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| Title | Children at the lekgotla: African child-led litigation for remedies in the climate crisis |
| Authors | Muller, Liesl Heila |
| Publication date | 2025 |
| Original Citation | Muller, L. H. (2025) 'Children at the lekgotla: African child-led litigation for remedies in the climate crisis', African Journal of Climate Law and Justice, 2, pp. 59-92. https://doi.org/10.29053/ajclj.v2i1.0004 |
| Type of publication | Article (peer-reviewed) |
| Link to publisher's version | 10.29053/ajclj.v3i1.0004 |
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| Download date | 2026-11-12 00:18:20 |
| Item downloaded from | https://hdl.handle.net/10468/18215 |

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African Journal of
Climate Law
and Justice
(AJCLJ) 2025

LH Muller 'Children at the lekgotla: African child-led litigation for remedies in the climate crisis' (2025) 1 *African Journal of Climate Law and Justice* 59-92
https://doi.org/10.29053/ajclj.v2i1.0004

# Children at the *lekgotla*: African child-led litigation for remedies in the climate crisis

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**Abstract:** The article discusses children's climate litigation as a critical avenue to seek remedies for the climate crisis, which disproportionately affects children and violates their fundamental rights. It highlights the challenges children face in accessing justice through courts, particularly due to stringent preliminary procedural hurdles such as demonstrating individual harm, proving direct causation, and issues related to redressability and separation of powers. The article argues for adopting a child rights-based approach and integrating non-Western philosophies such as South Africa's ubuntu to overcome these barriers. The article proposes that the emphasis of ubuntu on interconnectedness and collective well-being offers a more suitable framework for addressing climate change's complex, multi-generational nature in legal contexts. Engaging with children's litigation presents an opportunity for courts to evolve legal frameworks, moving towards more inclusive and effective remedies for climate injustice globally.

**Key words:** access to justice; children's rights; climate litigation; effective remedies; philosophical approaches

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## 1 Introduction

Children have identified the climate crisis as one of the main issues of concern for their generation, which violates their right to a healthy environment and many other fundamental child rights.[1] Their efforts to be heard and to secure a remedy for these violations have received media attention globally since 2018, when children's climate protests reached unprecedented scale and influence.[2] They have managed to access every level of governance, from the United Nations (UN) General Assembly to their local municipalities, in the hope of having their concerns addressed. Reactions from these spaces include congratulations for bravery and thanks, but evidence of subsequent action or change is sparse.[3]

One of the ways in which children have sought remedies for environmental and climate issues is through the courts.[4] The landmark case *Minors Oposa v Factoran*[5] was initiated by 45 children in the early 1990s in the Philippine courts. They successfully halted the issuance of deforestation permits by asserting a fundamental right to a balanced and healthful ecology. In 2011, child plaintiffs in *Juliana v US*[6] started their journey in the United States (US) courts, fighting for recognition of their rights and for an order directing the US to adopt a comprehensive plan to fight climate change. Since 2018, approximately 70 cases have been brought to courts by children and youth globally, internationally, regionally and domestically.[7]

Whether children have achieved access to justice and an effective remedy through climate litigation is debatable.[8] There are several pioneering cases where children were granted the relief they sought, and the outcomes have both positively developed the law and tangibly changed children's lives.[9] However, many cases have been dismissed at procedural stages, or are stuck there for years,[10] never overcoming strict procedural hurdles, designed to keep out undeserving

1 Office of the High Commissioner for Human Rights & Child Rights Connect 'Children's vision for human rights' (2023), https://www.ohchr.org/sites/default/files/documents/issues/children/Children-vision-HR-75.pdf (accessed 6 June 2025).
2 A Daly 'Climate competence: Youth climate activism and its impact on international human rights law' (2022) 22 *Human Rights Law Review* 1.
3 F Buhre & J Josefsson 'The materiality of youth representation at climate summits: Navigating barriers, routes, and spaces' (2025) 22 *Globalizations* 426.
4 E Donger 'Children and youth in strategic climate litigation: Advancing rights through legal argument and legal mobilisation' (2022) 11 *Transnational Environmental Law* 263.
5 (1993) GR No 101083, 224 SCRA 792.
6 217 FSupp3d 1224, 1260 (District Court of Oregon 2016).
7 Youth Climate Justice Project University College Cork *Caselaw Database,* https://www.ucc.ie/en/youthclimatejustice/caselawdatabase/ (accessed 4 June 2025).
8 A Daly 'Child and youth friendly justice for the climate crisis: Relying on the UN Convention on the Rights of the Child' (2024) 32 *The International Journal of Children's Rights* 632.
9 See, eg, *Future Generations v Ministry of the Environment & Others* (2018) 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia)*; Neubauer & Others v Germany* (2021) 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court)*; Held v Montana* (2024) MT 312 (Supreme Court of Montana).
10 See, eg, *La Rose v His Majesty the King* (2023) A-289-20, A-308-20 (*La Rose*); and *Juliana v United States* (2025) US 24-645 (*Juliana v US)*, which spent 10 years at the procedural phase.

litigants.[11] In fact, only a third of the cases launched by children and youths have been successful in the sense that some or all of their relief was granted. The rest of the cases have been dismissed or are pending, some for as long as 13 years at the procedural phase, without a hearing.[12] Even though some significant progress is being made, many children fail before presenting their full cases to the courts. They are barred by procedural laws designed neither for children nor the novel challenges presented by that climate change litigation. This has a bearing on their well-recognised right to be heard, to have their views taken seriously, and to gain access to justice and effective remedies, as outlined in the UN Convention on the Rights of the Child (CRC).[13]

This article theorises that two factors contribute to the courts' failure to provide remedies for children in climate litigation. First, in the failed child and youth climate cases, the legal frameworks regulating the procedural elements of access to courts and the courts' application thereof are characterised by a distinct lack of a child rights-based approach. Children face disproportionate difficulty in accessing courts and effective remedies.[14] A child rights-based approach to litigation is therefore necessary.[15] Procedural and substantial adjustments must be made to ensure that children access justice on an equitable basis with adults.[16] Second, the interpretive frameworks applied by courts are influenced by dominant Western philosophies that centre the individual, as opposed to the community, and the natural world as interconnected entities. Climate litigants, including children, have had considerable difficulty convincing judges in the Global North to consider the merits of climate cases, which are fraught with convoluted causes and effects, related to all peoples and across generations.[17] Child and youth climate litigants consistently employ approaches aligned with non-Western and indigenous approaches to climate justice.[18] Contrary to Western approaches, philosophies such as South Africa's ubuntu allow for more

11 See, eg, *Sacchi & Others v Argentina*, Communication 104/2019, UNCRC Committee (22 September 2021) UN Doc CRC/C/88/D/104/2019 (2011); *Sacchi & Others v Brazil*, Communication 105/2019, UNCRC Committee (22 September 2021) UN Doc CRC/C/88/D/105/2019 (2011); *Sacchi & Others v France*, Communication 106/2019, UNCRC Committee (22 September 2021) UN Doc CRC/C/88/D/106/2019 (2011); *Sacchi & Others v Germany*, Communication 107/2019, UNCRC Committee (22 September 2021) UN Doc CRC/C/88/D/107/2019 (2011) (*Sacchi*); *Agostinho & Others v Portugal & Others* (2024) ECHR 39371/20 (*Agostinho*); *Children of Austria v Austria* (2023) VFGH 123/2023 (*Children of Austria*); *Foley & Others v Sweden* (2025) Swedish SC M2022/01018 (*Aurora*).

12 Twenty-three out of 70 cases.

13 U Kilkelly 'Children's rights to access justice at the international level: Challenge and opportunity' in M Paré and others (eds) *Children's access to justice: A critical assessment* (2022) 139.

14 T Liefaard 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 95.

15 K Arts 'Children's rights and climate change' in C Fenton-Glynn (ed) *Children's rights and sustainable development: Interpreting the UNCRC for future generations* (*Series: Treaty Implementation for Sustainable Development*) (2019) 216.

16 H Stalford & K Hollingsworth '"This case is about you and your future": Towards judgments for children' (2020) 83 *Modern Law Review* 1030.

17 RS Abate 'Standing' in M Wewerinke-Singh & S Mead (eds) *The Cambridge handbook on climate litigation* (2025) 105.

18 A Daly and others 'Climate action and the UNCRC: A "postpaternalist" world where children claim their own rights' (2024) 4 *Youth* 1387.

complexity in conceptions of place and time and the value of the collective good of the wider community and the environment.[19]

South Africa presents an interesting case study to explore best practices for child-centred, post-colonial, non-Western approaches to climate justice for children. South Africa's rich human rights-based jurisprudence, including child rights, offers insights into how the law could be developed to be more conducive to child climate litigants globally and the remedies they require.[20] Since the advent of democracy in 1994, South African law has been subject to transformative constitutionalism and heavily influenced by African philosophy, specifically ubuntu.[21] How ubuntu has been used as a transformative interpretive lens to develop the law in line with human rights can be studied in South African jurisprudence. Children's presence in the courts as litigants requires them to consider children's rights in public matters, freeing child rights law from its traditional confinement to family and criminal matters.[22] Children's efforts to secure their democratic rights through the courts may present alternatives to failing dominant approaches, which the courts will do well to adopt, if they are to provide effective solutions to climate injustice. Children are coming to the *lekgotla*,[23] and it is a good sign for the climate crisis discourse.

The article is presented in seven parts. Following the introductory part 1, the trend on child and youth climate litigation is the focus of the second part of the article. Part 3 sketches the key barriers to effective legal remedies globally, while part 4 unpacks what is meant by a child rights-based approach. Part 5 of the article explores best practices from the South African legal context for a child rights-based approach to access to justice for children in the climate crisis. Part 6 focuses particularly on lessons that may be learnt from the jurisprudence on ubuntu, while part 7 is the conclusion.

## 2 Child and youth climate litigation

It is now well established that climate change disproportionately affects children,[24] who are more vulnerable than adults because of their unique physical,

19 F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18.

20 U Kilkelly & T Liefaard 'Legal implementation of the UNCRC: Lessons to be learned from the constitutional experience of South Africa' (2019) 52 *De Jure Law Journal* 521.

21 Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 16.

22 J Sloth-Nielsen 'Children's rights jurisprudence in South Africa – A 20 year retrospective' (2016) 49 *De Jure* 501.

23 The word *lekgotla* means 'courtyard' or 'court' in two Southern African languages, Sesotho and Setswana, meaning a meeting place for village assemblies, court cases and meetings of village leaders. It exemplifies government in some African societies. Being able to speak at the *lekgotla* means that one has an influence on governance. *Dictionary of South African English*, https://dsae.co.za/entry/kgotla/e03762 (accessed 17 August 2025).

