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10. Children's Access to Justice in Climate Matters: The Role of Vulnerability

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Abstract Children and young people are particularly vulnerable to the effects of climate change, and their rights are strongly affected. This chapter explores children's access to courts and complaints mechanisms in the light of theories of vulnerability. Issues of legal standing, extraterritoriality and legal capacity are discussed. The author argues that legal empowerment is necessary for children to obtain real access to justice in this area and to be able to influence decision-making.

Keywords access to justice | climate change | legal empowerment | legal capacity | complaints

10.1 INTRODUCTION

Children and young people are particularly vulnerable to the effects of climate change.[1] This now appears to be accepted as a fact[2] and was taken as a premise by the Committee on the Rights of the Child in Sacchi et al.[3] In 2021 it was confirmed by UNICEF's report presenting "the first comprehensive view of climate risk from

1 Karin Arts, "Children's Rights and Climate Change," in *Children's Rights and Sustainable Development: Interpreting the UNCRC for Future Generations*, ed. Claire Fenton-Glynn (Cambridge University Press, 2019), 216–235, 217–218; Francesca Ippolito, *Children's Environmental Rights under International and EU Law: The Changing Face of Fundamental Rights in Pursuit of Ecocentrism* (The Hague: Asser Press, Springer, 2023), 309; UNICEF, *The Climate Crisis Is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, 2021.

2 See, e.g., UN Human Rights Council, *Resolution adopted by the Human Rights Council on 1 July 2016, 32/33 Human Rights and Climate Change*, A/HRC/RES/32/33, preambular para. 13; UN Committee on the Rights of the Child, *Report from the 2016 Day of General Discussion, Children's Rights and the Environment* (December 23, 2016), 4–6, 23, with further references.

3 UN Committee on the Rights of the Child, *Sacchi et al. v. Argentina*, CRC/C/88/D/104/2019, Decision by the Committee on the Rights of the Child (October 8, 2021), para. 10.13.

a child's perspective".[4] As stated in the report, children are physically more vulnerable to floods, droughts, severe weather and heatwaves; physiologically more vulnerable to toxic substances and other forms of pollution, even at lower doses of exposure; and at greater risk of death from diseases that are likely to be exacerbated by climate change, such as malaria and dengue. Children have their whole life ahead of them, and "any deprivation as a result of climate and environmental degradation at a young age can result in a lifetime of lost opportunity".[5]

For this reason, children and youths demonstrate a particular engagement regarding climate change. However, in most countries children below the age of 18 do not have the right to vote and thus have no formal say in these matters. They are fully dependent on the decisions of adults, which creates an additional vulnerability. To make up for this dual vulnerability they need other formal channels for making their voices heard. One avenue is to be involved in the political system. Children and youth could either be represented in relevant decision-making bodies at the local, national or international level, or they could form separate bodies that give advice to decision-makers, such as children's municipal advisory boards or national youth parliaments. Another avenue is to use complaints mechanisms or the courts to challenge decisions made by the authorities in this area. This avenue, which is part of the broader issue of children's access to justice in climate matters, is the topic of this chapter.

In that respect, a third aspect of children's vulnerability enters the scene. Children are largely considered too vulnerable to bring cases themselves. In other words, they lack capacity and need to be represented by adults – either their parent(s), other guardian(s), or an organisation. Vulnerability is often used by adults as a reason for denying children autonomy, so as to protect them from the risks it may imply. The perceived inherent vulnerability of being a child has led to formal limitations to their ability to act in the legal system. In addition, there are several aspects of complaints mechanisms, and particularly of courts, that create a situation of vulnerability for children trying to use them. Also, the requirement of legal standing may be a challenge, including across borders.

For several years, climate change and children's rights has been the topic of recommendations to states in concluding observations issued by the UN Committee on the Rights of the Child.[6] In 2016, the Committee held its Day of General Discussion on Children's Rights and the Environment.[7] The event laid the

4 UNICEF, *The Climate Crisis Is a Child Rights Crisis*, 13.

5 UNICEF, *The Climate Crisis Is a Child Rights Crisis*, 11.

6 See, e.g., Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Fiji*, CRC/C/FJI/CO/2-4, (October 13, 2015), para. 23 d.

7 CRC Committee, *Report from Day of General Discussion 2016*.

foundation for more systematic work in this area, leading to the development of General Comment no. 26 on children's rights and the environment, with a special focus on climate change, which was launched in September 2023.[8]

Below, I present the use of vulnerability theory in this context, before looking into what kind of climate cases may be brought before a complaints mechanism or a court, accompanied by an outline of the relevant substantive children's rights. The concept of access to justice is subsequently discussed. A central part of the chapter is to explore children's human right to access to justice, with the CRC as a natural starting point. Possible barriers to children's access to justice at the national level are examined with a vulnerability approach, including the issues of legal standing and extraterritorial consequences of climate change. Special attention will be given to the requirement of legal representation and how to solve it. In the concluding remarks, I will point to possible ways forward.

10.2 VULNERABILITY THEORY IN THIS CONTEXT

10.2.1 Fineman's Theory and Children's Rights

One might explain the rationale behind human rights as being to compensate for the vulnerability of human beings, as a response to it,[9] or to protect them from the risk of harm.[10] Martha A. Fineman's vulnerability theory takes as its starting point that we are all vulnerable and emphasises the need for states to take measures to respond to our universal vulnerability. Her theory was developed as a critique of theories focusing on the "liberal subject", presuming that humans are by nature autonomous and independent actors.[11]

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

9 Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, vol. 60 (2010): 251–275, 254–255.

10 John Tobin, "Understanding Children's Rights: A Vision beyond Vulnerability," *Nordic Journal of International Law*, vol. 84(2) (2015): 155–182, 162, who adds to the risk of "exogenous" harm. Later in the same article (164–166) he opposes the presumption that children in general additionally need protection against the risk of endogenous harm, i.e., originating from within as opposed to having an external cause.

