

Protecting the African child in a changing climate: are our existing safeguards adequate?

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ABSTRACT: This paper sets out the ways in which children in Africa are vulnerable to the consequences of climate change, highlighting where relevant the specific vulnerability of the girl child. It identifies vulnerabilities in access to education, nutrition, the rights of migrants and refugees and the right to participate in decision-making processes. The paper considers these vulnerabilities in the context of the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Rights Protocol), and also looks at specific best practices in attempting to determine the extent to which the African human rights system currently provides adequate protection to children and complies with the best interest of the child principle. It concludes by finding that the African human rights system, particularly when the African Women's Rights Protocol is read in conjunction with the Children's Charter, largely provides adequate legal protection to the African child in a climate change context, but identifies room for improvement both in the right to sustainable development and the implementation of the rights as stipulated in the respective instruments, as it relates to climate change induced vulnerability.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Protéger l'enfant africain dans un climat changeant: les moyens de protection existants sont-ils adéquats?

RÉSUMÉ: Cet article expose les façons dont les enfants en Afrique sont vulnérables aux conséquences du changement climatique en soulignant, lorsque cela est nécessaire, la vulnérabilité spécifique des filles. Il identifie les vulnérabilités dans l'accès à l'éducation, la nutrition, les droits des migrants et des réfugiés et le droit de participer aux processus de prise de décision. L'article examine ces vulnérabilités dans le contexte de la Charte africaine des droits de l'enfant et du Protocole relatif aux droits des femmes en Afrique, et examine également les meilleures pratiques spécifiques pour déterminer dans quelle mesure le système africain des droits de l'homme offre actuellement une protection adéquate aux enfants en prenant en considération le principe de l'intérêt supérieur de l'enfant. Il conclut en constatant que le système africain des droits de l'homme, en particulier lorsque le Protocole relatif aux droits des femmes en Afrique est lu conjointement avec la Charte des enfants, fournit une protection juridique adéquate à l'enfant africain dans un contexte de changements climatiques mais identifie des possibilités d'amélioration dans le contexte du droit au développement durable et à la mise en œuvre des droits tels que stipulés dans ces instruments respectifs, en ce qui concerne la vulnérabilité induite par le changement climatique.

KEY WORDS: African Charter on the Rights and Welfare of the Child, climate change, children, rights, Africa, best interest of the child

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1 INTRODUCTION

Climate change is a phenomenon that results from increased greenhouse gasses being released through the burning of wood and fossil fuels, which results in more heat being trapped into the atmosphere.¹ The consequences include increased flooding and drought as rainfall patterns shift and become less predictable, a rise in sea levels as a result of melting ice in the polar regions as well as increased natural disasters, biodiversity destruction and spread of disease resulting from warming temperatures on land and sea. The impact of these consequences on humans include food insecurity where more erratic rainfall combined with higher or lower temperatures result in less crops being produced, water shortages as a result of increased drought, often together with flash floods and other natural disasters and a heightened risk of displacement and migration as some areas become uninhabitable.² Certain illnesses are also becoming more widespread as a result of a changing climate.³ As temperatures increase, malaria is spreading into the higher and previously colder regions of East and Southern Africa.⁴ The prevalence of water-borne diseases such as hepatitis E, cholera, diarrhoea and parasitic infections

¹ The Inter-governmental Panel on Climate Change, the most authoritative body on climate science in its Fifth Assessment Report found that it is beyond reasonable doubt that climate change is taking place and that there is a 95per cent chance that it is as a result of human activities. IPCC 'Climate Change 2014: Synthesis Report' (2014) *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*.

² JJ Romm 'Present and future climate realities for children' in UNICEF (ed) *The challenge of climate change: children on the front line* (2014) 6; R Hanna & P Oliva 'Implications of climate change for children in developing countries' in The Future of Children (ed) (2016) *Children and climate change* http://www.futureofchildren.org/publications/journals/journal_details/index.xml?journalid=86 (accessed 25 September 2016) 115; I Niang *et al* 'Africa' in IPCC Working Group II (ed) (2014) *Impacts, adaptation, and vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1237-1238.

³ United Nations Development Programme 'Resource Guide on Gender and Climate Change' (2009) <http://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/resource-guide-on-gender-and-climate-change.html> (accessed 12 October 2017).

⁴ United Nations Women Watch 'Fact Sheet: Women, Gender Equality and Climate Change' (2009) 4; Climate and Development Knowledge Network (CDKN) 'The IPCC's Fifth Assessment Report: What's in it for Africa?' (2014) 11 http://cdkn.org/resource/highlights-africa-ar5/?loclang=en_gb (accessed 10 October 2016).

is also increased by the increased strain that flooding, natural disasters and rising sea levels place on water and sewage systems.

