

# Children's right to sustainable development under the African human rights framework

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**ABSTRACT:** The aim of this article is to explore the existence of an implied right to sustainable development for children under the African human rights system, and the main elements of such a right. It avers that under the African human rights system, the existing rights such as the right to health and the right to development, if viewed from the perspective of the indivisibility of rights, provides for an implied right of children to sustainable development. It submits that such a right would include elements such as the right to a clean and healthy environment, to safe drinking water, education, and a right to participate in decisions affecting them. The article makes recommendations on how states, individually and collectively, as well as regional human rights bodies, can ensure the realisation and protection of this right. It further contends that there is a need for an explicit recognition of the right to sustainable development of African children, on the basis that it is a separate right and that there are benefits from recognition of it as a stand-alone right. The article adopts a doctrinal methodology and utilises theoretical approaches to the law as an analytical framework, thereby seeking to establish a human rights framework for addressing the challenges faced by children in the context of (sustainable) development in Africa.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### **Le droit des enfants au développement durable dans le système africain des droits de l'homme**

**RÉSUMÉ:** Cet article vise à explorer l'existence d'un droit implicite des enfants au développement durable dans le système africain des droits de l'homme et ses principaux éléments. L'article trouve que, dans le système africain des droits de l'homme, les droits existants tels que le droit à la santé, le droit au développement, appréhendés du point de vue de l'indivisibilité des droits, contiennent un droit implicite des enfants au développement durable. Ce droit inclurait notamment le droit à un environnement propre et sain, à l'eau potable, à l'éducation et le droit de participer aux décisions qui les concernent. Cet article formule des recommandations sur la manière dont les États, individuellement et collectivement, ainsi que les mécanismes régionaux des droits de l'homme peuvent assurer la réalisation et la protection de ce droit. Il affirme en outre qu'il est nécessaire de reconnaître explicitement le droit des enfants africains au développement durable, au motif qu'il s'agit d'un droit distinct et qu'il serait avantageux de le reconnaître comme un droit

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autonome. L'article utilise une approche doctrinale et théorique du droit comme cadre d'analyse, cherchant ainsi à développer un cadre normatif en droits de l'homme pour relever les défis auxquels les enfants sont confrontés en matière de développement (durable) en Afrique.

**KEY WORDS:** sustainable development, right to development, children's rights, African Charter on the Rights and Welfare of the Child, climate change

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## 1 INTRODUCTION

Since the middle of the 20th century there has been a growing awareness that the actions of humans have the ability to impact and irrevocably change the environment – through loss of biodiversity, environmental pollution, deforestation and desertification – and even impact the earth's climate.<sup>1</sup> The current geological age is sometimes referred to as the 'anthropocene', the age of humankind, where no aspect of the environment remains untouched by human actions.<sup>2</sup> The awareness of the power that we wield over the survival of a world that is habitable for humans has increasingly led to a call for a fundamental change in how we view our place in the world. Some of the earliest works published in this regard include *A sand county almanac*, 1949,<sup>3</sup> and *Silent spring*, 1962,<sup>4</sup> which deal with the adverse impacts of human activity on the environment and the possibility of a responsible relationship between people and the land they inhabit.

The first major action that was taken at the global level to address the challenges of the anthropocene head-on, was the adoption of the Brundtland Commission's Report of 1987, which for the first time articulated the concept of sustainable development, as meeting 'the needs of the present without compromising the ability of future generations to meet their needs',<sup>5</sup> and which also placed sustainable development on the agenda of the United Nations (UN).<sup>6</sup> Since then,

1 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 OC Ruppel 'Intersections of law and cooperative global climate governance challenges in the Anthropocene', Inaugural Address at University of Stellenbosch (2013) <https://scholar.sun.ac.za/handle/10019.1/5667> (accessed 20 August 2019); SL Lewis & AM Maslin 'Defining the anthropocene' (2015) 519 *Nature*.

3 A Leopold *A sand county almanac* (1949).

4 R Carson *Silent spring* (1962).

the use of the concept of sustainable development has become common-place to describe economic development, which takes account of the environmental and social impacts and tries to balance the economic, environmental and social aspects. The Millennium Development Goals and its successor, the Sustainable Development Goals (SDGs) were adopted by the UN in the 21st century to give effect to sustainable development at both the international and local levels.

While sustainable development has become a commonly recognised concept it remains relatively vague.<sup>7</sup> This indeterminateness raises some concerns from a legal perspective, as definitional uncertainties make it harder to apply and ultimately enforce a right to sustainable development.<sup>8</sup> This article is aimed at providing some clarity on the legal basis for a children's right to sustainable development in the African context.

This article elaborates on the need for recognition of the right to sustainable development of the child in the context of Africa. It argues that the African human rights system implicitly recognises the right to sustainable development of the child and attempts an initial analysis of what this right would entail, given the specific needs and vulnerabilities of children in Africa, particularly in the face of climate change. It further argues that an explicit acknowledgement of the right to sustainable development for children in Africa is necessary to effectively protect and promote it.

- 5 GH Brundtland 'Report of the World Commission on Environment and Development: Our Common Future' (1987) United Nations General Assembly document A/42/427, 16.
- 6 J McCormick 'The origins of the world conservation strategy' (1986) 10 *Environmental Review* 177 at 178.
- 7 V Barral 'Sustainable development in international law: nature and operation of an evolutive norm' (2012) 23 *European Journal of International Law* 377, 383; HE Daly 'Toward some operational principles of sustainable development' (1990) 2 *Ecological Economics* 1; B Hopwood, M Mellor & G O'Brien 'Sustainable development: mapping different approaches' (2005) 13 *Sustainable Development* 41; M Redclift 'Sustainable development (1987–2005): an oxymoron comes of age' (2005) 13 *Sustainable Development* 216.
- 8 EE Ekon 'The legal status of sustainable development in Nigerian environmental law' (2016) 7 *Journal of Sustainable Development Law and Policy* 104 at 107. While there are no universally binding instruments which provide for a right to sustainable development, the Protocol to the African Charter on the Rights of Women in Africa provides explicitly for the right of all women to sustainable development (article 19) and it has been argued that this right could not only apply to women. Nsibirwa argues that '[t]he [...] Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole society gains if a healthy and sustainable environment is attained.' (MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 49.) The authors believe that the African human rights system does acknowledge the right to sustainable development.

