

Beyond borders and time: The adequacy of international human rights law in establishing legal responsibility for harm caused by the climate crisis on African children

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Abstract: Climate change is one of the most pressing global challenges with deeply unequal impacts. African children, despite their continent contributing negligibly to global emissions, are disproportionately affected by its impacts. This article interrogates the adequacy of international human rights law, particularly the children's rights framework, in establishing legal responsibility for climate change-related harms affecting African children. It analyses the key legal challenges posed by the transboundary, cumulative and intergenerational nature of climate harm, including issues of causality, extraterritoriality and temporality. The article argues that while the current framework presents significant normative and jurisdictional gaps, the principles enshrined in children's rights norms, including the best interests of the child and the right to an effective remedy, offer opportunities for reinterpreting obligations in a manner that is responsive to the climate crisis. It further draws on evolving international jurisprudence on causation, extraterritoriality and climate attribution science to illustrate the potential for international legal responsibility.

Key words: African children; climate change; children's rights; extraterritoriality; international legal responsibility

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1 Introduction

Several scholarly writings and reports of human rights organisations have linked children's rights and climate change. However, the link has been insufficiently examined from an international accountability perspective. Given the nature of climate change, the harms caused to children in Africa originate from different corners of the world, predominantly from developed countries and through action spanning over a long period.¹ The adequacy of the international human rights law framework in ensuring accountability, at the international level, for harms caused to children in Africa has neither been critically analysed nor has it ever been a subject of successful litigation. The only international rights-based climate litigation involving a child from Africa was the *Sacchi* case at the UN Committee on the Rights of the Child (CRC Committee). The case was brought by 16 children from Tunisia, Nigeria and South Africa. As the case was declared inadmissible due to non-exhaustion of local remedies, it did not establish legal responsibility, and there is no jurisprudence on the merits that analysed the substantive rights that were allegedly violated.²

Cognisant of this, the article analyses the link between climate change and children's rights. In doing so, it looks at the broader frameworks that cover these areas, namely, international environmental law and international human rights law, as well as the specific frameworks provided by the two regions. The analysis aims to uncover the ability (or inability) of human rights law and, more specifically, children's rights norms to ensure accountability for climate change-induced violations at an international level. Climate change is a global phenomenon predominantly caused by industrialised countries. However, the impact is felt most severely by vulnerable populations in underdeveloped countries, including many in Africa. Additionally, climate vulnerability is further exacerbated by age, as children are among the most vulnerable groups. The focus on international accountability and the rights of African children highlights several layers of vulnerabilities and multiple normative frameworks for establishing legal responsibility and accountability.

In addressing the question of accountability, the article looks into the first element, namely, the possibility of establishing legal responsibility under human rights law for the harms caused by climate change. In doing so, the article analyses the impacts of climate change and their links with human rights in general and children's rights in particular. Furthermore, various commonly cited legal barriers are discussed, such as the possibility of creating a causal link between harm and

1 United Nations Framework Convention on Climate Change (UNFCCC) 9 May 1992 S Treaty Doc. 102-38; UNICEF 'Children in 98 per cent of African countries at high or extremely high risk of the impacts of climate change' (2023), <https://www.unicef.org/press-releases/children-98-cent-african-countries-high-or-extremely-high-risk-impacts-climate> (accessed 23 May 2025).

2 *Sacchi & Others v Argentina, Brazil, France, Germany, and Turkey* UN CRC Committee (CRC Committee), Communication 104/2019 Decision on admissibility (2021).

actions that cause climate change and the ability of the relevant norms and structures of human rights law to remedy extraterritorial harms and guarantee that victims can access justice even when they are in a different jurisdiction than the perpetrators.

2 Climate change: Impacts and responses

Climate change is understood as ‘a change in the state of the climate that can be identified ... by changes in the mean and/or the variability of its properties, and that persists for an extended period.’³ The definition of the United Nations Framework Convention on Climate Change (UNFCCC) of climate change is limited to a change in climate, which is attributed directly or indirectly to human activity.⁴ However, the definition adopted by the Intergovernmental Panel on Climate Change (IPCC) refers to any change in climate over time, whether due to natural variability or human activity.⁵ This distinction in definition is becoming irrelevant as there is increasing certainty that human activity is almost entirely responsible for present-day climate change. One of the most consequential conclusions of the IPCC in recent years has been that ‘it is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century.’⁶ The phrase ‘extremely likely’ in the IPCC reports implies 95 to 100 per cent certainty.⁷ Some scientists argue that it is 100 per cent certain that human activity is the cause of climate change, at times even more than 100 per cent, as certain natural events, such as volcanic eruptions, have a temporary cooling effect on the climate, offsetting the human impact.⁸

The latest report of the IPCC concludes that greenhouse gas (GHG) emissions have unequivocally caused global warming, with current global surface temperatures reaching 1,1°C compared to pre-industrial levels (1850 to 1900).⁹ Despite more than three decades of awareness of the catastrophic harm and concerted effort, global GHG emissions have continued to increase, with unequal contributions.¹⁰ This is already affecting many weather and climate extremes across the planet, with adverse impacts on people and disproportionately impacting vulnerable communities who have historically contributed the least to climate change.¹¹ Beyond having a disproportionate effect on marginalised

3 United Nations Framework Convention on Climate Change (UNFCCC) Fact sheet: Climate change science – The status of climate change science today (2011) 1.

4 Art 1(2) UNFCCC (n 1).

5 Intergovernmental Panel on Climate Change (IPCC) ‘Climate Change 2007: Synthesis Report’ (2007) 30.

6 IPCC ‘Climate Change 2013: The Physical Science Basis’ (2013) 17.

7 As above.

8 Carbon Brief ‘Analysis: Why scientist think 100 per cent of global warming is due to humans’, <https://www.carbonbrief.org/analysis-why-scientists-think-100-of-global-warming-is-due-to-humans/> (accessed 2 May 2025).

9 IPCC Synthesis report of the sixth assessment report: Summary for policy makers (2023) 4.

10 As above.

11 IPCC (n 9) 5.

communities, the Sixth Assessment report of the IPCC, for the first time, confirms that systems of marginalisation and subjugation have contributed to causing climate change and exacerbating its disproportionate impact.¹² It notes that 'historical and ongoing patterns of inequity such as colonialism' continue to worsen the disproportional effects of climate change. The delayed mainstream recognition of colonisation as a historical driver of climate change and the underlying cause of vulnerability of black, indigenous and people of colour further illustrates the layers of injustice that are at the heart of climate change. Although the links between colonisation and the industrial revolution that led to climate change seem straightforward, only after three decades did the IPCC officially add the term 'colonisation' to its vocabulary, partly owing to the lack of diversity in its technical experts.¹³ Moreover, this recognition further highlights the disproportional and unjust impact of climate change on different groups of people and the compounding injustice that affects their lives.¹⁴ The recognition of the link between colonisation and climate change has various implications. It would increase the historic emission levels of former colonisers as the emissions from their colonies would be attributed to them; it would invoke additional grounds of liability of polluters, such as unjust enrichment, and suggest a much more radical systemic change to the global governance structure to address the climate crisis.¹⁵

The impact of climate change on the African continent has been severe and is expected to worsen. Surface temperature increase has been more rapid in Africa as compared to the global average; frequency and intensity of heavy rain is expected to increase in all parts of the continent; both hot extremes and cold extremes are expected to exacerbate on the continent; all regions of the continent will continue to experience higher levels of rain induced and river flooding; almost all parts of the continent will experience longer and more frequent periods of drought.¹⁶ High-impact events in 2019 indicate the various impacts on the continent; the Horn of Africa has been experiencing severe droughts, which took a dramatic shift into unusually heavy rainfall, leading to floods and landslides.¹⁷ Heat waves exceeding 50°C and cold spells as low as -9°C was registered in Algeria in the same year, while temperatures exceeded 45°C in parts of Southern Africa; ocean heat content in East Africa was well above the global average; the eastern coast of the continent experiences sea level rises of two to three times above the global average; countries by the Indian ocean experienced devastating cyclones, including 'two of the strongest known cyclone landfalls on the east coast of

12 IPCC (n 9) 12.

13 'Colonialism: Why leading climate scientists have finally acknowledged its link with climate change' *The Conversation*, <https://theconversation.com/colonialism-why-leading-climate-scientists-have-finally-acknowledged-its-link-with-climate-change-181642> (accessed 10 October 2024).