11 Fineman, "The Vulnerable Subject and the Responsive State," 251–275, 263, 274; Ellen Gordon-Bouvier, "The Vulnerable Subject: Anchoring Equality in the Human Condition (Martha Fineman)," in *Leading Works in Law and Social Justice*, eds. Faith Gordon and Daniel Newman (London: Routledge, 2021).

Children share the universal vulnerability inherent in the human condition.[12] Yet, universal vulnerability does not mean that we are all vulnerable to the same extent all the time. Fineman recognises that "human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime".[13] There is an extra vulnerability inherent in being a child, and even within a person's childhood their vulnerability differs with age and maturity. In addition, there are vulnerabilities that depend on the circumstances or the situation that the child is in and the type of issue at stake. In the context of climate change, some children – for instance, indigenous children – face additional risks due to their close relationship with the environment.[14]

Children's rights are a response to the inherent vulnerability of children and the various vulnerable situation(s) in which they may find themselves. Taking each child as the starting point, rights serve to uphold the child's dignity even in vulnerable situations. Without rights, children's vulnerability may be used as a reason to keep them down and provide them with goods as charity only, leaving them to the benevolence of others. In the words of Liefaard, with the adoption of the CRC in 1989 and its almost universal ratification,

> the international community agreed to move away from the child being perceived merely as a vulnerable and dependent human being in need of special care and assistance, and accepted that a child is, in the first place, a rights holder like any other human being.[15]

Thus, the CRC represents a paradigm shift from viewing children as merely vulnerable to acknowledging them as rights holders. As Tobin points out, with a rights-based rather than a vulnerability approach, the focus shifts from protection to the child's evolving capacities and right to participation.[16] Ippolito states that the image of the competent child is related to the CRC as a transformative instrument guiding policy on children.[17]

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12 Fineman, "The Vulnerable Subject and Responsive State"; Gordon-Bouvier, "The Vulnerable Subject," 226–239, 227.

13 Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, vol. 20 (2008): 1–24.

14 CRC Committee, *Report from Day of General Discussion 2016*.

15 Ton Liefaard, "Access to Justice for Children: Towards a Specific Research and Implementation Agenda," *The International Journal of Children's Rights*, vol. 27 (2019): 195–227, 196.

16 Tobin, "Understanding Children's Rights."

17 Ippolito, *Children's Environmental Rights*, 76.

Yet, although it should not be the only or overarching perspective, the concept of vulnerability may be helpful in the implementation of rights. Even with a rights-based approach, an examination of the specific vulnerability of children or the vulnerable situations they may find themselves in may contribute to an understanding of what needs to be done.[18] For example, for a child to express their views freely, the setting has to be adapted to the situation of that child, including any specific vulnerability. This is relevant with regard to children's access to justice as well. Children cannot be expected to use the same channels for challenging rights violations as adults, without these channels being adapted to the more vulnerable situation of children in general and that child specifically.

10.2.2 Climate Change, Resilience and Autonomy

As all human beings are vulnerable to its consequences, climate change creates a universal vulnerability that we all share. In this case the vulnerability is caused by an external factor creating a threat to human existence (not to mention nature), yet the risk of harm may depend on the specific vulnerability of each human being. Although children in general are particularly vulnerable to the effects of climate change, their vulnerability varies with their age and the various situations of vulnerability they are in, including the geographical area in which they live.

According to Fineman, building resilience is essential to ameliorating the harmful effects of human vulnerability and should be a state responsibility. I agree with critics that one should take a step back and look at states' responsibility for creating harm in the first place,[19] or, in the case of climate change, for not doing enough to stop it. The resilience approach may be seen as related primarily to adaptation, whereas it does not fit so well with the obligation to take mitigation measures. On the other hand, the ability of individuals, including children, to take action to influence the government's mitigation efforts may be seen as an aspect of their resilience. I will return to this in relation to access to justice.

A few words should be added about autonomy. As mentioned, Fineman's vulnerability theory was developed in opposition to liberal theories based on the autonomy of a rational and self-sufficient person. Although she does not totally dismiss the idea of autonomy, she has been criticised for interpreting autonomy in too individualistic a way and for overlooking the value for the individual of being able to make their own life choices. Other authors have argued that, instead,

18 Sandberg, Kirsten, "The Convention on the Rights of the Child and the Vulnerability of Children," *Nordic Journal of International Law*, vol. 84(2) (2015): 221–247.

19 Gordon-Bouvier, "The Vulnerable Subject," 226–239, 236.

autonomy should be defined relationally, involving "social and reciprocal duties to others".[20] This seems to be relevant in the context of this article and the discussion about resilience above. A feeling of a certain autonomy is a vital part of resilience and is closely related to the ability to take action.

10.3 WHAT IS A CLIMATE CASE AND HOW ARE CHILDREN'S RIGHTS AFFECTED?

The term "climate matters" covers anything that may influence the climate in a positive or negative way or is a consequence of climate change that has already happened. Access to justice is relevant where the matter has a legal aspect.

One type of case would concern compensation for damage already done. Such cases are backward-looking but may also have implications for the future. They may be brought against the government for not having done enough to prevent the particular event that led to the damage or against companies that have been actively involved, for instance, in discharging polluting materials or cutting down rainforest.

Cases may also be brought to try to prevent climate change before it happens, typically by challenging discharge permits given by the government to releasing polluting materials, be it to the air, water or the ground. Air pollution is the one most directly linked to climate change, but pollution of the sea or the ground may have indirect effects on the climate.

