REDUCING STATELESSNESS AND ACCORDING SAFE HAVEN TO CLIMATE CHANGE REFUGEES*

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"I want to tell you about that lagoon
That lucid, sleepy lagoon lounging against the sunrise

Men say that one day
That lagoon will devour you

They say it will gnaw at the shoreline
Chew at the roots of your breadfruit trees
Gulp down rows of your seawalls
And crunch your island's shattered bones

They say you, your daughter
And your granddaughter, too
Will wander rootless
With only a passport to call home."

—Kathy Jetnil-Kijiner, Excerpt from "Dear Matafele Peinem,"
2014 United Nations Climate Leaders Summit[1]

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[1] Speech by Kathy Jetnil-Kijiner, 2014 UN Climate Leaders Summit, New York City, Sept. 23, 2014, *available at* https://www.youtube.com/watch?v=L4fdxXo4tnY

I. INTRODUCTION

Rising sea levels brought about by melting ice caps in the polar regions and glaciers[2] has started to threaten the territorial sovereignty of some states. Aside from this, extreme weather events have become more destructive in the past decades.[3] It is estimated that by 2050, weather-related events will displace 143 million people as rising seas are already menacing small island states.[4] In 2018 alone, 18.8 million people have been displaced by slow-onset disasters.[5]

Touted as modern day Atlantises, "small island developing states"[6] ("SIDS") are now in danger of sinking or disappearing due to rising sea levels. Several island nations are considered as "sinking states," including the following regions: "the Caribbean region, the South Pacific region, and [islands in] the Atlantic Ocean, the Indian Ocean, and the South China Sea."[7]

Right on our shores, the Philippines may also be considered as "sinking." This is especially true since being an archipelagic country of more than 7,600 islands and covering more than 30,000 kilometers of coastline, the Philippines is highly susceptible to changes in sea levels. In fact, Metro Manila is enumerated as one of the fastest sinking megalopolises in the world.[8] Consequently, changes in physical geography also affect human geography. In 2019, the Philippines placed second in the list of countries with mostly new displacements as a result of disasters, with 4.1 million internally displaced persons ("IDPs").[9]

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[2] Dana Nuccitelli, *How much and how fast will global sea level rise?*, 74 BULL. OF THE ATOM. SCIENTISTS 139 (2018).

[3] Stanley Changnon, *Trend Analysis: Are Storms Getting Worse?,* 63 WEATHERWISE 38 (2010).

[4] KANTA KUMARI RIGAUD ET AL., GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION 111 (2018), *available at* https://openknowledge.worldbank.org/handle/10986/29461

[5] Internal Displacement Monitoring Centre [hereinafter "IDMC"], *Global Report on Internal Displacement 2018*, IDMC WEBSITE, *available at* https://www.internal-displacement.org/global-report/grid2018

[6] Erin Halstead, *Citizens of Sinking Islands: Early Victims of Climate Change,* 23 IND. J. GLOB. LEGAL STUD. 819, 820 (2016).

[7] *Id.*

[8] Gilles Erkens et al., *Sinking coastal cities,* 372 PROCEEDINGS OF THE INTL. ASS'N OF HYDROLOGICAL SCIENCES 189, 190 (2015), *citing* Rodrigo Eco et al., *Investigating ground deformation and subsidence in northern Metro Manila, Philippines using Persistent Scatterer Interferometric Synthetic Aperture Radar (PSInSAR),* AMERICAN GEOPHYSICAL UNION G23A (2011).

[9] IDMC, *2020 Global Report on Internal Displacement (2020)*, IDMC WEBSITE, *available at* https://www.internal-displacement.org/global-report/grid2020

In a post-apocalyptic scenario where rising sea levels swallow cities and tiny island nations, the relationship of climate change and cross-border migration is worthy of study. Given the magnitude of recent polar ice cap melting,[10] this post-apocalyptic scenario may be happening sooner rather than later. Reducing statelessness and improving asylum-seeking of climate change refugees ("CCRs") coming from "sinking states" becomes an imperative in international refugee law.

This paper initially discusses the overarching correlation among environmental hazards, patterns of migration, and ensuing displacement of CCRs outside their home-countries. The paper also addresses the effects of a full territorial submersion to a sinking state's statehood and concomitantly, the civil and political status of its citizens. Finally, this paper tackles the various international and domestic legal impediments, policy gaps, and limitations in the right of haven afforded to CCRs, along with policy analysis and recommendation to mitigate the further displacement and/or refoulment of said CCRs using the lens of domestic immigration law.

II. ENVIRONMENTAL HAZARDS, DISPLACEMENT, AND MIGRATION

For our ancestors, migration had been a way of life. Disruptions, whether by famine, war, or enslavement, pushed them to seek better conditions elsewhere. Until recently, not much has been said about climate change-related and/or post-disaster migration, even though experts posit that climate change is a principal catalyst to increased migration[11] and food insecurity.[12]

Climate change and human mobility have an established nexus with each other.[13] Climate change permeates aspects of domestic life and affects natural resource-dependent occupations like fishing and farming. Stakeholders expressed the certainty of migration as an adapting mechanism

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[10] Quirin Schiermeier, *Climate science: The long summer begins,* 454 NATURE 266 (2018).

[11] John Campbell, *Climate-Change Migration in the Pacific,* 26 THE CONTEMP. PAC. 1 (2014), *available at* https://scholarspace.manoa.hawaii.edu/bitstream/10125/35801/1/v26n1-1-28.pdf

[12] United Nations Framework Convention on Climate Change [hereinafter "UNFCCC"], *Climate Change Is A Key Driver of Migration and Food Insecurity,* UNFCCC WEBSITE, Oct. 16, 2017, *available at* https://unfccc.int/news/climate-change-is-a-key-driver-of-migration-and-food-insecurity

[13] International Organization for Migration, *Effects of Climate Change on Human Mobility in the Pacific and Possible Impact on Canada* (2016), *available at* https://publications.iom.int/system/files/pdf/effects_of_climate_change_on_human_mobility.pdf

to the outcomes of climate change.[14] At once, the relationship among displacement, migration, and climate change-related disasters is manifest.[15]

Mosuela and Matias discuss that extreme weather events, such as Typhoon Haiyan (locally, Typhoon Yolanda) in 2013, held a close relationship with *a priori* cross-border migration among Filipinos.[16] Existing familial affiliations of those affected have reinforced migration relief opportunities in post-disaster settings, based on a study made on Canadian and American immigration and asylum policies.[17] Also, cross-border Filipino migrants become "transnational activists" in their own right, establishing networks of Filipino migrants who provide "aid through local channels instead of or in addition to conventional humanitarian systems" during disaster-related crises.[18]

During the aftermath of Typhoon Haiyan in 2013, which displaced over four million people, Philippine authorities observed that the level of severity of displacement of Haiyan victims was patently pronounced in the provinces along the path of the typhoon. By the third week of November 2013, the Department of Social Welfare and Development (DSWD) as well as the Department of Health (DOH) recorded approximately 17,000 persons taking free flights offered by the military into Metro Manila from the affected provinces. Likewise, after the typhoon hit, around 5,000 IDPs were moving out of Region VIII (Eastern Visayas) daily. The figure below shows the intensity of post-disaster migration following Haiyan.[19]

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[14] *Id.*

[15] *Id.*

[16] Cleovi Mosuela & Denise Margaret Matias, *The Role of A Priori Cross-Border Migration after Extreme Climate Events: The Case of the Philippines after Typhoon Haiyan, in* ENVIRONMENTAL CHANGE, ADAPTATION AND MIGRATION 113 (Felicitas Hillmann et al. eds., 2015).