14 As above.

15 S Deva 'Report of the Special Rapporteur on the Right to Development, Climate Justice: Loss and damage' A/79/168 (2024) 16.

16 IPCC Sixth Assessment Report: Regional Fact Sheet – Africa (2021).

17 World Meteorological Organisation State of the Climate in Africa (2019) 16.

Africa' with tropical cyclones Idai and Kenneth hitting mainly Mozambique but also Tanzania and Comoros, among others.¹⁸ Some of the recorded weather events in 2019 alone caused considerable loss and damage in Africa, including 1 200 deaths in Mozambique due to cyclones; 400 deaths in East Africa owing to flood and landslides; 69 000 homes destroyed in Sahel region due to floods; 28 000 people having been displaced in Central African Republic due to floods; 31 000 people in Burundi having been displaced due to torrential rain fall, high wind and other climatic events; 66 per cent of internal displacement in East and Horn of Africa during 2019 as a result of climatic events; in Ethiopia 131 000 people were displaced by drought, while 367 000 people were displaced by floods in that year.¹⁹

In addition to the disproportional impact of climate change geographically, it affects diverse people differently, owing to vulnerabilities and marginalisation. Children are one of the most vulnerable groups to climate change, if not the most vulnerable, due to their physical and cognitive stages of development. Natural disasters affect children more significantly than they do adults. For instance, heat waves affect younger children disproportionately because of their slower ability to adjust to heat; hence, they suffer severe consequences, including illnesses.²⁰ Children are less capable of adapting to water scarcity and food shortages. Malnourishment during the first years of life can result in irreversible stunting with lifelong consequences for children's cognitive capacity.²¹ Children are more vulnerable to vector-borne and waterborne diseases exacerbated by climate change.²²

The disproportionate impact of climate change on children is more pronounced where African children are concerned. African children are a diverse group, and their intersectional identity markers, such as age, gender and disability, determine how they are impacted by climate change.²³ Moreover, African children, as a distinct group, share vulnerabilities owing to their status as children, which entails a lower level of physical and cognitive maturity that increases their vulnerability to climate change.²⁴ Their status as children implies that, under normal circumstances, they will live longer to face the impacts of climate change throughout the century. At the same time, their African identity exacerbates their natural vulnerability owing to the vulnerable socio-economic conditions of the majority of the countries on the continent. It is reported that the top ten countries in the world where children are at extremely high risk for

18 As above.

19 As above.

20 Office of the United Nations High Commissioner for Human Rights (OHCHR) Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child (2017) UN Doc A/HRC/35/13 para 9.

21 OHCHR (n 20) para 13.

22 OHCHR (n 20) para 16.

23 E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 1 *African Human Rights Yearbook* 27.

24 As above.

environmental stress and extreme weather events are all in Africa, and of the top 33 extremely high-risk countries, 25 are African.²⁵ Diseases such as malaria, which are exacerbated by climate change, affect African children more than any other demographic group, followed by pregnant women.²⁶ In 2017 alone, 93 per cent of global malaria deaths occurred in Africa.²⁷ In addition to worsening the prevalence rate of malaria, warming in highland areas of Africa has led to malaria-carrying mosquitoes to expand to those areas, thereby endangering new groups of population that were never faced with this challenge and hence are ill-prepared to adapt.²⁸

Furthermore, climate change affects groups of children in Africa differently. It exacerbates existing gender inequalities. During droughts, girls are often responsible for fetching water over longer distances, leading to reduced school attendance and increased exposure to safety risks.²⁹ Economic hardships resulting from extreme climate events, coupled with pre-existing gender norms, lead to child marriages, as families seek to alleviate financial pressures, further disrupting girls' education and exposing them to health risks.³⁰ Climate-related disasters, such as floods and droughts, disproportionately impact children with disabilities.³¹ Droughts severely affect rural communities dependent on agriculture. Africa accounts for 44 per cent of all severe droughts recorded globally in the past century.³² Droughts significantly contribute to food insecurity and malnutrition among children in Africa, where approximately 30 per cent of children under the age of five suffer from stunted growth due to chronic malnutrition, conditions often exacerbated by climate-induced food shortages.³³ Flooding in urban slums leads to waterborne diseases due to inadequate sanitation. For instance, flooding in Nigeria in 2022 resulted in over 600 deaths, many of which were children.³⁴ Climate change threatens the traditional livelihoods of indigenous and nomadic communities, such as pastoralism and subsistence farming.³⁵ As natural resources become scarce, these communities face displacement, disrupting children's cultural practices and access to education and health care.

25 UNICEF 'The climate crisis is a child rights crisis Introducing the children's climate risk index' (2021) 79.

26 World Metrological Organisation (n 17) 24.

27 As above.

28 As above.

29 N Thèbaud-Bouillon-Njenga and others 'Study on the gendered impact of climate change on adolescent girls and young women in the Sahel: Multi-country analysis in Burkina Faso, Guinea, Mali, Niger and Nigeria' (2024) 20-42.

30 As above.

31 African Children's Committee 'Climate change and children's rights in Africa: A continental overview' (2024) 48.

32 United Nations Convention to Combat Desertification (UNCCD) 'Africa climate summit: Leaders outline common vision on drought resilience', <https://www.unccd.int/news-stories/press-releases/africa-climate-summit-leaders-outline-common-vision-drought-resilience> (accessed 1 May 2025).

33 Food and Agriculture Organisation of the United Nations (FAO) *Regional overview of food security and nutrition: Statistics and trends in Africa* (2023) 16.

34 UNICEF 'More than 1.5 million children at risk as devastating floods hit Nigeria' (2022), <https://www.unicef.org/press-releases/more-15-million-children-risk-devastating-floods-hit-nigeria> (accessed 1 May 2025).

35 African Children's Committee (n 31).

The confluence of climate change with conflict further worsens the adverse impact on children's rights. Climate change exacerbates tensions by intensifying resource scarcity, particularly water and arable land, due to prolonged droughts and erratic rainfall patterns.³⁶ This scarcity fuels community competition, often leading to conflicts over dwindling resources. It is estimated that over 6,9 million children under the age of five are acutely malnourished in the Sahel region, with 1,4 million suffering severe malnutrition, a situation intensified by both environmental degradation and armed violence.³⁷ Moreover, the displacement of populations due to conflict and climate shocks has resulted in over 3 million people being forcibly displaced, many of whom are children lacking stable access to necessities.³⁸ This intersection of climate change and conflict creates a vicious cycle that disproportionately affects children, undermining their health, security and prospects. The current level of havoc that global warming is wreaking on African children is a result of a 1,1°C increase as compared to pre-industrial levels.³⁹ A 1,5°C to 2°C warmer world will have profoundly devastating consequences for the world in general and more so for Africa.⁴⁰ The 1,5°C to 2°C goal in the Paris Agreement, which resulted from global power asymmetries, is neither grounded in science nor a fair deal for the parties to the agreement. According to the IPCC, 'warming of 1,5°C is not considered "safe" for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems compared to the current warming of 1°C'.⁴¹

Among the nations and communities for whom the 1,5°C goal is not considered 'safe', African nations stand out, particularly children in African countries.⁴² The goal of limiting warming from 1,5°C to 2°C, and most of the elements of the agreement favoured the interest of developed countries over that of developing countries. Dimitrov notes:⁴³

The agreement is least fair to the African Group and other Least Developed Countries. It does not include references to their special circumstances, is weak on international dimensions for adaptation policy, and precludes future claims for liability and compensation.

Sidelining the interest of developing countries, which are most affected by climate change despite minimal contribution to the problem, indicates a subtle continuation, disguised in diplomatic negotiation, of the global systems of

36 African Child Policy Forum (ACPF) 'The climate-conflict nexus and its impact on children in the Sahel' (2025).

37 ACPF (n 36) 12.

38 ACPF (n 36) 15.

39 IPCC (n 9) 4.

40 United Nations Africa Renewal 'Global warming: Severe consequences for Africa', <https://www.un.org/africarenewal/magazine/december-2022/global-warming-severe-consequences-africa> (accessed 2 May 2025).

41 IPCC Global Warming of 1,5°C: An IPCC Special Report (2018).

42 IPCC 'Climate change 2022: Impacts, adaptation and vulnerability' Working Group II contribution to the sixth assessment report (2022).