24 UNICEF *The climate crisis is a child rights crisis: Introducing the Children's Climate Risk Index,* https://files.eric.ed.gov/fulltext/ED614506.pdf (accessed 6 July 2025).

behavioural and developmental status,[25] which is amplified in the case of children in marginalised communities and in specific geographical contexts, most notably in Africa.[26] Children's dependency on adults and their societal status can hamper their resilience to climate harm. Strife and Downy refer to this phenomenon as 'youth-based environmental inequality'.[27] The climate crisis, and their position in it, cause children to suffer violations of their rights to equality, health, life, dignity and a clean, healthy and sustainable environment, among others. Lauding the work of young African climate activist, Vanessa Nakate, Thunberg comments that 'while we may all be in the same storm, we are not in the same boat', recognising the unequal way the climate crisis affects different sections of society.[28] Children, being one such category, need remedies, but have limited options to enforce their rights. They are denied voting power and are largely excluded from public decision making, including relating to the environment.[29] The courts are a last, and perhaps their only, resort.[30]

A 2023 global study on children's views on their rights establishes that most children are familiar with human rights and that, despite variations in ages and geography, they identify the same group of rights as their biggest challenges. Their main concerns include the right to a clean, healthy and sustainable environment, physical and mental health, a dignified standard of living free from violence, and the right to education.[31] These rights are all threatened by climate change.[32] Other concerns relate to the right to express one's views and for those views to be given due weight, such as children's legal recognition, discrimination and exclusion, and safe and meaningful participation. A recurring theme is children's desire for their voices to be heard and their opinions to be considered in decisions that affect them, at home, in schools and in policy making. Yet, they often feel that their perspectives are overlooked or dismissed by adults, leaving their concerns unaddressed.[33]

The CRC Committee's General Comment 26 on children's rights and the environment with a special focus on climate change was drafted after consultation with a child advisory team, and 16 331 contributions from children.[34] It confirms

25 African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) 'Study on climate change and children's rights in Africa: A continental overview' (2024).
26 Office of the High Commissioner for Human Rights (OHCHR) 'Climate change and the full and effective enjoyment of the rights of the child' (2017) A/HRC/35/13.
27 S Strife & L Downey 'Childhood development and access to nature: A new direction for environmental inequality research' (2009) 22 *Organisation & Environment* 99.
28 G Thunberg 'Editorial review for V Nakate *A bigger picture: My fight to bring a new African voice to the climate crisis*' (2022), https://www.amazon.com/Bigger-Picture-African-Climate-Crisis/dp/0063269120 (accessed 6 July 2025).
29 Strife & Downey (n 27).
30 *Mlungwana & Others v The State & Another* 2019 1 BCLR 88 (CC).
31 Office of the High Commissioner for Human Rights & Child Rights Connect (n 1).
32 Committee on the Rights of the Child 'General Comment 26: Children's Rights and the Environment with a Special Focus on Climate Change' (22 August 2023) CRC/C/GC/26.
33 Office of the High Commissioner for Human Rights & Child Rights Connect (n 1).
34 CRC Committee (n 32) para 2.

the crucial need for and importance of child participation in environmental decision making.[35] Considering the disappointing responses of those in power, it is not surprising that children have turned to the courts for relief.[36] Protest and high-level advocacy with decision makers can only take children so far. It cannot guarantee engagement, meaningful response and a positive outcome for children. Its effect depends entirely on the willingness of people in power to grant their attention and to act. The judicial process presents a unique opportunity for children to air their concerns and preferred outcome in detail, to which a defendant must reply systematically at the risk of an adverse finding or punishment by the court.[37] Children can be granted a straightforward, legally binding remedy against the parties if successful. While the court cannot usurp the role of the executive branch of government or direct all the actions of private actors, it can provide certainty and action in circumstances where children have been ignored and denied redress. At the very least, it can force the parties to engage meaningfully with the children's concerns, failing which the court can fashion a suitable remedy.[38]

The CRC Committee finds that despite children being 'at the vanguard of several environmental and climate change cases', they face significant hurdles in the form of preliminary procedural barriers, such as standing.[39] General Comment 26 emphasises the state's duty to prioritise and promote child-friendly access to justice by removing legal barriers and creating suitable remedies for children. This is currently not the case for many children. Children's rights to access to justice and to an effective remedy are implied rather than clearly stated in CRC.[40] It has always been fraught with difficulties in implementation.[41] In response, the CRC Committee published the second draft of its latest General Comment (Draft General Comment 27) on this topic in 2025.[42] It will add to existing authoritative interpretations such as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (EU child-friendly justice guidelines), which seek to set standards for a justice system that guarantees respect for and effective implementation of children's rights.[43] After widespread consultation with children and a first round of comments, the CRC Committee found that 'feeling and living the transformational significance of being a rights holder remains out of reach, as an abstract and remote prospect,

35 Committee on the Rights of the Child (n 32) para 26.
36 B Lewis 'Children's human rights-based climate litigation at the frontiers of environmental and children's rights' (2021) 39 *Nordic Journal of Human Rights* 185.
37 L Kotzé & H Knappe 'Youth movements, intergenerational justice, and climate litigation in the deep time context of the Anthropocene' (2023) 5 *Environmental Research Communications* 6.
38 P Rink and others 'Litigation by young people to hold governments to account for climate damage' (2024) 8 *BMJ Paediatrics Open* 1.
39 General Comment 26 (n 32) para 82.
40 Kilkelly (n 13).
41 Liefaard (n 14).
42 CRC Committee 'Draft General Comment 27 (202x) on children's right to access to justice and an effective remedy' (1 February 2024) CRC/C/GC/27.
43 Committee of Ministers of the Council of Europe 'Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice' (17 November 2010) CM/Del/Dec(2010)1098/10.

for many children worldwide'.[44] Children have the right to a clean, healthy and sustainable environment, as well as the right to be heard, for their views to be given due weight, and to have their rights vindicated with an effective remedy.[45] They actively pursue their rights in climate justice, and their work has broad ramifications. Still, the many failed climate cases imply that they may not have sufficient access to justice and effective remedies.

Access to justice is a broad concept. It covers a wide range of mechanisms, not limited to courts. Children interviewed in the process of drafting Draft General Comment 27 defined access to justice as being able to refer a problem or something unfair to 'someone who will listen, treat the matter impartially and provide relief, which redresses wrongs and prevents future harm'.[46] This reflects the strong connection between the right to be heard and access to justice and highlights the need for a remedy that is more than academic or symbolic.[47] Adults have their own views on what constitutes success in a climate case. Academics are interested in the effect of children's climate litigation on the theory of child rights law.[48] Lawyers are interested in the cases considering their incremental impact on the long-term strategy of global climate justice.[49] Children's views on whether or not cases are successful, and what level of access to climate justice they have achieved through the courts, as opposed to those of scholars and lawyers, must be determinative if they are to truly benefit.[50] However, detailed research on this topic is still forthcoming.[51] In its absence, a narrow and objective approach is preferable to avoid speaking for children about what they consider a success. The trend emerging from the cases is that they are often dismissed at the preliminary procedural phase, preventing them from proceeding to a full trial or hearing where the entire case is presented to the court for consideration. Whether a case was permitted to proceed to trial can be gleaned from the court papers. The result of a dismissal at the preliminary phase, inevitably, is that the child plaintiffs are not able to present their full evidence to court – limiting their ability to present their views, and to have them given due weight – and, ultimately, ruling out the possibility of being granted the remedy they sought from the court. Therefore, this article considers a dismissal on procedural grounds, denying a trial or merits hearing, a failure to access justice and an effective remedy.

A case law database hosted by the Youth Climate Justice (YCJ) project at the University College Cork records 70 child-led or child-involved climate-

44 Draft General Comment 27 (n 42) para 3. The Committee received 315 submissions as well as outcomes from over 141 consultations held on the General Comment, of which over 82 consultations involved the participation of at least 7 215 children.
45 Arts 3, 12 & 24 Convention on the Rights of the Child.
46 Draft General Comment 27 (n 42) para 2.
47 K Dosza *Children as climate citizens* (2024).
48 Daly and others (n 18).
49 Rink and others (n 38).
50 P Freire *Pedagogy of the oppressed* (1972).
51 See the Youth Climate Justice research project hosted by the University College Cork, https://www.ucc.ie/en/youthclimatejustice/research/ (accessed 6 July 2025).

related cases.[52] The database reflects the increasing trend of children and youth plaintiffs in climate litigation in recent years.[53] Daly affirms that on their own initiative, children and the youth are stretching the meaning and scope of children's rights through court cases brought individually, collectively, directly and through representatives.[54] Some of the most reported child-involved cases include *Sacchi v Argentina* (*Sacchi*),[55] where 16 children from countries all over the globe sought remedies against several high greenhouse gas-emitting countries on an international level at the UN Committee on the Rights of the Child, and *Agostinho v Portugal* (*Agostinho*),[56] where six Portuguese youths asked the European Court of Human Rights (European Court) to provide redress for violations of their rights against 33 countries who they say are not doing enough to address climate change. However, in both these cases, the child and youth applicants did not obtain a remedy. They were declared inadmissible because the plaintiffs had not exhausted local remedies before approaching these (quasi-) judicial bodies. These and 13 other cases have been brought at the international level, mainly at the UN level and in the European regional courts, with one in the Americas.[57] In addition to the international and regional cases, 55 cases have been launched at the domestic level, of which the majority are in the Americas (29 cases), nine in Europe, seven in Asia and four in Australasia. There is comparatively little child-involved climate litigation in Africa,[58] but the context is ripe.[59] African children are among the worst affected by climate change globally,[60] 25 out of the 33 countries that the United Nations Children's Fund (UNICEF) terms 'extremely high risk' for children being in Africa.[61] Africa is warming at higher rates than the rest of the world,[62] and African children are more vulnerable to its effects. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) is rightfully calling the climate crisis an 'African child rights crisis'.[63] Yet, only three cases directly represent the interests of African children, only one of which has led to the sought remedy being granted.[64]

52 Youth Climate Justice (n 7).
53 Donger (n 4).
54 A Daly 'Intergenerational rights are children's rights: Upholding the right to a healthy environment through the UNCRC' (2023) 41 *Netherlands Quarterly of Human Rights* 132.
55 *Sacchi* (n 11).
56 *Agostino* (n 11).
57 Youth Climate Justice (n 7).
58 UNEP *Global Climate Litigation Report: 2023 Status Review*; Youth Climate Justice (n 7).
59 E Boshoff & S Getaneh Damtew 'The potential of litigating children's rights in the climate crisis before the African Committee of Experts on the Rights and Welfare of the Child' (2022) 22 *African Human Rights Law Journal* 328.
60 African Children's Committee (n 25).
61 UNICEF (n 24) 120.
62 International Panel on Climate Change *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2023).
63 African Children's Committee (n 25) 3.
64 *Mbabazi & Others v The Attorney General & Another* (20 September 2012) High Court of Uganda 283/2012 (*Mbabazi v AG*) (never heard); *Various parties obo minors v Anglo-American South Africa Limited* (2020/32777) [2023] ZAGPJHC 1474 (14 December 2023) (*Children of Kabwe*) (dismissed at certification stage pre-trial); *African Climate Alliance & Others v Minister of Mineral Resources and Energy & Others* (56907/2021) [2024] ZAGPPHC 1271 (4 December 2024) (*Cancel Coal*) (remedy granted in 2024).