## 2 SUSTAINABLE DEVELOPMENT AND CLIMATE CHANGE

One of the biggest threats to the attainment of sustainable development across the world is climate change.<sup>9</sup> Human induced climate change is the result of increased greenhouse gasses (carbon dioxide, methane, nitrous oxide and ozone) being released through human activities, including the burning of fossil fuels, deforestation, and certain agricultural practices such as domestic livestock farming, which result in more heat being trapped into the atmosphere.<sup>10</sup> The consequences include increased and more erratic 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.

While no nation can escape the adverse consequences of climate change, developed countries are better prepared to deal with the adverse consequences, because of better infrastructure, financial safety nets and technological advancements, which together increase their resilience.<sup>11</sup> However, in developing countries, the consequences of climate change are much more dire, because of a lack of the infrastructure and technology which would enable them to 'bounce back' after suffering from drought, for example, as well as the relatively low investment in adaptation as opposed to mitigation and low global investment in adaptation of the African continent.<sup>12</sup>

- 9 JC Dernbach & F Cheever 'Sustainable development and its discontents' (2015) 4 *Transnational Environmental Law* 247, 252; J Pinkse & A Kolk 'Addressing the climate change-sustainable development nexus: addressing the role of multistakeholder partnerships' (2012) 5 *Business & Society* 176 at 177; M Munasinghe *Analysing the nexus of sustainable development and climate change: an overview* <http://www.oecd.org/env/cc/2510070.pdf> (accessed 25 October 2018), 15.
- 10 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 95% 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*.
- 11 The World Bank 'Building resilience – integrating climate and disaster risk into development: the World Bank Group experience' (2013) 35. [https://www.worldbank.org/content/dam/Worldbank/document/SDN/Full\\_Report\\_Building\\_Resilience\\_Integrating\\_Climate\\_Disaster\\_Risk\\_Development.pdf](https://www.worldbank.org/content/dam/Worldbank/document/SDN/Full_Report_Building_Resilience_Integrating_Climate_Disaster_Risk_Development.pdf) (accessed 11 November 2019).
- 12 J Reinl 'Investments to Cushion African Countries against Climate Shocks Not Enough' 27 September 2019 *Inter Press Service*, <http://www.ipsnews.net/2019/09/investments-cushion-african-countries-climate-shocks-not-enough/> (accessed 11 November 2019); see also UNEP, AMCEN and Climate Analytics, 'Africa's Adaptation Gap: Climate-change impacts, adaptation challenges and costs for Africa' (2013) [https://climateanalytics.org/media/schaeffer\\_et\\_al\\_2013\\_africao\\_s\\_a\\_daptation\\_gap\\_technical\\_report.pdf](https://climateanalytics.org/media/schaeffer_et_al_2013_africao_s_a_daptation_gap_technical_report.pdf) (accessed 11 November 2019).

In Africa, 33 of the 55 countries are classified as 'least developed' by the UN<sup>13</sup> and the remaining African countries as developing countries. It is thus ironic that the countries which are the most in need of development, are the same countries which will in future bear the brunt, and are already starting to suffer from the consequences of climate change. Climate change not only impact on the ability of countries to develop,<sup>14</sup> it also results in losses of gains which had been made in sustainable development.<sup>15</sup> This is because the consequences of climate change set out above impacts negatively on the availability of water, access to food, prevalence of life-threatening diseases and results in human migration, which further have the potential to lead to increased conflict — all consequences which pose serious threats to human life and development.

Children often suffer the most from the adverse effects of climate change. In fact, children are the most vulnerable group to environmental harm.<sup>16</sup> It is estimated that more than 1.5 million annual deaths of children under the age of 5 can be prevented by reduction of environmental risks.<sup>17</sup> In African countries children make up almost half of the population. Children are the most vulnerable to negative impacts of climate change such as more wide-spread diseases, climate induced migration, and lack of access to water and food, since these directly threaten their survival and development. According to the World Health Organisation (WHO), '88 per cent of the existing burden of disease as a result of climate change occurs in children under 5 years of age'.<sup>18</sup> In Africa, 84 million children live in 'areas of high or extremely high water scarcity',<sup>19</sup> and if global temperatures increase by an average of 3 degrees Celsius, the decrease in crop yields can result in '550 million people, more than half of whom live in Africa' facing food shortages.<sup>20</sup> Children have 'growing bodies and developing minds' which are 'extremely sensitive to the effects of malnutrition'.<sup>21</sup>

13 <https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> (accessed 12 November 2019).

14 African Union (AU) 'Draft African Union Strategy On Climate Change' (2014) 1, 8.

15 Dernbach and Cheever (n 9) 252.

16 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 15.

17 As above.

18 UNICEF 'Strategic Framework on Environmental Sustainability for Children 2016-2017' (2015) 6.

19 UNICEF 'Unless we act now: The impact of climate change on children' (2015) 66.

20 R Perrot 'South Africa's consideration of ethics and justice issues in formulating climate change policies' in DA Brown & P Taylor (2014) 'Ethics and climate change: A study of national commitments' IUCN (World Commission on Environmental Law) Environmental Policy and Law Paper 86 130.

21 JJ Romm 'Present and future climate realities for children' in UNICEF (ed) *The challenge of climate change: Children on the front line* (2014) 6

Despite the challenges posed by climate change to sustainable development, sustainable development has also been embraced as a solution to environmental problems, including climate change.<sup>22</sup> The UN Framework Convention on Climate Change (UNFCCC) in article 3(4) provides:

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

Through adopting measures in line with sustainable development principles, states would on the one hand decrease the negative impacts on the environment, thereby curbing the negative implications for humans, including children, and on the other hand increase the resilience of all people to the negative environmental consequences which do arise.

