The Human Rights Claim in Climate Justice: An Argument for Reintroducing the Principle of Anti-Discrimination and Strengthening the Anti-Domination Principle When Children Go to Court

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Abstract: Human rights, identity constructions, and climate justice come together in the Paris Agreement.[1] This Agreement gave rise to an unprecedented level of treaty-based individual claims. These claims have been filed in national, regional, and international forums across the world. This result was the intention of the drafters of the Paris Agreement: to generate a bottom-up force to motivate States to take action to address climate change.[2]

One unfortunate aspects of the Paris Agreement, however, is that it is the only human rights treaty without a formal protection from discrimination.[3] The article begins with an original retracing of the history of the climate justice regime. By following this evolution, it becomes clear that human rights and environmental justice were originally joined together, and it was in the moment of separation the anti-discrimination protection was lost, a loss that carried over into the climate justice regime. For the climate justice movement to not include a formal discrimination protection in the Paris agreement is to forget its history by leaving out the very group of people that provided the link between rights and the environment in the first place. This link between rights and the environment come out of Black peoples' struggle in a postcolonial fight for liberty against apartheid and colonial domination,

[1] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16–1104; C.N.10.2021. TREATIES-XXVII.7.d of 20 January 2021. [hereinafter *Paris Agreement*].

[2] Ad Hoc Working Grp. on the Durban Platform for Enhanced Action, Rep. of the Ad Hoc Working Grp. on the Durban Platform for Enhanced Action on the Twelfth Part of its Second Session, Held in Paris from 29 November to 5 December 2015, ¶ 29:2(b)., U.N. Doc. FCCC/ADP/2015/6 (2016). [hereinafter: Ad Hoc Working Group on the Durban Platform for Enhanced Action].

[3] *See*, *e.g.*, Article 2 in the Universal Declaration on Human Rights, Dec. 10, 1948, G.A. Res. 217 A [hereinafter UDHR]; article 2 of the UN Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 1577 U.N.T.S. 3 [hereinafter CRC]; article 2 in the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI) [hereinafter ICCPR]; article 2 of the International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI) [hereinafter ICESCR]; and the conventions focusing on the protection against discrimination explicitly: International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 (XX), 660 U.N.T.S. 195 [hereinafter CERD]; U.N. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

and a civil rights struggle in the USA. On a positive note, this article sees that children have unprecedented individual access to the arena of international human rights law through the Paris Agreement. This is also what makes the Paris Agreement a treaty of mixed messages: it grants rights to children while at the same time it eliminates the discrimination protection of the people that provided the link between rights and the environment in the first place. This internal tension of the treaty needs to be further explored if we are to understand its full potential and its severe weakness.

To better understand how identity is argued in human rights climate change litigation this article relies on the data base of the Columbia Climate School Sabin Center for Climate Change for its textual analysis on human rights climate change cases.[4] The material reviewed here is

[4] The non–U.S. Human Rights Climate Change Litigation in the data base the summer of 2021. Out of 52 cases documented, 26 cases have been selected based on the following criteria: that they provided an English language, either original or translated, version of the petitions. The cases are: VZW Klimaatzaak v. Kingdom of Belgium et al., Brussels Court of First Instance Judgment, Civil Division (June 17, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment.pdf [https://perma.cc/KZM7-5NAX]; Neubauer et al. v. Germany, Germany Federal Constitutional Court, Complaint, (June 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf [https://perma.cc/5523-BMEP]; Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal.pdf [https://perma.cc/6WP9-PJT9]; State Obligations in Rel. to the Env't in the Context of the Prot. and Guarantee of the Rts. to Life and to Pers. Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Rel. to Articles 1(1) and 2 of the Am. Convention on Hum. Rts., Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Nov. 15, 2017) http://climatecasechart.com/climate-change-litigation/non-us-case/request-advisory-opinion-inter-american-court-human-rights-concerning-interpretation-article-11-41-51-american-convention-human-rights/ [https://perma.cc/RW9U-F64Y]; Ali v. Federation of Pakistan, Petition, Supreme Court of Pakistan, (Apr. 1, 2016), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-I-of-2016_petition-1.pdf [https://perma.cc/9QZG-W9WS]; Armando Ferrão Carvalho et al. v. The Eur. Parliament et al., Decision, 565/19 P, European General Court, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf [https://perma.cc/64DX-XYP5]; Duarte Agostinho et al. v. Portugal et al., Complaint, 39371/20, European Court of Human Rights, (Sept. 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf [https://perma.cc/WRJ9-MR3F]; ENVironnement JEUnesse v. Canada, Judgment, 500-06-000955-183, Court of Appeal of Quebec, (Dec. 13, 2020); Family Farmers and Greenpeace Germany v. Germany, Judgment, VG 10 K 412.18, Admin. Ct. of Berlin (Oct. 25, 2018), http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/?cn-reloaded=1 [https://perma.cc/8CWN-6SDL]; "Hot Spots in Areas Bordering the Kaxarari Indigenous Land in Lábrea State of Amazonas in August, 2020.," n.d., 8.; Institute of Amazonian Studies v. Brazil, Complaint, (Oct. 8, 2020), http://climatecasechart.com/climate-change-litigation/non-us-case/institute-of-amazonian-studies-v-brazil/ [https://perma.cc/QE5E-ZAZA]; La Rose v. Her Majesty the

selected from fifty petitions.[5] Out of the fifty petitions, twenty cases were selected based on two criteria: they were composed in, or translated into,

Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT]; Lho'imggin et al. v. Her Majesty the Queen, Complaint, Canadian Federal Court of Appeal, (Feb. 10, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [https://perma.cc/KPL8-FUF5]; Maria Khan et al. v. Federation of Pakistan et al., Petition, Lahore High Court, (Feb. 14, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190214_No.-8960-of-2019_application-1.pdf [https://perma.cc/3AV8-TRTL]; Mex M. v. Austria, Complaint, European Court of Human Rights, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP]; Notre Affaire à Tous et al. v. France, Judgment, 1904967, 1904968, 1904972, 1904976/4-1, Paris Admin. Ct. (Oct. 14, 2021), http://climatecasechart.com/climate-change-litigation/non-us-case/notre-affaire-a-tous-and-others-v-france/ [https://perma.cc/G4ZM-D4DF]; Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (Apr. 23, 2013), https://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf [https://perma.cc/M3UH-5SEC]; Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Inter-Am. Comm'n H.R. (Dec. 7, 2005), http://climatecasechart.com/climate-change-litigation/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/ [https://perma.cc/P7MZ-X5T3] (petition denied Nov. 16, 2006); Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti, (Feb. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf [https://perma.cc/8NLA-Y6PL]; Plan B. Earth et al., v. Secretary of State for Transp., Amended Statement of Facts and Grounds, Claim No. CO/3149/2018, EWHC (Admin) (Nov. 1, 2018), http://climatecasechart.com/climate-change-litigation/non-us-case/plan-b-earth-v-secretary-of-state-for-transport/ [https://perma.cc/PYC3-QLL9]; Plan B Earth et al. v. Secretary of State for Bus., Energy, and Indus. Strategy, Court of Appeal, Civil Division, Decision, Claim No. CO/16/2018, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190120_Claim-No.-CO162018_decision.pdf [https://perma.cc/XU34-ELTS]; Rights of Indigenous People in Addressing Climate-Forced Displacement, Complaint, United Nations, USA 16/2020, (Jan. 15, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_USA-162020_complaint.pdf [https://perma.cc/RT8J-P4E6]; Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9].

[5] The requirement that the petitions be available in English through the said database unfortunately excludes the Urgenda Case from this set of data collection. Urgenda Foundation v. the State of the Netherlands, Judgment, No. 19/00135, HR Supreme Court of the Netherlands (Dec. 20, 2019), http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/ [https://perma.cc/B99E-8WN6].

English and they were filed by non-state actors.[6] The result was surprising; half of the petitions identified being a child as a legal ground for their claim.[7]

I. INTRODUCTION

Identity constructions have been central in both the environmental justice movement and the greening of the human rights movement.[8] Non-State actors are of importance to the Paris Agreement and the regime of climate justice.[9] The identities in the Paris Agreement are neither easily transferrable to, nor borrowed from, other forms of regulatory regimes. This is because they are constructed out of the vulnerability framework, rather than the equality framework of freedom from discrimination and domination. The consequences of relying on the vulnerability framework over freedoms and equality is currently underexamined, despite generating a surge of individual identity-based petitions under an international human rights treaty that we have not seen before. What this study will demonstrate is that children, as an identity, have benefitted from the vulnerability approach, while the same persons, when identifying as being of color or belonging to an indigenous

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[6] VZW Klimaatzaak v. Kingdom of Belgium & Others (children); Neubauer et al. v. Germany; (children); Plan B Earth and Others v. Prime Minister (migrants §§ 43, 71, race and minority § 65, gender § 65); Ali v. Federation of Pakistan (child); Armando Ferrão Carvalho and Others v. The European Parliament and the Council (children); Duarte Agostino and Others v. Portugal and 32 Other States (children); ENvironnement JEUnesse v. Canada (young people under 35); La Rose v. Her Majesty the Queen (children and youth); Lho'imggin et al. v. Her Majesty the Queen (indigenous people); Maria Khan et al. v. Federation of Pakistan et al. (women); Mex M. v. Austria (disability); Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada (indigenous); Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti (children); Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy (child); Rights of Indigenous People in Addressing Climate-Forced Displacement (indigenous people); Sacchi et al. v. Argentina et al. (children).

[7] VZW Klimaatzaak v. Kingdom of Belgium & Others (children); Neubauer et al. v. Germany; (children); Ali v. Federation of Pakistan (child); Armando Ferrão Carvalho and Others v. The European Parliament and the Council (children); Duarte Agostino and Others v. Portugal and 32 Other States (children); ENvironnement JEUnesse v. Canada (young people under 35); La Rose v. Her Majesty the Queen (children and youth); Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti (children); Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy (child); Sacchi et al. v. Argentina et al. (children).

[8] *See*, *e.g.*, U.N. Secretary-General, Rep. of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev.1 (June 5–16, 1972) [hereinafter *Stockholm Declaration*]; G.A. Res. 2106(XX), (Jan. 4, 1969); G.A. Res. 34/180, (Sept. 3, 1981); G.A. Res. 44/25, (Sept. 2, 1990). See also, David Schlosberg & Lisette B. Collins, From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice, 5 WIRES CLIMATE 359, 360 (2014).

[9] Ad Hoc Working Group on the Durban Platform for Enhanced Action, *supra* note 2.

community, will have a harder time fitting within the human rights provision of the Paris Agreement.

By not recognizing discrimination and domination as significant barriers for people to take adaptation actions when climate change is harming them, the Paris Agreement and the world are losing out on one of the most effective adaptation strategies against the climate crisis. Discrimination and domination explain why people of color, minority groups, and indigenous people are often either pushed into areas affected by climate change because these are the only places they can afford to live, or they are unable to leave areas affected by climate change because they cannot afford to move to another place, or they are unwillingly forced to become migrants.[10] For indigenous communities, their identities may also be tied up with the land itself, after internal colonial processes narrowly confined them.[11] By not recognizing protection from discrimination and external dominations as foundational principles in the Paris Agreement, the most effective adaptation strategy is left outside the scope of the agreement. This weakens the legal argument for individuals affected by climate change based on discrimination which drastically affects the strength of the "going-to-court strategy" of the climate justice movement. This article, therefore, argues for the importance of including a discrimination protection in the climate justice legal struggle, as well as a clear condemnation of external domination of people under the Paris Agreement's adaptation strategy.[12] This article resists the binary between freedom and vulnerability that the Paris Agreement forces, shifting instead to freedom, equality, AND vulnerability; all of which are integral parts of a global community coming together to address the climate crisis.

II. BACKGROUND

The struggle for substantial government action to fight climate change has entered courtrooms in unprecedented ways through claims based on international human rights. The international instrument that makes it possible for individuals to bring climate justice claims to national, regional, and international forums is Paragraph 11 of the Paris

[10] See the work by Elisa Fornalé, *Floating rights in times of environmental changes, in* MIGRATIONS AND FUNDAMENTAL RIGHTS: THE WAY FORWARD (eds. G. Cataldi, M. Corleto & M. Pace), Editoriale Scientifica Napoli (2019) 183–200.

[11] For a step-by-step dissemination of the ways in which landscape construct identity see, Paul van den Akker, *Madre Milpa, Modified Maise and More, in* HERITAGE AND RIGHTS OF INDIGENOUS PEOPLES: PATRIMONIO Y DECERECHOS DE LOS PUEBLOS INDÍGENAS (eds., Manuel May Castillo & Amy Strecker) Leiden University Press 137 (2017).

[12] There is a discussion to whether there is an international law obligation to consult with indigenous people before making a decision that affects their communities; this obligation is established in non-legally binding agreement. *See*, *e.g.*, G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007); *see also* DWIGHT NEWMAN, INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 267–285 (Andrew Byrnes et al. eds., 2013) (discussing norms of consultation with indigenous peoples).

Agreement.[13] The paragraph mentions indigenous peoples, local communities, migrants, children, persons with disabilities, people in vulnerable situations, gender equality, empowerment, and intergenerational equity. What the paragraph does not mention is ethnic minorities, race, or ethnicity.

It is through this paragraph that human rights, individual identity, and climate justice create a new opening of the arena of public international law to individual persons. This is part of a climate justice movement strategy to increase the mitigation and adaptation pressure on the state parties to the treaty.[14] The relationship between the mitigation and the adaptation strategy is not clear cut, but rather interdependent, as for example addressed in article 6(8)(a) in the Paris Agreement. It can be argued that addressing discrimination should fall both within the mitigation and the adaptation strategies of the treaty, since discrimination affects the social ability to survive climate change. [15]

What also is to be noted in the paragraph is that it is vulnerability and not freedom that brings these identities together. This new form of human rights in the Paris Agreement brought both loss and gains. The loss being the exclusion of the individual right to freedom, and the obligation of the State to protect said freedom. The omission of individual freedom as the universal starting point changes the understanding of the equality principle as the baseline for all discrimination claims, since the individual freedom is what creates the equality principle as far as UN human right treaties go. To replace individual universal freedom with individual universal vulnerability based, not on the abstract notion of freedom but on the concrete vulnerability of each person's biological body changes the equality principle to its core. The catalogue of identities in the paragraph becomes crucial in its function of creating a presumption of vulnerability wider than the individual biological body. This is why the omission of the concepts of minority, race, and ethnicity from the paragraph is of significance and deserves to be examined.