43 RS Dimitrov 'The Paris Agreement on Climate Change: Behind closed doors' (2016) 16 *Global Environmental Politics* 7.

marginalisation and subjugation that contributed to causing climate change in the first place. Moreover, based on the current commitment of countries, enveloped in nationally determined contributions (NDCs) under the Paris Agreement, global warming will pass 1,5 degrees within the century.⁴⁴ Even this bleak prediction assumes that countries will fully implement their commitments, but there is a considerable implementation gap given the lack of political will.⁴⁵ Besides, due to the nature of the phenomenon, irrespective of the scale of mitigation measures taken today and over the following decades, global warming will continue due to the inertia of the climate system and the long-term effects of previous greenhouse gas emissions.⁴⁶ Furthermore, irrespective of the level of adaptation measures taken, some of the impacts of climate change are beyond adaptation and will inevitably result in loss and damage.⁴⁷ The inherent weaknesses of the climate action regime enveloped in the UNFCCC include weak adaptation requirements, a lack of an effective loss and damage mechanism, voluntary determination of national mitigation goals, and a lack of a clear division of responsibility for mitigation, significantly diminishing the possibility of justice under this framework. This renders the human rights law regime appealing to fill the protection and accountability gap of the climate change law regime.

3 Climate change and children's rights

The nexus between climate change and children's rights can be understood by exploring the link between climate change and human rights more broadly, as children's rights operate by the same underlying norms and standards applicable in human rights. As climate change law is a sub-group of environmental law, the links between environmental law and human rights law are relevant in this discussion. In this regard, it can be noted that there have been various efforts to recognise the right to the environment internationally as a human right. However, very little has been achieved by the international community in recognising this right that has received wide recognition in regional and national systems. As early as 1972, the Stockholm Declaration of the United Nations (UN) noted that there is 'a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.⁴⁸ Presently, the right to a healthy environment remains soft law internationally.

⁴⁴ IPCC (n 9) 10.

⁴⁵ IPCC (n 9) 11.

⁴⁶ Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (2009) para 15.

⁴⁷ UNFCCC Report of the Conference of the Parties on its 19th session, held in Warsaw from 11 to 23 November 2013: Decision 2/CP.19, Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (2013) UN Doc FCCC/CP/2013/10/Add.1 6.

⁴⁸ United Nations Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (1972) Principle 1.

Climate change discourse and, in general, environmental protection, usually takes the approach of protecting the planet, which is a problematic and erroneous approach. Climate change is an issue of social justice characterised by extreme inequalities in responsibility and vulnerability.⁴⁹ Climate change is best described as an issue of 'global injustice' where one group of people, mainly wealthy people from rich countries, caused a problem and another group of people, primarily poor people from poor countries, suffer the consequences.⁵⁰ The confirmation by the IPCC that the history of colonisation exacerbates present-day vulnerability to the impacts of climate change further underlines the scale of the injustice of climate change that is built on another grave global injustice that was never remedied, namely, the colonisation of black, indigenous and people of colour.⁵¹ Hence, beyond anything, it is an urgent plight of the vulnerable and should be seen primarily as a human rights concern. However, the responses to climate change stray away from this approach. In the negotiation of the Paris Agreement, one of the contentious issues was the rights-based wording that was part of article 2 (purpose of the agreement) of the draft agreement. The position taken by those advocating a strong rights-based approach was the premise that addressing climate change is not just about the planet but about protecting people.⁵² Hence, the outlined purpose of the agreement should have reflected the apparent connection between people and planet by providing human rights protection as an inseparable aim of protecting the planet. However, due to resistance from a select group of developed nations, the suggested provision was moved to the Preamble to the agreement.⁵³ Climate justice is not about the planet but about people on the planet, more specifically about people whose lives are severely affected by the negative impacts of global warming despite having a negligible contribution to causing it.⁵⁴ It demands the availability of institutions to render remedies, the possibility for victims to confront perpetrators, and institutions with jurisdiction over perpetrators and standing for victims.

There is growing consensus about the adverse impact of climate change on all ranges of human rights, with the recognition of disproportional impact on vulnerable groups such as children. However, there is strong resistance to accepting a human rights-based legal obligation about climate change, emanating from seemingly political considerations, but also due to legal complications

49 J Dehm 'Carbon colonialism or climate justice?' (2016) 33 *Windsor Yearbook of Access to Justice* 140.

50 K Mickelson 'Beyond a politics of the possible? South-north relations and climate justice beyond a politics of the possible?' (2009) 10 *Melbourne Journal of International Law* 3.

51 K Sherwood-O'Regan 'The Climate change and colonisation connection' (2022), <https://climatenetwork.org/2022/03/09/what-do-activists-and-ngos-need-to-know-to-be-allies-to-communities-on-the-frontlines-of-climate-change-per-centEF-per-centBF-per-centBC-2/> (accessed 5 May 2025).

52 Human Rights Watch 'Human rights in climate pact under fire', <https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire> (accessed 4 April 2025).

53 OW Pedersen 'The European Court of Human Rights and international environmental law' in JH Knox & R Pejan (eds) *The human rights to a healthy environment* (2018) 7.

54 J Williams and others 'Africa and climate justice at COP27 and beyond: Impacts and solutions through an interdisciplinary lens' (2022) 5 *UCL Open Environment* 5.

in attributing human rights responsibility to states.⁵⁵ In a vivid display of this resistance and its response to the call by the Office of the High Commissioner for Human Rights (OHCHR) for submission on the relationship between climate change and human rights, the United States of America (US) noted the following:⁵⁶

The United States does not consider that a right to a safe environment or other similarly worded or rights exists under international law. Further, the United States believes that a 'human rights approach' to addressing climate change is unlikely to be effective, and that climate change can be more appropriately addressed through traditional systems of international cooperation and international mechanisms for addressing this problem, including through the UNFCCC process.

It is also worth mentioning that major human rights organisations such as Amnesty International and Human Rights Watch downplayed the link between human rights and climate change.⁵⁷ Climate change admittedly was 'not a priority' and 'of marginal relevance' to their work on human rights until as late as 2019.⁵⁸ Despite such strong resistance by powerful nations, reluctance from major human rights organisations, and a lack of success in recognising an internationally binding right to the environment, there has been a proliferation of efforts to effectively identify the linkages between climate change and human rights.⁵⁹ Most efforts focus on international and regional human rights courts and quasi-judicial bodies. The sharp increase in climate change litigation observed after adopting the Paris Agreement is sometimes referred to as the 'rights turn' in climate action, where litigation is focused on establishing a state's obligation to address climate change as a human rights violation.⁶⁰

The Inuit Circumpolar Conference took the first concrete step of linking climate change and human rights through the petition they filed to the Inter-American Commission on Human Rights (IACHR). The petition claimed that climate change, which resulted from the failure of the US to curb its greenhouse gas emissions, violated the Inuit's human rights.⁶¹ Although the petition was unsuccessful, the process led to the complainants making testimony about the link between climate change and their affected human rights, helping establish

55 AJK Fleming 'Human rights: An alternative approach for addressing climate-induced loss and damage' Master's dissertation, University of Gothenburg, Roehampton University & University of Tromsø, 2015 48.

56 United States of America 'Observations on the relationship between climate change and human rights', <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/Submissions/USA.pdf> (accessed 5 May 2023).

57 P Alston *International human rights* (2024) 1025.

58 Alston (n 57) 1026.

59 C Carlarne 'Climate change, human rights, and the rule of Law' (2020) 25 *UCLA Journal of International Law and Foreign Affairs* 29.

60 As above.

61 Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States, submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic regions of the United States and Canada (2005) 76.

the connection between the two.⁶² This was followed by various soft laws and official reports expounding on the causal relationship between climate change and human rights. The 2007 Malé Declaration urged the international community to address the issue urgently by noting that ‘climate change has clear and immediate implications for the full enjoyment of human rights’.⁶³

This was echoed by the UN Human Rights Council, which issued a resolution recognising the threats posed by climate change to a range of human rights.⁶⁴ While climate change is believed to have ‘implications for the full range of human rights’,⁶⁵ its direct impact on certain fundamental rights highlights its gravity. The right to life is among the basic rights directly affected by climate change. The right is deemed to be a supreme right that is necessary for the exercise of all other human rights.⁶⁶ Regarding children’s rights to life, states have an obligation to ensure, to the maximum extent possible, the survival and development of the child.⁶⁷ Climate change threatens the right to life through ‘an increase in death, disease and injury from heatwaves, floods, storms, fires and droughts’ and ‘an increase in hunger and malnutrition and related disorders’.⁶⁸ Other rights that are directly affected include the right to food, the right to water, the right to health, the right to housing and the right to self-determination.⁶⁹

Despite the linkage of the impact of climate change on a wide range of human rights, there is one glaring exception: the lack of recognition of climate migrants as refugees. The IPCC has highlighted the impact of climate change on causing cross-border movement.⁷⁰ Climate change is one of the root causes of child displacement in Africa, resulting in movement within a country, within the continent of Africa and beyond.⁷¹ Millions of African children are displaced from their homes each year due to slow-onset and sudden disasters such as floods and droughts, whose frequency, intensity and duration have been exacerbated by climate change.⁷² The international law definition of refugee is limited to those facing individual persecution based on race, religion, nationality, membership

62 As above.

63 Malé Declaration on the Human Dimension of Global Climate Change (2007) (Malé, 14 November 2007) 2, <https://www.ciel.org/reports/the-male-declaration-on-the-human-dimension-of-global-climate-change/> (accessed 5 May 2025).