Another possibility is to challenge licences given by the government to activities that may damage the environment and contribute to climate change. One example is oil drilling licences in new areas, as in the Norwegian constitutional climate lawsuit concerning oil drilling in the Arctic, decided by the Supreme Court in the plenary in 2020.[21] Another one is timber licences, as in the well-known case from the Philippines, where the plaintiffs claimed that excessive timber logging was a threat to a balanced ecology.[22]

Yet another type of case involves those brought to challenge the climate goals of the government for being too modest and not meeting its international obligations. In the Dutch Urgenda case, with children among the applicants,[23] the government was required to take additional measures to reduce greenhouse

20 Gordon-Bouvier, "The Vulnerable Subject," 226–239, 236.

21 Norwegian Supreme Court Plenary Judgment, HR-2020-2472-P.

22 Philippines Supreme Court, *Oposa vs. Factoran* (July 30, 1993).

23 Otto Spijker, "The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?," in *Courts and the Environment*, eds. Christina Voigt and Zen Makuch (Edward Elgar Publishing, 2018), 305–344.

gas emissions further.[24] In the German constitutional case, parts of the Federal Climate Protection Act were struck down for not setting sufficiently ambitious climate goals to be compatible with fundamental rights, interpreted in the light of the Paris Agreement.[25]

If children are to bring a case to court or a complaints mechanism regarding a violation of their rights, they need to establish that their rights are or will be affected. The environment is mentioned in two of the articles of the CRC, Art. 24 on the right to health and Art. 29 on the aims of education. Art. 24 obliges states to "combat disease […] taking into account the dangers and risks of environmental pollution".[26] Thus, as pointed out by Ippolito, the "groundbreaking approach" of the CRC extends to the dangers and risks of environmental pollution.[27] Under Art. 29, education shall be directed to, among others, the "development of respect for the natural environment".[28] Although they are not strong or comprehensive, these provisions indicate that the environment is relevant to children's rights, and they have been a starting point for further developing the legal thinking around children's rights in this area.[29]

The climate emergency has been called a "child rights crisis".[30] Climate change affects most of children's substantive rights: the right to life, survival and development under Art. 6; non-discrimination under Art. 2; the best interests of the child under Art. 3; as well as the right to health as mentioned; education (Art. 28); rest, leisure, play, recreational activities, cultural life and the arts (Art. 31); freedom from exploitation (Arts. 32–36); protection from all forms of violence (Art. 19); an adequate standard of living, housing, food, water and sanitation (Art. 27); and the right to identity (Art. 8).[31] Art. 12 on the right to express views is of course highly relevant in this context.

24 *Urgenda Foundation v. State of the Netherlands*, HAZA C/09/00456689 (2015).

25 *Neubauer et al. v. Germany* (2020).

26 Art. 24, para. 2(c).

27 Ippolito, *Children's Environmental Rights*, 76.

28 Art. 29, para. 1(e).

29 Ippolito, *Children's Environmental Rights*, 84–103 and 116–122, offers an extensive presentation and discussion of those two provisions.

30 UNICEF, *The Climate Crisis Is a Child Rights Crisis*.

31 CRC Committee, *Report from Day of General Discussion 2016*; Thoko Kaime, "Children's Rights and the Environment", in *International Human Rights of Children*, ed. Ursula Kilkelly and Ton Liefaard (Springer, 2019), 563–585; Arts, "Children's Rights and Climate Change"; Ippolito, *Children's Environmental Rights*, in addition to the rights to health and education, highlights the right to an adequate standard of living, to rest, leisure and play and the four general principles, 122–142.

Climate change may also have indirect impacts on the ability of governments to protect children's rights. For example, in Bangladesh, some families have rushed to marry off girls in anticipation of losing their homes to river erosion.[32] Furthermore, by aggravating existing inequalities in the use of and access to productive land and freshwater, climate change can cause violent conflicts, exploitation, and large-scale migration or displacements. Climate change poses an existential threat to indigenous children due to their close relationship with the environment.[33]

Thus, a variety of children's rights may be affected by climate change. For the court to find a violation of children's rights, a causal link between the issue in question – the risk of harm or the harm already done, the measure taken or not taken or the insufficient policy goals – and one or more of these rights has to be established. In this chapter I will not follow the issue of children's substantive rights further but rather examine whether it is possible for children to demand that the question is tried at all.

10.4 ACCESS TO JUSTICE

10.4.1 Placing Access to Justice in Context

Children's access to justice is linked to the need to hold states accountable for violations of children's rights. Accountability may take various forms, but in this context it is about legal accountability, i.e., holding states accountable by legal means or in the legal system. Whereas the concept of accountability is directed at the state and how to make it uphold its obligations, the concept of access to justice takes the individual as its point of departure.

Although the CRC represented a leap forward in recognising the child as a rights holder, having rights on paper is only a first step. It is up to states to create institutions, policies and measures to implement those rights. However, the implementation often leaves something to be desired, and children do not fully enjoy their rights. Thus, a second step for being recognised as a true rights holder is the ability to seek a remedy for the violation of those rights. Otherwise, the status as rights holder becomes symbolic. Without access to justice for rights violations, children are left in the vulnerable situation that their rights were meant to compensate for. A lack of access to justice may actually add to children's vulnerability because it renders the child with a feeling of helplessness and lack of control.

32 CRC Committee, *Report from Day of General Discussion 2016*, 12–13.

33 The examples are from the report from the CRC Committee, *Report from Day of General Discussion 2016*.

Not only have the child's rights been violated, but they are not able to take any action to improve the situation.

In the climate emergency that the world is facing, this feeling may be particularly strong, since the situation is urgent and children do not have a place at the table. In this situation, access to justice would be a way to build resilience in children. Being able to stand up for their own rights could at least to some extent make up for their strong vulnerability in this context. This of course comes in addition to possible substantive outcomes of the cases brought, in placing an obligation on the state to do more, which would contribute to ameliorating the consequences and, thus, children's vulnerability. Providing children with access to justice is a responsibility of the state.