[17] *Id.*

[18] *Id.*

[19] MICHELLE YONETANI & LORELLE YUEN, THE EVOLVING PICTURE OF DISPLACEMENT IN THE WAKE OF TYPHOON HAIYAN: AN EVIDENCE-BASED OVERVIEW 21 (2014), *available at* https://www.internal-displacement.org/publications/the-evolving-picture-of-displacement-in-the-wake-of-typhoon-haiyan-an-evidence-based

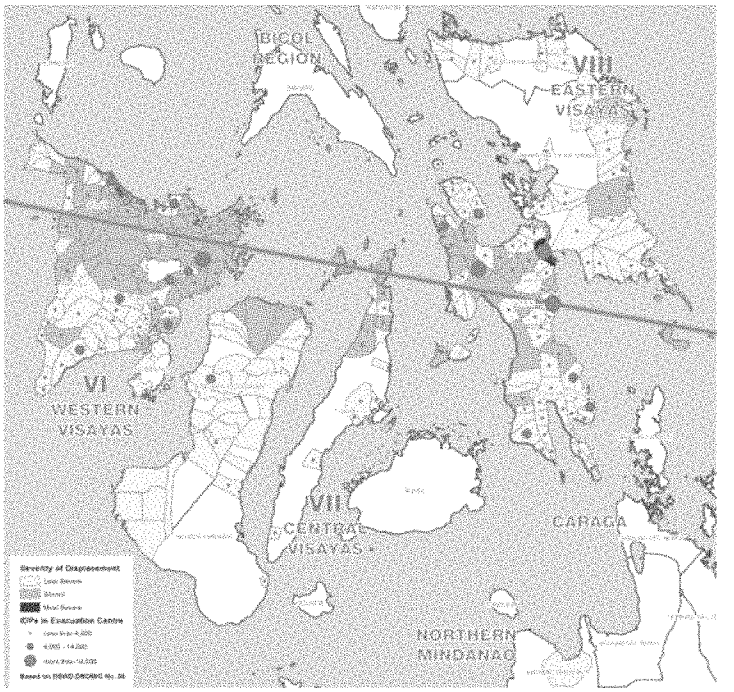

FIGURE 1. Intensity in number of IDP migrations post-Haiyan (IDMC, 2014).

What is peculiar about studies done post-Haiyan is the lack of information available on post-disaster cross-border migration and data on asylum-seeking displaced persons. Prior to Haiyan, data on migration influx are primarily interprovincial rather than international, typically towards the direction of metropolitan areas, with demographic data revealing that most migration patterns occur among women and the youth.[20] What is clear is that post-Haiyan remittances from Overseas Filipino Workers ("OFWs") provided lifeline support to disaster-stricken family members left in the Philippines, with 57% of middle-income households and 24% of lower-income households reporting to have received remittances.[21] Su and Tayag

[20] Pratikshya Bohra-Mishra et al., *Climate variability and migration in the Philippines,* 38 POPULATION & ENV'T 286 (2017), *citing* AGNES QUISUMBING & SCOTT MCNIVEN, MIGRATION AND THE RURAL-URBAN CONTINUUM: EVIDENCE FROM THE RURAL PHILIPPINES 1 (2017).

[21] Yvonne Su, *The remittance gap: key findings of a study in Tacloban City after Typhoon Haiyan,* HUMANITARIAN PRAC. NETWORK, Dec. 2017, *available at* https://odihpn.org/resources/remittance-gap-key-findings-study-tacloban-city-typhoon-haiyan

suggest that the long-standing labor migration history in the country provided an economic buffer for many Filipino families post-disasters.[22]

Speaking of "sinking states," majority of the Pacific Island states lie on low elevation areas. In these states, roughly 16% of their land areas are located in low-elevation coastal zones,[23] and their terrain and elevation are relatively flat and low. Tuvalu's highest elevation, for example, is only 5 meters above sea level, the Marshall Islands at 10 meters, and Nauru at 71 meters, respectively. Considering this, the vulnerability of these island states vis-à-vis rising sea levels, saltwater intrusion, storm surge, and soil erosion cannot be denied.[24] Nishimura argues that as with most Pacific island states, migration has been internal.[25] In the past, Tuvaluan climate change migrants to Fiji and New Zealand were recorded. Yet, the consensus from affected citizens in sinking states is that cross-border migration and relocation is a measure of last resort.[26]

This paper takes a departure from Mosuela and Matias's study of *a priori* cross-border migrations,[27] as it tackles the legal and institutional limitations of post-disaster cross-border migration from sinking states, using the relative viewpoints in international refugee law and domestic immigration law. Data will be culled from state practices mounted in the interregnum to counter ill-effects of rising sea levels on sinking states and the measures to relocate affected citizens. This paper also tackles the potential loss of statehood and the resulting statelessness of affected citizens from sinking states.

III. SINKING STATES, LOSS OF STATEHOOD, AND STATELESSNESS

The 1933 Montevideo Convention outlines the following requisites or elements of statehood: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with the other

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[22] Yvonne Su & Maria Tanyag, *Globalising myths of survival: post-disaster households after Typhoon Haiyan,* GENDER, PLACE & CULTURE 1 (2019).

[23] LAUREN NISHIMURA, THE SLOW ONSET EFFECTS OF CLIMATE CHANGE AND HUMAN RIGHTS PROTECTION FOR CROSS-BORDER MIGRANTS 30 (2018), *available at* https://disasterdisplacement.org/wp-content/uploads/2019/01/D18050_OHCHR_slow-onset-of-Climate-Change_EN-web.pdf

[24] *Id.*

[25] *Id.* at 39.

[26] *Id.* at 40.

[27] Mosuela & Matias, *supra* note 16.

states.[28] In the case of so-called sinking states, does the complete loss of territory negate the existence of its statehood?

By the strict application of the Montevideo Convention, the permanent submergence of territories amounts to a state's extinction.[29] This is because the main criterion to establish one's statehood is its territory.[30] Necessarily, the loss of a submerged country's territory, eventually its statehood, gives rise to a position of statelessness.

The United Nations High Commissioner for Refugees ("UNHCR"), in a 2009 submission to the Ad Hoc Working Group on Long-Term Cooperative Action ("AWG-LCA 6") under the UN Framework Convention on Climate Change ("UNFCCC"), submitted that a sunken state's population would be rendered, at the very least, *de facto* stateless.[31] The UNHCR stated:

> Should, the entire territory of a State be permanently submerged, inevitably there could be no permanent population attached to it or a government in control of it. The loss of all territory has been cited most frequently as a possible ground for loss of statehood[.]
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> * * *
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> Should statehood cease, the population would be rendered stateless. Disappearance of a State due to loss of territory or the permanent exile of the population or the government is without precedent. The international community could agree that the affected States would continue to exist nonetheless. Even in such a case, however, governments of affected States would face many constraints in practice, and their populations would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased. *The population could thus be considered de facto stateless.*[32]

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[28] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

[29] North Sea Continental Shelf Case (Den. v. Ger.; Neth. v. Ger.), Judgment, 1969 I.C.J. Reports 3 (Feb. 20).

[30] Island of Palmas (U.S. v. Neth), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

[31] United Nations High Commissioner for Refugees [hereinafter "UNHCR"], Climate Change and Statelessness: An Overview, May 15, 2009, *available at* http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf

[32] *Id.* (Emphasis supplied.)

Statelessness may mean a host of political, social, economic, and cultural setbacks. A stateless person has no nationality, hence they have no formal legal rights. The Object Theory of the Individual in international law assumes only states can be subjects of international law and individual persons are merely objects, thus, are accorded rights and duties according to the aid or assistance of their sovereign nation.[33] Without a nationality, a stateless person may not bind himself in a contract, buy or own property, or start a civil court case, according to the domestic law of their sovereign country.[34] Obviously, not having a nationality of state would mean a stateless person may neither vote nor participate in political processes. Statelessness could also pose travel restrictions, as the refugee lacks the documentation to prove they are a national of an existing sovereign state, such as a passport.

By reason of their lack of nationality, stateless persons are also shown to suffer lack of access to education, employment, health care options, and property rights. This leads to a heightened social exclusion, and increased vulnerability to violence, exploitation, trafficking, and forcible displacement.[35] For instance, Thailand's labor laws prohibit refugees from working legally. As a result, refugees are often left with no option but to engage in illicit or illegal work, which is often hazardous and a degradation of their self-worth.[36] In Malaysia, 26% of refugees earned less than MYR 500 (≅USD 115) a month, while 58% earned between MYR 500 to MYR 1000 (≅USD 115-230) per month.[37] Across various jurisdictions, calls are made to rethink refugee access to the formal labor economy if countries were to secure their full integration to society. For refugees exiled in urban settings, the humanitarian community expressed an "emphasis on local integration [...] instead of repatriation or third country settlement [...] allow[ing] refugees to contribute to the social fabric of the host city without discrimination or exclusion."[38]

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[33] George Manner, *The Object Theory of the Individual in International Law,* 46 AM. J. INT'L. L. 428 (1952).

