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Nowhere to Go: A Regional Human Rights-Based Approach to Climate Displacee Protection in Southeast Asia

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Cover Page Footnote

Evan FitzGerald is a Ph.D. candidate at the United Nations University Institute for the Advanced Study of Sustainability. He has a J.D. from the University of Massachusetts School of Law and an LL.M. in Transnational Law from Temple University's Beasley School of Law in Tokyo, Japan. Gregory G. Toth is an independent researcher. He has a J.D. and Ph.D. in sustainability from the University of Florida, a Master of International Law from the University of Geneva, and a Master of International Business from Thunderbird.

NOWHERE TO GO: A REGIONAL HUMAN RIGHTS BASED APPROACH TO CLIMATE DISPLACED PROTECTION IN SOUTHEAST ASIA

Evan M. FitzGerald* & Gregory G. Toth†

Abstract: An influx of climate-driven, cross-border migration has begun in Southeast Asia, but these peoples are not considered refugees. They are at best economic migrants, and at worse stateless persons. They are displaced because of human-driven environmental decline, with limited protections due to the lack of an internationally accepted definition of their status: there is no agreed upon definition of what constitutes a person displaced by climate change. As such, there are no legal frameworks that accurately speak to the realities of this growing problem. Worse, there is limited understanding that the confluence of these omissions will lead to disastrous effects and a humanitarian toll unlike anything the world has seen.

We propose a first step in addressing this challenge for Southeast Asian states—a legally binding definition. We submit that a “climate displaced” is one who is compelled to migrate due to the direct or related impact of changing climates. We propose a second step in addition to this definition—a Southeast Asian state regional climate migration framework that takes a human rights-based approach. This approach, based on existing international legal frameworks, is the only way to properly address the humanitarian challenges inherent to migration. We also propose a series of fundamental and operational principles as building blocks for such a regional framework. These principles consider human rights and address shortfalls with other frameworks. Southeast Asian states have an opportunity to develop the world’s first cross-border climate migration framework, and we have drafted our recommendations to assist in that effort.

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“[A]ll migration governance measures should be implemented with full respect for the human rights of the people concerned. They are no different—and in no way less valuable or less deserving of dignity—than you or I.”—Michelle Bachelet

INTRODUCTION

Between 200 million and one billion people will be displaced due to environmentally-related pressures by 2050.¹ Inhabitants of countries in the Association of Southeast Asian Nations (“ASEAN”)² will face some of the highest levels of exposure,³ including rapid-onset events such as cyclones and floods, as well as slow-onset events such as sea level rise and drought.⁴ It is no coincidence that ASEAN states, such as Vietnam and Cambodia with agriculture and populations concentrated on coastal plains,⁵ are considered

¹ Not all environmental causes are climate-induced; for example, chemical spillage or over-harvesting can result in environmental damage. Mostafa Naser, *Climate Change, Environmental Degradation, and Mitigation: A Complex Nexus*, 36 WM. & MARY ENV’T L. & POL’Y REV. 713, 747–48 (2012).

² Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

³ DANG NGUYEN ANH ET AL., INT’L ORG. FOR MIGRATION [IOM], *ASSESSING THE EVIDENCE: MIGRATION, ENVIRONMENT AND CLIMATE CHANGE IN VIETNAM* 3 (2016).

⁴ U.N. Econ. and Soc. Comm’n for Asia and the Pacific, *The Disaster Riskscape Across Asia-Pacific: Pathways for Resilience Inclusion and Empowerment*, at 2, U.N. Doc. ST/ESCAP/2863, Sales No. E.19.II.F.12 (2019).

⁵ See Colm Duffy et al., *Drivers of Household and Agricultural Adaptation to Climate Change in Vietnam*, 13 CLIMATE AND DEV. 242, 243 (2020).

both highly vulnerable⁶ and sensitive⁷ to the impacts of climate change.⁸ This region's low levels of adaptive capacity⁹ and economic stability¹⁰ will see an increasing migration push¹¹ as disasters intensify with projected temperature increases.¹²

The internationally recognized protections that exist for peoples compelled to migrate by war or politics¹³ do not extend to peoples displaced by the impacts of climate change.¹⁴ Some regional agreements, such as Africa's Kampala Convention and Latin America's Brazil Declaration, have experienced moderate success filling this void with elements therefrom being incorporated into many of the signatories' national laws. However, in practice many of these same countries have emphasized repatriation over other solutions respective of migrants' human rights.¹⁵

The goal of this article is to offer a starting point for the discussion of a regionally based human rights-based approach ("HRBA") for the protection of those in Southeast Asia pushed to migrate by the effects of climate change. In Part I, we outline climate-induced issues and migration patterns in Southeast Asia. In Part II, we examine the agreements applicable to these

⁶ "Vulnerability is the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate change and variation to which a system is exposed, its sensitivity, and its adaptive capacity." WORKING GRP. II OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 6 (2001).

⁷ "Sensitivity is the degree that a system is affected, either adversely or beneficially, by climate-related stimuli. Climate-related stimuli encompass all the elements of climate change, including mean climate characteristics, climate variability, and the frequency and magnitude of extremes. The effect may be direct (e.g., a change in crop yield in response to a change in the mean, range, or variability of temperature) or indirect (e.g., damages caused by an increase in the frequency of coastal flooding due to sea-level rise)." *Id.*

⁸ See WORLD BANK GRP., TURN DOWN THE HEAT: CLIMATE EXTREMES, REGIONAL IMPACTS, AND THE CASE FOR RESILIENCE 1–2 (2013).

⁹ Adaptive capacity is the ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities, or to cope with the consequences. See EMMA JAKKU & TIM LYNAM, WHAT IS ADAPTIVE CAPACITY, REPORT FOR THE SOUTH EAST QUEENSLAND CLIMATE ADAPTION RESEARCH INITIATIVE 5 (2010).

¹⁰ Katrina Wyman, *Responses to Climate Change*, 37 HARV. ENV'T L. REV. 167, 174–175 (2013).

¹¹ Push factors are those that compel migration away from a certain area. Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT'L L. J. 607, 620–21 (2009); see also Naser, *supra* note 1, at 751.

¹² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT 15: GLOBAL WARMING OF 1.5 °C, SUMMARY FOR POLICY MAKERS 1, 7 (Valerie Masson-Delmotte, et al., eds., 2018).

¹³ See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

¹⁴ Roxana A. Mastor et al., *Energy Justice and Climate-Refugees*, 39 ENERGY L. J. 139, 154 (2018); Jane Steffens, *Climate Change Refugees in the Time of Sinking Islands*, 52 VAND. J. TRANSNAT'L L. 727, 729–30 (2019).

¹⁵ INT'L COMM. OF THE RED CROSS, THE KAMPALA CONVENTION: KEY RECOMMENDATIONS TEN YEARS ON 28 (2019); Liliana Lyra Jubilut & Andrea Cristina Godoy Zamur, *Brazil's Refugee Resettlement: Power, Humanitarianism, and Regional Leadership*, in REFUGEE RESETTLEMENT: POWER, POLITICS, AND HUMANITARIAN GOVERNANCE 70, 85–86 (Adèle Garnier et al. eds., 2018).

issues and those in comparable situations. In Part III, we offer foundational and operational HRBA principles that should be included in a regional migration framework. We start from the position that those displaced by climate change, like all other persons, have the same rights and freedoms detailed in the Universal Declaration of Human Rights (“UDHR”), such as the rights to adequate standards of living and health.¹⁶ Finally, we offer recommendations for moving forward with a HRBA regional agreement to provide climate displacement protections while balancing state interests.

I. CLIMATE INDUCED MIGRATION IN SOUTHEAST ASIA

A. *Climate Related Migration*

An estimated 24.9 million additional people were living apart from their usual places of residence in 2019.¹⁷ These “migrants” are categorized in various ways,¹⁸ with primary distinctions being made along temporal lines, as well as geographic and causal lines. The temporal categorization of migration involves distinguishing between “temporary” and “permanent” displacement.¹⁹ Temporary migration is based on state-of-mind, as it entails leaving one’s nation with the *intent* to return.²⁰ Intent is important because migrants commonly experience displacement that exceeds the amount of time they initially planned, blurring the line between migratory permanence and impermanence.²¹

The geographic categorization of migrants appears straightforward, as it primarily relies on whether an international border has been crossed but becomes more difficult to recognize with the introduction of causal corollaries. International migrants include those avoiding persecution (29.4 million persons;²² asylum seekers and refugees, collectively “refugees”), those seeking certain financial or material improvements (164 million persons;

¹⁶ G.A. Res. 217 (III) A, The Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948); Tiffany Duong, Comment, *When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law*, 31 U. PA. J. INT’L L. 1239, 1256–57 (2010).