10.4.2 Definition of Access to Justice

From the individual's point of view, the term "access to justice" would normally refer to "the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law".[34] The UN Human Rights Council (HRC), in its report on access to justice for children, defined access to justice somewhat differently, as the "ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards".[35] The differences are the focus on "obtaining" a remedy as well as this definition's wider scope, including customary and religious justice mechanisms and alternative and restorative dispute resolution mechanisms. It also includes children as victims or witnesses, or coming into contact with the justice system for other reasons, such as regarding their care, custody or protection.[36]

My use of the term is closer to the definition first mentioned, though I find it useful to deal with children's access not just to courts and tribunals but also to an independent ombudsperson or administrative complaints mechanisms.[37] Such mechanisms may or may not be independent of the government, but they

34 Francesco Francioni, "The Rights of Access to Justice under Customary International Law," in *Access to Justice as a Human Right*, ed. Francesco Francioni (Oxford: Oxford University Press, 2007), 1–55, part I B.

35 UN Human Rights Council, *Access to Justice for Children, Report of the United Nations High Commissioner for Human Rights*. A/HRC/25/35, (December 16, 2013), para. 4.

36 A/HRC/25/35, para. 4.

37 Francioni, "The Right of Access to Justice," part I B is not opposed to using access to justice in this broader sense and mentions i.a. administrative agencies, if they are engaged in some form of administration of justice.

are still supposed to be impartial to the original decision while providing a low-threshold review of an administrative decision. For most people, not least children, it is more convenient to have an issue settled at a lower level by an administrative agency or an ombudsperson rather than having to take it to court. It is cheaper, less time-consuming and less overwhelming in terms of procedure and formalities. However, to some extent the same legal questions may arise with regard to children's access to these mechanisms as to the courts.

In human rights theory, there is a discussion of whether the right of access to justice is an individual right in itself or a procedural guarantee dependent on other substantive rights.[38] The HRC considers access to justice to be "a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights".[39] Francioni maintains that although in human rights treaties it is most often construed as a procedural right, in international practice the distinction is often blurred. He adds that this "happens especially when there is an unreasonable interference with the ability of the claimant to have access to courts, independently of the nature of the right for which judicial protection is sought".[40]

Denying children access to complaints mechanisms or courts may be viewed as an unreasonable interference in itself. In climate matters, however, access to justice for children is primarily important as a prerequisite for the protection of other rights. Thus, it is sufficient in this context to view access to justice as a procedural right.

10.4.3 Prevention and Strategic Litigation

The term "promotion" of rights in the HRC definition gives rise to another clarification, regarding the purpose of access to justice in the area of climate change. Litigation in climate matters may have the aim of preventing, rather than seeking redress for, environmental harm.[41] Thus, the rights violations need not yet have occurred but may be potential future violations. The actual case litigated may be about preventing harm, e.g., by seeking to have a discharge permit for polluting materials declared invalid. As prevention of harm is a core principle in

38 Francioni, "The Right of Access to Justice," part II C; Liefaard, "Access to Justice for Children," 195–227, 198–199.

39 A/HRC/25/35; Liefaard, "Access to Justice for Children," 195–227.

40 Francioni, "The Right of Access to Justice," part II C.

41 Christina Voigt, ed., *International Judicial Practice on the Environment: Question of Legitimacy*, *Studies on International Courts and Tribunals* (Cambridge University Press, 2019); CRC Committee, *Report from Day of General Discussion 2016*.

international environmental law,[42] the alleged future harm suffices as a basis for legal standing with regard to human rights violations if the harm was "reasonably foreseeable to the State party at the time of its acts or omissions".[43]

According to the Committee on the Rights of the Child, states have a due diligence obligation to "take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights, paying due regard to the precautionary principle".[44] For that purpose they should assess the environmental impacts of policies and projects,[45] with a special focus on consequences for children.

When used strategically, litigation may have the aim of providing effects outside of the specific case. It may also be a source of inspiration both for other national courts and for the international system.[46] This is particularly important with regard to climate change, where the point is harm prevention and that the harm occurs over the long term. If children are denied access to justice, they lose this opportunity to influence policy-making. One may possibly view this as discrimination on the grounds of age, and in any case there are policy arguments in their favour. Importantly, as pointed out by Nolan and Skelton, child-rights strategic litigators should ensure that their practice is consistent with the rights of the child to avoid risks of harm to children by the litigation itself.[47]

10.4.4 Legal Empowerment of Children

The focus of this chapter is not what constitutes the result of "obtaining" an effective remedy; it is rather the process, particularly children's place in the process through legal empowerment, meaning their ability to use the courts, ombudspersons or complaints mechanisms of their own accord in order to protect their own rights. In his article on children's access to justice, Liefaard refers to the HRC definition and zooms in on two core requirements: the legal empowerment of children and

42 Lesli Anne Duvic-Paoli, "Introduction," in *The Prevention Principle in International Environmental Law*, ed. Lesli-Anne Duvic-Paoli (Cambridge University Press, 2018), 1–12; Nicolas de Sadeleer, "The Principle of Prevention," in *Environmental Principles: From Political Slogans to Legal Rules,* 2nd ed., ed. Nicolas de Sadeleer (Oxford University Press, 2020).

43 UN Committee on the Rights of the Child, *Sacchi et al. v. Argentina*, CRC/C/88/D/104/2019, Decision by the Committee on the Rights of the Child. (October 8, 2021), para. 10.7.

44 CRC/C/GC/26, para. 69.

45 Ibid.

46 John H. Knox, "Constructing the Human Right to a Healthy Environment," *Annual Review of Law and Social Science*, vol. 16 (2020): 79–95, 85–86.

47 Aoife Nolan and Ann Skelton, "The Case for Child Rights-Consistent Strategic Litigation Practice," *Human Rights Law Review*, vol. 22 (2022): 1–20.

the availability of child-friendly or child-sensitive proceedings.[48] The latter will be mentioned below but not explored in any detail. Whereas Liefaard's contribution deals with children's access to justice in general, this chapter applies the general thinking about children's legal empowerment to climate matters in particular.

