

Chapter 24

Article 23

Refugee children

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1. State parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human right and humanitarian instruments to which the states are parties.
2. State parties shall undertake to cooperate with existing international organisations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

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1 Introduction

Over the past few decades the world has witnessed an unprecedented scourge of forced displacement both within and outside territorial borders. Every year, people are forced to move or flee their homes or places of habitual residence in order to avoid or escape the effect of conflicts, situations of violence, natural disasters or development projects. As of December 2023, 117,3 million people all over the world were forcibly displaced and global estimates indicate that children make up 40 per cent of all forcibly-displaced persons.¹ Over the last year, the global refugee population increased by 7 per cent.² The total number of refugees across the globe stands at 43,4 million, of which 6,9 million are asylum

1 UNHCR 'Global trends: Forced displacement in 2023' 2024 2 UNHCR Global Trends report 2023.

2 As above

seekers,³ with 3,6 million new applications for 2023.⁴ Whilst a global challenge, the scale of forced movement and displacement of people varies from one continent to another. Africa is one of the continents most affected by the refugee crises, particularly those linked to conflict. The study by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on children on the move identified conflict as a major cause of cross-border movement of children in Africa. An even larger number of children are forced to move within and outside state borders, either alone or with their families, as a result of protracted conflict in the region.⁵

In Sudan, for example, approximately 1,2 million Sudanese refugees had fled to neighbouring countries in 2023. According to the United Nations (UN) report on forced displacement, the 'number of Sudanese refugees and asylum-seekers globally increased by at least 826 800 during the year to reach 1,8 million'.⁶ Children make up 40 per cent of the world's refugees, with 2 million children born as refugees between 2018 and 2023.⁷ Similarly, 49 per cent of internally-displaced persons are children; meanwhile, three⁸ out of the four countries with the highest population of internally-displaced children are in Africa.

Refugee and displaced children are exposed to several harms during flight, at their destination and upon their return or resettlement. They are at risk of violence, including sexual exploitation and abuse, family separation, forced labour, detention, trafficking, and so forth, and more often than not lack access to essential services relevant to their survival and development such as food, water, medical care and adequate shelter.⁹ Refugee children are also more likely to be out of school. According to available data, more than 7 million refugee children do not attend school.¹⁰ Several factors can impede children's access to education in host countries, including language barriers and bureaucratic impediments requiring refugee children to obtain legal status or some form of government documentation before they can be enrolled.¹¹ Furthermore, the difficult conditions in refugee camps can cause stress as well as mental health and psychological challenges for children.¹² In General Comment 23, the Convention on the Rights of the Child (CRC) Committee highlights the peculiar and often urgent mental health needs of migrant and refugee children, noting that children experience stress differently from adults.¹³ Refugees are more susceptible to mental health problems compared to the general population, and

3 As above.

4 UNHCR (n 1) 6.

5 African Committee of Experts on the Rights and Welfare of the Child 'Mapping children on the move within Africa' (2018) 43, https://www.acerwc.africa/sites/default/files/2023-08/2019%20Study%20on%20Children%20on%20the%20Move%20ENG2_0.pdf (accessed 31 August 2024). The study defines children on the move as children who are internally-displaced persons, refugees, asylum seekers, economic migrants or trafficked persons.

6 UNHCR (n 1) 8.

7 UNHCR (n 1) 18.

8 These countries are Somalia (66 per cent), Afghanistan (62 per cent), Niger (58 per cent) and Burkina Faso (56 per cent); UNHCR (n 1) 28.

9 UNICEF 'Migrant and displaced children' <https://www.unicef.org/migrant-refugee-internally-displaced-children> (accessed 6 July 2024).

10 UN News 'UNHCR: More than 7 million refugee children are out of school' <https://action.unrefugees.org/news/new-unhcr-report-reveals-over-7-million-refugee-children-out-of-school/#:~:text=It%20reveals%20that%20by%20the%20end%20of%202022%2C,million%20children%20%E2%80%93%20are%20not%20enrolled%20in%20school>. (accessed 6 July 2024).

11 M Anderson 'Refugee children: The challenges they face and the efforts to overcome them' 6 April 2020, *Denver Journal of International Law and Policy* (djilp.org) <https://djilp.org/refugee-children-the-challenges-they-face-and-the-efforts-to-overcome-them/> (accessed 6 July 2024).

12 E Pardo 'Children refugees' mental health: The unseen scars of trauma' 7 November 2023, <https://www.dw.com/en/children-refugees-mental-health-beyond-the-past-trauma/a-66148160> (accessed 6 July 2024).