[34] JERI DIBLE, THE SOCIAL AND POLITICAL CONSEQUENCES OF ANOTHER STATELESS GENERATION IN THE MIDDLE EAST 10 (2016), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/1039168.pdf

[35] *Id.*

[36] *Thailand: Implement Commitments to Protect Refugee Rights,* HUMAN RIGHTS WATCH, July 6, 2017, *available at* https://www.hrw.org/news/2017/07/06/thailand-implement-commitments-protect-refugee-rights

[37] Rashvinjeet Bedi & Hariati Azizan, *Grant refugees in Malaysia the right to work,* THESTAR, June 23, 2019, *available at* https://www.thestar.com.my/news/nation/2019/06/23/grant-refugees-in-malaysia-the-right-to-work

[38] ALISON BROWN ET AL., URBAN REFUGEE ECONOMIES: ADDIS ABABA, ETHIOPIA 11 (2018), *available at* https://www.principlesinpractice.info/system/files/content/resource/files/main/10850IIED.pdf, *citing* Sarah Dryden-Peterson & Lucy Hovil, Local integration as a durable solution: refugees, host populations and education in Uganda (Sept. 23, 2003),

To counter the extinction of statehood and the potential statelessness of CCRs, experts suggest that affected countries may enter into land leasing contracts with other countries as climate change adaptation strategies.[39] McAdam suggests the possibility of relocation and a government-in-exile in a foreign state.[40] This was likewise recommended by a UNHCR submission to the UNFCCC.[41] The UNHCR also recommended that affected citizens from sinking states be allowed to apply for a change of nationality or secure a dual nationality in a receiving state.[42]

Regrettably, cross-border migration as a climate change-related measure is easier said than done.[43] In order to iron out the details of an asylum-seeking program wherein no statelessness would arise, recognition of sovereignty by receiving states and the international community is necessitated since sovereignty is unquestionably the most important element in statehood.[44] Wong suggests that while the presumption of continuity of statehood still applies even if a state loses territorial sovereignty over a piece of land, recognition by other sovereign states will be a nagging issue:

> It is sufficient to note that extinction will not occur as soon as the first wave covers the last rock—such a result would be untenable under international law [...] Recognition will have a particularly important role and it will be crucial for the island state to ensure that it continues to be recognised—or, preferably, obtain acts of fresh recognition—by sovereign states.[45]

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available at https://www.unhcr.org/research/working/3f8189ec4/local-integration-durable-solution-refugees-host-populations-education.html; Alexandra Fielden, Local integration: an under-reported solution to protracted refugee situations (June 2008), *available at* https://www.unhcr.org/research/working/486cc99f2/local-integration-under-reported-solution-protracted-refugee-situations.html; Jeff Crisp, The local integration and local settlement of refugees: a conceptual and historical analysis (April 2004), *available at* https://www.unhcr.org/research/working/407d3b762/local-integration-local-settlement-refugees-conceptual-historical-analysis.html

[39] Hongliang Zhang et al., *Adaption to Climate Change through Fallow Rotation in the U.S. Pacific Northwest*, 5 CLIMATE 1 (2017).

[40] Jane McAdam, '*Disappearing States', Statelessness and the Boundaries of International Law*, Jan. 21, 2010, *available at* https://ssrn.com/abstract=1539766

[41] Manner, *supra* note 33.

[42] *Id.*

[43] *Id.*

[44] Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan,* 15 AM. U. INT'L. L. REV. 1101 (2000).

[45] Derek Wong, *Sovereignty Sunk? The Position of "Sinking States" at International Law,* 14 MELB. J. OF INT'L. L. 346, 390 (2013).

Aside from the need for recognition of sovereignty even with the territorial loss, suitable asylum-seeking privileges would imply the systematic arrangement of housing requirements, military obligations, healthcare options, pensions, and other social security benefits for the refugees in the receiving state. As such, the UNCHR stated that "although complete relocation of the entire population would be a measure of last resort, early preparedness could also help avert a humanitarian catastrophe by promoting orderly movements of affected populations and increasing the viability of the move."[46]

IV. LEGAL MECHANISMS IN PROTECTING CCRS

A. Treaty law

To be clear, the initial premise is that citizens from sinking states, who are, or later on will be, forced to resettle because of climate change, are unlikely to have a right to resettle elsewhere under existing international law.[47] Under the current definition, CCRs are not considered "refugees" under the Refugee Convention and domestic immigration law.[48] Thus, it has been argued that there is a clear policy vacuum[49] in treaty law and domestic law as regards the protection of CCRs.

Crootof, however, argues that in the absence of treaty law which may be directly applied to a specific factual or legal question, state parties, "in need of reliable guiding principles," practice improvisation of rights and duties as "adaptive interpretations of broadly related treaty text."[50] Because of this improvisation, treaty text becomes ancillary in the interpretation of analogous situations—a development of customary international law ensues, functioning as an effective derivative.[51] This is since treaty law would not have, during its creation, anticipated a myriad of circumstances including climate change. Take, for instance, the 1951 Refugee Convention. A perusal of its text does not include or even allude to "refugees" who may have been driven outside their countries due to environmental factors. Note that in 1951, not much has been said or researched about the ill-effects of climate change.

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[46] *Id.*

[47] Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167 (2013).

[48] *Id.*

[49] *Id.*

[50] Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 238 (2016).

[51] *Id.*

Understandably, the text of the treaty only includes persecutions in military or war-like situations.

Now more than ever, in the wake of sinking island territories and the resulting statelessness of these states' citizens, states look to customary international law[52] founded on "custom" to justify and warrant the right of CCRs to move and live elsewhere.

CCRs likewise do not have a clear-cut right to resettle in case their home states disappear. For instance, CCRs could not rely on the principle of non-refoulement under various human rights instruments.[53] This is due to the self-limiting enumerations of qualified refugee groups under Article 33(1) of the 1951 Refugee Convention:

> No 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.*[54]

B. State practice and international regional frameworks

There are, however, several international and regional frameworks which may be applied analogously to the protection of CCRs, namely:

1. The Kampala Convention on the Protection of IDPs in Africa, a treaty of the African Union that addresses internal displacement caused by armed conflict, natural disasters, and large-scale development projects in Africa;

2. The Great Lakes Regional Pact (Burundi, the Democratic Republic of the Congo, Kenya, Malawi, Rwanda, Tanzania, and Uganda), which covers not only conflict-induced displacement but also displacement caused by natural disasters and induced by development projects; and

3. The 1998 Guiding Principles on Internal Displacement ("ID"), which lays down the following solutions to address ID: (1) return

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[52] Article 38(1) of the Statute of the International Court of Justice lists treaty law, along with customary international law, as sources of international law.

[53] Wyman, *supra* note 47.

[54] United Nations Convention Relating to the Status of Refugees [hereinafter "Refugee Convention"] art. 33(1), July 28, 1981, 189 U.N.T.S. 150. (Emphasis supplied.)

> to the place of origin, (2) integration into the place of displacement, and (3) settlement in another part of the country, at the election of the IDP.

As there is yet no clear inclusion of CCRs under comprehensive, specialized, or relevant instruments, the protection of and migration tracks accorded to this class of "refugees," under existing legal regimes have not yet solidified.[55] State practice, however, establishes that while the protection of CCRs is not yet set in treaty law, it is not uncommon in domestic refugee policies.[56] Such includes the practice of states in offering leasehold agreements to "sinking states," or agreeing to offer permanent residence and citizenship to the affected citizens thereof.[57]

For instance, in 2009, Indonesia's Maritime Affairs and Fisheries Ministry announced that it is considering "renting" some of its 17,000 uninhabited islands to CCRs.[58]

In the 1960s, the Australian government planned to relocate the entire population of Nauru to an island off Queensland. This relocation was brought about by environment-related devastation in the island-nation due to phosphate mining. In 1962, Australia designated its own Director of Nauruan Resettlement to explore resettlement options in the South Pacific, such as in uninhabited islands in Fiji, Papua New Guinea, Solomon Islands, and Australia's Northern Territory. In the end, all options were ultimately deemed unacceptable. Despite an offer to acquire Australian citizenship, Nauruans, for nationalistic reasons, i.e. public sentiments not to be assimilated to Australia and fears that resettlement may undermine their identity as Nauruan people, refused to resettle. Despite a high level of vulnerability as an island-state, Nauruans viewed cross-border resettlement as an option of last resort.[59]

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[55] JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 39–48 (2012).