Migration or forced displacement, while it has many causes (including war, conflicts, lack of opportunities and natural disasters) can also result from climate change, in conjunction with other causes. Indications are that the 'total numbers of climate-related migrants by the middle of the century' may be between 200 million to over one billion, which even at the lower side of the spectrum, constitutes a vast migration of people.⁵ The most obvious form of climate-induced migration or displacement is where rising sea levels claim low-lying areas, forcing people to move inland. In other cases climate change may be one of a number of factors resulting in migration, for example increased variability in rainfall in areas that are already drought prone may lead to conflict over limited resources resulting in displacement of communities. Yet in such cases climate change is still an important catalyst for the displacement and must thus be counted among its causes. Many of these effects are already present and measurable on the African continent.⁶

Together with other parts of the developing world, Sub-Saharan Africa is particularly prone to suffer the consequences of climate change because of its position on and close to the equator, where the most drastic changes in weather patterns are projected to take place.⁷ Other causes of its particular vulnerability include the high levels of poverty and under-development and high dependence on natural resources for livelihoods.⁸ These factors impact on the resilience of communities and make it harder to 'bounce back' when disaster strikes because of a lack of resources in reserve.⁹ It is in this context that this article argues states have an obligation to take steps to protect people against the worst consequences of climate change, through mitigation and increasing resilience through adaptation and disaster risk management.

Children have specific vulnerabilities to climate change because of the direct threat that these risks pose to their survival, development and mental and physical well-being.¹⁰ Children are also reliant on adults for security and are physically, psychologically and emotionally immature,

⁵ International Organisation for Migration 'Migration and climate change' (2008) 31 *Migration Research Series* 11.

⁶ African Union 'Draft African Union Strategy on Climate Change' (2014) 1, 8; CDKN (n 4 above) 1, 11.

⁷ MIT Technology Review 'Climate Change: Why the Tropical Poor Will Suffer Most' 17 June 2015 at <https://www.technologyreview.com/s/538586/climate-change-why-the-tropical-poor-will-suffer-most/> (accessed 12 October 2017).

⁸ UN Women Watch (n 4 above) 1.

⁹ United Nations Environmental Programme (UNEP) 'Guidebook on national legislation for adaptation to climate change' (2011) 5; ANCEN (Experts Group of African Ministerial Conference on Environment) 'Guidebook – Addressing climate change challenges in Africa: a practical guide towards sustainable development' (2011) 3.

¹⁰ CC Venton 'Why we need a child-centred approach to adaptation' in UNICEF (ed) *The challenge of climate change: children on the front line* (2014) 32; J Guillemot & J Burgess 'Children rights at risk' in *The challenge of climate change: children on the front line* (2014) 32; J Currie & O Deschênes 'Children and climate change: introducing

with repercussions of negative impacts often manifesting over the course of a lifetime.¹¹ In the African context children make up more than 40 per cent of the population.¹² Furthermore, for physical and socially constructed reasons, the impact of climate change differs between girl children and boy children. For all of these reasons it is necessary to look specifically at the needs of children in a changing climate and the obligations that regional international law places on states to protect them.

This article considers the particular vulnerability of the African child to a changing climate and examines the extent to which the existing rights of children, and where relevant rights of girl children specifically, are protected particularly in the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol), address these vulnerabilities. At the same time, it considers some examples of international best practice to determine the extent to which the African human rights system can learn from this, in order to better protect the interests of the child on a continent bearing the brunt of a changing climate. The aim of this article, while firstly to gain a better understanding of the way in which the African child is particularly at risk of climate change, is mainly normative, and sets out to identify the challenges or gaps that exist in the rights themselves and in the implementation of the rights of children and considers some of the ways in which this may be improved, to ensure that the principle of the best interest of the child is complied with and the vulnerabilities of children, particularly girl children, are addressed.

2 CLIMATE CHANGE AND THE AFRICAN CHILD

Intersectionality theory expounds that the lived experiences of people is the result of many factors, and that it is not possible to gain a full understanding of the situation of specific people without consideration of their intersecting identities. McGibben and McPherson explain it as follows:

Identities, sometimes referred to as identity markers, intersect to compound oppression. Age, culture, (dis)ability, ethnicity, gender, immigrant status, race, sexual orientation, social class, and spirituality all denote social location, a powerful determinant of one's access to the social and material necessities of life.¹³

the issue' in *The Future of Children* (ed) (2016) Children and Climate change http://www.futureofchildren.org/publications/journals/journal_details/index.xml?journalid=86 (accessed 25 September 2016) 3, 4.

¹¹ UNICEF UK 'No place to call home: Protecting children's rights when the changing climate forces them to flee' 4.

¹² World Bank 'Population Ages 0-14 (per cent of total) data for 2016 indicates that 42per cent of the population in Sub-Saharan Africa were between ages 0 to 14 years. <http://data.worldbank.org/indicator/SP.POP.0014.TO.ZS?locations=ZG> (accessed 12 October 2017).

¹³ E McGibben & C McPherson 'Applying Intersectionality & Complexity Theory to Address the Social Determinants of Women's Health' (2011) 61.

Children in Africa come from different cultural, religious, ethnic and social backgrounds among many other identity markers, which means that they have many-varied lived experiences, which may compound or decrease their vulnerability to climate change. The category of 'children' also includes everyone below the age of 18 years, which means that the category includes persons with vastly different capacities, e.g. a three-year-old and fifteen-year-old would have completely different lived experiences and capacities to cope with climate stressors. Despite this, and as identified above, the category of 'children' is still a useful delimitation, because what children share is a physical, psychological and emotional immaturity as well as the fact that they are at the beginning of their lives, with many years of their lives ahead, which makes their collective vulnerability of significant concern. In the case of girl children, their particular vulnerability to the effects of climate change result from the intersectionality of their vulnerabilities based on sex, age and in the African context, often also religious and socio-economic circumstances.