The Paris Agreements brought not only loss but also gains. The gain being the establishment of children as petitioners. This is possible thanks to being explicitly mentioned in the paragraph, allowing the use of both

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[13] Rep. of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016); Paris Agreement to the United Nations Framework Convention on Climate Change ¶ 11, Dec. 12, 2015, T.I.A.S. No. 16–1104 [hereinafter Paris Agreement].

[14] Draft Decision on Workstream 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the ADP Contact Group (Nov. 10, 2015). [hereinafter: Durban Workstream 2].

[15] The connection between mitigation in Section B and adaptation in Section G is not completely separable, rather they are interconnected and interdependent. *See generally* BENOIT MAYER & ALEXANDER ZAHAR, *Introduction, in* DEBATING CLIMATE LAW, 1 (2021) for more discussion on this connection.

a child identity and the intergenerational principles to access the Courts as identified vulnerable categories.[16] The way in which the Paris Agreement constructs this subject is so well fitting, similar to the child identity from the UN Convention on the Rights of the Child (CRC).[17] The child in the CRC is the only UN human rights identity constructed outside of the anti-discrimination and equality frame, and it is its first article establishing age, not discrimination, as its subject foundation. However, the CRC as a human rights treaty has a discrimination protection in article 2 even if the child as such is not constructed as a response to discrimination, differently from women in CEDAW and minorities in CERD who are constructed out of a protection against discrimination framework.

A. The Theoretical Framework

As briefly mentioned above, the Paris Agreement does not rest on liberty as its normative foundation but is instead founded on the vulnerability framework. This section will present a short overview of the theoretical foundation of anti-discrimination and anti-domination frameworks, and it will address the two major schools of vulnerability theory as represented by Judith Butler[18] and Martha Fineman.[19]

Quentin Skinner has described freedom as the individual foundation for individual rights with two approaches, one based on the individual freedom, and another on free society. He connects the first to Thomas Hobbes and the latter to a neo-Roman understanding of the free state.[20] It is the neo-Roman approach that Philip Pettit develops into the neo-Republican theory of non-domination.[21] These two approaches, freedom from discrimination and freedom from domination, are normally the bedrock of human rights treaties.[22] Even though the main focus of this

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[16] In a way, Children in Climate Justice litigation is the real-life version of what Helen Stalford, Kathryn Hollingsworth, and Stephen Gilmore have created as a subversive writing practice by re-writing already decided cases but this time with a child rights perspective. *See generally* HELEN STALFORD, KATHRYN HOLLINGSWORTH & STEPHEN GILMORE, REWRITING CHILDREN'S RIGHTS JUDGEMENTS—FROM ACADEMIC VISION TO NEW PRACTICE (2017). See also, Catherine E. Smith & Susannah W. Pollovogt, Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases, 48 U.C.D. L. Rev. 655 (2014), in developing a theory expanding the equal protection doctrine to child-status; and Catherine E. Smith, Smith, J., Concurring, in What Obergefell v. Hodges Should Have Said: The Nation's Top Legal Experts Rewrite America's Same-Sex Marriage Decision (ed., Jack M. Balkin) (Yale University Press, 2020).

[17] CRC, *supra* note 3.

[18] *See* JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? 51 (2016).

[19] *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (arguing that vulnerability is constant, universal, and inherent in the human condition, and proposing a "post-identity" approach to vulnerability).

[20] QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 8–16 (1998).

[21] *See generally* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012) (discussing freedom as non-domination).

[22] *See, for example.*, art. 2, UDHR; arts. 1–2, IESCR; art. 1 CERD; art. 1 CEDAW.

article is on the discrimination protection,[23] there is a significant overlap with non-domination theory in that they both give rice to an abstract principle of equality.[24] One element that distinguishes the individual freedom approach from the non-domination approach is the relationship to interferences with freedom as "matter in motions."[25] A motion is the right to act until that action interferes with someone else's freedom.[26] In his neo-republican approach, Pettit places his focus on the implosion of a constituting distinction between abstract and concrete freedom from domination.[27] For Pettit, it is not the absence of a motion of domination that constitutes non-domination, but rather the absence of even an abstract possibility of domination, even when not acted upon.[28] Eric Ghosh, in his critical reading of Skinner and Pettit, opens up a relational understanding of freedom.[29] This relationship to freedom has crossover characteristics with some forms of vulnerability theories, asking not only for the action but also for a possibility of harm without intent to harm. There is still a significant difference from the equal enjoyment of freedoms, as vulnerability theory does not rely on an equality principle but on a universal principle of biological vulnerability. For this reason, all three foundations of human rights will be addressed briefly in this article:

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[23] *See generally* DEBORAH HELLMAN & SOPHIE MOREAU, PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW (2013) (showing how equality constitutes the objective element establishing the boundaries for interference with individual freedoms).

[24] *See generally* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM (1998).

[25] *Skinner* at 6. See also for a general critique of this position the classical work by C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press (2011, 1962).

[26] *Skinner* at 6.

[27] *See generally* PHILIP PETTIT, JUST FREEDOM: A MORAL COMPASS FOR A COMPLEX WORLD (2014) (borrowing from Henrik Ibsen's *A Doll's House* when describing the difference between being free and not being concretely dominated, by, in this case, a doting husband); *see also* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012) (for an illuminating in-depth analysis on the theoretical understanding of domination as a positive liberty in form of protection from arbitrary power rather than the now hegemonic liberal view of non-interference); ERIC GHOSH, BEYOND THE REPUBLICAN REVEAL: NON-DOMINATION, POSITIVE LIBERTY AND SORTITION (2020) (Ghosh traces the non-domination principles through the theoretical claims of Philip Pettit (how the vulnerability to power itself is a form of domination, even if not acted upon), Quentin Skinner (that positive-liberty connects to the ability of full political participation), Frank Michelman (how positive-liberty justifies an active Supreme Court in safeguarding not only negative-liberty but also a positive idea of liberty to fulfil the American ethos of ability to prosper)).

[28] *See generally* GHOSH, *supra* note 27, comparing the new republican revived understanding of freedom, not being based in non-interference as anti-discrimination law might most generally be placed with but rather understood in the frame on freedom from abstract and concrete forms of domination).

[29] BUTLER, *supra* note 18, at 119; Fineman, *supra* note 19, at 1. Two forms of vulnerability theories are formulated by Judith Butler from the perspective of the subjectivity of power, and Martha Fineman from a perspective of the subjectivity of the individual, to be addressed below in this article. BUTLER, *supra* note 18, at 119; Fineman, *supra* note 19, at 1.

individual freedom as anti-discrimination protection; non-domination as forms of the State not only being responsible for its negative obligations but also for its positive obligations of non-domination; and vulnerability theory as addressed by Judith Butler,[30] Martha Fineman,[31] and commented on by Katie Oliviero.[32]

The Paris Agreement's articulation of the global climate crisis as a human rights issue has been celebrated by climate justice activists and human rights activists alike.[33] There are great similarities between climate justice and vulnerability-based human rights because both have concrete universality at their base. Climate justice reacts to climate change's universal scope of harm, and the biological body to the universal vulnerability to harm.[34]

Katie Oliviero argues that the appeal of the vulnerability approach rests on the fact that it is accessible, it is easily explained, and the sense of vulnerability helps mobilize political claims against the State.[35] The argument for a non-liberty approach to State responsibilities through vulnerability has been developed by both Judith Butler and Martha Fineman. Both authors place the universal, or the "we" as Butler calls it, in the biological body and its vulnerability.[36] Fineman is clear in what she is presenting is a theoretical alternative to the liberal doctrine of equality.[37] For Fineman, vulnerability theory is the response to a condition of post-identity.[38] Both authors are aspiring to establish a claim on the State through a theory of vulnerability, not only in the foundational liberal approach of freedom and equality, but through the vulnerability argument to mobilize to further action of sustaining biological life.[39] However, for Fineman, it is a question of replacing identity with categories of vulnerability, while for Butler, it is a question of social and political expression of power and preference of whose vulnerability is to be protected and whose vulnerability is to be exploited.[40] Returning to Katie Oliviero, it might well be that vulnerability

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[30] *See* BUTLER, *supra* note 18, at 51.

[31] *See generally* Fineman, *supra* note 19.

[32] KATIE OLIVIERO, VULNERABILITY POLITICS: THE USES AND ABUSES OF PRECARITY IN POLITICAL DEBATE 265–284 (2018).

[33] For an overview of the case law in the wake of the Paris Agreement see E.P. Ermakova, *Lawsuits Against Governments and Private Companies of European Countries over Climate Protection under Paris Agreement 2015 (UK, Netherlands, Germany, and France*), 604–25 (2020).

[34] *See* Sam Adelman, *Human Rights in the Paris Agreement: Too Little, Too Late?*, 7 TEL 17 (2018).

[35] *See* OLIVIERO, *supra* note 32, at 37–38.

[36] BUTLER, *supra* note 18, at 51; *see* Fineman, *supra* note 19 at 11.

[37] Fineman, *supra* note 19, at 2.

[38] *Id.* at 17.

[39] *Id.* at 4.

[40] *See*, *e.g.*, Butler's discussion on the Western war in the Middle East. BUTLER, *supra* note 18, at 119.

is universal, but its share is not evenly divided, and it is not covered and disseminated as a vulnerability equally.[41] Oliviero's critique of universal vulnerability is similar to the critique Eric Ghosh makes of a universal theory of non-domination. His concern is that such a theory cannot take account of the various degrees of abstract domination different people face and that the degree of domination is in itself not shared equally among people.[42]

A way forward from the absence of protection from discrimination is proposed by Sheila Foster.[43] Her suggestion can also be applied to the non-domination principle. She acknowledges the limitations of formal anti-discrimination legislation when it comes to proving intent and causality in climate justice cases. She suggests that one way of addressing the weaknesses of both anti-discrimination legislation and vulnerability theory is to include discrimination against specific groups as a factor when making general vulnerability assessments.[44] It should, for the sake of clarity, be established that a vulnerability assessment in and of itself does not necessarily mean the abandonment of a liberal understanding of equality or a need to lead to an exclusion of an anti-discrimination protection. For example, the European Court of Human Rights relies on a vulnerability doctrine without undoing the protection against discrimination of the European Convention on Human Rights.[45] However, it is indisputable that the Paris Agreement does not have a provision against discrimination and that it has not identified race, ethnicity, or minority status as any of the vulnerable groups in its human rights paragraph.

Despite this serious shortcoming in a human rights treaty, should we not diminish the value of a global climate justice agreement in and of itself. It is no small feat for the world to gather around this singular international treaty, one that deals with the challenge not only of redressing climate injustice as it pertains to one person's lifetime, but also as it pertains to the condition of humankind as a whole.[46] As the first international, legally-binding treaty to establish a formal link between environmental regulations and individual rights, the Paris Agreement has

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[41] OLIVIERO, *supra* note 32, at 265.

[42] GHOSH, *supra* note 27, at 232.

[43] Sheila R. Foster, *Vulnerability, Equality, and Environmental Justice: The Potential and Limits of Law, in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 136 (Ryan Holifield et al., eds. 2017).

[44] Sheila R. Foster, *Vulnerability, Equality, and Environmental Justice: The Potential and Limits of Law, in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 136, 146 (Ryan Holifield et al., eds. 2017).

[45] For an extensive examination of the European Court of Human Rights (ECtHR) case law on the vulnerability doctrine, *see generally* CORINA HERI, RESPONSIVE HUMAN RIGHTS: VULNERABILITY, ILL-TREATMENT AND THE ECTHR (2021).

[46] As of June 21, 2022, there were 195 signatories and 193 Parties to the treaty, including the United States after its re-entry into the treaty on January 20, 2021. See *Supra* note 1.

opened up new possibilities for non-state actors to access the global arena through litigation.[47]

B. The Subject of the Paris Agreement

There are various terminologies available when addressing the non-State actor within the international literature. Roland Portmann makes the incisive point that the "concept" of the international person is open to interpretation, and that the "conception" of an international person consists of what a designated international treaty says it is, with the exceptions of international war crimes and basic human rights.[48] Kate Parlett, like Portmann, addresses international law's open approach to non-State actors through the critique of the subject-object binary within the field. The subject of international law is commonly treated as an individual person dependent on the functions and capacities that have originally been granted to this individual as an instrument of the State. Parlett points to the international subject who, unlike the State, remains subjugated to the acts of States and who cannot be part of the shaping and making of international law.[49] Anne Peters has defined this part of international law, where the individual holds a position of legal subjecthood, as an area of "international public law."[50] To Peters, individual rights within the international legal system have the dual function of both upholding the individual's rights and maintaining the specific legal regime itself.[51] For Portmann, Parlett, and Peters, the open nature of the concept of the subject as a person in international law permits ambiguity, and thus fails to permit a one-to-one correspondence between "subject" and "identity."

How non-State actors align, or fail to align, with the individual in international law is further complicated by identity constructions. Within law, there is a distinction between identities as they are constructed by law and how an individual person might identify,[52] and this yet might still differ from how other persons assign identities upon others.[53] The discrepancies or spaces in-between law, self, and other can be damaging

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[47] The Paris Agreement might be credited as being the first legally binding environmental treaty to also be based on human rights, but it is one among 500 environmental treaties in place today, according to Karen N. Scott, *Managing Fragmentation Through Governance: International Environmental Law in a Globalised World, in* INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 207, 208 (Andrew Byrnes et al., eds. 2013). *See also* Tadanori Inomata, Joint Inspection Unit, *Management Review of Environmental Governance within the United Nations System*, JIU/REP/2008/3 (2008).

[48] ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 21 (2013).

[49] KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW (2011).

[50] ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (Jonathan Huston trans., 2018).

[51] *Id.* at 471.

[52] For further discussion of this distinction, *see generally* the seminal work by W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (Brent Hayes Edwards ed., 2007).

