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The role of soft law in ensuring durable solutions for children displaced by climate change in Africa

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Summary: *As global temperatures rise, the frequency and intensity of sudden and slow-onset climate impacts are increasing, disproportionately affecting African children. These impacts drive cross-border displacement, creating an urgent need for durable solutions that protect the rights of displaced children. However, the current international refugee regime does not recognise children displaced by climate change impacts as refugees unless they have experienced some form of individual persecution. Consequently, climate-displaced children are often excluded from the traditional durable solutions of voluntary repatriation, local integration and resettlement to a third state provided under this legal regime. Further, even if they were to have access to these durable solutions, such solutions may not be appropriate in the context of climate change displacement. To address this gap, the article explores the potential of international and regional soft law instruments as a means to protect the rights of climate-displaced children. Although soft law instruments show promise in the protection of climate-displaced children and their rights in Africa, the article concludes that the instruments fall short of*

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fully supporting states in fulfilling their obligations to such children under key legal frameworks, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. This stems from a distinct lack of recognition of the need for access to durable solutions for children, generally, or for children whom climate change impacts have displaced and are who not refugees, more specifically. The findings suggest that while international and regional soft law may offer a bridge for some protection gaps, there is still a need for stronger legal mechanisms and practical measures to fully protect the rights of climate-displaced children in Africa.

Key words: soft law; climate change; African children's rights; displacement; durable solutions

1 Introduction

As global temperatures rise, climate change is increasingly recognised as a significant driver of cross-border displacement.¹ Both sudden-onset events, such as extreme weather and flooding, and slow-onset processes, including rises in sea levels and land degradation, are forcing populations to cross international borders in search of international protection. In *Ioane Teitiota v New Zealand*² the United Nations (UN) Human Rights Committee underscored this reality, emphasising the urgent need to protect those displaced by climate change.³ Further, the Intergovernmental Panel on Climate Change (IPCC) 2022 Sixth Assessment Report reinforces the likelihood of widespread displacement due to climate change impacts.⁴

Africa, where surface temperatures are rising faster than the global average, is experiencing increasingly frequent and severe climate

1 Intergovernmental Panel on Climate Change (IPCC) 'Africa' in 'Climate Change 2022: Impacts, adaptation and vulnerability' Working Group II Contribution to the IPCC Sixth Assessment Report (2022) 1285, 1289.

2 *Ioane Teitiota v New Zealand UNHR Committee* (7 January 2020) CCPR/C/127/D/2728 para 9.11.

3 See, eg, the most recent discussion by W Kälin & HE Chapuisat 'Protection of persons displaced across borders in the context of disasters and the adverse effects of climate change' UNHCR Legal and Protection Policy Research Series PPLA/2024/01 (2024) 1, 5; D Cantor and others 'International protection, disasters and climate change' (2024) 36 *International Journal of Refugee Law* 185-190; G Lauria 'International law, the climate-migration nexus, and *Teitiota v New Zealand*' in C Nicholson & B Mayer (eds) *Climate migration: Critical perspectives for law, policy and research* (2023) 185-200.

4 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.

change impacts.⁵ As a result, the Task Force on Displacement (TFD)⁶ warns that African states face a heightened risk of displacement, requiring urgent rights-based solutions, especially for vulnerable groups such as children, who are among the most affected groups.⁷

Children are particularly susceptible to climate-related risks, which are compounded by the risks they face when displaced from their state of origin.⁸ As such, their fundamental rights, as enshrined in the Convention on the Rights of the Child (CRC)⁹ and the African Charter on the Rights and Welfare of the Child (African Children's Charter),¹⁰ are threatened by continued displacement. As such, there is a need for the international community to develop durable solutions to displacement due to climate change, which aim to end a child's continued displacement.¹¹ Traditional durable solutions are derived from the international protection regime stemming from the Convention Relating to the Status of Refugees (1951 Refugee Convention)¹² and the African Union (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee

5 IPCC (n 1) 1285-1289.

6 The Task Force on Displacement (TFD) is a mechanism created by the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM) at the Convention on Climate Change Conference of the Parties 21.

7 Task Force on Displacement 'Report of the Task Force on Displacement' (2018) para 22; World Meteorological Organisation 'The State of the Climate in Africa 2022' (2023) 17.

8 See part 2 below.

9 Convention on the Rights of the Child adopted 20 November 1989, entered into force 2 September 1990 1577 UNTS 3 (CRC). CRC currently is the most ratified rights instrument in the world, with just the United States of America abstaining. It provides children with a balanced approach to children's rights, recognising their need for protection and autonomy. For a detailed explanation of how this Convention protects children's rights, see J Tobin *The UN Convention on the Rights of the Child: A commentary* (2019).

10 African Charter on the Rights and Welfare of the Child adopted 11 July 1990, entered into force 29 November 1999 CAB/LEG/24.9/49 (African Children's Charter). The Children's Charter is the first regional instrument that specifically focuses on the rights of the child and acts as a bridge between international law and African observation of rights. The importance of the Charter can be seen in its supplementation of CRC to ensure that the African child's rights are appropriately protected. For an in-depth discussion on how this Convention protects the rights of children in Africa, see J Sloth-Neilsen, E Fokala & G Odongo *The African Charter on the Rights and Welfare of the Child: A commentary* (2024).

11 United Nations Children's Fund 'Children displaced by climate change: Preparing for a future already underway' (2023) 3; United Nations Children's Fund 'Time to act: African children in the climate change spotlight' (2023)16; IPCC (n 4) 2246-2247; *Ioane Teitiota v New Zealand* (n 2) para 9.11.

12 Art 1A(2) Convention Relating to the Status of Refugees adopted 28 July 1951, enacted 22 April 1954 189 UNTS 137 (1951 Refugee Convention).

Convention).¹³ However, as explored in this article, the international refugee regime and its associated durable solutions are not adequate for addressing climate change displacement.¹⁴

Given these limitations, this article examines how primary soft law instruments, which are non-binding yet norm-setting legal frameworks, may provide alternative solutions for African children displaced by climate change.¹⁵ While not legally binding, these instruments can influence state practice and over time evolve into enforceable legal standards for states.¹⁶

The article first contextualises child displacement in Africa due to climate change before exploring the concept of durable solutions, particularly in relation to displaced children. It then analyses the limitations of traditional durable solutions within the refugee regime for situations of climate displacement and examines how primary soft law instruments may help fill protection gaps. Finally, the article presents conclusions and recommendations, adopting a child rights-based approach that recognises children as rights holders and states as duty bearers.¹⁷

2 Displacement of children due to climate change impacts in Africa

Due to their unique physical, psychological and developmental immaturity, children are particularly vulnerable to the risks associated with both climate change and displacement.¹⁸ For example, climate change creates risks to a child's right to life, survival and development

13 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa adopted 10 September 1969, enforced 20 June 1974 United Nations Treaty Series 14691 (OAU Refugee Convention).

14 See parts 3 and 4.

15 Primary soft law may declare new norms or reaffirm or rearticulate existing binding norms and obligations in a new context. Secondary law, on the other hand, is the recommendations and General Comments from various United Nations or regional supervisory bodies, the jurisprudence of international and regional courts, decisions of Special Rapporteurs, and resolutions from organs such as the United Nations General Assembly. D Shelton 'Soft law' in D Armstrong *Routledge handbook of international law* (2009) 68-72; A Guzman & T Timothy 'International soft law' (2010) 2 *Journal of Legal Analysis* 171-226.