A first instance in which children are particularly affected as a result of a changing climate, is the right to education. In rural communities where families depend on subsistence farming or another form of reliance on natural resources for sustenance, the consequences of variations in rainfall patterns, soil salinisation and shrinking water resources may be dire. The Inter-governmental Panel on Climate Change in its fifth Assessment Report of 2014 indicate that major crops in Africa, such as maize, millet and sorghum, are highly sensitive to changes in temperature, and crop losses across Sub-Saharan Africa could average 22 per cent, and up to 30 per cent in South Africa by the year 2050.¹⁴

Apart from food security which affects all people, in Sub-Saharan Africa currently agriculture accounts for '65 percent of Africa's labour force'.¹⁵ This may result in children being taken out of school (a) because parents no longer have the means to pay for education, (b) to work on the family farm in an attempt to increase crop output or to find alternative employment as a means of supplementing the family income, (c) to take over the household and food production duties from parents who may migrate to the cities in search of better employment opportunities or (d) as water and fuel becomes less accessible, to perform water and fuel sourcing duties from further locations.¹⁶ Most

¹⁴ CDKN (n 4 above) 20.

¹⁵ World Bank 'Fact Sheet: The World Bank and agriculture in Africa' <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21935583~pagePK:146736~piPK:146830~theSitePK:258644,00.html> (accessed 12 October 2017).

¹⁶ Children in a Changing Climate Coalition 'Child-centred adaptation: Realising children's rights in a changing climate' (2015) 24; OC Ruppel 'Climate change and human vulnerability in Africa' in OC Ruppel & K Ruppel-Schlichting (eds) *Environmental law and policy in Namibia* 284; PLAN International 'We stand as one: children, young people and climate change' (2015) 28-31; UNICEF (n 11 above) 13.

of these responsibilities are more likely to fall on girl children than boy children.¹⁷ This kind of trend has the effect of ‘perpetuating the cycle of disempowerment’ experienced by girl children, who are then less likely to complete their education and find better employment opportunities.¹⁸ Moreover, even if girls are able to balance the duties of searching for resources further from home with education, they ‘become more vulnerable to injuries from carrying heavy loads long distances, and also face increased risk of sexual harassment and assault’ on the way to and from remote resource locations.¹⁹

Secondly, children of both sexes are impacted by lack of nutrition because of food insecurity, which leads to stunting in growth and impacts on the mental development of children, particularly where undernutrition takes place within the first two years of the child’s life, in which case the consequences may be ‘irreversible, with life-long implications for physical, cognitive and reproductive health’.²⁰ UNICEF presents data which indicates that ‘[m]alnutrition represents a major danger to children’s lives, contributing to nearly half of all deaths in children under five’.²¹ Also in this regard girl children are often worse affected, with female health declining more during food shortages as compared to male health.²²

Thirdly, children are more vulnerable to the hardships associated with forced migration, which include not only physical strain and deprivation of socio-economic rights but also emotional suffering and the possibility of being separated from their family, all of which may have repercussions for their development and future well-being.

Displaced children and their families lose much more than shelter when forced out of an area. They lose access to health care, education, livelihoods, social services and networks, religious services, political autonomy, and the security and identity associated with a sense of home. Children that become separated from their parents and other family members are more likely to experience violence, exploitation or abuse. Long-term implications of psychological and physical childhood trauma can extend to impacts on their health, education and economic well-being over their lifetime.²³

Migration or forced displacement as a result of climate change can take various forms. Children and particularly adolescents may migrate from rural areas into the cities, looking for better opportunities, parents may

¹⁷ Children in a changing climate & Plan International ‘Weathering the Storm: Girls and Climate change’ 1; UN Women Watch (n 8 above) 2.

¹⁸ UN Women Watch (n 8 above) 2.

¹⁹ As above.

²⁰ KL Ebi ‘Childhood health risks of climate change’ in UNICEF (ed) *The challenge of climate change: Children on the front line* (2014) 8; JJ Romm ‘Present and future climate realities for children’ in UNICEF (ed) *The challenge of climate change: Children on the front line* (2014) 6; UNICEF East Asia and Pacific Regional Office (EAPRO) ‘Children and Climate Change: The impacts of climate change on nutrition and migration affecting children in Indonesia’ (2011).

²¹ Unicef Data ‘Malnutrition’ <http://data.unicef.org/topic/nutrition/malnutrition/> (accessed 7 October 2017).

²² UN Women Watch (n 8 above) 2.

²³ UNICEF (n 11 above) 4.

leave for the cities, often leaving their children with extended family (where it has been shown they are at a heightened risk of abuse)²⁴ or in the most extreme cases migration can be across national borders. This can range from smaller displacements, such as the 90 000 people displaced by floods in the Zambezi River Valley during 2008, to more than 2.6 million people displaced by the drying up of large parts of Lake Chad.²⁵ Whether because of internal displacements, often the result of a natural disaster, or beyond their borders, people in camps for internally displaced persons or refugees face further violations. In such camps there is often no provision for separate facilities for women and children, 'who may put off going to the toilet until it is dark' in order to have some privacy, which then exposes them to 'the risk of sexual violence'.²⁶ Other challenges related to privacy relate to the 'ability and willingness' of mothers to breastfeed in crowded camp conditions, the absence of which leads to an increased risk of 'malnutrition and infectious disease in infants'. Another challenge is the lack of priority given to education in these camps, with 'only half of child refugees globally [...] enrolled in primary schools globally'.²⁷ Finally, in the chaos resulting from migration, more particularly following natural disasters, there is a risk of children being separated from their families, which heightens the risk of sexual and other abuse.²⁸ In cross-border migration it is particularly adolescent girls who are at risk of sexual violence and exploitation, 'including at borders when corrupt government officials or smugglers may demand sex in exchange for onward passage'.²⁹

