose: https://www.ucc.ie/en/youthclimatejustice/caselawdatabase/. Accessed 20 September 2024.

5 See a copy of the petition at: https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf. Accessed 2 June 2021.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

outcomes. The Committee on the Rights of the Child, for example, recognised in *Sacchi* the possibility of transboundary responsibility for human rights violations (Parker *et al.*, 2021; Daly, 2022). Such developments have prompted academic attention in relation to how these efforts by child litigants are changing human rights law, and changing human rights law procedures (Lewis, 2021; Parker *et al.*, 2021; Daly, 2022).

There is much to be done, however, to elaborate on what these developments in climate justice mean for children's rights. One element of this is the question of how child and youth friendly these procedures are. This article now turns to providing an overview of the main points which require further examination, as well as an initial framework through which to consider whether climate justice is child and youth friendly.

3 What is Child Friendly Justice?

Ensuring that justice is child friendly is crucial for 'levelling' the playing field and placing children centre-stage for decision-making about their interests in a context where children lack political and other types of power (Stalford and Hollingsworth, 2020). Child friendly justice has become an area of intense examination in the past decade. A vast body of literature has developed pointing to the various ways in which courts, lawyers and others can work through children's rights when a child's interests are being determined in court (Liefaard, 2015; Daly, 2018; Liefaard and Kilkelly, 2018; Stalford and Hollingsworth, 2020). This term was coined by the Council of Europe in the context of its *Child Friendly Justice Guidelines,* published in 2010 – a collection of international principles and practical guidance aimed at adapting the legal process to children's needs and rights (council of europe, 2010). Other regional and international guidance, including the *Guidelines on Action for Children in the Justice System in Africa,* also enshrine equivalent principles. Child friendly justice seeks to 'place a strong emphasis on meaningful child participation by modifying structures and procedures' (Jaffé, 2021).[6]

The Guidelines outline how children's rights should be upheld before, during and after justice proceedings. Whilst the guidelines themselves are extremely long and detailed, running to 15 pages, in brief, the Council of Europe outlines that child friendly justice is defined as:

6 Stalford and Hollingsworth (2020) argue, however that there should be a shift in terminology, away from "child friendly justice" in favour of "justice for children".

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

> Justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level … It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.
>
> COUNCIL OF EUROPE, 2010

Child friendly justice intersects with numerous other human rights such as due process and the right to information, and may include child friendly materials. Stalford, Cairns and Marshall (2017) note that though standards of child friendly justice may not necessarily have been entirely transposed into justice processes, there is evidence of efforts in numerous jurisdictions to accommodate more sensitively the interests and needs of children (African Child Policy Forum, 2012; Daly, 2018). There have been campaigns seeking to embed child friendly justice into everyday legal practice, such as the TALE (Training Activities for Legal Experts) and ACRiSL (Nolan and Skelton, 2022) projects. The TALE project assists lawyers to develop children's rights-based arguments to present to judges and other decision-makers. The ACRiSL project aims for children's rights-based strategic litigation (ACRiSL, 2023; Nolan and Skelton, 2022). The Committee on the Rights of the Child emphasises the obligations that those working with children, beyond state services such as 'other adults … and organizations' (UN Committee on the Rights of the Child, 2003) have to implement children's rights in their work.

There is somewhat of a divide, however, between the child friendly justice work which has occurred to date, and the climate litigation which is unfolding at present. This is because the child friendly justice framework has developed in relation to family and criminal law cases – the kinds of cases in which children have been almost exclusively involved to date (Daly, 2018; Stalford and Hollingsworth, 2020). A new landscape has emerged, however, in which numerous children are litigants in climate cases which are highly political in nature, and this requires a revisiting of the framework of child friendly justice to suit that context. The differences between the cases in which children have traditionally been involved and children's climate litigation are both numerous and exciting. Stalford and Hollingsworth note some characteristics of children's cases in 'traditional' proceedings (Stalford and Hollingsworth, 2020). Most children will not be physically present at hearings; and depending on age and capacity, may not even be aware that they are taking place. In contrast, children and youth involved in climate litigation have (generally) themselves

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

chosen to be involved, and will likely be present at proceedings (see, e.g., the description by Van Der Voo (2020) of the numerous children and young people present at the *Juliana* hearings). These factors change significantly the dynamic of proceedings, and potentially what child friendly justice might mean when it comes to climate cases.

"Strategic litigation" is that which seeks to bring about positive legal and social change in rights enjoyment (Skelton, 2017), which is what is generally sought in climate cases too. To date, strategic litigation has primarily focused on, for example, rights in the context of immigration, deprivation of liberty and economic rights. Even in this space, academic work tends to consider how to litigate strategically for children, rather than examining the position of *children as rights holders* in the process of that. Only recently has research focused on making strategic litigation child friendly. Fortunately, such examination has come at a time where children have started litigating in relation to the climate crisis.

4 What is Child Friendly Justice in the Climate Crisis?

As climate cases are generally very different to the types of cases in which children have typically been involved in the past, there are a number of questions to answer about what constitutes child/youth friendly justice in this context. One crucial basis for determining what constitutes child and youth friendly climate justice is, of course, the principles of the UN Convention on the Rights of the Child (CRC). The CRC framework is imperfect for access to justice issues, as I have argued elsewhere (Daly, 2018). There are a number of reasons for this, including the failure of the CRC explicitly to set high standards for children in terms of accessing courts, having party status, having a right to be present at proceedings and so on. This can be contrasted with the UN Convention on the Rights of People with Disabilities (2006), which enshrines rigorous and detailed standards relating to justice processes for that group (Daly, 2018). Nevertheless, the CRC provides a useful basis for organising an approach to justice based on accepted children's rights principles which have been agreed to by almost every state on the globe.