16 Shelton (n 15) 68-72; Guzman & Timothy (n 15) 171-226.

17 For a detailed explanation of this approach, see UN Committee on the Rights of the Child General Comment 13 on the right of the child to freedom from all forms of violence (2011) CRC/C/GC13 para 59; see also UN Committee on the Rights of the Child General Comment 26 on children's rights and the environment, with special focus on climate change (2023) CRC/C/GC/26 paras 6-8; United Nations Secretary-General 'Guidance note of the Secretary-General on child rights main streaming' (31 July 2023).

18 United Nations Children's Fund 'The climate crisis is a child rights crisis: Introducing the Children's Climate Risk Index' (2021) 3.

due to increased and more severe exposure to extreme temperatures, storms and flooding. Further, various other rights found in the conventions are at risk due to disruptions by climate impacts to children's access to health care, education and social services, as well as increased exposure to violence and exploitation.¹⁹

The prolonged and ongoing drought in the Horn of Africa, which began in 2020, serves as a stark example of the effects of climate change impacts.²⁰ This drought has exacerbated food and water scarcity, resulting in heightened child mortality and morbidity rates.²¹ Moreover, the effects of the drought on livelihoods within the region have contributed to increased occurrences of child labour, gender-based violence and harmful practices such as early marriage and female genital mutilation.²² Overall, children's vulnerability to climate change and the associated risks pose a significant threat to the realisation of children's rights, as found in CRC and the African Children's Charter.²³ These risks can drive or influence the decisions of children or their families to leave their place of origin in search of international protection.²⁴

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- 19 United Nations Human Rights Council 'Human rights and climate change' (25 March 2009) 10/4; Intergovernmental Panel on Climate Change 'Summary for policymakers' in *Climate change 2022: Impacts, adaptation and vulnerability* Working Group II Contribution to the IPCC Sixth Assessment Report (2022) 3, 9 & 11; FMN Asadullah and others 'Child marriage, climate vulnerability and natural disasters in coastal Bangladesh' (2021) 53 *Journal of Biosocial Science* 948-967; R Alsalem Report of the Special Rapporteur on Violence against Women and Girls, its causes and consequences: Violence against women and girls in the context of the climate crisis, including environmental degradation and related disaster risk mitigation and response 11 July 2022 A/77/136 para 46; MH Greenfield 'An urgent need to reassess climate change and child labour in agriculture' (2022) *The Lancet Planetary Health* e456-e457; United Nations Office of the Special Representative of the Secretary-General on Violence Against Children 'The climate crisis and violence against children' (2022) 4-6.
- 20 World Food Programme 'Regional drought response plan for the Horn of Africa: 2023' World Food Programme 23 January 2023, <https://www.wfp.org/publications/regional-drought-response-plan-horn-africa-2023> (accessed 12 August 2024); World Health Organisation 'Drought and food insecurity in the greater Horn of Africa' 30 July 2024, <https://www.who.int/emergencies/situations/drought-food-insecurity-greater-horn-of-africa> (accessed 23 August 2024).
- 21 United Nations Children's Fund 'Children are facing deadly drought in the Horn of Africa' 22 April 2022, <https://www.unicef.org/stories/climate-drought-horn-of-africa> (accessed 30 April 2024); K Terry & A Rai 'Amid record drought and food insecurity, East Africa's protracted humanitarian crisis worsens' Migration Policy Institute 18 January 2023, <https://www.migrationpolicy.org/article/east-africa-drought-food-insecurity-refugee-migration> (accessed 30 April 2024); International Organisation for Migration 'East and Horn of Africa regional drought response 2023' Global Crisis Response Platform, <https://crisisresponse.iom.int/response/east-and-horn-africa-regional-drought-response-2023> (accessed 12 August 2024).
- 22 UNICEF (n 21); Terry & Rai (n 21).
- 23 E Gibbons 'Climate change, children's rights, and the pursuit of intergenerational climate justice' (2014) 16 *Health and Human Rights Journal* 22; CRC (n 9); African Children's Charter (n 10).
- 24 UNICEF 'Preparing for a future' (n 11); UNICEF 'Time to act' (n 11) 16.

Children who have been displaced across a state border, especially if they are unaccompanied or have crossed using irregular means, are at further risk of exposure to, among others, trafficking; abduction; sexual and labour exploitation; both physical and mental trauma; limited access to health care; and family separation.²⁵ Further, there may be limited or no access to education and other social services while they are on the move, which are essential to the survival and development of the child.²⁶ These displacement risks to the rights are further compounded by climate change impacts, such as the risks associated with extreme weather exposure while on the move.²⁷

Given children's vulnerability due to ongoing displacement, ending such displacement, where possible, is essential to protecting their rights and reducing potential long-term harm to their health, well-being and development.²⁸ The way in which host states and the international community can develop durable solutions that address the consequences of climate displacement for children, however, has often been overlooked.²⁹

As will be expanded upon below, durable solutions are traditionally associated with the international refugee regime.³⁰ However, McAdam, Kälin, Cantor and others have established that the traditional refugee regime is inadequate for addressing displacement due to climate change impacts.³¹ For example, the definition of refugee found within the 1951 Refugee Convention precludes persons displaced by climate change impacts due to the narrow,

25 Office of the Special Representative of the Secretary-General on Violence Against Children 'Keeping the promise: Ending violence against children by 2030' United Nations July 2019 55; R Marcus and others 'What works to protect children on the move: Rapid evidence assessment' (2020) 7 & 25; CRC Committee General Comment 26 (n 17) paras 35-36; African Committee of Experts on the Rights and Welfare of the Child General Comment 7 on article 27 of the African Children's Charter 'Sexual exploitation' (2021) para 118.

26 Marcus and others (n 25) 7 & 25; CRC Committee General Comment 26 (n 17) paras 35-36.

27 United Nations High Commissioner for Refugees 'Climate change and disaster displacement' UNHCR Africa, <https://www.unhcr.org/climate-change-and-disasters.html> (accessed 9 January 2023); F Perera *Children's health and the peril of climate change* (2022) 25; United Nations Human Rights Council 'Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child' A/HRC.35/13 May 2017 3. See also D Martinez Garcia & M Sheehan 'Extreme weather-driven disaster and children's health' (2016) 46 *International Journal of Health Services* 81.

28 MT Chazalnoë and others 'Background paper children on the move: Why, where, how?' (2021) 2.

29 UNICEF 'Preparing for a future' (n 11) 3; IPCC (n 4) 2246-2247; Ioane Teitiota *New Zealand* (n 2) para 9.11.

30 See part 3.

31 J McAdam *Climate change, forced migration, and international law* (2012) 44, 238; Kälin & Chapuisat (n 3) 5-14; W Kälin & N Schrepfer 'Protecting people crossing borders in the context of climate change: Normative gaps and possible approaches' (2012) UNHCR Legal and Protection Policy Research Series (2012) 69-72; Cantor and others (n 3) 185-190.

individualist, persecution-based nature of the definition.³² Regionally, it has been suggested that the OAU Refugee Convention broadens the definition of refugee to include persons who, due to events that 'seriously disturb public order' in the state of origin, are compelled to leave their places of habitual residence to seek refuge.³³ Woods states that events that disturb the 'public order' can and should be interpreted to include climate change impacts.³⁴ However, such an interpretation would be implied as it is not made explicit in the Convention.³⁵

Considering the inadequacy of the conventions named above, Kälin and Schrepfer, as well as McAdam, suggest that primary soft law instruments may provide an alternative framework for protecting children displaced due to climate impacts in Africa.³⁶ These soft law instruments may include climate-specific instruments such as the Paris Agreement to the UN Framework Convention on Climate Change (Paris Agreement), but primarily consist of instruments that deal with aspects of human mobility.³⁷

Fundamental human mobility primary soft instruments include international instruments such as the New York Declaration (NYD),³⁸ its accompanying Global Compacts – the Global Compact for Safe, Orderly and Regular Migration (GCM)³⁹ and the Global Compact for Refugees (GCR),⁴⁰ the Nansen Initiative's Protection Agenda for Cross-border Displaced Persons in the Context of Disasters and Climate Change (Nansen Protection Agenda);⁴¹ and the United Nations Children's Fund (UNICEF) Guiding Principles for Children on the Move in the Context of Climate Change (UNICEF Guiding

32 Art 1A (2) 1951 Refugee Convention; Kälin & Chapuisat (n 3); Cantor and others (n 3) 184-190; G Goodwin-Gill & J McAdam 'Displacement related to the impacts of disasters and climate change' in G Goodwin-Gill & J McAdam *The refugee in international law* (2021) 1083-1135; McAdam (n 31) 41-51.