[53] For the meeting point of the personal even among friends, *see generally* Marie-Amélie George, *Framing Trans Rights*, 114 NW. UNIV. L. REV. 555 (2019).

and hurtful; although as scholars have demonstrated, these spaces can also be opportunities for advancing specific agendas of liberation and resistance.[54] For example, Jessica Clarke advocates for a strategic use of the space between legal, group, and personal non-binary identities.[55] Other scholars, such as Angela Harris, have tried to bridge gaps between legal identity and personal identity through an anti-essentialist critique and radical fragmentation.[56] Kimberlé Crenshaw has pointed to the limitation of law itself to manage the complexities of identities.[57] When it comes to international law, this debate has often been led by post-colonial researchers like Ratna Kapur who critique a superimposed legal and colonial identity framework upon the identities of persons. [58] Elizabeth Faulkner and Conrad Nyamutata, following the postcolonial school, have developed a similar critique in child rights.[59] Notably, John Jost, operating in the field of Social Psychology, has developed a theory of system justification to explain the interdependency between individual experiences and beliefs within larger social and political structures in preserving the status quo, an interdependency often expressed in terms of identity.[60] Kevin McDonald suggests that the focus should shift from questions of representation to what he calls "embodied intersubjectivity," the embodied sensation of belongingness to a cause together with others.[61]

Overall, the foundation of any identity construction is that it is held by the individual while still founded in the commonality of the group, and it thus constitutes either a factual or experienced recognition of other individuals within said group. The agency to recognize and to reject one's

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[54] *For examples*, the double consciousness of W.E.B. Dubois, THE SOULS OF BLACK FOLKS, Oxford University Press (1903, 2007); the hybridity of Homi Bhabha, THE LOCATION OF CULTURE, Routledge (1994, 2004).

[55] *See generally* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019) (advocating for the legal recognition of non-binary gender).

[56] *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (recognizing the theme of gender essentialism in feminist literature and arguing that it silences Black women).

[57] *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (discussing the multidimensionality of Black women's experiences and the law's inability to adequately protect Black women).

[58] *See generally* Ratna Kapur, *On Violence, Revolution and the Self,* 24 POSTCOLONIAL STUD. 251 (2021) (examining the relationship between epistemic violence and power).

[59] *See generally* Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT'L L. 1 (2008) (suggesting that it is possible for international law not to be colonial); Elizabeth A. Faulkner & Conrad Nyamutata, *The Decolonisation of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child*, 28 INT'L J. OF CHILD'S RIGHTS 66 (2020) (discussing "the power dynamics and colonial legacy upon which views of children are formed").

[60] *See generally* JOHN T. JOST, A THEORY OF SYSTEM JUSTIFICATION (2020) (discussing persecuted individuals defending the social systems that oppress them).

[61] KEVIN MCDONALD, GLOBAL MOVEMENTS: ACTION AND CULTURE 32 (2006).

own belonging to a specific identity is what has been central to the feminist and civil rights movements of the later part of the twentieth century and has its roots in the political expression of being recognized as a full citizen.[62]

The first identity-based movement to break away from the requirement of individual agency, to not require the need to both recognize and be recognized, is the Child Rights Movement coming out of the adoption of the CRC, where identification has been constituted in a hyper-formalized manner: membership is solely based on being under the age of 18, and thus is in no need of either internally-experienced belongingness or external recognition based on factual or sensory experiences.

C. Climate Justice: Environmental Regulations Meet Human Rights

The formalized connection between human rights and climate change in the Paris Agreement is the result of decades of both environmental and human rights struggles to merge; or, as I argue, to reunite after their separation in Rio.[63]

Climate change is defined by the UN as: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[64] The effects of climate change can be both incomprehensible in their magnitude and, at the same time, utterly quantifiable, perhaps most simply described by two numbers: 2 and 1.5. Will Steffen captures the incomprehensible magnitude of climate change when he remarks, "climate change cuts to the core of contemporary society—energy systems, lifestyles, institutions and governance, forms of economic organization, and basic values."[65] Yet the consequences of climate change are clearly articulated by the *Paris Temperature Limit*, cited in Article 2 of the Paris Agreement: "Holding the increase in the global average temperature to well below 2° C above pre-industrial levels and pursuing efforts to limit the temperature increase to

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[62] *See generally* MARIA GRAHN-FARLEY, CHILD RIGHTS, LEGAL THEORY AND SOCIAL ADVOCACY, Cambridge University Press (forthcoming 2022) for more discussion of agency and identity.

[63] *See generally* Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L. Q. 809 (2018) (detailing the history of the environmental justice movement); Hum. Rts. Counc., Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) (discussing the relationship between human rights and the environment) [hereinafter Knox Report]; Hum. Rts. Counc., Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Note by the United Nations High Commissioner for Human Rights, A/HRC/10/24 (Nov. 17, 2008) (discussing approaches to human rights promotion and protection).

[64] U.N. Framework Convention on Climate Change art. 1 ¶ 2, May 9, 1992, 1771 U.N.T.S. 107.

[65] Will Steffen, *A Truly Complex and Diabolical Policy Problem*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY at 1, 2 (John S. Dryzek et al., eds., 2011).

1.5° of pre-industrial levels (...) would significantly reduce the risks and impacts of climate change."[66] Although global in its scale, climate change's impact is both person- and place-specific.[67]

Triggered by climate change, climate justice is a rights-based approach to advocating for a range of individual rights to proactive governmental responses to environmental destruction. The climate justice literature describes both a collective and an individual strand of the broader movement. Paul Routledge aptly describes the intersection of these two strands, as together they signify "both the direct participation of those most affected by economic and climate injustices, and collective struggle."[68] The vulnerability framework connects to the individual strand of climate justice and is based on the premise that climate change in its universality gives rise to distinct, individual, justiciable claims that can be argued through rights; each individual is vulnerable in its particular way, but to be vulnerable itself is shared universally as part of the human condition of biological embodiment. These rights are justiciable because of the individual's vulnerability to the harm caused by climate change. It is on the basis of an individual's right to seek justice for harm, expressed as a particular vulnerability, that the relationship between the individual and the international is constructed, and it is, as already addressed, formalized in Paragraph 11 of the Paris Agreement when it connects the climate with human rights and vulnerable categories of persons.

D. The Origin of the Environmental Movement

This section will provide an overview of how today's climate regulatory regime gained its "justice," and how the idea of environmental justice carried over into the "justice" of the contemporary climate discourse.

The climate justice movement is today in large part its own unique movement, yet as its individual and collective strands suggest, it has roots in the wider environmental justice movement that in turn evolved out of the environmental movement. Indeed, the climate justice movement today can still be found to share many of the values and viewpoints of the wider environmental justice movement, as described by Diane Sicotte and Robert Brulle:

> Climate injustice may be a type of environmental injustice so all-encompassing that only the most privileged remain untouched by fossil fuel extraction and transport, heat waves, droughts, storms or flooding

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[66] Paris Agreement, *supra* note 1, at art. 2.

[67] Jeff Popke et al., *A Social Justice Framing of Climate Change Discourse and Policy: Adaptation, Resilience and Vulnerability in a Jamaican Agricultural Landscape*, 73 GEOFORUM 70, 71 (2016).

[68] Paul Routledge, *Translocal Climate Justice Solidarities*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 385 (John S. Dryzek et al., eds., 2011).

> disasters. The climate justice movement thus has potential as the basis of a broader identity through which to mobilize for extensive, systemic change. However, realizing this potential will mean the creation of a truly global movement, in which activists all over the world work closely and effectively together.[69]

Eileen Gauna argues that the climate justice movement still has a lot to learn from the environmental justice movement when it comes to inclusion and its ability to see and make alliances between different issues across racial, cultural, and national lines.[70]

One important element in both the climate justice movement and the environmental justice movement is their codification into law. Climate Law is a relatively new subject, as Benoit Mayer and Alexander Zahar locate Climate Law's emerging as a legal discipline between 2005 and 2010.[71] Yet, in many ways, the world looked very different in the era of the environmental movement's heyday. In addition to the world looking different in the 1960s as compared to today, the world also looked and still looks very different depending on location.[72] For the sake of expediency, the mainstream narrative of the environmental movement with the example of the US can be located in the years between the 1960s and 1980s, although some might even stretch this period to the 1990s to end with the Rio Declaration.[73] At least in the US, there is a distinct time period of about two if not three decades during which the field of environmental law flourished, in the form of laws that were adopted and institutionalized.[74] The agenda of the US environmental movement was institutionalized on December of 1970 in the formation of the Environmental Protection Agency (EPA).[75] This time period is

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[69] Diane M. Sicotte & Robert J. Brulle, *Social Movements for Environmental Justice through the Lens of Social Movement Theory*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 25–36 (Ryan Holifield et al., eds., 2017).

[70] *See generally* Eileen Gauna, *El Dia De Los Muertos: The Death and Rebirth of the Environmental Movement*, 38 ENVIRONMENTAL LAW 457 (2008) (discussing what climate change activists can draw from the environmental justice community).

[71] BENOIT MAYER & ALEXANDER ZAHAR, DEBATING CLIMATE LAW 1–2 (2021).

[72] *See generally* Christopher Rootes & Eugene Nulman, *The Implications of Environmental Movements*, *in* THE OXFORD HANDBOOK OF SOCIAL MOVEMENTS 729 (Donatella Della Porta & Mario Diani eds., 2015) (explaining that in the Global North and especially North-West, the environmental movement has enjoyed quite broad support from the ruling elite and corporations, while in the Global South the environmental movement often is seen as a threat to corporate interests).

[73] *Id.* at 732. Rootes and Nulman emphasize that the U.K. experience differs from that of the U.S.: the Environmental Movement was still influential in the U.K. by 2008, as it was instrumental in the U.K. adoption of the U.K. Climate Change Act. *See also* Purdy, *supra* note 63, at 812–813.

[74] Rootes & Nulman, *supra* note 72, at 729 (arguing that there was no environmental movement pre-dating the adoption of the EPA and that it is a constant dilemma to determine what comes first: the social movement or the popular opinion consolidating into a social movement).

[75] Robert Chan & Patricia L. Cahn, *The Environmental Movement Since 1970*, 11 EPA J. 31, 31–35 (1985).

characterized by broad political consensus reaching across the aisle, supported by Democrats and Republicans alike.[76] The environmental agenda enjoyed broad public support which corresponded with both the black letter law and its institutionalization.[77] Even though a general interest in environmental preservation can be traced back to the conservationist movement of the Theodore Roosevelt era, it is in the 1960s that the modern environmental movement in the U.S. can be located.[78]

The concept of justice within the environmental movement emerged in the 1960s, and its concerns expanded from a focus on regulations to include a normative, rights-based expression, which thus became the environmental justice movement. The environmental justice movement has a normative agenda, yet, to a large extent, it is still anchored in local and place-based conditions.[79] The movement takes on a "distributive, procedural, and corrective justice" approach while also focusing on the material aspects of power by including "resource redistribution, access and participation to political and administrative decision making" as its agenda.[80]

The basis of the environmental justice movement as a response to local, particularized effects wrought by environmental damage gradually led to the cooperation between actors in social movements at the local level. This cooperation between environmentally-concerned persons and justice-concerned persons in the civil rights movement is how the individual agency of members of subordinated groups, particularly urban Black people became central to the environmental movement, and key to its development into a justice-driven movement.[81] Most notably, the way the environmental movement gained its justice was through the fight of Black communities in the Civil Rights Movement.[82] Racial equality is intrinsically linked to the transition from an environmental movement to

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[76] Purdy, *supra* note 63, at 812–813; Chan & Cahn, *supra* note 75.

[77] *See generally* Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85 (2001) (for a discussion of the institutionalization of the U.S. environmental movement).

[78] Sicotte & Brulle, *supra* note 69, at 25–26; *see generally* Jeff Todd, *Trade Treaties, Citizen Submissions, and Environmental Justice*, 44 ECOLOGY L.Q. 89 (2017) (for a discussion of the history of the U.S. enviornmental justice movement, the citizen submissions process, and a holistic approach to evironmental justice).

[79] Chan & Cahn, *supra* note 75, at 35.

[80] Todd*, supra* note 78, at 95.

[81] *See generally* Dorceta Taylor, *The Environmental Justice Movement*, 18 EPA J. 23 (1992) (detailing rising racial and ethnic minority involvement in an environmental justice movement founded on principles of fairness and justice).

[82] *See generally* John H. Adams, *The Mainstream Environmental Movement*, 18 EPA J. 25 (1992) (arguing that we must diversify the staffs of environmental organizations to include more people of color).

an environmental justice movement.[83] Not only is there a Black freedom and equality foundation to the "justice" of the environmental justice movement, there is also a gender dimension based on the same principles of freedom and equality. One point made by Greta Gaard is her nuanced critique of what she describes as a blind eye to the role that feminism played in the Civil Rights Movement, and she also draws parallels between the Civil Rights Movement and the environmental justice movement's often-neglected recognition of the important role women and the feminist struggle played in both movements.[84]

It is at the local level that the environmental movement also comes to encounter a rights-based discourse. The beginning of the relationship between environment and rights in the US is traditionally located in the struggle against the PCB landfill in Warren County, North Carolina, in 1982.[85] The merger between the environmental movement and the civil rights movement is generally located in this moment, as it was the predominately Black community in Warren County that was most impacted by the PCB landfill.[86] Although this narrative is countered by several authors pointing to both earlier and later occasions of similar dynamics between environmental and civil rights struggles, there is wide agreement on the fact that the environmental and racial justice struggles are historically interconnected. [87]

What took place in the US was unique in its particularity, based on the historical and social context of slavery and segregation, which involved individuals in regional struggles that, by their very inseparability, concerned environmental and civil rights issues at once.[88] The legacy of environmental racism remains a serious concern within the larger environmental justice movement to this day.[89] However, similar if not

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[83] *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001) (examining the rise of the environmental justice movement and environmental racism).

[84] *See generally* Greta Gaard, *Feminism and Environmental Justice*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 74 (Ryan Holifield et al., eds., 2017) (examining the role of feminism in the environmental justice movement).

[85] Office of Legacy Management, *Environmental Justice History*, U.S. DEPT. OF ENERGY, https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history [https://perma.cc/WV9Z-THUN]. [hereinafter: Environmental Justice History]

[86] David Schlosberg & Lisette B. Collins, *From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice*, 5 WIREs CLIMATE CHANGE 359, 360 (2014).

[87] *Id.* at 360. Schlosberg and Collins argue that the connection between the environment and minority grassroots activism has a far longer history then *Warren County* and goes back to the urban redefining of "environment" to include the place where people live, and no longer purely focusing on the wilderness.