13 CRC Committee 'The general principles regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' 16 November 2017 13 CRC/C/GC/23).

refugee children are particularly more vulnerable as they usually lack the experience and skill to cope with the situation.¹⁴

The African Children's Committee study on children on the move highlights the gaps in protection and treatment accorded to children on the move in Africa.¹⁵ These include discrimination, neglect and violence, drug abuse, radicalisation and violent extremism, as well as loss of identity, name and nationality, especially due to a lack of documentation. In some cases, children of refugees are not guaranteed registration at birth.¹⁶ In addition, children on the move are at risk of forced deportation and in certain instances are returned to their country of origin and/or situations that led to their movement in the first place, thus heightening their vulnerability to violations.¹⁷ This is further exacerbated by limited access to justice, including for violations from third parties such as business enterprises. More so, family separation places children on the move outside of protective parental and family care, which further exposes them to more harm.

Weak legal and institutional frameworks relating to children on the move in Africa, including at the national level, make it even more challenging to address the challenges they face. While progress has been made in addressing issues related to birth registration, forced labour and trafficking as well as access to education and health, legal and institutional gaps persist when it comes to ensuring the application of the best interests principle to all matters relating to children, the prevention of forced repatriation, arbitrary detention as well as the respect for the principle of *non-refoulement*.¹⁸ Other factors that impede the protection of children on the move in the African region include a lack of regional coordination as well as inadequate data and documentation.

Against the foregoing, this chapter explores the meaning and importance of article 23 in the protection of children's rights in Africa as well as links to other Charter articles and human rights treaties. Specifically, the chapter examines the nature of state obligations under article 23, and emerging practices on the fulfilment of these obligations at both national and regional fora, including through the jurisprudence of relevant regional and international treaty bodies. In a region that hosts a significant number of forcibly-displaced children, article 23 is significant in that it sets forth the normative framework for dealing with the issues relating to children who are refugees, asylum seekers or those who are internally displaced. Unlike CRC, article 23(4) extends the provisions of article 23 to internally-displaced children regardless of the circumstances that led to the displacement. This all-encompassing nature of article 23(4) is particularly relevant in the context of climate change-induced displacement, considering the gap in the international legal framework protecting children impacted by climate change-induced displacement.¹⁹ According to the African Children's Committee study, climate change and food insecurity are key drivers of movement of children, with significantly higher risks of displacement for people in lower-income countries and those living in poverty.²⁰ Article 23 undoubtedly affords a wider coverage to children affected by forced displacement within and outside state borders. This is a welcome development for children in Africa given the scale of protection issues confronting refugee, but also internally-displaced and migrant children, as highlighted in the African Children's Committee's study on children on the move.²¹

14 Pardo (n 12).

15 African Children's Committee study (n 5) 70.

16 African Children's Committee study (n 5) 71.

17 CRC Committee (n 13) 9.

18 African Children's Committee study (n 5) 86.

19 BE Fox 'Not just hot air: Soft law and the protection of climate change induced displaced children's needs and rights' PhD thesis, Stellenbosch University, 2024 21.

20 African Children's Committee Study (n 5) 53.

21 African Children's Committee Study (n 5) 70.

2 Links to other Charter articles

The full realisation of article 23 is inextricably linked to the four cardinal principles of the African Children's Charter, namely, non-discrimination; the best interests of the child; child participation; and survival and development.²² These serve as a yardstick for interpreting all other rights in the Convention. Article 23 also must be read closely with other salient provisions of the African Children's Charter that afford protection to children, including those on the move. For example, article 15 protects children from child labour; article 27 protects children from sexual exploitation and sexual abuse; and article 16 guarantees the protection of children against abuse. As noted above, refugee children are at a high risk of several human rights violations, including forced labour, sexual exploitation and abuse. Article 16 of the Children's Charter is instructive in enjoining states to

take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

Considering that refugee children face a higher risk of being separated from their family, article 18 of the Children's Charter, which guarantees the protection of the family, is pivotal to fulfilling the obligations set out in article 23. Article 18 recognises that 'the family shall be the natural unit and basis of society. It shall enjoy the protection and support of the state for its establishment and development.' In a similar vein, article 19 guarantees parental care and protection and upholds children's rights to reside with their parents. Article 19 further states that 'no child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child'. In the event of separation from their parents, children have the right to maintain contact on a regular basis.²³ Where the separation results from the action of a state party, article 19(3) obliges the state party to provide the child or, where appropriate, another family member, with essential information concerning the whereabouts of the absent member or members of the family. States are also obliged to notify the parents of the child in the event of an apprehension. This provision is particularly important for refugee children as they are at a higher risk of migration detention.