33 Art 1 OAU Refugee Convention (n 13).

34 T Wood 'Who is a refugee in Africa? A principled framework for interpreting and applying Africa's expanded refugee definition' (2019) 31 *International Journal of Refugee Law* 13 & 22.

35 African Union Commission 'Summery conclusions: Roundtable on addressing root causes of forced displacement and achieving durable solutions in Africa' (2019) 6.

36 Kälin & Schrepfer (n 31) 69-72; Goodwin-Gill & McAdam (n 32); McAdam (n 31) 238.

37 The Paris Agreement to the United Nations Framework Convention on Climate Change adopted 12 December 2015, entered into force 4 November 2016 TIAS 16-1104 (Paris Agreement).

38 New York Declaration for Refugees and Migrants 3 October 2016 A/RES/71/1 (NYD).

39 Global Compact for Safe, Orderly and Regular Migration, UN Doc A/RES/73/195 19 December 2018 (GCM).

40 Global Compact on Refugees, UN Doc A/73/12 (Part II) 2 August 2018 (GCR).

41 The Nansen Initiative 'Agenda for the protection of cross-border displaced persons in the context of disasters and climate change' (Vol 1 December 2015) 6 (Nansen Protection Agenda).

Principles).⁴² The NYD, GCM and GCR, for the most part, have been well received in Africa and, despite their non-binding nature, have a track record of improving the rights of those they affect.⁴³ Furthermore, African regional instruments include the African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers (African Guiding Principles).⁴⁴

3 Conceptualising durable solutions for displaced children

When looking at ‘solutions’ to displacement, the first step is to define the problem that must be addressed.⁴⁵ In the context of the displacement of children due to climate change impacts, the question arises as to how states end the continued displacement of such children in a way that will respect, protect and fulfil their rights. As such, what follows is a discussion of solutions that seek to end existing displacement situations.

The original conceptualisation of durable solutions began in the context of the international refugee regime.⁴⁶ As such, durable solutions are seen as ‘any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives’.⁴⁷ These durable solutions traditionally include voluntary repatriation, local integration or resettlement.⁴⁸ The United Nations High Commissioner for Refugees (UNHCR) has subsequently provided its own definition of durable solutions to encompass ‘[t]he means by which the situation of persons of concern to the UNHCR can be satisfactorily and permanently resolved through ensuring

42 UNICEF Guiding principles for children on the move in the context of climate change (2022) (UNICEF Guiding Principles).

43 For a discussion on the implementation of these soft law frameworks, see African Union ‘Senior officers validate plan of action to implement the global compact for safe, orderly and regular migration 28 August 2024, <https://au.int/en/pressreleases/20240828/senior-officers-validate-action-plan-gcm-implementation-africa> (accessed 26 January 2025); International Organisation for Migration ‘Migration governance indication data on the implementation of the global compact for migration in Africa’ (2024); F Khan & C Sackeyfio ‘What promise does the Global Compact on Refugees hold for African refugees?’ (2018) 30 *International Journal of Refugee Law* 696-698.

44 African Commission on Human and Peoples’ Rights African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers (2023) (African Guiding Principles).

45 BS Chimni *International refugee law: A reader* (2005) 331.

46 M Bradley and others ‘Whither the refugees? International organisations and “solutions” to displacement, 1921-1960’ (2022) 41 *Refugee Survey Quarterly* 159, 161.

47 International Organisation for Migration *Glossary on migration* (2019) 59-60.

48 As above; United Nations High Commissioner for Refugees ‘Global Appeal’ 2018-2019 (2019) 201; see also Statute of the Office of the United Nations High Commissioner for Refugees adopted 14 December 1950 Annex to UN Doc A/Res428(V) ch 1 para 1.

national protection for their civil, cultural, economic, political and social rights'.⁴⁹ Finding durable solutions, therefore, represents the end of mobility for those who have been displaced.⁵⁰

Ending mobility is particularly important for children to ensure the protection of their rights, as found in CRC and the African Children's Charter. States should embark on this important process from the moment that a child crosses a state border into the host state. Displacement for a child without finding a durable solution, on average, is 17 years, the equivalent of a child's entire education from birth to high school completion or, in other words, the equivalent of their entire childhood.⁵¹ The need for durable solutions for children therefore is immediate, as children cannot postpone their growth and development while waiting on the immigration systems of a host state to find a solution to their displacement.⁵² Goodwin-Gill captures the need for urgency, stating that '[s]olutions for children ... cannot be mortgaged to some future time and place, but to be durable must contribute now to the full development of the child'.⁵³

Thus, durable solutions for children require that their displacement has ended in its entirety, that solutions are found timeously and that the rights of the child, as found in CRC and the African Children's Charter, are respected, protected and fulfilled.

4 Traditional solutions and climate change-displaced children

There is no hierarchy for durable solutions, and all solutions to displacement should be determined on a case-by-case basis.⁵⁴ Nevertheless, in general, host states tend to gravitate towards voluntary repatriation as the first-choice solution.⁵⁵ In the context

49 United Nations High Commission for Refugees 'Durable solutions' UNHCR Master Glossary (2021), <https://www.unhcr.org/glossary/#d> (accessed 27 February 2023); UNHCR (n 42) 201.

50 M Bradley & J McAdam 'Rethinking durable solutions to displacement in the context of climate change,' Brookings 14 May 2012 1, <https://www.brookings.edu/research/rethinking-durable-solutions-to-displacement-in-the-context-of-climate-change/> (accessed 30 April 2024).

51 MO Ensor & EM Goździak 'Introduction' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 8.

52 J Pobjoy 'Refugee children' in C Costello (ed) *Oxford handbook on international refugee law* (2021) 759.

53 G Goodwin-Gill 'Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions' (1995) 3 *International Journal of Children's Rights* 405-407.

54 United Nations High Commissioner for Refugees 'Refugee protection and mixed migration: The 10-point plan in action' (2011).

55 M Zieck 'Reimagining voluntary repatriation' in C Costello and others *The Oxford handbook of international refugee law* (2021) 1064-1079. See also K Long

of climate displacement, there are significant barriers to making use of this solution. Further, these barriers are exacerbated when those displaced are children.

Voluntary repatriation refers to the free and informed return of forcibly displaced persons to their country of origin in safety and dignity.⁵⁶ The process of voluntary repatriation can be categorised as either 'organised', where assistance is provided by entities such as the United Nations Refugee Agency (UNHCR) or the host state, or 'spontaneous', where displaced individuals return on their own.⁵⁷ However, the preference for repatriation is often influenced more by the host state's interests and the socio-political/geopolitical context than by what is truly best for the displaced person and their rights.⁵⁸ Further, depending on the severity of the climate impact that drove the initial displacement, repatriation may not be a viable solution for children displaced by climate change impacts.⁵⁹ Repatriation in the context of climate change impacts runs the risk of reintroducing the child to situations resulting in irreparable harm, breaching the state's obligation of *non-refoulement*.⁶⁰ This can be attributed to the long-term impacts many states will suffer due to climate change.