[88] *See generally* UNITED CHURCH OF CHRIST: COMMISSION FOR RACIAL JUSTICE, TOXIC WASTE AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITY WITH HAZARDOUS WASTE SITES (1987) [https://perma.cc/TD6V-9RL9] (reporting comprehensively on the presence of hazardous waste in racial and ethnic communities).

[89] Paul Mohai & Robin Saha, *Racial Inequality in the Distribution of Hazardous Waste: A National-Level Reassessment*, 54 SOC. PROBS. 343, 334–370 (2007).

identical agendas were developed in other parts of the world by enactments of environmental regulations and standards with their own rights-based claims in national legislation during this time.[90] Notably, by the 1990s, the environment had become a clear left-right political issue in the USA; gone were the large majorities of the 1960s in support of increased environmental regulations.[91] The idea of passing common environmental regulations was no longer seen as feasible; neither was science alone able to bridge political conflicts enough to create the consensus needed for legislation to become an effective instrument in the battle against climate change.[92]

Out of this history of contestation, alternative environmental strategies have emerged as a consequence of longstanding political gridlock. One strategy has been the appeal to religion, drawing on the way in which the civil rights movement had its strong anchor within the Black church.[93] Another strategy is the appeal of a more culturally sensitive understanding that might be better in communicating the science behind climate change to the public, what Sheila Jasanoff calls a "cosmopolitan knowledge."[94] A third strategy, one that pursues a line of reasoning similar to that discussed by Jasanoff, has been articulated by Albert Lin as the use of myths in environmental law. Lin argues that myths serve important functions: various myths can be used to explain complex scientific relationships that might otherwise be hard to grasp without the narrative structure these forms otherwise provide.[95] Alex Soros has forwarded one more strategy: the push to create public engagement through promoting "environmental heroes."[96] It is in this light—the search for strategies that can bypass the stumbling block of bipartisan legislation and right-left politicization of the environment—that we can understand the turn to individual stakeholder litigation. However, there might be a renewed push to mobilize a wider environmental consensus and to leave the partisan right-left identities behind, at least according to authors like David Uhlmann; and judging

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[90] *See* Knox Report, *supra* note 54, § II ¶ 8.

[91] Rootes & Nulman, *supra* note 72, at 736. The political deliberation route was, after the election of George W. Bush as president, not realistic when they tried to undermine the Clean Air Act.

[92] *See generally* Christopher H. Schroeder, *Global Warming and the Problem of Policy Innovation: Lessons from the Early Environmental Movement*, 39 ENV'T L. 285 (2009) (arguing that poor conditions for policy innovation slow down progress).

[93] Chika Okafor, *Returning to Eden: Toward a Faith-Based Framing of the Environmental Movement*, 26 VILL. ENV'T L. J. 215, 217 (2015).

[94] Sheila Jasanoff, *Cosmopolitan Knowledge: Climate Science and Global Civic Epistemology*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 129, 131 (John S. Dryzek, et al., eds., 2011).

[95] Albert C Lin, *Myths of Environmental Law*, 1 UTAH L. REV. 45, 92 (2015).

[96] Alex Soros, *The Real Heroes of the Environmental Movement*, 25 SUR-INT'L J. ON HUM. RTS. 119, 1247 (2017).

from the global response to the Paris Agreement in courts across the world, there might be some truth to this statement.[97]

E. The International Evolution: Principles of Liberty and Intergenerational Responsibilities

This section questions the widely-agreed-upon understanding that climate justice and human rights developed as separate international agendas, evolved from separate points of origin. The common narrative is that since the inception of the UN, the environmental agenda and human rights agenda co-evolved along two parallel yet separate tracks within the UN system.[98] The story continues, the Paris Agreement for the first time merged the climate justice together with human rights.[99]

As already mentioned, the international environmental justice regime that later evolved into the climate justice regime has its starting point in Stockholm 1972 with the adoption of the Stockholm Declaration.[100] However, Omer Aloni has revived an extensive record of environmental regulations and agendas previously advocated for by the League of Nations.[101] He finds that there was international activity taking place regarding the conservationist movement and the specific regulations of species such as birds and whales, but without succeeding in establishing an international common position on the environment of the kind that the Stockholm Declaration does.[102] The path towards the Paris Agreement began in Stockholm during the first "environmental" conference hosted by the United Nations.[103] The conference adopted a non-legally-binding document, officially titled "The Declaration of the United Nations Conference on the Human Environment," which came to be called the "Stockholm Declaration."[104]

The connection of the environment to fundamental rights—although not called human rights but rather "freedoms" in the declaration—is expressly stated in the first section of the proclamation, where the environment is linked to the basic enjoyment of fundamental freedoms. "Human rights," as a term, is explicitly referenced in the same

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[97] David M. Uhlmann, *Back to the Future: Creating a Bipartisan Environmental Movement for the 21st Century*, 10 ENV'T L. REP. 50 (2020).

[98] *See, e.g.*, John H. Knox, *Preliminary Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Human Rights Council Preliminary Report 22/3, ¶ 10, UN Doc. A/HRC/22/43 (Dec. 24, 2012); Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L 31 (2015); Susana Borras, *New Transitions from Human Rights to the Environment the Rights of Nature*, 5 TEL. 113 (2016).

[99] *Id.* at ¶¶ 58–62.

[100] U.N. Secretary-General, Rep. of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev.1 (June 5–16, 1972)

[101] OMER ALONI, THE LEAGUE OF NATIONS AND THE PROTECTION OF THE ENVIRONMENT 34 (2021).

[102] *Id.* at 80.

[103] *Stockholm Declaration*, *supra* note 8.

[104] *Id.*

declaration in Principal 16, this time as a limit upon actions that can be taken to protect the environment. The principle addresses demographic policies to be taken for the protection of the environment and how the limit on acceptable actions is set by human rights. In other words, the Stockholm Declaration is not mute on human rights. It opens by establishing the link between fundamental freedoms and the environment, but it also recognizes that there is a possibility of conflicting interests between the environmental agenda and the human rights agenda—when there is such a conflict, human rights take precedence. The Declaration makes a clear distinction between fundamental rights based on the inherent right of each person to freedom and equality, as established in Principle 1, and human rights as a regulatory regime, as addressed in Principle 16. This distinction is today no longer maintained but is important to keep in mind for the understanding of the central role the discrimination protection holds in the evolution of environmental and climate justice.

The first principle makes visible the closeness between the environment and liberty. It does so by connecting traditional liberal freedoms directly with anti-discrimination and non-domination. The principle in the Stockholm Declaration begins by establishing freedom from discrimination: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[105] The same principle continues by giving expression to the rejection of external domination in connecting the need to eliminate racial discrimination and colonialism as a condition for freedom from domination: "In this respect, policies promoting or perpetuating *apartheid*, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."[106] This connection was formed one decade in advance of the merging of civil rights and environmental rights through the Warren County struggle in the USA.[107] Another theme that has remained foundational to climate justice also present in the Stockholm Declaration is the temporal dimension, as the *intergenerational principle*. This will later help develop a focus on the link between children and the climate justice struggle.

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[105] *Id.* at 4, Principle 1.

[106] *Id.*

[107] Environmental Justice History, *supra* note 85.

1. Human Rights and the Environment are Delinked in Rio and Participation Is Introduced

The principle of fundamental freedoms in Principal 1 and the direct use of the terminology of human rights in Principal 16 demonstrates a link between human rights and the environment from the inception of international environmental justice in Stockholm. It is also clear that is it the Rio Declaration that delinks human rights from the environment. The trajectory of anti-discrimination that had spurred the idea of environmental justice on both the international level with the Stockholm Declaration and on the national level in the USA in Warren County were not maintained and not carried forward into the environmental declaration to follow Stockholm. The Rio Declaration of 1992 is another non-legally binding agreement between states.[108] In comparison with the Stockholm Declaration twenty years prior, the tone of the Rio Declaration is less confrontational and more conciliatory towards structural inequalities and domination at both international and national levels. Absent is the connection between the environment and fundamental freedoms, and the equality framework based in freedom from discrimination is taken out and replaced by empowerment through participation. The anti-discrimination language grounded in the idea of every person's inherent right to freedom has been replaced by the language of "participation," which can be seen throughout the Rio Declaration. It is through the introduction of participation that children are brought into the environmental regime as active subjects. The idea of participation and empowerment is catalogued in Principle 20 for women, who are to be seen as having a "vital role in environmental management," while Principle 21 establishes that "creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and a better future for all."[109]

The anti-domination principle that together with the anti-discrimination principle constituted the bedrock of the Stockholm Declaration is also abandoned in Rio. The anti-domination principle is being replaced by incentivizing knowledge exchange. Principle 22 establishes "[i]ndigenous people … have a vital role in environment management and development because of their knowledge and traditional practices."[110] The Rio Declaration abandons the anti-domination principle in Principal 1 of the Stockholm Declaration, which reads, "oppression and foreign domination stand condemned and must be eliminated."[111] This is replaced by Principal 23 in Rio, which states that "the environment and natural resources of people under oppression,

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[108] *See generally* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

[109] *Id.* at 4, Principle 21.

[110] *Id.* at 4, Principle 22.

[111] *Stockholm Declaration*, *supra* note 8, at Principle 1.

domination and occupation shall be protected."[112] Rio pivoted from an anti-domination principle to a guardianship principle.

It is not that individual human rights as understood today as also including inherent fundamental freedoms were absent from within the environmental agenda from its inception in Stockholm. Rather, they were taken out of the environmental agenda in the Rio Declaration. The liberal form of freedom in anti-discrimination and minority protection did not carry over from Stockholm into Rio. The republican (with a lower case "r") values of freedom from domination in the initial principle in the Stockholm Declaration calling for the elimination of oppression and foreign domination is moved down to Principle 23 in the Rio Declaration, now with a focus on the environment rather than the people within said environment: "The environment and natural resources of people under oppression, domination and occupation shall be ***protected***."[113] This shift to protection should be compared against the assertion that occupation and domination shall be ***eliminated,*** as the Stockholm Declaration clearly declared. Additionally, the very words "human rights" as mentioned in the Stockholm Declaration both in the first paragraph of the preamble that "man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights," and in Principal 16 as a limitation on environmental actions, also fell out of the Rio Declaration.

2. Diversity Takes Center Stage in Johannesburg

In 2002, it was time for South Africa to host the adoption of the Johannesburg Declaration, formally titled the Johannesburg Declaration on Sustainable Development.[114] The Johannesburg summit follows the trajectory of the Rio Declaration, away from a foundation of inherent individual freedoms and freedom from domination by others. Instead of these liberal and republican values, there is a focus on "rich diversity"—not as an inherent right, but rather as an expression of "collective strength."[115] Johannesburg not only moved away from the idea of anti-discrimination and anti-domination of the Stockholm Declaration, but also away from the protection of exploitation of resources against capital interests. Instead, Johannesburg assumes that it claims that free and flowing capital will help the environment. Human dignity is connected to the "opening of markets, ensuring capacity building," in Section 18 of the Johannesburg Declaration.[116] Similar to the Rio Declaration, in the

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[112] *Rio Declaration*, *supra* note 108, at Principle 23.

[113] *Id.* (emphasis added).

[114] World Summit on Sustainable Development (WSSD), "Johannesburg Declaration on Sustaniable Development," Declaration, Adopted at the 17th Plenary Meeting (Johannesburg Declaration).

[115] *Id.* ¶ 16.

[116] *Id.* ¶ 18.

Johannesburg Declaration, women are to be empowered, rather than the discrimination against them simply being eliminated,[117] and one sees a reaffirmation of "the vital role of indigenous people in sustainable development," instead of a declaration for the elimination of their oppression and freedom from domination.[118] Women and indigenous people's distinctiveness is to be seen as a contribution of diversity and perspectives, no longer as socially constructed categories with roots in oppression, discrimination, and domination. Women and indigenous people have, by this stage in the international climate justice regime, become *a priori* identities to enrich the environmental movement's struggle, and not socially constructed expressions of discrimination to be fought; the critique of ethnic or racial discrimination remains absent.

3. Children and Climate Are Directly Linked in Johannesburg

The intergenerational principle from Stockholm, via Rio, is carried forward into the Johannesburg Declaration.[119] What is entirely new in the Johannesburg Declaration is the prominent role that children, as a named category of identity, are assigned in the preamble: "children of the world spoke to us in a simple yet clear voice that the future belongs to them."[120] In turn, a collective responsibility is stated to children:

> As part of our response to these children, who represent our collective future, all of us, coming from every corner of the world, informed by different life experiences, are united and moved by a deeply felt sense that we urgently need to create a new and brighter world of hope.[121]

One way to interpret the role of children in the Johannesburg Declaration is the role of the pure, undistorted voice of truth, which is more in line with the "Greta Thunberg effect" of speaking truth to power. With her courage, she has become the hero to many that Soros called for in his strategy to circumvent political gridlock.[122]

Yet there is another way of interpreting the emphasis on children in the preamble of the Johannesburg Declaration, which is that the evolution of the pragmatist approach, where peoples' self-interests are in their children's futures, is persuasive.[123] These two interpretations—the

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[117] *Id.* ¶ 20.

[118] Johannesburg Declaration, *supra* note 114¶ 25.

[119] For a substantial overview of intergenerational law and instruments *see* MARIE-CLAIRE CORDONIER SEGGER, MARCEL SZABÓ & ALEXANDRA R. HARRINGTON, INTERGENERATIONAL JUSTICE IN SUSTAINABLE DEVELOPMENT TREATY IMPLEMENTATION (2021).

[120] Johannesburg Declaration, *supra* note 114, ¶ 3.

[121] *Id.* ¶ 4.

[122] *See* Soros, *supra* note 96.

[123] Richard Howarth et al., *Intergenerational Justice*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 338, 339–353 (2011).

voice of truth and the pragmatist approach—are not mutually exclusive, but instead co-exist. In the context of the Paris Agreement and the petitioners in the climate justice movement, it seems each interpretation supports and benefits from the other, and both approaches fit neatly in a regime creating a further distance to the principles of freedom and equality, as well as anti-domination. The child identity does not need the liberal principles of freedom and equality for its construction as it is a construction out of age and not discrimination protection.