There are a number of ways in which the CRC could be used to provide a basis for child and youth friendly climate justice, and the proposed approaches here to child and youth friendly justice are not necessarily exhaustive. In this article, I am suggesting that access, participation, interests and judgments are a useful focus (see Figure 1 below). Other CRC rights will, of course, be relevant, such as the right of children to life under CRC Article 6; which is closely

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

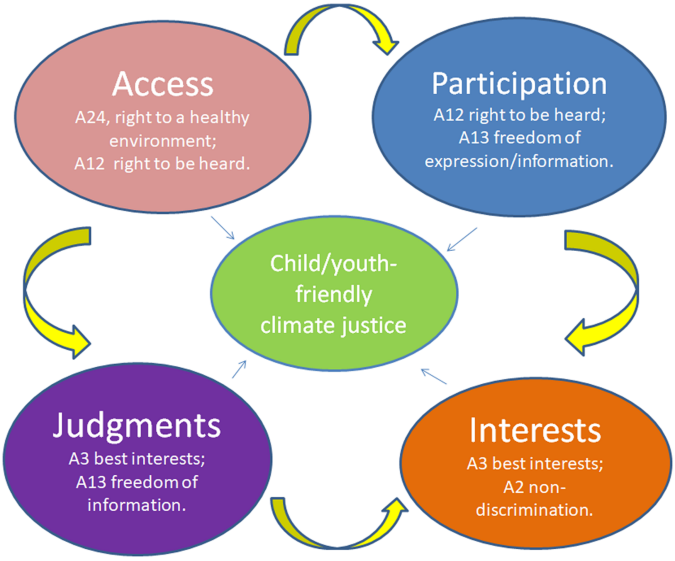


FIGURE 1 Child and youth friendly climate justice through the UN Convention on the rights of the child

linked to the CRC Article 24 right to a healthy environment and other rights – the scope of this article requires brevity here. Furthermore, it is acknowledged that CRC rights are indivisible and interconnected as demonstrated by the interconnection of the four concepts in the figure below. One has to gain *access* to courts, for example, to enjoy *participation* in litigation – both are underpinned by the CRC Article 12 right to be heard.

4.1 *Access: Courts and Complaints Mechanisms*

The first matter in relation to climate justice concerns how difficult it can be for children and youth, as compared with adults, to access courts and other complaints mechanisms. Without access to such mechanisms, children will lack what Lundy refers to as 'a "right of audience"[7] – a guaranteed opportunity to communicate views to an identifiable individual or body with the responsibility to listen' (Lundy, 2007). The CRC provides a key mechanism for children to invoke their rights in court – some CRC standards may not exist at national level. For example, Article 24 of the CRC guarantees children the right to health, including a healthy environment. Many states will not have enshrined such a right at domestic level (see Knox, 2020). The ability to invoke one's CRC rights

7 The use of the term here by Lundy is not to be confused with the term of art referring to the entitlement of individual lawyers to appear and argue cases before specific courts.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

at domestic level therefore will be a crucial part of ensuring child and youth friendly climate justice. The Committee itself refers in General Comment No. 26 to the 'multiple barriers faced by children in disadvantaged situations in enjoying and claiming their rights,' (UN Committee on the Rights of the Child, 2023) and acknowledges that despite being at the forefront of working for environmental justice, do not have legal standing in many instances (UN Committee on the Rights of the Child, 2023).

Children will also face barriers to litigating CRC rights at domestic level. In 2016 Children's Rights International Network (CRIN) published a comprehensive report on access to justice for children around the world. One of the findings related to incorporation – at that time only 94 countries had fully incorporated the CRC into national law. A further 29 had incorporated the CRC with reservations limiting its application. Less than half of all countries allow the CRC to be directly enforced in courts (Children's Rights International Network, 2016). Such low rates of accessibility of CRC rights in national courts will inevitably prevent access to enforcement of CRC rights for children and youth activists.

Another crucial issue is the legal status of children – limitation of children's legal status is likely to amount to a significant barrier to whether children and youth can access climate justice. Almost all states recognise the right of children to bring a case in their own name, yet it is common for the ability of children themselves to engage with the legal system to be severely limited, and to require all of those under 18 years to approach the courts through a litigation guardian. It is vital that children of all ages enjoy access to courts as independent individuals (Children's Rights International Network, 2016). Without this, they will not enjoy the right to be heard under CRC Article 12. The Committee states that children should have child friendly complaints mechanisms provided to them by states for violations of their environmental rights, including the ability to initiate proceedings themselves (UN Committee on the Rights of the Children, 2023).

Another significant obstacle to the right of children to be heard in climate cases, at both national and international level, relates to potential difficulties around admissibility. Where a petition is deemed inadmissible, it will not proceed to be heard on its merits. There are then numerous access issues in relation to climate cases which confront both adults and children/youth. Climate litigation raises questions about the enforceability of human rights generally in the context of environmental harm (Parker *et al.*, 2021). Standing will generally be based on whether the complainant is a "victim" owed enforceable obligations by the respondent state. Yet it can be a challenge to prove human rights violations as a result of the cumulative effect of the actions of numerous

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

states over a long period of time. As Lewis (2021) notes, child/youth litigants have taken a confident perspective in their arguments in this regard, 'relying on advances in climate science and the growing recognition that preventing global heating is a shared responsibility which all states must act upon.' The Committee on the Rights of the Child demonstrated a willingness in *Sacchi* to accept the potential victim status of children (United Nations, 2021). It also took a progressive approach by finding that, in theory, states may have transboundary responsibilities for climate harms. To ensure children's access to justice, it is hoped that international courts (and other fora) will continue to recognise children's victim status in relation to the climate crisis, as well as transboundary responsibilities for climate harms. To fail to do so is to deny the scientific realities of the climate crisis, and to exclude children's climate cases from being heard on their merits.

Another crucial access issue at international level is the requirement that petitioners first exhaust domestic remedies. In *Sacchi*, as noted above, the Committee declared the complaints of the children and youth inadmissible due to non-exhaustion of domestic remedies.[8] It is a key principle of international human rights law that applicants must first exhaust all domestic avenues before a case can proceed to examination on its merits, and most commentators were therefore in agreement with the decision of the Committee. Nolan, for example, makes the point that finding it admissible 'could result in the Committee becoming a tribunal of "first instance of preference" for child rights litigators' (Nolan, 2021).

The decision of inadmissibility is not as clear-cut as it may first appear, however. There is an exception clause to the principle of exhaustion of domestic remedies under Article 7(e) of OPIC where domestic litigation is 'unlikely to bring effective relief'. One important point is that perhaps the Committee's decision was justifiable in the instances of France and Germany, where youth climate litigation was being pursued (and indeed in Germany had been successful). Yet in other instances the failure to engage the exception clause was less justifiable. In the case of Turkey, Çali points out that, 'there is no domestic case law precedent that would allow these children to have any prospect of success to have the merits of their arguments to be assessed by Turkish Courts, including its Constitutional Court,' primarily because none of the applicants were from Turkey and it would be impossible under Turkish law for them to access Turkish courts without having some direct links such as owning land

8 The Duarte application was rejected by the European Court of Human Rights for the same reason. See *Duarte Agostinho ECHR Case: A bump in the road for youth climate justice?* (2024) at www.wy4cj.org.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

which had experienced environmental harm. Çali personally submitted arguments to the Committee on this point (Çali, 2021).