Furthermore, article 25 recognises that children separated from their parents and who are temporarily or permanently deprived of their family environment are entitled to special protection and assistance, and obliges states to provide alternative family care for children who are separated from their parents. Article 25(2)(b) is particularly instructive for the protection afforded to children under article 23. It obliges states to take all necessary measures to trace and reunite children with parents or relatives where 'separation is caused by internal and external displacement arising from armed conflicts or natural disasters'. The obligation to take necessary measures must also be seen as ensuring that international and local organisations carrying out tracing services for separated and unaccompanied child refugees and migrant children receive the right support from state parties as envisaged under article 23(2). Flowing from the provisions of articles 18, 19 and 25, state parties, in keeping with their obligations under article 23, have the responsibility to preserve and protect the family unit and avoid the separation of refugee children from their families except where it is in their best interests to do so. Article 22 also bears direct relevance to article 23 of the Charter, not least because it addresses a specific situation that may lead to children becoming refugees or being forcibly displaced. Article 22 provides that state parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable during armed conflicts that affect the child. A failure to respect the rules

²² Arts 3, 4(1), 4(2) 6 & 5 respectively.

²³ Art 19(2).

of international law can result in forced displacement and the situation of children becoming refugees. In furtherance of their obligations under international humanitarian law, article 22(2) further enjoins states to protect the civilian population in armed conflicts and take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Articles 22 and 23 are intricately linked in that one of such ways of ensuring the protection of children affected by conflict as envisaged under article 22 is the full and effective implementation of the provisions of article 23.

3 Links to other human rights treaties

There is a robust international legal framework underpinning the situation of refugees. The foremost of these is the Universal Declaration of Human Rights (Universal Declaration). It provides that all persons should have the right to seek and to enjoy asylum from persecution in other countries.²⁴ The 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees is the first internationally-binding treaty specific to the situation of refugees. The protection afforded to refugees, including child refugees, under these legal instruments is reinforced and complemented by other international and regional instruments drawn from international human rights law, international humanitarian law, international criminal law, and customary international law, and they all bear direct relevance to the protection afforded under article 23 as well as the resulting state obligation.²⁵

Article 22 of CRC contains provisions similar to article 23 on refugee children. However, unlike CRC, article 23 extends the protection it affords to internally-displaced children, making the provisions of article 23 much more comprehensive.²⁶ Furthermore, unlike article 22 of CRC, which recognises the enjoyment of ‘applicable rights’ of refugee children, article 22 guarantees the enjoyment of rights set out in the African Children’s Charter and other human rights and humanitarian instruments to which states are parties. In this regard, article 23 provides a more extensive recognition and application of the rights of refugee children, by reinforcing legal protection for refugees and internally-displaced children under a wider legal framework applicable in different situations, including armed conflict and climate change.²⁷

In General Comment 6, the CRC Committee gives effect to the nature of the state obligation towards unaccompanied or separated children including asylum-seeking children and refugee children as envisaged under article 22 of CRC. First, the Committee clarifies that these obligations extend to all arms of government, that is, the executive, legislature and judiciary, and emphasises the right of asylum-seeking children, including unaccompanied and separated children, to access asylum procedures and other complementary mechanisms providing international protection, irrespective of their age.²⁸ In terms of the protective measures for refugee and asylum-seeking children, the CRC Committee stipulates procedural safeguards such as ensuring that asylum seeking children are represented by an adult who is familiar with the child’s background.²⁹ Furthermore, the Committee enjoins states to give priority to refugee status applications filed by unaccompanied and separated children and to make every effort to render a decision promptly and fairly.³⁰ In its joint General Comment 22 on the rights of children in the

24 Art 14 Universal Declaration of Human Rights.

25 Other relevant norms include the Cartagena Declaration on Refugees (1984); the Bangkok Principles on the Status and Treatment of Refugees (1966).

26 M Gose ‘The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child’ University of the Western Cape 2002, 73.

27 As above.

28 CRC Committee General Comment 6 ‘Treatment of unaccompanied and separated children outside of their country of origin’ 1 September 2005 CRC/GC/2005/6 para 13.

29 General Comment 6 para 69.

30 General Comment 6 para 70.

context of international migration, the Committee further elaborates on state obligation with regard to refugee and migrant children, noting that the obligation of states cannot be unilaterally or arbitrarily curtailed by excluding areas or zones from its territory or jurisdiction.³¹ These obligations not only apply in respect of children within states' borders but also to those who come under the jurisdiction of states while attempting to gain entry into the territory of a state.³² Recognising that refugee and migrant children with disabilities are susceptible to double discrimination on the basis of their disability, the Committee recommends that states pay keen attention to policies to prevent discriminatory practices against migrant and refugee children and ensure the implementation of policies that ensure that they enjoy their rights on an equal basis with other children.³³ These provisions are particularly relevant in giving effect to article 23(1) of the African Children's Charter as they clarify concrete steps expected of states in fulfilling their obligations under the Charter. In addition, the Committee enjoins states to apply the national and international legal framework that affords the most favourable protection to children on the move in situations where standards differ, while ensuring a child-centred approach in giving effect to the envisaged protections. In this regard, it is worth highlighting that article 23 provides better protections to internally-displaced children in Africa.