The fact that children are harmed by climate change and that they have the rights that should lead to a duty for state and private actors is undisputable, and yet many child litigants are not fully accessing the courts. In what seems to be a developing trend, children are storming the firmly shut gates of courts worldwide, coming away disappointed and jarred.[65]

## 3 Barriers to justice and an effective remedy globally

Despite the urgent need for climate remedies and the impressive efforts of children, access to justice remains out of reach for many plaintiffs. Child-involved cases are examined in this part, using the 70 cases analysed on the Youth Climate Justice (YCJ) case law database to determine the barriers to judicial remedies. In this article, 'child-involved cases' include cases where children are the drivers of the litigation, where they participate in the litigation, and where allies represent their interests. These include cases where the applicants are either named individual children or organisations and other individuals representing their interests, where these parties are the drivers behind a case without identified complainants. These cases have in common that they bring the courts and the parties' attention to child rights in a way that seeks to enhance children's access to rights. Some climate change adjacent cases (like some pollution cases) are included if they involve violations of the right to a 'liveable climate'. The terms 'child' and 'youth' include those up to the age of 25 years. In this article, they are collectively referred to as the youth. The words applicants, complainants and plaintiffs are used interchangeably to refer to those bringing the case to the court's attention.

In 70 per cent of youth cases (49 of the 70) on the YCJ database, the litigants have not obtained a remedy. Thirty cases have been dismissed, of which only five were heard on the merits. Twenty-six cases were found to be inadmissible and never made it to a hearing on the merits, except for two cases, in which the inadmissibility finding was overturned on appeal. Eighteen cases are pending, of which 13 have had no hearing. The average delay on the pending cases is four years, with the longest being 13 years (see Table 1).

65 Earth Justice 'UN Committee on the Rights of the Child turns its back on climate change petition from Greta Thunberg and children from around the world' 11 October 2021, https://earthjustice.org/press/2021/un-committee-on-the-rights-of-the-child-turns-its-back-on-climate-change-petition-from-greta-thunberg-and (accessed 6 July 2025).

**Table 1: Global cases without remedy**

| | Total (49) | Less than 2 years | 3-6 years | 9-13 years |
|---|---|---|---|---|
| Pending (never heard)[66] | 13 | 3<br>*CLM v Ireland*<br>*AS v Turkey*<br>*Lighthiser v Trump* | 8<br>*Haiti petition*<br>*De Conto v Italy*<br>*Uricchio v Italy*<br>*Engels v Germany*<br>*EJA v Australia*<br>*Children's Petition*<br>*UN SG*<br>*Indonesian Youth*<br>*NZ Students v BP* | 2<br>*Mbabazi v AG*<br>*Ali v Pakistan* |
| Pending (some preliminary hearing/ finding)[67] | 5 | 2<br>*ICJ Advisory Opinion*<br>*Japanese Youth* | 3<br>*Greenpeace v Norway*<br>*Delta del Paraná*<br>*Alvarez v Peru* | |
| Admissible, dismissed on merits[68] | 5 | 2<br>*North Sea Fields*<br>*Sharma* | 3<br>*Mathur*<br>*Foster v Washington*<br>*Martinez v Colorado* | |

66 *Community Law and Mediation Centre v Ireland* (9 September 2024) High Court of Ireland (*CLM v Ireland*); *AS & Others v Presidency of Türkiye & Others* (2024) Turkey Constitutional Court (*AS v Turkey*); *Lighthiser v Trump* (29 May 2025) District Court Montana 2:25-cv-00054 (*Lighthiser v Trump*); *Petition to the Inter-American Commission on Human Rights Seeking to Redress Violations of the Rights of Children in Cité Soleil, Haiti* (4 February 2021) IAm Comm of HR (*Haiti petition*); *De Conto v Italy & 32 states* (3 March 2021) ECHR 14620/21 (*De Conto v Italy*); *Uricchio v Italy & 32 states* (3 March 2021) ECHR 14615/21 (*Uricchio v Italy*); *Engels & Others v Germany* (1 September 2022) ECHR 46906/22 (*Engels v Germany*); *Environmental Justice Australia v Australia* (25 October 2021) UN Special Rapporteurs on Environment; Indigenous Peoples; Persons with Disabilities (*EJA v Australia*); *Children's Petition to the UN Secretary General to Declare a Climate Emergency* (10 November 2021) UN Secretary General (*Children's Petition UN SG*); *Indonesian Youths & Others v Indonesia* (14 July 2022) National Commission on Human Rights of the Republic of Indonesia (*Indonesian Youth*); *NZ Students for Climate Solutions & UK Youth Climate Coalition v Board of BP* (8 December 2022) ICC (*NZ Students v BP*); *Mbabazi* (n 64); *Ali v Federation of Pakistan* (2016) Lahore High Court, Punjab (*Ali v Pakist*an).

67 *Request for an Advisory Opinion on the Obligations of States in Respect of Climate Change* (1 March 2023) ICJ A/77/L.58 (*ICJ Advisory Opinion*); *Youth Climate Case Japan for tomorrow* (6 August 2024) (*Japan youth*); *Greenpeace Nordic & Others v Norway* (15 June 2021) ECHR 34068/21 (*Greenpeace v Norway*); *Asociación Civil Por La Justicia Ambiental y otros c/ Entre Ríos, Provincia de y otros* (3 July 2020) Supreme Court of Argentina CSJ 468/2020 (*Delta Del Parana*); *Alvarez & Others v Peru* (2019) Superior Court of Lima 000859-2020-0-1801 (*Alvarez v Pe*ru).

68 *Greenpeace Nordic and Nature & Youth v Energy Ministry* (2024) Oslo District Court 23-099330TVI-TOSL/05 (*North Sea Fields*); *Sharma & Others v Minister for the Environment* (2021) FCA 560 (*Sharma*); *Mathur et al v Her Majesty the Queen in Right of Ontario* (2020) ONSC 6918 ('*Mathur*'); *Foster v Washington & Others Department of Ecology* (2015) Supreme Court of Washington No 14-2-25295-1 (*Foster v Washington*); *Martinez v Colorado Oil & Gas Conservation Commission* (2019) Colorado Supreme Court 17 SC 297 (*Martinez v Colorad*o).

| | | | | |
|---|---|---|---|---|
| Ruled inadmissibility, but successfully appealed, now pending hearing[69] | 2 | | 2<br>*Youth v Mexico*<br>*La Rose* | |
| Ruled inadmissible (dismissed)[70] | 24 | 13<br>*Carvalho*<br>*Children of Austria*<br>*Genesis v Washington*<br>*Pandey v India*<br>*Raincoast v Canada*<br>*Sacchi*<br>*Sagoonick v Alaska*<br>*Salis v State*<br>*Lemme v Bayern*<br>*Habana v Mexico*<br>*Lho'imggin v Canada*<br>*Barhaugh v Montana*<br>*Clean Air v US* | 9<br>*Agostinho*<br>*JEUnesse v Canada*<br>*Aurora*<br>*Layla v Virginia*<br>*Natalie v Utah*<br>*Children of Kabwe*<br>*Aji v Washington*<br>*Alec v McCarthy*<br>*Kanuk v Alaska* | 2<br>*Juliana v US*<br>*PUSH v Sweden* |

The data reveals a disappointing reality for young climate advocates. A child litigant launching pleadings today is unlikely to be admitted to court to present the facts of their case until about four years later. They have a 50 per cent chance of never

69 *Jóvenes v Gobierno de México* (2023) District Court in Administrative Matters RA 317/2022 (*Youth v Mexico*); *La Rose v Her Majesty the Queen* (2020) T-1750-19; *La Rose v His Majesty the King* (2023) A-289-20, A-308-20 (*La Rose*).

70 *Carvalho & Others v Parliament & Council* (2018) ECJ T-330/18 2018/C 285/51 (*Carvalho*); *Children of Austria* (n 11); *Genesis B v US Environmental Protection Agency* (2025) California CD 2:23-cv-10345 (*Genesis v Washington*); *Pandey v Union of India* (2019) National Green Tribunal 187/2017 (*Pandey v India*); *Raincoast Conservation Foundation & Others v Attorney General Canada* (2019) Canada SC 38892 (*Raincoast v Canada*); *Sacchi* (n 11); *Sagoonick v State of Alaska* (2025) Alaska SC 3AN-24-06508CI (*Sagoonick*); *Salis & Others v State of Sachsen-Anhalt* (2022) Federal CC 1 BvR 1565/21; 1 BvR 1566/21; 1 BvR 1669/21; 1 BvR 1936/21; 1 BvR 2574/21; 1 BvR 2575/21; 1 BvR 2054/21; 1 BvR 2055/21; 1 BvR 2056/21; 1 BvR 2057/21; 1 BvR 2058/21 (*Salis*); *Lemme & Others v State of Bayern* (2021) Federal CC (*Lemme v Bayern*); *Habana & Others v Mexico* (2023) DC Admin Matters 11/2022 (*Habana v Mexico*); *Lho'imggin & Others v Her Majesty the Queen* (2020) FC 1059 (*Lho'imggin v Canada*); *Barhaugh v Montana* (2011) Montana SC OP 11-0258 (*Barhaugh v Montana*); *Clean Air Council v United States* (2019) Pennsylvania DC 362 F.Supp.3d 237 (*Clean Air v US*); *Agostinho* (n 11); *ENVironnement JEUnesse v Procureur General du Canada* (2021) QCCA 1871 (*JEUnesse v Canada*); *Aurora* (n 11); *Layla H & Others v Commonwealth of Virginia & Others* (2025) Virginia SC 240684 (*Layla v Virginia*); *Natalie R & Others v State of Utah* (2022) Utah SC 20230022 (*Natalie v Utah*); *Children of Kabwe* (n 63); *Aji Pexrel Piper v State of Washington* (2021) Court of Appeals for Washington 480 P.3d 438 (*Aji v Washington*); *Alec L v McCarthy* (2014) US 14-405 (*Alec v McCarthy*); *Kanuk Kanuk v State Department Natural Resources* (2014) 335 P.3d 1088, 1095 Supreme Court of Alaska (*Kanuk v Alaska*); *Juliana v US* (n 10); *PUSH Sweden, Nature and Youth Sweden & Others v Government of Sweden* (2023) Stockholm District Court (*PUSH v Swede*n).

being admitted to court at all, even after ten years of litigation, as in the *Juliana*[71] case. When the court finally dismissed their bid to enter court, no applicants were children any longer. The majority of youth climate plaintiffs in the cases have never presented their full evidence to the courts. Lengthy and burdensome court proceedings are not unique to climate litigation or to children. What is unique about climate cases is the high number of cases that fail at the preliminary stage before the merits are heard. According to Abate, standing (a preliminary issue) is a common barrier for climate litigants.[72] Auz identifies admissibility as another significant procedural hurdle that may threaten climate litigation's success.[73] Other common preliminary hurdles that keep climate litigants out of court fall under justiciability, which relates mainly to the separation of powers, according to Eckes and others, and sometimes jurisdiction.[74] These authors all allude to the need for these stringent requirements to be relaxed to ensure access to courts in climate cases. This becomes even more important when child litigants are involved.