Moreover, the 'voluntariness' of voluntary repatriation can be scrutinised when applied to children.⁶¹ Children are at risk of having their interests subsumed into those of their parents if accompanied or disregarded due to perceived incapacity if unaccompanied.⁶² States should ensure the respect for, protection and fulfilment of rights such as the right to life, survival and development,⁶³ best interests,⁶⁴

'Rethinking "durable" solutions' in E Fiddan-Qamiyeh and others *The Oxford handbook of refugee and forced migration studies* (2016) 475-487.

56 United Nations High Commissioner for Refugees 'Voluntary repatriation' UNHCR Master Glossary (2021), <https://www.unhcr.org/glossary/#v> (accessed 27 February 2023).

57 Chimni (n 45) 334-336.

58 Chimni (n 45) 331; Bradley and others (n 46) 164; JC Hathaway 'Refugee solutions, or solutions to refugeehood?' (2007) *Refuge: Canada's Journal on Refugees* 4.

59 Bradley & McAdam (n 50) 1-3.

60 UNICEF 'Preparing for a future' (n 11); United Nations Human Rights Council (n 27) paras 29 & 37; R Johannessen 'Durable solutions for children toolkit' (2019) 3.

61 Chimini (n 45) 331.

62 J Pobjoy *The child in international refugee law* (2017) 46-47; J Bhabha 'More than their share of sorrows: International migration law and the rights of children' (2003) 22 *Saint Louis University Public Law Review* 267; J Kanics 'Challenges and progress in ensuring the right to be heard and the best interests of children seeking international protection' (2016) 32 *Refuge* 18; United Nations High Commissioner for Refugees 'Guidelines on international protection: Child asylum claims under articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees' (December 2009) HCR/GIP/09/08 para 2.

63 Art 6 CRC; art 5 African Children's Charter.

64 Art 3 CRC; art 4 African Children's Charter.

participation⁶⁵ and non-discrimination⁶⁶ in decisions regarding a child's return.

In contrast, local integration serves as the solution, offering the least adverse effects on the rights of children when timeously implemented and with the child's active involvement in the process.⁶⁷ Local integration is a durable solution in which a displaced individual permanently settles into a host state.⁶⁸ This is a complex and gradual process that interacts with several other interrelated processes, including legal, economic and socio-cultural integration.⁶⁹ This solution is often finalised with the naturalisation of the displaced person into the host state.⁷⁰ Nevertheless, this solution faces several barriers to respecting, protecting and fulfilling children's rights. Displaced children often experience discrimination when attempting to access the same rights as local citizens. They are also frequently subjected to stigma and isolation. These challenges can prevent them from fully integrating into the host state and its society.⁷¹ Further, the gradual nature of this solution may restrict a child's access to education, health care and other basic services required to safeguard their rights.⁷²

As with voluntary repatriation, climate change impacts create unique barriers to the use of local integration as a durable solution to displacement. Most persons displaced across state borders are found in neighbouring states.⁷³ These states may not have the capacity to integrate the displaced population into their communities, resulting

65 Art 12 CRC; arts 4(2) & 7 African Children's Charter.

66 Art 2 CRC; art 3 African Children's Charter.

67 Ensor & Goździak (n 51) 7.

68 United Nations High Commissioner for Refugees 'Local integration' UNHCR Master Glossary (2021), [unhcr.org/glossary/#/](https://www.unhcr.org/glossary/#/) (accessed 27 February 2023).

69 United Nations High Commissioner for Refugees (n 68); United Nations High Commissioner for Refugees 'Executive committee (ExCom) local integration (2005) Conclusion 104 (LVI); and ExCom, Local Integration and Self-Reliance' (2 June 2005) EC/55/SC/CRP.15.

70 United Nations High Commissioner for Refugees (n 68). Naturalisation practices of states vary dramatically, especially prevalent between the Global North and Global South. F Khan & R Ziegler 'Refugee Naturalisation and Integration' in C Castello (ed) *Oxford Handbook on International Refugee Law* (2022) 1059.

71 Chimini (n 45) 332; International Federation of the Red Cross 'Displacement, climate change and durable solutions: fact sheet 8' IFRC 4, https://ctk.climatecentre.org/downloads/modules/training_downloads/2g%20FactSheet%2008%20-%20Displacement%20and%20Climate%20-%20Durable%20Solutions.pdf (accessed 11 March 2023).

72 A Price 'Enduring solution in the midst of "crisis": Refugee children in Europe' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 35-36 & 41-43. See also EM Goździak 'What kind of welcome? Addressing the integration needs of Central American children and adolescents in US local communities' in MO Esor & EM Goździak (eds) *Children and forced migration: Durable solutions during transient years* (2016) 51-78.

73 Platform on Disaster Displacement 'Human rights, migration and cross-border displacement in the context of adverse effects of climate change' Platform on Disaster Displacement 6 October 2017, <https://disasterdisplacement.org/>

in the expansions of displacement encampments or urban slums.⁷⁴ Additionally, they may lack the capacity to mitigate and adapt to the negative consequences of climate change. Due to their proximity to the state of origin, these states may experience the same or similar sudden and slow-onset climate change impacts.⁷⁵ As such, children, already displaced by climate change impacts, may face secondary displacement in the state in which they have sought international protection.⁷⁶

Resettlement in a third state thus stands out as the potential go-to solution for children displaced by climate change.⁷⁷ Resettlement refers to the process whereby persons currently situated in the host state in which they initially sought protection are transferred to a third state that has agreed to admit them with permanent residence status.⁷⁸ The UNHCR highlights that this solution provides resettled displaced persons, as well as their dependents, with access to rights similar to those enjoyed by nationals of the third state.⁷⁹ Resettlement, however, is often considered a last-resort solution for those who have been displaced and who do not have the option of repatriation or local integration.⁸⁰ Kneebone and Macklin highlight that resettlement is a 'solution' most often favoured by high-income states in the Global North who, for varying reasons, are reluctant to receive displaced persons from the Global South.⁸¹ As a durable solution, resettlement often proves problematic as host states do not have a specific legal obligation to facilitate resettlement.⁸² Further,

staff-member/human-rights-migration-and-cross-border-displacement-in-the-context-of-adverse-effects-of-climate-change/ (accessed 27 February 2023).