I find the term "legal empowerment" useful in this context because the issue is that of empowering children to use complaints mechanisms and courts, i.e., how to make children able to promote their own rights in climate matters through a system for making decisions that governments have to abide by. The UN High Commissioner for Human Rights has described legal empowerment of children as relating to the legal capacity of children and the role of parents or others in legally representing their child.[49]

In children's rights theory, Federle has emphasised power as a better concept for discussing rights than the theories of choice (will) or interest. In the theory of choice, capacity is a prerequisite for children having rights at all, and children are often seen as lacking capacity. The interest theory presupposes that someone else has the capacity to exercise the child's rights. In both cases, the focus on capacity serves to disempower the child and leave them to adults protecting their interests in a paternalistic way. Instead, we should recognise children as powerless and see rights as a way of giving them power and commanding respect.[50] Empowerment is used as a term to describe how rights flow downhill, from those with power to the powerless.[51] Provided children are given the opportunity in a society that truly respects them, most of them "can and will assert their rights if we are willing to listen and take them seriously".[52] For the youngest children, someone else must do it for them, but Federle sees this as a very different kind of intervention because it is not built on paternalistic considerations.[53]

The term "empowerment" indicates an approach based on power relations, and I find Federle's theory and the characterisation of children as powerless useful in a discussion of children's access to justice in climate matters. The Committee on the Rights of the Child in General Comment no. 26 repeatedly speaks about the need to empower children.[54]

48 Liefaard, "Access to Justice for Children," 195–227, 204.

49 A/HRC/25/35.

50 Katherine Hunt Federle, "Rights Flow Downhill," *The International Journal of Children's Rights*, vol. 2 (1994): 343–368, 365.

51 Federle, "Rights Flow Downhill," 343–368, 365; Katherine Hunt Federle, "Do Rights Still Flow Downhill?," *The International Journal of Children's Rights*, vol. 25 (2017): 273–284, 282–283.

52 Federle, "Rights Flow Downhill," 343–368, 367.

53 Federle, "Rights Flow Downhill," 343–368, 367.

54 CRC/C/GC/26, paras 26, 30, 33, 53, 66.

10.5 CHILDREN'S RIGHT TO ACCESS TO COURTS, OMBUDSPERSONS OR COMPLAINTS MECHANISMS

10.5.1 The Right to Access to Justice under the CRC

The CRC has no explicit provision giving children the right to access to justice for violations of Convention rights, formulated as the right to an effective remedy or similar, as opposed to e.g. the European Convention of Human Rights Art. 13, which provides that everyone "whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". However, under Art. 4 CRC, states "shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention". Arguably, without providing children with access to courts or similar to seek remedy for violations of their rights, a state does not undertake all measures as required by Art. 4.

Under the Vienna Convention on the Law of Treaties, Art. 31, a treaty shall be interpreted "in the light of its object and purpose". This is considered an obligation under customary international law and is thus binding on states without regard to whether the state in question has ratified the Vienna Convention.[55] When states ratify a human rights treaty, they undertake an obligation to implement those human rights domestically and presumably intend to do so. The purpose of the CRC is to make states respect and ensure children's rights as expressed in the Convention. It supports the interpretation of Art. 4 to cover access to justice.

The Committee on the Rights of the Child is of the view that "[f]or rights to have meaning, effective remedies must be available to redress violations."[56] The Committee further emphasises that states should pay particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives, including access to independent complaints procedures and to the courts.[57] General Comments issued by the Committee are soft law and not binding on states. However, as the Committee has been designated by the Convention to undertake the task of monitoring the implementation of the Convention in the States Parties, it is the most authoritative body in interpreting the CRC at the international level. The General Comments build on the broad

55 John Tobin, *The UN Convention on the Rights of the Child: A Commentary*, (Oxford Commentaries on International Law, 2019) in his commentary to the CRC takes the Vienna Convention as a starting point for the interpretation.

56 UN Committee on the Rights of the Child, *General Comment no. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5 (November 27, 2003), para. 24, under the heading "Justiciability of Rights".

57 CRC/GC/2003/5, para. 24; CRC/C/GC/26, paras. 82–87.

experience of the Committee in undertaking this task and should be given great weight insofar as their interpretations are not contrary to the wording or purpose of the Convention.[58]

The development and adoption of the third Optional Protocol to the CRC on a communications procedure may be seen as a recognition by states that the CRC requires states to establish an effective remedy, although the protocol is not binding on states that have not ratified.[59]

Children's rights theory supports the view that the Convention contains the right of the child to seek a remedy before a court of law or quasi-judicial mechanism for violations of the rights established by the CRC, based on the arguments just mentioned.[60] In the following I will presume that children have this right. The issues of legal standing and extraterritorial jurisdiction will be presented briefly, leading to a discussion of whether the right to seek a remedy implies a right in certain situations to act independently, without being represented by a guardian.

10.5.2 Legal Standing and Extraterritoriality

The requirement of legal standing or *locus standi* may pose a barrier to children bringing a case to court.[61] It may also be a barrier to the use of a complaints mechanism, although some of these have less strict requirements. In simple terms this means that a child has to demonstrate that they have a personal interest in or a real need for bringing the case.

One of the conditions for bringing cases to the Committee on the Rights of the Child under the third Optional Protocol on a communications procedure is that they have exhausted available domestic remedies. In the climate complaints

58 Tobin, *The UN Convention*, 110, points to the Committee's work as being "of particular importance" in the interpretation of Art. 4, and to General Comment no. 5 on general measures (and no. 19 on public budgeting) in particular.

59 Kirsten Kvalø, *Å ha rett eller å få rett. Gir norsk rett effektive rettsmidler ved krenkelse av FNs barnekonvensjon?* (UiO: Duo 2014), 17.

60 Kvalø, *Å ha rett eller få rett*, chapter 2, with a thorough discussion of the legal arguments; Laurene Graziani, "Access to Justice: A Fundamental Right for All Children," in *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead*, eds. Ton Liefaard and Julia Sloth-Nielsen (Leiden: Brill Nijhoff, 2016); Liefaard, "Access to Justice for Children"; Ton Liefaard and Jaap. E. Doek, ed., *Litigating the Rights of the Child, The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Dordrecht: Springer, 2015) discuss children's access to justice for their CRC rights in a wider sense, looking at children's rights in litigation in various jurisdictions and regional courts, without focusing on the role of children themselves.