At the regional level, the 1969 Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa contains provisions that reinforce the protection under article 23. For example, article 2(2) of the Convention is directly linked to article 23(1) as it stipulates that the granting of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state, thus reinforcing the obligation of states towards children seeking asylum under article 23.

International humanitarian law (IHL), the body of law applicable during armed conflict, protects persons who are not or no longer are taking part in hostilities and restricts the means and method of warfare. IHL contains significant provisions relevant to article 23.³⁴ It is important to highlight that IHL violations can lead to people becoming refugees either through the forceful movement of populations or direct attacks against civilians and civilian objects,³⁵ which force victims to flee for their safety during armed conflicts.³⁶ As such, IHL stipulates that refugees must be regarded as protected persons in all circumstances and without any adverse distinction.³⁷ Under the fourth Geneva Convention, detaining powers are required to not treat as enemy alien refugees who do not in fact enjoy the protection of any government.³⁸

31 CRC Committee 'The general principles regarding the human rights of children in the context of international migration' 16 November 2017 CRC/C/GC/22.

32 CRC Committee (n 31) para 12.

33 CRC Committee (n 31) para 25.

34 Convention IV relative to the Protection of Civilian Persons in Time of War, Geneva adopted 12 August 1949, entered into force, 21 October 1950 art 49; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts adopted 8 June 1977, entered into force, 7 December 1978 1125 UNTS 609 (Additional Protocol II) art 17; N Melzer *International humanitarian law: A comprehensive introduction* (2016) 17.

35 As above (art 49 Fourth Geneva Convention; art 17 Additional Protocol II). Civilian objects are objects that are not military objectives; AP I art 52(1); J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2009) Vol I Rule 9 (CIHL).

36 As above (art 49 Fourth Geneva Convention; art 17 Additional Protocol II); T Pfanner 'Displacement' (2009) 91 *International Review of the Red Cross* 464.

37 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts adopted 8 June 1977, entered into force 7 December 1979 1125 UNTS 609 (Additional Protocol I) art 73.

38 Convention IV (n 34) art 44.

IHL applicable to non-international armed conflict prohibits the displacement of civilians except if the security of those civilians is at risk, or imperative military reasons require such an action.³⁹ If civilians are to be displaced, IHL requires parties to the conflict to take all possible measures ‘in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’.⁴⁰ The obligation to take all possible measures to protect civilians is absolute.⁴¹ In addition, IHL guarantees the right of displaced persons to voluntary return to their place of origin as soon as the security concerns have ceased.⁴²

Furthermore, international criminal law prohibits the forcible transfer of civilians.⁴³ Deportations or forcible transfers of a population, when committed as a widespread or systematic attack against a civilian population, amount to crimes against humanity.⁴⁴ In addition, ordering displacement during armed conflict, save for security or military imperative reasons, is criminalised as a war crime.⁴⁵ Also, the forcible transfer of children from one group to another committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group amounts to genocide.⁴⁶

One of the key protections afforded to refugees under international law is the prohibition of *refoulement* or forced return. In this regard, article 33(1) of the 1951 Refugee Convention clearly states that

[n]o Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principle of *non-refoulement* prohibits states from expelling or returning refugees to places where their lives or freedom will be threatened. This protection applies not only to refugees but also to asylum seekers whose status is yet to be determined. It is worth noting that the principle of *non-refoulement* is not only reinforced in several international and regional legal standards relating to refugees, but has also attained the status of customary international law.⁴⁷

The global compact on refugees is another normative standard on the protection of refugees, including children. The global compact focuses on four key objectives, namely, easing the pressure on host countries; increasing refugee self-reliance; expanding access to third country solutions; and supporting conditions in countries of origin for refugees to return to safety and dignity.⁴⁸ Overall, it provides a comprehensive framework for various stakeholders, including states, in responding to the situation of refugees.

39 Additional Protocol II (n 34) art 17(1). For international armed conflict, see Convention IV (n 34) arts 49 & 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts adopted 8 June 1977, entered into force 7 December 1978 1125 UNTS 3 (Additional Protocol I) arts 51(7)(9) & 85(4)(a).

40 Additional Protocol II (n 35) art 17(1).

41 As above.

42 Henckaerts & Doswald-Beck (n 35) 132.

43 Rome Statute of the International Criminal Court adopted 17 July 1988, entered into force 1 July 2000 ISBN 92-9227-227-6 (Rome Statute) art 7(1)(b).