### 3 THE RIGHT TO SUSTAINABLE DEVELOPMENT IN AFRICA

As noted above, the concept of sustainable development was first elaborated in the Brundtland report of 1987. Holden *et al* suggest that core to the concept of sustainable development is 'safeguarding long-term ecological sustainability, satisfying basic human needs, and promoting intragenerational and intergenerational equity'.<sup>23</sup> Sustainable development is thus generally described as aimed at meeting the 'triple bottom line' of environmental, economic and social components.<sup>24</sup>

The UN Declaration on the Right to Development of 1986 declared the *right* to development to be an inalienable human right. Through reading together provisions of international instruments, such as the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), a clear picture emerges of the right of all persons to a standard of living adequate for health and well-being, in an environment that is not

22 J Robinson *et al* 'Climate change and sustainable development: realising the opportunity' (2006) 35 *Ambio* 2, 3. See also the references to climate change in the Sustainable Development Goals.

23 E Holden, K Linnerud & D Banister 'Sustainable development: our Common future revisited' (2014) 26 *Global Environmental Change* 130 at 131.

24 The term was first coined by John Elkington and popularised in particular through his book *Cannibals with forks: the triple bottom line of 21st century business* (1999).

detrimental to their wellbeing – a right to sustainable development.<sup>25</sup> The UN Agenda 2030 which establishes the SDGs further expressed the commitment of signatories ‘to respecting all human rights, including the right to development’.<sup>26</sup>

A much clearer framework exists for the right to sustainable development at the level of the African continent. The African Charter on Human and Peoples’ Rights (African Charter) provides for the right of all peoples to development,<sup>27</sup> as well as a right to a satisfactory environment<sup>28</sup> which together with other socio-economic rights could be interpreted to provide for a right to sustainable development.<sup>29</sup> In addition, while adopted before the concept of sustainable development became mainstream, the right to development in the African Charter provides that

all peoples shall have the right to their economic, social and cultural development, with due regard to their freedom and identity in *the equal enjoyment of the common heritage of mankind* (emphasis added).

This phrase ‘common heritage of mankind’ has been interpreted as

a principle of international law that holds that elements of humanity’s common heritage (cultural and natural) should be held in trust for future generations and be protected from exploitation by individual nation states or corporations.<sup>30</sup>

This could thus be interpreted to provide for a right to sustainable development.

Amechi further notes that apart from providing for a right to a generally satisfactory environment, article 24 of the African Charter also links the right to environment to [sustainable] development.<sup>31</sup> He submits that this envisages

that African citizens should not only be able to live in an undegraded and pollution-free environment, but also, be able to access the resources provided by their environment in order to develop to their full potential.<sup>32</sup>

This link is also reiterated by the African Commission’s State Reporting Guidelines and Principles on articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment adopted at the 61st Ordinary Session of the Commission in April 2018, when it provides that in relation to article 24:

25 See for example UDHR articles 2, 22, 25, 26; ICESCR articles 2, 3, 11, 12, 13, 15 and CRC articles 2, 24, 27, 28, 29, as elaborated in ‘The Human Right to Sustainable Development’ <https://www.pdhre.org/rights/sustainable-development.html> (accessed 19 August 2019).

26 Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1, para 35.

27 Art 22 of the African Charter on Human and Peoples’ Rights (African Charter).

28 Art 24 African Charter.

29 J Oloka-Onyango ‘Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?’ (2000) Human Development Report 2000 Background Paper 6.

30 [https://en.wikipedia.org/wiki/Common\\_heritage\\_of\\_mankind](https://en.wikipedia.org/wiki/Common_heritage_of_mankind); Edwin Egede ‘Common heritage of mankind’ in Oxford Bibliographies, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0109.xml> (accessed 21 August 2019).

31 Amechi (2010) 123.

32 As above.

[t]he requirement of being favourable to their development, [...] entails that the environment should be used in a sustainable manner, which fulfills the needs of the present generation, without compromising the ability of future generations to meet their own needs.<sup>33</sup>

The jurisprudence of the African Commission also supports this interpretation of a rights-based approach to sustainable development. The first case in which the African Commission dealt with the question of a violation of the right to development under article 22 was in *Kevin Mgwanga Gumne, et al v Cameroon*. In this case the complainants

alleged economic marginalization by the Government of Cameroon as well as denial of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter.<sup>34</sup>

The Commission found that while states have a responsibility to 'invest its resources in the best way possible to attain the progressive realisation of the right to development', in the present case the complainants had not provided enough evidence to show that there was a basis for a finding of a violation of this right.<sup>35</sup> The Commission in this case lost a valuable opportunity to elaborate on the substance and content of the right to development. It did not clarify the elements of the right which complainants would have to fulfill in order to succeed with a claim alleging violation of the right to development. Subsequent cases provided more legal and conceptual clarification of the right to development. However, there is still a lack of comprehensive framework outlining the elements of the right and what constitutes its violation.

In a Communication dealing with the conflict in the Darfur region of Sudan, the Commission in finding a violation of the right to development, argued as follows:

The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, [...] the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic, social and cultural rights, but other individual rights of the Darfurian people. [...] the Commission finds that the Respondent State is in violation of Article 22 of the Africa Charter.<sup>36</sup>

In its only inter-state communication to date, the Commission also found a violation of article 22. It found that

[t]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also

33 African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and The Environment (2018) 28.

34 OC Okafor 'A regional perspective: article 22 of the African Charter on Human and Peoples' Rights' (2013) in Office of the High Commissioner for Human Rights, *Realizing the right to development: essays in commemoration of 25 years of the United Nations Declaration on the Right to Development*, United Nations, New York and Geneva, 373-384.

35 Communication 260/2002, *Bakweri Land Claims Committee v Cameroon*, para 206.

36 Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 224.

occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.<sup>37</sup>

This decision of the Commission highlighted the clear link between articles 21 (right to freely dispose of wealth and natural resources) and 22 of the African Charter, and also emphasised that the actions of other states can violate human rights in the affected state.

The Communication which has probably contributed the most to developing the content of the right to development under the Charter is *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (Endorois case). In this case the Commission highlighted the holistic character of the right to development which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.<sup>38</sup> The Commission further ‘placed the burden of “creating conditions favourable to a people’s development” on the Government’.<sup>39</sup> The African Court on Human and Peoples’ Rights, in the case of *the African Commission on Human and Peoples’ Rights v Kenya* (Ogiek case), followed the logic of the *Endorois case*, in emphasising both the need for effective consultation, as a crucial part of the right to development and also placing the burden of development squarely on the state.<sup>40</sup>

The following elements of the right to development under the Charter can thus be extracted from the jurisprudence of the Commission and the Court: 1) an element of progressive realisation; 2) a link to the right to freely dispose of their wealth and natural resources; 3) a duty on states not only to refrain from violating the right to development but also to deploy its resources to address marginalisation; 4) a requirement of meaningful participation by affected persons; 5) a responsibility to ensure that the obligations arising from the right to development are to be fulfilled by states individually and collectively. Read together, this jurisprudence supports the idea of the right under article 22 being a right to sustainable development. For example, it is concerned with safeguarding long-term ecological sustainability by ensuring that people are able to control their natural resources, is aimed at satisfying basic human needs including the realisation of socio-economic rights, and attempts to ensure that economic development is in the interest of the people concerned.

The Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) expels any further doubts about the existence of a right to sustainable development at the African regional level, by

37 Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 95.

38 S Kamba ‘The right to development in the African human rights system: the Endorois case’ (2011) 44 *De Jure* 390.

39 Okafor (n 34) 376.

40 Application 6/2012, *African Commission on Human and Peoples’ Rights v Kenya*, paras 207-209.

providing explicitly for the right of women to sustainable development,<sup>41</sup> as well as the right to a healthy and sustainable environment, including to the extent that it relates to environmental and water management and the protection of women's indigenous knowledge.<sup>42</sup> The Protocol places duties on state parties to 'take all appropriate measures' to introduce the gender perspective in the national development planning procedures, ensure participation of women, promote women's access to credit, training, skills development and to take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes. In one of the few academic assessments of the Maputo Protocol, Nsibirwa argues that

[t]he [...] Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole society gains if a healthy and sustainable environment is attained.<sup>43</sup>

Contrary to these two instruments, the African Charter on the Rights and Welfare of the Child (African Children's Charter) has no provision which deals with the right of children to sustainable development. The Charter deals with the right to development of the child as an individual right, in the context of the right to life, survival and development.<sup>44</sup> However, it is our contention that a holistic reading of the Children's Charter does envision sustainable development as being in the best interest of children. This is elaborated further in the next section that deals particularly with the rights of children to sustainable development.

Apart from the human rights instruments themselves, there are other frameworks that outline some aspects of the right to sustainable development in the African context. Regional environmental law, in particular the Revised African Convention on the Conservation of Nature and Natural Resources (Convention on Nature) adopted in 2003, concerns itself with sustainable development and human rights.<sup>45</sup> The objectives of the Convention on Nature are aligned with the classical conception of sustainable development, and it was adopted 'with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.'<sup>46</sup> The revision was done with the specific aim of 'expanding elements related to sustainable development.'<sup>47</sup> The principles that should guide states in implementing the Convention rely on the right of all peoples to a

41 Art 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

42 Art 18 Maputo Protocol.

43 MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 49.

44 Art 5 of the African Charter on the Rights and Welfare of the Child (African Children's Charter).

45 W Scholtz 'Human rights and the environment in the African context' in W Scholtz & J Verschuuren (eds) *Regional environmental law: transregional comparative lessons in pursuit of sustainable development* (2015) 102, 103.

46 Convention on Nature, article II.

47 The revised Convention on Nature replaced the 1968 version.

satisfactory environment favourable to their development; the duty of states, individually and collectively to ensure the enjoyment of the right to development; and the duty of states to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner – clearly illustrating the human rights norms underlying the Convention.<sup>48</sup> Interestingly, and particularly concerning, is the complete absence of provisions on climate change, apart from a vague reference in the preamble that affirms ‘that the conservation of the global environment is a common concern of human kind as a whole’.

Finally, considerations of sustainable development were included in the AU’s Agenda 2063 – the Africa we want – which was adopted as a ‘plan for structural transformation and a shared strategic framework for inclusive growth and sustainable development.’<sup>49</sup> The first important aspect in this regard is that it is a long term plan<sup>50</sup> – fifty years – for Africa’s development, and is thus crucially concerned with future generations.<sup>51</sup> Sustainable development is also the first aspiration of Agenda 2063, formulated as follows: ‘a prosperous Africa based on inclusive growth and sustainable development’. This aspiration includes measures for climate change adaptation and mitigation, and explicitly makes the link between the challenges posed by climate change to sustainable development.<sup>52</sup>

## **4 THE RIGHT OF CHILDREN TO SUSTAINABLE DEVELOPMENT**

This section is limited to the level of current normative recognition of the right of the child to sustainable development. In doing so it draws particularly on the rights in the CRC, the African Children’s Charter, the principle of the best interest of the child, and the frameworks discussed in the previous section, The African Charter, Maputo Protocol, Convention on Nature and Agenda 2063, in interpreting the child’s right to sustainable development in Africa.

### **4.1 The question of inter-generational justice**

There is a risk that the consequences of present unsustainable development, including climate change, can simply be ignored and consigned to future generations to deal with, as the main impacts will only be felt after the damage has been done. This approach of consigning the finding of solutions to future generations is also supported by a narrative that technological advancement will have sufficiently developed to deal with these consequences in the future,

48 See article III of the Convention on Nature.

49 Agenda 2063, iii.

50 For purposes of implementation the Agenda 2063 was divided into ten year implementation plans.

51 Agenda 2063, para 5.

52 Agenda 2063, para 16 & 17.

and that there is no need for present generations to alter their way of life. However, this may be seen as not only unethical, but also unjust, as the consequences were firstly not of their making and secondly there is no knowing what the state of technology in future will be. Sustainable development, especially in the context of environmental sustainability, thus gives a place of prominence to the needs of generations to come.<sup>53</sup>

Sustainability thus presupposes a long-term timeframe, in which present actions are *consciously* aimed at minimising the impact on future generations and not jeopardising the ability of future generations to meet their needs. Some scholars have argued that this concern with future generations means that issues of the environment and sustainability cannot be dealt with within a human rights framework, as they concern generations who are not yet alive, and thus have no entitlement to human rights (yet).<sup>54</sup> One way in which this concern has been addressed, is by noting that while some of the future generations which may be affected are not yet born, the environmental degradation and climate change will already severely affect the current generation of children. Thus considerations of inter-generational justice can be applied in the present human rights context, as young children run the risk of inheriting an irreversibly degraded living environment.<sup>55</sup> Therefore, because these young generations face great risks to their life and survival owing to unsustainable practices, legal protection in the form of the right to sustainable development is warranted. Unfortunately, the legal instruments dedicated to children's rights fall short of explicit recognition of a standalone right to sustainable development, however, some protection is provided, particularly in relation to environmental degradation.