[56] McAdam, *supra* note 40.

[57] *Id.*

[58] Bernd Musch-Burowska & Anne Thomas, *Indonesia Offers Space to "Climate Refugees"*, DEUTSCHE WELLE, May 6, 2009, *available at* https://www.dw.com/en/indonesia-offers-space-to-climate-refugees/a-5213045

[59] Jane McAdam, *How the entire nation of Nauru almost moved to Queensland,* THE CONVERSATION, Aug. 15, 2016, *available at* https://theconversation.com/how-the-entire-nation-of-nauru-almost-moved-to-queensland-63833

C. Judicial decisions on the protection of CCRs: The case of Ioane Teitiota[60]

Ioane Teitiota, a Kiribati national, migrated to New Zealand from his home country to escape the effects of climate change. According to him, the situation in his hometown, Tarawa, had become unstable due to rising sea levels. As a result of rising sea levels: (1) fresh water became scarce owing to the saltwater intrusion into the freshwater supply due in part to damaged sea walls, such that 60% of the nation's population had to depend on rationed water supplies from the national public utilities board; (2) Tarawa became overcrowded and uninhabitable as a big part of the land has eroded, resulting in a housing crisis and land dispute among the locals; and (3) there has been a decline in crop productivity due to the increased salinity of the soil.[61]

Teitiota sought refugee status in New Zealand, but was later on rejected by the administrative agencies therein. Having brought his case to the local court and the Supreme Court of New Zealand, his application for refugee status was likewise rejected.[62] In 2015, New Zealand deported him and his family back to Kiribati.[63]

The New Zealand Supreme Court resolved that the outcomes of climate change-related disasters may not bring affected persons strictly within the protections afforded in the Refugee Convention since there is no hard and fast rule regarding its applicability using other international legal instruments.[64] The right to life must be interpreted in broad strokes, not in myopic perspectives.[65] The New Zealand Supreme Court did not find any act or omission by the Government of Kiribati that arbitrarily deprived Teitiota of his right to life, as in fact, Kiribati instituted reforms to address climate change. As such, the court concluded Teitiota would not face a real risk of persecution if he and his family were deported back to Kiribati.[66]

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[60] United Nations Human Rights Committee [hereinafter "UNHRC"], Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, [hereinafter, "Ioane Teitiota v. New Zealand"], U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

[61] *Id.*, ¶¶ 2.4, 2.5 & 2.6.

[62] *Id.*, ¶ 2.2.

[63] *Id.*, ¶ 4.4.

[64] *Id.*, ¶ 2.8.

[65] *Id.*, ¶ 2.9.

[66] *Id.*, ¶ 2.10.

Having sought this action before the United Nations Human Rights Committee, Teitiota claims New Zealand violated his right to life under the International Covenant on Civil and Political Rights ("ICCPR").[67]

The Human Rights Committee ruled in favor of the Government of New Zealand and upheld the Supreme Court's ruling. *Firstly*, the Committee found no evidence of actual or imminent harm to Teitiota and his family. In his case, there is no factual determination that he is faced or is facing an imminent risk of being arbitrarily deprived of his right to life upon deportation to Kiribati.[68] In effect, the Committee reasoned Teitiota's situation is not materially different from all other citizens in Kiribati. *Secondly*, the Committee found no real risk of suffering serious physical harm from violence linked to land, property, or housing disputes in Kiribati.[69] There was also no evidence to support that he was unable to grow crops in his homeland as a farmer. He only claimed there was difficulty, but not impossibility, to cultivate crops.[70]

Moreover, the Committee found that New Zealand administrative agencies and courts thoroughly considered Teitiota's arguments and evidence, and examined them in line with the Refugee Convention and the ICCPR.[71] The New Zealand courts likewise found the Government of Kiribati had taken big steps to address the effects of climate change in accordance with the 2007 National Adaptation Programme of Action by Kiribati and the UNFCC, as required of least developed nations under said agreement.[72] To the mind of the Committee, Kiribati was taking adaptive measures to reduce existing vulnerabilities and improve resilience despite climate-related disasters.[73] Thus, Teitiota's suit was denied with finality.

This majority decision received strong dissents from members of the Committee. Committee member Duncan Laki Muhumuza said, "whereas the risk to a person expelled or otherwise removed, must be personal—not deriving from general conditions, except in extreme cases, the threshold should not be too high and unreasonable."[74] Muhumuza believed there was, in fact, a "real, personal and reasonable" risk of threat to Teitiota's right to life, in view of the squalid living conditions in Kiribati.[75] It would be absurd

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[67] *Id.*, ¶¶ 1.1, 3.
[68] *Id.*, ¶ 9.10.
[69] *Id.*, ¶ 9.7.
[70] *Id.*, ¶ 9.9.
[71] *Id.*, ¶ 9.13.
[72] *Id.*, ¶ 9.6.
[73] *Id.*, ¶ 9.12.
[74] *Id.*, Annex 2, ¶ 3.
[75] *Id.*, Annex 2, ¶ 5.

to wait for a life-threatening situation to consider this threshold as having been met.[76] Thus, the mere imminent threat to his right to life is enough. In his words, "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the 'justification' that after all there are other voyagers on board."[77]

D. Interoperability of international human rights law and international refugee law in the protection of CCRs

McCosker suggests that, in viewing a specific legal problem, the "practical interoperability" between fields of international law may be taken into account.[78] In other words, the convergence of various legal regimes entrenched in distinct subsets of international law are not remote and should ideally be reconciled rather than be treated in disjunct or piecemeal interpretations.

Legal interoperability has practical purposes. On a supranational level, legal interoperability, which is the process of "making legal rules work in various jurisdictions," caters to "full harmonization" of policies "in a bilateral, plurilateral or multilateral level."[79] Weber suggests that the "normative objective of legal interoperability consists of the attempt to combat legal fragmentation caused by different national law systems."[80]

Instances of legal interoperability in fields of international law are replete in text and practice. For instance, norms under international human rights law are said to have concurrent applicability with state obligations under international humanitarian law.[81] Though international humanitarian law and international human rights law vary in theoretical origins,[82] jurisprudence[83]

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[76] *Id.*

[77] *Id.*, Annex 2, ¶ 6.

[78] Sarah McCosker, *The 'Interoperability' of International Humanitarian Law and Human Rights Law: Evaluating the Legal Tools Available to Negotiate their Relationship*, *in* INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 145 (Andrew Byrnes et al. eds., 1999).

[79] Rolf Weber, *Legal Interoperability as a Tool for Combatting Fragmentation, Global Commission on Internet Governance*, at 6 (Dec. 2014), *available at* https://www.cigionline.org/sites/default/files/gcig_paper_no4.pdf

[80] *Id.*

[81] McCosker, *supra* note 78, at 146.

[82] Waseem Ahmad Qureshi, *Untangling the Complicated Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict*, 6 PENN. ST. J.L. & INT'L AFF. 203 (2018).

[83] In Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ¶ 106, I.C.J. GL 131, (July 9, 2004), the ICJ ruled that "as regards

has established their "interchangeable application" or interoperability in both peacetime and wartime,[84] "each set of rules dependent on the other for its application."[85] In another instance, Espenilla studied how the confluence of international human rights law and international disaster law operates in post-disaster settings, particularly in espousing a "human-rights based approach" to relief and recovery.[86]

International human rights law affords complementary or subsidiary protection to refugees. Chetail fosters the view that international human rights law and international refugee law, while deemed at the outset as two distinct branches of international law, are, in fact, joined at the hip.[87] This premise is now conceded under state practice and academic text.[88] Chetail, maintaining that human rights law is the springboard of refugee protection policy, states:

> Contrary to conventional wisdom, the Geneva Convention is not a human rights treaty in the orthodox sense, for both historical and legal reasons. However, human rights law has radically informed and transformed the distinctive tenets of the Geneva Convention to such an extent that the normative frame of forced migration has been displaced from refugee law to human rights law. *As a result of this systemic evolution, the terms of the debate should be inversed: human rights law is the primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role.* This assertion is

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the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law." In Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), ¶ 216, I.C.J. GL 116 (Dec. 19, 2005), the ICJ ruled that "it thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territories[.]"