As discussed briefly above, climate induced migration is closely linked to conflict, both as a cause and a consequence. There is some evidence that 'the shrinking of Lake Chad to a tenth of its former size' is the result of climate change in conjunction with over-use, and the resultant migration of 2.6 million people, including 1.5 million children, looking for alternative water and food sources 'contributed to the pressures triggering the conflict in the region'.³⁰ The conflict in Darfur has also been characterised by the previous UN Secretary General as a 'climate' conflict.³¹ Such migration and conflict resulting from climatic pressures lead to increased risk of violence against

²⁴ UNESCAP 'Regional Stakeholders' Consultation and Planning on the Commercial Sexual Exploitation of Children and Child Sex Abuse in the Pacific' (2007).

²⁵ CDKN (n 14 above) 11.

²⁶ UNICEF (n 11 above) 17.

²⁷ UNICEF (n 11 above) 11; UNICEF 'Uprooted: the growing crisis for refugee and migrant children' (2016).

²⁸ Children in a Changing Climate Coalition (n 16 above) 24; Ruppel (n 16 above) 284.

²⁹ DJJ O'Connell 'Telling tales: child migration and child trafficking: stories of trafficking obscure the realities for migrant children' (2013) 37 *Child Abuse & Neglect* 1069-1079.

³⁰ UNICEF West and Central Africa Regional Office 'Children on the move, children left behind' (2016) www.unicef.org/media/files/Children_on_the_Move_Children_Left_Behind.pdf (accessed 12 October 2017); UNICEF (n 11 above) 18.

³¹ Ban Ki Moon 'A climate culprit In Darfur' in *Washington Post* 16 June 2007 <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501857.html> (accessed 12 October 2017).

children, labour and sexual exploitation which has the biggest impact on girl children, who may be 'forced into marriage, domestic servitude, cheap labour, and sexual exploitation'.³² Not just during migration and conflict, but also generally '[i]n times of hardship, child marriage is also likely to increase' as families try to ease the burden on their limited resources.³³

Finally, with regard to the right to participation, children are often overlooked in discussions about how best to address climate change challenges. This is because children are often regarded as unable to grasp the problem, or unable to contribute in a constructive and meaningful way to its solution. However, numerous case studies, among others conducted by UNICEF, have proven the valuable input that can be provided by children, once they are empowered with the necessary knowledge.³⁴ Girl children, because of their particular vulnerability, also have a very specific perspective to contribute to discussions on how to mitigate and adapt to a changing climate. But because they are often slotted under the heading of either 'children' or 'women', their specific needs resulting from their intersecting identities are often overlooked. Girl children are also the group least likely to participate in decision-making processes, either because of socialisation which diminishes the worth of their opinions or because of lack of relevant child-friendly information.³⁵

While lack of access to education, malnutrition, sexual exploitation and the other impacts set out above are all complex issues with multiple causes and the extent to which climate change is in a 'complex interaction ... with other social, economic, political and cultural drivers' makes it hard to quantify the exact causal relationship, scientists have repeatedly established that there is a link between climate change and increases in the violations set out above.³⁶ For this reason it is necessary in the quest to finding holistic solutions, to recognise the role played by climate change in contributing to and exacerbating these violations.

Having considered some of the impacts, including gendered impacts arising from physical or socially constructed differences between the sexes, of climate change for African children, the next section will attempt to ascertain the extent to which there is protection in the African human rights system against these human rights violations perpetrated against children in a climate change context.

³² UNICEF (n 11 above) 17; Children in a Changing Climate Coalition (n 16 above) 1; UNODC 'Current Status of victim service providers and criminal justice actors in India on Anti human Trafficking' (2013) http://www.unodc.org/documents/southasia//reports/Human_Trafficking-10-05-13.pdf.

³³ UNICEF (n 11 above) 17; Children in a Changing Climate Coalition (n 16 above) 1.

³⁴ UNICEF (n 11 above) 22.

³⁵ Children in a Changing Climate Coalition (n 16 above) 2; UN Women Watch (n 8 above) 2.

³⁶ UNICEF (n 11 above) 3, 5; IPCC (n 2 above); CDKN (n 15 above) 24. See also J Barnett & WN Adger 'Climate change, human security and violent conflict' (2007) 26 *Political Geography* 639-655; S Caney 'Climate change, human rights and moral thresholds' in Gartner *et al Climate ethics* (2010) 163-177.

3 PROTECTION OF THE CHILD UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

Under the African human rights system there are particularly two instruments which are of significance in the protection of the rights of children, namely, the African Children's Rights Charter and in the case of the girl child, the African Women's Rights Protocol. These two instruments are undergirded by the rights protected in the African Charter on Human and Peoples' Rights (African Charter), but, for the current purposes, reliance will be placed on the former two instruments, insofar as they provide more extensive protection of the rights of the child. However, where there is no relevant provision on a specific right in either of these instruments, regard will be had to the African Charter itself. This section will deal with the vulnerabilities set out above under specific but interrelated themes of rights, starting with the rights/principles at the core of the African Children's Rights Charter and then looking at rights related to a clean environment, education, migration and access to information and participation, in an attempt to ascertain the responsibilities which this places on African states.