¹⁷ INTERNAL DISPLACEMENT MONITORING CTR., GLOBAL REPORT ON INTERNAL DISPLACEMENT 2020 1 (2019), <https://www.internal-displacement.org/global-report/grid2020/downloads/2020-IDMC-GRID-part1.pdf>.

¹⁸ It should be noted that these categorizations, like most, are oversimplified and not universal. Definitions seem to differ by organization, complicating comparisons. John Anderson, *The Adaptive Nature of Human Categorization*, 98 PSYCH. REV. 409, 410–411 (1991); Shanti Robertson, *Status-making: Rethinking migrant categorization*, 55 J. OF SOCIO. 219, 220 (2019).

¹⁹ *Id.*

²⁰ Naser, *supra* note 1, at 743–44.

²¹ Mastor et al., *supra* note 14, at 151.

²² See INT’L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 2020 21 (2019).

“economic migrants”), and domestic migrants that include those evading adverse treatment, events, or the effects of either (50.8 million persons;²³ internally displaced persons, “IDPs”).²⁴

While the categories of migrants are often blurred,²⁵ “climate migration” has a distinct definition:

The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.²⁶

Based on the above definition, and that of “climate refugee” proposed by Biermann and Boas as those who have left their homes due to sudden or progressive changes in their natural environment related to the impacts of climate change,²⁷ we adopt the following definition of “climate displacee”:

An individual compelled to migrate either by an alteration in their natural environment or an impact thereof traceable to climate.

The definition of “climate displacee” is intentionally broad and contains several important components. The inclusion of “impact thereof” is intended to encapsulate the climate-caused financial difficulties that compel economic migration, as well as the temporal aspect of movement. This is important because these difficulties will soon be the primary driver of why people leave their homes.²⁸ The definition also applies regardless of whether such peoples’ migration involves crossing an international border or shifts from “temporary” to “permanent” when homelands fail to recover from

²³ INTERNAL DISPLACEMENT MONITORING CTR., *supra* note 17, at 11–12.

²⁴ Francesco Castelli, *Drivers of migration: why do people move?* 25 J. TRAVEL MED. 1, 6 (2018).

²⁵ There are seldom singular or clear-cut causes for migration, as many of the factors are interrelated; for example, a disaster can lead to economic hardship, which can lead to conflict, which can in turn lead to disaster, and vice-versa, making it difficult to say definitively which factor or factors were ultimately responsible. See NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF CLIMATE CHANGE VOL. 118 (2015).

²⁶ GLOSSARY ON MIGRATION, IOM (2019), <https://www.iom.int/glossary-migration-2019>.

²⁷ Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Change Refugees* 1 (Global Governance Working Paper No. 33, Nov. 2007), http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf.

²⁸ NANSEN INITIATIVE, *supra* note 25, at 14–15 (2015).

environmental degradation.²⁹ Further, it incorporates not only economic migrants,³⁰ but also refugees and IDPs effected by climate impacts and changes.³¹

The final reason our proposed definition is intentionally broad is that the interrelation of climate change impacts and migration push are not fully understood.³² While it is easy to see the causal connections between migration and the sudden onset disasters that are magnified by climate change (e.g., floods, fires, and freezes), slow onset disasters can also create situations that necessitate permanent migration.³³ As such, attributing migration to a specific cause for the sake of categorization is difficult. For example, in the ASEAN context,³⁴ sea level rise is a slow onset event, which is amplified by the frequency of typhoons and monsoons.³⁵ In turn, this increases the prevalence and severity of flooding and landslides that leach soil nutrients, contaminate ground/drinking water,³⁶ and contribute to irreversible³⁷ salinization of soil,³⁸ negatively affecting agricultural production.³⁹ When exacerbated by poverty, the resultant loss in resources⁴⁰ can leave impacted populations with no alternative but to move elsewhere to meet their bodily and financial needs.⁴¹ By this measure, several ASEAN members are at particular risk.⁴²

²⁹ Naser, *supra* note 1, at 744–45.

³⁰ *UNHCR Master Glossary of Terms*, U.N. HIGH COMM’R ON REFUGEES, <https://www.unhcr.org/glossary/#e> (select “E” and scroll to second term, “economic migrant”).

³¹ Atapattu, *supra* note 11, at 616; *UNHCR Master Glossary of Terms*, *supra* note 30 (definitions for “climate refugee” and “person displaced in the context of disasters and climate change”); Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 *ARIZ. J. ENV’T. L. & POL’Y* 457, 480 (2015).

³² Will Steffan et al., *The Anthropocene: From Global Change to Planetary Stewardship*, 40 *AMBIO* 739, 751–752 (2011).

³³ NANSEN INITIATIVE, *supra* note 25, at 24.

³⁴ Y. Hijioka et al., *CLIMATE CHANGE 2014 IMPACTS, ADAPTATION, AND VULNERABILITY* 1133, 1687 (V.R. Barros et al. eds., 2014).

³⁵ *Id.* at 1334.

³⁶ WORLD BANK GRP., *supra* note 8, at 78–79.

³⁷ Mateugue Diack et al., *Restoration of Degraded Lands Affected by Salinization Process under Climate Change Conditions: Impacts on Food Security in the Senegal River Valley*, in *SUSTAINABLE INTENSIFICATION TO ADVANCE FOOD SECURITY AND ENHANCE CLIMATE RESILIENCE IN AFRICA*, SPRINGER 275, 277 (Rattan Lal et al. eds. 2019).

³⁸ WORKING GRP. II OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY* 49 (2001); see generally Joyce J. Chen & Valerie Mueller, *Coastal climate change, soil salinity and human migration in Bangladesh*, 8 *NATURE CLIMATE CHANGE*, 981–985 (2018).

³⁹ Hijioka, *supra* note 34, at 1347.

⁴⁰ See WORLD BANK GRP., *supra* note 8, at 109.

⁴¹ See *id.* at 110.

⁴² According to the Global Multidimensional Poverty Index, which measures global poverty by looking at health, education, and standard of living. UNITED NATIONS DEV. PROGRAM & OXFORD POVERTY AND HUMAN DEV, INITIATIVE, *GLOBAL MULTIDIMENSIONAL POVERTY INDEX 2019: ILLUMINATING INEQUALITIES*, 1–2 (2019).

B. Southeast Asia Migration Flows

Migration and climate patterns make it possible to estimate some ASEAN climate displacee movements. Vietnam and Cambodia provide particularly useful insights in this regard.⁴³ Both countries have experienced extremely high rates of migration since the 1990s, and within each state are large portions of the population, especially impoverished people, that remain particularly vulnerable to natural disasters.⁴⁴ When natural disasters occur in Vietnam, government programs seek to assist affected groups by providing temporary shelters close to the areas of origin.⁴⁵ In theory, this allows people to return home as soon as possible in the event of a natural disaster.⁴⁶ However, these programs face implementation challenges, such as Vietnam's lack of a migration-focused agency capable of efficient orchestration.⁴⁷ Further, not everyone receives the intended benefits of these programs. This is due to the Vietnamese government distinguishing between two categories of internal migration: "organized" and "spontaneous."⁴⁸ Organized migration refers to government-sponsored programs, while spontaneous migration refers to movements occurring without governmental support.⁴⁹

Approximately 90,000 Vietnamese people leave the country every year to seek employment opportunities abroad.⁵⁰ This is likely spontaneous, albeit temporary, migration.⁵¹ Despite having a smaller population than Vietnam, the number of Cambodian external migrants is even higher,⁵² with residents of agricultural-focused villages often crossing borders in search of seasonal work.⁵³ As of 2011, 34,000 Cambodian migrants had migrated to the Republic of Korea, 33,000 to Malaysia, and 750,000 to Thailand.⁵⁴ The exceptionally high number of Cambodians entering Thailand were joined by over 91,000 refugees from Myanmar and over 550,000 stateless persons of various ethnicities.⁵⁵ This pattern is further complicated by the fact that Thailand does

⁴³ See WORLD BANK GRP., *supra* note 8, at 95.

⁴⁴ DANG NGUYEN ANH ET AL., *supra* note 3, at 39.

⁴⁵ *Id.* at 27.

⁴⁶ *See id.*

⁴⁷ *See id.* at 58.

⁴⁸ *Id.* at 16.

⁴⁹ *Id.*

⁵⁰ *Id.* at 47.

⁵¹ *See id.* at 16.