44 As above.

45 Rome Statute (n 43) art 8(2)(e)(viii).

46 Rome Statute (n 43) art 6(e).

47 UNHCR *A guide to international refugee protection and building state asylum systems* (2017) 20.

48 United Nations ‘Global compact on refugees’ UN Doc A/73/12 (2 August 2018) 4.

4 Legal interpretation

4.1 Definitions

Article 23 protects three broad categories of children – refugees, asylum seekers and the internally displaced. These concepts require further clarification to better understand the specific vulnerabilities and corresponding state obligations towards the different categories.

4.1.1 *Refugees*

A refugee under 1951 Refugee Convention (as modified by the Protocol) is any person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Note that the OAU Refugee Convention extends the definition of a refugee to persons who are forced to flee their country due to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of their country of origin or nationality.⁴⁹ Note also that the refugee definition is declaratory, meaning that people are to be regarded as refugees until otherwise determined.⁵⁰

4.1.2 *Asylum seekers*

Asylum seekers are persons who have fled their country and are seeking protection in another country, but whose request for refugee status or complementary protection is pending a decision.⁵¹ The right to seek asylum is guaranteed under international and regional law, and states are obliged to grant asylum to refugees as a peaceful and humanitarian act.⁵²

4.1.3 *Internally-displaced persons*

According to the Kampala Convention,⁵³ internally-displaced persons (IDPs) are

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular, as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised state border.⁵⁴

49 Convention Governing Specific Aspects of the Refugee Problem in Africa adopted 10 September 1969, entered into force 10 June 1974 art 1(2).

50 UNHCR 'Refugee definition' 1 March 2019 <https://emergency.unhcr.org/protection/legal-framework/refugee-definition> (accessed 9 July 2024).

51 UNHCR 'Who is an asylum seeker' Asylum-seekers | UNHCR <https://www.unhcr.org/about-unhcr/who-we-protect/asylum-seekers> (accessed 9 July 2024).

52 Art 2(2) OAU Refugee Convention.

53 This definition mirrors the definition in the UN Guiding Principles on Internal Displacement.

54 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted 22 October 2009, entered in force 6 December 2012 art 1.

From the above definition, IDPs are people who have not crossed an international border, and this is the major difference between refugees and IDPs. However, both IDPs and refugees are exposed to similar challenges and are at risk of violations of their rights. It is little wonder, therefore, that article 23 extends the protection it affords refugee children to internally-displaced children.

4.2 Nature of state obligations

Regarding states' obligations towards enshrined rights, the African Children's Charter stipulates that state parties

shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provision.⁵⁵

The following part provides an analysis of state obligations as envisaged under article 23 of the African Children's Charter.

Article 23 has four main pillars, namely, the obligation to take all appropriate measures to ensure protection and assistance for refugee children; the obligation to cooperate with international organisations to trace and reunite unaccompanied refugee children; obligations towards children that are separated from parents or legal guardians; and obligations towards internally-displaced children. Considering that the obligations relating to refugee children apply in the same vein to internally-displaced children, this chapter will focus mainly on obligations relating to the former.

4.2.1 Article 23(1): The obligation to take protection and assistance measures

A starting point to understanding the obligation under article 23(1) is to, first, clarify what is considered 'appropriate measures' and what specific actions would amount to appropriate measures on the part of states. The word 'appropriate' according to the *Oxford learners dictionary* means 'suitable, acceptable, or correct for the particular circumstances'.⁵⁶ Thus, states are to take measures that are suitable, correct or acceptable, having regard to the peculiar circumstances and vulnerabilities of refugee and asylum-seeking children. It does appear that states have a margin of discretion to determine what measures will be suitable, correct or acceptable, having regard to the circumstances.⁵⁷ Notwithstanding the margin of discretion being exercised by states, such measures, in keeping with article 18 of the Vienna Convention on the Law of Treaties (VCLT), must not contravene the object and purpose of the African Children's Charter. Thus, states must not take measures that will jeopardise the enjoyment of the rights in the Charter as well as other international human rights and humanitarian instruments as required by article 23. In the context of protecting children from violence, the CRC Committee in its General Comment 13 noted that 'the term "appropriate" refers to the broad range of measures cutting across all sectors of government, which must be used and be effective in order to prevent and respond to all forms of violence'.⁵⁸ The Committee further notes that taking appropriate measures means that 'an integrated, cohesive, interdisciplinary and coordinated system is required, which incorporates the full range of measures'.⁵⁹ Having clarified that measures to be taken by states must be appropriate

⁵⁵ Art 1 African Children's Charter.

⁵⁶ *Oxford learners dictionary* appropriate adjective – Definition, pictures, pronunciation and usage notes, OxfordLearnersDictionaries.com (accessed 10 July 2024).