3.1 Basic principles in the African Children's Rights Charter

There are a number of principles which are set out at the start of the African Children's Rights Charter, which form the bedrock of the other rights protected in the Charter, but which are also rights in themselves.³⁷ The first in the right to non-discrimination, which is set out in article 3 of the Children's Charter and provides that every child is entitled to the enjoyment of the rights in this Charter, irrespective of a number of grounds of discrimination, including ethnic group, colour, sex, language and social origin.³⁸ The right not to be discriminated against is a right which applies both by itself, and in conjunction with other rights. As a right in itself, the prohibition of discrimination on the ground of sex, for example, means that there may not be discrimination against girl children. However, while formal equality may be easy to

³⁷ These 'four pillars' were originally identified by the United Nations Committee on the Rights of the Child as forming the basis of the United Nations Convention on the Rights of the Child, but they equally apply to the African Children's Charter.

³⁸ The right to non-discrimination and equality is also a general principle of human rights and can similarly be found in article 2 of the African Charter and article 2 of the African Women's Rights Protocol, with slight variances as to the grounds of discrimination which are prohibited, the latter obviously focussed on sex and gender. Various provisions under the African Women's Rights Protocol have also been interpreted as having a character of transformative equality, which goes beyond formal and substantive equality in order to change the values and 'underlying structure' of a society. See S Fredman 'Beyond the dichotomy of formal and substantive equality: towards new definitions of equal rights' in I Boerefijn *et al* (eds) *Temporary special measures: accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 111.

achieve, substantive and transformative equality may be more elusive, since the root causes of inequality is often deep-seated in the values of society.³⁹ To the extent that this principle must be understood in the context of other rights, it will be further discussed below.

The second principle is the inherent right to life, which under the African Children's Rights Charter is protected under article 5 dealing with survival and development. The right to life is relevant in the context of nutrition, as identified above, where food security is often threatened by climate induced circumstances and also relates to the right to health protected under article 14 of the African Children's Rights Charter, specifically subsections (c) and (d) which relate to nutrition. The right to life is also relevant in the context of conflict, and will be discussed as such below. The further two bedrock principles are both found in article 5 of the African Children's Rights Charter and are 'the best interest of the child', which must be the primary consideration in all decisions related to the child and the right of the child to participate and express their own views, to the full extent of their capabilities. The right to express their views will be returned to below in the section related to participation.

The best interest of the child is an interesting principle which has often been used as a standard to measure the protection of children's rights, particularly, where there are no specific rights dealing with a specific aspect, as in the current case, climate change.⁴⁰ In terms of UN Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (GC14), the best interest of the child must be understood as a substantive right of all children, as an interpretive principle when read together with other rights and as a rule of procedure. Furthermore, in the interpretation of the best interest of the child the state must ensure that the dignity of all children is respected (a negative duty) as well as ensure the 'holistic development of every child', which implies a positive duty.⁴¹ In an attempt to formulate the best interest of the child principle clearly, Mauras states that the best interest implies that all policies and distribution of resources must 'be used in a progressive

³⁹ Fredman (n 38 above).

⁴⁰ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya*, Communication 2/2009 of the African Committee on the Rights and Welfare of the Child, delivered on 22 March 2011; Decision on the communication *Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la defense des droits de l'homme (Senegal) v Senegal* Decision 3/Com/001/2012 on 15 April 2014 at the 23rd Ordinary Session of the Children's Committee; JB Kelly 'The best interests of the child a concept in search of meaning' (1997) 35 *Family and Conciliation Courts Review* 377; M Freeman 'Article 3 the best interest of the child' in A Alen *et al* (2007) *A Commentary on the United Nations Convention on the Rights of the Child* 1-2.

⁴¹ United Nations Committee on the Rights of the Child (CRC) General Comment 14 'On the right of the child to have his or her best interests taken as a primary consideration' adopted on 29 May 2013 at the 62nd session of the CRC (GC14) para 42.

way' to fulfil the best interest of the child 'to the maximum extent possible'.⁴² Thus for example, based on the already manifesting and projected ramifications of climate change, the fact that all states to a greater or lesser extent contribute to climate change,⁴³ and the positive duty implied by the best interest of the child, states may have a legal obligation under the African Children's Rights Charter to mitigate climate change. When the best interest of the child principle is read in conjunction or as interpretative principle in the context of other rights in the African Children's Rights Charter and the African Women's Rights Protocol, it may provide a strong legal basis for climate change mitigation and adaptation duties on states.

There are also international and regional soft law instruments which, while not enforceable, have some strength in encouraging states to adopt certain patterns of behaviour. In this regard, the current development policy at the level of the African Union, Agenda 2063, has two aspirations that are of relevance here: the first Aspiration is to build 'a prosperous Africa based on inclusive growth and sustainable development', which includes addressing climate change by 'prioritizing adaptation in all our actions, drawing upon skills of diverse disciplines' and Aspiration six which recognises the significance of the youth and the need to put children first.⁴⁴ While these two Aspirations as such do not speak to each other directly, the fact that both climate change and the best interest of the child are central to its implementation, means that states in adopting the Agenda 2063 have taken note of their responsibilities in this regard. Nonetheless, there is no clear recognition of the interrelatedness of the best interest of the child with sustainable development and the holistic approach that is required in this regard. The AU has also adopted a Draft Strategy on Climate Change in 2014 in order to provide a framework for Member States to address 'the challenges and opportunities associated with climate change in the continent' through poverty alleviation and sustainable development.⁴⁵ Finally, with the adoption of the Paris Agreement in December 2015, states made the strongest human rights commitment yet in respect of climate change, through affirming that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'. While none of these soft law instruments and guidelines are binding on states, they show a certain consensus and commitment on the side of states to address issues of common concern in the manner in which they set out,

⁴² M Murras 'Public policies and child rights: entering the third decade of the Convention on the Rights of the Child' (2011) 633 *Annals* 53.