[84] Qureshi, *supra* note 82, at 209.

[85] *Id.* at 210, *citing* Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, *in* INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 250-51 (Orna Ben-Naftali ed., 2011).

[86] Jacqueline Joyce Espenilla, *Disaster, Displacement and Duty: The Application of International Human Rights Law to Philippine Relief and Recovery*, 84 PHIL. L.J. 956 (2010).

[87] Vincent Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*, *in* HUMAN RIGHTS AND IMMIGRATION, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 22 (Ruth Rubio-Marin ed., 2014).

[88] *Id.* at 19.

> grounded on a comparative assessment of applicable norms under both refugee law and human rights law.[89]

One may argue that international refugee law is an organic subset of human rights law and is a "remedial or palliative branch of human rights law."[90] As both fields may be applied in parallel, the respective rights and safeguards under international human rights law and international refugee law are interlaced and have fortified one another through time. Thus, their bundled application forms an amalgam of protections that may be afforded to CCRs, Chetail stating that:

> *The cumulative application of the two branches of international law reinforces the international refugee protection regime through a mutually supportive process of normative sedimentation. As a result of such intermingling, refugee law is now indissociable from human rights law, each branch of international law being part of the same normative continuum.* Following such a stance, one can even argue further that refugee law has been absorbed by human rights law. While the Geneva Convention retains some symbolic relevance, the distinction between nationals and aliens which conditions the very content of refugee status has been largely marginalized and superseded by the general applicability of human rights to non-citizens.
>
> The transformation of refugee law by human rights law has far-reaching effects largely beyond the content of its norms. The gravitational force of human rights law has attracted the Geneva Convention into its orbit and anchored it as a satellite within the constellation of other applicable human rights treaties. As a result of this centripetal force, the conception of the Geneva Convention as a whole has been revisited and reframed through the lens of human rights law. The single and evasive reference to human rights in its preamble has been retrospectively viewed as the ultimate evidence of its human rights origin. The Geneva Convention has thus been reconstructed as a human rights treaty in its own right. This is rather ironic, given that the Refugee Convention is not a human rights treaty per se simply because it is a duty-driven—and not a human rights-based—instrument. Clearly perception counts more than reality. In a normative environment largely dominated by human rights, all observers are now convinced of the human rights nature of the Geneva Convention. *Both in principle and in practice, human rights law has thus become the new orthodoxy of refugee law.*[91]

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[89] *Id.* at 22. (Emphasis supplied.)
[90] *Id.* at 70.
[91] *Id.* (Emphasis supplied.)

A human rights-based approach to the evolution of the "refugee" definition is evident under the Geneva Convention, particularly on the assurance that all humans enjoy fundamental rights and freedoms, particularly freedom from discrimination.[92] Relatedly, a textual analysis of the UN Human Rights Committee's decision pertaining to Ioane Teitiota[93] would reveal the parallel and cumulative applications of human rights law and international refugee law in refugee protection. In that case, Teitiota, under Articles 1[94] and 2[95] of the Optional Protocol to the ICCPR, claimed that New Zealand violated his right to life under Article 6(1) of the ICCPR,[96] as well as the principle of non-refoulement under international refugee law.[97] In considering the merits of Teitiota's case, the Committee, probing the mesh links between human rights law and international refugee law, ruled that:

> The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. Thus, States parties must allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.
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> * * *
>
> The Committee observes that the State party thoroughly considered and accepted the author's statements and evidence as credible, and that *it examined his claim for protection separately under both the Refugee Convention and the Covenant.* The Committee notes that in

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[92] *Id.* at 27.

[93] *Ioane Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016.

[94] Article 1 states: "A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol."

[95] Article 2 states: "Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration."

[96] Article 6(1) states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[97] *Ioane Teitiota v. New Zealand*, U.N. Doc. CCPR/C/127/D/2728/2016.

> their decisions, the Immigration and Protection Tribunal and the Supreme Court both allowed for the possibility that the effects of climate change or other natural disasters could provide a basis for protection.[98]

V. PICKING AN ANTIDOTE: INTERNATIONAL LAW OR DOMESTIC LAW REFORM?

A. Policy vacuum in international and domestic immigration law

A policy vacuum exists when laws, rules, and guidelines, national or international, are rendered inapplicable to a new, albeit possibly interrelated or analogous, situation. In this case, a "policy vacuum" exists due to a conceptual muddle on the definition of "refugee," both in international law and domestic immigration law.

Necessarily, this vacuum is not without risk as it gives policy makers *carte blanche* authority to interpret, or misinterpret, "persecution" and overly restrict the definition of "refugee" in any direction that caters to a specific policy agenda.

Policy vacuums, in the past, were typified by ad hoc decisions and lack of positive regulations.[99] This vacuum also applies when policymakers could not reach a consensus on the level of requirement of state effort or resource to be devoted to cutting institutional drawbacks.[100] This is since a state's "reasonable efforts" are deemed vital ingredients when addressing identified policy objectives.[101] Given this policy lacuna, states exert little to no effort to protect CCRs.

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[98] *Ioane Teitiota v. New Zealand*, ¶¶ 9.3 & 9.6. (Emphasis supplied.)

[99] *In a Policy Vacuum,* 17 ECON. AND POL. WEEKLY 416 (1982).

[100] Ronnie Halperin & Jennifer Harris, *Parental Rights of Incarcerated Mothers with Children in Foster Care: A Policy Vacuum*, 30 FEMINIST STUD. 339 (2004).

[101] *Id.*

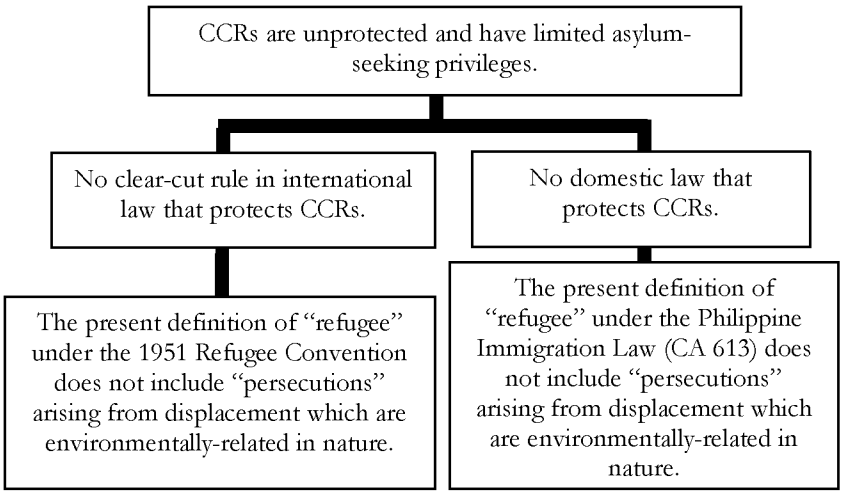

FIGURE 2. Conceptual framework on the lack of legal protection afforded to CCRs.

In the case of sinking states, neither international law nor domestic law offers clear-cut protections to CCRs. Other than referring to it as a policy vacuum, Wyman calls this situation a "rights gap" issue, stating—

> First, the domestic immigration policies of most countries generally do not allow non-citizens to remain permanently because of environmental conditions in their home countries. Immigration legislation in some countries, including the United States, provides a framework under which non-citizens may remain temporarily because of environmental conditions in their home country. But countries rarely enable people to remain permanently because of environmental conditions back home.
>
> Second, climate migrants are unlikely to qualify for protection under international law for two main reasons. First, climate migrants are unlikely to be considered refugees under the United Nations Convention Relating to the Status of Refugees ("Refugee Convention" or "Convention"). Second, they are unlikely to be able to invoke the non-refoulement principle under existing international human rights law.[102]

Take for instance the 2020 United Nations Human Rights Committee Ruling concerning the case of Ioane Teitiota and his asylum application with the state of New Zealand. In that case, we have seen the tangled and

[102] Wyman, *supra* note 47, at 177-78.

interweaving relationship between international law and domestic law frameworks in the receiving country on the treatment of CCRs.