⁵² For example, in 2008, 3.6 million Cambodian citizens were classified as internal migrants. *See* G. OUDRY, K. PAK, & C. CHEA, *ASSESSING VULNERABILITIES AND RESPONSES TO ENVIRONMENTAL CHANGE IN CAMBODIA* 22 (2016).

⁵³ *Id.* at 50.

⁵⁴ *Id.* at 12.

⁵⁵ *Thailand Fact Sheet January 2016*, U.N. HIGH COMM'R FOR REFUGEES (Jan. 2017).

not have a national asylum framework. While the U.N. is helping the Thai government with these and related challenges, more assistance is needed.⁵⁶

Like Thailand, more developed ASEAN and East Asian countries are typically the destinations of migration movements. In 2015, there were over 15,000 refugee applications filed in the Republic of Korea.⁵⁷ Likewise, Japan had a total of 7,586 refugee applications around the same time.⁵⁸ These are relatively small numbers, given the populations of Korea and Japan,⁵⁹ and while they may be due to the host countries' geographic isolation, they are most likely due to strict asylum policies. For instance, Japan had 19,269 applications for recognition of refugee status in 2017, with only 20 legally recognized as refugees.⁶⁰ By comparison, there were over 179,000 refugees and stateless persons in Malaysia during the same period despite the nation having only 33 million people⁶¹ and no laws that provide the right to asylum.⁶² More than 155,000 of these refugees came from Myanmar, with the remainder coming from nations such as Pakistan, Yemen, Somalia, Syria, and Sri Lanka.⁶³

II. MIGRATION LAW AND CLIMATE DISPLACEDS

A. *International Agreements on Migration*

There are no globally recognized legal protections for climate displaceds.⁶⁴ This is due in part to there being no legally binding definition of what constitutes a climate displaced, despite the existence of several

⁵⁶ *See id.*

⁵⁷ *The Republic of Korea Factsheet*, U.N. HIGH COMM'R FOR REFUGEES (Feb. 2016), <https://www.unhcr.org/en-us/protection/operations/500019d59/republic-of-korea-fact-sheet.html>.

⁵⁸ *Japan Fact Sheet*, U.N. HIGH COMM'R FOR REFUGEES (Feb. 2016), <https://www.unhcr.org/en-us/protection/operations/5000196c13/japan-fact-sheet.html>.

⁵⁹ *See Population, Total - Korea, Rep.*, THE WORLD BANK GRP. (2019), <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=KR>; *see Population, Total - Japan*, THE WORLD BANK GRP. (2019), <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=JP>.

⁶⁰ Press Release, Japan, Ministry of Justice, Immigration Bureau, Number of applicants recognized as refugees in 2017 (Mar. 2018), <http://webcache.googleusercontent.com/search?q=cache:xxEdC9H6dXkJ:www.moj.go.jp/content>

[/001255158.pdf+&cd=10&hl=en&ct=clnk&gl=us&client=firefox-b-d](http://webcache.googleusercontent.com/search?q=cache:xxEdC9H6dXkJ:www.moj.go.jp/content/001255158.pdf+&cd=10&hl=en&ct=clnk&gl=us&client=firefox-b-d) (Japan).

⁶¹ *Population & Demography*, DEP'T. OF STAT. MALAY. (2020), https://www.dosm.gov.my/v1/index.php?r=column/ctwoByCat&parent_id=115&menu_id=L0pheU43NWJwRWVVSZklWdzQ4TlhUUT09.

⁶² *Figures at a Glance in Malaysia*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/en-us/figures-at-a-glance-in-malaysia.html> (last visited Feb. 2, 2022).

⁶³ *Id.*

⁶⁴ Mastor et al., *supra* note 14, at 154; Steffens, *supra* note 14, at 729–30.

proposals.⁶⁵ Such proposals come from institutions such as the U.N.,⁶⁶ the European Parliament,⁶⁷ the Climate Institute,⁶⁸ the Nansen Initiative,⁶⁹ the International Organization on Migration (“IOM”),⁷⁰ or from pre-existing academic debate,⁷¹ but there has been no consensus within or between them to date.⁷²

The 1951 Refugee Convention and its 1967 Protocol (collectively, the “Convention”) are the two foremost documents that define a refugee.⁷³ However, this definition provides only limited assistance to persons fearing persecution who are unable or unwilling to return to their country of origin.⁷⁴ The Convention was primarily designed to address issues that were present immediately following World War II.⁷⁵ It is limited in scope, and even taken together with the 1967 Protocol, provides that only certain persons can be refugees.⁷⁶ The Convention’s “legal definition” of refugee does not reflect modern modalities, much less issues related to climate change.⁷⁷ Though it is possible to amend the Convention to include climate change as a driver of migration—and thus qualify climate displacees as refugees—it is unlikely this will happen.⁷⁸ Nations typically avoid amending definitions within an existing framework because it can impose additional requirements and reignite interpretation debates.⁷⁹

Legal protections for IDPs are similarly robust. The United Nations High Commissioner for Refugees (“UNHCR”) Guiding Principles on Internal Displacement (“Guiding Principles”) provide for the needs of IDPs and ensure

⁶⁵ Naser, *supra* note 1, at 757–58.

⁶⁶ Atapattu, *supra* note 11, at 619–20; Steffens, *supra* note 14, at 757–58.

⁶⁷ See Joanna Apap, The Concept of ‘climate refugee’—towards a possible definition, EUR. PARL. RSCH. SERV., PE 621.893 (Feb. 2019).

⁶⁸ Atapattu, *supra* note 11, at 620.

⁶⁹ NANSEN INITIATIVE at 17, *supra* note 25, at 16–17.

⁷⁰ See *Environmental Migration Portal—Environmental Migration*, IOM (2020), <https://environmentalmigration.iom.int/environmental-migration>.

⁷¹ Naser, *supra* note 1, at 734; see Sodiqa Williams, Comment, Do What You Can Do, With What You Have, Where You Are: Assessing the Plight of Climate Change Refugees and Approaches to Fill the Gaps Within the International Legal Framework, 1 CHI-KENT J. ENV. ENERGY L. 103, 119 (2011).

⁷² Atapattu, *supra* note 11, at 620.

⁷³ Convention Relating to the Status of Refugees, *supra* note 13; Protocol Relating to the Status of Refugees, *supra* note 13.

⁷⁴ See Convention Relating to the Status of Refugees, *supra* note 13, at 14.

⁷⁵ Duong, *supra* note 16 at 1249–50.

⁷⁶ See Convention Relating to the Status of Refugees, *supra* note 13; Protocol Relating to the Status of Refugees, *supra* note 13.

⁷⁷ Atapattu, *supra* note 11, at 624.

⁷⁸ See Steffens, *supra* note 14 at 751–52.

⁷⁹ See Stillings, *infra* note 221.

that they have the same rights and freedoms of other persons in their nation.⁸⁰ Moreover, the Guiding Principles intentionally frame the rights of IDPs as consistent with human rights law.⁸¹ Central to this is the idea that nations are responsible for the protection of populations in their own jurisdictions, putting IDP concerns squarely within the ambit of national law;⁸² IDPs have the right to request humanitarian assistance, and certain national authorities are required to render such assistance.⁸³ This is a logical conclusion, as IDPs can have significant social, political, and economic impacts within their home nations.⁸⁴ While the Guiding Principles do not explicitly mention climate change or climate displaced, their universal nature makes up for this deficiency.⁸⁵ Like the UDHR, they affirm that all peoples have an inherent right to life, liberty, and security.⁸⁶

The challenges of refugees and IDPs are consistently recognized at the international level. The 2016 New York Declaration for Refugees and Migrants acknowledged the responsibilities placed on nations with IDPs,⁸⁷ and the Global Compact for Safe, Orderly and Regular Migration, adopted two years later, reaffirmed the importance of international cooperation along with the certainty of state sovereignty.⁸⁸ Unlike the Convention and the Guiding Principles, both of these documents recognize cross-border and climate-induced migration,⁸⁹ and point to the Nansen Initiative for Disaster Induced Cross-Border Displacement as a future standard bearer (“Nansen Initiative”).⁹⁰ The Nansen Initiative’s Agenda for the protection of cross-border displaced persons sheds light on cross-border movements, including key drivers and the people that undertake them.⁹¹

To this end, the International Law Commission (“ILC”) has also created draft articles that concern the protection of persons in the event of both human-made and environmental disasters.⁹² Collectively, these instruments supplement documents such as the Paris Agreement, which highlights the

⁸⁰ U.N. Secretary-General, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2, introductory note (Feb. 11, 1998); Atapattu, *supra* note 11, at 617.