64 Human Rights Council ‘Res 10/4, Human Rights and Climate Change’ (2009) UN Doc A/HRC/RES/10/4 1.

65 Human Rights Council ‘Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights’ (2009) para 20.

66 United Nations Human Rights Committee General Comment 6: Article 6 (Right to life) (1982) para 1.

67 Art 6 Convention on the Rights of the Child (1989).

68 Human Rights Council Report (n 65) para 20.

69 Human Rights Council Report (n 65) paras 25–41.

70 Intergovernmental Panel on Climate Change ‘Key risks across sectors and regions’ in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report* (2022) 2247.

71 African Children’s Committee ‘Mapping children on the move within Africa’ (2018) 54.

72 UNICEF ‘Children displaced in a changing climate: Preparing for a future already underway’ (2023).

of a particular social group or political opinion.⁷³ This leaves a seismic legal gap in the protection of climate-displaced children who cross national borders. However, this gap can be filled by a progressive interpretation of the definition of a refugee, a possibility demonstrated by the UN Human Rights Committee in the recent *Teitiota* case.⁷⁴ The Committee, in deciding whether or not to reject the application for refugee status and the subsequent deportation to the country of origin, where an individual faces severe climate change-related harm, violated the right to life, noted that '[t]he effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states'.⁷⁵

While the Committee did not find a violation in this case, regrettably, it showed the possibility for interpretative expansion of refugee status determination on the grounds of climate harm. Moreover, putting aside this normative exception, climate change is interlinked with and affects a wide range of recognised human rights/children's rights. The impact of climate change on vulnerable groups such as children raises concerns regarding collective morality, making human rights law the most attractive tool to address the issue.⁷⁶ Moreover, besides being an attractive tool, the human rights framework may provide the possibilities for accountability, which international environmental law has failed to achieve.⁷⁷ The decades of painstaking, fruitless discussion on the issue of loss and damage are the best example of that possibility.⁷⁸ The lack of an effective loss and damage mechanism despite continued push for it from the Global South reflects the rejection of accountability by those most responsible and the failure of the international environmental law regime to espouse it.⁷⁹ The link between human rights law and climate change is a quest for justice, enveloping legal norms that appeal to collective morals.⁸⁰ Despite the intricate connection, it is contended by developed nations that the impacts of climate change should be addressed solely by climate change law, primarily the UNFCCC.⁸¹ Environmental law and human

73 Art 1A(2) United Nations Convention Relating to the Status of Refugees (1951).

74 *Ioane Teitiota v New Zealand* UNHCR Committee (2020) UN Doc CCPR/C/127/D/2728/2016 (2020).

75 *Teitiota* case (n 74) para 9.11.

76 OW Pedersen 'Climate change and human rights: Amicable or arrested development?' (2010) 1 *Journal of Human Rights and the Environment* 4.

77 Legal Assistance 'Human rights under the UNFCCC regime', https://legalresponse.org/legaladvice/human-rights-under-the-unfccc-regime/?utm_source=chatgpt.com (accessed 3 May 2025).

78 SciencesPo 'Assessing Cop 29: Did the "finance cop" meet its lofty goals?' <https://www.sciencespo.fr/psia/chair-sustainable-development/2025/02/14/assessing-cop29-did-the-finance-cop-meet-its-lofty-goals/> (accessed 10 May 2025).

79 R Malavika 'A TWAIL perspective on loss and damage from climate change: Reflections from Indira Gandhi's speech at Stockholm' (2022) 12 *Asian Journal of International Law* 69.

80 A Sen 'Elements of a theory of human rights' (2004) 32 *Philosophy and Public Affairs* 1.

81 Eg, in the 2024 hearings for the International Court of Justice's advisory opinion on climate change, several developed countries, including Germany, the United States, the United Kingdom and others, argued that the Paris Agreement and the UNFCCC are the primary treaties governing states' obligations concerning climate change. They argued that climate-specific treaties constitute the *lex specialis* and *lex posterior* in this domain, suggesting that obligations under general international human rights law should not override or duplicate those established under the UNFCCC framework. See IISD 'Summary of the International

rights law mostly operate in silos by design. However, this silo is losing ground given recent developments that authoritatively assert the linkage. The recent advisory opinion of the International Tribunal on the Law of the Seas (ITLOS) affirmed that climate change treaties do not constitute *lex specialis* and should be interpreted within the broad framework of international law, including human rights law.⁸²

An important factor that makes human rights regimes, specifically the children's rights regime, a preferred tool in seeking accountability for climate change is the agency it gives to individuals, specifically children. Complaint mechanisms embedded in international and regional human rights monitoring mechanisms provide a direct voice to individuals and groups to seek justice for the human rights harms suffered. This is crucial for children who are the most voiceless in societies, more so in African societies where children are 'seen but not heard'.⁸³ However, this goes beyond the cultural context of Africa and delves into the political realities on the continent where democracy is yet to prevail in many corners. Various African states are ruled by leaders and elites who may not consider the people's best interests when making decisions and taking action.⁸⁴ Furthermore, even in an ideal democracy, children do not constitute the political community of a nation, as a legally disenfranchised 'constitutionally silent' section of society.⁸⁵ The direct access the international human rights law gives children can be seen as a means to address the plight of the most voiceless in the climate crisis.

However, there is a caveat here: The direct access in seeking justice does not cover all human rights violations by any state anywhere. In the case of climate change, African children may not be able to and, so far, have not been able to receive justice for climate change-induced violations by the most responsible states. Violating a legal duty requires identification of a victim or victims, a perpetrator and an act or omission that contravenes a legal responsibility.⁸⁶ Hence, the widely accepted assertion that climate change threatens a broad range of human rights does not necessarily translate into an assertion that climate change is violating those same human rights.⁸⁷ To go from the first assertion to the second, there is a need to address the legal bottlenecks and identify who is legally responsible and

Court of Justice hearings on states' obligations in respect of climate change' Earth Negotiations Bulletin (2024).

82 International Tribunal for the Law of the Sea Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law Advisory Opinion (2024) 224.

83 Þ Björnsdóttir & J Einarsson 'Child participation in Ghana: Responsibilities and rights' in E Oinas, H Onodera & L Suurpää *What politics? Youth and political engagement in Africa* (2018) 295.

84 A Anghie & BS Chimni 'Third World approaches to international law and individual responsibility in internal conflicts' (2003) 2 *Chinese Journal of International Law* 77.

85 A Osler 'Power, politics and children's citizenship: The silencing of civil society' (2022) 30 *International Journal of Children's Rights* 440-472.

86 Pedersen (n 76) 12.

87 As above.

how that responsibility can be established. Notwithstanding that, the normative force of human rights depends critically on the existence of corresponding obligations and accessible remedies.⁸⁸ Rights are rendered meaningless without corresponding duties, especially during the climate crisis. Without such duties being assigned and upheld, the right remains aspirational rather than operational. The primary responsibility of states in implementing human rights and, more broadly, in remedying ‘internationally wrongful acts’ is interrogated below in the context of international accountability for climate harm.