- 74 Intergovernmental Panel on Climate Change 'Health, wellbeing, and the changing structure of communities' in Sixth Assessment Report Impacts, Adaptation and Vulnerability (2022) 1100; Bradley & McAdam (n 50) 4.
- 75 IPCC (n 74) 1100.
- 76 Bradley & McAdam (n 50) 1-4; M Cullen 'Disaster, displacement and international law: Legal protections in the context of a changing climate' (2020) 8 *Politics and Governance* 275.
- 77 Bradley & McAdam (n 50) 3.
- 78 United Nations High Commissioner for Refugees 'Resettlement' UNHCR Master Glossary (2021), <https://www.unhcr.org/glossary/#r> (accessed 28 February 2023).
- 79 As above.
- 80 United Nations High Commissioner for Refugees 'What is resettlement' October 2020, <https://www.unhcr.org/5fe06e8b4> (accessed 7 March 2023).
- 81 S Kneebone & A Macklin 'Resettlement' in C Costello (ed) *Oxford handbook on international refugee law* (2021) 1080. In 2023 the United Kingdom's attempt to introduce the Safety of Rwanda Bill, which aimed at implementing third-state resettlement, faced criticism for potentially endangering refugees and asylum seekers by limiting their choice and participation in the process. United Nations 'UK-Rwanda asylum law: UN leaders warn of harmful consequences' 23 April 2024, <https://www.unhcr.org/news/press-releases/uk-rwanda-asylum-law-un-leaders-warn-harmful-consequences> (accessed 30 April 2024).
- 82 Kneebone & Macklin (n 81) 1080-1081.

unlike voluntary repatriation and local integration, this solution is not a solution underwritten by the principles of *non-refoulement*.⁸³

In addition, children who are resettled may face many of the risks associated with local integration described above as they attempt to assimilate into their new host state, and they may also experience heightened exposure to instances of discrimination and xenophobia, trafficking, lack of access to basic education and other needs.⁸⁴ As noted by Van Selm, the success of resettlement is judged by the local integration of the displaced individual into the new host society.⁸⁵ Further, the Committee on the Rights of the Child (CRC Committee) highlights in this regard that the potential for the child to experience these risks is multiplied if the child is separated or unaccompanied.⁸⁶

5 Bridging the protection gap: The role of soft law in safeguarding climate-displaced children

Despite the limitations discussed above, it remains essential for states to pursue durable solutions for children displaced by climate change, as ongoing displacement poses numerous risks to their rights. However, a protection gap has been created by the lack of explicit recognition of persons displaced by climate impacts by the 1951 Refugee Convention and the OAU Refugee Convention. Therefore, soft law instruments, which purport to protect the rights of persons displaced by climate change impacts, can be examined to determine the extent to which they support the implementation of climate-displaced children's rights when seeking durable solutions to their displacement.

At the international level, several soft law instruments, such as NYD, GCR and GCM, acknowledge climate change as a significant driver of human mobility in the twenty-first century.⁸⁷ However, much like the traditional refugee regime, they do not specifically identify persons displaced by climate impacts as a distinct group

83 Kneebone & Macklin (n 81) 1080.

84 Price (n 72) 35-36 & 41-43. See also MO Ensor 'Refugee girls and boys and the dilemmas of (un)sustainable return to South Sudan' in MO Esor & EM Goździak EM (eds) *Children and forced migration: Durable solutions during transient years* (2016) 105-126.

85 J van Selm 'Refugee resettlement' in E Fiddan-Qamiyeh and others *The Oxford handbook of refugee and forced migration* (2016) 520.

86 CRC Committee General Comment 6: Treatment of unaccompanied and separated children outside their country of origin (2005) CRC/GC/2005/6 paras 92-94.

87 GCR (n 40) para 8; GCM (n 39) Objectives 2(h)-(l) para 18; see also W Kälin 'The global compact on migration: A ray of hope for disaster-displaced persons' (2018) 30 *International Journal of Refugee Law* 665.

in need of protection when crossing international borders. Instead, they indicate that states are likely to classify such persons as irregular migrants, subjecting them to the immigration policies of the host states rather than asylum or protection policies.⁸⁸ Consequently, they are excluded from the refugee protection regime, relieving states of the obligation to offer them durable solutions.⁸⁹ These instruments maintain the traditional binary of 'refugee' and 'voluntary migrant' that has been used to describe those who leave their habitual homes. However, following the introduction of the African Guiding Principles, this position may no longer be the default in the African regional context.

The African Guiding Principles, developed by the African Commission on Human and Peoples' Rights (African Commission),⁹⁰ are rooted in African regional treaty law, case law, standards and resolutions, serving as a framework for AU member states upon which to base their human mobility legislation.⁹¹ Each principle is accompanied by an explanatory note outlining their derivation and interpretation aims to address contemporary challenges in human mobility, including displacement due to climate change impacts.⁹² These principles reiterate that displacement may be motivated by adverse effects of both sudden or slow-onset climate change impacts, which may result in different degrees of vulnerability. These levels include forced displacement, migration and planned relocation.⁹³ Further, they highlight that displacement due to climate change impacts may be temporary, recurrent or permanent.⁹⁴ Thus, when there is any type of mobility across international borders as a result of climate change impacts, those displaced are to be defined as 'climate migrants'.⁹⁵ However, the African Guiding Principles go further than just recognising that climate change impacts may result in mobility across a state border by stating that the definition of 'refugee', as laid out in article 1 of the OAU Refugee Convention, will now also explicitly apply to persons who are 'compelled to seek refuge outside their country of origin, nationality or habitual residence as a result

88 UNICEF Guiding Principles (n 42) 18.

89 Objective 2 of the GCM seemingly confirms that persons displaced by climate change impacts will be considered irregular migrants. The GCM also states that as part of the guiding principle of national sovereignty, states may distinguish between regular and irregular migration status. GCM (n 39) paras 15 & 18.

90 The African Commission derives its powers to create this instrument from art 45(1)(b) of the African Charter on Human and Peoples' Rights adopted 27 June 1981, enforced 21 October 1986 CAB/LEG/67/3rev.5, 21 ILM 50.

91 African Guiding Principles (n 44) Foreword 6.

92 As above.

93 Principle 2(2) African Guiding Principles.

94 As above.

95 As above.

[of] climate change that affects their fundamental rights, regardless, of whether such events seriously disturb public order'.⁹⁶

What is unique about the African Commission's definitions and explanations of 'climate migrant' and 'refugee' is that they move away from the binary approach traditionally found in forced migration policy, soft law and scholarship. Characterising human mobility in a binary fashion does not capture the complexities of twenty-first century movement.⁹⁷ Rather, it recognises that human mobility should be viewed as a spectrum. On the one end, there are voluntary migrants and, on the other end, there are refugees. Between these two extremes lie persons forced to leave their habitual homes for various reasons, including due to sudden and slow-onset climate change impacts.⁹⁸

The creation of the 'climate migrant' definition, the recognition of the spectrum of mobility and the inclusion of climate-displaced persons as refugees are major steps forward for the protection of persons displaced due to climate impacts and their recognition as a group in need of protection. Therefore, when addressing durable solutions for climate-displaced children in Africa, consideration must be given to those now classified as refugees and those who, while forcibly displaced, may not meet traditional refugee criteria.

5.1 Obligations and commitments towards climate-displaced children deemed refugees

International soft law endorses the notion that traditional durable solutions should be accessible to all persons classified as refugees, a category now extended in the African context to encompass individuals identified as refugees due to the effects of sudden or slow-onset climate change impacts.⁹⁹ In particular, NYD and GCR outline in significant detail the commitments made by states regarding finding durable solutions for refugee persons. Notably, both instruments commit to working towards durable solutions from the outset of a refugee situation, with a focus on sustainability, safety and dignity.¹⁰⁰ By specifying the various elements of the traditional durable solutions,

96 My emphasis; Principle 2(4) African Guiding Principles.

97 K Warner 'Coordinated approaches to large-scale movements of people: Contributions of the Paris Agreement and the Global Compacts for migration and on refugees' (2018) 39 *Population and Environment* 384.

98 R Hamlin *Crossing: How we label and react to people on the move* (2021) 2; I Atak & F Crépeau 'Refugees as migrants' in C Castello and others *The Oxford handbook of international refugee law* (2021) 134; Warner (n 97) 384.