While some perceive Teitiota's case as a welcomed improvement in the treatment of CCRs under international law,[103] setting a "global precedent,"[104] the Committee has, in effect, made a tacit ruling that mere difficulty alone in adjusting to climate change-related events, e.g. rising sea levels, impacts on agricultural production, and limited access to potable drinking water, does not violate an applicant's right to life as an environmental refugee. In alluding to the rulings of New Zealand's domestic authorities,[105] the Committee effectively treated and acknowledged domestic law and state practice as constituent elements in according asylum to CCRs.

B. Weighing policy options

In addressing this apparent policy vacuum, local or international, reference is made to how principles of public policy play a role in the analysis in crafting prospective strategies to protect CCRs. Kingdon submits that policy change comes only about when three streams converge, namely—problems, politics, and policies.[106] Kingdon's model presents that while three streams may be operating autonomously of one another, all three have to come together for public policy to germinate.[107] We shall discuss the various implications of international and local public policymaking in the protection of CCRs. The figure below shows the various policy options considered by the authors.

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[103] Maria Courtoy, *An historic decision for "climate refugees"? Putting it into perspective,* UNIVERSITÉ CATHOLIQUE DE LOUVAIN WEBSITE, Mar. 25, 2020, *available at* https://uclouvain.be/en/research-institutes/juri/cedie/news/united-nations-human-rights-committee-views-on-communication-no-2728-2016-ioane-teitiota-v-new-zealand-october-24-2019.html; *UN landmark case for people displaced by climate change,* AMNESTY INTERNATIONAL WEBSITE, Jan. 20, 2020, *available at* https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change

[104] Evan Wasuka, *Landmark decision from UN Human Rights Committee paves way for climate refugees,* ABC NEWS WEBSITE, Jan. 21, 2020, *available at* https://www.abc.net.au/news/2020-01-21/un-human-rights-ruling-worlds-first-climate-refugee-kiribati/11887070

[105] *Ioane Teitiota v. New Zealand,* ¶¶ 9.7, 9.8 & 9.9.

[106] JOHN KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 197 (1984).

[107] *Id.*

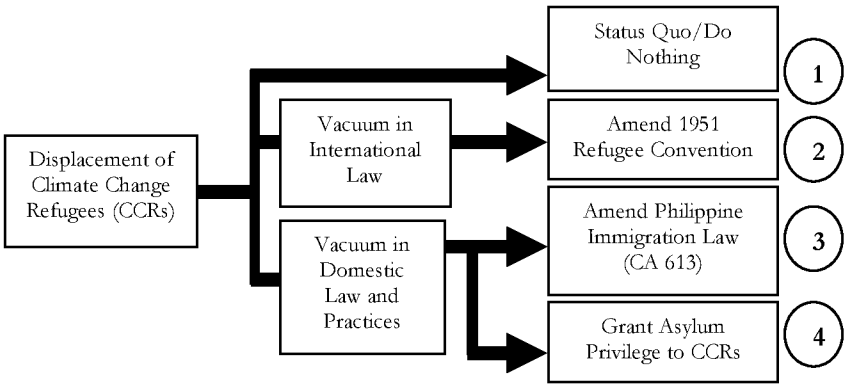

FIGURE 3. Policy options for the protection of CCRs.

At the outset, costs and externalities vary between international law reform and domestic law reform measures, respectively, and with critical differences. While ratification is purely voluntary, there is the relative difficulty and intricacy in entering into and ratifying of treaties.[108]

Under the Vienna Convention on the Law of Treaties, state parties, to be bound under a treaty, may consent either through the signature of its representative, its ratification or approval, or its accession.[109] Before consent may bind states in a treaty, state parties advise, negotiate and deliberate its terms and conditions. Even before negotiation, the party state outlines the extent of authority with which the representative may bargain and negotiate. Once signed, the ratification process depends on the domestic law of the party state that signed it. According to Hathaway, the "cost of commitment" in treaty making and assent operates as a trade-off to territorial and external sovereignty.[110] Chetail agrees with this premise, as "territorial sovereignty is both the foundation and the limit of international refugee law."[111] Hathaway states:

> The Sovereignty model cuts across analytic approaches to state behavior and has been adopted by rationalist and normative scholars alike. Under this model, the existence of sovereign states relies on two basic principles: exclusive territorial authority and the noninterference of external actors in domestic life. Human rights law, which seeks to place limits on how states can treat their citizens and legitimates the interference of other states or international

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[108] Oona Hathaway, *The Cost of Commitment*, at 2, Apr. 11, 2003, *available at* http://papers.ssrn.com/abstract=394282

[109] Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331.

[110] Hathaway, *supra* note 108, at 107.

[111] Chetail, *supra* note 87, at 71.

> organizations in domestic affairs, is revolutionary in this view, because it conflicts with national sovereignty, i.e., "the political independence of a state." This direct tension between sovereignty and human rights means, as Hedley Bull argues, that the exchange of recognition of sovereign jurisdictions between states "implies a conspiracy of silence entered into by governments about the rights and duties of their respective citizens." That shared belief has, in turn, led to arguments that sovereignty must be made "conditional upon the protection of at least basic human rights." Thus sovereignty and human rights stand in a zero-sum posture—strengthening one necessarily weakens the other.[112]

Apart from sovereign concessions, the cost of commitment in treaty making and ratification includes the cost of compliance. Although states have reason to believe they may unwillingly contravene existing treaty obligations when situations go haywire, they do not voluntarily bargain terms and agreements thereto with the preconceived notion that they may break them when the obligation becomes undesirable.[113] Thus, when a country considering joining a treaty looks internally and determines that its national institutional mechanisms are already compliant with the tenets of the treaty, the cost of commitment decreases, as it would "entail only *de minimis* administrative costs."[114] There is, thus, a direct relationship between a state's existing domestic institutional interests and readiness to consent to treaties. In fact, Hathaway made a rather non-mainstream deduction that countries who have better human rights records are more unenthusiastic to join human rights treaties than countries who have poorer ratings.[115]

In entering into treaties and international agreements, states incur significant monetary costs. For instance, during the United Nations Climate Change Conference held in Poznan, Poland ("COP14"), the direct cost for the UNFCCC Secretariat alone in hosting said conference amounted to at least USD 2 million. For the host country, costs were even higher, Poland having spent a total of USD 35 million.[116] For the upcoming COP26, which

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[112] Hathaway, *supra* note 108, at 106-7. (Citations omitted.)

[113] *Id.*

[114] *Id.* at 111.

[115] *Id.* at 136.

[116] UNFCCC, Fact sheet: Poznań – COP 14/CMP 4, at 2, Oct. 2008, *available at* https://unfccc.int/files/press/backgrounders/application/pdf/fact_sheet_poznan_cop_14_cmp_4.pdf

will be held in Glasgow, Scotland, the host country is estimated to spend more than GBP 200 million.[117]

Additionally, of special consideration is the cost of socio-political capital to enter into climate-change and refugee treaties. Inescapably, addressing the rights of CCRs at the international level, through the reform of international instruments, would involve the extensive mobilization of political capital to get countries to agree to a drastic measure. This measure would involve intensive political debate, as well as administrative and financial burdens. We have seen how discussions on human mobility issues panned out in the European Union ("EU"), especially in light of the Syrian Civil War refugee situation (2011-present). At that time, several European countries struggled to make room for incoming asylum seekers. Such a polarizing issue has brought EU countries to various oppositions when some countries disputed distribution quotas on asylum-seekers.[118]

Apart from the institutional difficulty of changing paradigms in international law, there is an inherent impossibility in "policing" and enforcing climate change and refugee treaties. Chiefly, there are various skepticisms on whether, in principle, international law is *law* since there is no single government or international organization that enforces international law.[119] The supposition that it is difficult to enforce international law stems from the absence of a direct international counterpart of a local police officer or sheriff. What the United Nations Security Council simply does, acting under Chapter VII of the UN Charter, is to impose mandatory sanctions, which may be economic (e.g. trade embargo), diplomatic (e.g. severance of diplomatic relations), or military (e.g. armed force to maintain/restore international peace).[120] Yet, patently, in human rights treaty making, external enforcement appears to be minimal, if not non-existent. As such, it is important to consider how public policies, i.e. protection of refugees, are enforced internally.[121]

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[117] *COP26: Climate summit policing will cost more than £200m,* BRITISH BROADCASTING CORPORATION WEBSITE, Jan. 17, 2020, *available at* https://www.bbc.com/news/uk-scotland-51149272

[118] Julian Borger et al., *EU plan for migrant quotas hits rocks after France and Spain object*, THE GUARDIAN, May 19, 2015, *available at* https://www.theguardian.com/world/2015/may/19/eu-plan-for-migrant-quotas-hits-rocks-after-france-and-spain-object

[119] Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

[120] Frederic Kirgis, *Enforcing International Law,* 1 AM. SOC'Y OF INTL LAW INSIGHTS (1996), *available at* https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law

[121] Hathaway, *supra* note 108, at 114.