4 State responsibility

States are responsible for breaches of their international obligations that can be attributed to them under international law.⁸⁹ However, when it comes to climate change, it has been challenging to create consensus on the responsibility of states, even if there is agreement on the fact that climate change interferes with the realisation of human rights.⁹⁰ The nature of state responsibility for climate change has for some time been a subject of academic, political and legal debate. The lack of consensus on state responsibility is best evidenced by the multiplicity of advisory opinions requested at regional and international tribunals. In January 2023, Chile and Colombia initiated the first advisory process before the Inter-American Court of Human Rights (Inter-American Court) to ‘clarify the scope of the state obligations for responding to the climate emergency under the framework of international human rights law’.⁹¹ In April 2023, the UN General Assembly requested an advisory opinion from the International Court of Justice (ICJ) on the obligation of states concerning climate change.⁹² The questions raised in the request are twofold: The first inquiries about the legal obligations of states under international law to protect the climate system from anthropogenic emissions; and the second pertains to the legal consequences of breach of these obligations by states, when they cause ‘significant harm’ to the climate system concerning ‘peoples and individuals of the present and future generations’.⁹³ African civil society organisations lodged the most recent request for an advisory opinion at the African Court on Human and Peoples’ Rights (African Court) in May 2025.⁹⁴ The request outlined a broad range of questions on specific human rights obligations of states to protect the rights of individuals and people from

88 Art 2(3)(a) International Covenant on Civil and Political Rights (1966).

89 Arts 1 & 2 International Law Commission ‘Responsibility of states for internationally wrongful acts’ (2001).

90 AJK Fleming ‘Human rights: An alternative approach for addressing climate-induced loss and damage’ (2015) 48.

91 <https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/> (accessed 5 May 2023).

92 International Court of Justice Press release The General Assembly of the United Nations requests an advisory opinion from the Court on the obligations of States in respect of climate change (icj-cij.org) (accessed 5 May 2023).

93 As above.

94 Y Seudi ‘Africa’s turn: The African Court’s advisory opinion on climate change’, <https://www.cjiltalk.org/africas-turn-the-african-courts-advisory-opinion-on-climate-change> (accessed 5 May 2025).

climate change harms by the African Charter on Human and Peoples' Rights (African Charter), among others.⁹⁵ The result of these and other efforts may conclude the debate among scholars and legal practitioners on the nature of state responsibility. However, this remains to be seen in the near future. What is evident from these requests is the theoretical and political challenge climate change poses regarding the question of state responsibility and accountability.

4.1 Problem of causality

The nature of climate change challenges the possibility of establishing state responsibility for rights violations. GHG emissions do not fit the pattern of cause and effect typically associated with claims for human rights violations, as the impacts of climate change are the cumulative effect of the actions of many agents over a long period of time. The human impacts of climate change, such as food insecurity, respiratory diseases and others, may have multiple contributory causes.⁹⁶ This has been described as the challenge of diffused causality, where linking a singular metrological event that harms climate change poses challenges. Reflecting on this, the UN noted that 'it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming'.⁹⁷

In addition to the multiplicity of contributory factors, another key challenge is the temporal distance between emissions that cause climate change and the harm that occurs.⁹⁸ In conventional human rights violations, an action that violates a right is immediately connected with a breach of the right, for instance, a person is arrested without a cause and, which manifests into arbitrary detention, a form of human rights violation; the female genitalia of a girl child is subjected to mutilation. That act translates into a violation of multiple rights, including the right to health. When it comes to climate change, the act that causes it, which is GHG emission, does not immediately result in a rights violation. Various chains of events over time can lead to different environmental phenomena. For instance, prolonged drought may cause a vulnerable child to become severely malnourished, limiting cognitive development and resulting in low educational attainment, thereby violating the child's right to education. Similarly, global warming can cause unusually heavy rainfall, leading to floods in areas lacking proper drainage infrastructure. Such floods can claim lives, constituting a violation of the right to life. The negative impacts of climate change today result

95 African Court on Human and Peoples' Rights Request for Advisory Opinion by the Pan-African Lawyers Union on the obligations of states with respect to the climate change crisis (2025) 39.

96 A Venn 'Rendering international human rights law fit for purpose on climate change' (2023) 23 *Human Rights Law Review* 17.

97 OHCHR 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (2009) para 70.

98 Pedersen (n 76) 14.

from more than a century of GHG emissions.⁹⁹ This temporal gap between the act that causes the violation and the time the violation takes place poses a challenge. The dispersed causality, the delay between actions and effects, and the resulting harm complicate attribution. This includes, first and foremost, attribution of a particular event, such as drought, to climate change among other contributing factors and, following that, attribution of the change in climate to a specific perpetrator. Identifying the perpetrator further requires linking the conduct that resulted in the violation with a state that effectively controls it.

One way of addressing the first challenge of diffused causality is reliance on climate science's ever-evolving and improving accuracy. The science of climate change is increasingly becoming more detailed in exposing the emission levels of entities and the range of impacts, focusing on human vulnerabilities.¹⁰⁰ Scientists are continually increasing efforts to attribute sudden and slow-onset events to climate change through scientific data, now referred to as 'attribution science'.¹⁰¹ In a recent piece analysing the ongoing drought in the Horn of Africa that has affected millions of children, scientists have noted that it would not have occurred had it not been for anthropogenic climate change and that the droughts in the region were made 'at least 100 times more likely by climate change'.¹⁰² Furthermore, the reports of the IPCC provide authoritative global scientific data that is increasingly being used in rights-based climate litigation.¹⁰³ Additionally, the requirement under the UNFCCC and Paris Agreement for states to regularly update their national GHG emission inventory is another essential tool that can be used to ensure the proportional attribution of responsibility among states.¹⁰⁴

One key challenge of the need for attribution science is its underdevelopment in Africa, owing to the resource intensity of the endeavour.¹⁰⁵ A recent report that analyses the devastating 2022 floods in the KwaZulu-Natal region of South Africa¹⁰⁶ indicates the complicated methods and advanced tools required to accurately determine the extent to which anthropogenic GHG emissions contributed to the floods. According to the attribution science conducted on this weather event, the extreme rainfall that resulted in the floods has a return time

99 R Lindsey 'Climate change: Atmospheric carbon dioxide' (2023), <https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide> (accessed 10 March 2024).

100 R Cho 'Attribution science: Linking climate change to extreme weather' State of the Planet (2021), <https://news.climate.columbia.edu/2021/10/04/attribution-science-linking-climate-change-to-extreme-weather> (accessed 2 May 2025).

101 Carbon Brief 'Mapped: How climate change affects extreme weather around the world', <https://www.carbonbrief.org> (accessed 2 May 2025).

102 Carbon Brief 'Deadly drought in Horn of Africa "would not have happened" without climate change', <https://www.carbonbrief.org> (accessed 2 May 2025).

103 Venn (n 96) 17.

104 Art 13 Paris Agreement (2015).

105 FEL Otto and others 'Attribution of extreme weather events in Africa: A preliminary exploration of the science and policy implications' (2015) 132 *Climatic Change* 617.

106 Wits University 'The 2022 Durban floods were the most catastrophic yet recorded in KwaZulu-Natal', <https://www.wits.ac.za/news/latest-news/general-news/2023/2023-04/the-2022-durban-floods-were-the-most-catastrophic-yet-recorded-in-kwazulu-natal.html> (accessed 2 May 2025).

of approximately 20 years and is expected to occur every 20 years on average.¹⁰⁷ This compares with a return time of every 40 years in a 1,2°C cooler world. It also found that the probability of such an event ‘has approximately doubled due to human-induced climate change, and the intensity of the current event has increased by 4–8 per cent.’¹⁰⁸ Such specific attributions are crucial to ensure global accountability of major GHG emitters in proportion to their contribution.

Another cause for concern in the reliance on climate science for human rights litigation is the issue of uncertainty. The reports of the IPCC make their conclusions with varying levels of certainty, which is expressed through wordings such as ‘high confidence’, ‘very high confidence’, and so forth. Generally, it should be noted that reports on climate change science fall short of guaranteeing 100 per cent certainty, as is customary in natural science. To bridge this gap in applying human rights to climate change, the principle of precaution embedded in environmental law can be an essential tool. The aim of the precautionary principle, which is rooted in international environmental law, is to ‘avoid causing adverse impacts in situations of scientific uncertainty’.¹⁰⁹ The use of the principle of extraterritorial uncertain harm is established by the jurisprudence of the Inter-American Court in its advisory opinion, where it noted the duty of states to act by the principle of precaution to protect human rights in instances of transboundary environmental harm.¹¹⁰ The court noted that ‘in protecting the rights to life and personal integrity ... states must act in keeping with the precautionary principle. Therefore, even without scientific certainty, they must take “effective” measures to prevent severe or irreversible damage.’¹¹¹ When it comes to the issue of temporal challenge, one possible avenue to address it is the allocation of responsibility based on records of past emissions, otherwise called historical emissions. However, international law does not reflect tangible responsibility for historical emissions.¹¹²

4.2 Temporality and children as future generations

The challenge of attribution of responsibility is not the only one related to the temporal element of climate change. It is said that ‘climate change is a form of slow violence that manifests over time, with the cause and effect dispersed over space and time’.¹¹³ Hence, another key contentious issue concerning the temporal element of climate change is the right of future generations. The long-term predictions of the IPCC are gloomy, to say the least. Future generations are

107 Centre for Environmental Rights ‘Polluter pays for climate change loss and damage: A report on the KZN flooding of 2022’ (2024) 12.