99 Principle 2(4) African Guiding Principles.

100 NYD (n 38) para 75; GCR (n 40) para 85.

GCR aims to enhance predictability and increase the likelihood of achieving these solutions for all refugees.¹⁰¹ Additionally, the African Guiding Principles specify that these principles pertain to the entirety of the displacement process and mandate that 'states shall receive refugees and ensure the resettlement of those refugees'.¹⁰²

The duties and procedures that states are required to undertake concerning all three traditional durable solutions found in the international refugee regime have been broadened in NYD, GCR and the African Guiding Principles. For example, among other things, these instruments, in the context of voluntary repatriation, highlight that host states should recognise the right of refugees and asylum seekers to leave and return to the host state without undue penalisation towards their status determination applications.¹⁰³ Further, NYD states that to ensure sustainable, safe and dignified repatriation and reintegration of refugees, host states, alongside UN organisations and other relevant stakeholders, should recognise the necessity of the voluntary nature of repatriation for as long as refugees require international protection from the host state.¹⁰⁴ The priority, thus, is to create an environment conducive to voluntary return to the state of origin while respecting the principle of *non-refoulement* and ensuring free and informed choice for refugees.¹⁰⁵ Measures for informed repatriation, reintegration and reconciliation should be planned and supported, including through funding for rehabilitation and legal safeguards for access to support mechanisms in the host state.¹⁰⁶ Further, direct repatriation support should be provided, particularly for vulnerable groups such as children, to prevent further displacement.¹⁰⁷

In discussing local integration as a durable solution, NYD, GCR and the African Guiding Principles emphasise the importance of granting legal stay to persons seeking international protection to facilitate their integration into a host state while acknowledging that determinations regarding permanent settlement or citizenship lie within the jurisdiction of the host nation.¹⁰⁸ They highlight that local integration requires efforts from both refugees and host

101 GCR (n 40) para 86.

102 Principles 2 & 21 African Guiding Principles.

103 Host states are thus expected to provide identification and travel documents, facilitate the socio-economic reintegration of returnees, and consider measures for property restitution. NYD (n 38) Annex I para 11; Principles 17 (1)-(3) African Guiding Principles.

104 NYD (n 38) Annex I para 12(a).

105 GCR (n 40) para 87; Principles 20(3)-(4) African Guiding Principles.

106 NYD (n 38) Annex I paras 13(b)-(d); GCR (n 40) 99.

107 GCR (n 40) para 89.

108 NYD (n 38) annex I para 13(a); GCR (n 40) para 97; Principle 18(2) African Guiding Principles.

communities.¹⁰⁹ With reference to children, efforts should focus on promoting self-reliance by enhancing their access to education, health care and other services in the host state.¹¹⁰ Importantly, host states should empower child refugees to make the most of their skills and capacities, as this enables them to contribute significantly to their well-being and that of their host communities.¹¹¹

Furthermore, GCR makes commitments in support of states that choose to pursue local integration, which include the international community providing financial and technical assistance to host states.¹¹² This support includes developing a strategic framework for local integration, strengthening relevant institutions, communities and civil society, as well as addressing documentation issues, providing language and vocational training, and promoting respect and good relations.¹¹³ Investments in settlement areas aligned with national development plans and the 2030 Agenda will be encouraged, and regional frameworks for legal status or naturalisation for refugees will be explored where appropriate.¹¹⁴

Regarding resettlement as a durable solution, states are encouraged to expand opportunities for refugees through various means, such as medical evacuation, humanitarian admission, family reunification, skilled migration, labour mobility and education.¹¹⁵ In situations of mass displacement, states are encouraged to broaden their criteria for resettlement and humanitarian admission programmes, along with the consideration of temporary humanitarian evacuation programmes.¹¹⁶ Further, states commit to sharing their best practices, providing refugees with information for informed decisions and upholding protection standards.¹¹⁷ In addition, efforts will be made to strengthen good resettlement practices, such as establishing multi-year schemes, efficient processing, investing in reception and integration services and prioritising vulnerable cases, including at-risk women and girls.¹¹⁸ Core groups will continue to coordinate responses in specific situations, aligning with existing multilateral resettlement mechanisms.¹¹⁹ Currently, only a limited number of states offer resettlement as a durable solution to displacement. There

109 GCR (n 40) para 98.

110 NYD (n 38) Annex I paras 13(b) and 39.

111 NYD (n 38) Annex I para 13(c).

112 GCR (n 40) para 99.

113 As above.

114 As above.

115 NYD (n 40) Annex I para 14(a).

116 NYD (n 40) Annex I para 14(c).

117 NYD (n 40) Annex I para 14(b).

118 GCR (n 40) para 92.

119 GCR (n 40) para 93.

is a need to help create an environment that encourages expanded adoption of this durable solution.¹²⁰

In addition to the traditional durable solutions, GCR also recognises the need for other pathways for admitting individuals with international protection needs that can enhance access to protection and solutions.¹²¹ These pathways may include family reunification, private or community sponsorship programmes, humanitarian visas, migration corridors, educational opportunities and labour mobility for refugees with needed skills.¹²²

Importantly, GCR purports to align these commitments with international human rights standards such as CRC and the African Children's Charter, requiring states to offer comprehensive assistance to refugee children, including mental health support, child protection systems and family reunification.¹²³ Further, NYD mandates adherence to CRC obligations, aiming to provide a nurturing environment for refugee children to fully realise their rights and capabilities.¹²⁴ The African Guiding Principles state that states must take all appropriate measures in all areas of the migration and displacement process to safeguard the rights and well-being of children, providing suitable assistance to every child, whether accompanied or unaccompanied, which includes prioritising the child's best interests and respecting their right to express their views in all matters affecting them.¹²⁵ As these principles apply to the entire displacement process, these protections of children's rights, particularly in terms of participation, should include decisions about finding suitable durable solutions for displaced children.¹²⁶

It is clear from the above that the soft law takes a big step forward in protecting those displaced by climate change, if they are recognised as refugees, when seeking durable solutions. However, none of the above instruments discussed addresses the need for durable solutions for children specifically, nor for these solutions to be found timeously, leaving them vulnerable to prolonged displacement and associated risks.

For children who are not considered refugees, but who have nevertheless been displaced by a climate change impact across

120 GCR (n 40) para 90.

121 GCR (n 40) para 94.

122 GCR (n 40) para 95.

123 GCR (n 40) para 76.

124 NYD (n 38) para 32.

125 Principle 10(2) African Guiding Principles.

126 Principle 2 African Guiding Principles.

a state border, the above risks are exacerbated by the absence of explicit obligations placed on states for such children seeking durable solutions to end their displacement. This raises concerns about the protections and support available to such children, especially considering the complexity of their displacement and the unique challenges they face. What follows is an exploration of the obligations and commitments – or lack thereof – towards these children within existing international and regional soft law frameworks.

5.2 Obligations and commitments towards climate-displaced children who are not refugees

There are no explicit obligations or commitments made by GCR, GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles or the African Guiding Principles regarding finding durable solutions for persons or children who are not defined as refugees but who have nonetheless been forcibly displaced across a state border due to climate change impacts. As such, this leaves a lacuna in the protection of the rights of such children seeking durable solutions. Nevertheless, the above-named instruments purport to be child sensitive. This means that they aim to aid states in respecting, protecting and fulfilling the rights of children as found in CRC and the African Children's Charter during all stages of mobility (which should include ending a child's displacement). With this in mind, various provisions found in these soft law instruments may be read to reflect some of the aspects of the traditional durable solutions described above. These aspects of durable solutions could be used to establish state practices that will protect the rights of children displaced by climate change who have crossed an international border.