The terms standing, admissibility, justiciability and jurisdiction represent varying meanings depending on the state, making a discussion on the global issues challenging. However, they can be collectively termed preliminary judicial inquiries or procedural hurdles. Generally speaking, the elements of the preliminary inquiry into procedural elements involve deciding three questions, regardless of what they are termed: first, whether the *court* has the power to decide a case (jurisdiction); second, whether the right *person* is before the court (standing); third, whether the case can be solved with a judicial *remedy* (justiciability).[75] What preliminary inquiries have in common is that they must be decided before a full hearing of the merits is held. They are meant to filter cases, keeping out those undeserving of the court's limited resources and time. The preliminary inquiry decides whether a court may 'receive' a case for determination.[76] The courts' failure to receive youth climate cases emerges as a problematic trend. Coupled with the existing difficulties children face when accessing courts, it may highlight a potential violation of the right to access justice and an effective remedy.

71 *Juliana* (n 10).
72 Abate (n 17).
73 J Auz 'Admissibility' in Wewerinke-Singh & Mead (n 17) 131.
74 C Eckes, J Nedevska & J Setzer 'Separation of powers' in Wewerinke-Singh & Mead (n 17) 145.
75 C Loots 'Chapter 7: Standing, ripeness and mootness' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2018).
76 A Rabie & C Eckard '*Locus standi*: The administration's shield and the environmentalist's shackle' (1976) 9 *Comparative and International Law Journal of Southern Africa* 141.

## 3.1 Trends in dismissals

> We've faced extreme resistance from the federal government, yet we've never wavered in our resolve. All great movements have faced obstacles, but what sets them apart is the perseverance of the people behind them.
>
> Miko Vergun, plaintiff in *Juliana v US.*[77]

The *Juliana*[78] plaintiffs put on a brave face after the final judgment, which ended their 10-year fight over procedural issues, but their case is a textbook example of failed access to justice for children. It should not take children ten years, seven interlocutory applications, a team of lawyers, 43 *amicus* submissions from members of congress, public justice and lawyers associations, and the support of child rights experts across the globe to be heard in a court.[79] As the *amicus curiae* in *Various Parties obo Minors v Anglo American* (*Children of Kabwe*)[80] in South Africa explains: '[T]he best interests of the child require the fixing of procedures, and procedural standards that are achievable by child litigants and those acting for them, and which ensure that the court considers the best interests of the child at every stage of these procedures'.[81]

A child rights-based approach requires preliminary proceedings to be just that, namely, preliminary. They should be expeditious, imposing a low burden on the litigants, and granting courts the widest possible jurisdiction to admit cases to be heard. The UN Committee puts a strong emphasis on the need to adapt remedial mechanisms, including procedural requirements, to ensure that remedies are available to children.[82] What *Juliana*[83] and the other delayed and inadmissible youth climate cases illustrate is a failure to adapt preliminary enquiries to the needs of children and to employ a child rights-based approach.

### *3.1.1 Individualised harm*

Plaintiff Dani R is a 17 year-old resident of Santa Clarita, California. Dani faces increasing extreme weather events due to climate change. Dani lives in a canyon where heavy rains in 2022 caused mudslides that caused severe damage to the foundation of her home and holes in the ceiling (Complaint in *Genesis B v US Environmental Protection Agency*).[84]

77 Our Children's Trust 'Press release' 24 March 2025, https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/67e16f3acf84c27786e9c14e/1742827322618/2025.24.03.JulianaCertDeniedPR.FINAL.pdf?ref=climateinthecourts.com (accessed 6 July 2025).
78 *Juliana* (n 10).
79 Our Children's Trust 'Juliana v US', https://www.ourchildrenstrust.org/juliana-v-us (accessed 6 July 2025).
80 *Various Parties obo Minors v Anglo American South Africa Limited* Supreme Court of Appeal (526/24) *(Kabwe appeal)* Written submission of *amicus curiae*: Centre for Child Law and others (24 February 2025).
81 *Kabwe appeal* (n 80) *amicus curiae* written submission para 3.
82 Draft General Comment 27 (n 42).
83 *Juliana* (n 10).
84 *Genesis* (n 70) Complaint para 40.

Perhaps the most common ground for refusing to receive a child climate case is a finding that the damage to the claimant is not unique to them *individually*. In the US, which has the strictest preliminary rules, the principle that 'injury to all is injury to none' applies.[85] Claimants in the European Union (EU) face similar problems. Before the European Court of Justice (ECJ), a claimant must prove a 'direct and individual concern'.[86] This has been interpreted to mean that a plaintiff's injury must be heightened and different from others in society. The rule is duplicated in some other Global North and other jurisdictions, applied to lesser or greater degrees depending on the state but, as Abate points out, with much inconsistency.[87]

The youth cases include nine cases dismissed for lack of individualised harm. Confirming Abate's analysis, there are three US cases,[88] one in the ECJ,[89] two in Sweden[90] and three more in Mexico, India and Canada.[91] In the US cases, *Layla v Virginia* (*Layla*),[92] *Clean Air v United States* (*Clean Air*)[93] and *Genesis v Washington* (*Genesis*),[94] the plaintiffs requested declaratory relief confirming that the state's action or inaction, which affects climate change, caused violations of their constitutional rights. In all three cases, various courts found that the plaintiffs did not meet the requirements for injuries that must be 'actual or imminent' and 'concrete and particularised'.[95] The *Layla*[96] Court, for instance, stated that the continued permitting of fossil fuel infrastructure did not result in a particularised injury but instead amounted to 'general policy disagreements'.[97] The 12 young people between the ages of 8 and 25 each described in immense detail how climate change impacts their daily lives and well-being.[98] The *Clean Air*[99] Court would not accept that the Trump administration's regulatory rollbacks on climate change contributions would cause the plaintiffs any specific harm, and that the harm they allege is neither imminent nor certain.[100] This is despite the two children (ages 7 and 11) describing personal issues relating to climate anxiety and detailed health concerns they face as a result of climate change, including being hospitalised after an extreme weather event.[101] The *Genesis*[102] Court similarly decided that

85 Abate (n 17) 107. In the USA, the injury inquiry falls within a three-pronged standing test, including attribution and redressability.
86 Abate (n 17) 113.
87 Abate (n 17).
88 *Genesis* (n 70); *Layla* (n 70); *Clean Air* (n 70).
89 *Carvalho* (n 70).
90 *Aurora* (n 11) and *PUSH Sweden* (n 70).
91 *Habana* (n 70); *Pandey* (n 70); and *La Rose* (n 10). *La Rose* was later successfully appealed and is awaiting hearing.
92 *Layla* (n 70).
93 *Clean Air* (n 70).
94 *Genesis* (n 70).
95 *Genesis* (n 70) California Federal Court Order 2:23-cv-10345 (11 February 2025) 13; *Clean Air* (n 70) Pennsylvania Federal Court Memorandum 2:17-cv-04977 (19 February 2019) 9.
96 *Layla* (n 70).
97 *Layla* (n 70) Virginia Appellate Court Opinion 1639-22-2 (25 June 2024) 14.
98 *Layla* (n 70) Complaint paras 16-73.
99 *Clean Air* (n 70).
100 *Genesis* (n 70) California Federal Court Order 2:23-cv-10345 (11 February 2025) 13.
101 *Clean Air* (n 70) Complaint paras 7-9.
102 *Genesis* (n 70).

the plaintiffs' assertion that allowing dangerous levels of climate pollution was a generalised grievance.[103] The 18 plaintiffs had each explained their particular injuries, from lung diseases caused by wildfire smoke, and disappearing cultural traditions because of the dying off of fish in the local rivers.[104]

The plaintiffs in *PUSH Sweden*[105] argued that government actions regarding the sale of coal-burning assets would cause excessive emissions, exacerbating climate change and violating their rights.[106] The Court failed to see any injury at all. In another Swedish case, *Aurora,*[107] the Court found that the 600 plaintiffs did not experience direct individualised harm because of the state's alleged inadequate climate mitigation plan, which denied them access to court. Applying the victim status test established by the European Court in *Verein KlimaSeniorinnen Schweiz v Switzerland*,[108] the Court concludes that the case could have proceeded if the plaintiffs had sued through an organisation and not individually.

The most damning finding is from the ECJ in *Carvalho,*[109] a case brought by 10 families from various European countries asking for relief requiring the EU to take more serious measures to reduce greenhouse gas emissions. The Court found that climate change affects everyone somehow and specifies that a claimant's injury must distinguish them from others by being 'peculiar to them or by reason of circumstances in which they are differentiated from all other persons' (the *Plaumann* test).[110] On appeal the plaintiffs argued that this high standard violates the right to effective judicial protection, but this argument was not accepted. To make things worse, the court ordered the plaintiffs, as the unsuccessful parties, to pay the defendants' legal costs.[111]

The very nature of climate change means that every person and every part of nature are affected in collective and individualised ways. While the plaintiffs attempt to illustrate their personal harm, the case law shows that they find it difficult to prove that their injury is greater than that of the general public or exceptionally unique.[112] If these injury requirements are not relaxed, very few climate litigations will be allowed to proceed to the merits phase, and if cost orders follow, many will be discouraged from approaching a court.

103 *Genesis* (n 70) California Federal Court Order 2:23-cv-10345 (11 February 2025) 14.
104 *Genesis* (n 70) Complaint paras 24-97.
105 *PUSH Sweden* (n 70).
106 *PUSH Sweden* (n 70) Complaint.
107 *Aurora* (n 11).
108 *Verein KlimaSeniorinnen Schweiz & Others v Switzerland* (2024) ECHR 53600/20.
109 *Carvalho* (n 70).
110 *Carvalho* (n 70) ECJ judgment (15 May 2019) para 45.
111 *Carvalho* (n 70) ECJ appeal order (25 March 2021).
112 Abate (n 17).

### *3.1.2 Attribution*

> [T]here is simply no basis to the claim that the Commonwealth's policies of approving permits for certain facilities ... are responsible for the heat rash, tick bites, reduced shellfish stocks, diminished access to places of recreation, and other injuries.
>
> Appellate Court, *Layla v Virginia*[113]

Standing requirements in some jurisdictions also require a plaintiff to show that their injury is fairly traceable to the action or inaction of the defendant. Four US cases (*Layla,*[114] *Clean Air*,[115]*, Genesis,*[116] *Natalie v Utah (Natalie)*[117]) and one Canadian case[118] failed on this account. The claim in *Natalie*[119] is similar to that in *Layla*[120] in that it alleges that the state's support of fossil fuel infrastructure, in this case the state's Fossil Fuel Development Policy, caused and contributed to dangerous air quality and climate change that harmed the plaintiffs. The Court dismissed the complaint because the plaintiffs did not tie the harm to government actions that were specific enough.[121] The US courts in the youth cases fail to see climate harms as anything more than circumstantial.