Thus, the devolution of refugee protection from an international legal standpoint to a domestic intervention would be a breath of fresh air. Some countries, in fact, have already taken the cudgels of the refugees and legislated their refugee protection measures, in line with standards of international law. For instance, Cyprus, with the technical assistance of UNHCR, following its EU accession, promulgated its first national refugee legislation and asylum procedures in 2000.[122] In 2002, Cyprus took over from UNHCR the responsibility for asylum adjudication of the refugee status of various asylum seekers.[123] New Zealand, in 2017, announced that it is offering an "experimental humanitarian visa" to CCRs.[124] As such, Hathaway suggests international law and treaty enforcement must not be too stringent as to make domestic compliance inconvenient.[125] In a way, international law, as suggested, only serves as a "stepping stone to better practices" in fortifying local monitoring and enforcement measures of international conventions.[126] As will be seen later in the paper, it is recommended that a domestic rewording of the obsolete phraseology of the term "refugee" under domestic law is seen as a feasible first step.

VI. PROTECTING CCRS UNDER PHILIPPINE DOMESTIC LAW: INCREMENTAL CHANGE IN DEFINITION, RADICAL IN IMPACT

The present definition of "refugee" under international refugee law and domestic immigration law is based solely on racial, religious, or political persecutions—none of which includes displacement from environment or climate change-induced disasters.

Presently, the 1951 Refugee Convention only defines the term "refugee" as "any person who[,] owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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."[127] Similarly, domestic law only protects

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[122] *Protection - UNHCR Cyprus,* UNHCR WEBSITE, *available at* https://www.unhcr.org/cy/protection

[123] *Id.*

[124] Charles Anderson, *New Zealand considers creating climate change refugee visas*, THE GUARDIAN, Oct. 31, 2017, *available at* https://www.theguardian.com/world/2017/oct/31/new-zealand-considers-creating-climate-change-refugee-visas

[125] Hathaway, *supra* note 108, at 137.

[126] *Id.*

[127] Refugee Convention, art. 1(A)(2).

refugees on the basis of political, religious, and racial persecution, but not from the dangers brought by climate change or environmental factors.[128] Philippine refugee law, enacted in 1940, is somewhat similar to the text of the 1951 Refugee Convention. Understandably, at that time, climate change and its effects were not yet part of mainstream discourse.

Considering that the present definition of "refugee" is limited only to racial, religious, and political persecution, a proposed amendment of Section 47(b) of Commonwealth Act No. 613 is necessary, which when newly worded, would read:

> Section 47. Notwithstanding the provisions of this Act, the President is authorized–
>
> * * *
>
> (b) For humanitarian reasons, and when not opposed to the public interest, to admit aliens who are refugees for religious, political, racial, *or environmental reasons*, in such classes of cases and under such conditions as he may prescribe.[129]

It is submitted that while a change in the definition of "refugees" in our domestic law is incremental, the impact is radical in terms of affording protection to CCRs coming from "sinking states." While grand transformative reforms are well and good, some changes ought to be incremental.[130] This is because transformative reforms in climate policy are seen as "more risky and expensive,"[131] "more cognitively challenging,"[132] and commands "a longer lead-time."[133]

Ultimately, domestic protection to foreign CCRs will spur international comity and reciprocity in favor of Philippine citizens who may emigrate or seek asylum elsewhere when climate change-related catastrophes,

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[128] Section 47 of the Commonwealth Act No. 613 defines qualified refugees as "aliens who are refugees for religious, political, or racial reasons[.]"

[129] Com. Act No. 613 (1940), § 47(b). The Philippine Immigration Act of 1940. (Emphasis supplied.)

[130] Mark Stafford Smith, *Responding to Global Environmental Change, in* CHANGE!: COMBINING ANALYTIC APPROACHES WITH STREET WISDOM 29 (Gabriele Bammer ed., 2015).

[131] *Id.*, *citing* Andrew Ash et al., *Australian agriculture in a climate of change*, *in* MANAGING CLIMATE CHANGE: PAPERS FROM THE GREENHOUSE 2009 CONFERENCE 101 (Imogen Jubb, Paul Holper & Wenju Cai eds., 2010).

[132] *Id.*, *citing* Mark Stafford Smith, Lisa Horrocks, Alex Harvey & Clive Hamilton, *Rethinking adaptation for a 4ºC World*, 369 PHIL. TRANS. R. SOC. A. 196 (2011).

[133] *Id.*

in turn, affect our country. Bunker called this give-and-take relationship in disaster relief as a "tradition of neighborly helpfulness," motioning that international comity in rendering aid operates as a "shared responsibility,"[134] stating—

> In the aggregate, voluntary help in emergencies must be tremendous, the help of one neighbor to another; neighboring communities, each helping the others; groups sharing a common faith and interest helping members of the group. Such help is not measurable, and no record of its extent or nature exists. Nonetheless, voluntary effort for the alleviation of human suffering is a recognizable fact. The impulse to help others is basic to both our religious and pioneering traditions. It has motivated disaster relief in the past as it still does in the present.[135]

VII. THE PHILIPPINES' TRACK RECORD IN DOMESTIC REFUGEE PROTECTION

How does the Philippines fare in receiving refugees?

In the past, the Philippine refugee policy and practice has had rosy episodes. In 1937, then President Manuel L. Quezon received refugees from China, in view of the unsettled conditions during the Second Sino-Japanese War. To allay fears of price-fixing of house rentals and artificial shortage of food supplies, Quezon prohibited the practice of hoarding. Quezon likewise enjoined all government agencies to extend whatever necessary assistance to these refugees.[136] After World War II broke out in Europe, the Philippines, from 1937 to 1941, received a total of 1,200 European Jews, mostly coming from Austria and Germany, who were escaping the Holocaust. Anecdotal references put it that then Philippine President Manuel Quezon, U.S. President Dwight Eisenhower and the Freiders, Jewish-American brothers concocted a way to rescue and bring these Jews to Manila over a game of poker. Unfortunately, as the Jews came to Manila to escape war-torn Europe,

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[134] Ellsworth Bunker, *The Voluntary Effort in Disaster Relief,* 309 ANNALS AM. ACAD. POL. & SOC. SCI. 107, 109 (1957).

[135] *Id.* at 107-8.

[136] Proc. No. 173 (1937). Enjoining All Branches, Subdivisions, Agencies, and Instrumentalities of the Commonwealth Government To Extend Their Cooperation in Rendering the Necessary Aid To the Refugees From China and Prohibiting, As An Emergency Measure, the Raise in House Rentals and Prices of Foodstuffs and Other Prime Necessities of Life.

a new war had already dawned on the Philippines as a participant of the World War II's eastern front.[137]

The Philippines likewise received refugees from Hong Kong, then a British Colony in 1940, after the rise of unsettling political conditions.[138] In the same year, Philippines welcomed 30,000 Kuomintang party members fleeing the Chinese Civil War.[139]

In 1948, the Philippines opened its facilities in Guian, Samar to White Russians who were fleeing the Bolshevik Revolution. The refugee camp in the island of Tubabao, Samar, housed engineers, professors, artists, lawyers, priests, and former military personnel of the Russian Czar.[140] Decades later, in 2013, when Typhoon Haiyan hit Samar and Leyte, these same refugees, now settled elsewhere. The international community also came to the Philippines' aid to help rebuild typhoon-torn communities in Samar. For some of these Russian refugees, it was a full-circle moment.[141]

From 1975 to 1992, scores of Vietnamese refugees, onboard boat rafts plying the South China Sea, fled their war-torn country after the fall of Saigon. Several of these boats, which were drifting for days, were rescued by fisherfolk living on the coast of Bataan. A total of 2,700 refugees were received and housed in the processing centers in Ulugan Bay and Tara Island, Palawan.[142] In 1980, the Philippines also accepted refugees from war-torn Laos, Cambodia, and Vietnam. They were housed in the Philippine Refugee Processing Center in Morong, Bataan.[143]

Weighed against laudable historical records, recent data from the World Bank, however, shows that the Philippines only has a present refugee population of 642. This is in stark contrast to other neighboring countries in

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[137] Madison Park, *How the Philippines saved 1,200 Jews during Holocaust*, CNN WEBSITE, Feb. 3, 2015, *available at* https://edition.cnn.com/2015/02/02/world/asia/philippines-jews-wwii/index.html

[138] Proc. No. 570 (1940). Enjoining All Branches, Subdivisions, Agencies, and Instrumentalities of the Commonwealth Government and Inhabitants of the Philippines To Extend Their Cooperation in Rendering the Necessary Aid To the Refugees From the British Colony of Hongkong.