GCM, for example, lacks explicit objectives for finding durable solutions in migration contexts. Rather, it broadly refers to all non-refugees as migrants without specific consideration for persons displaced due to climate change impacts who may not be voluntary migrants but who also are not refugees.¹²⁷ This has been criticised as perpetuating the refugee-migrant binary, which allows for those who do not fit into the categories neatly to fall between the protection cracks.¹²⁸ While it distinguishes between regular and irregular migrants, it does not offer a dedicated objective for comprehensively

¹²⁷ GCM (n 39) para 15.

¹²⁸ H Crawley & D Skleparis 'Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in European "migration crisis"' (2018) 44 *Journal of Ethnic and Migration Studies* 48-64; Warner (n 97) 384.

addressing irregular migration and associated protections.¹²⁹ Instead, the topic of irregular migration is woven throughout the GCM, touching upon issues such as migrant detention and trafficking prevention.¹³⁰ Consequently, GCM does not envision durable solutions, specifically. However, elements of the traditional solutions described above, such as voluntary repatriation and local integration, can be found scattered across various objectives. For instance, Objective 21 of GCM emphasises safe and dignified return procedures, highlighting child-sensitive reintegration programmes and *non-refoulement* obligations.¹³¹ Similarly, Objective 16 promotes local integration measures such as the provision of language training and access to employment for all migrants.¹³² Yet, it is important to note that GCM does not discuss naturalisation or permanent settlement for irregular migrants. Further, these objectives and their associated commitments were not drafted to act as durable solutions for displaced persons but rather to ensure dignified immigration policies for irregular migrants.

GCM does, however, introduce potential pathways for new solutions beyond the three traditional durable solutions. Objective 5, for instance, acknowledges the need for flexible migration pathways for those displaced by sudden-onset disasters, mentioning temporary humanitarian visas and temporary work permits.¹³³ Unfortunately, this objective focuses more on controlling entry into a host state than ending situations of displacement, thus still leaving displaced children vulnerable to the risks associated with displacement. In terms of more permanent forms of displacement, Objective 5 calls for state cooperation on solutions for those displaced by slow-onset impacts where adaptation in or return to may not be possible through the creation of a visa, but lacks specifics as to how this will work and its impacts on ending displacement, and whether specific considerations should be made in the context of children.¹³⁴

Furthermore, GCM also does not discuss access to durable solutions for children specifically. The protection of climate-displaced children is left to the general principle of child-sensitive procedures found in

129 A Pécoud 'Narrating an ideal migration world? An analysis of the Global Compact for Safe, Orderly and Regular Migration' (2021) 42 *Third World Quarterly* 25; Objective 13(h) 'Protect and respect the right and best interests of the child at all times, regardless of their migration status' GCM (n 39) para 29; Objective 15: 'We commit to ensuring that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services' GCM (n 39) para 31.

130 GCM (n 39) Objectives 10 & 13.

131 GCM (n 39) para 37.

132 GCM (n 39) para 32.

133 GCM (n 39) para 21(g).

134 GCM (n 39) para 21(h).

the instrument, which purports to align the commitments within the instruments with children's rights as outlined in CRC and the African Children's Charter.¹³⁵ Nevertheless, Objective 2 emphasises the need for states to develop coherent approaches to address the vulnerabilities of climate-displaced persons, including children, by promoting sustainable outcomes and considering recommendations from consultative processes such as the Nansen Protection Agenda.¹³⁶

The Nansen Protection Agenda underscores the temporary nature of protection for climate-displaced persons and emphasises that once the temporary measures and protections come to an end, durable solutions are needed that will allow persons displaced due to climate change impacts to rebuild their lives in a 'sustainable way in their country of origin, in some cases, in the country that received them or in exceptional cases in a third country.'¹³⁷ It suggests bilateral return agreements and host state integration efforts, stressing the importance of the involvement of displaced persons and communities.¹³⁸ Cooperation between the state of origin and host states should be ensured to receive returnees with respect for their safety, dignity and human rights.¹³⁹ If the return of a climate-displaced person to a state of origin is not possible, for example, where the causes of the displacement persist, host states should consider local integration or resettlement in a third country.¹⁴⁰ Importantly, measures should be developed to support the cultural and familial ties of the displaced in such cases.¹⁴¹ However, the Protection Agenda does not address effective practices specifically in the context of children finding durable solutions for climate change displacement. For this, one could look to the UNICEF Guiding Principles.

The UNICEF Guiding Principles focus on the rights of climate-displaced children while on the move. However, they regrettably do not comprehensively discuss durable solutions for such children. They only go as far as mentioning that such solutions are at the discretion of host states, emphasising children's best interests.¹⁴² These principles neither outline states' obligations regarding durable solutions nor detail aspects of traditional solutions.

135 GCM (n 39) para 15.

136 GCM (n 39) para 18(k).

137 Nansen Protection Agenda (n 41) 71.

138 As above.

139 As above.

140 As above.

141 As above.

142 UNICEF Guiding Principles (n 42) 29.

Lastly, the African Guiding Principles also do not explicitly address durable solutions for individuals not classified as refugees. However, they incorporate protective measures that correspond to the durable solution approaches described above. For instance, Principle 20(3) emphasises voluntary repatriation, stipulating that states must not repatriate migrants, irrespective of their migration status, if they face a genuine risk of irreparable harm to their fundamental human rights, especially the right to life. Additionally, Principle 37(6) underscores the importance of state cooperation in enabling the safe and dignified return of migrants.

When comparing the commitments for durable solutions in the soft law instruments in the refugee context with the objectives, guiding principles and best practices outlined for non-refugees, it becomes apparent that the latter are more aligned with protecting the rights of children. For instance, the UNICEF Guiding Principles were expressly crafted to safeguard the rights of children displaced by climate change, while GCM emphasises the importance of upholding a child's best interests as a cross-cutting and fundamental principle.¹⁴³

Furthermore, the African Guiding Principles do not have a principle dedicated to the protection of the rights of children. Nevertheless, the protection of the rights of children is woven throughout the instrument. In particular, Principle 10(2), which deals with migrants in vulnerable situations, emphasises the responsibility of states to provide comprehensive support to migrant children, whether they are accompanied or unaccompanied, ensuring that their best interests are prioritised. This includes assistance tailored to their needs and respecting their rights to express their opinions, considering their age and maturity.¹⁴⁴ It covers various aspects, including legal proceedings regarding their migrant status and determining their identity and relationships with accompanying adults.¹⁴⁵ This principle will also apply to those migrants deemed 'climate migrants' in the African region and, thus, the rights of children should be considered when a host state is searching for durable solutions for a climate-displaced child. However, these commitments often lack explicit provisions for expeditiously finding durable solutions for climate-displaced children, leaving them vulnerable to prolonged displacement situations.

Thus, none of the aforementioned soft law instruments explicitly delineate durable solutions for individuals or children not

143 GCM (n 39) para 15.

144 Principle 10(2) African Guiding Principles.

145 As above.

classified as refugees. This includes the African Guiding Principles, notwithstanding its progressive strides toward acknowledging persons displaced by climate change impacts as a vulnerable group deserving of protection. However, GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles and the African Guiding Principles do contain certain commitments that, while not explicit, have the potential to be interpreted in a way that helps guarantee certain rights associated with durable solutions for children displaced by climate change.

The above-named soft law instruments could potentially be used as tools by host states to influence state behaviour, address the some of the gaps in protection created by the binding legal frameworks, and ensure that the rights of climate-displaced children are upheld in the context of finding durable solutions. However, it is nevertheless noted that these measures were not drafted with the intention to end displacement but rather to facilitate regular migration, as such states would have to be explicit in their intentions to uphold the rights of climate-displaced children in ending their displacement.