The initial dismissal of *La Rose*[122] in Canada included a finding that the claim that Canada contributes to excessive greenhouse gas emissions causing climate change was based on 'an overly broad and unquantifiable number of actions and inactions on behalf of the respondents'.[123] Climate change is caused by numerous actions and inactions, not limited to any particular, sole defendant in one clear chain of traceability. Climate damage is caused by various events at various points in time, having both short and long-term effects.[124] Climate attribution science should assist future litigants with the burden of proof in this rule. However, courts will still need to be flexible enough to accept that climate change complexities may need to be aired in more detail at the merit stage with all the evidence and personal accounts available.

113 *Layla* (n 70) VAC opinion 1639-22-2 (25 June 2024) 16.
114 *Layla* (n 70).
115 *Clean Air* (n 70).
116 *Genesis* (n 70).
117 *Natalie* (n 70).
118 *La Rose* (n 10).
119 *Natalie* (n 70).
120 *Layla* (n 70).
121 *Natalie* (n 70).
122 *La Rose* (n 10).
123 *La Rose* (n 10) Ontario Federal Court order (27 October 2020) para 40.
124 F Paz Landeira 'Temporalities in crisis: Analysing the *Sacchi v Argentina* case and children's rights in the climate emergency' (2025) 39 *Children and Society* 854.

### *3.1.3 Redressability and separation of powers*

> The defendants fight to keep children out of court – not because the children are wrong, but because they know that once young people are heard, once their stories and evidence are before the court, they win.
>
> Kelly Matheson (Our Children's Trust)[125]

The redressability requirement was the issue that finally ended the *Juliana*[126] case after 10 years of fighting over whether the court may or may not hear the case. In terms of this procedural rule, a favourable decision must be likely to redress a plaintiff's claim.[127] The relief should also be within the powers of the court to grant. It must not usurp the power of the executive branch of government, such as to draft legislation and make specific policy decisions (the doctrine of the separation of powers). It is considered at the preliminary stage and comes up again during the main hearing. Eckes and others describe the separation of powers barrier as one of the core issues in climate litigation.[128] Eight youth climate cases cite this issue as a reason for not allowing the case to proceed to a hearing on the merits – five US cases, one Canadian, one Swedish and one Austrian.[129]

The *Layla*,[130] *Natalie*[131] and *Clean Air*[132] plaintiffs only requested declaratory relief. They wanted the courts to declare that certain acts violated their rights.[133] The *Layla*[134] plaintiffs asked for injunctive relief, if proper, but did not specify what kind. The *Natalie*[135] plaintiffs did not ask for any injunctive relief at all. Both the *Layla*[136] and *Natalie*[137] plaintiffs felt confident that a mere declaration of rights and violations would provide substantive relief, as the defendants would aim to bring their conduct in line with the Constitution. However, the courts disagreed and refused to hear their evidence in trial.[138] The courts failed to see how a purely declaratory order would provide a tangible benefit.

125 Quoted from presentations at Youth Climate Justice's online event 'Child/youth participation, climate action, and success in a climate case' 21 May 2025, https://ucc.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=3120b710-9b66-4f59-a39e-b2ea00e846fc (accessed 17 August 2025).
126 *Juliana* (n 10).
127 *Diamond Alternative Energy LLC v EPA* (2025) 606 US.
128 Eckes and others (n 74).
129 *Layla* (n 70); *Natalie* (n 70); *Clean Air* (n 70); *Juliana* (n 10); *Kanuk* (n 70); *Children of Austria* (n 11), *Lho'imggin* (n 70), *Aji* (n 70), *Aurora* (n 11).
130 *Layla* (n 70).
131 *Natalie* (n 70).
132 *Clean Air* (n 70).
133 *Layla, Natalie, Clean Air* (n 70) complaints.
134 *Layla* (n 70).
135 *Natalie* (n 70).
136 *Layla* (n 70).
137 *Natalie* (n 70).
138 *Layla* (n 70) VAC opinion 1639-22-2 (25 June 2024) ; *Natalie* (n 70) Utah High Court order 20230022-SC (20 March 2025).

The *Juliana*,[139] *Kanuk v Alaska (Kanuk)*,[140] *Aji v Washington (Aji)*[141] (US) and *Lho'imggin v Her Majesty the Queen (Lho'imggin)*[142] (Canada) plaintiffs wanted declaratory relief, clarifying their rights and the duties of their states.[143] They also wanted orders requiring their states to account for carbon emissions and to adopt comprehensive plans to address climate change. The *Juliana*[144] Court stated that it was beyond its judicial power 'to order, design, supervise, or implement the plaintiffs' requested remedial plan'.[145] The other courts had similar stances, holding that a court cannot solve the plaintiffs' global climate problems[146] and that they are more appropriately dealt with by the executive and legislative branches of government. They found that climate change issues were essentially political, and that principles such as sovereign immunity prevented them from even hearing the cases.[147]

The Swedish *Aurora*[148] and the *Children of Austria*[149] Courts both refused to engage with cases on the basis that it interfered with the legislative powers of the state. The *Aurora*[150] Court found that the judiciary cannot order the executive to take specific actions because of the separation of powers doctrine.[151] One judge commented that even engagement with a case that directly or indirectly requests legislative change would violate the separation of powers doctrine.[152] The *Children of Austria*[153] plaintiffs challenged the Federal Climate Protection Act on the basis that it does not provide equal protection for children and future generations. The Court decided not to repeal the impugned section, because repeal would change the nature of the Act to the extent that it would give it new meaning and, as such, would amount to an act of legislation.[154]

Eckes and others argue that climate cases are political in nature and that a consideration of the boundaries of the court's power will inevitably surface.[155] Such questions can be fully aired at the merits hearing, where it will resurface, making an exception to this requirement at the procedural phase not irreversible. Making a final finding on the redressability at this early stage precludes the court from applying a purposive approach later on when all the evidence has been canvassed, and full impacts on child rights can be assessed. It may be premature

139 *Juliana* (n 10).
140 *Kanuk* (n 70).
141 *Aji* (n 70).
142 *Lho'imggin* (n 70).
143 See complaints.
144 *Juliana* (n 10).
145 *Juliana* (n 10) Ninth Circuit Court of Appeals Opinion 18-36082 (17 February 2020) 25.
146 *Layla* (n 70).
147 *Kanuk* (n 70).
148 *Aurora* (n 11).
149 *Children of Austria* (n 11).
150 *Aurora* (n 11).
151 *Aurora* (n11) Supreme Court (19 February 2025).
152 Sabin Centre for Climate Change Law 'Aurora case summary', https://climatecasechart.com/non-us-case/anton-foley-and-others-v-sweden-aurora-case/ (accessed 17 August 2025).
153 *Children of Austria* (n 11).
154 *Children of Austria* (n 70) CC decision 123/2023-12 (27 June 2023).
155 Eckes and others (n 74).

to make a finding of this nature before considering all the elements of the case. This was the opinion of Judge Aitken,[156] who ruled in favour of the *Juliana*[157] plaintiffs at an earlier stage.[158] She maintained that the preliminary stage is not the proper place to air all the evidentiary and jurisdictional issues, which will be aired in more depth in the trial phase in any event.[159] She alludes to the principle that the preliminary elimination phases' primary purpose is to filter out frivolous litigants, not to decide finally on the issues.[160] The state opposed children's access to court in what some call an unprecedented way and managed to get the courts to decide the core issues without hearing all the evidence, and the courts should not have allowed it.[161]

### *3.1.4 Class action*

Two cases deal with the certification of a class for a class action. This process may also be described as a preliminary inquiry. The *Children of Kabwe*[162] case aims to seek relief for a defined group of children in Zambia who have been affected by lead poisoning caused by a mine that was run by or belonged to Anglo American. The case was brought in South Africa because of the restrictive laws applicable to claims against the government in Zambia, and because the erstwhile owner of the mine, Anglo American, has an office in South Africa. Children living in Kabwe face poverty and a legal system that excludes them from obtaining relief. The *Children of Kabwe*[163] litigants seek to declare a class to allow any affected child in Kabwe to claim from the defendants should the class action be successful.[164] The preliminary stage is the part where the court must certify a class. The court must decide, among other things, whether the case is triable. The Court dismissed the application on the grounds of triability, but at no point did it consider the impact of such a decision on the ability of children to access an effective remedy elsewhere.[165]

*ENVironnement JEUnesse v Procureur General du Canada*[166] sought relief from a Canadian court to represent a class of young people under 35 in a class action alleging that Canada's inadequate climate mitigation measures violated

156 Our Children's Trust '*Youth v Gov*', https://www.ourchildrenstrust.org/juliana-v-us#:~:text=On%20December%2029%2C%202023%2C%20U.S.%20District%20Court%20Judge,dates%20from%20Judge%20Aiken%20on%20January%2019%2C%202024 (accessed 6 July 2025).
157 *Juliana* (n 10).
158 Our Children's Trust (n 156) Judge Aitken (19 April 2024).
159 As above.
160 As above.
161 As above.
162 *Children of Kabwe* (n 64).
163 *Children of Kabwe* (n 64).
164 *Children of Kabwe* (n 64) Application (20 October 2020), https://www.ucc.ie/en/youthclimatejustice/caselawdatabase/various-parties-obo-minors-v-anglo-american-south-africa-limited--others.html (accessed 6 July 2025).
165 *Children of Kabwe* (n 64) High Court order (14 December 2023).
166 *JEUnesse* (n 70).

their fundamental rights.[167] The Court dismissed the request based on the finding that the 35-year age cut-off for the class was arbitrary and not objective.[168] In both cases, the courts fail to consider the interests of children and their particular access to justice needs, which may only be addressed by special measures such as a class action. Both are being appealed. Class actions are particularly important to children as a group to ensure that the largest number of children have access to litigation.

### *3.1.5 Exhaustion of local remedies*

The decision in *Sacchi*[169] has been criticised for not applying the exception to the rule that applicants must exhaust local remedies before approaching the CRC Committee for relief.[170] *Amicus curiae* submissions by the Special Rapporteurs on Human Rights and the Environment made arguments supporting an exception on the basis that domestic courts are unlikely to bring effective relief due to the multinational nature of the problem.[171] Daly and others argue that children's unique sense of time and the disproportionate effect of climate change on children as a group may have implications for children's rights to access justice on an equitable basis with adults, affecting their non-discrimination rights under article 2 of CRC.[172] The *amici* emphasised that the passage of time in climate change matters was particularly important because of the exponential escalations and irreversible damage which ensues with each passing day. General Comment 27 refers specifically to the fact that children experience time differently.[173] Unfortunately, the Committee did not distinguish between climate cases and other cases. The European Court faced similar criticisms after the youth litigants in *Agostinho*[174] had been denied access to court for the same reason.