[139] Laurice Peñamante, *Nine Waves of Refugees in the Philippines*, UNHCR WEBSITE, June 7, 2017, *available at* https://www.unhcr.org/ph/11886-9wavesrefugees.html.

[140] Ayee Macaraig, *PH a 'paradise' for grateful White Russian refugees*, RAPPLER, June 20, 2015, *available at* https://www.rappler.com/nation/96914-philippines-paradise-white-russians

[141] *Id.*

[142] Peñamante, *supra* note 139.

[143] *Id.*

the ASEAN region, with Indonesia currently housing over 10,793 refugees, Malaysia at 121,302, and Thailand at 102,245.[144]

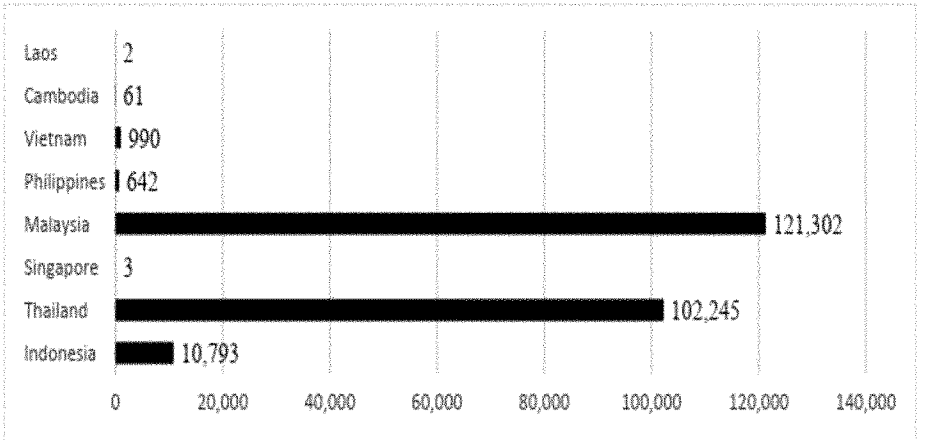

FIGURE 4. Refugee population in the ASEAN region (World Bank, 2018).

Data shows refugee population in the Philippines fell sharply from 19,860 in 1990 to just over 269 in 2015 and 642 in 2018.[145]

In November 2019, a certain Iranian asylum-seeker, Bahareh Zarebahari, was detained at the Ninoy Aquino International Airport and faced the risk of deportation. This came after Zarebahari, a vocal critic of the Iranian government, was arrested by Philippine officials following an Interpol Red Notice issued against her by Iran. Zarehbahari recounted that her problems began when she represented Iran in an international pageant. After that, she began receiving hostile messages from Iranian embassy officials in the Philippines, who told her she had to visit the embassy for questioning.[146] Philippine officials responded that the reason she was being detained was primarily due to the Interpol Red Notice issued against her.[147] Subsequently, the Department of Justice (DOJ) sent Zarehbahari a notice of recognition, informing her that she has been granted the status of a refugee in the country. The DOJ likewise expressed that, for purposes of finding employment, it will

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[144] *Refugee population by country or territory of asylum - Philippines, Cambodia, Indonesia*, THE WORLD BANK WEBSITE, *available at* https://data.worldbank.org/indicator/SM.POP.REFG?contextual=default&end=2018&locations=PH-KH-ID&name_desc=true&start=2018

[145] *Id.*

[146] *Philippines: Authorities must not deport Iranian asylum seeker trapped in Manila airport*, AMNESTY INTERNATIONAL WEBSITE, Nov. 7, 2019, *available at* https://www.amnesty.org/en/latest/news/2019/11/philippines-authorities-must-not-deport-iranian-asylum-seeker-trapped-in-manila-airport.

[147] *Id.*

assist her in securing a Certification for Exemption on Alien Work Permit from the Department of Labor and Employment (DOLE).[148]

Despite Zarehbahari's case, it would seem like the Philippines' record of providing asylum to refugees, whether by reason of political, racial, or religious persecutions, leaves much to be desired. On the question of whether or not the record would reflect on the acceptance of CCRs, the same is yet to be tested. While it is high time to amend domestic law regulations on the protection of CCRs, it is important to look at current data on the recent Philippine practice in allowing asylum-seekers. As the world is on the cusp of climate change and rising sea level, the values and needs surrounding the protection of CCRs will subsequently have to be revisited.

To address the precarious asylum seeker protection in the Philippines, efforts had been taken by various Philippine government agencies to establish institutional changes. In October 2017, the Department of Foreign Affairs (DFA), along with other key government agencies such as the Supreme Court, Department of the Interior and Local Government, Department of Labor and Employment, Department of Education, Department of Trade and Industry, Department of Health, Department of Social Welfare and Development, Technical Education and Skills Development Authority, Bureau of Immigration, Public Attorney's Office, Commission on Higher Education, Philippine Charity Sweepstakes, Philippine Health Insurance Corporation, and Professional Regulation Commission jointly signed the Inter-Agency Agreement on the Protection of Asylum Seekers, Refugees and Stateless Persons in the Philippines.

The agreement sought to simplify the processing of benefits and services to refugees and stateless persons seeking asylum in the country. Based on this document, the DFA and its partner agencies vowed to issue International Civil Aviation Organization ("ICAO")-compliant Convention Travel Documents to recognized refugees and stateless persons in the Philippines.[149] The Philippines also continues to implement the "Emergency Transit Mechanism," an agreement with the UNHCR and the International Organization for Migration ("IOM") that permits the speedy evacuation of

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[148] Lian Buan, *Philippines grants asylum to Iranian beauty queen*, RAPPLER, Nov. 8, 2019, *available at* https://www.rappler.com/nation/244471-philippines-grants-asylum-iranian-beauty-queen

[149] *PH gov't agencies sign agreement to protect asylum seekers, refugees and stateless persons*, DFA WEBSITE, Oct. 18, 2017, *available at* https://www.dfa.gov.ph/dfa-news/dfa-releasesupdate/14318-ph-gov-t-agencies-sign-agreement-to-protect-asylum-seekers-refugees-and-stateless-persons

refugees at risk of persecution and refoulment.[150] This Inter-Agency Agreement, however, does not include climate change or environmental refugees.

VIII. CONCLUSION

As discussed in this paper, both international law and Philippine domestic immigration law exhibit a policy vacuum in the protection of CCRs. This is primarily due to the limited definition of "persecutions" arising only from religious, political, and racial reasons, but not from displacement arising from climate change-related disasters.

While treaty law and domestic immigration law are silent as to the protection of CCRs, customary international law is rife with instances of individual countries and regional intergovernmental legal frameworks addressing climate change refugees' rights.

Modifying current domestic immigration law is seen as a first step in protecting CCRs, assuring them of their right to resettle and start life anew, and preventing the negative effects of statelessness. Between a stringent modification of the 1951 Refugee Convention and the relative ease in amending domestic immigration law, the latter is proving to be more feasible, attainable, and laden with less negative externalities and costs. If amendments are successful, the ultimate challenge is for Philippine policymakers to ensure faithful application of a revised policy allowing asylum, protection, and integration of CCRs.

Finally, with the Philippines counted among the most vulnerable to impacts of climate change, recognition and protection of climate change refugees may, in the long run, be beneficial, as any good policy gesture in the present may be deemed as a karmic investment on how our citizens may be treated, if and when the Philippines itself becomes a sinking state.

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[150] *Id.*