108 As above.

109 European Parliamentary Research Service ‘The precautionary principle: Definitions, applications and governance’ (2015) 6.

110 Inter-American Court of Human Rights Advisory Opinion on the Environment and Human Rights (2017).

111 Inter-American Court (n 110) para 180.

112 Pedersen (n 76) 14.

113 R Nixon *Slow violence and the environmentalism of the poor* (2011).

likely to inherit a planet unlike the one we live in now, should climate change continue at its current pace. However, future generations do not yet enjoy legal protection in human rights law. Only when a person comes into existence do they become the subject of rights, termed right-bearer contemporaneity.¹¹⁴ Without a right holder, a corresponding obligation would not exist, as the obligation-right contemporaneity requires.¹¹⁵ However, response to climate change takes into account its long-term consequences and thereby has the interests of future generations in mind. The concern about the long-term consequences of current climate change patterns has been the main driving force behind frameworks for addressing climate change.¹¹⁶ This is reflected in the long-term goals of frameworks such as the Paris Agreement, which aims to limit global warming to ‘well below 2 degrees’ by the second half of the twenty-first century.¹¹⁷

It is argued that one way of ensuring the protection of the rights of future generations (those not yet born today) is by way of protecting the future interests of those who are alive today and are expected to be alive for the coming decades.¹¹⁸ An action or inaction that will result in the future violation of the rights of someone alive today and expected to live many years down the line would be contrary to human rights obligations. By protecting the current generation from actions or inactions that will violate their human rights in the future, the rights of those not yet born, whose existence will eventually overlap with those who are alive and subject to rights today, will be protected.¹¹⁹

This is one of the clear added values of using a child rights-based approach to climate change. Children are the natural connections between current generations that have the full capacity to shape the world and future generations that are not yet born. In a way, children are part of the future generation; they have a limited yet evolving capacity to shape the world, and they face the daunting risk of inheriting a planet with an irreversibly devastated ecosystem. Hence, the relevant children’s rights norms can serve a double purpose of protecting the future interests of children and generations not yet born. In this regard, the most pertinent norm peculiar to children’s rights is the correct/principle of the child’s best interests. The UN Convention on the Rights of the Child (CRC) provides that ‘in all actions concerning children, whether undertaken by public or private

114 Gosseries introduces the concept of ‘right-bearer contemporaneity’, which holds that rights only vest in individuals once they come into existence: ‘when and only when a person will come into existence, she will have rights’ (456). He contrasts this with the ‘obligation-right contemporaneity’ requirement, which posits that an obligation cannot exist unless the corresponding right already exists (455). This distinction is particularly relevant in debates around future generations’ rights and the temporal structure of legal obligations in fields such as climate justice and human rights law. A Gosseries ‘On future generations’ future rights’ (2008) 16 *Journal of Political Philosophy* 446.

115 As above.

116 B Lewis ‘The rights of future generations within the post-Paris climate regime’ (2018) 7 *Transnational Environmental Law* 14.

117 Arts 2 & 4 Paris Agreement.

118 D Bell ‘Does anthropogenic climate change violate human rights?’ (2011) 14 *Critical Review of International Social and Political Philosophy* 104.

119 As above.

social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.¹²⁰ The CRC Committee broadly interpreted the principal elements: a right and a procedural rule. In its General Comment, the Committee linked the best interests of the child and the principle of precaution in alluding to the long-term ramifications. The Committee noted that in applying the child's best interests in decision-making processes, the precautionary principle calls for an assessment of potential future risk, harm and other effects affecting the safety of children.¹²¹

A stronger provision of the long-term implications of the principle is found in the work of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The African Charter on the Rights and Welfare of the Child (African Children's Charter) itself provides for the strongest protection of the best interests of the child by making it 'the primary consideration' in 'all actions concerning the child undertaken by any person or authority'.¹²² Furthermore, the African Children's Committee, in General Comment 5 on state obligations, noted that the best interests of the child include 'short-term, medium-term and long-term best interests'. Furthermore, the General Comment interestingly references the rights of future generations. It notes that actions that affect the rights of future generations violate the best interests of the child standard.¹²³ This arguably is the most expansive interpretation of the principle of the best interests of the child. Although the General Comment does not define what is meant by future generations, from the spirit of the text it may be argued that it refers to children who are alive today and whose rights will be affected in the future. Moreover, the explicit mention of the 'rights of future generations' in the interpretation of the state's obligation relating to children's rights provides a vital opening to ensure the rights of children in the face of climate change, especially if international mechanisms take inspiration from this to expand the legal protection at the international level.

The principle of the best interests of the child makes the usage of a child rights-based approach to climate change the strongest tool to not only remedy harms taking place now, but to remedy harms that have not yet materialised. Hence, it enhances the deterrent effect of accountability and serves as a prevention mechanism. As mentioned above, even in the best-case scenario predictions, climate change will continue to have adverse impacts due to the long-term effects of accumulated emissions. It is difficult to hold perpetrators accountable for harm that has not yet materialised; however, the best interests of the child overcome this challenge. Actions that will result in future harm would be contrary to the

120 Art 3(1) Convention on the Rights of the Child.

121 CRC Committee General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) para 74.

122 Art 4(1) African Charter on the Rights and Welfare of the Child (1990).

123 African Children's Committee General Comment 5: State party obligation under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection (2018) 11.

best interests of the child and can already be considered a violation of children's rights before the harm manifests. As noted in the General Comment of the African Children's Committee, '[s]tate actions that imperil the enjoyment of the rights of future generations of children (eg, allowing environmental degradation to take place or inappropriate exploitation of natural resources) are regarded as violating the best interests of the child standard'.¹²⁴

The temporal challenge connected to climate change accountability is not only about the future impact or the impact on future generations but also pertains to responsibility for past/historical emissions. There is disagreement regarding responsibility for historical emissions. Developed states argue that they are under no obligation for emissions before establishing the UNFCCC, a stance that is contested by customary law. In the *Trail Smelter* case, for instance, it was underscored that states are prohibited from causing 'injury by fumes in or to the territory of another', without specifying the type of fumes.¹²⁵ Since the 1960s, there has been international awareness about the harm caused by GHG emissions.¹²⁶ In the *Corfu Channel* case, the ICJ noted that states are not obligated to allow their territories to be used for acts that hamper the rights of other states.¹²⁷ Moreover, as reiterated by Kenya in the recent ICJ advisory opinion proceedings, including pre-1992 emissions in the UNFCCC and the Kyoto Protocol indicates the legal responsibility attached to historical GHG emissions.¹²⁸

4.3 Extraterritoriality

Although human rights are considered universal norms, their application does not match their proclaimed universality.¹²⁹ Traditionally, states have obligations regarding individuals within their jurisdiction and jurisdiction is primarily understood to be territorial.¹³⁰ The issue of the extraterritorial obligation of states for human rights violations is an ongoing debate where consensus is lacking in both norms and jurisprudence.¹³¹ An analysis of international treaties indicates this lack of coherence of norms. The Vienna Convention on the Law of Treaties (VCLT) provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its

¹²⁴ African Children's Committee (n 123) 12.

¹²⁵ *Trail Smelter* case (*United States v Canada*) 1941, United Nations, RIAA vol III (1965).

¹²⁶ UK Research and Innovation 'A brief history of climate change discoveries', <https://www.discover.ukri.org/a-brief-history-of-climate-change-discoveries/index.html> (accessed 23 May 2025).

¹²⁷ *Corfu Channel* (*United Kingdom v Albania*) Merits, Judgment, ICJ Reports (1949) 22; see also *Gabcikovo-Nagymaros* Project (Hungary/Slovakia) Judgment, ICJ Reports 1997, 7 para 40.

¹²⁸ International Court of Justice Public sitting held on Friday 6 December 2024, Peace Palace, President Salam presiding, on the Obligations of States in respect of Climate Change (Request for advisory opinion submitted by the General Assembly of the United Nations) Verbatim Record (2024) Kenya's submission 35.