Another issue to consider is that piecemeal national cases will likely be incapable of securing the kind of international cooperation which is necessary to mitigate properly the climate crisis. Chalifour *et al.* make the point that: 'It is simply impractical and unjust for courts to require climate litigants to play "whack-amole" in defending their constitutional rights, forcing them to challenge each major project approval separately' (Chalifour *et al.*, 2021). This appears particularly unjust, given the timescale involved in such challenges, and the irreversibility of many of the harms of climate change. Wewerinke-Singh also emphasises the injustice of: 'expecting these children to experiment with largely untested, highly complex and expensive transnational litigation strategies.' Litigants, such as in the US *Juliana* case, struggle successfully to invoke constitutional rights in relation to climate policy issues which courts usually deem to be the business of the Executive, rather than courts, to decide. Given these domestic hurdles, Chalifour *et al.* (2021) argue that the Committee will only hear complaints relating to the climate, 'when it is almost certainly too late to prevent the most serious violations of [children's] rights'.

There would appear, therefore, to be a number of legitimate reasons for regional and international courts to rely in climate cases on the exception clauses in relation to exhaustion of domestic remedies. This would, of course, require a rather radical approach by courts, recognising that the seriousness and immediacy of the climate crisis for children's rights requires the interpretation of legal standards in favour of applicants where justifiable. Fraser and Henderson point out that interpretation is not a value-free or neutral activity: 'Interpreting and advising on the law (especially the open-ended, transnational norms common in human rights law) require the interpreter to exercise judgment' (Fraser and Henderson, 2022). Considering the traditional exclusion of children from justice processes (Children's Rights International Network, 2016; Daly, 2018) it is particularly problematic to witness decision-makers opting against interpretation which would uphold admissibility of these petitions.

Parker *et al.* in fact identify a trend in youth climate cases whereby applications are dismissed at a procedural stage due to a lack of justiciability or standing (Parker *et al.*, 2021). Note *Sacchi*, for example, and several domestic examples such as *PUSH Sweden, Nature and Youth Sweden and Others v. Government of Sweden* (filing date 2016), where the Stockholm District Court determined that there had been no injury to the applicants where the government had sold several coal-fired power plants to a company. Parker *et al.* argue that this trend undermines the agency of children and youth, and is a denial of their right to redress for rights violations (Parker *et al.*, 2021).

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

The Council of Europe guidelines emphasise that justice for children must be 'speedy' (Council of Europe, 2010). Wewerinke-Singh notes that some of the *Sacchi* applicants, particularly those from island States, may have fewer than 15 years before they lose their homes to climate change (Chalifour *et al.*, 2021). The need for expediency is another reason that judges should incline in favour of accepting exception clauses in regional/international applications when it comes to exhausting domestic remedies. Litigation will take years at national level, particularly where there may be appeals through a number of levels of courts (note, for example, the *Sharma* case in Australia). Then, where an unsuccessful national claim is to go on to regional /international level it will also be a number of years working through that process. The *Sacchi* application, for example, was filed September 2019, and the decision on admissibility was released October 2021. Applicant Greta Thunberg had moved into adulthood by the time that decision was released. And of course this was only a decision on admissibility. Considering that IPCC reports inform us that irreversible damage will be done within a number of years, our national and international justice systems appear ill-equipped to deal with what constitutes an urgent – many would argue the most urgent – children's rights issue. The urgency point is also a strong argument in favour of fast tracking climate cases – it is very encouraging that the European Court of Human Rights did so in relation to the *Duarte* application (Fraser and Henderson, 2022). Article 7 (e) of OPIC also has an exception where domestic litigation would be 'unreasonably prolonged'. In many instances, exhausting domestic remedies would take many years, which is particularly burdensome for children, as it may mean that they age out and would be unable to pursue a complaint via the Committee on the Rights of the Child, and so in the *Sacchi* decision, this could have been another reason to set aside the burden of meeting the rule of exhausting domestic remedies.

It is also important to emphasise the principle of nondiscrimination enshrined in Article 2 of the CRC and in other international instruments. The protection of children as a group can be read into the term, "other status" (Daly, Thorburn Stern and Leviner, 2022). Considering the temporality of childhood as opposed to adulthood, there are significant Article 2 issues at play where proceedings run to several years. Children taking a climate case – or any case for that matter – are in a different position than adults. Failure to account for this arguably engages the principle of nondiscrimination. Childhood is fleeting, and there is great irony in a child litigant invoking principles of children's rights in proceedings that will last well into their adulthood. The principle of nondiscrimination also arises in a number of other elements of climate justice, for example in relation to the disproportionate impact that the climate crisis

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

has on children as a group as compared with adults – this is further considered under "interests".

Another crucial element of the principle of nondiscrimination is that it requires us to consider the access to justice of children and youth from different backgrounds. Some groups may have even greater difficulty accessing justice compared to other children, and yet will likely be even worse affected by the climate crisis than the average child. One important feature of the *Sacchi* application was that there was strong focus on the rights of children from Indigenous backgrounds (Daly, 2022). Amongst the CRC rights cited by applicants in that application – the rights to life (Article 6) and to health (Article 24), which are typical to see in cases relating to the environment and human rights – was the right of Indigenous children to their own culture (Article 30). A number of the applicants were themselves from Indigenous communities, and their personal stories of the erosion of their ways of life added great strength to the application, as well as bringing attention to Indigenous issues.

4.2 *Participation: Being an Active, Supported Participant*

Article 12, as noted above, enshrined the right of children to be heard and to have their views accorded due weight. This has, of course, become known as "participation", about which much has been written (Daly, 2018). When asked in 2014 research, children had the following suggestions for the European Commission (2014) as to how to help them to be involved in decision-making about their interests:

> In-depth and frank discussions, considering the range of possibilities, compromising, suggesting alternative solutions, devoting time, openness, developing trust, a trusted person, consulting peers, awareness of one's preference, and appropriate age.

This highlights the level of time and relationship-building with relevant adults that is necessary for adequate participation of children in climate litigation. Fraser and Henderson emphasise the duties that legal practitioners have to ensure inclusion in climate justice processes of traditionally excluded voices such as those of children (Fraser and Henderson, 2022). In doing so however, care has to be taken that practitioners understand children's rights and child friendly justice. This will require understanding the need to build trust with children/youth, and the need for child friendly information (Stalford, Cairns and Marshall, 2017).