⁴³ As recognised in the reference to 'common but differentiated duties' in the Paris Agreement of 2015, which has to date been ratified by 45 African States.

⁴⁴ African Union *Agenda 2063* (2014) 3, 4, 9.

⁴⁵ African Union (n 44 above) 16.

and support an interpretation of existing obligations which include these commitments.

3.2 Right to development and clean environment

Interestingly, the African Children's Rights Charter nowhere provides for environmental rights for children. The closest it comes to this is in article 14 where it provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health, which may imply that they must have a healthy environment which is not detrimental to their health. While there is reference to 'development' in article 5, this is not development in the same sense as understood under the African Charter. In article 5 of the African Children's Rights Charter development solely relates to the development of *the child*, which is completely different from the peoples' right to development provided in article 22 of the African Charter. It is also dissimilar from article 24 of the African Charter which provides for a general satisfactory environment favourable to peoples' development. It is not clear why the drafters of the African Children's Rights Charter did not have regard to the environmental human rights of children, or whether perhaps they thought that it was sufficiently covered by the African Charter. However, they clearly did not conceive of the far-reaching consequences of climate change, along with other environmental degradation currently experienced which is detrimental to the wellbeing of children,⁴⁶ in drafting this instrument.

In stark contrast, the African Women's Rights Protocol does provide for the right of women to live in a healthy and sustainable environment and provides extensively for their rights to participation in management and preservation, development of renewable energy and other technologies, the development of women's indigenous knowledge systems and management and disposal of domestic and toxic waste.⁴⁷ In addition, the African Women's Rights Protocol provides for the right of women to sustainable development, including participation in development of policies and access to and control over resources.⁴⁸ In this regard, while the girl child is not protected from environmental degradation under the African Children's Rights Charter, the African Women's Rights Protocol, which applies to all women, irrespective of their age (to the extent applicable), goes some way to providing a basis for the protection of rights threatened by climate change, for example where they relate to plans and policies to mitigate climate change through adoption of renewable energy sources and national development strategies.

Ironically, this thus means that under the African regional human rights system, the rights of girls to a healthy environment and

⁴⁶ Including the destruction of biodiversity, pollution of land, sea and air with plastic particles and other waste and the extinction of species.

⁴⁷ Article 18(1) of the African Women's Rights Protocol.

⁴⁸ Article 19, particularly 19(b) and (c), of the African Women's Rights Protocol.

sustainable development are relatively better protected than boys. It is, however, beyond the scope of this article to delve into the meaning of the right to development and the right to a satisfactory environment as provided for under the African Charter, as well as its implications for the climate change responsibilities of States, and more research should be done in this regard. Still, it remains unfortunate that the African Children's Rights Charter is silent on this important aspect of the wellbeing of children. A slightly round-about way to argue for this right under the African Children's Rights Charter is to rely on the principle of the best interest of the child, noting that clearly the negative consequences of climate change, particularly for children, are such that States have duties arising from this principle to ensure that children are protected against these consequences.

3.3 Access to education

The right to education is one of the rights which has become one of the most uncontroversial rights in the human rights repertoire. As such, it is extensively provided for and protected in the African Children's Rights Charter, in the African Charter and the African Women's Rights Protocol. The African Children's Rights Charter provides in article 11 that every child has the right to education, and that this places a duty on the state in subsection (3) to (a) provide free and compulsory basic education; (b) progressively make secondary education free; (d) take measures to encourage regular attendance at schools and the reduction in drop-out rates; (e) take special measures in respect of female children to ensure equal access to education. Read as a whole, this section thus provides most of the elements which are needed in respect of children's right to education, also including a focus on girls' education.

By providing that primary education must be free and compulsory, the African Children's Rights Charter provides a distinct disincentive to parents to remove young children from school. Since it is free, their ability to access school is not dependent on having the means to do so, and being compulsory implies that there must be some kind of sanction against parents who remove their children from school. Unfortunately, similar safeguards do not exist with regard to secondary education, and while the provision for progressively making secondary education free is laudable, financial means are only one of the reasons why parents may choose to take their adolescent children out of school. Other reasons also account for parents' taking their children out of school, including that they may work for a source of income for the family, that they may take over the running of the household and resource sourcing or, in the case of girls, that they may be married to lessen the burden on the family's resources.

However, these areas that are left open by article 11(3)(b) are to some extent remedied by the provisions of (d) and (e). If read together, (d) and (e) provide for a whole range of creative actions which states should take to ensure that girl children stay in school. Article 12 of the African Women's Rights Protocol provides similarly for the elimination

of all forms of discrimination against women and guarantee of equal opportunity and access in the sphere of education and training. This relates to the need for transformative equality, identified above, where the social values and structures underlying inequality has to be addressed in order to address the problem at hand, namely, girls not going to school. Given that some of the causes (identified above) of why girl children are leaving school are related to climate change consequences, states will in this regard have to look at the environmental impacts which hinder attendance by children.