⁵⁷ A Adeola & B Mezmur 'The protection of internally displaced children in Africa: A doctrinal analysis of article 23(4) of the African Children's Charter' (2025) 61 *Journal of African Law* 122.

⁵⁸ CRC Committee General Comment 13 The right of the child to freedom from all forms of violence 18 April 2021 UN Doc CRC/C/GC/13 para 38.

⁵⁹ Rome Statute (n 43) para 39.

in that they must be suitable, cross-cutting and in line with object and purpose of the Charter and relevant international legal instruments, the next question arises as to what these measures entail in concrete terms. It is important to note that article 23 does not specify what these measures should entail. However, recourse can be made to article 1 of the African Children's Charter which requires states to take *legislative and other measures*⁶⁰ in realising the rights in the Charter.

Elaborating on legislative and other measures as contained in article 1, the African Children's Committee notes that the obligation to take legislative measures requires 'the timely enactment and continuous review of national legislation and related administrative guidance to ensure their compatibility with relevant international norms and related standards on the rights of the child'.⁶¹ With regard to other measures, the Committee also notes that they include an array of policies, regulations, directives, subsidiary legislation, and implementing tools (such as protocols) necessary to breathe life into principal legal sources.⁶² Appropriate measures under article 23 should involve a broad range of integrated, multidisciplinary actions that are not limited to legislative measures but must also include administrative, financial, educational, judicial and social measures.⁶³ To be effective, these measures must be complemented by quality case management systems and child-friendly procedures for documenting, registering and referring cases.⁶⁴ Furthermore, these measures should be geared towards ensuring that refugee children and children seeking asylum receive appropriate protection and humanitarian assistance. This would entail, first and foremost, that they have access to basic rights such as health care, food, shelter, education, survival and development, and protection from exploitation and abuse.⁶⁵ To ensure access to basic needs, states must strive to remove barriers and bureaucratic impediments such as stringent requirements for documents before services can be accessed.⁶⁶ Furthermore, states must make budgetary allocations for the provisions of basic needs such as food, as flagged by the African Children's Committee in its Concluding Observations to Rwanda.⁶⁷ In addition to these basic needs, states are also obliged to provide protection services such as mental health and psychosocial support to enable refugees and asylum-seeking children to recover from the trauma they may have experienced because of the circumstances of their flight.⁶⁸

One of the key protection needs of refugee and asylum-seeking children is the recognition of their status. Thus, states must ensure that processes for determining refugee status are not only fair but are expeditious, having due consideration for the best interests of the child. It is in the best interests of children that in processes affecting them, their views are heard and taken into account. As such, states are obliged to ensure inclusive and participatory processes for determining status, including providing feedback mechanisms such as child rights desks and interpreters to enable refugee and asylum-seeking children to express their views, but also to report any form of violence against them.⁶⁹ In its Concluding

60 My emphasis.

61 African Children's Committee General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (art 1) and systems strengthening for child protection' (2018) para 5.1.

62 As above, para 5.3.6.

63 Adeola & Mezmur (n 57).

64 Concluding Observations and Recommendations on the initial report of the Republic of Benin, African Committee of Experts on the Rights and Welfare of the Child (September 2019) para 39.

65 C Whalen 'Article 22: The right to protection for refugee and asylum-seeking children' in Z Vaghri and others (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child* (2022) 363.

66 Concluding Observations and Recommendations on the first periodic report of the Republic of South Africa, African Committee of Experts on the Rights and Welfare of the Child (March 2019) paras 9 & 38.

67 Concluding Observations and Recommendations on the second periodic report of the Republic of Rwanda, African Committee of Experts on the Rights and Welfare of the Child (September 2019) para 40.

68 Concluding Observations and Recommendations on the initial report of the Republic of Botswana, African Committee of Experts on the Rights and Welfare of the Child (September 2023) para 39.

69 Concluding Observations and Recommendations on the initial report of the People's Democratic Republic of Algeria, African Committee of Experts on the Rights and Welfare of the Child para 36.

Observations to Algeria, the African Children's Committee noted that refugees coming from sub-Saharan countries are denied refugee status without fair hearing, and stressed the need to enhance protection mechanisms for them as well as improve the quality of service in camps.⁷⁰ To ensure due process guarantee and access to justice for refugee and asylum-seeking children, standardised policies on free, quality legal advice and representation for refugee and asylum-seeking children, including those who are separated or unaccompanied, should be put in place.⁷¹ The African Children's Committee has highlighted specific measures that states can take with respect to protecting refugee and asylum-seeking children, including those separated or unaccompanied. For example, in its Concluding Observations to Angola, the African Children's Committee enjoined the state party to provide adequate food and basic services such as education, health care and birth registration in order to improve the living conditions in the refugee camps.⁷²