There are numerous examples of good relationships between lawyers and youth litigants from which to draw. In the *Sharma* case, legal representative

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Jack McLean describes the extensive preparation of his law firm to work with youth litigants – they engaged media advisors, counsellors experienced in working with the issue of children and climate anxiety (Advancing Child Rights Strategic Litigation, 2022) The firm also rethought their ways of working in relation to communicating; moving from formal methods to more informal methods, for example Whatsapp chats and live tweeting 'for our clients to break things down in plain language.' Bella Burgemeister, environmental activist and youth litigant in the *Sharma* case outlines the positive experience that she had of working with her legal representatives: 'I guess one of the big things from me in this case was how well we were treated basically by … the legal team. It was incredible to see how positive everyone was being, and how informed all of our litigants were during the legal process' (Advancing Child Rights Strategic Litigation, 2022).

Lundy emphasises that the power of children's participation lies in its 'capacity to harness the wisdom, authenticity and currency of children's lived experience in order to effect change' (Lundy, 2007). Children and youth have proven themselves immensely competent on the climate crisis (Daly, 2022). Not all firms or networks will be able to embed a dedicated Child and Youth Advisory Group in a particular climate case, but could perhaps consider alternatives such as a dedicated youth advisory group to advise on children/youth cases more broadly.

4.2.1 The Right to Participate

One important issue is the manner in which children become parties and litigate on climate issues. In traditional proceedings such as those envisaged in the Council of Europe guidelines (Council of Europe, 2010), children usually become involved in proceedings, not through their own choice, but rather because of disputes between adults (e.g. parent versus parent in family law, or parent versus state in child protection cases). In climate litigation however, child/youth litigants are usually experienced climate activists, such as Greta Thunberg in *Sacchi*, and Xiuhtezcatl Martinez in *Juliana*. They are frequently members of groups such as *Fridays for Future*. Legal representative in the *Sharma* case, Jack McLean, described the young litigants in that case as 'amazing, seasoned campaigners' for the Australian group *School Strike for Climate*, who had already had a lot of media experience (Advancing Child Rights Strategic Litigation, 2022).

There is often inherent suspicion that children are being used as tools by parents or legal representatives (see further below), particularly in climate litigation. It seems that child friendly justice involves in-depth work to ensure that children understand and consent to involvement in proceedings. McLean also describes as 'first and foremost' the task of determining the legal capacity

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

of the young litigants to be involved in proceedings (Advancing Child Rights Strategic Litigation, 2022). He outlines the importance of being clear with the young people about the risks around public perceptions, the time commitments involved and other crucial elements of being involved in the case. One reason for this 'was to ensure the case was coming from them, rather than their legal representatives' (Advancing Child Rights Strategic Litigation, 2022). Nolan and Skelton (2022) also emphasise the need for practitioners to examine their assumptions around child capacity and maturity, and refrain from unnecessarily giving children a passive role in litigation.

The online world can be important for children and youth to access opportunities to participate in climate litigation – note the ability of children to sign-up through social media to become involved in the *Juliana* case (Daly, 2022). Van Der Voo details the diversity of the children and youth from all over the US, who came together to litigate against the government's climate policies – some had convinced parents to join them in their cause (Van Der Voo, 2020). This points to the importance for children of their CRC Article 13 freedom of expression and access to information, so that they can learn about the climate crisis, and become involved in activities where they wish to do so. It also highlights the need for parents to be supportive and respectful where their children are eager to engage in climate activism and litigation.

4.2.2 Children/youth Participation and the Position of Parents

Children may alternatively become involved in climate cases via parents. In the well-known 1994 case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources* (1994) in the Philippines, a group of children brought a lawsuit with prominent lawyer *Oposa* to stop the destruction of nearby rain forests on the basis of the constitutional right of people to a 'balanced and healthful ecology'. In this case, the children were relatives of the adults, including Oposa himself. This may be a very legitimate action for parents to take – the climate crisis will, of course, affect all current children, significantly decreasing the quality of life in the decades to come.

Parents should, of course, have thought through potential consequences of the involvement of the children, for example whether they may attract the attention of dangerous opponents – climate activism can be a deadly activity in many countries (Glazebrook and Opoku, 2018). This may require weighing up the interests of children in being involved in crucial climate litigation on the one hand, and their safety interests on the other. It must also be emphasised that even 'very young' children (the Committee on the Rights of the Child defines this as under eight years old) children should be given information and asked their views (UN Committee on the Rights of the Child, 2005).

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Jack McLean outlines that parents of youth litigants are an important feature of the efforts in that case (Advancing Child Rights Strategic Litigation, 2022). Parents were, for example, part of the 'capacity' assessment for determining whether the children were to be deemed to have the understanding and abilities to be involved in the case. The legal representatives wanted to ensure that the involvement of the youth litigants was not due to pressure from parents – they determined that this was not the case. In fact, he describes the parents as 'quite hands off' in the case. He concludes that the firm would have been cautious about taking on a youth client if their parents were against it. This, he outlines, was a 'luxury' of the *Sharma* case – it would be different if a child was suffering a specific type of harm (Advancing Child Rights Strategic Litigation, 2022). It may be an important feature of future climate litigation to negotiate parent-child disagreements. The dynamics of family life are hugely important to upholding children's rights – CRC Article 5 upholds the principle of the evolving capacities of the child, which means that parental influence will decrease as children gain the ability to exercise their own rights. It is crucial not to exclude children and youth applicants simply because their parents do not approve.

4.2.3 The Right to Information

The right to information is, of course, an inherent aspect of both access *and* participation, as children do not have the chance to access justice if they have no knowledge of their options. It is crucial, therefore, that school curricula contain information about the climate crisis, and about relevant justice mechanisms. The Committee on the Rights of the Child (2023) emphasises in General Comment No. 26 that, 'States have an obligation to make environmental information available' on the environment. Information about justice mechanisms will be an important part of this, as without it children will be less likely to access such mechanisms. In 2022, the Education Minister in Ireland announced reform of the final exams, including the piloting of a subject on climate activism (O'Brien, 2022), an encouraging move and one which is a step towards better participation of children in climate justice.