Take as an example water-sourcing duties as a reason to be taken from school, a task that is traditionally assigned to girls. This means that as part of the project of keeping girls in school, states would need to have national plans with scenario planning in place, so that the State will have a responsibility to provide people with alternatives for example better and more sustainable long-term water management and provision, possible through building of a dam, better systems of irrigation or desalination of sea water. Where projections indicate that a specific region will become so dry that it can no longer sustain human habitation there may be a need for more drastic measures such as relocating the community to another part of the country where there is water (taking into consideration the issues associated with mass migration). This is strengthened by article 15 of the African Women's Rights Protocol which provides for a duty on states to take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food as well as (b) adequate systems of supply and storage to ensure food security. A duty to have in place such a national scenario planning strategy, together with the data collection processes that it necessitates, may be one of the consequences of the best interest of the child principle, so that the state is in a position to make informed decisions and is not caught off guard by either sudden environmental upheavals or slow onset change.

A second example is early marriage entered into because the family cannot support itself. In this regard, one direct measure to be taken by the state might be to criminalise child marriages.⁴⁹ While this is a laudable and praiseworthy step, it may not eradicate the problem, or may lead families to adopt other, equally abominable courses of action, such as child inappropriate labour or child trafficking, since the root cause was not addressed. Similar strategies to those suggested above may go some way to addressing the root cause of climate change here as well.

In this regard there is thus an overlap between the right to education, the right to nutrition and food security, clean water, sexual and reproductive rights. States should adopt cross-cutting policies and approaches to development and climate change adaptation which take

⁴⁹ The African Women's Rights Protocol in any case in article 6 determines the minimum age for marriage at 18 years and the African Children's Charter in article 21(2) prohibits child marriage, stating that states should promulgate legislation to stipulate the minimum age of marriage to be 18 years.

into account the interrelated nature of the causes and effects of human rights violations.

3.4 Conflict and migration

The African Children's Rights Charter provides in article 23 for the plight of refugee children, stating that states should take all appropriate measures to ensure that a child seeking refugee status or considered a refugee in accordance with applicable international or domestic law, shall receive appropriate protection. The problem with this provision is that the international law related to refugees has not been amended to provide for climate refugees.⁵⁰ This means that persons fleeing climate induced disasters cannot claim refugee status, unless one of the traditionally accepted grounds is also present, such as conflict. The African Women's Rights Protocol, as in the case of development and environmental rights, provides more extensively for women refugees. Articles 10 and 11 provide respectively for the right to peace and protection of women in armed conflict. The right to peace includes a duty on states to take all appropriate measures to ensure increased participation of women in structures and processes for conflict prevention (which in the current context would include climate change adaptation/mitigation), in the decision-making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women, and in the management of camps for such persons. Thus through increased involvement in management by women, refugee camps can be made more friendly to women and girl children in the way that they are set up, in order to minimise the risk of sexual violence and to afford privacy to mothers who are breastfeeding, thus indirectly improving the health of young children. Involving women in management of asylum seeker processes may also go some way towards addressing the issues that refugee girl children face at the borders. This is further strengthened by article 27 of the African Children's Rights Charter, which provides that states should take measures to protect children from all forms of sexual exploitation and sexual abuse and article 11 of the African Women's Rights Protocol which provides for the right to protection in armed conflict, including where women are displaced, and against sexual exploitation. Specific steps also need to be taken in terms of these provisions for children who are separated from their families during migration, particularly girl children.

Migration could further be seen as a necessary consequence of a changing climate, with which states will have to deal at a regional or sub-regional level. The African Union Peace and Security Council in February 2017 adopted a Decision on 'Free Movement of People and Goods and its Implications on Peace and Security in Africa', aimed at greater integration at a regional level. However, the Decision does not

⁵⁰ See article 1 of the Convention Governing Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 by the African Union Assembly of Heads of State and Government. CAB/LEG/24.3.

engage with the issue of refugees and displaced persons, except in a negative sense, to the extent of underlining that measures should be put in place to ensure that migration does not result in exacerbated inequalities and challenges to peace and security.⁵¹ It therefore does not contain a proactive initiative to aid in the movement of those who may need it the most, including climate refugees. This is in stark contrast to the New York Declaration for Refugees and Migrants and the subsequent Roadmap adopted by the United Nations in 2016, which provides for the detailed protections for refugees and migrants.⁵² This Declaration clearly and explicitly addresses the concerns of children and particularly girls who are migrants or refugees. It also provides for protection for 'the human rights of all refugees and migrants, *regardless of status*' (emphasis added), which, while not directly recognising climate refugees, may at least go some way towards a wider and more inclusive definition of refugees.