¹²⁹ D Palombo 'Extraterritorial, universal, or transnational human rights law?' (2023) 56 *Israel Law Review* 95.

¹³⁰ Palombo (n 129) 97.

¹³¹ JH Knox 'Climate change and human rights law' (2009) 50 *Virginia Journal of International Law* 41.

entire territory.’¹³² This provision suggests two points: first, that the territorial application of obligations is assumed. The other indication is that it is possible to establish extraterritorial obligation if it is in the intention of the treaty, or extraterritoriality can be established through other types of legal reasoning. Hence, a close analysis of different human rights treaties and possible legal arguments for extraterritoriality is crucial in establishing extraterritoriality.

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain provisions that shed light on the territorial scope of their application. ICCPR requires state parties to respect and ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the present Covenant.¹³³ The provision provides room for interpretation both in support of and against extraterritoriality. It could imply a cumulative requirement where the individuals protected must be in the state’s territory and under its jurisdiction or effective control. On the other hand, the jurisprudence on this provision, as well as scholarly writings, interpret the provision to mean that the duty of states extends to those within their jurisdiction and those within effective control of the state.¹³⁴ The UN Human Rights Committee, in its General Comment that clarifies state responsibility, noted that state parties must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.¹³⁵

Furthermore, various principles of international law can be utilised to decipher what is meant by effective control over territory. The ‘no harm’ principle of international law has been interpreted to imply state responsibility for transboundary environmental damage resulting from activities conducted within one’s geographic territory, including industrial pollution.¹³⁶ Another potentially useful interpretive principle is the doctrine of *sine qua non*, which implies that a state is responsible for a harm if it is established that the damage would not have occurred if it were not for the act of the state.¹³⁷ While this principle aids in further refining arguments for attribution, when it comes to climate change, it will run into the above-mentioned challenge of diffuse causality of harms caused by climate change. Hence, for this principle to add interpretive value, it requires the use of increasingly advancing climate science and tweaking the principle to consider the cumulative contributing factors to climate change-related harm.

¹³² Art 29 Vienna Convention on the Law of Treaties (1969).

¹³³ Art 2(1) International Covenant on Civil and Political Rights (1966).

¹³⁴ Knox (n 131) 42.

¹³⁵ Human Rights Committee General Comment 31 [80] The nature of the general legal obligation imposed on state parties to the Covenant (2004) para 10.

¹³⁶ *Trail Smelter* case (n 125).

¹³⁷ P Minnerop & FEL Otto ‘Climate change and causation: Joining law and climate science on the basis of formal logic’ (2020) 27 *Buffalo Environmental Law Journal* 56.

ICESCR does not provide a territorial scope that limits the application of the provisions of the Covenant to the territory of a state party. Furthermore, supporting argument for extraterritorial application, ICESCR requires state parties to take steps ‘individually and through international assistance and cooperation, especially economic and technical, to the maximum of their available resources, to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means.’¹³⁸ The Committee on Economic, Social, and Cultural Rights (ESCR Committee) has repeatedly interpreted this provision to imply extraterritorial application of the provisions of the Covenant. For instance, in its General Comment on the right to water, the Committee noted:¹³⁹

To comply with their international obligations about the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in different countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction.

However, contrary to the interpretation by the ESCR Committee, the ICJ has noted that the absence of territorial scope in ICESCR indicates the inherent territorial nature of the rights contained therein.¹⁴⁰ This further contradicts the jurisprudence of the ICJ itself in prior cases where it stated that the absence of territorial limitation in a treaty indicates the intention to allow extraterritorial application.¹⁴¹ Despite some contradictory interpretations, the consistent approach of the ESCR Committee in favour of extraterritoriality provides a solid basis to argue for the extraterritorial obligation of states for climate change-induced harms. The ICJ further affirmed the extraterritorial scope of ICCPR and ICESCR in the Wall Opinion, wherein it stated that ‘while the jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory’ and, in such instances, states must comply with the provisions of ICCPR.¹⁴²

CRC provides an explicit limitation, providing that state parties should ‘respect and ensure the rights outlined in the present Convention to each child within their jurisdiction.’¹⁴³ However, the CRC Committee has interpreted the term ‘jurisdiction’ broadly by taking inspiration from the jurisprudence of regional mechanisms, mainly the Inter-American Court. In its recent decision on the *Sacchi* case, the Committee adopted the broad definition of jurisdiction adopted by the Inter-American Court, where the term ‘is not limited to the

138 Art 2(1) International Covenant on Economic, Social and Cultural Rights (1966).

139 ESCR Committee General Comment 15 The right to water (2002) para 31.

140 International Court of Justice Advisory Opinions and Orders Legal: Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion (2004) para 111.

141 Knox (n 131) 47.

142 International Court of Justice (n 140) para 109.

143 Art 2(1) Convention on the Rights of the Child.

concept of national territory but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the state in question.¹⁴⁴ The CRC Committee further noted in the *Sacchi* decision that

when transboundary harm occurs, children are under the jurisdiction of the state on whose territory the emissions originated ... if there is a causal link between the acts or omissions of the state in question and the negative impact on the rights of children located outside its territory, when the state of origin exercises effective control over the sources of the emissions in question.¹⁴⁵

While progressive in extending extraterritorial obligation based on a broad interpretation of jurisdiction, the approach of the Committee remains cautious as it provides for the necessity of a causal link between the act or omission and the negative impact. The Committee further noted that ‘not every negative impact in cases of transboundary damage gives rise to the responsibility of the state in whose territory the activities causing transboundary harm took place.’¹⁴⁶ For a transboundary harm to attract the responsibility of the source state, it must be significant.¹⁴⁷ The significance level of the harm is to be determined on a case-by-case basis. Moreover, the Committee notes that significant harm lies somewhere between merely detectable and serious or substantial.¹⁴⁸

Although territoriality has been the rule regarding state responsibility, both norms have several exceptions, as outlined above and in interpretation. Regarding climate change, extraterritoriality should be the rule given the jurisdictional separation of the foremost perpetrators and the overwhelmingly large number of victims. The approach taken by the CRC Committee in *Sacchi* indicates the normative possibility and openness for such a shift.¹⁴⁹ However, this has yet to be translated into practical application as the decision fell short of interrogating the merits of the case.

Moreover, once extraterritorial obligation gains ground, the issue of the type or level of extraterritorial obligation becomes relevant. While the negative obligation to respect human rights is less controversial when applied extraterritorially, the positive obligations to protect and fulfil have far less acceptance. The ESCR Committee has noted that the obligation of international cooperation depends on states’ ability, based on their available resources. Regarding climate change, the implication is that developed countries should assist developing countries in combating climate change.¹⁵⁰ While this concept found its way into the Paris Agreement through the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), it faces resistance as a binding legal

¹⁴⁴ Inter-American Court of Human Rights (n 116) para 74.

¹⁴⁵ *Sacchi & Others v Argentina* (decision on admissibility) UN CRC Committee (2021) para 10.7.

¹⁴⁶ *Sacchi* (n 145) para 10.12.

¹⁴⁷ As above.

¹⁴⁸ As above.

¹⁴⁹ Venn (n 96) 23.

¹⁵⁰ Knox (n 131) 48.

obligation under human rights law. This is owing to the positive nature of the obligation as it pertains to the duty to fulfil and the duty to protect, which enjoy far less acceptance when applied extraterritorially, compared to the negative duty to respect.¹⁵¹

There is significant resistance from developed countries to the positive obligations of an extraterritorial nature. Hence, scholars suggest a compromised approach where states are obligated to respect the rights of people outside their territories by refraining from actions infringing on their ability to enjoy their rights and the obligation to protect people outside their territory by regulating actions of third parties within their effective control. The comprised approach suggests sacrificing the duty to fulfil it to get developed nations' buy-in and at least take measures to uphold their extraterritorial duty, to respect and protect rights.¹⁵² This proposition falls short of providing comprehensive protection in the face of climate change and dismisses the holistic nature of human rights and the corresponding obligations.

Establishing international state responsibility for climate change requires a significant shift in the understanding of the cause of trans boundary harm, from being the responsibility of the state in effective control of where the harm takes place, to the state that has effective control of the territory or person that originates the harm. The traditional understanding of jurisdiction to mean effective control of the territory where the damage occurs does not address human rights concerns related to climate change.¹⁵³ It renders the possibility of an effective remedy inaccessible for victims such as affected children in Africa and elsewhere in the Global South. There is a need to reimagine the scope of application of human rights law to render it fit for purpose for the current global challenge of climate change. Greenhouse gas emissions that occur across oceans continue to deteriorate the human rights of countless communities on another continent.¹⁵⁴ Climate change clearly shows how human rights violations can be far from a local event; instead, climate change is a massive and systematic international human rights violation perpetuated by wealthy people in rich countries. Extraterritorial application of human rights is needed to remedy the rights of African children, whose rights are being chipped away by climate change. As demonstrated above, this is supported by norms, principles and jurisprudence.