F. The New Beginning of an Environmental Human Rights Regimes: The Road Towards Paris

This section of the article will examine the development of the Paris Agreement from the drafting process to its formal decoupling of human rights and the principles of freedom and equality, as well as non-domination principles. It maps the place allocated to what I will later refer to as the *identities* supporting the filing of petitions based on environmental rights and human rights today.

The road towards Paris begins in Bangkok 2012. There are only four themes treated in the draft texts that were connected to any of the subjects and identities included in what was to become Paragraph 11 of the Preamble to the Paris Agreement. These themes are: "human rights," "indigenous people," "gender," and, "women."[124] An important aspect of the drafting process is the weight given to what is called the "Non-Party stakeholder engagement."[125] Within the Preamble, it is noted that when it comes to pressuring parties to more ambitious adaptation efforts, "the unique, nationally determined characteristics, stakeholders are important to be taken into account."[126] There is a deliberate effort in developing a mechanism for "[o]pportunities for Parties and civil society to bring forward adaptation activities with the potential for scaling-up and replication to increase the resilience of *vulnerable people*, communities and ecosystems."[127]

1. Non-State Actors and Identity Themes

One category of non-party stakeholders in the first draft that emerged from Bangkok 2012 are indigenous people. The role of indigenous people in both climate change mitigation and adaptation is a recurrent theme throughout the drafting process, which is first expressed as a matter of "[s]upporting indigenous knowledge and practices in adaptation and mitigation."[128]

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[124] *Paris Agreement*, *supra* note 1, at Preamble.

[125] Durban Workstream 2, *supra* note 14, at 2–12.

[126] Ad Hoc Working Group on the Durban Platform for Enhanced Action, *supra* note 2.

[127] *Id.* (emphasis added).

[128] *Id.* at ¶ E (17) & D.

Kerri Woods envisions that within the Paris Agreement is the seed of a new form of regime, which she calls an "environmental human rights regime."[129] Judging from the petitions filed in the area, this has so far mostly proved correct. A clearly formed "rights language" is presented by the two workstreams and contours of what became Paragraph 11 of the Paris Agreement. "Human rights" returns to the language of the environmental agenda, over forty years post-Stockholm, but with a new meaning and a twist.[130] Whereas the Stockholm Declaration presumes the potential for a conflict between the environmental justice agenda and human rights agenda, the Paris Agreement sees the agendas as united. In turn, identity is aligned with rights-based language in the draft. Notably, indigenous people are still the most referenced group in the draft of those that will finally end up in Paragraph 11, appearing now in a shared textual space with questions of gender coming second, closely followed by the subject of "empowering women" third. Worth noting is that the phrase "vulnerable people" also appears frequently in the text, while references to "disabilities," "children," and "migrants" are limited in what will become Paragraph 11. The term "vulnerable people" is later found in petitions themselves to take on their own formal category, and while vulnerability is not a specific category of identity in general human rights, this is one example of how the Paris Agreement has created its own rights-based identities. By the time the final draft has been presented to the participants for the Paris negotiations, human rights will have found their place in the Paris Agreement and created a new form of identity category— "the vulnerable."[131]

G. Children Are Taking the Lead

To begin the analysis of the 20 petitions examined in greater depth below, this section will give a brief overview of the identity claims made by the petitioners themselves.[132] Overall, the subject constructions by the

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[129] Kerri Woods, *Environmental Human Rights*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 149, 149–159 (Ryan Holifield et al. eds., 2018).

[130] Ad Hoc Working Group on the Durban Platform for Enhanced Action, *supra* note 2, at ¶ E (17) & D.

[131]For a developed history of the role of stakeholders in the drafting of the Paris Agreement, *see* Ronnie D. Lipschultz & Corina McKendry, *Social Movements and Global Civil Society*, *in* THE OXFORD HANDBOOK OF CLIMATE CHANGE AND SOCIETY 369–383 (John S. Dryzek, Richard B. Norgaad & David Schlosberg eds., 2011).

[132] VZW Klimaatzaak v. Kingdom of Belgium et al., Brussels Court of First Instance Judgment, Civil Division, (June 17, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment.pdf [https://perma.cc/KZM7-5NAX] (children); Neubauer et al. v. Germany, Germany Federal Constitutional Court, Complaint, (June 2, 2020) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf [https://perma.cc/5523-BMEP] (children); Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal.pdf [https://perma.cc/6WP9-PJT9] (migrants ¶¶ 43, 71, race and minority ¶ 65, gender ¶ 65); Ali v. Federation of Pakistan., Petition, Supreme Court

petitioners revealed one identity behind climate justice that stood out from the others: the child. Out of the 20 petitions selected that relied on a defined identity for making a claim against the State, seven presented climate justice claims that were purely and solely identified with children,[133] while an additional three petitions had children and youth

of Pakistan, (Apr. 1, 2016), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-___-I-of-2016_petition-1.pdf [https://perma.cc/9QZG-W9WS] (child); Armando Ferrão Carvalho et al. v. The Eur. Parliament et al., Decision, 565/19 P, European General Court, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf [https://perma.cc/64DX-XYP5] (children); Duarte Agostinho et al. v. Portugal et al., Complaint, 39371/20, European Court of Human Rights, (Sept. 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf [https://perma.cc/WRJ9-MR3F] (children); ENvironnement JEUnesse v. Canada, Judgment, 500-06-000955-183, Court of Appeal of Quebec, (Dec. 13, 2020) (young people under 35); La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT] (children and youth); Lho'imggin et al. v. Her Majesty the Queen, Complaint, Canadian Federal Court of Appeal, (Feb. 10, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [https://perma.cc/KPL8-FUF5] (indigenous people); Maria Khan et al. v. Federation of Pakistan et al., Petition, Lahore High Court, (Feb. 14, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190214_No.-8960-of-2019_application-1.pdf [https://perma.cc/3AV8-TRTL] (women); Mex M. v. Austria, Complaint, European Court of Human Rights, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP] (disability); Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (Apr. 23, 2013), https://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf [https://perma.cc/M3UH-5SEC] (indigenous); Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti, (Feb. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf [https://perma.cc/8NLA-Y6PL] (children); Plan B Earth et al. v. Secretary of State for Bus., Energy, and Indus. Strategy, Court of Appeal, Civil Division, Decision, Claim No. CO/16/2018, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190120_Claim-No.-CO162018_decision.pdf [https://perma.cc/XU34-ELTS] (child); Rights of Indigenous People in Addressing Climate-Forced Displacement, Complaint, United Nations, USA 16/2020, (Jan. 15, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_USA-162020_complaint.pdf [https://perma.cc/RT8J-P4E6] (indigenous people); Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9] (children).

[133] *See generally VZW Klimaatzaak* (children); *Neubauer et al.* (children); *Ali* (child); *Armando Ferrão Carvalho et al.* (children); *Duarte Agostinho et al.* (children); *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti* (children); *Sacchi et al.* (children).

petitioners included among the larger group of petitioners.[134] In other words, the presence of children and youth in the petitions is substantial.

There was only one petition made by petitioners who identified themselves as indigenous peoples. This particular result would have been slightly larger if I had not used the Paris Agreement as a qualifier for petition selection; several indigenous petitions were made before the Paris Agreement was adopted and put in effect, and one of the petitions was made in 2020, though it was against the USA during the period of time at which the country had withdrawn from the Agreement.[135]

Women were another group of vulnerable categories that could be categorized in different ways. Paragraph 11 of the preamble addresses women as a group in the context of "gender equality" and "empowerment of women." Only one petition could fall within "gender equality,"[136] and none fell within "empowerment of women." One petition to take note of in this context is the one delivered by an association calling itself the "Senior Women for Climate Protection."[137] However, even in this instance, the petitioners clearly stated that they intended their claim to fall under the "vulnerable" group category. In addition, this petition did not reference the Paris Agreement, most likely because it was filed in Switzerland, a country that had not yet ratified the treaty by the time of the petition's submission. This made the petition fall outside of the 20 qualifying petitions and outside of the boundaries of the data collected in this study. It should also be noted that there was one case where petitioners identified as "migrants."[138] There was also one petitioner identifying as living with a disability.[139]

In addition, as already repeatedly been mentioned, Paragraph 11 does not make any mention of minorities, ethnicity, or race. Instead of arguing a right to protection from discrimination, the petitioners argue they are disproportionately vulnerable to social and economic breakdown because it historically is the breeding ground for xenophobic actions and

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134 ENvironnement JEUnesse v. Canada; Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti; Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy.

135 *See, for example, Rights of Indigenous People in Addressing Climate-Forced Displacement* (indigenous).

136 *See generally Maria Khan et al.* (women).

137 *See generally* Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council et al., A-2992/2017 (Switzerland Supreme Court May 5, 2020).

138 Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, ¶¶ 43, 71 (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal.pdf [https://perma.cc/6WP9-PJT9].

139 Mex M. v. Austria, Complaint, European Court of Human Rights, ¶ 1 (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP] (disability).

aggressions against said groups.[140] This is not a discrimination argument, but rather a vulnerability argument because it is not based on a link between concrete events and concrete consequences for the petitioners, but rather for future risks and a good example of how a vulnerability approach is a good and necessary complement to a freedom and equality approach.[141]

H. Individual Rights and Individual Claims to Be Litigated

What becomes abundantly clear across these petitions is that litigation, as a strategy to advance the climate justice agenda, has become central within the broader climate justice movement.[142] What has made the litigation strategy possible for every woman, man, and child is the movement's broader transition to a rights-based approach. For example, the fifteen Canadian children and youth in *La Rose v. Her Majesty the Queen*,[143] expressly reference a rights-based approach in their Federal Court filing: "The plaintiffs seek declarations that the defendants, by the Impugned Conduct, have unjustifiably infringed their rights, and the rights of all children and youth in Canada, present and future."[144] Similarly, seven-year-old Rabab Ali from Pakistan argues that her rights as well as those of other Pakistani children have been "severely and adversely affected" by climate change in her petition:

> The youth Petitioner along with other Pakistani children are severely and adversely affected by the increasing level of CO_2 pollution in the atmosphere, which not only harms and continuously threatens their mental and physical health, quality of life and wellbeing, but also infringes upon their constitutionally guaranteed "Right to Life" and the inalienable "Fundamental Rights" of youth Petitioner and the future generations of Pakistan.[145]

The transition from a regulatory regime to an individual rights-based regime has opened litigation as a strategy to force more ambitious forms of mitigation and adaptation measures in hopes of reversing climate

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[140] *Plan B Earth et al. v. Prime Minister*, ¶¶ 43, 71.

[141] *Id.*

[142] *See generally* Purdy, at *Supra* note 63.

[143] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[144] *Id.* ¶ 6.

[145] Ali v. Federation of Pakistan., Petition, Supreme Court of Pakistan, 1 (Apr. 1, 2016), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-I-of-2016_petition-1.pdf [https://perma.cc/9QZG-W9WS].

change and addressing the climate crisis. As the present article has argued thus far, this was a conscious strategy adopted by the drafters of the Paris Agreement.[146]

However, there are surprising trends in the petitions respecting the articulation of this strategy. To repeat, the narrative of the environmental human rights regime is that there has been an evolution between two parallel tracks, one following the environment and the other one following human rights—that they have come together in the greening of human rights and the establishment of climate justice as a human right itself in Paragraph 11 of the preamble of the Paris Agreement. It is understood as that the Paris Agreement has effectively enabled the merger of two parallel tracks, the greening of human rights and the rights-based approach to climate justice, thus transforming the climate change movement into a climate justice regime—a rights-driven movement constituted by individual, rights-holding subjects. Yet in some respects, the petitioners pursue these tracks as *separate paths for advocacy*.

In the non–legally-binding Communication to the Committee on the Rights of the Child, *Chiara Sacchi et al. v. Argentina et al.*[147] and in the legal case *Plan B Earth and Others v. Prime Minister*, the two tracks are made very clear.[148] The petitioners in the Sacchi communication rely on the greening of the CRC, while in the *Plan B Earth v. Prime Minister* case, the petitioners rely on the greening of the European Convention on Human Rights. However, both also treat climate justice as a human right in and of itself with direct reference to Paragraph 11 of the preamble of the Paris Agreement.[149]

I. Group and Individual Identity

On closer examination, the 20 identity-based and vulnerability-based petitions are constructed in vastly different ways.[150] I will present

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[146] Ad Hoc Working Group on the Durban Platform for Enhanced Action, *supra* note 2, **at.** ¶ E.

[147] Sacchi et al. v. Argentina et al., C.R.C. 104/2019, Decision, Convention on the Rights of the Child (Oct. 8, 2021).

[148] Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO16 2018_appeal.pdf [https://perma.cc/6WP9-PJT9].

[149] *Plan B Earth et al. v. Prime Minister*, ¶¶ 1, 13; *Sacchi et al.*, ¶¶ 172–73.