As well as states parties to the CRC, legal representatives and other adults also have responsibilities to uphold the right of children to information. The Council of Europe likewise emphasises that justice be 'age appropriate and to [uphold the right to] understand the proceedings' (Council of Europe, 2010). Article 13 of the CRC envisages that information appropriate to the age of the child can and should be provided no matter what developmental stage the child is at. Preverbal children can be informed and communicate through, for example, drawings and other means. The format of information will be crucial,

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

because providing children and youth with long complex documents will, of course, not meet the requirements of CRC Article 13. Research indicates that professionals tend to focus on the *child's* ability to communicate rather than the professionals' own abilities to support children to do so (Brandon *et al.*, 2011). Stalford, Cairns and Marshall (2017) note that the right to information is not just about providing children and youth with practical facts – this is only the first layer. The second layer is information about their rights in relation to particular aspects of the justice process. The third layer is that:

> [I]nformation has to be reinforced, repeated and refined as the process unfolds so that young people know exactly how they can implement their rights. They need to know who has the authority, experience and knowledge to address their concerns appropriately and how to access them. Importantly, the information they receive should be provided in a way that gives them confidence that their contribution will be welcomed and valued.

Jack McLean outlines how, in the *Sharma* case, the lawyers changed their ways of working in order to suit the ways in which young people were accustomed to receiving information, through online mechanisms in plain language (Advancing Child Rights Strategic Litigation, 2022). Youth litigant Bella Burgemeister described how useful it was for herself and other youth litigants to receive information through social media for proceedings in which they could not personally attend, due to living on the other side of the country. She also outlined how there were frequent meetings with plain language used, which helped her follow what was going on: 'Usually we get forgotten about quite often … so the Teams and Zoom meetings were really appreciated' – she highlights that the youth litigants felt properly involved (Advancing Child Rights Strategic Litigation, 2022).

4.2.4 The Right to Support

Children and youth must also receive support and guidance, for example, through challenging and worrying elements of justice such as the likelihood of success of the particular case, particularly where proceedings will likely fail. Some litigants in the *Sacchi* case appeared understandably and very publicly distressed about the outcome, indicating the emotional toll that climate activism can take. Then 16-year-old petitioner, Alexandria Villasenor, for example, stated: 'I have no doubt this judgment will haunt the Committee in the future … Yet again, the adults have failed to protect us' (Hausfeld and Earthjustice, 2021).

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Another important point is that children should be protected to the extent possible from any adverse consequences of their participation in climate justice. The Council of Europe likewise emphasises that justice be 'focused on the needs and rights of the child' (Council of Europe, 2010). Children will inevitably face public hostility when taking climate cases. On the launch of the *Duarte* case, for example, some of the social media questions to the child/youth applicants were accusatory and hostile – 'Did your parents push you into taking this case?' and particularly, 'Why are you attacking countries?' (Global Legal Action Network, 2022). Likewise in the *Sharma* case, youth litigants received some hostility as youth litigant Bella Burgemeister outlines: 'They were bad mouthing some of us, talking about us in a way that we never thought would come from this. As 16-year-olds, we never thought anyone would do that in a public media' (Advancing Child Rights Strategic Litigation, 2022). This demonstrates how child and youth litigants can be open to hostility, particularly on social media from climate deniers and other hostile figures. Plans to shield children/youth litigants from public hostility to the extent possible must be built into climate litigation efforts. This is necessary to ensure that their participation does not lead to undue emotional harm due to online bullying or perhaps even to physical danger. Legal representative McLean outlines: 'We try to be gatekeepers and stand between the media and our clients. We try to make sure that all requests come through us so that we can judge the capacity of our clients to deal with the media work (Advancing Child Rights Strategic Litigation, 2022).

Taking a children's rights approach requires recognising children's unique characteristics and recognising that they may require more support than adult litigants. There are a number of ways that this can be done, but most importantly this will involve extensive communication with children/youth on all decisions being made in relation to litigation and surrounding media activities (and so overlap somewhat with the right to information). Legal representatives can, for example, engage in "autonomy support", a term from self-determination theory reformulated for children in court proceedings: 'non-controlling, impartial information and support to form and/or express views and decisions about a best interest matter' (Daly, 2018). It involves adults giving supportive, non-directive guidance to children and youth when courts are deciding their interests. This will ensure that children can weigh up decisions around the extent to which they wish to participate, and that they are fully aware of any potential negativity around their climate litigation.

4.3 *Interests: Children/youth adequately Considered in all Matters*

Article 3 of the CRC requires that the best interests of children are a primary consideration in all matters affecting them. This raises a number of questions

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

in relation to climate justice. The first is the point that climate litigation and other complaints mechanisms are a key means through which children's interests can be vindicated. Children as a group are in a particularly vulnerable position considering that the right to vote is generally only enjoyed by those over the age of 18 (Wall, 2021). This democratic deficit means that the excluded position of children generally should be taken into account by courts making decisions on the climate crisis. The UN Committee on the Rights of the Child in its General Comment No. 14 on *The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* outlines that the principle of the best interest of the child must be considered in all decisions – decisions on climate policies, for example, would be included here. The Committee continues that states must explain how the best interests principle has been respected in a particular decision, 'that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases' (UN Committee on the Rights of the Child, 2013). Legal arguments therefore in climate cases taken by child and youth applicants should centre on this state obligation, yet this is not the case in the vast majority of climate litigation involving children and youth to date (Donger, 2022 and Daly, 2023).

The second consideration is that because the climate crisis clearly harms children's interests, efforts must be made to mitigate this – litigation and other complaints mechanisms will be an inevitable part of these efforts. As outlined above, Article 12 requires the participation of children in matters affecting them. There are strong arguments in favour of involvement of children and youth in climate justice mechanisms when one considers the levels of distress that children and youth experience when they encounter climate chaos firsthand. The children and young people in the *Duarte* (2020) petition outlined the mental distress of the present effects of the climate crisis (for example, missing school and sports due to heat waves), as well as their worries about the future. The European Court of Human Rights also appears to frame their distress in this way – the court took the unprecedented step of asking states implicated application to speak to the implications of the climate crisis in relation to ECHR Article 3, which relates to torture and inhuman degrading treatment. The interconnection between the fears of children and youth and their desire to access climate justice makes it all the more important to ensure child friendly climate justice processes. A related question will be whether it is in the best interests of a particular child to take a climate case. This question can only be answered, of course, on a case-by-case basis as outlined above.

A further issue relating to the issue of children's interests is that judges (and other decision-makers in justice systems) must ensure that the best interests

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

of children as a group are a primary consideration in the outcomes of decisions.[9] The article will now turn to considering this point.