Cognisant of the challenges faced by vulnerable groups of children, such as refugee, migrant and asylum-seeking children, and their increased risks of statelessness due to lack of registration at birth, the African Children's Committee has long established the importance of ensuring that refugee, migrant and asylum-seeking children are registered and accorded a nationality at birth.⁷³ In *Children of Nubian Descent* the Committee was of the view that the obligation under the African Children's Charter relating to birth registration is not only limited to passing laws but also includes removing limitations and barriers to birth registration.⁷⁴ In addition, the African Children's Committee notes in its General Comment on article 6 of the African Children's Charter that the registration of birth of refugee children, internally-displaced, separated and unaccompanied children, as well as children born to internally-displaced persons and asylum seekers, is one of the special measures of protection guaranteed under the African Children's Charter.⁷⁵

The African Commission on Human and Peoples' Rights (African Commission)'s Resolution on the inclusion of refugees, asylum seekers, internally-displaced persons and stateless persons in socio-economic national systems, services, and economic opportunities in Africa, provides additional elements on the appropriate measures that states can take in favour of refugee and asylum-seeking children. The Resolution calls on African states to

design, disseminate and implement action plans for the protection, promotion and respect of the rights of forcibly-displaced and stateless persons, as well as accountability frameworks to monitor progress, through mapping of systems and policies, with a view to identifying gaps that limit the social and economic inclusion of displaced and stateless persons.⁷⁶

The Resolution further calls on states to remove restrictions that prevent the social and economic inclusion of forcibly-displaced and stateless persons in urban and rural areas including through facilitating access to and recognition of refugee documents, combating the separation of families; and raising awareness on the rights and duties of refugees, asylum seekers and forcibly-displaced

70 As above.

71 CRC Committee 'The general principles regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' 16 November 2017 (CRC/C/GC/23) 5.

72 Concluding Observations and Recommendations on the initial report of the Republic of Angola, African Committee of Experts on the Rights and Welfare of the Child para 41.

73 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*, No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*).

74 *Children of Nubian Descent* (n 73) para 40.

75 African Children's Committee General Comment on article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02, adopted by the Committee at its 23rd ordinary session (7-16 April 2014) para 57.

76 Resolution on the inclusion of refugees, asylum seekers, internally displaced persons and stateless persons in socio-economic national systems, services and economic opportunities in Africa ACHPR/Res.565 (LXXVI) 2023.

persons.⁷⁷ States are also enjoined to include refugees and stateless persons in national efforts to achieve Sustainable Development Goals (SDGs).⁷⁸ Beyond protection and assistance measures, the obligations under article 23 also imply that states prevent and address the root causes of forced displacement beyond responding to the consequences. Preventative efforts will minimise children's exposure to forced displacement and the resultant impact. This notion has been echoed by the African Children's Committee in its Concluding Observations to Nigeria where the Committee, while commending the efforts put in place to protect refugees and internally-displaced persons, including children, urged Nigeria to intensify its efforts to address factors that cause the internal displacement of children.⁷⁹

4.2.2 Article 23(2): The obligation to cooperate with international organisations

Article 23(2) provides that

state parties shall undertake to cooperate with existing international organisations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

The use of the word 'shall' is instructive in that article 23 make is mandatory for this cooperation between states and international organisations that protect and assist refugee children to take place. The call for cooperation by states is also echoed in the African Commission's Resolution on the inclusion of refugees, asylum seekers, internally-displaced persons and stateless persons in socio-economic national systems, services and economic opportunities in Africa, wherein states are enjoined to collaborate with sub-regional, regional and international institutions that protect and assist forcibly-displaced and stateless persons, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR), with a view to facilitating the assimilation and integration of stateless persons and refugees as a long-lasting solution for long-term refugees.⁸⁰ By requiring states to cooperate with international organisations, article 23(2) recognises the important role these organisations⁸¹ play in ensuring protection and assistance for refugee and asylum-seeking children, including in relation to tracing and family reunifications. Furthermore, the African Children's Committee, through its Concluding Observations, has always urged states such as the Republic of Congo, Burundi, Uganda to collaborate with donors and the international community to ensure that the needs of refugee and asylum-seeking children are met without discrimination, and that durable solutions are found.⁸²

4.2.3 Obligations towards children separated from their families

Article 23(3) speaks to state obligations in the context of children separated from their families. It urges state parties to the African Children's Charter to ensure that separated refugee and asylum-seeking children are accorded the same protection as other children permanently or temporarily deprived of their family environment for any reason. In its Day of General Discussion on children's rights and alternative care, the CRC Committee noted the increasing number of children without

⁷⁷ Para 7.

⁷⁸ Para 8.

⁷⁹ Concluding Observations and Recommendations on the Periodic Report of the Federal Republic of Nigeria, African Committee of Experts on the Rights and Welfare of the Child para 34.