⁸¹ *Guiding Principles on Internal Displacement*, *supra* note 80, annex.

⁸² Elizabeth Ferris, *Climate Change, Migration, Law, and Global Governance*, 44 N.C.J. INT’L L. & COM. REG. 425, 433–34 (2019).

⁸³ *Guiding Principles on Internal Displacement*, *supra* note 80, at 6.

⁸⁴ Toscano, *supra* note 31, at 467.

⁸⁵ *See Guiding Principles on Internal Displacement*, *supra* note 80.

⁸⁶ *Id.* at 5–7.

⁸⁷ G.A. Res. 71/1, at 1–2 (Oct. 3, 2016).

⁸⁸ *See* G.A. Res. 73/195 (July 13, 2018).

⁸⁹ G.A. Res. 71/1, *supra* note 87, at 10.

⁹⁰ G.A. Res. 73/195, at 15 (July 13, 2018); NANSEN INITIATIVE, *supra* note 25, at 7.

⁹¹ *See* NANSEN INITIATIVE, *supra* note 25, at 15.

⁹² Ferris, *supra* note 82, at 445–46.

importance of climate change in humanity's future,⁹³ and the general protections of human rights law. Unfortunately, neither the Nansen Initiative nor the ILC's recommendations are legally binding. Even when taken collectively, all these positive steps suffer from shortcomings, such as critical issues surrounding admission and the rights of displaced persons if admitted—again leaving these concerns in the domain of more focused approaches.⁹⁴

B. *Regional Migration Frameworks*

Regional frameworks offer an alternative solution to climate change migration where international legal instruments have failed. These more targeted solutions, such as Latin America's Brazil Declaration and Africa's Kampala Convention, serve as models for future legal developments since they are two of a limited number of such frameworks that concern regional displacement.⁹⁵

The Brazil Declaration ("Declaration") is a 2014 UNHCR-sponsored agreement, encompassing Latin America and the Caribbean, that targets the elimination of statelessness and seeks to improve upon the Cartagena Declaration on Refugees, a non-binding agreement between 10 Latin American countries.⁹⁶ It acknowledges that humanitarian commitments to refugees, stateless persons, and displaced persons are constantly evolving.⁹⁷ It further highlights the importance of a common legal framework to address the protections of displaced persons, and recognizes that states have primary responsibility for responding to humanitarian issues.⁹⁸

The importance of taking a HRBA is a constant theme throughout the Declaration.⁹⁹ This is evident in its recognition that climate change poses challenges to all people in Latin America and that climate impacts may affect displacement.¹⁰⁰ The Declaration calls for the creation of local integration

⁹³ Steffens, *supra* note 14, at 745.

⁹⁴ See NANSEN INITIATIVE, *supra* note 25, at 8.

⁹⁵ Sheila C. McAnaney, Comment, *Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement*, 87 N.Y.U. L. REV. 1172, 1185–86 (2012); Duong, *supra* note 16, at 1264; Wyman, *supra* note 10, at 180.

⁹⁶ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America (Nov. 22, 1984) (Mex. and Pan.)

⁹⁷ Brazil Declaration and Plan of Action, *A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean* (Dec. 3, 2014) (Braz.).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 3.

programs that support the inclusion of refugee policies and laws at the national level.¹⁰¹ It also creates an observatory that tracks displaced populations.¹⁰² However, the Declaration does not legally require nations to meet the needs of climate displacees.¹⁰³ There are several references to the traditional definition of refugees, but only passing mention to climate change-related challenges.¹⁰⁴ Without a clear definition of climate displacee, or the inclusion of such persons within the traditional definition of refugee, the Declaration does not provide the level of protection required for these populations. Though the Declaration is a positive development, it does little more than identify that the problem exists and highlight the need for additional studies.¹⁰⁵

The Kampala Convention takes a different approach and provides protection for African-based IDPs.¹⁰⁶ This regional framework begins by defining an internally displaced person as:

... persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.¹⁰⁷

The Kampala Convention articulates a legal framework that provides for obligations and responsibilities of party states.¹⁰⁸ Article 4 requires that party states respect humanitarian and human rights laws in order to avoid the arbitrary displacement of persons.¹⁰⁹ Article 4 also calls for the creation of an early-warning system to establish and implement disaster risk reduction (“DRR”) strategies to protect and assist displacees.¹¹⁰ The system is designed to protect against arbitrary displacement, including displacement from forced evacuations due to natural or human-made disasters if such evacuations are not required for safety and health purposes.¹¹¹

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 15.

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 18.

¹⁰⁵ *Id.*

¹⁰⁶ African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Oct. 23, 2009, 3014 U.N.T.S. 33, pmbl. [hereinafter Kampala Convention].

¹⁰⁷ *Id.* art. 1.

¹⁰⁸ *Id.* art. 2.

¹⁰⁹ *Id.* art. 4(1).

¹¹⁰ *Id.* art. 4(2).

¹¹¹ *Id.* art. (4)(b).

The Kampala Convention explicitly ensures a HRBA; this is vital to the success of future migration frameworks because it provides necessary protections where none may presently exist, especially in the case of climate displacees. The early-warning system envisioned by the drafters of the Kampala Convention goes one step further in ensuring these protections. The ability to identify human rights violations before they occur is crucial; the early-warning system makes sure that warning signs of potential violations are caught.

Article 5 of the Kampala Convention highlights that it is the responsibility of parties to the Convention to provide humanitarian assistance for those displaced due to natural or human-made disasters.¹¹² And this responsibility is reinforced by the parties' duty to cooperate to protect displacees.¹¹³ This requirement is potentially challenged by the provisions in Article 10, however, which note that displacements can be legally induced by large-scale development projects, pending an environmental impact assessment.¹¹⁴ As climate change impacts become more prevalent and affect more states of the African Union, these states may look to protect their own interests and better harness available natural resources.¹¹⁵ Article 10 requires that the states perform an environmental impact assessment; however, it is unclear whether this assessment is multinational. This issue is unfolding in relation to the damming of the Blue Nile by Ethiopia's Grand Ethiopian Renaissance Dam, which restricts the flow of water to Sudan and Egypt.¹¹⁶ This project has the potential to impact a huge number of people; the dam will exacerbate droughts upriver, leading to the creation of displacees.¹¹⁷

The considerations of the Kampala Convention are important considerations for an ASEAN migration framework. While some ASEAN states may not share land-based borders, there are many that share both borders and access to natural resources. Several ASEAN states also share river systems, like the Mekong River, which is currently subject to damming in several locations.¹¹⁸

¹¹² *Id.* art. 5.

¹¹³ *Id.*

¹¹⁴ *Id.* art. 10.

¹¹⁵ Damian Zane, *Ethiopia's River Nile dam: How it will be filled*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-africa-53432948>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Brian Eyer, *Science Shows Chinese Dams are Devastating the Mekong*, FOREIGN POL'Y (Apr. 22, 2020), <https://foreignpolicy.com/2020/04/22/science-shows-chinese-dams-devastating-mekong-river/>.

III. HUMAN RIGHTS AND CLIMATE DISPLACEDS IN SOUTHEAST ASIA

A. *Migration and Human Rights Vulnerability*

A regional framework for climate displacee protection is needed in the absence of state law. This is especially true for ASEAN states, as many do not maintain adequate asylum or immigration procedures. A regional framework will help to guide individual countries with the creation and implementation of climate displacee laws at the national level to empower these states to meet future demands. These laws need to consider not only a proposed regional framework, but also preexisting global human rights conventions.

There are several global conventions that provide climate displacees with some measure of protection despite few of these legal documents specifically addressing climate issues.¹¹⁹ The Convention provides basic protections from certain types of persecution that may arise as a result of climate displacement.¹²⁰ The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) extends protections that include a guarantee of adequate food and housing, as well as the continuous improvement of living conditions.¹²¹ The International Convention on Civil and Political Rights (“ICCPR”) provides a right to life and includes the right to freedom of movement.¹²² All of these documents have enshrined the principle that human rights law exists to protect society’s most vulnerable populations.¹²³

Foremost amongst these is the UDHR, which protects the human dignity of all persons.¹²⁴ It is through this lens, specifically Article 3 (right to life),¹²⁵ Article 13 (right to movement),¹²⁶ Article 14 (right to a standard of living and health),¹²⁷ and Article 25 (right to enjoy asylum),¹²⁸ that we analyze the asylum and immigration laws of ASEAN states, and whether destination

¹¹⁹ Kara Moberg, Note, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1127–28 (2009); Mastor et al., *supra* note 14, at 161–162.