61 Nolan and Skelton, "The Case for Child Rights-Consistent Strategic Litigation Practice," 1–20, 14.

from Sacchi et al. to the Committee, the issue of standing in domestic courts was raised against three of the five countries as a reason not to have exhausted domestic remedies. The complainants referred to the exception that the application of the remedies would be unreasonably prolonged or unlikely to bring effective relief; see Art. 7(e).[62] To Argentina, the children claimed that resolving the issue of their standing alone would take years of litigation. The Committee replied that directly or indirectly injured parties, the ombudsperson, civil society organisations, and national, provincial and municipal authorities could have standing to bring claims for environmental damage and that the children should at least have tried.[63] To Brazil, the children's argument was that they lack standing in court and that the "People's Legal Action" is limited to citizens over the age of 16. The Committee noted the argument that public civil suits would be filed at the discretion of the authorised entities in question and that the authors would not have direct standing as parties, but it found that this did not exempt the authors from attempting to engage authorised entities in a lawsuit.[64] To Turkey, the children claimed that none of them would be able to demonstrate legal standing in an administrative procedure because they were not born in the State Party and did not live or have assets there. A similarly restrictive requirement would apply before the Constitutional Court. The Committee replied that they did have possibilities for filing a suit before the domestic courts, including the Constitutional Court, as well as an administrative proceeding.[65]

From the Committee's replies, one may apparently conclude that even where children do not have standing, or appear not to have it, they should make an attempt at having the case filed. Moreover, if they do not have standing themselves, they should try through institutions, organisations or authorities that may have standing. Thus, the Committee seems to indicate that it may be possible for a child to exhaust domestic remedies even without being able to file a lawsuit in their own name, with or without a legal representative. It is questionable whether having to convince an authority to sue the government or a business corporation actually is a way for children to promote their own rights. This solution does not seem to recognise the children as legal agents and thus does not build their resilience by empowering them. It rather leaves them powerless. Moreover, in these cases, time is of the essence, and asking children to venture a lawsuit that may in

62 Optional Protocol on a Communications Procedure, Art. 7(e).

63 *Sacchi et al v. Argentina*, para. 10.18.

64 UN Committee on the Rights of the Child, *Sacchi et al v. Brazil*, CRC/C/88/D/105/2019, Decision by the Committee on the Rights of the Child (October 8, 2021), para. 10.18.

65 UN Committee on the Rights of the Child, *Sacchi et al v. Turkey*, CRC/C/88/D/108/2019, paras. 7.2 and 9.17. The issue was not raised with Germany and France.

some instances be expected to take years will add to their vulnerability to the consequences of climate change.

Extraterritorial jurisdiction for transboundary harm was the essential discussion in Sacchi et al. According to the Committee, jurisdiction may be established if there is a causal link between the acts or omissions of the state in question and the negative impact on the rights of children located outside its territory, provided that the state of origin exercises effective control over the sources of the emission.[66] Regarding all of these complaints, the Committee found that the states had extraterritorial jurisdiction. This is an important clarification, making it possible for children to bring cases against other states and thus increasing their resilience.

10.5.3 Do Children Have a Right to Bring a Case on Their Own?

The issue here is whether a child has the right under the CRC to bring a case to court or a complaints mechanism without being represented by a guardian, which is often seen as a question of legal capacity.

The CRC gives parents primary responsibility for the upbringing and development of the child (see Art. 18). That responsibility includes a right to make decisions for the child, although delimited by the assumption that parents have the child's best interests as their basic concern. Art. 5 also gives a certain priority to parents in that it obligates states to respect the "responsibilities, rights and duties of parents". However, this is linked to the child's exercise of the rights in the Convention and only with regard to providing direction and guidance. The provision does not necessarily give parents the final say. Moreover, the way they give this guidance should be consistent with the evolving capacities of the child, meaning that it will be different for a 2-year-old than for a 14-year-old. Naturally, it will also depend on the individual maturity of the child and the complexity of the issue in question.[67] As mentioned earlier, emphasising the child's evolving capacities is important in a child rights approach in order to empower them instead of seeing them primarily as vulnerable.

Another essential aspect of a child rights approach as opposed to a vulnerability approach is the right of the child to express their views and have them given due weight according to age and maturity under Art. 12. According to Art. 18, parents should consider the child's best interests before deciding anything regarding the

66 *Sacchi et al v. Argentina*, para. 10.7.

67 Gerison Lansdown, "The Scope and Limitations of the Concept of Evolving Capacities within the CRC," in *Parental Guidance, State Responsibility and Evolving Capacities*, eds. Claire Fenton-Glynn and Brian Sloan (Brill Nijhoff, 2021), 36–51, 43.

child, and in doing so, they should take the child's own views into account. The Committee in General Comments no. 12 and 14 states that a consideration of best interests cannot be made without regard to the child's view. To be able to give the child's view due weight, the parents must take into account the evolving capacities of the child.[68] The direction and guidance mentioned above should gradually change into reminders and advice and, later, to an exchange on an equal footing. As the child matures, it follows from Art. 12 that his or her views shall have increasing weight in the assessment of his or her best interests.[69] When understood in this way, the right to be heard becomes closer to a right to decide, but not quite. It is more like an encouragement to reach a consensus. If, instead, parents emphasise the child's vulnerability and need to be protected, they may easily place too little weight on the child's views.