[150] VZW Klimaatzaak v. Kingdom of Belgium et al., Brussels Court of First Instance Judgment, Civil Division, (June 17, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment.pdf [https://perma.cc/KZM7-5NAX] (children); Neubauer et al. v. Germany, Germany Federal Constitutional Court, Complaint, (June 2, 2020) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf [https://perma.cc/5523-BMEP] (children); *Plan B Earth et al. v. Prime Minister* (migrants ¶¶ 43, 71, race and minority ¶ 65, gender ¶ 65); Ali v. Federation of Pakistan., Petition, Supreme Court of Pakistan, (Apr. 1, 2016), http://climatecasechart.com/climate-change-litigation/wp-content/upl

oads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-I-of-2016_petition-1.pdf [https://perma.cc/9QZG-W9WS] (child); Armando Ferrão Carvalho et al. v. The Eur. Parliament et al., Decision, 565/19 P, European General Court, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf [https://perma.cc/64DX-XYP5] (children); Duarte Agostinho et al. v. Portugal et al., Complaint, 39371/20, European Court of Human Rights, (Sept. 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf [https://perma.cc/WRJ9-MR3F] (children); ENvironnement JEUnesse v. Canada, Judgment, 500-06-000955-183, Court of Appeal of Quebec, (Dec. 13, 2020) (young people under 35); La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT] (children and youth); Lho'imggin et al. v. Her Majesty the Queen, Complaint, Canadian Federal Court of Appeal, (Feb. 10, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [https://perma.cc/KPL8-FUF5] (indigenous people); Maria Khan et al. v. Federation of Pakistan et al., Petition, Lahore High Court, (Feb. 14, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190214_No.-8960-of-2019_application-1.pdf [https://perma.cc/3AV8-TRTL] (women); Mex M. v. Austria, Complaint, European Court of Human Rights, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP] (disability); Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (Apr. 23, 2013), https://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf [https://perma.cc/M3UH-5SEC] (indigenous); Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti, (Feb. 4, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_13174_petition.pdf [https://perma.cc/8NLA-Y6PL] (children); Plan B Earth et al. v. Secretary of State for Bus., Energy, and Indus. Strategy, Court of Appeal, Civil Division, Decision, Claim No. CO/16/2018, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190120_Claim-No.-CO162018_decision.pdf [https://perma.cc/XU34-ELTS]; Rights of Indigenous People in Addressing Climate-Forced Displacement, Complaint, United Nations, USA 16/2020, (Jan. 15, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_USA-162020_complaint.pdf [https://perma.cc/RT8J-P4E6] (indigenous people); Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9] (children); Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council et al., A-2992/2017 (Switzerland Supreme Court May 5, 2020); Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others, No. No. A-2992/2017 (Switzerland Supreme Court May 5, 2020). This case is not included because it is not filed under the Paris Agreements since Switzerland was not a party to the Paris Agreement at the time of filing the petition.

examples from the specific cases below, beginning with "indigenous people,"[151] followed by "people living with disabilities,"[152] then "gender,"[153] and finally "children."[154]

1. Indigenous People

The first indigenous people case concerns the *Lho'imggin et al. v. Her Majesty the Queen*, which is filed in Canadian Federal Court by the two Head Chiefs representing their two houses: Misdzi Yikh and the Sa Yikh, both governed by Wet'suwet'en indigenous law. In this case, the petitioners are not using an individual identity construction because this is a collective identity with its origin in the occupation and settlement of native land. The claim filed is linked to the territorial aspects of their cultural practices affected by climate change: "Like many indigenous peoples in Canada and across the globe, the Likhts'amisyu Houses' identity, culture, legal order and sustenance is bound up with their land and fishing territories. They cannot be who they are at some other place."[155]

In this petition, the use of identity is not based on social construction but rather on a positivist legal territorial claim: the right to the protection of their identity under Canadian law—first, Constitutional Section 91 of its Constitution Act, 1867, and the Canadian Environmental Assessment Act, and second, its international obligations, including the Paris Agreement and other international commitments within the United Nations Framework Convention on Climate Change (1992),[156] the Kyoto Protocol (1998),[157] the Copenhagen Accord (2009),[158] and the Cancún Agreement (2010).[159]

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[151] *Lho'imggin et al.* (indigenous people); *Artic Athabaskan Council, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada* (indigenous); *see* THE ALASKA INST. FOR JUST., RIGHTS OF INDIGENOUS PEOPLE IN ADDRESSING CLIMATE-FORCED DISPLACEMENT 3 (2020) (indigenous people).

[152] *Mex M.* (disability).

[153] *Maria Khan et al.* (women).

[154] *Sacchi et al.* (children); *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti* (children); *Plan B Earth et al. v. The Sec'y of State for Business, Energy, and Industrial Strategy* (child); *La Rose* (children and youth); *Duarte Agostinho et al.* (children); *Armando Ferrão Carvalho et al.* (children); *Ali* (child); *VZW Klimaatzaak* (children); *Neubauer et al.* (children).

[155] *Lho'imggin et al. v. Her Majesty the Queen.*

[156] The United Nations Framework Convention on Climate Change, May 9, 1992. 1771 U.N.T.S. 107, 165; S. Treaty Doc. No. 102-38 (1992); U.N. Doc. A/AC. 237/18 (Part II) Add.1; 31. I.L.M. 849 (1992).

[157] The Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997. 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc. FCCC/CP/1997/7/Add.1.

[158] The Copenhagen Accord, Dec. 18, 2009, UNFCCC 15th session/ CMP 5.

[159] The Cancún Agreement, Dec. 10, 2010; as referenced in *Lho'imggin et al. v. Her Majesty the Queen. Id.* ¶¶ 38, 42, 83.

This type of identity-based claim has been protected ever since the Stockholm Declaration's first principle establishing freedom from domination, where "colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."[160] However, as already addressed above, through Principle 22 of the Rio Declaration, this has been watered down to "States should recognize and duly support their identity, culture and interests, and enable their effective participation in the achievement of sustainable development," and in Principle 23, where their territory is described as being a responsibility of the nation-state to protect the environment of occupied territory, to "[t]he environment and natural resources of people under oppression, domination and occupation shall be protected."[161] This is quite different from the Stockholm Declaration, which describes it as an occupation to be eliminated.[162] By Section 25 of the Johannesburg Declaration, it has further lost strength from being seen as an unjust occupation and oppression to be eliminated, to being understood as a right to participation, replacing previous self-determination claims: "We reaffirm the vital role of the indigenous peoples in sustainable development."[163]

In the drafting process of the Paris Agreement, both Tuvalu and Costa Rica emphasized the effects of climate change on indigenous peoples. Tuvalu raises the issue of the effects of deforestation upon indigenous peoples: "Actions to reduce emissions from deforestation and forest degradation shall ensure that the rights of indigenous peoples and local communities are not adversely affected and that all actions are consistent with the United Nations Declaration on the Rights of Indigenous Peoples."[164] Tuvalu continues by pointing out the importance of developing strategies to reduce emissions from deforestation in consultation with indigenous peoples: "The Conference of Parties serving as the assembly of Parties shall, in consultation with appropriate indigenous peoples' and local community organizations, develop guidelines to ensure that the rights of indigenous peoples and local communities are not adversely affected by actions to reduce emissions from deforestation and forest degradation."[165]

Similarly, Costa Rica has emphasized the importance of alignment between the already adopted position on the protection of indigenous peoples and the Paris Agreement: "Be consistent with the principles under the Convention on Biological Diversity, the United Nations

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[160] *Stockholm Declaration*, *supra* note 8, at Principle 1.

[161] *Rio Declaration*, *supra* note 108, at Principle 22, 23.

[162] *Id.* at Principle 22.

[163] *Johannesburg Declaration*, *supra* note 114, ¶§ 25.

[164] Draft Protocol to the Convention Presented by the Gov't of Tuvalu under Article 17 of the Convention, at 7 ¶ 3, U.N. Doc. FCCC/CP/2009/4 (June 5, 2009).

[165] *Id.* ¶ 4.

Convention to Combat Desertification, and the United Nations Declaration on the Rights of Indigenous Peoples."[166]

These positions were finally placed in Article 7(5) of the Paris Agreement, regulating that the adaptation measures take into consideration the knowledge of indigenous peoples.[167] In this respect, the Paris Agreement had no actual strengthening effects on the identity construction of indigenous peoples; indeed, the construction used in this case relies on already established identities, but in a weaker form than the Paris Agreement.

The "classical" claim to rights by indigenous people, as presented by *Lho'imggin et al. v. Her Majesty the Queen*, is overshadowed by an individual human rights-based claim based on harm instead of collective self-determination, as exemplified in *Sacchi et al. v. Argentina et al.*[168] In *Sacchi et al.*, two children argue for the right of indigenous peoples as an individual right to culture in Article 30 of the CRC.[169] This is a right that does not place territorial or jurisdictional claims on the State in the way that *Lho'imggin et al. v. Her Majesty* argued, but instead as an individual right to hold an indigenous identity. [170]

The meaning of indigenous rights has clearly evolved from a collective right to self-determination to an individual right of self-expression with the transition of environmental justice into the human rights sphere as climate justice.

2. Persons with Disabilities

Disability is not an identity but defines a condition the person is living with even when it takes the form of a vulnerable category in the Paris Agreement because the constituting element is vulnerability.[171] Yet in the applicant's case in *Mex M. v. Austria*, a case filed with the European Court of Human Rights, the effects of living with a disabling condition—in this case, multiple sclerosis (MS)— disability constructs an

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[166] Draft Protocol to the Convention Prepared by the Gov't of Costa Rica to be Adopted at the Fifteenth Session of the Conf. of the Parties, at 10, U.N. Doc. FCCC/CP/2009/6 (June 8, 2009).

[167] *Paris Agreement*, *supra* note 1, at Article 7(5).

[168] Lho'imggin et al. v. Her Majesty the Queen, Complaint, Canadian Federal Court of Appeal, (Feb. 10, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [https://perma.cc/KPL8-FUF5]; Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9].

[169] *Sacchi et al.*

[170] *See generally Lho'imggin et al.*

[171] *See generally Paris Agreement*, *supra* note 1.

vulnerability-based right for litigation purposes.[172] This is not a critique of the litigation strategy but rather it highlights the role law plays in identity constructions as human rights. The applicant argued that his rights established in Article Eight were violated by Austria's inability to stay within the Paris Temperature Limit, which puts him at risk of "immense suffering" and the effects of the rising temperature are imminent.[173] The facts are that the applicant's disability is 60 percent from living with MS.[174] MS not only affects the applicant's nervous system but also makes his muscles particularly sensitive to temperature, what is called Uhthoff's syndrome. The disability increases with climbing temperatures. Below 25 degrees Celsius (77 degrees Fahrenheit)° he is able to move independently, but by 30 degrees Celsius (86 degrees Fahrenheit), he becomes fully dependent on his electric wheelchair.[175] The Paris Agreement shapes the claim in that the treaty, together with the larger frame of UNFCCC, is evidence of "the global consensus on, and state's commitments to, preventing the risk of harm posed by the dangerous climate crisis."[176] Since this application relies on the construction of the European Convention on Human Rights (ECHR),[177] the Paris Agreement is not part of constituting an identity in this instance. Instead, the Paris Agreement is used here both to prove an awareness of the dangers of climate change to Austria and to establish a global consensus.[178]

3. The Gender of a Person

Like disability, gender is a category of vulnerability a relational construction, in this case the relationality between two sexes. Gender equality is at the center of the petition by five women from Pakistan filed against the Government of Pakistan in Lahore High Court.[179] In this petition, the women argue that the failure of the government to meet its obligations to stay within the Paris Temperature Limit amounted to discrimination against them. This discrimination claim is based on

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[172] Mex M. v. Austria, Complaint, European Court of Human Rights, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP].

[173] *Mex M.*, ¶ 60.

[174] *Id.*

[175] *Id.* at Appendix ¶ ¶ 1–2.

[176] *Id.* at Appendix ¶ 41(i).

[177] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Sept. 3, 1953, 4 XI.1950.

[178] *See Mex M.*

[179]Maria Khan et al. v. Federation of Pakistan et al., Petition, Lahore High Court, (Feb. 14, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190214_No.-8960-of-2019_application-1.pdf [https://perma.cc/3AV8-TRTL].

vulnerability, and not liberty. The equality is based on comparability of vulnerabilities; the women argue that the shortcomings of the government to effectively implement the adaptation measures in accordance with the Paris Agreement disproportionately affects women as a class of citizen when compared to men.[180] The petitioners argue that gender together with socio-economic factors are a "key determinant of vulnerability to climate change."[181] This is an example of how being named as a vulnerable category in Paragraph 11 serves the function of making the concreteness of individual biological vulnerability into an abstraction of categorized vulnerability. This short-cut is what is denied people of, for example, minority status making the claim under the Paris Agreement.

The identity construction by the petitioners follows both a social construction and a biological construction of women as a vulnerable category. Even though women are understood to be more vulnerable to the incipient climate crisis due to the social construction of gender and their subjugation, the petition makes no mention of male-made vulnerabilities of women. Instead, both socially-constructed and biologically-constructed gender is treated as in itself without cause, and solely as susceptible to climate-induced harm: "In time of a disaster, women are more likely to suffer due to their limited access to financial, natural, institutional or social resources and often due to social norms and ethos (e.g., dress codes that inhabit mobility)."[182] This again highlights the advantages by being named as a vulnerable category in Paragraph 11. Without being named, there would be a requirement that the category construction itself be made vulnerable by the climate crisis. The biological construction is explained as follows: "Women's productive and reproductive activities make them disproportionately vulnerable to changes in biodiversity, cropping patterns and insect and disease vectors."[183]

Likewise, within the context of vulnerability and gender, there is no recognition of the fact that all of the women in the petition have access to petition the Court only through their relationship to a man, for instance, in accordance to their relationship to either a father (as daughters) or a husband (as wives). To address social inequality as their own cause of climate-effected harm has, since the Rio Declaration, fallen outside of the scope of the environmental regimes addressing climate change.

J. The Child Petitioner

The UN Convention on the Rights of the Child defines the child as "being under the age of 18 years or the age of majority if earlier than 18

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[180] *Id.* ¶¶ 15, 24.

[181] *Id.* ¶ 25.

[182] *Id.*

[183] *Id.*

years."[184] The indisputable status of the child identity as "every human being below the age of eighteen years," as stated in Article 1 of the CRC, makes the child identity extremely well suited for climate litigation due to the intergenerational element in climate justice.[185] It is an identity construction that melts together with the vulnerable category construction that is uniquely suited to function in combination with multiple other forms of identity constructions because not much effort is needed to establish the child identity itself. The hyper-formalized construction of age can easily be combined with other forms of identity constructions. However, there might be a limit to the use of age alone as an identity: for example, in *Environment Jeunesse v. Canada*, the petitioners used '35 years and under' to construct a class.[186] In this instance, the Superior Court of Québec declined to authorize the proposed class with the motivation that the 35-year cut off is arbitrary.[187]

1. The Bridge Between the Present Time and the Intergenerational Principle

The tension between political and institutional decisions with respect to the climate and the moral, intergenerational principle is an embedded dilemma within climate justice.[188] The requirements of political and institutional reach in the lived present have repeatedly confronted the intergenerational principle that has followed the climate justice regime from its inception in the second principle of the Stockholm Declaration of 1972. In the Federal Constitutional Court, *Neubauer et al. v. Germany* successfully bridged the liberal constitutional conditions placed on political institutions in the present with the moral, intergenerational claims for the future by arguing that:

> a violation of the duty to preserve the natural foundations of human life threatens to call into question the legitimacy of the state and the liberal constitution. This is to be agreed in principle. Without precaution that safeguards the natural foundations of life in a future-oriented manner, the scope for action that actually exists could become so limited that no real scope for decision-making remains. Such a situation

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[184] CRC, *supra* note 3, at Article 1.