UNICEF particularly calls on states 'in the absence of an international legal framework that grants legal status and protection to these vulnerable migrants – and recognising that many children will be displaced or migrate internally' to ensure that the 'humanitarian, sustainable development, climate change, migration and disaster risk reduction frameworks' that they adopt are based on children's rights and the best interest of the child is central to all decisions affecting them.⁵³ In this regard UNICEF identifies the best practice of the Children's Emergency Relief and Protection Act⁵⁴ in the Philippines as being ground-breaking national legislation, since it has a dual focus, on preventing displacement and in protecting the rights of children who have through necessity been displaced.⁵⁵ In order to achieve the protection of these rights, the law includes a 'child-focused Comprehensive Emergency Program that guarantees the delivery of basic needs, the establishment of evacuation centres and transitional centres for orphaned, separated and unaccompanied children, increased protection against child trafficking, exploitation and violence', as well as aiming to 'minimise the time children spend without important documentation and education', and improved data collection on affected children.⁵⁶

3.5 Participation and access to information

Children are not just the victims of climate change induced risks, but also have an important role to play in finding solutions to the issues we

⁵¹ Ghana Business News 'AU on free movement of people and goods and its implications on peace and security in Africa' 27 February 2017, <https://www.ghanabusinessnews.com/2017/02/27/au-on-free-movement-of-people-and-goods-and-its-implications-on-peace-and-security-in-africa/>.

⁵² United Nations 'New York Declaration' <http://refugeesmigrants.un.org/declaration>.

⁵³ UNICEF (n 11 above) 24.

⁵⁴ Republic Act No. 10821.

⁵⁵ As above.

⁵⁶ As above.

face. While adults are often limited in their thinking to the short and medium term, children have displayed an ability to consider the distant future.⁵⁷ The best interest of the child also requires ‘consultation with children through participatory assessments that are systematic, age-appropriate and gender-sensitive.’⁵⁸ The 2030 Agenda for Sustainable Development, adopted by the United Nations High-level Political Forum on Sustainable Development in 2015, represents a commitment by world leaders to ‘strive to provide children and youth with a nurturing environment for the full realization of their rights and capabilities’, which, according to the Children in a Changing Climate Coalition ‘is the strongest acknowledgement to date of the capacity of children to participate in the processes that shape their world’.⁵⁹ Under the African Children’s Rights Charter there is also already a recognition of the agency of children, through the provision for rights *along with responsibilities*, which can only be fulfilled if children are allowed to participate.⁶⁰ Along with the non-discrimination clause in the Children’s Charter, there is thus provision in the African human rights context for children to participate, also in decisions related to climate change. The concern, as already touched on above, is in the extent to which they are in practice provided with the resources, knowledge and opportunity to do so. A UNICEF project in Philippines has demonstrated that when children are equipped with the necessary skills, and have access to ‘child-friendly and language-appropriate information [and] mechanisms for their meaningful participation in decision making’ they are able to make meaningful contributions’.⁶¹ Such conducive environments are not often created for children to voice their opinions in public fora.

4 CONCLUSION AND RECOMMENDATIONS

Having looked at the social and economic circumstances of children in Africa in the context of a changing climate, and considering the legal means through which the vulnerability of children in particular, and girl children specifically (created by the intersectionality of sex, age and poverty) could potentially be addressed, it is concluded that the African human rights system, particularly when the African Women’s Rights Protocol is read in conjunction with the Children’s Charter, largely provides adequate legal protection to the African child in a climate change context. The right to education, participation, freedom from exploitation and even rights during migration are for the most part very

⁵⁷ Children in a Changing Climate Coalition (n 16 above) 2.

⁵⁸ United Nations High Commissioner for Refugees (UNHCR) ‘Guidelines on determining the best interests of the child’ (2008) 20, 23.

⁵⁹ Children in a changing climate coalition ‘Child-centred adaptation: Realising children’s rights in a changing climate’ (2015) 11; Sustainable Development Knowledge Platform ‘Transforming our world: the 2030 Agenda for Sustainable Development’ <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed 17 October 2016).

⁶⁰ Article 31 of the African Children’s Charter.

⁶¹ UNICEF (n 11 above) 7.

well covered by the African human rights system. The African Children's Rights Charter does not provide for the rights to a healthy environment and sustainable development. However, this may be remedied, at least to some extent, through reading the African Children's Rights Charter holistically, and taking into account the best interest of the child, as well as reading it in conjunction with the other regional instruments.

What is needed from states going forward from this juncture is a clear, holistic approach to implementation of their obligations towards children in the context of climate change as outlined above. From the interrelated nature of the rights considered above, it is clear that states cannot address these complex issues in isolation, with the overlap between the right to education, the right to nutrition and food security, clean water, sexual and reproductive rights being just one example. Furthermore, there is a need for states to go to the root causes of human rights challenges, including conflict and migration, food security and access to other socio-economic rights, which in the 21st century is becoming more and more related to and magnified by a changing and more unpredictable environment.

In order to address the inadequacy of current programmes and policies for implementation at the regional and national levels, there is a particular need for states to reconsider 1) policies and laws related to migration at national and regional level, as well as regional cooperation agreements, to provide for the very real challenge of climate refugees, 2) a rethinking of development policies to bring them in line with a child-centred approach and in full consciousness of the current and future challenges posed by climate change and 3) taking seriously the role of children in finding solutions to climate problems and contributing to mitigation and adaptation strategies, rather than just being victims that need protection. In order to do this, states and regional inter-governmental organisations should set up systems to track accurate data related to the impacts of climate change on children, disaggregated according to sex and age and should create the spaces for children to learn about climate change and engage with the solutions. Finally, states should take ownership of their responsibilities under the Paris Agreement which came into effect in November 2016, being the latest of the multi-lateral agreements aimed at ensuring that the global temperature rise remains below two degrees, in fulfilment of their Nationally Determined Contribution. Finally States that have not yet signed and ratified the Paris Agreement should do so in order to show their commitment to addressing this global challenge.