4.4 *Judgments: Children's Rights Awareness and Information*

In recent years, even before the proliferation of children's climate cases, there was an increasing academic interest in how children's rights relate to judging. Stalford, Hollingsworth and Gilmore co-ordinated a large-scale project from 2016–17 examining how judging could incorporate children's rights standards and theory. The authors emphasised the potential for progressive judging, and advocated 'a position whereby those charged with interpreting and implementing the law internali[s]e and commit themselves to the values espoused by children's rights' (Stalford *et al.*, 2017).[10]

As noted in relation to the matter of admissibility, judging is not value free, and judges can interpret the law in a creative way; not simply applying legislation but rather resolving gaps and ambiguities in the legal framework (Kennedy, 1997). They can therefore be proactive in taking a children's rights approach to legal sources. They also have significant leeway in interpreting provisions such as the best interests principle. Though there may be obstacles which are constitutional, institutional or procedural, as Tobin notes the extent of these perceived obstacles are often overstated (Tobin, 2009). Human rights provisions are written in very broad terms. Considering the scientific evidence regarding the seriousness of the climate catastrophe which looms, judges can legitimately prioritise the best interests of children when deciding climate cases and weighing children's interests against other factors. This is crucial where children are disproportionately affected by the climate crisis, and yet struggle to influence policy-making as they are generally excluded from the right to vote (Daly, 2025, forthcoming).

Another key question relating to judgments is whether those sitting on climate cases have training in children's rights. It has been argued that there should also be a body of knowledge about which practitioners working on proceedings concerning children should have some understanding, I recommend elsewhere that this should include: 'competence to communicate with children, to understand autonomy and autonomy support, to understand children's rights, and to be able to think critically about the adult/child dichotomy' (Daly, 2018). Some judges, particularly in the common law system, are

9 This is not always the case, however. In *Sharma*, for example, the Court did not conduct a best interests analysis of the mining plans in question. See Donger (2022).

10 See also Lawson, Stalford and Woodhouse (2023). Stalford *et al.*, 2017 devised a framework to identify a children's rights-based approach to judging, including recognising children as rights-holders.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

reluctant to facilitate children to be present in court, or to hear their experiences. The right of children to take cases, to be in court, and to be respected as individuals, should be normalised in justice processes. In relation to the *Sacchi* application, the Committee held a closed hearing whereby the applicants could present their experiences, without State representatives present. This demonstrates the efforts of the Committee to ensure a child/youth friendly process (Nolan, 2021). Youth climate activists are transforming perceptions of children and youth (Rogers, 2020 and Daly, 2022) and climate litigation may well be the avenue through which to ensure that systems are prepared for the fact that, sometimes, litigants will be children.

The final issue is the communication of judgments to children (Lawson, Stalford and Woodhouse, 2023). All judgments should be accompanied with child friendly versions, in order to meet the requirements of CRC Article 13, the right to freedom of information of children, and Guideline 49 of the Council of Europe's guidelines (Council of Europe, 2010). In another example of moving towards more child/youth friendly procedures, the Committee on the Rights of the Child produced an open letter to the petitioners in the *Sacchi* case. It included a simplified, child friendly explanation of the case, and begins with the words: 'We write to acknowledge the importance of your actions in bringing this historic case to the Committee on the Rights of the Child' (United Nations, 2022) This move by the Committee indicates that there is great potential for making innovations in the field of children's climate justice when it comes to judgment delivery.

Stalford and Hollingsworth note that a wide variety of formats are open to judges through which to meet the needs of particular children and youth (Stalford and Hollingsworth, 2020). As well as open letters, judges can construct a 'plain language judgment' that explains complex legal issues in simpler terms. They can include explanations to children in the judgment itself, or append a summary to the judgment. Judges can use even more innovative means, such as diagrams, cartoons or video messages which will, of course, be particularly useful for younger children and for those with communication difficulties. Such approaches will constitute a sea change from what has been done to date; however, child/youth climate litigation encourages adults to rethink traditional, inaccessible communication in legal fora.

Stalford and Hollingsworth also identify potential functions of judgments written for children which they suggest will enhance access to justice. They identify, for example, a "communicative" function whereby children are assisted in understanding the decision made and in achieving a sense of procedural justice. They emphasise that it is traditionally assumed that lawyers or other adults will communicate this to children, but that it should be seen

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

as the function of judges themselves to ensure that children's rights are met, as lawyers and other adults may not have the inclination or training for this. The authors identify a 'developmental function', which they suggest will 'not only … facilitate acceptance of and reconciliation with the specific decision in question but also to contribute to the child's longer-term overall development, sense of identity and legal citizenship' (Stalford and Hollingsworth, 2020). Although there will be legal victories in the future such as in France and Germany, there will also be losses. The public reaction of the young applicants in *Sacchi* demonstrates that inevitably children and youth will be left disappointed and distressed. Judgments written to assist children and youth to understand the basis on which decisions are made will be one crucial element of efforts to make climate justice child friendly for the cases to come.

5 Conclusion

Children will be amongst those that suffer disproportionately in the climate crisis, and this inequality is compounded by their exclusion from climate policy processes. Accessing courts and other complaints mechanisms will therefore be particularly important for children as a group. This makes it all the more crucial that those mechanisms are suited to their unique characteristics as children and youth. The adults involved have a responsibility to ensure that children's rights are embedded in their practices. It is easy to fall into the trap of viewing child litigants as symbolic Messiah figures here, 'to help restore order, on behalf of all beings' (Rogers, 2020) Yet these children are not only political/legal activists on behalf of humanity. They are also individual rights holders and their status as children requires that they receive additional support and care in climate litigation.

Progress is being made in climate case law through children's rights arguments – for example the recognition by the UN Committee on the Rights of the Child of transboundary responsibility for human rights violations in *Sacchi* (Daly, 2022). There is also evidence of repeated exclusion of children and their arguments from these processes, however, through negative decisions on standing and admissibility. It appears that adult decision-makers are frequently failing to permit child and youth litigants to even have their cases heard on their merits (Parker *et al.*, 2021).

Added to this, the child friendly justice framework mainstreamed by the Council of Europe has yet to be properly elaborated in relation to youth climate activists. Climate litigation is of quite a different nature in comparison to the types of litigation to which children and youth have been parties until

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

this point in time. Instead of being involved as a consequence of the disputes of their parents or other adults, youth climate litigants are themselves joining as parties to petitions concerning the climate. The litigation tends to be part of broader campaigns on the climate crisis, and these campaigns require much media work. Whilst such campaigns provide an opportunity for children and youth to be heard on the most important issue of our times, they also leave these young people open to abuse and bullying.