#### 4.2 Applicable legal instruments and principles

The CRC recognises the duty of state parties to take into account the dangers and risks of environmental pollution in respect of protecting the right to health of the child.<sup>56</sup> The Committee on the Rights of the Child has also acknowledged the significance of various components of the right to sustainable development through its mandate of interpreting the CRC. In its General Comment regarding the rights of indigenous children the Committee urged state parties to consider quality of natural environment while ensuring the realisation of children's right to life, survival and development to the highest extend possible.<sup>57</sup>

53 D McGoldrick 'Sustainable development and human rights: an integrated conception' (1996) 45 *The International and Comparative Law Quarterly* 796 at 812.

54 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 67.

55 Report of the Special Rapporteur (n 54) para 68.

56 Art 24 of the CRC.

57 UNCRC General Comment 11 (2009) Indigenous children and their rights under the Convention para 35.

Moreover, as seen above, the Maputo Protocol contains an explicit and broad incorporation of the right to sustainable development.<sup>58</sup> Even though the Protocol is not a child rights instrument, the recognition is significant as it applies (at least) to girls, but also holds benefits for all children, as all people benefit when women actively participate in concerns related to sustainable development, and if they have access to credit and land rights. The Maputo Protocol further recognises all the three elements of sustainable development, that is, environmental, social, and economic, as a human right of women and girls in Africa.<sup>59</sup> The Protocol provides for this right in broad terms in two provisions: article 18 the right to a healthy and sustainable environment and article 19 the right to sustainable development. While the former deals only with environmental sustainability, the latter focuses mainly on social and economic sustainability.

On the other hand, the African Children's Charter has no provision which deals with the right of children to development, except as an individual right in the context of the right to life, survival and development.<sup>60</sup> The right to development of the child is interpreted broadly to include the child's physical, mental, spiritual, moral, psychological and social development, in the context of the development of children from childhood to adulthood.<sup>61</sup> Moreover, the Charter does not contain right to a satisfactory environment. However, if rights which are indeed protected in the Children's Charter, such as the right to life, right to education<sup>62</sup> and the right to health<sup>63</sup> are read together with the right/principle of the best interest of the child,<sup>64</sup> a case can be made for the right of African children to sustainable development. This link between sustainable development and children's right to education was already made by the African Commission in the *Darfur* case,<sup>65</sup> as well as in the Agenda 2063's first 'Aspiration', both discussed above.<sup>66</sup>

Because of their specific vulnerability, children enjoy rights that are not bestowed upon adults.<sup>67</sup> One such right is the right to life, survival and development, protected in article 5 of the Children's Charter. While all individuals are entitled to the right to life, in relation to children there is an absolute prohibition on state parties' interference with this

58 Art 18 and 19 Maputo Protocol.

59 As above.

60 Art 5 of the African Charter on the Rights and Welfare of the Child (African Children's Charter).

61 General Comment 5 of the African Committee of Experts on the Rights and Welfare of the Child on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection' (2018) P12.AUTHORS – para 12.

62 Art 11 African Children's Charter.

63 Art 14 African Children's Charter.

64 Art 4 African Children's Charter.

65 Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 224.

66 Agenda 2063, para 10.

67 S Sanz-Caballero 'Children's rights in a changing climate: a perspective from the United Nations Convention on the Rights of the Child' (2013) 13 *Ethics in Science and Environmental Politics* 1 at 3.

right (negative obligation) and states have an obligation to realise it to the highest extent possible (positive obligation).<sup>68</sup> The right to sustainable development can thus also find expression through this cardinal provision of the Children's Charter, in that the state would be responsible for ensuring that economic, social and environmental conditions in the country are such that they support and enhance the child's right to life and development. In a context of climate change, states need to put in place all the necessary measures to adapt and mitigate the consequences of climate changes, to protect children from the life threatening impacts of climate change.

Among the rights that are closely interlinked with the environmental aspect of sustainable development is the right to health. The UN Committee expounded upon the obligations of state parties in relation to the environment/health context, which include: taking measures to address the risks of environmental pollution, ensuring housing facilities are free from dangerous smokes, regulating the environmental impact of business activities that can compromise children's health, access to safe drinking water and sanitation.<sup>69</sup> In relation to the highest attainable standard of health the UN Committee on the Rights of the Child also explicitly stated that state obligations extend beyond combating environmental pollution, to include ensuring the existence of a sustainable environment through addressing climate change and putting children's rights at the centre of climate change adaptation and mitigation.<sup>70</sup>

Another important right and cardinal principle in the African Children's Charter is the right to participation.<sup>71</sup> Children have a right to be heard in matters that affect them. The participation right of children has two key elements, the right to express their views and the right to have their views given due weight.<sup>72</sup> Protection of children's right to sustainable development entails ensuring that they take part in decisions that will affect their future. Hence participation is intrinsic in the realisation of sustainable development.

The jurisprudence of the African Commission in the *Endorois* case, discussed above, demonstrated that meaningful participation of affected group is one of the elements of peoples' rights to development.<sup>73</sup> When it comes to the African Children's Charter, the fact that it gives children the right to meaningful participation in matters that affect them entitles them to take part in decisions pertaining to sustainable development. It is paramount that children

68 EA Sutherland 'The child's right to life, survival and development: evolution and progress' (2015) 26 *Stellenbosch Law Review* 272 at 280.

69 Committee on the Rights of the Child General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24).

70 Committee on the Rights of the Child General comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24).

71 African Children's Charter art 7 & art 4(2).

72 Defining Child Participation; Unpacking Gender Equality Approach to Children and Young People's Participation' <https://www.wvi.org/sites/default/files/Defining%20Child%20Participation.pdf> (accessed 21 November 2019).

73 Okafor (2013) 376.

influence the shaping of the world, which they will be inheriting. Hence the right to participation of the child under the African Children's Charter is an important consideration in sustainable development.