¹²⁰ See Convention Relating to the Status of Refugees, *supra* note 13; Protocol Relating to the Status of Refugees, *supra* note 13.

¹²¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4 [hereinafter ICESCR]; Steffens, *supra* note 14, at 742.

¹²² ICESCR, *supra* note 121.

¹²³ G.A. Res. 71/1, *supra* note 87, at 6 (Oct. 3, 2016); see generally G.A. Res. 217 (III) A, *supra* note 16.

¹²⁴ G.A. Res. 217 (III) A, *supra* note 16.

¹²⁵ *Id.* art. 3.

¹²⁶ *Id.* art. 13.

¹²⁷ *Id.* art. 14.

¹²⁸ *Id.* art. 25.

states are suited to receive climate displacees. These countries include the ASEAN states of Thailand and Malaysia as migration origin nations, and the Republic of China, Japan, and Korea as migration destination nations.

1. *Thailand*

Thailand has been a party to the ICCPR and ICESCR since 1996 and 1999, respectively.¹²⁹ However, Thailand is not a party to the Convention,¹³⁰ nor does it have any asylum laws.¹³¹ Thailand's immigration law, the Immigration Act, classifies those without Thai nationality as "aliens,"¹³² whereas "immigrants" are aliens that enter the country.¹³³ Aliens without valid passports, or other documents used in lieu of passports, are denied entry to Thailand.¹³⁴ Aliens without the ability to make a living are likewise denied entry, as are those with no money.¹³⁵ However, aliens that are residents of nations that border Thailand are allowed to make temporary trips into the country without valid paperwork.¹³⁶ There are also several other temporary visitor categories that include business, scientific research or training activities, amongst others.¹³⁷

While Thailand demonstrated its commitment to human rights by ratifying the ICCPR and ICESCR, it has not fully addressed its human rights challenges as it has not ratified the Convention.¹³⁸ Likewise, Thailand maintains no asylum act or law despite the large number of refugees and stateless persons within its borders.¹³⁹ While the U.N. can help alleviate the pressures resultant of such persons' presence in the short term with the UNHCR's assistance in providing coordination and resource mobilization, reliance on the U.N. is not a long-term solution.¹⁴⁰

Thailand's immigration law does not meet the challenges posed by the four articles from the UDHR. It does not allow for a standard of living and

¹²⁹ *Status of Ratification Interactive Dashboard*, U.N. HIGH COMM'R FOR REFUGEES, <https://indicators.ohchr.org/> (last visited Feb. 1, 2022).

¹³⁰ *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

¹³¹ *See Thailand Fact Sheet January 2016*, *supra* note 55.

¹³² Immigration Act B.E. 2522, § 4 (1979) (Thai).

¹³³ *Id.*

¹³⁴ *Id.* § 12.

¹³⁵ *Id.*

¹³⁶ *Id.* § 13.

¹³⁷ *Id.* § 34.

¹³⁸ *See States Parties to the 1951 Convention*, *supra* note 130.

¹³⁹ *See Thailand Fact Sheet January 2016*, *supra* note 55.

¹⁴⁰ *See generally id.*

health, right to life (due to restricted entry), or asylum. However, Thailand's immigration law arguably does allow for some freedom of movement, at least for citizens of bordering nations with the intent to stay temporarily.¹⁴¹ Thailand's other displaced persons law, its national screening mechanism, provides a definition of a "protected person," as one who is unable or unwilling to return to their home nation owing to reasonable grounds that they would suffer persecution as determined by the Committee.¹⁴² However, this definition lacks clarity about what the Committee may determine to be reasonable.¹⁴³ An alien determined to be a protected person is afforded rights under Clause 25, which provides for non-repatriation and that children will be educated.¹⁴⁴ The national screening mechanism is an encouraging development. However, it does not provide support to those who could become climate displacees or comport with the four articles from the UDHR. This is due to its nebulous definition of "protected person" and limited support provided to those with such status.

Due to Thailand's lack of an asylum framework and refugee law, it is not prepared to receive climate displacees. If Thailand were to adopt a refugee law or ratify the Convention then it may become a potential destination for displaced persons, provided that the definition chosen for "refugee" reflects that of climate displacee.

2. *Malaysia*

Malaysia is not a party to the ICCPR, the ICESCR,¹⁴⁵ or the Convention.¹⁴⁶ Malaysia does not have an asylum law,¹⁴⁷ but it does have an immigration law. Section 6 of Malaysia's Immigration Act of 1959/1963 provides the basic requirements for entry into the country for those other than citizens.¹⁴⁸ A valid entry permit is required for entry into Malaysia.¹⁴⁹ Even with an entry permit, a person that is unable to demonstrate that they have the

¹⁴¹ See Immigration Act B.E. 2522 *supra* note 132.

¹⁴² Regulation of the Office of the Prime Minister On the Screening of Aliens who Enter into the Kingdom and are Unable to Return to the Country of Origin B.E. 2562 (2019) (Thai).

¹⁴³ See *id.*

¹⁴⁴ *Id.* cl. 25.

¹⁴⁵ See *Status of Ratification Interactive Dashboard*, *supra* note 129.

¹⁴⁶ See *States Parties to the 1951 Convention*, *supra* note 130.

¹⁴⁷ *Protection in Malaysia*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/en-us/protection-in-malaysia-591401344.html> (last visited Feb. 1, 2022).

¹⁴⁸ Immigration Act, 1959–63, § 6 (Malay.).

¹⁴⁹ *Id.*

means of supporting themselves and any dependents and are likely to become “a pauper or charge of the public,” is considered a prohibited immigrant.¹⁵⁰

Malaysia’s immigration laws do not reflect UDHR considerations. In addition to not being a party to the three conventions noted above, its laws do not provide a guaranteed right to life or right to a standard of living and health.¹⁵¹ There is also no freedom of movement, except perhaps through repatriation.¹⁵² There is no right to asylum because no asylum laws exist in Malaysia, leaving the responsibility for refugee issues to the U.N.¹⁵³

Malaysia’s immigration law is not conducive to receiving climate displacees. There is nothing in the text of its immigration law that alludes to the challenges of those at risk from climate change, despite Malaysia being both a destination and origin for climate displacees because of its location in Southeast Asia.¹⁵⁴ Malaysia’s inability to cope with climate displacees is further signaled by its lack of a dedicated asylum law and adherence to basic human rights frameworks. This inability stands in contrast to potential destination nations, which may have better developed refugee procedures and coordination.

3. *The Republic of Korea (Korea)*

Korea is party to both the ICCPR and ICESCR, having ratified them in 1990.¹⁵⁵ It is also party to the Convention as of 1992.¹⁵⁶ Korea’s Refugee Act and Immigration Act both contain definitions of “refugee” and “foreigner,” with the latter defined as “any person who is not a national of Korea.”¹⁵⁷

Korea requires that all foreigners hold a valid passport and visa when entering the country.¹⁵⁸ The same law allows foreigners who qualify as refugees to stay for up to 90 days with the proper approvals.¹⁵⁹ Korea’s Refugee Act defines “refugee” as a foreigner who is:

unable or does not desire to receive protection from the nation of his/her nationality in well-grounded fear that he/she is likely to be persecuted based on race, religion, nationality, the status of a

¹⁵⁰ *Id.* § 8.

¹⁵¹ *See* Immigration Act, *supra* note 148.

¹⁵² *Id.* § 46.

¹⁵³ *See Protection in Malaysia*, *supra* note 147.

¹⁵⁴ OUDRY ET AL., *supra* note 52, at 12; ANH ET AL., *supra* note 3, at 47.

¹⁵⁵ *Status of Ratification Interactive Dashboard*, *supra* note 129.

¹⁵⁶ *See States Parties to the 1951 Convention*, *supra* note 130.

¹⁵⁷ Immigration Act, art. 2 (S. Kor.).

¹⁵⁸ *Id.* art. 7.