5 Effective remedy as a right and an obligation

Accountability and effective remedy are two sides of the same coin. While accountability broadly looks at the wrongdoer's responsibility, answerability

151 Knox (n 131) 49.

152 Venn (n 96) 23.

153 Palombo (n 130) 116.

154 OA Badaru 'Examining the utility of Third World Approaches to International Law for international human rights law' (2008) 10 *International Community Law Review* 383.

and sanction, effective remedy aims to ensure that the sanction imposed on the wrongdoers ensures the victim is rehabilitated, compensated and guaranteed non-repetition of the harm. The aforementioned challenges of establishing state responsibility internationally, namely, causality, extraterritoriality and temporal problem, are not insurmountable. The notion of effective remedy, which is both a substantive right of victims and an obligation of duty bearers, ties the rights of children and the obligations of states in the context of climate change. As noted above, rights are meaningless if their violation cannot be remedied. Violations can only be remedied by establishing the corresponding obligation of the duty bearer. International human rights law must be interpreted in a manner that ensures its objective and purpose, which is guaranteeing the enjoyment of the rights protected therein.¹⁵⁵

The arguments against the applicability of human rights law in establishing accountability for climate change-related harms, and thereby for GHG emissions, are a manifestation of structural global power asymmetries ubiquitous in international relations. Such arguments contradict a purposive interpretation of norms, which is to remedy rights violations. The assertion that ‘a treaty’s recognition of a human right does not mean that any interference with that right by any actor, anywhere in the world, violates a legal duty’¹⁵⁶ is an inadvertent admission of this power imbalance. However, it was meant to inspect technical legal barriers. The broad levels of obligation on duty bearers under human rights law should allow for the interference of rights from anywhere by any actor to be deemed a violation. If a company based in Germany can interfere with the enjoyment of a group of children’s rights to life in Burkina Faso, it should be seen as a violation of CRC, which is a legal duty. That is, if those alleging the violation demonstrate the necessary link between the act and the harm, which is possible given the advances in attribution science and the already-existing jurisprudence on the possibility of attributing responsibility proportionally to contribution.

The right to an effective remedy further supports the purposive interpretation of human rights norms. If an adverse negative impact on human rights does not have an effective remedy, what is the purpose of rights? The right to an effective remedy has been recognised by various international instruments, including ICCPR, which provides that states have an obligation ‘to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy’.¹⁵⁷ Moreover, the UN Human Rights Committee has interpreted the right to an effective remedy, including the duty to investigate violations, undertake prosecution and compensate victims.¹⁵⁸

155 M Wewerinke-Singh ‘State responsibility for human rights violations associated with climate change’ in S Duyck, S Jodoin & A Johl (eds) *Routledge handbook of human rights and climate governance* (2018) 78.

156 Deva (n 15).

157 Art 2(3)(a) International Covenant on Civil and Political Rights.

158 International Commission of Jurists *The right to a remedy and reparation for gross human rights violations: A practitioner’s guide* Revised Edition (2018).

While CRC does not explicitly provide this right, the Convention's requirement of effective remedies to redress violations is implicit.¹⁵⁹ The concept of access to justice for children is widely accepted in the interpretation of the Convention.¹⁶⁰ This is further supported by adopting the Optional Protocol on a communications procedure, whose aim includes encouraging effective remedies for children whose rights are violated.¹⁶¹ Additionally, the CRC Committee underscored that 'for rights to have meaning, effective remedies must be available to redress violations' and that 'where rights are found to have been breached, there should be appropriate reparation, including compensation'.¹⁶²

The right to an effective remedy and reparation for human rights violations is well established in the norms and practice of international human rights law.¹⁶³ The failure of the human rights framework to ensure accountability for climate change-induced rights violations for all, including children in Africa, violates the right to effective remedy and consequently renders children's rights meaningless in the face of climate change. Given the large scale of the impact of climate change and the 'doomsday' projections of future impact, the lack of accountability for the most affected communities would perpetuate injustice and threaten the survival of human rights law itself. The prediction that international human rights law will eventually fail, as its foundation is not universal as it claims but Eurocentric and dismissive of lived experiences of the rest of the world, may be unfolding in various ways. Climate change threatens the relevance of human rights as it keeps taking us closer to a world where justice may become meaningless in the face of extinction, where extreme scarcity leads to a survival of the fittest scenario.¹⁶⁴

6 Conclusion

Establishing international legal responsibility under a human rights framework is key to ensuring accountability for climate-related harm African children suffer. International human rights law, particularly children's rights law, offers a robust normative foundation for recognising children's specific vulnerabilities in climate change. Climate change has been described as 'the defining human and children's rights challenge of this generation'.¹⁶⁵ Hence, it would be logical to conclude that

159 Human Rights Council '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 51.

160 T Liefwaard 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 196.

161 Preamble to the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2014).

162 CRC Committee General Comment 5 on general measures of implementation of the Convention on the Rights of the Child (2003).

163 International Commission of Jurists (n 158).

164 Open Global Rights 'Leaving the "Goldilocks zone": Will human rights survive climate change?' <https://www.openglobalrights.org/leaving-goldilocks-zone-human-rights-survive-climate-change/> (accessed 30 September 2023).

165 UNICEF 'The climate crisis is a child rights crisis: Introducing the Children's Climate Risk Index' (2021) 9.

human rights law implies an obligation on any state, especially high-emitting states, to counter climate change and remedy human rights violations caused by climate change on children in Africa. However, the applicability of human rights law to address climate change and, more so, to ensure accountability for GHG emissions, is highly contested by powerful nations that claim to be champions of human rights.¹⁶⁶ The structural and doctrinal features of international law, particularly the challenges of establishing causation, overcoming jurisdictional barriers, and addressing the long-term, cumulative nature of climate harms, have so far been at the heart of the arguments against the applicability of human rights frameworks in addressing climate harms. Furthermore, the current international legal order that underpins human rights law has not yet offered meaningful conceptual frameworks to remedy the transboundary and temporally dispersed harms inflicted by GHG emissions, mainly due to structural inequalities and jurisdictional limitations in international law.

There are arguments in support of and against international state responsibility for violating human rights through GHG emissions. Hence, developing international jurisprudence that supports the affirmative view arguably is the most effective way of settling the legal challenges, levelling power asymmetries and forging a path to accountability. International litigation that connects African children affected by climate change and significant historical and current contributing countries to GHG is needed to establish the necessary jurisprudence. The content of rights is ultimately defined when applied to a particular context.¹⁶⁷ Emerging jurisprudence suggests a growing willingness to interpret children's rights dynamically in the light of evolving threats like climate change. The principle of the best interests of the child, combined with the right to an effective remedy, can serve as an entry point for transformative legal interpretation. Fulfilling the right to remedy is not limited to an *ex post facto* application, where remedies should be availed once rights are violated. It also implies the obligation to provide functional structures through which victims can obtain redress.¹⁶⁸ Furthermore, advances in attribution science and incorporating climate justice principles into human rights discourse provide an evolving basis for challenging traditional legal limitations. International accountability mechanisms must undergo conceptual evolution to ensure that African children are not left without recourse. This includes rethinking jurisdictional norms to enable extraterritorial accountability, particularly where powerful states effectively control GHG sources that harm populations beyond their borders. In sum, if children's rights are to retain their legitimacy and moral authority in the face of the climate crisis, the international legal system must be willing to stretch beyond the confines of existing doctrine to meet the demands of international and intergenerational justice. In this context,

166 ICJ Advisory opinion proceedings: Submissions of developed countries on obligations of states in respect of climate change (2024).

167 A Lähteenmäki-Uutela and others 'Rights of the child as imperatives for transforming food systems' (2024) 29 *Ecology and Society* 29.

168 Wewerinke-Singh (n 155) 76.

recent jurisprudence by the CRC Committee and other human rights bodies indicates normative shifts. There is a need to critically interrogate the ability and willingness of bodies such as the CRC Committee to spearhead this normative shift and meet their obligation of safeguarding children's rights globally.