Core to the child rights instruments is the principle of the best interest of the child, which ought to be the primary consideration in all decisions and actions concerning the child.<sup>74</sup> This implies that states have a duty to take all measures to ensure that the interest of children have pride of place in all legislation, policies and budget allocations that are done in giving effect to the right to development and sustainable development in particular, as well as in addressing the challenges of climate change. This is also in line with the principle of development as identified from the African Commission's jurisprudence above that states have a duty to deploy its resources for ensuring development and addressing marginalisation of certain groups.

According to General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration, 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. The consequence of the best interest being a substantive right is that a child can rely on this right to claim fulfilment of its obligations from the state. Freeman and Tobin both take the view that the best interest of the child 'must be seen both as informed by and constrained by the rights, and the other principles, provided for by the Convention'.<sup>75</sup> In terms of best interest being an interpretive principle, this means that, if more than one interpretation of a right is possible, the one that best serves the best interest of the child should be followed.<sup>76</sup> As a rule of procedure, an action must be assessed for the potential impact on children and the end decision must be justifiable in terms of the best interest of the child.<sup>77</sup> There must also be procedures in place to ensure that the implementation of the best interest of the child is guaranteed. Vital to the process of determining the best interest of the child is that the child must be given an opportunity to express his or her views and to have such views taken into account.

As clearly demonstrated in the introduction, unsustainable practices including those that result in climate change and environmental degradation, are contrary to the best interest of the child in many aspects, as it affects the survival, health, physical wellbeing and development of the child. Hence the best interest principle demands

74 Art 4 African Children's Charter.

75 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*; J Tobin 'Beyond the supermarket shelf: using a rights based approach to address children's health needs' (2006) 14 *International Journal of Children's Rights* 275 at 287.

76 General Comment 14, para 6(b).

77 In this regard, states parties 'shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations', General Comment 14, para 6(c).

that states take the necessary measures to ensure the protection of children from climate change, unsustainable practices and environmental degradation.<sup>78</sup> It is crucial to note that in the African Children's Charter the principle of the best interest of the child is 'the' primary consideration and not 'a' primary consideration.<sup>79</sup> Hence, despite considerations such as economic growth, interest of private sector or any other factor that aims to justify environmental degradation and policy decisions on development, the best interest of the child trumps all. In addition, while the elements noted above which constitute the right to development under the African human rights system make provision for progressive realisation, in considering the best interest of the child, there is also a need to take account of the time perception of children, as well as the prolonged exposure of children to the negative environmental impacts of unsustainable development, which would militate against unnecessary delays. Thus as far as possible, there is a need for measures to be expedited and realised immediately.

#### **4.3 Developments towards the protection of the right to sustainable development of children**

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee or Committee), which is the organ established by the African Children's Charter to monitor its implementation, has limited case law jurisprudence. Moreover the issue of sustainable development and its impact on children's rights has not featured in any of the communications considered by the African Children's Committee. The Committee has, thus far, not found implied rights in the normative framework of the African Children's Charter. Unlike the African Commission, which uses the doctrine of implied rights and found rights that are not explicitly recognised in the African Charter, such as the right to food, through its jurisprudence,<sup>80</sup> the African Children's Committee is yet to add implicit rights to the list of children's rights in Africa.

In addition to its quasi-judicial mandate of determining communications, the Committee is also mandated to consider periodic state party reports as a means to explicate and expound upon rights recognised in the Children's Charter. The State Reporting Guidelines of the Committee outline clusters of rights and provide a breakdown of the type of information that should be provided by state parties in their report. The reporting procedure therefore provides a platform to apply the rights in the Charter to challenges on the ground, and the concluding observations and recommendations adopted after review of

78 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 56-58.

79 As above.

80 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR (ACHPR 2001) paras 65 & 66.

state reports also provide guidance on the content and application of rights.

In its recent Concluding Observation and Recommendation on the Kingdom of Eswatini, the Committee noted with concern the impact of drought on the survival and development of children and urged the state party to take the necessary measures to address this concern.<sup>81</sup> In another Concluding Observation and Recommendation to Lesotho, the Committee raises the need to ensure the supply of clean drinking water to all children, under the right to survival and development.<sup>82</sup> In various Concluding Observations and Recommendations the African Committee has also raised the issue of provision of clean drinking water under the right to health.<sup>83</sup> Not only does providing clean drinking water require a balanced ecosystem and sustainable environment,<sup>84</sup> climate change which by 2025 will result in half of the world population living in water distressed areas, also impacts on this right.<sup>85</sup> Clearly the state party reporting procedure could be used to address contemporary child protection challenges related to environmental degradation and climate change, within the context of existing rights.

Beyond the normative framework of the African Children's Charter, the Committee has developed a policy document entitled *Agenda 2040: Fostering an Africa fit for children*.<sup>86</sup> The document aims to address current child rights concerns in Africa by outlining ten priorities as aspirations to be achieved by 2040 along with action steps to be taken by state parties and other stakeholders.<sup>87</sup> Aspiration 9 of *Agenda 2040* provides that 'Every child is free from the impact of armed conflicts and other disasters or emergency situations'.<sup>88</sup> While in the explanation of Aspiration 9, it is alluded that disasters and emergency situations such as climate change have a disproportionate and negative impact on children, the action steps are primarily focused on armed conflict. Only one action step could be interpreted to extend to natural disasters, by requiring that children be equipped to be resilient in the face of disasters and other emergency situations.<sup>89</sup>

81 African Children's Committee Concluding Observation and Recommendations, Eswatini (2019) 7.

82 African Children's Committee Concluding Observation and Recommendations, Lesotho (2016) 7.

83 African Children's Committee Concluding Observation and Recommendation Sierra Leone (2018) 11; African Children's Committee Concluding Observation and Recommendation Liberia 8.

84 World Health Organization 'drinking water' <https://www.who.int/news-room/fact-sheets/detail/drinking-water> (accessed 9 August 2019).

85 As above.

86 *Agenda 2040: Fostering an Africa fit for children* is a policy document developed by the African Children's Committee and adopted by the African Union Executive Council through decision no EX.CL/December.997(XXXI) of the African Union, as a document of the Union. It elaborates on Paragraph 53 of AU-Agenda 2063 and presents measurable goals and priority areas to which the African Union and its Member States commit themselves for the 25 years starting 2015.