6 Recommendations

The above body of soft law instruments, particularly the African Guiding Principles, brings the international community a step closer to ensuring that the rights of children displaced due to climate change impacts are protected. In summary, the above discussion highlighted the following:

- NYD, GCR and GCM acknowledge climate change impacts as a driver of displacement but do not explicitly classify climate-displaced persons as refugees, limiting their access to durable solutions. However, the African Guiding Principles have subsequently introduced the concept of 'climate migrants' and broadened the refugee definition found in the OAU Refugee Convention to include those displaced by climate change, ensuring stronger protection in Africa and providing access to some children displaced by climate change impacts to the traditional durable solutions.
- GCR and NYD touch on access to durable solutions for those classified as refugees, which now includes those covered by the refugee definition found within the African Guiding Principles. However, these durable solutions are not child sensitive and do not protect the rights of displaced children.

- The soft law instruments analysed lack explicit commitments for durable solutions for those children who have been displaced by climate change impacts but are not recognised as refugees. However, they do contain commitments that could be interpreted to support aspects of durable solutions, such as safe and dignified return procedures, integration efforts and humanitarian pathways. GCM, the Nansen Protection Agenda, the UNICEF Guiding Principles and the African Guiding Principles are also committed to ensuring that these procedures, efforts and pathways are child sensitive, helping to respect, protect and fulfil the rights of climate-displaced children.
- Despite the various child-sensitive principles, no soft law instrument analysed mandates time-bound solutions for climate-displaced children, leaving many vulnerable to prolonged displacement.
- Thus, while these soft law instruments are not legally binding, they can influence state behaviour, guiding policies to bridge protection gaps. States must intentionally align their efforts with child rights frameworks to ensure effective, durable solutions for children displaced by climate change in Africa.

In relation to the above, an actionable recommendation is for states to use periodic reports to child rights treaty-monitoring committees to demonstrate how they protect and fulfil the rights of climate-displaced children in Africa.¹⁴⁶ In other words, reports to the CRC Committee and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) hold states accountable for children's rights.¹⁴⁷ Host states should include information on legislative, administrative and other measures taken to support climate-displaced children in their search for durable solutions.

In 2024 the CRC Committee adopted the simplified reporting procedure as the default for state reports.¹⁴⁸ It is recommended that the CRC Committee include specific questions in its list of issues prior to reporting (LOIPR) for states hosting climate-displaced children.¹⁴⁹ These questions could be integrated into climate change efforts or

146 Art 44 CRC; art 43 African Children's Charter.

147 As above.

148 Office of the High Commissioner for Human Rights 'Reporting guidelines' United Nations, <https://www.ohchr.org/en/treaty-bodies/crc/reporting-guidelines> (accessed 21 September 2023).

149 CRC Committee 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by states parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child' 3 March 2015 CRC/C/58//Rev3 para 40.

the special protections rights cluster. Their inclusion aligns with the CRC Committee's General Comment 26 on children's rights and climate change, which underscores states' obligations to protect displaced children from rights violations caused by environmental degradation.¹⁵⁰ This includes obligations related to admission policies and *non-refoulement*. A state's LOIPR responses will now constitute its periodic report.¹⁵¹ The African Children's Committee has not yet adopted a simplified reporting procedure, but states should still include measures taken in line with African Children's Charter rights.

In addition, even if climate-displaced children can access traditional durable solutions, numerous hurdles remain due to the nature of climate change impacts. Innovative, adaptable solutions beyond conventional approaches are needed.¹⁵² For example, host states could integrate durable solutions for climate-displaced children into their climate adaptation commitments under frameworks such as the Paris Agreement.¹⁵³ This would involve recognising displacement due to climate change as a natural adaptation response, ensuring that states adapt to climate impacts to alleviate displacement drivers, and facilitating planned relocation when necessary. The African Guiding Principles open this avenue up by recognising resettlement in Principle 2(2) as a part of climate change migration and the commitments made in Principle 32 for a favourable environment for all migrants. In particular, Principle 32(4) states:

States shall develop adaptation and resilience strategies to sudden-onset and slow-onset disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought, and sea level rise, reducing climate risks and vulnerability and taking into account the need to create pathways for migration.

As such, there is a growing need for innovative, practical and adaptable solutions beyond traditional solutions' conventional scope. States should thus also consider incorporating durable solutions

150 CRC Committee General Comment 26 (n 17) para 50. General Comments, a form of secondary soft law, are used to promote the implementation of CRC and assist states in fulfilling their reporting obligations. They are an essential tool in helping explain the Convention obligations in the context of particular issues. Child Rights Connect 'Fact Sheet 3: General Comments of the Committee on the Rights of the Child', <https://childrightsconnect.org/wp-content/uploads/2013/10/Fact-sheet-CRC-GC-EN.pdf> (accessed 2 October 2023).

151 Art 43 African Children's Charter. See, eg, African Guiding Principles (n 44).

152 OC Ruppel & S van Wyk 'Climate change-induced movement of persons in Africa: Human rights responses to aspects of human security' in OC Ruppel and others (eds) *Climate change: International law and global governance* 805; McAdam (n 23) 7-9; S Atapattu 'Climate change, human rights and forced migration: Implications for international law' (2009) 27 *Wisconsin International Law Journal* 608.

153 Paris Agreement (n 37).

for climate-displaced children into their nationally determined contributions under the Paris Agreement.¹⁵⁴ Further research should also be conducted on the required level of international collaboration, guided by the principles of equity and common but differentiated responsibilities needed to achieve these adaptation measures.¹⁵⁵ Importantly, these adaptation strategies should reflect a children's rights-based approach, supporting the respect for, promotion and fulfilment of the rights owed to children displaced by climate change who are seeking durable solutions as found in CRC and African Children's Charter.¹⁵⁶

7 Conclusion

This article has demonstrated that while soft law instruments cannot replace binding legal frameworks, they play a crucial role in shaping national and regional policies and fostering international cooperation. In particular, primary soft law frameworks help address the protection gap left by the 1951 Refugee Convention and the OAU Refugee Convention for children displaced by climate change in Africa. The African Guiding Principles and other soft law instruments analysed above offer valuable guidance for host states and international bodies receiving displaced persons. However, these frameworks still fall short of adequately supporting states in fulfilling their obligations under CRC and the African Children's Charter.

A comparison of soft law commitments for durable solutions in refugee and non-refugee contexts reveals a stronger alignment with children's rights in the latter. Instruments such as the UNICEF Guiding Principles, GCM and the African Guiding Principles explicitly emphasise children's rights in climate displacement, whereas refugee frameworks lack this clarity. Additionally, soft laws do not adequately prioritise timely solutions for displaced children, which is fundamental in the protection of their rights as prolonged displacement exacerbates their vulnerabilities. Further challenges also remain in ensuring that children's interests are not overshadowed by those of their parents, as highlighted in both refugee and non-refugee contexts.

The evolving landscape displacement due to climate impacts in Africa requires a shift from broad commitments to concrete, rights-based actions by states. Strengthening the implementation of the existing primary soft law frameworks, integrating child-sensitive

154 Art 3 Paris Agreement (n 37).

155 Art 2(2) Paris Agreement (n 37).

156 UN Secretary-General (n 17).

approaches into climate adaptation strategies and fostering greater international cooperation are critical steps forward in the protection of the rights of climate-displaced children. As climate change continues to drive displacement, the protection of children's rights must remain at the forefront of policy responses. By embedding durable solutions within national and international legal and policy frameworks, states and global institutions can work towards a future where all children, regardless of displacement status, have access to stability, security and the full enjoyment of their rights.