Much more research is required in this area, but applying the principles of the CRC should be a minimum for those working with children in the area of climate justice. There is much to learn from the experiences of strategic litigation occurring recently, much of which is still ongoing at the time of writing (2022). As outlined in this article there are emerging examples of legal representatives engaging in innovative means of communication to work with their child/youth clients. It seems that the intergenerational dynamics and the inspirational nature of youth activism means that youth climate litigation can benefit the adults involved as much as the child/youth litigants. It has been suggested in this article that using the concepts of access, participation, interests and judgments will be a rights-based starting point for those considering embedding children's rights in justice processes. It is clear, however, that further research into the views and experiences of children and youth who have been involved in these cases will be invaluable.[11] Their expert advice will be the primary way through which we can ensure child friendly justice for the future climate cases which will undoubtedly be taken.

Acknowledgements

I would like to thank the anonymous reviewers for their feedback. I would also like to thank the attendees of the 2023 Frontiers Research workshop of the School of Law, University College Cork, as well as Esther Montesinos Calvo-Fernández.

This research is funded by the European Union (ERC, 101088453). Views and opinions expressed are, however, those of the author(s) only and do not necessarily reflect those of the European Union or the European Research Council Executive Agency. Neither the European Union nor the granting authority can be held responsible for them.

11 At the Youth Climate Justice project, we are conducting this research. See https://www.ucc.ie/en/youthclimatejustice/. Accessed 18 September 2024.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

References

Advancing Child Rights Strategic Litigation (ACRiSL), *Key Principles for Climate Justice Litigation*, (Advancing Child Rights Strategic Litigation, 2023).

Advancing Child Rights Strategic Litigation (ACRiSL), *Event: Engaging with Children and Young People in Child Rights Strategic Litigation* (6 April 2022) (2022). Available at: https://mediaspace.nottingham.ac.uk/media/t/1_naiq6qsr. Accessed 7 April 2022.

African Child Policy Forum, & Defence for Children International, *Achieving Child Friendly Justice in Africa* (African Child Policy Forum/DCI, 2012).

Aliozi, Z., *Climate Justice and Human Rights, in a World in Climate Emergency* (Global Campus Europe – Policy Brief, 2021).

Bowman, B. et al., "Youth, Climate and Environmentalism", in K. Bell (ed.), *Diversity and Inclusion in Environmentalism* (Routledge, 2021).

Brandon, M. et al., *Child and Family Practitioners' Understanding of Child Development: Lessons Learnt from a Small Sample of Serious Case Reviews* (England and Wales: Department for Education, 2011).

Brown Weiss, E., *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (United Nations University, 1989).

Çali, B., "A Handy Illusion? Interpretation of the 'Unlikely to Bring Effective Relief' Limb of Article 7(e) OPIC by the CRC in *Sacchi et. al.*", EJIL Talk! 2021. Available at: https://www.ejiltalk.org/a-handy-illusion-interpretation-of-the-unlikely-to-bring-effective-relief-limb-of-article-7e-opic-by-the-crc-in-saachi-et-al/. Accessed 2 December 2021.

Chalifour, N. et al., "Coming of Age in a Warming World: The Charter's Section 15 (1) Equality Guarantee and Youth-Led Climate Litigation", *Journal of Law & Equality* 2021 (17(1)).

Chang, H-C., "Climate Strike or Not? Intersectionality of age and culture encountered by young climate activists in Taiwan", *Childhood* 2022 (29(1)): 7–23. DOI: 10.1177/09075682221074869.

Children's Rights International Network (CRIN), *Rights, Remedies, Representation: Global report on access to justice for children* (2016).

Committee on the Rights of the Child, General Comment No. 26, *Children's Rights and the Environment with a Special Focus on Climate Change* (22 August 2023), CRC/C/GC/26.

Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010.

Daly, A., *A Commentary on the UN Convention on the Rights of the Child, Article 15: The right to freedom of association and to freedom of peaceful assembly* (Brill, 2016).

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Daly, A. *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill, 2018).

Daly, A., "Climate Competence: The impact of youth climate activism on international human rights law", *Human Rights Law Review* 2022 (22(2)), ngac011. DOI: 10.1093/hrlr/ngac011.

Daly, A., "Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC", *Netherlands Quarterly of Human Rights* 2023 (41(3)), 132–154. DOI: 10.1177/09240519231195753.

Daly, A., "Nondiscrimination/equality and children's rights in the climate crisis", in A. Daly, R. Thorburn Stern and P. Leviner (eds.), *Treated Like a Child: Equality/Nondiscrimination, Children and International Human Rights Law* (Brill, 2025, forthcoming).

Daly, A. and Lundy, L., ENOC Synthesis Report Children's Rights & Climate Justice, *European Network of Ombudspersons for Children* (2022).

Daly, A., Thorburn Stern, R. and Leviner, P., "UN Convention on the Rights of the Child, Article 2 and Discrimination on the basis of Childhood: The CRC Paradox?", *Nordic Journal of International Law* 2022 (91(2)), 419–452.

Donger, E., "Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization", *Transnational Environmental Law* 2022 (11(2)), 263–289. DOI: 10.1017/S2047102522000218.

European Commission, *Evaluation of Legislation, Policy and Practice on Child Participation in the European Union: A Final Report to the European Commission Directorate-General for Justice* (European Commission, 2014), 178.

Fraser, J. and Henderson, L., "The Human Rights Turn in Climate Change Litigation and Responsibilities of Legal Professionals", *Netherlands Quarterly of Human Rights* 2022 (40(1)). DOI: 10.1177/09240519221085342.

Glazebrook, T. and Opoku, E., "Defending the Defenders: Environmental protectors, climate change and human rights", *Ethics and the Environment* 2018 (23(2)), 83. DOI: 10.2979/ethicsenviro.23.2.05.

Global Legal Action Network (GLAN), *Duarte Agostinho Press Conference* (8 September 2020), Available at: https://www.youtube.com/watch?v=_PKwTE32UoY&t=129s. Accessed 3 February 2022: 39:50.

Hausfeld/Earthjustice, *UN Committee on the Rights of the Child Turns Its Back on Climate Change Petition From Greta Thunberg and Children From Around the World* (11 October 2021). Available at: https://www.globenewswire.com/en/news-release/2021/10/12/2312125/27401/en/UN-Committee-on-the-Rights-of-the-Child-Turns-Its-Back-on-Climate-Change-Petition-From-Greta-Thunberg-and-Children-From-Around-the-World.html. Accessed 3 February 2022.

Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: Impact, Adaptation, Vulnerability, 'Summary for Policymakers'* (2022). Available at: https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/. Accessed 1 April 2022.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Jaffé, P., "Child-Friendly Justice: A malleable catalyst for the promotion of child and human rights", in E. Marrus and P. Laufer-Ukeles (eds.), *Global Reflections on Children's Rights and the Law* (Routledge, 2021).