87 *Africa's Agenda for Children 2040: fostering an Africa fit for children* (2016) 10.

88 *Africa's Agenda for Children 2040* (n 87) 18.

89 *Africa's Agenda for Children 2040* (n 87) 19.

Rather than focusing on the responsibility on state parties to address and prevent environmental degradation, the Agenda thus only addresses the need to prepare children to withstand and live with harsh climatic conditions. Even though Agenda 2040 is not a normative document, it is a missed opportunity in terms of making a clear link between children's rights and sustainable development, especially as the Agenda claims to be informed by the African Children's Charter and other documents such as the UN Sustainable Development Goals.<sup>90</sup>

An examination of the various applications of the right to health, the right to survival and development, education and the principle/right of the best interest of the child and the right to participation, if viewed from the perspective of the indivisibility of rights, leads to the conclusion that the right to sustainable development of the child is implied under the African human rights system. Such a right to sustainable development would include elements such as the right to a clean and healthy environment, to safe drinking water, education, and a right to participate in decisions affecting them. A right to sustainable development cuts across the various rights that are explicitly included in these instruments. However, it is our contention that there is still need for an explicit recognition of the right to sustainable development of African children, on the basis of a separate right and while some elements can be derived from other rights, there are benefits from its recognition as a stand-alone right.

Both the right to development and the right to satisfactory environment under the African Charter on Human and Peoples' Rights are clearly defined as peoples' rights, or collective rights,<sup>91</sup> and the Maputo protocol bestows the right to sustainable development to women collectively.<sup>92</sup> It has been argued that the incorporation of peoples' collective rights in the African Human Rights system enhances enforcement.<sup>93</sup> While it is not trite that the right to sustainable development can only be exercised collectively, under the African human rights system it has thus far been exercised only as a collective right. Hence the implied or explicit recognition of the right in the African Children's Charter should take cognisance of the nature of the right and its applicability to render it a collective right of children.<sup>94</sup> However, there is a need for a much more focused study in future to address this fully.

## 5 THE NEED FOR EXPLICIT RECOGNITION

Explicit recognition of the right to sustainable development, especially as it relates to the right to environment may seem to be untenable for

90 Africa's Agenda for Children 2040 (n 87) 10.

91 Art 2 African Charter.

92 Art 18 Maputo Protocol.

93 M Talbot 'Collective rights in the Inter-American and African human rights systems' (2018) *Georgetown Journal of International Law* 185.

94 The African human rights system is praised for its inclusion of the concept of peoples' rights, however this concept is missing in the African Children's Charter.

various reasons. As highlighted above, the argument is sometimes made that since environmental rights are linked with future generations, they cannot fall in the human rights regime, which requires present victims.<sup>95</sup> Furthermore, there are arguments that environmental rights aim to prevent environmental damage, and human rights law remedies past violations not future scenarios.<sup>96</sup> However, these arguments overlook the broad nature and various elements of the right to sustainable development, as well as the already manifesting impacts of environmental degradation on human rights. As argued in this paper, environmental protection is no longer only for the sake of future generations but also equally for the sake of the current generations and especially for children who will bear the brunt of degradation of the environment and the consequences of climatic change. In addition, legislation and policy decisions which will result in negative consequences have to be repealed even if the negative consequences have not yet manifested, if it is clear that they will be detrimental and in contravention of established legal and human rights principles. Similarly, the harmful activities of industries and corporations should be regulated and limited in law, to prevent harm to children. This is in line with the principle of the best interest of the child and that business interests cannot trump the realisation of their rights and interests.

A further reason why there is a need for explicit recognition relates to the mode of monitoring the implementation of the right and remedying violations of the right. Human right monitoring has a preventive element in addition to a remedial one. In fact one of the most utilised mechanism of monitoring, also under the African human rights system, the state reporting procedure, serves exactly this purpose. The state reporting mechanism allows state parties to identify risks and put in place measures to prevent violations in accordance with concluding observations and recommendations of treaty bodies.<sup>97</sup> However, for this objective to be realised, the right needs to be recognised and the state concerned has to report on measures it is taking to ensure its realisation. If a certain right is not explicitly recognised, state parties will not be inclined to report on any elements of such right, even if it can be inferred from other rights.

For a right to be invoked before courts and international treaty bodies, it is essential that it be explicitly provided in the relevant instrument. While a right may be recognised through creative interpretation of human rights instruments, as has been done with the right to food by the African Commission, this would leave the duty to recognise the right with international treaty bodies, which are often not willing to interpret rights too broadly. In addition, the UN Committee on the Rights of the Child noted the importance of incorporation of

95 McGoldrick (n 53) 812.

96 McGoldrick (n 53) 813.

97 International supervisory mechanisms for human rights <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/international-supervisory-mechanisms-for-human-rights> (accessed on 9 August 2019).

rights recognised in the CRC in domestic legislation in order to invoke it in national courts and thereby ensure its implementation.<sup>98</sup> Establishing access to justice for children in the context of sustainable development is a key means of ensuring that states and private actors are held accountable for obligations.

Related to this is the general rule of law that where there is a right there is a remedy. Conversely, where there is no right, there is no need for any steps to be taken to remedy the situation. So the explicit recognition of the right to sustainable development for children would lead to further elaboration of what the duties of states and other stakeholders and even the international community are in respecting, protecting and fulfilling this right for children. Under article 1 of the African Charter states assume the obligation to 'adopt legislative or other measures to give effect' to the rights protected under that treaty. A similar provision is provided under article 1 of the African Children's Charter. Thus an explicit recognition would make sustainable development not only an Aspiration to be achieved, as under the Agenda 2063, but impose obligations which can be enforced by rights holders.

Another important reason for explicit recognition of the right to sustainable development in international instruments is the extraterritorial impact of environmental degradation.<sup>99</sup> Various national laws may recognise the right to environment and may criminalise certain acts that amount to environmental degradation. However, international recognition of the right is needed to ensure protection across territories.

There is furthermore a moral obligation on the present generations and in particular the policy makers for the explicit recognition of children and future generations to a liveable future. An explicit recognition of a right to sustainable development for children would thus be an indication of a commitment of leaders on this continent to ensure that development does not only take place, but that in developing economically, the social and environmental considerations and the obligations towards future generations is given full recognition.