¹⁵⁹ *Id.* art. 16-2.

member of a specific social group, or political opinion, or a stateless foreigner who is unable or does not desire to return to the nation in which he/she resided before entering the Republic of Korea (hereinafter referred to as "nation of settlement") in such fear.¹⁶⁰

Article 1 of the Refugee Act makes explicit Korea's Convention adherence.¹⁶¹ Refugees enjoy numerous benefits that include social security,¹⁶² guaranteed primary and secondary education for children,¹⁶³ temporary subsidization of living costs,¹⁶⁴ and medical services.¹⁶⁵

As signatories to the three human rights conventions, Korea's immigration and refugee laws adhere to the country's legal obligations. Through the lens of the UDHR articles, the right to life is recognized in Article 16-2 of the Immigration Act, which provides for the granting of temporary landing permission if a foreigner fears for their lives.¹⁶⁶ The right to movement is likewise adhered to through both the Refugee Act and the Immigration Act, with Article 30 of the refugee act providing refugees the same rights as those in the Convention.¹⁶⁷ The right to health and a standard of living of refugees are present in Articles 31 and 32 of the Refugee Act, which provide for social security and basic livelihood security respectively.¹⁶⁸ Though asylum is not specifically mentioned, Korea respects the right to claim refugee status, and has specific procedures in place to determine whether such status will be granted.¹⁶⁹

However, Korea's definition of a refugee is not broad enough to allow for an interpretation that includes climate displacees.¹⁷⁰ Its definition, likely based on the definition of refugee from the Convention, reflects the document on which it is based.¹⁷¹ Korea has not yet addressed climate displacees issues, despite being a destination nation for migrant labor. Its laws are thus not

¹⁶⁰ Refugee Act, art. 2 (S. Kor.).

¹⁶¹ *Id.* art. 1 ("This Act is intended to stipulate matters on the status and treatment of refugees pursuant to the 1951 Convention relating to the Status of Refugees (hereinafter referred to as 'the Refugee Convention') and the 1967 Protocol relating to the Status of Refugees (hereinafter referred to as 'the Refugee Protocol')").

¹⁶² *Id.* art. 30.

¹⁶³ *Id.* art. 33.

¹⁶⁴ *Id.* art. 40.

¹⁶⁵ *Id.* art. 42.

¹⁶⁶ *See* Immigration Act, *supra* note 157.

¹⁶⁷ *See id.*; *see* Refugee Act, *supra* note 160.

¹⁶⁸ *See* Refugee Act, *supra* note 160, arts. 31–2.

¹⁶⁹ *Id.* art. 5

¹⁷⁰ *See id.*

¹⁷¹ *See id.*; Convention Relating to the Status of Refugees, *supra* note 13.

currently conducive to receiving climate displacees, though this could change with an amendment to its definition of “refugee.”

4. *Japan*

Japan is a signatory to both the ICCPR and ICESCR and has obligated itself to uphold the principles enshrined in those two frameworks since 1979.¹⁷² It has also been a party to the Convention since the 1980s.¹⁷³ The Convention is recognized in Japan’s Immigration Control and Refugee Recognition Act (“Act”), which was last amended in 2016.¹⁷⁴ This act provides for both immigration and asylum procedures in Japan, with the term “foreign national” used to define a person who is not of Japanese nationality.¹⁷⁵

The Act states that all foreign nationals must have a passport to enter Japan, and cannot be indigent (without a fixed dwelling place) or likely to burden the government because of an inability to work.¹⁷⁶ Japan has numerous immigration categories, many of which can be applied if an employer sponsors the applicant.¹⁷⁷ Japan permits the granting of temporary refuge (asylum) to foreign nationals under the auspices of the Convention if they are fleeing “a territory where their life, body, or physical freedom were threatened.”¹⁷⁸ Granting this status permits refugees to gain long-term residency status, but they must enter Japan from a territory where they would be persecuted according to the Convention’s definition.¹⁷⁹

As a signatory of numerous human rights conventions, it is no surprise that Japan’s Act adheres to UDHR principles. The Act provides immigrants with a right to life, freedom of movement, and the right to a standard of living and health—provided they meet several standard criteria.¹⁸⁰ These considerations are noted in the Act’s Article 17, which allows for permission for emergency medical care, and Article 18-2, which permits landing for temporary refuge.¹⁸¹ Immigrants normally must have a passport and valid

¹⁷² *Status of Ratification Interactive Dashboard*, *supra* note 129.

¹⁷³ *States Parties to the 1951 Convention*, *supra* note 130, at 1, 3.

¹⁷⁴ Immigration Control and Refugee Recognition Act, Cabinet Order No. 319 of 1951, ch. 1, art. 2 (Japan).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* art. 3, 5.

¹⁷⁷ *See id.* tbl.1.

¹⁷⁸ *Id.* art. 18-2.

¹⁷⁹ *Id.* art. 61-2-2.

¹⁸⁰ *Id.* art. 17, 18-2.

¹⁸¹ *Id.*

employment to stay in Japan.¹⁸² This is arguably not difficult to accomplish, because there are many immigration categories available. Provided that such procedural requirements are met, Japan's Act adheres to the three relevant articles of the UDHR. Asylum in Japan is an option for those who do not meet the requirements for migrant work. Japan has adopted the universally recognized definition of "refugee" and placed it at the beginning of the Act.¹⁸³ This definition allows for the right to enjoy asylum under the UDHR and the refugee convention, though its application is limited.

The Act does not note climate displacees.¹⁸⁴ This is because the internationally recognized definition of "refugee" has not changed in more than half a century.¹⁸⁵ Japan's definition of a refugee as a person fleeing from "a territory where their life, body, or physical freedom are threatened," however, could be broadly interpreted to include climate displacees.¹⁸⁶ Interpreting Japanese asylum law in this way allows for people from ASEAN states fleeing climate change to request asylum in Japan. However, Japanese asylum practices result in only .001% of applicants being granted refugee status.¹⁸⁷ Due to these limitations, the Japanese Act cannot be considered conducive for receiving climate displacees.

5. *The Republic of China (Taiwan)*

Taiwan recently adopted both the ICCPR and ICESCR on the same day in 2009.¹⁸⁸ However, Taiwan is not a party to the Convention.¹⁸⁹ Taiwan does not have asylum laws, nor does it make publicly available data on the number of refugees that have applied for asylum.¹⁹⁰ Taiwan's immigration law uses the term "alien" for those who are not "nationals,"¹⁹¹ but its immigration act does not explicitly define the term "alien."¹⁹²

¹⁸² *Id.* art. 6.

¹⁸³ *Id.* art. 2.

¹⁸⁴ *See id.*

¹⁸⁵ Convention Relating to the Status of Refugees, *supra* note 13.

¹⁸⁶ Immigration Control and Refugee Recognition Act, *supra* note 174.

¹⁸⁷ Japanese Ministry of Justice Immigration Bureau, *supra* note 60.

¹⁸⁸ Wendy Zeldin, *Taiwan: Two International Human Rights Covenants Ratified*, LIBRARY OF CONGRESS: GLOBAL LEGAL MONITOR (Apr. 15, 2009), <https://www.loc.gov/law/foreign-news/article/taiwan-two-international-human-rights-covenants-ratified/>.

¹⁸⁹ *See States Parties to the 1951 Convention*, *supra* note 130.

¹⁹⁰ *See Enact Refugee Law to Help Hong Kong, Taiwan Presidential Candidate Says*, REUTERS (Dec. 12, 2019), <https://www.reuters.com/article/us-hongkong-protests-taiwan/enact-refugee-law-to-help-hong-kong-taiwan-presidential-hopeful-says-idUSKBN1YG15K>.

¹⁹¹ Immigration Act, art. 3(1) (Taiwan).

¹⁹² *See id.*

Several articles note temporary and permanent alien immigration into Taiwan. Article 16 specifically speaks to non-resident persons looking to obtain residency in Taiwan.¹⁹³ It allows for non-resident nationals who are residing in Taiwan due to special circumstances in their home countries to apply for residency and citizenship.¹⁹⁴ It mentions that stateless persons and non-citizens that entered Taiwan before the immigration act are allowed to stay in Taiwan without fear of repatriation if they came from Thailand, Myanmar, or Indonesia.¹⁹⁵ Taiwan requires all new entrants to Taiwan to have a passport, and the government prohibits entry by those without the proper paperwork or ability to make a living in the country.¹⁹⁶

Taiwan's immigration law cannot be said to adhere to UDHR principles, because Taiwan remains unsigned to the Convention and its immigration law does not explicitly provide a right to life, standard of living and health, or movement.¹⁹⁷ Accordingly, Taiwan has not met the standards established in Article 25 of the UDHR, because the country does not have any laws that address the issue of asylum.¹⁹⁸ Though Taiwan's immigration law mentions allowing people from certain nations to stay, these permissions are only granted for those in the country before the law was passed.¹⁹⁹ Migrants attempting to enter Taiwan are required to have a passport,²⁰⁰ and if they desire to stay, they must have a way to earn a living.²⁰¹

Taiwan is unlikely to include climate change concerns in updates to its immigration laws because it is not a party to the noted human rights conventions. None of the relevant definitions' elements, including those of climate displacees, are addressed by Taiwanese migration law. If a climate crisis were to suddenly occur, Taiwan may begin to accept refugees, but its current policy has not signaled potential acceptance.