To what extent children may claim self-determination under the CRC is unclear. There is no explicit provision giving the child such right. Arguably, some of the rights may be interpreted to give children some degree of autonomy, subject to their evolving capacities. This has been argued for civil and political rights such as the right to identity under Art. 8, private life under Art. 16, freedom of expression under Art. 13, and freedom of association under Art. 15.[70] Whether any of these could be interpreted to give children the right to decide for themselves to bring a case to court may not be entirely dismissed, at least for older children. In particular, the right to private life is generally considered to encompass some degree of self-determination. Admittedly, bringing a case to court or a complaints mechanism is a step further than deciding for oneself in other matters. But if a certain right to self-determination may be argued from the articles mentioned, the ability to independently bring a violation of that right before a complaints mechanism or court could be seen as a natural extension of that right. In conclusion, a right of children to have legal capacity in their domestic system should probably not be entirely excluded all the way up to the age of 18.[71] As mentioned above, the

68 UN Committee on the Rights of the Child, *General Comment no. 14 (2013) on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)*, CRC/C/GC/14, (May 29, 2013), para. 43; UN Committee on the Rights of the Child, *General Comment no. 12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12, (July 20, 2009), paras. 70–74, General Comment no. 14 refers to Art. 3(1) on best interests, but the same applies to the parents' assessment of best interests under Art. 18.

69 CRC/C/GC/14, para. 44, CRC/C/GC/12, para. 84.

70 For some of these in relation to gender identity, see Kirsten Sandberg "The Rights of LGBTI Children under the Convention of the Rights of the Child," *Nordic Journal of Human Rights*, vol. 33(4) (2015): 337–352.

71 Similarly, Liefaard, "Access to Justice for Children," at 4.2, 205.

possibility to challenge a violation of their rights would serve to empower children and increase their resilience, thus making them less vulnerable.

In the context of the third Optional Protocol under the CRC, the relationship between the child's own ability to act in domestic courts and the actions of the child's parent or other guardian is unclear. One might argue that where the child is barred from using domestic remedies because the guardian is not willing to consent, there is no domestic remedy available to the child. In case the child is allowed by the guardian to bring a case to court but otherwise is not supported by the guardian, the domestic remedy may be unlikely to bring effective relief. In both situations, the lack of support from the guardian in exhausting national remedies should not prevent children from bringing the case to the Committee. In Sacchi et al., the issue of parental consent and representation was not raised.

It would be hard to accept if children were prevented from bringing a case to the CRC Committee because their parents would not let them take it to national courts. That would underline and increase their vulnerability in case of a rights violation and be contrary to a child rights approach. It would leave them powerless.

10.5.4 Should Children Have Legal Capacity, and Why?

Generally speaking, being represented by their parents may be a good thing for children, be it in court or before a complaints mechanism. These are systems made for adults that, until they are made properly child-sensitive, do not take account of children's vulnerability due to their age and lesser degree of maturity. In the following, I will first deal with courts, as the court system has some features that may not be present to the same extent in relation to complaints mechanisms.

Legal Capacity in Relation to Courts

A court process may put the child in a vulnerable situation for various reasons. The child may feel awkward in the court setting, and appearing in court may be an emotional or psychological strain on the child. If in addition the litigation is about politically contested issues, as cases concerning climate change are likely to be, the child may encounter hostile reactions.[72] Thus, the child may need the support of their parents if the child is involved in a court process. This does not apply in the same way to complaints mechanisms, as they are normally less formal and attract less attention.

72 Nolan and Skelton, "The Case for Child Rights-Consistent Strategic Litigation Practice," 1–20, 18.

It may also well be that, for good reasons, parents consider it not to be in the child's best interests to enter into a court process at all. In addition to the arguments already mentioned, litigation is time-consuming and may interfere with the child's schooling. The legal costs may be high, and the parents may not consider it in the child's best interests to risk spending this amount of money, be it from the child's own means or those of the parents. Besides, parents may have their own legitimate interests in not having to represent the child, in addition to possible costs. They may not have the time to spend on litigation or may not be willing to put themselves in the position of speaking in court for a view that they do not share.

The child, however, may be of a different view and want to bring a case in spite of their parents' resistance. In the best-interests consideration that parents should make under Art. 18, the child's own views should have due weight under Art. 12, and more so with higher age and greater maturity. In many countries, parental consent is needed for a child to bring a case all the way up to the age of 18; in other words, they have a veto. Such a categorical rule leans on a perceived general vulnerability of children and youth without any consideration of children's evolving capacities under Art. 5 CRC. Neither is there any guarantee that the parents will have taken the child's own views duly into account.

In some instances, there may be a conflict of interest in a legal sense between children and parents. In that case the child may have the right to have a guardian ad litem appointed, typically in a situation where the child sues the parents, e.g., for compensation due to maltreatment. In climate cases the situation would usually not be so clear-cut. Parents may, as described, have a different view of what is in the best interests of the child or may simply disagree with the child on substance. It is hard in these cases to untangle the parents' own interests from their view of the child's best interests. As long as the parents' grounds seem legitimate, it is difficult to establish a conflict of interest in a legal sense, and the child may not have a guardian ad litem.

So how to solve these issues? If children have neither legal capacity nor the right to a guardian ad litem, they are left with being represented by their parents. It may imply that they are prevented from bringing a case, which is difficult to accept in an area where children are particularly vulnerable to the effects of adults' passivity or wrong decisions. Their vulnerability may be a legitimate reason for giving the parents a say in whether a case should be brought and for assuming that children need the support of their parents in the first place. However, strict rules on legal capacity with a high age limit is one example of children's assumed vulnerability being the only consideration underlying the rules. There should be scope for taking children's evolving capacities and right to participation into account, as there

would be with a child rights approach. If their parents are neither willing nor able to represent them, the child should at least have the right to a guardian ad litem. Yet it is questionable, at least for older children, whether this sufficiently upholds the respect for children's autonomy in an area like this. They probably should have legal capacity from a certain age or subject to an assessment of maturity.

Alternatively, as suggested by Federle, one should do away with the concept of legal capacity. Children would still need to be represented when they are not able to do so themselves, but the approach then would be different. Clark, rather than doing away with the concept of legal capacity, sees it as a flexible legal concept capable of facilitating the legal agency of children.[73] In her view, with the Optional Protocol, their status as children no more determines legal capacity. This should be possible also at the national level.