⁸⁰ Resolution (n 76) para 3.

⁸¹ Eg, UNHCR; Save the Children; United Nations Children's Fund (UNICEF); International Committee of the Red Cross (ICRC).

⁸² Concluding Observations and Recommendations on the initial report of the Republic of Congo, African Committee of Experts on the Rights and Welfare of the Child paras 44-46; Concluding Observations and Recommendations on the initial report of the Republic of Burundi, African Committee of Experts on the Rights and Welfare of the Child paras 36-37; Concluding Observations and Recommendations on the first periodic report of the Republic of Uganda, African Committee of Experts on the Rights and Welfare of the Child (May 2022) para 34.

parental care, including separated and unaccompanied children, highlighting that they are among the most vulnerable groups and are easily forgotten.⁸³ Consequently, the Committee urged states to 'establish non-discriminatory national policies to protect the rights of children who are separated, unaccompanied or without care, including refugee, asylum-seeking, migrant and undocumented children'. The Committee further urged states to 'develop and support family-based care options that can be used as a primary response during emergencies and humanitarian crises'.⁸⁴

Article 25 of the African Children's Charter must be read alongside article 23(3), as it affords special protection to children separated from their parents by requiring states to provide alternative family care, which could include foster placement or placement within suitable institutions, as recommended by the African Children's Committee in its Concluding Observations to the periodic report of the Republic of Congo.⁸⁵ States are to ensure that children placed in alternative family care have access to basic services.⁸⁶ In addition to placing in alternative care, the African Children's Committee has also recommended providing skills training to child-headed families and neglected children.⁸⁷ This will go a long way towards building their resilience.

Specifically, article 25(2)(b) makes direct provision relevant for refugee children who are separated by requiring states to take all necessary measures to trace and reunite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters. Unaccompanied and separated children can be easily invisible among groups of populations on the move, hence states are required to take specific actions such as identifying unaccompanied and separated children and providing them with support, including legal and financial assistance for family reunification.⁸⁸ In discharging this obligation, measures to ensure tracing and family reunification for refugee children must be done with due consideration for the best interests of the child, including by ensuring that children are not forced to return to places where they may be at risk under the guise of family reunification.⁸⁹ The CRC Committee emphasises this in its General Comment 6 where it notes that in affording proper treatment to unaccompanied or separated children, states must fully respect *non-refoulement* obligations. Consequently, the Committee notes that 'in fulfilling obligations under the Convention, states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child'.⁹⁰ This point was further buttressed during the CRC Committee's Day of General Discussion on the rights of all children in the context of international migration where the case was made for extreme caution in situations where 'the premise of family reunification may mean repatriation of a child, against his/her best interests, into a conflict or crisis situation or without guarantees of appropriate protection'.⁹¹ The CRC Committee reiterated the importance of *non-refoulement* in its more recent General Comment 22 and expressed concerns about the narrow definition accorded to *non-refoulement* by some states, while noting that the principle extends beyond situations stipulated in articles 6(1) and 37 of CRC.⁹²

83 CRC Committee 'Day of General Discussion: Children's rights and alternative care' (2021) 9.

84 Day of General Discussion (n 83) 30-31.

85 African Children's Committee Concluding Observations Congo (n 82).

86 As above.

87 African Children's Committee Concluding Observations Rwanda (n 67).

88 Concluding Observations and Recommendations on the initial report of the Republic of Benin, African Committee of Experts on the Rights and Welfare of the Child (September 2019) para 39; see also Concluding Observations on Angola (n 72) and Burundi (n 82).

89 Whalen (n 65) 365.

90 CRC Committee General Comment 6 para 27.

91 CRC Committee Day of General Discussion (n 83) 9.

92 Para 46.

5 Conclusion

With the global rise in forced displacement, more children are at risk of being forcibly displaced, and some of these will seek refuge outside their state's borders. Children who have fled their homes owing to conflict, situations of violence, natural disasters, climate change, development projects and such other circumstances are at a higher risk of having their rights violated and have several protection needs, including the need not to be forcibly returned to where their lives may be at risk. Article 23 of the African Children's Charter is poignant in addressing issues relating to child refugees and asylum seekers. It provides the normative framework and sets forth the obligation of states to ensure protection of and assistance for child refugees and asylum seekers, including those who have been separated from their parents. It requires states to take appropriate measures; undertake international cooperation and to guarantee the protection of children who have been separated from their families. The obligation to take appropriate measure includes legislative, administrative, financial, educational, judicial and social measures that are suitable, acceptable and correct, having regard to the peculiar circumstances of refugee and asylum-seeking children. Finally, article 23 extends its provisions to internally-displaced children, thus providing a more comprehensive protection for the different categories of displaced children in Africa.