Kennedy, D., *A Critique of Adjudication* (*Fin de Siècle*) (Harvard University Press, 1997).

Knox, J., "Constructing the Human Right to a Healthy Environment", *Annual Review of Law and Social Science* 2020 (16), 79–95. DOI: 10.1146/annurev-lawsocsci-031720-074856.

Lawson, D., Stalford, H. and Woodhouse, S., *Promoting Children's Rights in the European Court of Human Rights: The Role and Potential of Third Party Interventions* (University of Liverpool, 2023).

Lewis, B., "Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights" *Nordic Journal of Human Rights* 2021 (39), 180–203. DOI: 10.1080/18918131.2021.1996002.

Liefaard, T., "Child-Friendly Justice: Protection and Participation of Children in the Justice System", *Temple Law Review* 2015 (88(4)), 905–927.

Liefaard, T., "Access to Justice for Children: Towards a Specific Research and Implementation Agenda", *The International Journal of Children's Rights* 2019 (27(2)), 195–227. DOI: 10.1163/15718182-02702002.

Liefaard, T. and Kilkelly, U., "Child-friendly justice", in B. Goldson (ed.), *Juvenile Justice in Europe: Past, Present and Future* (Routledge, 2018).

LSE, *Climate Case Law Database* (2021). Available at: https://climate-laws.org/geographies/lao-people-s-democratic-republic/policies/national-strategy-on-education-and-awareness-on-the-environment-and-climate-change-2018-2025 Accessed 6 April 2022.

Lundy, L., ""Voice" is not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child", *British Educational Research Journal* 2007 (33(6)), 927–942. DOI: 10.1080/01411920701657033.

Martinez, X., *We Rise: The Earth Guardians Guide to Building a Movement that Restores the Planet* (Rodale, 2021).

Nolan, A., "Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v Argentina", *EJIL: Talk!* (20 October 2021). Available at: https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina/ Accessed 20 December 2021.

Nolan, A. and Skelton, A., "Turning the Rights Lens Inwards: The Case for Child Rights-Consistent Strategic Litigation Practice", *Human Rights Law Review* 2022 (22(4)), ngac026.

O'Brien, C., "Give Me a Crash Course in … Leaving Cert Reform", *Irish Times* (2 April 2022). Available at: https://www.irishtimes.com/life-and-style/give-me-a-crash-course-in-leaving-cert-reform-1.4841992. Accessed 2 July 2024.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

Parker, L. et al., "When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World", *Journal of Human Rights and Environment*, 2021 (64). Available at SSRN: https://ssrn.com/abstract=3960982.

Peel, J. and Osofsky, H. M., "A Rights Turn in Climate Change Litigation?", *Transnational Environmental Law* 2018 (7(1)), 37–67. DOI: 10.1017/S2047102517000292.

Rogers, N., "Victim, Litigant, Activist, Messiah: the Child in a Time of Climate Change", *Journal of Human Rights and the Environment* 2020 (3(11)). DOI: 10.4337/9781800881099.00009.

Setzer, J. and Higham, R., "Global Trends in Climate Change Litigation: 2021 Snapshot", *LSE*, *Columbia University, Centre for Climate Change Economics and Policy* 2021.

Skelton, A., *Strategic Litigation Impacts: Equal Access to Quality Education* (Open Society Justice Initiative, 2017).

Stalford, H. et al., *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Bloomsbury Publishing, 2017a).

Stalford, H. et al., "Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information", *Social Inclusion* 2017b (5), 207–208.

Stalford, H. and Hollingsworth, K., "'This Case is About You and Your Future': Towards Judgments for Children", *The Modern Law Review* 2020 (83(5)), 1030–1058. DOI: 10.1111/1468-2230.12536.

Thew et al., "'Youth is Not a Political Position": Exploring justice claims-making in the UN Climate Change Negotiations", *Global Environmental Change* 2020 (61). DOI: 10.1016/j.gloenvcha.2020.102036.

Tobin, J., "Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children", *Melbourne University Law Review* 2009 (33(2)). Available at SSRN: https://ssrn.com/abstract=1574027.

UNICEF, *Climate & Environment Discussion Paper* (UNICEF, November 2021).

United Nations, *Press release – UN Child Rights Committee Rules that Countries Bear Cross-Border Responsibility for Harmful Impact of Climate Change* (11 October 2021). Available at: https://www.ohchr.org/en/press-releases. Accessed 1 April 2022.

United Nations (n.d.)., "Global Issues: Youth". Available at: https://www.un.org/en/global-issues/youth. Accessed 6 April 202.

Van Der Voo, L., *As the World Burns: The New Generation of Activists and the Landmark Legal Fight Against Climate Change* (Timber Press, 2020).

Wall, J., *Give Children the Vote: On Democratizing Democracy* (Bloomsbury Publishing, 2021).

Watts, N. et al., "The 2019 Report of The Lancet: Countdown on Health and Climate Change: Ensuring that the Health of a Child Born Today is not Defined by a Changing Climate", *The Lancet* 2019 (394(10211)), 1836–1878. DOI: 10.1016/S0140-6736(19)32596-6.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/

List of Cases and UN Documents

Association Oxfam France et ors v. France N °1904967, 1904968, 1904972, 1904976/4-1 [2021].

Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018, Radicaci6n no. 11001-22-03-000-2018-00319-01, p. 18–19 (Colom.).

Duarte Agostinho and Others v. Portugal and Others (2020), European Court of Human Rights, Application No. 39371/20.

Environnement Jeunesse v. Attorney General of Canada (Superior Court, 500-06-000955-183) (11 July 2019) *Held v Montana*, 14 August 2023, Montana First Judicial District Court, Lewis and Clark County, Cause No CDV-2020-307.

Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

Minors Oposa v. Secretary of the Department of Environmental and Natural Resources 33 ILM 173 (1994).

Neubauer et al. v. Germany (BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20).

Sharma and others v. Minister for the Environment [2021] FCA 560.

Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560.

UN Committee on the Rights of the Child, General Comment No. 14 on *The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (2013) CRC/C/GC/14.

UN Committee on the Rights of the Child, General Comment No. 7: *Implementing child rights in early childhoo*d (2005) (UN/CRC/GC/7), para. 11.

UN Committee on the Rights of the Child, General measures of implementation of the Convention on the Rights of the Child (2003) CRC/C/GC/26, para. 56.

Downloaded from Brill.com 11/06/2024 12:46:50PM
via Open Access. This is an open access article distributed under the terms
of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/