[185] *Id.*

[186] ENvironnement JEUnesse v. Canada, Judgment, 500-06-000955-183, Court of Appeal of Quebec, ¶ 1 (Dec. 13, 2020).

[187] *Id.*

[188] *See generally* Jasmina Nedevska Törnqvist, Why Care About Future People's Environment?: Approaches to Non-Identity in Contractualism and Natural Law (Oct. 2, 2018) (Doctoral Dissertation, Stockholm University (available on Digitala Vetenskapliga Arkivet Portal) (addressing the dilemma and concluding that the there is a link to be made between similar experiences between generations).

> erodes both spheres of freedom and the foundations of the legitimacy of the state.[189]

The most-used identity construction in climate justice cases—and the one uniquely capable of managing a link between claims for the present and claims for the future—is the child.[190] In this respect, the child identity approach to climate justice has transitioned the fight against climate change from an abstract universal obligation in the Stockholm Declaration to a concrete, individual right to life, as claimed by children all over the world. This is how seven-year-old Rabab Ali in Pakistan expresses her individual right to life as an outgrowth of the intergenerational principle: "The Earth is a legacy left to this youth Petitioner, other children and future generations who will have to endure the inherited Environment degraded as a result of the choices made today by her government and current generations."[191] Rabab Ali continues to argue from the position of individual right to life: "The level of air pollution from vehicles, industry, the burning of waste and the mining and burning of Coal threatens life and human health in violation of the Fundamental Rights of the people of Pakistan, including the Right to Life."[192]

The most formalized use of the child identity is in *Sacchi et al. v. Argentina et al.*[193] *Sacchi* was communicated under the UN CRC's Third

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[189] Neubauer et al. v. Germany, Germany Federal Constitutional Court, Complaint, 101-02 (June 2, 2020) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf [https://perma.cc/5523-BMEP].

[190] *See* Ali v. Federation of Pakistan; ENVironnement JEUnesse v. Canada.; Armando Ferrão Carvalho et al. v. The Eur. Parliament et al., Decision, 565/19 P, European General Court, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf [https://perma.cc/64DX-XYP5]; La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT]; Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9]; Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal.pdf [https://perma.cc/6WP9-PJT9]; Duarte Agostinho et al. v. Portugal et al., Complaint, 39371/20, European Court of Human Rights, (Sept. 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf [https://perma.cc/WRJ9-MR3F].

[191] Ali v. Federation of Pakistan, at 1.

[192] *Id.* at 34 ¶ xv.

[193] Sacchi et al. v. Argentina et al., Petition, (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9].

Optional Protocol,[194] by sixteen children from Argentina, Brazil, France, Germany, India, Marshall Islands, Palau, South Africa, Sweden, Tunisia, and the United States. One of the children in the communication is the youth activist Greta Thunberg from Sweden. Through the strict age construction, children as subjects are able to carry the claim of the present into the future. They serve themselves as the embodiment of time, carrying the political-institutional legal responsibility into the universal moral obligation of the future.

This particular bridge is found in each of the selected child and youth petitions. In *Duarte Agostinho et al. v. Portugal et al.*, the petitioners construct the bridge between present and future times through arguing that things are already bad in the present, but they are gradually getting worse: The risk is set to increase significantly over the course of their lifetimes and will also affect any children they may have. The Applicants have already experienced reduced energy levels, difficulty sleeping, and a curtailment on their ability to spend time or exercise outdoors during recent heat waves.[195] The age of eighteen, or the age of majority, is not a strict rule among most of the petitions. Instead, a blend between "child" and "youth" is often used, with the focus on the bridge between the present crisis and claims to the future. Even in *Duarte Agostinho et al. v. Portugal et al.*, age is indirectly used to identify children and with that the petitioners as an "other status" under Article 14 of the ECHR in the filing with the European Court of Human Rights.[196] The petitioners argue that the material interferences with their rights under Article 2 and/or Article 8 are greater than upon older generations, not only because they will live longer, but also because the impacts of climate change will worsen over time[197]

Similarly, the nine child and youth petitioners in the successful *Neubauer, et al. v. Germany* capture the suitability of children and youth as petitioners: Germany has a population of about 83 million people, 18% of whom are under nineteen years old. An average fifteen-year-old German citizen is expected to live to the age of ninety. These demographic estimates can be linked with the projections of the rise in global mean temperature.[198]

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[194] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted Dec. 19, 2011, G.A. Res. A/RES/66/138.

[195] Duarte Agostinho et al. v. Portugal et al., Complaint, 39371/20, European Court of Human Rights, 60 ¶ 20 (Sept. 2, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint-1.pdf [https://perma.cc/WRJ9-MR3F].

[196] *Id.* ¶¶ 8–9.

[197] *Id.*

[198] Neubauer et al. v. Germany, Germany Federal Constitutional Court, Complaint, 31 ¶ bb (June 2, 2020) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint.pdf [https://perma.cc/5523-BMEP].

The Neubauer petition continues by successfully pointing out that the cost for the climate damage of today and in the past will be paid by the taxpayers of the future.[199] The intergenerational argument is further developed, not only through financial debt in the form of taxes, but also in a debt of debilitation in the form of an ability to live a healthy life: "The complainants will probably have to accept very drastic deteriorations in their living environment during their lifetime, which result from the fact that previous generations have profited considerably from the emission of greenhouse gases and have thereby seriously damaged the ecosystem."[200]

In short, the age construction of the child helped transform the previously unbridgeable dilemma: how to square the intergenerational principle of future harm with the legitimacy of political and legal institutions in the present.

K. The Long Narrative

What in this article is called "the long narrative" is used by all the petitioners, children and adults alike to contextualize their identities and categories of vulnerability. The long narrative serves the function of illustrating that climate change is a threat to life as we know it, in the place where one lives, and that the harm is the duration of the change itself—in short, its continuation over time will be irreversible if actions against climate change are not taken immediately.[201] In *Lho'imggin et al. v. Her Majesty the Queen*, the Likhts'amisyu House describes how climate change has caused insect infestations in forests as well as wildfires.[202] The Likhts'amisyu House also experienced a decline in salmon fishery, and for two decades they have not been able to fish the specific salmon that sustains their way of life.[203] Another example of the use of long narrative to establish duration is Mex's disability-based ECHR petition, which argues that climate change will amplify his disability over time.[204] In his long narrative that emerges in the petition, Mex describes how his suffering from MS will be exacerbated by the temperature increase from

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[199] *Id.* at 40.

[200] *Id.* at 104.

[201] There are similarities in purpose with the theoretical scholarly trend of rewriting already delivered judgments from a specific perspective – the significant difference is that the long narratives are written for the actual pleading and part of the ruling of the case at hand. However, the purpose to turn the perspective of the recipient of the text through narrative is similar to the rewrite movement. *See generally* REWRITING CHILDREN'S RIGHTS JUDGEMENTS (Helen Stalford et al. eds., 2017).

[202] Lho'imggin et al. v. Her Majesty the Queen, Complaint, Canadian Federal Court of Appeal, ¶ 5 (Feb. 10, 2020), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200210_NA_complaint.pdf [https://perma.cc/KPL8-FUF5].

[203] *Id.*

[204] Mex M. v. Austria, Complaint, European Court of Human Rights, (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_13412_complaint.pdf [https://perma.cc/4ZEV-4LAP].

25 to 30 degrees and this affects his ability to move around freely without the need for his electronic wheelchair.[205] As an argumentative strategy, the long narrative articulates the importance of the preservation of a way of life as an effective claim against climate change. It is the *change* of temperature that is causing the harm, not the temperature itself. To argue that 30 degrees in and of itself always means individual harm would not be possible had Mex lived in a geographical location that normally and over a long period of time had maintained temperatures in the thirties, centigrade. This is an example of the place-based connection between the claim and the harm.

The preservation of the current individual way of life is clearly expressed in *Armando Ferrão Carvalho et al. v. The Eur. Parliament et al.,*:

> This case is brought by children and their parents, working in agriculture and tourism in the EU and abroad who are and will increasingly be adversely affected in their livelihoods and their physical well-being by climate change effects such as droughts, flooding, heat waves, sea level rise and the disappearance of cold seasons. They are supported and joined by an association of indigenous Sami youth.[206]

The fight for the preservation of one's way of life as an across-the-board construction of identity claims is new to the rights-based approach. Indeed, this shared goal of the preservation of society "as it is" unites petitioners from otherwise disparate backgrounds, even some who have been the target for said claims in the past. The general claim for the preservation of a current way of life used to be the type of claim made by occupied, conquered, and colonized peoples, peoples whose identities were destroyed by forced relocation and loss of land or its occupation.

As the use of the long narrative suggests, the climate justice regime is relatively moot when it comes to different societal relations and conditions of life circumstance.[207] Instead, it is primarily focused on the preservation of current relations and conditions.[208] The adaptation and mitigation strategies are focused on the technical aspects of mitigation and adaptation to address the rising temperature rather than on aspects of equity, reparation, or justice.[209] This formation obscures the role of socially-constructed subjugations and oppressions in the perpetuation of

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[205] *Id.* ¶ 58.

[206] Armando Ferrão Carvalho et al. v. The Eur. Parliament et al., Decision, 565/19 P, European General Court, ¶ 1 (Mar. 25, 2021), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf [https://perma.cc/64DX-XYP5].

[207] Armando Ferrão Carvalho and Others v. The European Parliament and the Council, T-33018, judgment, E.C.J. ¶ 1 (March 2021).

[208] *Id.*

[209] *Id.*

climate change that, if addressed, would be important adaptation strategies. Ultimately, reconnection with the origin of the rights-based regime—racial justice and freedom from domination in the form of occupation—have been left out from the long narratives of the petitioners.

1. Complex Narrative

The long narrative not only functions as a descriptive account that supports an argument for preserving life as it is; the long narrative also makes it possible to bring in more complex aspects of the effects of climate change on the petitioners. In *La Rose*, age is also linked to vulnerability: "Because of their vulnerability and their age, these individuals and the generations of children and youth to follow will continue to bear a disproportionate share of the burden of climate change."[210] From age as the constructing element for a claim, the reach is not far to make the biological link to the vulnerability of the material body. The biological construction of the child is well developed in *La Rose v. Her Majesty the Queen*.[211] In *La Rose*, the vulnerability of children to climate change is first described as children being more vulnerable in body because their "lung growth and development continues through childhood so the respiratory system of children is more susceptible to environmental-related injuries and may be altered by environmental exposures."[212] The petition continues by listing their immature immune systems, higher metabolic demands, and immature central nervous systems, all of which add to children's vulnerabilities.[213]

This is an illustrative example of how the vulnerability construction differs from the freedom and equality constructed protection from discrimination. The vulnerability is in that way hyper-individual while at the same time being caused without a defined purpose of a specific target. Both the source of harm and the harmed are detached from each other and from the subjective element of intent. The subjectivity is in vulnerability left to the one being harmed, to in this case bring an action to Court. This again is why being named in Paragraph 11 is so important, because it provides the link between the abstract notion of identity and the concrete harm of the body without having to show proof of identity construction through climate-based subjugation.

In *La Rose*, it is not only the biological body but also the mental health of the child that is highlighted. Within the long narrative the argument is made that: "Children and youth are particularly vulnerable to adverse mental health impacts from climate change. These mental health

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[210] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, ¶ 6 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[211] *See generally id.*

[212] *Id.* ¶ 78.

[213] *Id.*

impacts include elevated levels of anxiety, depression, post-traumatic stress disorder and a distressing sense of loss."[214]

Similarly, in the long narrative Cecilia Rose, a fifteen-year-old from Toronto, Ontario, is of Arawak Indian, Irish, and Ukrainian ancestry (not developed any further within the narrative).[215] The narrative takes us through Cecilia's life and how she has come to suffer from anxiety and has become in need of therapy.[216] She also suffers from asthma, which she was diagnosed with at the age of six: she regularly visits a specialist because of her asthma, and she has had strong, adverse reactions to beginning her medication.[217] Cold temperatures exacerbate her asthma, and her asthma has also severely worsened due to the increased temperature changes cause by climate change.[218] The extreme temperatures in Toronto have had a severe impact on Cecilia's lungs, and in combination with increased allergy risk, which can send her into anaphylactic shock.[219] As her narrative continues, not only is Cecilia risking asthma and allergy but also Lyme disease from ticks and increased exposure to other dangerous phenomena as an effect of climate change.[220] Additionally, climate change has affected her education: her school had to install cooling centers due to the increase in extreme temperatures, and she has watched her friends faint due to the heat.[221] In the end, because of the extreme heat, her parents have opted to keep her home from school during this period of time.[222] We also are told of sustained economic impact when Cecilia notes how her parent's home has been flooded and reports that they had to spend money on repairs.[223]

L. A Double-Jeopardy Intersectionality

The long narrative is not only used to describe the everyday life of the child, but it is also used to describe the vulnerability of children as exemplified in *Sacchi et al.*: "Petitioners, children from around the world,

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[214] *Id.* ¶ 85.

[215] *Id.* ¶ 94.

[216] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, ¶ 96 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* ¶ 97.

[221] *Id.* ¶ 98.

[222] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, ¶ 98 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[223] *Id.* ¶ 99.

already carry that burden [of harm from climate change]. Climate change is exposing them to life-threatening dangers and harming their health and development. For the indigenous petitioners, their thousand-years-old cultures are threatened by climate change."[224] The long narrative of the everyday life of children and youth is these petitions, as told through multiple identity relations, leads to what this researcher calls a *double-jeopardy intersectionality*.[225] A double-jeopardy intersectionality operates on two premises: first, that the child as a general identity is already represented as a vulnerable group due to their status as children; and second, that the child's already established vulnerability is exacerbated in the merging together of other vulnerable identities, like those of racially marginalized communities with weaker social-economic status, and are thus at higher risk of harm due to the ongoing climate crisis.[226] To be able to address the full complexity of double-jeopardy intersectionality, it is necessary to include both the legal and socially constructed vulnerabilities that stem from discrimination and external domination. To not be able to include liberty and equality into the theoretical frame when describing double-jeopardy intersectionality will make mute the impact of discrimination and external domination as significant causes of vulnerability.