Explicit recognition of rights is furthermore crucial to ensure political will and commitment from states and galvanise the necessary support and resources from stakeholders to realise the right.<sup>100</sup> One of the strengths of the Sustainable Development Goals as opposed to the Millennium Development Goals is said to be the fact that the SDGs are anchored on human rights norms.<sup>101</sup> This has given them political weight and increased commitment. However not all the elements of the

98 UNCRC General Comment 5 General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6) (2003) para 20.

99 A Boyle 'Human rights and the environment: where next?' (2012) 23 *European Journal of International Law* 613 at 634.

100 <https://canadians.org/blog/blue-planet-project-calls-explicit-recognition-right-water-un-development-agenda> (accessed 22 August 2019).

101 I Winkler 'The sustainable development goals and human rights: a critical early review' <https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1348695> (accessed 22 August 2019).

SDGs are explicitly recognised in human rights norms, the right to sustainable development of the child is an example. Hence it is crucial to explicitly recognise the right in order to benefit from the accountability mechanisms of human rights systems that inspire political commitment.

Finally, in the Preamble of the African Children's Charter, states noted

with concern that the situation of most African children remains critical due to the unique factors of their socio-economic, [...] and developmental circumstances, natural disasters [...] and on account of the child's physical and mental immaturity he or she needs special safeguards and care

Through this, the additional protection, which should be bestowed upon children, was acknowledged. Given the intergenerational nature of climate change and sustainable development, and the specific needs and vulnerabilities that children have in this regard, it is therefore paramount and in the best interest of the child that the specific factors that impact on children in this regard be fully developed and that it is acknowledged as a right.

## 6 CONCLUSION AND RECOMMENDATIONS

News reports released in June 2019 indicate that the permafrost in the Canadian Arctic, which scientists expected to remain frozen for at least another 70 years, had begun thawing.<sup>102</sup> This is just one of the many consequences of human induced climate change which was not expected to take place in our lifetime, and which will have far-reaching consequences for today's children and future generations. There is a need for a realisation on the side of the present generation, and leaders in particular, that the consequences of the development decisions that we take today will have repercussions which we may not experience ourselves. As noted by Viljoen, the various human rights instruments discussed in this paper together create 'overlapping and connecting [...] layers of protection.'<sup>103</sup> Together these instruments offer protection for the right to sustainable development.

However, as we argue above, there is, in addition, a need for an explicit recognition of the future challenges that we create for children through our present mode of development which had been followed since the industrial revolution and which has become untenable, unsustainable and unfit for our limited world. There is thus a need for a recognition of the best interest of the child, and for providing children

102 Matthew Green 'Scientists amazed as Canadian permafrost thaws 70 years early' 18 June 2019 *Reuters* <https://www.reuters.com/article/us-climate-change-permafrost/scientists-amazed-as-canadian-permafrost-thaws-70-years-early-id-USKCN1TJ1XN> (accessed on 21 August 2019); Grant Currin 'Arctic Permafrost Is Going Through a Rapid Meltdown – 70 Years Early' 13 June 2019 <https://www.livescience.com/65709-arctic-permafrost-melts-decades-early.html> (accessed 21 August 2019).

103 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington & Lee Journal of Civil Rights & Social Justice* 29.

with opportunities to participate, in order to share a world which will continue to be habitable. While it would be best if this could be done through the amendment of existing instruments, it is not likely that these instruments will be opened up for review in the foreseeable future, and there is thus a need for its incorporation through other means, including interpretation.

Based on the arguments and conclusions made in this paper we make the following recommendations:

The African Children's Committee should use its case law jurisprudence to find an implied right to sustainable development, if presented with a communication that relates to any of the elements of the right. The Committee should improve the analysis of the right to life, survival and development and the right to health including access to safe drinking water, to include various elements of sustainable development such as: the right to a satisfactory environment, protection from environmental pollution and degradation, access to resources provided by the environment, the right to economic, social and cultural development, the principle of non-discrimination and participation in sustainable development. The Committee can do this in its concluding observations and recommendations, and through a General Comment on the right to survival and development.

The Committee may amend its state reporting guidelines to incorporate elements of sustainable development. The Committee could specifically request the following information from state parties through its reporting guidelines; disaggregated information on the effects of pollution and climate change on the health and wellbeing of children, precautionary measures to protect children against environmental harm, participation of children in environmental decision-making and availability of remedies for environmental harm caused to children.

The Committee may specifically urge state parties to put the best interest of children at the centre of climate adaptation strategies, put in place preventive measures with regards to environmental degradation, and mitigate current impact of climate change and environmental degradation on children. The Committee could urge states parties to put in place environmental standards that are based on the best available scientific research and recommendations. The Committee may further push for the incorporation of children's rights in environmental impact assessments conducted prior to public or private projects.

The Committee could further pay special attention to countries most affected by climate change and environmental degradation and utilise its multi-faceted mandate to respond accordingly. In addition to state party reporting mechanism and communication mandate, the Committee could undertake onsite investigation in these countries with a view to analyse the impact of environmental degradation and climate change on children's rights and welfare and recommend the necessary measures.

The African Commission may make use of its norm-setting functions to elaborate the meaning of the right to development under

the African Charter, and to ensure that this is in line with the principles of sustainable development, as well as to elaborate on the content of the right to sustainable development under the Maputo Protocol. The African Commission and the African Court could use the opportunity of cases brought before it that relate to article 22 of the African Charter to develop its jurisprudence in this regard and particularly to elaborate on the duties and expectations in relation to states in respecting, protecting and fulfilling this right.

Civil society organisations could ensure the inclusion of aspects of sustainable development in their complementary reports to the Committee and the Commission and further bring communications against state parties who are failing to protect children from environmental degradation. Civil society organisations should advocate for the inclusion of the right of children to sustainable development, preferably within the existing instrument protecting the rights of children on the continent.

State parties should comply with their obligations under the African Charter, the Maputo Protocol and the African Children's Charter, to respect, protect and fulfill the rights of all people to development, within an environment that is not detrimental to their health and wellbeing, and in a manner which allows future generations to do the same. State parties should also cooperate for the purposes of development, to ensure that economic development is delivered, within the social and environmental boundaries, and without detrimental effects resulting for another state as a result of their development efforts.