General Comment no. 26 does not use the term "legal capacity". However, the Committee underlines that providing access to justice includes removing barriers for children to initiate proceedings themselves.[74] This implies making arrangements to make children less dependent on their parents in this respect.

The need for a lawyer and the costs of bringing a case would still be barriers. However, General Comment no. 26 on children's rights and the environment states that children in environmental cases should have access to free legal and other appropriate assistance, including legal aid and effective legal representation.[75] In addition, states are asked to consider protecting children from adverse costs orders, with the intention "to limit the financial risk to children who bring cases in the public interest regarding environmental matters".[76] These measures would alleviate the challenges of legal assistance and costs.

Legal Capacity in Relation to Complaint Mechanisms

With regard to complaints mechanisms, the issues of legal capacity, representation, costs, legal assistance and child-unfriendliness do not pose the same problems as discussed above. Complaint mechanisms normally are not, or need not be, as strictly structured as the court system with its formal procedures. They may more easily be approached directly, even by a child, although efforts may be needed to make children aware that they exist and explain how they may be approached.

73 Sevda Clark, "Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability," *Nordic Journal of International Law*, vol. 84 (2015): 183–220, 217.

74 CRC/C/GC/26, para. 83.

75 CRC/C/GC/26, para. 86.

76 CRC/C/GC/26, para. 86.

Since there is not the same risk of harm to children in using such a mechanism as with courts, a child should have the right to act without a guardian. Furthermore, even if the procedures are not as strict as those of the courts, those that do exist have to be made child-friendly. As emphasised in General Comment no. 26, states should provide children with complaint mechanisms that are "child-friendly, gender-responsive and disability-inclusive".[77]

In Norway, as an example, there is no central complaint mechanism for children in particular. However, the Parliamentary Ombud, who receives complaints regarding administrative authorities in general, has started a process of introducing more child-friendly procedures. The initiative is based on a comment in the preparatory works for the new Ombud's Act stating that the Ombud should accommodate for receiving more complaints from children.[78] The child may act on their own without being represented by an adult. This is the case even where the child does not have the right to act on their own vis-à-vis the administrative body in question. Increasing the number of complaints implies making the Ombud known to children as someone they may complain to, accepting complaints from children even if they do not fulfil the ordinary formal requirements, shorter timeframes, and training on how to communicate with children.[79]

In many types of climate cases, the ordinary complaint mechanism is the County Governor, a state body keeping oversight of how acts are implemented in the municipalities. For child protection cases, the County Governors recently made a web-based portal for children's complaints, which is child-friendly in its appearance and language and easy to navigate.[80] In climate cases, however, under, e.g., the Act on Planning and Building, the Act on Pollution, etc., it is very difficult for children to make complaints. For one thing, the County Governor is not well known to children. Besides, the complainants have to follow procedural rules, including standards on producing evidence, etc., that are not easy to navigate, let alone fulfil. To make this mechanism more child-friendly, there is major work to be done.

On several occasions the CRC Committee has recommended that Norway establish an independent complaints mechanism for children,[81] but the government

77 CRC/C/GC/26, para. 83.

78 Doc. 21 (2020–2021) and Recommendation from the Parliament committee no. 409 (2020–2021).

79 Sivilombudet (2022), chapter 1. Klagesaker, Klager fra barn. On the homepage of the Parliamentary Ombud (www.sivilombudet.no) "Klagehjelp til barn og unge" (complaint assistance to children and young people) is easy to spot on the front page, with child-friendly information and good examples (www.sivilombudet.no/klagehjelp-til-barn/) (visited March 10, 2024).

80 Statsforvalteren, *Barn og unges rett til å klage på barnevernet*.

81 CRC/C/NOR/CO/5-6, para. 8, CRC/C/NOR/CO/4, para. 14.

has so far not been willing to do so.[82] In the meantime, the Parliamentary Ombud could be well placed to deal with complaints from children in climate cases. The public authorities that make decisions in such cases have obligations under the CRC, and part of the Ombud's mandate is to look into possible violations of human rights. Legal standing would not be a barrier. However, as the cases are complex, they might need legal assistance, and free legal aid could be desirable.

In order to increase their resilience, children need to have access to a low-threshold, child-friendly complaints mechanism. Preferably, they would then not have to face the heavier burden of bringing the case to court.

10.6 CONCLUDING REMARKS AND WAY FORWARD

Arguably, legal empowerment of children is particularly important in areas where their future is at stake, as in relation to climate change, where children are especially vulnerable. Their lack of voting rights implies that they do not have the same possibility as adults to influence political decisions in the direction of mitigating climate change and thus reducing their vulnerability. Children need structures for influencing decisions in this area. These structures may be in the political arena, such as in children's local councils or parliaments, provided they are listened to and their views taken into account. Political participation in this way is important in order to compensate, to some extent, for their lack of voting rights.

However, there is no contradiction between political and legal means of obtaining influence; rather, they complement each other. In the climate emergency, children need the possibility to make use of all means available, including legal avenues, to hold governments accountable to children's rights and the promises governments have made in international agreements. For that reason, they should have the ability to challenge decisions in the legal system. Environmental NGOs in many countries have standing to sue, and joining them may be seen as an easy way to participate in a lawsuit. However, NGOs have their own agendas, and it would no longer be the child's case. It might be different if it was a child-led organisation, but typically there would be (young) adults in the organisation as well. Thus, referring children to NGOs or other institutions or bodies means we do not recognise the child's own legal agency. In the face of their vulnerability in this urgent situation, this is not a response empowering children and increasing their resilience. It is only when their own legal agency is recognised with regard to claiming their own rights that they will be acknowledged as true rights holders.

82 Doc. 8:56 S (2021–2022) and Recommendation from the Parliament committee no. 179 (2021–2022).

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