The particular vulnerability posed to youth with multiple identity relations is also explained in *Plan B Earth et al. v. Prime Minister* as being at higher risk of increased xenophobia.[227] Similarly, gender, when paired with belonging to a racial minority, is in this petition seen as double-jeopardy intersectionality: gender-based violence is understood as directly caused by the social and economic breakdowns originating in the climate

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[224] Sacchi et al. v. Argentina et al., Petition, ¶ 4 (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9].

[225] *See* Maria Grahn-Farley, *A Child Perspective on the Juvenile Justice System*, 6 J. GENDER, RACE & JUST. 297, 298 (2002) (providing a developed description of double jeopardy and child rights).

[226] *Id.* For a continuation of Kimberlé Crenshaw's demonstration of the limited reach of anti-discrimination legislation in addressing complex forms of what this article calls double-jeopardy intersectionality, see *supra* note 57. *See also* SHREYA ATREY, INTERSECTIONAL DISCRIMINATION 26 (2019) (positioning anti-discrimination rightly in the universalist camp of rights). I agree with Atrey's critique of anti-discrimination law as not being able to see or address differences; however, my concern is that when it does not even exist a discrimination prohibition, I think we risk losing something of normative value. Atrey is not arguing against a discrimination prohibition, she is demonstrating its limitations, with which I agree. *See also* Shreya Atrey and Peter Dunne, *Intersectionality and Human Rights Law* (Hart Publishing 2020).

[227] Plan B Earth et al. v. Prime Minister, Court of Appeal, Civil Division, Claim for Judicial Review, ¶ 65(c) (July 26, 2018), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180726_Claim-No.-CO162018_appeal.pdf [https://perma.cc/6WP9-PJT9].

crisis.[228] The final double-jeopardy intersectionality listed in the petition is of youth suffering from mental health concerns.[229]

This double-jeopardy intersectionality is particularly prominent when arguing for the impact it has on the other forms of identification and relationality a child might possess. The child or youth identity constructed out of time and biology is indisputable in its logic: the climate crisis will get worse, and the people who are young today will live longer in a worsening climate—and even more so for the people who are not yet born than the people who are old today. The challenge to this identity construction emerges when identities forged of time and biology meet the socially constructed identities expressed in xenophobia and sexism. It might well be that people fall into racism and sexism in moments of social and economic crisis, yet it is still not the climate crisis that has created racism and sexism. The climate justice frame can only hold an adaptation and mitigation strategy addressing these effects, but the very critique of racism and sexism as socially producing identities are left to be addressed outside of the climate justice frame, and within the liberal legal anti-discrimination regimes. This creates a gap within the climate justice regime and its use of right-based identities.

In *La Rose*, the double-jeopardy intersectionality is constructed first by establishing the vulnerability of indigenous people, and the conclusion is reached that children within indigenous groups are the most vulnerable: "Indigenous children and youth are particularly vulnerable to Climate Change Impacts."[230] The long narrative is used by Sáj, a thirteen-year-old petitioner in La Rose. In her narrative, she identifies herself as of Carry the Kettle (Ceg-A-Kin) Nakoda descent.[231] She reports that the increase in rain has caused flooding to her rural community in the Prairie Pothoe Region, causing extensive damage by destroying cabins, crops, and highways.[232] The area of her home is now considered "high risk." In addition to the flooding, there is an increase of drought causing wildfires and extreme cold and hot temperatures. The extreme cold prevented her from engaging in downhill skiing and other outdoor activities.[233] Her little sister developed a respiratory illness, due to toxic seasonal algal blooms, after waterskiing in the Kipabiskau Lake, where they own a cabin. This illness has now caused the family to fear that visiting their cabin will cause health risks. Sáj also remarks on visiting family and friends in Treaty 4

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[228] *Id.* ¶ 65(d).

[229] *Id.* ¶ 65(e).

[230] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, ¶ 77 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[231] *Id.* ¶ 187.

[232] *Id.* ¶ 188.

[233] *Id.* ¶ 189.

territory where the Carry the Kettle Nakoda Nation is located.[234] In the territory, the salinity of Quill Lake has grown due to increased rain and rising groundwater in addition to the flooding that comes with these phenomena.[235] These factors affect the fresh water supply and the soil where family and friends' crops grow. Her great aunt who lives in the territory was surrounded by wildfires, which burned all the vegetables she grew.[236] In this case, the claim to indigenous identity is not part of making a collective people-based claim like *Lho'imggin et al. v. Her Majesty the Queen*. Instead, Sáj's long narrative, sharing her story of the impact of climate change on an intersectional identity as part of her everyday life, is as an individual.

M. The Political Role of Speaking Truth to Power: The Way to Empower without Constituting Obligations

In the Johannesburg Declaration, the role of speaking truth to power was assigned to the children of the world.[237] It can be said that children have responded to this call. Children have made their voices heard around the world in school strikes, rallies, and protests for climate justice. However, there is a less romantic and more serious way to interpret the role taken by children across these actions in relation to speaking truth to power. To be empowered to speak is a radically weaker form of construction than the freedom of free speech. The freedom of speech, the bedrock of human rights, is in the climate justice regime replaced with the discourse of empowerment to speak. This does not generate any legal rights or obligations in the way that freedom of speech does.

When it comes to children the empowerment to speak is even one more step more complicated since children cannot even back their empowerment up with political power since they cannot vote. The frustration over not being able to vote is expressed by two of the petitioners in *La Rose*, even though not fought for, again the systemic injustice of being excluded from the democratic political process affecting one's life at the core is a struggle that cannot be expressed within the Climate Justice legal frame.[238] The first child is Zoe who is thirteen years old: in her long narrative, she describes her experiences of wildfires and the harm they cause to the lungs, forcing the family to stay inside and miss school, unable to play outdoors, swim, or run.[239] She

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[234] *Id.* ¶ 191.

[235] *Id.*

[236] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, 46–47 ¶¶ 187–193 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[237] *See generally Johannesburg Declaration*, *supra* note 114.

[238] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, ¶ 27(d) (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[239] *Id.* ¶¶ 174–177.

describes how the wildfires scare her and make her fearful of her well-being. She continues describing the death of the red cedar trees because of climate change's effect on drought[240]. She also has also experienced sea level rise and coastal erosion affecting her local community because it changes the public space available for community gatherings.[241] She concludes that she has joined the movement of children and youth striking from school to make her voice heard because she is unable to vote and to participate in the political process.[242] Similarly, Sáj also expresses that she is engaged in activism and other strikes, protests, and rallies and has become a vegan, all because she cannot vote.[243] Neither Zoe nor Sáj questions their foundational construction as persons who are unable to vote as unfair or of dubious legal purchase. Instead, they describe how they have found alternative ways to express their commitments to fighting climate change outside of the political process.

To speak truth to power in litigation is, if not necessarily a weak substitute for access to political institutions, one of the few mechanisms left to children within legitimate social institutions, as the petitioners in *La Rose* point out: "This inequality perpetuates prejudice and exacerbates the pre-existing disadvantage suffered by the plaintiffs and all children and youth particularly in circumstances where the plaintiffs and other children and youth are unable to vote and have little political influence."[244]

If there is one characteristic that makes the child petitioners stand apart from the other forms of identity-based petitioners, it is the frankness with which they speak when assigning a generational responsibility upon adults. This responsibility is what Rabab Ali centers in her petition: "[b]ecause of the irresponsible attitude of the Respondents towards nature and natural resources, the youth Petitioner pledged to raise her small voice for a big cause before the apex Courts for the recognition and protection of her Fundamental Rights and an order compelling the Respondents to reduce CO_2 emissions."[245]

The children in *Sacchi et al. v. Argentina* similarly do not hold back their opinions on the consequences of the inaction of adults up to this

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[240] *Id.* ¶ 177.

[241] *Id.* ¶ 178.

[242] *Id.* at 42–43, ¶¶ 174–179.

[243] *Id.* at 47 ¶ 193.

[244] La Rose v. Her Majesty the Queen, File No. T-1750-19, Complaint, Canadian Federal Court Decisions, 61 ¶ 233 (Oct. 15, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191025_T-1750-19_complaint.pdf [https://perma.cc/5QTK-6ZVT].

[245] Ali v. Federation of Pakistan., Petition, Supreme Court of Pakistan, 13 ¶ 2 (Apr. 1, 2016), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-I-of-2016_petition-1.pdf [https://perma.cc/9QZG-W9WS].

point: "For decades, the excuse that no site-specific harm can be traced to any particular emission or country, and thus that no state bears responsibility, has been used to justify inadequate climate action. This excuse has turned the climate crisis into what economists call a "tragedy of the commons."[246]

Refreshing as it might be to hear children and youth speak their minds, it is worth reflecting if the appreciation would be equally supportive of the adult generation had children been granted formal political power. This is what child litigation, as utilized in the petitions against climate change, has brought forward: a formal, institutional power in the hands of children. What the legal institutions receiving their petitions will make out of their legal claims is still to be seen.

III. CONCLUSION

In the conclusion of the study, I argue that, across the many national, regional, and international petitions filed, the intention of the drafters of the Paris Agreement to use national stakeholders to push the parties of the treaty to increase their ambition when it comes to the mitigation of, and adaptation to, climate change has been a successful and deliberate strategy. [247] This strategy developed during the drafting of the treaty has in that sense achieved its goal. What is surprising is that it is children who are taking the lead in this fight, a factor that was not predicted by any of the preparatory works leading up to the adoption of the Paris Agreement.[248]

The article also demonstrates that the environmental justice movement transitioned from being a movement focused on environmental regulation to a movement based on rights. This was done when the movement began combining the struggle to protect the environment with the protests against toxic dumping lead by people of color in Warren County, North Carolina, USA, in the late 1970s,[249] and internationally at the Stockholm Declaration calling for the end of apartheid and the elimination of external domination of colonized people in its first principle.[250] This origin of the climate justice movement has fallen out of the common discourse when celebrating the Paris

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[246] Sacchi et al. v. Argentina et al., Petition, 57 ¶ 204 (Sept. 23, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/ZAY8-T7Q9].

[247] Ad Hoc Working Group on the Durban Platform for Enhanced Action, *supra* note 2, at. ¶ 29:2(b).

[248] There is a hint towards the role of children in leading this fight in the Johannesburg Declaration of 2002. This detail will be discussed below.

[249] David Schlosberg & Lisette B. Collins, *From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice,* 5 WIRES CLIMATE CHANGE 359, 360 (2014).

[250] *Stockholm Declaration*, *supra* note 8. The Stockholm Declaration is celebrating its 50th anniversary this year.

Agreement as the first-time climate justice and human rights were merged into the same treaty. It is correct that it is the first time the two regimes have been united in a legally binding treaty, but human rights, as based on freedom and equality, have from their origin been an intrinsic part of the very fabric of the environmental justice movement, from which the climate justice movement grew. Unlike its origin in the 1970's, today's climate justice framework makes no mention of race, ethnicity, or minorities, even though discrimination protection was central when stakeholders were developing the adaptation strategies within the climate justice framework.

As a rights-based movement that comes in multiple forms, the climate justice human rights regime has unleashed a bottom-up strategy that resembles the "kitchen sink" approach, meaning that one throws all but the kitchen sink on the problem to see what sticks. A consequence of this approach is that despite similar degrees of persuasion, it is not yet possible to draw any legal methodological conclusions from these petitions. The successes, the near-misses, and the failed cases cannot be synthesized into one singular, comprehensive legal strategy or meaning.

The one thing that can be generalized is that children, as a collective identity and as an individual category of identity are exceptionally well suited for making claims to climate justice under the Paris Agreement. As a constructed identity, the category mirrors the human rights construction established in the treaty. The limitation upon litigation claims posed by children is that the rules for the composition of narratives of oneself are already set by the rules of litigation. This is not unique to children but affects every form of petitioner. This would also be the main warning with litigation-driven policy-setting agendas. Litigation decisions are based on the best possible way of winning a case and not on the consequences for the long-term success of a policy or an agenda. However, the long narrative provides for a relatively free form of self-description. What is harder to accomplish within a rights-based litigation narrative without a formal protection from discrimination, is the expression of collective values that connect to the original idea of environmental justice—a rejection of one group subjugating another group through racial, sexist, or colonial projects in favor of universal support and solidarity.

The origin of the "justice" in both the climate justice movement and human rights movements today is the shared fight against discrimination and struggle for racial equality. This is still one of the most central adaptation strategies to address the immediate effects of climate change. Although the connection to protection from discrimination has fallen out of the Paris Agreement, it can still be an important political and institutional contribution from adults in assisting children's voices in their litigation efforts outside of the limits of the legal sphere. True solidarity cannot be replaced by intersectionality and a reliance on vulnerability theory alone, which is what is available within the litigation strategy without a provision providing a protection from discrimination

and non-domination. This lack of protection from discrimination and domination significantly weakens the possibility of making communal change through the Paris Agreement.

In the future there is hope that the political-institutional powers to which only adults have access should play an important role as a deliberate democratic complement to the litigation strategies adopted by children. It is in the political realm that there is a possibility to move away from a binary view between liberty- and vulnerability-based theoretical frameworks. In the political, through legislation it is possible to make a space of trinity, between the negative rights of freedom from discrimination, to the positive rights to freedom from domination, and the positive obligation of the State to address individual concrete vulnerability.

Yet the very way in which litigations structure the identity narratives of petitioners obscures the social and political aspects of identity and vulnerability constructions. The rules for climate justice litigation as they stand today silences the ways the various identities and peoples addressed in the Paris Agreement have been made vulnerable through social, political, and legal discriminatory decisions fueled by ideologies of discrimination and domination, made by people with access to political institutions and legislative organs.

These limitations are, of course, not set in stone. Yet it should not be left to children and small groups of individual judges to take on the larger social responsibility of addressing the discriminatory and unequal structures underpinning the uneven harms of climate change. This is where adults, through the political process of democratic deliberation and legislation, can and should provide a legal framework that expands the ability of climate justice and litigation to both allow for solidarity and a critique of discrimination, as well as a critique of the domination of one group of persons over other groups of persons based on prejudices and historical gains, at the same time as one can recognize the vulnerability of the individual body. This is why this article wants to propose the reintroduction of the anti-discriminatory principle into climate justice, and to strengthen its anti-domination framework, this to accompany the vulnerability frame of empowerment that underpins the Paris Agreement.