## 4 A child rights-based approach

> Firstly, it means children getting the attention and help that they NEED when their rights are violated.
>
> Black Girls Rising (on justice)[175]

167 *JEUnesse* (n 70) Complaint.
168 *JEUnesse* (n 70) Superior court order (11 July 2019).
169 *Sacchi* (n 11).
170 Daly (n 8) 643.
171 *Sacchi* (n 11) *amicus curiae* submissions on admissibility: D Boyd & JH Knox (Special Rapporteurs on Human Rights and the Environment).
172 A Daly, RT Stern & P Leviner 'UN Convention on the Rights of the Child, article 2 and discrimination on the basis of childhood: The CRC paradox?' (2022) 91 *Nordic Journal of International Law* 419.
173 CRC (n 41) para 25.
174 *Agostinho* (n 11).
175 Black Girls Rising (30 June 2025) 'Submission to the CRC Committee on draft General Comment 27'.

Several authors make a case for relaxing standing and admissibility requirements in climate cases.[176] This is already the case in some countries in relation to public interests or environmental cases to ensure better access to courts.[177] This argument is strengthened in the context of child rights, where the power imbalances and child-specific barriers to courts are essential considerations.

Draft General Comment 27 defines access to justice as 'the ability for children to obtain a just and timely remedy for violations of children's rights, through avenues adapted to children'.[178] It relates to both the process and the outcome. The CRC Committee confirms that states have a duty to ensure the child's right to access justice and an effective remedy, informed by the best interests of the child, non-discrimination, survival and development, and the right to be heard.[179] Practically, this means that when courts decide on whether a case will proceed to court, they must actively consider the effect of their decision on the equality, development and survival of the child, as well as their right to be heard and to have their best interests considered a primary consideration. In none of the failed youth cases did a court explain how they engaged with these principles during the preliminary inquiry stage.

A child rights-based approach to access to justice means that remedies must be available, accessible and adapted to children.[180] Justice is not limited to children being able to launch proceedings. If children are unable to advance to the merits stage, where they can share their stories with the court, their right to be heard is compromised. If children's unique vulnerabilities have no bearing on the court's decision to admit them to court, their right to equality is affected. If the court does not weigh the child's interests against the need to stave off frivolous litigants, the child's right to have their best interests considered paramount in all matters affecting them is potentially violated. A child rights-based approach requires the court's engagement with these matters.[181] It does not mean that any child litigant will be allowed into court, but rather that adaptations are made to level the playing field.[182]

Employing a child rights-based approach to access to justice may include adapting the law to allow courts the broadest possible discretion in relation to preliminary inquiries. General Comment 27 suggests that states grant

176 Abate (n 17); J Auz 'Admissibility' in Wewerinke-Singh & Mead (n 17); Eckes and others (n 74).
177 Eg India and Australia, where broader standing requirements are set out in some environmental laws. Abate (n 17) 120.
178 Draft General Comment 27 (n 42) para 9.
179 Draft General Comment 27 (n 42) para 15.
180 Draft General Comment 27 (n 42) para 5. See also the Committee of Ministers of the Council of Europe (n 43) 9.
181 L Parker and others 'When the kids put climate change on trial: Youth-focused rights-based climate litigation around the world' (2022) 13 *Journal of Human Rights and the Environment* 89.
182 Draft General Comment 27 (n 42) 5 'Due process guarantees do not preclude adequate adjustments to compensate for the power differential between children and other parties'.

courts the widest possible jurisdiction regarding subject matter, standing, class actions, territorial issues, time and representation.[183] General Comment 26 refers specifically to the complex nature of environmental cases, including transboundary effects, causation and cumulative impacts.[184] It stresses the importance of children's voices being heard despite these difficulties. It suggests adaptations such as broadening standing rules, shifting the burden of proof from plaintiffs, facilitating group complaints, accelerating time frames and designing creative remedies.[185]

The EU child-friendly justice guidelines describe child-friendly justice as accessible, adapted to and focused on the needs and rights of the child.[186] This includes adopting a comprehensive approach that considers 'all interests at stake, including psychological and physical wellbeing and legal, social and economic interests of the child'.[187] The American Declaration on Rights and Duties of Man[188] requires 'a simple and prompt procedure by which the courts can provide protection against acts of authorities that violate, to their detriment, any of the fundamental rights enshrined in the Constitution'.[189] The Inter-American Court's Advisory Opinion on the duties of states in relation to climate change contains some progressive principles on adjusted court rules for children and other groups vulnerable to discrimination, including in relation to standing and collective cases.[190] It urges states to use principles such as the *pro actione* principle, which means that courts must avoid interpretations and applications of procedural rules that prevent or hinder in an unjustified manner the possibility of a jurisdictional body to hear and resolve in law the claims submitted to it, and the interpretation most favourable to access to jurisdiction must always prevail.[191] According to the Court, 'judicial bodies should interpret and apply the relevant rules in such a way as to effectively guarantee access to material justice for those who require it in the context of the climate emergency'.[192]

## 5 Best practices from South Africa

> Through affidavits, young people were able to voice their opinions on coal.
>
> Michelle Sithole, Attorney for the applicants in *Cancel Coal*[193]

183 Draft General Comment 27 (n 42).
184 General Comment 26 (n 32).
185 As above.
186 Committee of Ministers of the Council of Europe (n 43) 9.
187 Committee of Ministers of the Council of Europe (n 43) 10.
188 Inter-American Commission on Human Rights American Declaration of the Rights and Duties of Man (DRDM) (2 May 1948).
189 Art XVIII DRDM (n 188).
190 *Advisory Opinion AO-32/25* Inter-American Commission on Human Rights (29 May 2025).
191 *Advisory Opinion AO-32/25* (n 190) para 543.
192 *The Obligations of States in Responding to the Climate Emergency* (*Advisory Opinion)* IACHR (29 May 2025) Ser A/32 OC-32/25 para 543.
193 Youth Climate Justice webinar (n 125).

Young South African climate activists recently won their first climate court case. The African Climate Alliance, an organisation made up of and led by youths between the ages of 14 and 25 years,[194] challenged a minister's decision to procure 1 500 megawatt additional coal-fired power, and won. They won the *Cancel Coal*[195] case on the very narrow grounds that the minister had failed to consider the impacts of his decision on children's rights.[196] This is a good start for a child rights-based approach in South African environmental law, but a few months later, when the Supreme Court of Appeal ruled on the exceptionally high levels of air pollution in the Highveld Priority Area (*Deadly Air*),[197] the Court was silent on children's rights. The Court received ample support from the *amicus curiae*, Centre for Child Law,[198] on the applicable child rights in domestic and international law, and its implications on the case, but the Court declined to grapple with the issues.[199]

A decisive child-focused judgment by the Supreme Court in *Deadly Air*[200] would have been helpful to children who are defending the upcoming appeal in *Cancel Coal*,[201] and those fighting to appeal the *Kabwe* judgment,[202] in which the High Court refused to certify a class for thousands of children who suffer ongoing lead poisoning from a mine in Zambia, which was previously run by Anglo American.[203] Children need firm child rights principles in law to challenge climate and pollution-related cases, especially involving private companies.[204] The South African cases are not perfect. As in the rest of the world, South African courts are still developing climate jurisprudence, especially concerning children. *Amici curiae*, such as the Centre for Child Law, is working alongside child applicants to ensure that child rights are centred in the cases and that they shape the development of the law.[205] South Africa has a liberal Constitution, rich child rights and social justice jurisprudence upon which to draw, which may guide the way forward.[206] The following part explores some of the most useful best practices from the South African context.

194 https://www.afri|canclimatealliance.org/ (accessed 6 July 2025).
195 *Cancel Coal* (n 64).
196 As above.
197 *Minister of Environmental Affairs v Trustees for the Time Being of Groundwork Trust & Others* 2025 (4) SA 98 (SCA) (*Deadly Air*).
198 The Centre for Child Law is a children's rights strategic impact litigation organisation based at the University of Pretoria, South Africa, https://www.centreforchildlaw.co.za/ (accessed 6 July 2025).
199 L Muller 'SCA moved environmental rights forward, but left children's rights behind' 27 May 2025, https://www.dailymaverick.co.za/article/2025-05-27-sca-moved-environmental-rights-forward-but-left-childrens-rights-behind/ (accessed 6 July 2025).
200 *Deadly Air* (n 197).
201 *Cancel Coal* (n 64).
202 *Children of Kabwe* (n 64).
203 *Cancel Coal* (n 64).
204 M Wewerinke-Singh & Z Nay 'Climate change as a children's rights crisis: Procedural obstacles in international rights-based climate litigation' in P Czech and others (eds) *European yearbook on human rights* (2022) 647.
205 Muller (n 199).
206 Sloth-Nielsen (n 22) 505.

### 5.1 Liberal standing

South African law departed from stringent standing requirements in the early days of its constitutional democracy.[207] Under the previous dispensation, similar stringent standing provisions to those employed today in many Global North countries were applicable.[208] However, in the 1995 case, *Ferreira v Levin* (*Ferreira*),[209] Judge President Chaskalson set the stage for a constitutional, human rights-based approach to standing:[210]

> Whilst it is important that this court should not be required to deal with abstract or hypothetical issues and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the question of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

The South African Constitution provides the widest possible standing, giving *anyone* who alleges that a right in the Bill of Rights has been infringed or threatened the right to approach a court, even if they themselves are not affected. The persons who may approach a court include anyone (a) acting in their own interest; (b) acting on behalf of another person who cannot act in their own name; (c) acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (d) an association acting in the interest of its members.[211] This wide standing is duplicated in the Children's Act. It eliminates any problems children may have under a system with strict rules regarding issues such as victim status, the need to prove direct and particularised harm, and limitations on representation.[212]

Several cases have concretised the wide standing afforded by the Constitution, relying on the principle established in *Ferreira*.[213] Transformative constitutionalism, a principle by which the courts are required to develop law in line with the Constitution, has allowed for the common law principles to progressively evolve in line with the constitutional principles of dignity, equality and freedom, as opposed to a strict application of the law as it has always been.[214] Ngcukaitobi notes that South African case law has applied wide standing to address inequality in South African society.[215] The Constitution has enabled

207 E Bray '*Locus standi* in recent case law and its possible impact on environmental litigation' (1996) 11 *SA Public Law* 590.
208 Rabie & Eckard (n 76) 145.
209 1996 (1) SA 984 (CC) para 230.
210 *Ferreira* (n 209).
211 The Constitution of the Republic of South Africa, 1996.
212 Sec 15 Children's Act 38 of 2005; sec 38 Constitution.
213 *Ferreira* (n 209); T Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' (2002) 18 *South African Journal on Human Rights* 590.
214 MJ Murcott *Transformative environmental constitutionalism* (2002).
215 Ngcukaitobi (n 213).

judges to move away from an individualised approach to standing.[216] In the words of another constitutional court judge, O'Regan J: 'In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.'[217]

A collective, as opposed to individualised, approach to standing is employed in *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs*,[218] where the Court reflected on the need to reconceptualise *locus standi* rules to address environmental harm. Because climate change will not spare anyone, everyone should be given the right to protect what will inevitably be in their own and all of society's interests. To counter floodgates arguments, the judge observed that the fear of numerous and frivolous litigation probably was overestimated in environmental matters, considering the massive barriers inherent to such cases, and that in some cases floodgates need to be opened to 'to irrigate the arid ground below them'.[219] The Court was satisfied that 'busybodies' could be sufficiently punished or discouraged with a punitive cost order.[220] Van Reenen argues that a continued individualised approach to standing is artificial and out of touch with modern realities.[221] The reality is that children, like people living in poverty, are a class who, in terms of access to courts, are 'on arid ground' and for whom the floodgates need to be opened to bridge the gap between them and those better resourced (financially and otherwise) to litigate.