The absence of dedicated asylum laws that comply with the UDHR from the two surveyed ASEAN states (Thailand and Malaysia; Table 1) is troubling. What is more concerning, however, is that although two of the three destination states (Korea and Japan) maintain UDHR-compliant asylum and immigration laws, it likely will be difficult for climate displacees to find

¹⁹³ *Id.* art. 16.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* art. 18.

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* art. 16.

²⁰⁰ *Id.* art. 22.

²⁰¹ *Id.* art. 18.

refuge in these states. Furthermore, none of the countries surveyed provide protections for climate displacees.

Table 1: Origin and Destination States Human Rights Adherence

State	ASEAN	Origin	Destination	The Convention	ICCPR	ICESCR	Asylum Law	Imm. Law	UDHR Compliant Laws
Thailand	Yes	Yes	Yes	No	Yes	Yes	No	Yes	No
Malaysia	Yes	Yes	Yes	No	No	No	No	Yes	No
Korea	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Japan	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Taiwan	No	No	Yes	No	Yes	Yes	No	Yes	No

Until there is a new definition of refugee, or a regional framework that is adopted by ASEAN and properly considers climate displacees, it will be difficult for climate displacees to find refuge in most destination countries. This poses a significant problem for ASEAN states as it appears that both developing and developed states are not willing to accept climate displacees. Exactly where these climate displacees will go is a matter of concern, reinforcing the need for an ASEAN framework on climate migration.

B. Human Rights as a Basis for a Southeast Asia Migration Agreement

In light of predictions that a sea level rise of just two meters will displace nearly 180 million people, the majority in Southeast Asia, there is a need for a framework to support climate displacees in the ASEAN region.²⁰² It is unlikely that the current internationally accepted definition of refugee will change before climate pressures become too great. Indeed, trying to change an entrenched international instrument may be untenable.²⁰³ However, the vacuum created by such an infeasibility and the lack of individualized asylum procedures among the surveyed ASEAN states could be filled through the development of a regional climate displacee framework.

Though no such framework exists as of 2022, there are precedents in other parts of the world. The Kampala Convention provides protection within African nations for “persons or groups of persons who have been forced [. . .]

²⁰² U.N. Econ. and Soc. Council, *Migration and Climate Change in Asia and the Pacific*, U.N. Doc. E/ESCAP/GCM/PREP/5, 1, 5 (2017); see generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY (Christopher Fields, et al., eds., 2014).

²⁰³ Wyman, *supra* note 10, at 174–75.

to avoid the effects of [. . .] natural or human-made disasters.”²⁰⁴ This regional framework definition directly addresses the possibility that migration may be caused by climate change. Despite being limited to IDPs, it is a worthwhile model to consider when developing a regional framework for ASEAN states. This is especially so as the Kampala Convention is the only binding regional framework that recognizes that climate change can spur migration.

However, identifying the need and a logistical precedent upon which to model a response are only the initial steps; climate displacees should be able to enjoy the same rights and freedoms under both international and domestic laws as those who have not been displaced.²⁰⁵ To this end, adopting a framework that maintains a HRBA is essential to ensuring the protection of climate displacees.

An ASEAN-based legal instrument for climate displacees requires the alignment of moral and ethical considerations from states with complex histories and divergent cultural backgrounds; its creation from scratch will be fraught with difficulties. However, basing such an instrument on internationally and regionally accepted legal precedents, such as human rights law, may help reduce frictions.²⁰⁶ The tools and monitoring requirements for human rights abuses already exist, and a HRBA will remove some of the ability for compromise between the states (given the unwavering nature of human rights).²⁰⁷ Moreover, the alignment of any potential regional framework with the UDHR must be accompanied by a recognition of the reality that human rights and environmental issues are often intertwined.²⁰⁸ This recognition must also come with a willingness by origin and destination states of climate displacees to consider the challenges of those least able to help themselves.²⁰⁹

The first step in this alignment is inclusion of the right to life, which guarantees (by requiring governments to protect) the life and liberty of each

²⁰⁴ Kampala Convention, art. 1.

²⁰⁵ *Guiding Principles on Internal Displacement*, *supra* note 80, at 2.

²⁰⁶ McAnaney, *supra* note 95, at 1202; Steffens, *supra* note 14, at 755.

²⁰⁷ Zackary L. Stillings, Note, *Human Rights and the New Reality of Climate Change: Adaptation's Limitations in Achieving Climate Justice*, 35 MICH. J. INT'L L. 637, 652 (2014); Steffens, *supra* note 14, at 755.

²⁰⁸ Human Rights Council Res. 16/11, U.N. Doc. A/HRC/RES/16/11, at 2 (Apr. 12, 2011); Duong, *supra* note 16, at 1253–54; *see* Rina Kuusipalo, *Exiled by Emissions—Climate Change Related Displacement and Migration in International Law: Gaps in Global Governance and the Role of the UN Climate Convention*, 18 VT. J. ENV'T. L. 614, 630 (2017).

²⁰⁹ McAnaney, *supra* note 95, at 1202; *see* Stillings, *supra* note 207, at 652.

person.²¹⁰ As discussed in Part I.A., climate change has the ability to deprive people of life, making these articles of central importance.²¹¹ When migration is the only option available, it is essential that climate displacees are secure in the knowledge that they will not lose their lives because they lacked choices.²¹²

The right to a standard of living adequate for health (UDHR Art. 25;²¹³ ICESCR Art. 11;²¹⁴ ICRMW Art. 43²¹⁵) is of equal importance because of how climate change can affect human health and employment security.²¹⁶ Climate displacees will be forced to leave their countries and jobs because of preexisting or potential harm to their and their families' health.²¹⁷

Another important right is freedom of movement (UDHR Art. 13;²¹⁸ ICCPR Art. 12;²¹⁹ ICRMW Arts. 5, 8, 39;²²⁰ Banjul Charter Art. 12²²¹), which guarantees that every person has the right to leave, and return to, their country. This is important, because climate displacees are forced to leave their homes temporarily or permanently, and for a right to leave one place to have any meaning, a right to arrive to another is required.²²²

The right to asylum (UDHR Art. 25)²²³ is perhaps the most obvious requirement of a climate displacee framework. Climate displacees will need to access asylum procedures in destination nations without the fear of repatriation. Similarly, the rights to social security (UDHR Art. 22;²²⁴

²¹⁰ G.A. Res. 217 (III) A, *supra* note 16, art. 3; International Covenant on Civil and Political Rights art. 6, Dec. 16 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families art. 9, Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter ICRMW]; Duong, *supra* note 16, at 1255.

²¹¹ Duong, *supra* note 16, at 1255–56.

²¹² *See id.* This is exemplified by New Zealand's Pacific Access Category limited migration scheme with Tuvalu and the United States' Compact of Free Association with the Marshall Islands. *See Amy Louise Constable, Climate Change and Migration in the Pacific: Options for Tuvalu and the Marshall Islands*, 17 REG'L ENV'T. CHANGE 1029, 1032 (2017).

²¹³ "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." G.A. Res. 217 (III) A, *supra* note 16.

²¹⁴ ICESCR, *supra* note 121, art. 11.

²¹⁵ ICRMW, *supra* note 210, art. 43.

²¹⁶ G.A. Res. 217 (III) A, *supra* note 16, art. 25; Duong, *supra* note 16, at 1256–57.

²¹⁷ Duong, *supra* note 16, at 1251.

²¹⁸ G.A. Res. 217 (III) A, *supra* note 16, art. 13.

²¹⁹ ICCPR, *supra* note 210, art. 12.

²²⁰ ICRMW, *supra* note 210, arts. 5, 8, 39.

²²¹ African Charter on Human and Peoples' Rights art. 12, Oct. 21, 1986, 1520 U.N.T.S. 217.

²²² Synonymous in necessity to the freedom of movement is the right to enjoy asylum. G.A. Res. 217 (III) A, *supra* note 16, art. 14.

²²³ *Id.* art. 25.

²²⁴ *Id.* art. 22.

ICRMW Arts. 27, 61²²⁵) and social and international order (UDHR Art. 28²²⁶) demand international cooperation to ensure the “economic, social and cultural” aspects of human dignity and the remainder of UDHR rights. This is imperative in the case of climate displacees given their compulsory assimilation into the host society, wherein they are unlikely to have adequate economic opportunities and cultural networks, including representation for ensuring they enjoy certain nation-based rights.