### 5.2 Special roles of the courts

In *Ferreira*[222] O'Regan J confirms that courts have a new and special role in a constitutional democracy, which requires them to develop the law to adapt to the constitutional environment.[223] Murcott and Vinti argue that courts are mandated to apply transformative environmental constitutionalism to ensure that environmental decision making does not negate the realisation of rights and amount to a regression in achieving constitutional aims.[224] Murcott argues that social justice cannot exist in a malfunctioning environment. She promotes 'transformative environmental constitutionalism', which requires that courts use what she calls 'transformative adjudication' to ensure social justice through a rights-based approach and substantive reasoning that gives effect to rights and

216 As above.
217 *Ferreira* (n 209) para 230.
218 *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs* 1996 (3) All SA 462 (Tk) 473.
219 As above.
220 As above.
221 TP van Reenen '*Locus standi* in South African environmental law: A reappraisal in international and comparative perspective' (1995) 2 *South African Journal of Environmental Law and Policy* 121.
222 *Ferreira* (n 209).
223 As above.
224 MJ Murcott & C Vinti 'The judge-made "duty" to consider climate change in South Africa' (2024) 16 *Journal of Human Rights Practice* 125.

promotes social justice, dignity and equality.[225] This approach to adjudication may allow courts to consider child rights and develop procedural laws in line with international legal standards.

### 5.3 Redressability and separation of powers

The South African Constitution makes express provision for the declaration of rights as appropriate relief.[226] Where a right has been declared, the question of duty arises, and the nature and content of that duty must be determined with close consideration for the separation of powers where state defendants are involved. The Supreme Court of Appeal in *Deadly Air*[227] grappled with these issues in the context of environmental litigation. Affected communities living in what has been called the most polluted section of air in the world, applied to court to declare their rights and order the government to act. The area contains 12 coal-fired power stations, a petrochemical refinery, metal smelters and hundreds of mines,[228] contributing to the deaths of thousands of children annually.[229] The area was declared a high-priority area, but in 10 years, the Minister of the Environment had taken no action to improve air quality.[230] The applicants wanted the court to order the minister to take specific action and make regulations to implement the 'Highveld Priority Plan', which aims to bring air pollution within the legal bounds. The Court granted their relief.

If the Court had followed the *Juliana*[231] Court's approach, the remedy to order the executive to act in a particular manner would have been out of the question. That Court called the case 'an attack on the separation of powers'.[232] Liefaard comments that this approach is a serious concern for realising child rights.[233] The Supreme Court of Appeal, in *Deadly Air*,[234] applied a purposive approach to the enquiry, and found (i) that the poor air quality in the Highveld Priority Area is in breach of the constitutional right to an environment that is not harmful to health and wellbeing; and (ii) that the minister has a legal duty to prescribe regulations

225 Murcott (n 214) 132.
226 Sec 38 Constitution of the Republic of South Africa.
227 *Deadly Air* (n 197).
228 Centre for Environmental Rights, groundWork & the Highveld Environmental Justice Network *Broken promises: The failure of the Highveld Priority Area* (2017), https://groundwork.org.za/wp-content/uploads/2022/07/broken-promises.pdf (accessed 6 July 2025).
229 UNICEF 'Air pollution accounted for some 3 365 deaths of children under five years across South Africa in 2021' 20 June 2024, https://www.unicef.org/southafrica/press-releases/air-pollution-accounted-some-3365-deaths-children-under-five-years-across-south (accessed 6 July 2025).
230 Centre for Environmental Rights, groundWork & the Highveld Environmental Justice Network (n 228).
231 *Juliana* (n 10).
232 Eckes and others (n 74) 146.
233 T Liefaard (June 2025), https://www.linkedin.com/posts/ton-liefaard-838b1912_press-release-statement-on-unicef-board-activity-7341012575729397765-MaW7?utm_source=share&utm_medium=member_desktop&rcm=ACoAAALOc1sBq8dvZWlG4zZy8N6NwtA28TU_NNE (accessed 6 July 2025).
234 *Deadly Air* (n 197).

under the relevant legislation to implement and enforce the published Highveld Priority Area Air Quality Management Plan.

The *Deadly Air*[235] Court confirms what was previously found in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd & Others*[236] that the environmental right is immediately realisable under South African law. It is neither subject to progressive realisation nor dependent on the availability of resources.[237] This is an important finding for the redressability of the right. This meant that the Court could move on to the issue of whether or not it could order the minister to take specific actions. The minister argued that she had the discretion to make regulations but could not be ordered to do so, based on the separation of powers doctrine. Through a purposive, rights-informed interpretation of relevant legislation, the Court found that the minister bears a duty to the public to implement plans to reduce harm.[238] In finding whether the minister has a duty to act, the Court interpreted the permissive language (the minister *may* make regulations) of the legislation to create an obligation (the minister *must* make regulations). It ruled that making regulations was mandatory, because such an interpretation affords better constitutional protection to the affected persons. The case law confirms that the mere making of legislation or a policy to protect constitutional rights is not sufficient. The Court in *Government of South Africa v Grootboom*[239] found:

> The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive ... the formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

The rights-based approach allowed the Court to order the government to act on what necessarily had to be done to provide protection, but without specifying the plan's content. This approach could have been followed in *Juliana*.[240] The Supreme Court, however, did overturn sections of the High Court order that specified considerations to be taken into account in making the regulations, because it stated that that would violate the separation of powers principle.

235 As above.
236 2023 (4) SA 325 (CC) (23 December 2022).
237 C McConnachie 'The right to a safe environment, here and now (2024) 14 *Constitutional Court Review* 307.
238 McConnachie (n 237) 308.
239 2000 11 BCLR 1169 (CC) 42.
240 *Juliana* (n 10) Ninth Circuit Court of Appeals Opinion 18-36082 (17 February 2020) 32. The Ninth Circuit stated that 'the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes'.

### 5.4 Representation

Several youth climate cases have become stuck at the issue of whether individuals may represent the interests of others, whether the interests of future generations are relevant to the cases of those litigating today, and whether class actions should be allowed on behalf of affected groups.[241] On individuals representing those in similar situations, the courts have again adopted a broad approach.[242] In *Beukes v Krugersdorp Transitional Local Council*[243] the Court applied a broad approach to the burden of proof in standing on behalf of a class of persons, stating that formalistic requirements must not stand in the way of litigants at the procedural phase. Subsequent courts have also adopted this stance, stating that it is crucial for those who live in poverty to have access to justice. The same applies to children and future generations. In the recent *Deadly Air*[244] case, the Court went as far as to state that children have standing to bring a case before the court even if they had no personal damage but are acting solely in the interest of future generations.[245]

The South African jurisprudence provides three core lessons for youth climate justice adjudication in future, including:

(a) Where a power imbalance affects litigants, adjustments must be made to allow them access;
(b) To do so, the court must apply a human rights-based approach, considering whether its decision gives effect to the rights of the affected people.
(c) Closing the gap in access to justice requires the judiciary to be flexible and broaden archaic procedural requirements in the interest of those unlikely to obtain justice in any other way.

## 6 Lessons from ubuntu

The main barriers in children's litigation at the procedural phase can be summed up as the insistence on the presence of individualised harm (harm that is greater and different from all others in society); and a clear path of attribution of harm, coupled with the failure to accept climate change's multiple, non-linear causes and effects; and to employ a purposive human rights-based approach to achieve benefits for the broader community as opposed to the individual.

These can be summed up further as a failure to recognise the interconnectedness of all people and the environment across space and time. African law, with its underpinnings in philosophies of relationality,[246] can be employed to overcome

241 S Bookman & M Wewerinke-Singh 'Intergenerational equity' in Wewerinke-Singh & Mead (n 17) 344.
242 Ngcukaitobi (n 213) 605.
243 1996 (3) SA 467 (W) 474.
244 *Deadly Air* (n 197).
245 *Deadly Air* (n 197) para 82.4.
246 P Ikuenobe 'Relational autonomy, personhood, and African traditions' (2015) 65 *Philosophy East and West* 1005.

the legal and conceptual barriers that plague child climate litigants and to provide solutions that lead to more effective remedies. To do so, a decolonial approach must be employed, which questions dominant narratives in domestic and international law.

A decolonial approach to access to justice and effective remedies requires delinking from the currently applied norms. Legal arguments must disrupt the normalised impacts of inequality and domination. Children, through their climate litigation, are already doing this. Their cases propose disruption of major economic systems, hierarchies of power, and prioritisation of those who do not significantly contribute to the profit of those in power. If courts are going to follow suit, they will need to critically analyse 'the impacts of inequality and domination, aiming to disrupt them being seen as a given'.[247] They must then replace such assumptions with new philosophies that can address climate change. This article argues that uniquely African philosophies that engender a sense of connection and duty to community in adults and children may provide fertile ground for such a child-led revolution.

African philosophies of 'oneness' or 'humanness' are found throughout the continent under various names, and in differing contexts, but the core concept universal to all African traditions is that all beings are related to one another, and that their being is dependent on one another.[248] They derive meaning from their 'relation' to others, regardless of their position in society. In Southern Africa it is called ubuntu.[249] We are warned against simply translating the concept of ubuntu, but many words have been ascribed to it. In its most poetic form, it has been called the 'potential of being human',[250] and at its most utilitarian, the instinct to facilitate survival.[251] They all point to what ultimately is a communitarian, collective approach, captured in the phrase 'I am because you are'[252] or, in the words of Justice Mokgoro, '[i]t is a basically humanistic orientation towards fellow beings' which highlights 'the importance of sacrifice for every advantage or benefit, which has significant implicants for reciprocity and caring within the communal entity'.[253]

247 AB Tuchten 'Law's happiness: A decolonial approach to well-being and human rights' LLM dissertation, University of Pretoria, 2021 12; S Tamale *Decolonisation and Afro-feminism* (2020) xiv.

248 JR Mugumbate and others 'Understanding ubuntu and its contribution to social work education in Africa and other regions of the world' (2023) 43 *Social Work Education* 1123.

249 The focus on this manifestation of African philosophy is justified because it is widely used in literature and jurisprudence, but is not meant to elevate its importance above any other form or name.

250 Mokgoro (n 21) 17.

251 L Mbigi & J Maree J 'Ubuntu: The spirit of African transformation management' (1995) *Sigma Press Johannesburg* 7.

252 J Gathogo 'John Mbiti's ubuntu theology: Was it rooted in his African heritage?' (2022) 48 *Studia Historiae Ecclesiasticae* 4.

253 Mokgoro (n 21) 17.

Several African scholars have made the connection between ubuntu and the environment. In essence, ubuntu recognises that there is no difference between humans and the environment. That being so, we cannot separate our own well-being from that of our neighbour and nature.[254] Topidi writes that humans and the environment have no choice but to live together in harmony without exploiting one another because they are one entity.[255] Accordingly, we are incomplete without the collective, according to Ramose.[256] According to ubuntu, altruism toward nature and one another is also self-care. Mabele and others propose ubuntu as a tool to decolonise environmental solutions because it promotes life through 'mutual caring and sharing between and among humans and non-humans'.[257] It is on this basis that rivers in South America are found to be holders of rights. Feria-Tinta, in her book *A barrister for the earth* reflects that the notion that a river or a forest can be the holder of rights is not so strange if one considers that modern law has, for instance, recognised the rights of companies.[258] It is a matter of questioning what is a given in the dominant narrative. Dominant legal narratives readily accept value in recognising the property rights of unconscious financial entities. However, they question the value of protecting life itself, manifested in a river that sustains everything around and within it. Ubuntu is disruptive to Western ways of understanding the interaction between humans and the environment.[259]

Ubuntu also connects us to our ancestors and our descendants. According to Ndofirepi:[260]

> The maintenance of harmony and equilibrium in the wholeness of creation is of fundamental importance in the African world view. In order to maintain harmony in creation, one must show respect for all living things (those in the visible world, as well as the living dead – the ancestors).

The interconnectedness of ubuntu invariably leads to an accepted sense of duty, a principle that infuses African law.[261] The regional rights treaties all emphasise the need for decolonial approaches and interpretation of all rights through the lens of African values and traditions.[262] The African Charter on Human and Peoples' Rights (African Charter)[263] and the African Charter on the Rights and Welfare of

254 J McIntyre-Mills 'Recognising our hybridity and interconnectedness: Implications for social and environmental justice' (2017) 66 *Current Sociology* 886.
255 K Topidi 'Ubuntu as a normative value in the new environmental world order' in D Amirante & S Bagni (eds) *Environmental constitutionalism in the Anthropocene* (2022) 51.
256 MB Ramose 'Ecology through ubuntu' (2015) *Environmental Values* 69.
257 MB Mabele, JEB Krauss & W Kiwango 'Going back to the roots: Ubuntu and just conservation in Southern Africa' (2022) 20 *Conservation and Society* 92.
258 M Feria-Tinta *A barrister for the earth: Ten cases of hope for our future* (2025).
259 Tamale (n 247).
260 AP Ndofirepi & RN Shanyanana 'Rethinking *ukama* in the context of "philosophy for children" in Africa' (2015) 31 *Research Papers in Education* 5.
261 K Horsthemke '*Ukama* and African environmentalism' in K Horsthemke *Animals and African ethics* (2015) 94.
262 W Benedek 'Peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in P Kunig, W Benedek & CRR Mahalu *Regional protection of human rights by international law: The emerging African system* (1985) 87.
263 Organisation of African Unity *African Charter on Human and Peoples' Rights* (1981).

the Child (African Children's Charter)[264] contain rights alongside responsibilities for both adults and children.[265] This causes disruption in the Western legal thought, which is concerned that rights will depend on duties.[266] To African conceptions of well-being, rights and duties are different sides of the same coin, and a society that does not have duties toward one another cannot have rights. The African Children's Committee provides insight into the solidarity of ubuntu in its General Comment on article 31 of the African Children's Charter:[267]

> Solidarity is built on a sense of a shared humanity by all and underscores the idea of communality and the interdependence of members of a group community. It is a notion founded on the understanding that every individual is an extension of others and is a central theme in African philosophy.

The name of the African Charter itself is unique in that it specifies both 'human' and 'peoples', acknowledging that humans are part of a collective, which in itself has rights.[268] The African approach to human rights stands in stark contrast to Western approaches to human rights, which are premised on 'social atomisation and individualism' and for which the rationale of rights is the inherent value of the individual pitted against another.[269] Climate change is an inherently communal problem that needs communal answers. African philosophies may be able to provide a basis for that shift. A Western approach is useful to the vindication of some human rights, such as freedom of speech, but falls short in the context of the complicated, multi-generational, international crisis, which is climate change.[270]

The Western fixation on the requirement of individualised harm can be overcome with an African lens. By the ubuntu reasoning, all individuals' interests are implicated once environmental harm is established.[271] The indivisibility of all people and nature renders a strict 'individual injury' rule senseless. Ubuntu also requires accepting sacrifice as a necessary component of any benefit. Group solidarity and, therefore, sacrifice for collective interest are core to ubuntu. Such a decolonial approach would require reconceptualising the role of the law from being a tool of personal defence to something which allows everyone to thrive within a community.

The way in which children experience climate change is unique.[272] Landeira argues that climate change anxiety disproportionately impacts children because

264 Organisation of African Unity *African Charter on the Rights and Welfare of the Child* (1990).
265 Benedek (n 262) 87.
266 J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 174.
267 African Children's Committee 'General Comment 4 on article 31 of the ACRWCR on the Responsibilities of the Child' (2018) para 71.
268 Viljoen (n 19) 18.
269 A Claude 'The African context of human rights' (1987) 34 *Africa Today* 5.
270 J Wilkens & ARC Datchoua-Tirvaudey 'Researching climate justice: A decolonial approach to global climate governance' (2022) 98 *International Affairs* 125.
271 L le Grange 'Ubuntu, ukama and the healing of nature, self and society' (2011) 44 *Educational Philosophy and Theory* 56.
272 Paz Landeira (n 124) 855.

of the intensified way in which they experience the fastness and inevitability of the crisis and the slowness of the law/judicial systems.[273] A child rights-based approach, therefore, will require flexibility in procedural rules that is able to consider immediate harm and future risks simultaneously. Tamale explains that African philosophies conceive of time as a spiral. It is multidimensional and multilayered and cannot be fixed.[274] It is able to contain the complexities of children's experience of time and climate change. The African Children's Committee was able to accommodate children's unique experiences of time in *IHRDA & Another v Kenya* (*Nubian minors*),[275] where they granted an exception to the rule that local remedies must be exhausted.[276] In its decision on the preliminary stages of the case, the Committee expressly considers the best interests of the child and finds that an unduly prolonged domestic remedy cannot be considered to fall within the ambit of 'available, effective, and sufficient local remedy' and warrants an exception.[277] In the words of the African Children's Committee:[278]

> A year in the life of a child is almost six per cent of his or her childhood ... States need to adopt a 'children first' approach with some sense of urgency. The implementation and realisation of children's rights in Africa is not a matter to be relegated to tomorrow, but an issue that is in need of proactive, immediate attention and action.

African philosophies have been used as an interpretive principle at the domestic level, most prominently in South Africa. South African constitutional jurisprudence is heavily influenced by what Constitutional Court Justice Mokgoro called 'indigenous values' in the very first case to be heard by the Court.[279] Without an established jurisprudence, she relies on ubuntu as a system of values extraneous to the constitutional text, which is intrinsic to its historical context, to inform its interpretation. The South African courts went on to rely on and expand the definition of ubuntu in many subsequent cases,[280] across both the public and private spheres, offering a unique insight into how such a 'metanorm'[281] can push the law beyond the colonially imposed boundaries, making South African constitutional jurisprudence one of the most progressive in the world. Infusing law with particularly African values has allowed South African courts to give effect to rights in a more tangible way, which speaks to the realities of affected people and addresses colonial inequalities. That being said, there are those (Ramose) who argue that South African constitutionalism has not

273 Paz Landeira (n 124) 856.
274 Tamale (n 247).
275 (2011) AHRLR 181 (ACERWC 2011).
276 E Durojaye & EA Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 12 *African Human Rights Law Journal* 564.
277 *Nubian minors* (n 275) para 32.
278 *Nubian minors* (n 275) para 33.
279 *S v Makwanyane* 1995 (3) SA 391 (CC) para 300.
280 TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30.
281 Bennett (n 280).

gone far enough and that its essence as a colonial compromise limits its ability to truly embody ubuntu.[282]

In finding the death penalty unconstitutional, the South African Constitutional Court stated that the death penalty was the 'antithesis of ubuntu', a violence that poisons not only the individual but the entire society.[283] The Court relied on the dignity of the individual (the accused), as well as the communal entity, making a compelling case for abolition of the death penalty, a fiercely retributive punishment, which neither benefits the victims, nor rehabilitates the criminal. A similar approach was employed by the Truth and Reconciliation Commission, in which perpetrators of apartheid could obtain acquittal in exchange for telling the whole truth of their politically motivated crimes.[284] The benefit of bringing the horrors of apartheid into the light, and for families to know what happened to their loved ones, was considered more beneficial for the South African people as a group than the punishment of the individual. For instance, this can be contrasted with the approach employed in international law in the Nuremberg trials.[285] It promotes a reconciliatory approach as opposed to a retributive approach and prefers a solution useful to society above one which satisfies only a few individuals. When the time comes, judges can use ubuntu, as Justice Mokgoro once did, to interpret fundamental rights through the lens of the values of ubuntu, finding that razing the earth, depleting its resources, and leaving only destruction for future generations might be the antithesis of ubuntu.[286]

## 7 Conclusion

Children's climate litigation plays a significant role in their strategies for achieving climate justice, but the unreformed ways of interpreting and applying procedural rules, which gatekeep access to courts, are proving to be a key barrier to their accessing remedies. Current guidelines and standards do not adequately address barriers to access to justice for children which relate to procedural hurdles such as standing, admissibility, jurisdiction, and justiciability. There is a need to adjust laws by applying a child rights-based approach to procedural inquiries. This requires courts to decolonise legal approaches and integrate indigenous philosophies, such as Southern Africa's ubuntu, to bridge the gaps in children's access to climate remedies. Ubuntu, with its emphasis on relationality, interconnectedness of all beings and the collective good, offers a powerful lens to address climate change's complex, multi-generational nature. Children's active presence in the courts, or

282 MB Ramose 'Ubuntu: Affirming a right and seeking remedies in South Africa' in L Praeg & S Magadla (eds) *Ubuntu: Curating the archive* (2014) 121.
283 *Makwanyane* (n 279) para 225.
284 South African History Online 'Truth and Reconciliation Commission' 23 November 2018, https://sahistory.org.za/article/truth-and-reconciliation-commission-trc-0 (accessed 6 July 2025).
285 R Rotberg 'Truth commissions and the provision of truth, justice, and reconciliation' (2000) 3 *Truth v Justice: The Morality of Truth Commissions* 12.
286 *Makwanyane* (n 279).

*lekgotla*, presents a unique opportunity for judicial systems to engage with these child-centred and decolonial approaches. By adopting such perspectives, courts can move beyond traditional limitations and provide more relevant and effective solutions to climate injustice, benefiting not only children but society as a whole.