Despite the well-recognized importance of such rights, there are serious challenges in creating a HRBA framework. Requiring that states abide by additional legal obligations may stretch already tight resources.²²⁷ These constraints will continue to grow with the costs of adapting to and mitigating climate change; and while some may view this as providing further incentives for a *sooner rather than later* approach, others may feel that the high costs have made this unfeasible.²²⁸ As such, even though nations may want to help provide for climate displacees, these challenges may leave nations in an untenable position and may even cause them to suspend their adherence to human rights obligations.²²⁹ This issue becomes more problematic as certain human rights claims may only arise after violations occur,²³⁰ and such violations may require that states take action to provide relief within and outside of their borders.²³¹ This may result in states experiencing monetary hardships through the payment of ongoing legal fees, solatia, and other forms of compensation.

An ASEAN-aligned migration framework should have three purposes in recognition of such difficulties. The first is to develop a legal instrument that recognizes that migration spurred by climate change is already occurring. Although this will take time (the Kampala Convention took three years before it entered into force),²³² it will ensure that this issue is taken seriously and will set the stage for future developments. The second is to ensure a common understanding of how human rights apply in the context of climate displacement. This requires countries to commit to human rights principles and to adopt a regional consensus that human rights matter. An ASEAN conception of what human rights entail may be different than an American or European conception, but the bare minimum of adherence to the UDHR is

²²⁵ ICRMW, *supra* note 210, arts. 27, 61.

²²⁶ G.A. Res. 217 (III) A, *supra* note 16, art. 28.

²²⁷ Stillings, *supra* note 207, at 665.

²²⁸ *See id.* at 666.

²²⁹ *See id.* at 667.

²³⁰ Moberg, *supra* note 119, at 1117.

²³¹ Duong, *supra* note 16, at 1260.

²³² Kampala Convention, *supra* note 106.

vital.²³³ The third purpose is to generate a set of foundational and operational principles that can be included in a regional framework for adoption at the national level. An ASEAN-aligned climate displacee framework would necessarily bind ASEAN states, but each country will likely desire carve-outs. Developing foundational and operational principles can allow for both a regionally aligned framework that is vague enough for regional ratification, while also providing guidance for the required development of national laws if none exist. While such principles do not guarantee that every ASEAN state will have the same climate displacee laws, the existence of a regionally aligned framework can ensure that these laws are similar enough to be effective at addressing climate change migration.

This article proposes a set of five foundational principles and four operational principles that the drafters of an ASEAN-aligned climate displacee framework should consider implementing. These principles provide model language based on existing international legal instruments and were developed to reflect the need for a HRBA and the realities of current and anticipated migration-related issues.

C. Foundational Principles

Most legal instruments contain a preamble that sets forth the purpose of the document. This preamble is often followed by foundational principles that set the tone for the remainder of the instrument and include broad provisions that confirm both the need for the framework and adherence to other frameworks. An ASEAN HRBA climate migration framework should be no different. Luckily, there are numerous existing frameworks that can provide model language for these foundational principles, ensuring that the human rights of climate displacees are protected.

1. Foundational Principle 1: Reaffirm the Importance of Human Rights

The UDHR provides for a right to life, a right to movement, a right to a standard of living and health, and a right to enjoy asylum.²³⁴ The ASEAN

²³³ The Asian view of human rights may differ from that of other regions, such as Europe, due to not having witnessed “homogenized culture or tradition” that encompasses the entirety of the region and results in a diminished role of law. Sienho Yee, *The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustrations*, in 8 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW AND CONTRIBUTORS 157, 161 (2004).

²³⁴ G.A. Res. 217 (III) A, *supra* note 16, arts. 13, 14, & 25.

Human Rights Declaration should affirm these rights, establish them as universal and indivisible, and state that ASEAN member-states should adopt programs that include environmental protection and sustainability.²³⁵

Having a foundational principle that notes the importance of human rights is imperative when considering climate displacees. However, for this foundational principle to be effective in addressing climate issues, it must go beyond stating human rights “guarantees.” This article proposes that an ASEAN climate migration framework include the following language:

Recognizing that both natural and human-induced environmental issues increasingly affect the lives and well-being of peoples throughout the world, and in particular Southeast Asia, we reaffirm our commitment to the universal and indivisible human rights of all people as stated in the Universal Declaration of Human Rights and the ASEAN Human Rights Declaration.

This foundational principle sets the stage for the remainder of an ASEAN climate migration framework. It highlights adherence to customs and norms of both the international and regional communities, with the latter recognizing that climate change is not only a reality, but that it also impacts human rights. An important part of this statement is its allusion to how ASEAN states will find it increasingly difficult to respect these rights in light of expected climate-compelled migration.

2. *Foundational Principle 2: Good Faith*

Good faith is vital to creating a successful framework. Parties to an ASEAN climate migration framework must agree to act in good faith and abide by the terms of the agreement. Good faith means “the honesty or lawfulness of purpose.”²³⁶ This principle is often found at the beginning of agreements, such as in the ICCPR. Article 2 of the ICCPR calls on each party state to take the necessary steps to adopt laws or other measures necessary to give effect to the rights enshrined in the agreement.²³⁷ This good faith

²³⁵ Association of South-East Asian Nations [ASEAN], *ASEAN Human Right Declaration* (2012), <https://asean.org/asean-human-rights-declaration/>.

²³⁶ *Good Faith*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/good%20faith>.

²³⁷ ICCPR, *supra* note 210, art. 2, ¶ 2.

provision clarifies the scope of states' legal requirements when they sign an agreement.²³⁸

The basis for this internationally recognized idea of good faith is found in Article 31 of the Vienna Convention on the Law of Treaties.²³⁹ This article requires that a treaty be interpreted in good faith and in accordance with its ordinary meaning.²⁴⁰ We propose that an ASEAN climate migration framework include the following language to address good faith:

We interpret the following provisions in good faith based on the plain meaning of the words and will adopt or change any and all national laws necessary to comport, and enforce alignment with, this agreement.

This language accomplishes several goals. It reaffirms the importance of interpreting the language of the agreement plainly and in good faith. It also requires that parties either adopt or modify their own national laws to meet the requirements set forth in the agreement. Lastly, it provides an enforcement requirement that aims to ensure compliance. This may be the most challenging sentence to include in an agreement as it creates an obligation amongst the states to enforce the laws. In the eyes of some, this may potentially deprive the state of sovereignty (if they choose to ignore their choice in accession and right to rescind). This concern must be resolved at the national level, as mass migration can only be properly addressed through the unanimous agreement of all regional states to abide by the rules.

3. *Foundational Principle 3: Capacity Building*

Capacity building involves building developing states' ability to deal with the challenges of climate change.²⁴¹ It is an essential consideration in a climate migration framework due to the differences in migration between origin states and destination states, as destination states may have greater capacity to receive displacees. The United Nations Framework Convention on Climate Change notes that capacity building needs to be state driven.²⁴²

²³⁸ Hum. Rts. Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

²³⁹ Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31.

²⁴⁰ *Id.*

²⁴¹ Building Capacity in the UNFCCC Process, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/topics/capacity-building/the-big-picture/capacity-in-the-unfccc-process> (last visited Feb. 1, 2022).

²⁴² *Id.*

Capacity building also should not attempt to reinvent the wheel but should build upon what currently exists in the laws of each state.²⁴³ The core concepts of capacity building highlight the implementation of actions in an effective and systematic manner, learning by doing, and engagement in a continuous process driven by improvement.²⁴⁴

While capacity building is not designed to spread resources amongst different nations, it exists to develop each state's abilities to react to migration challenges. Capacity building is especially important in the ASEAN context. The existing economic disparity amongst ASEAN states and potential destination states is great, as exemplified by the differences in GDP between Korea and Thailand.²⁴⁵ Building capacity amongst ASEAN states will help them to prevent one state, and its peoples, from being without the ability to recover. We propose that an ASEAN climate migration framework include the following language to address capacity building:

We will develop and continually enhance laws to improve migration capacity, implement these modifications in an effective manner, and should a difficulty arise, seek support from and provide support to other member-states.

This language accomplishes several goals. It reaffirms the need for states to implement the laws created by an ASEAN climate migration framework and requires that these states do so effectively. It also calls for information sharing, as it gives states an option to report both their successes and failures, so the process of implementation can be refined through the exchange of states' experiences. An excellent accompaniment to this principle would be to provide a standardized mechanism for such knowledge sharing within the agreement.²⁴⁶

4. *Foundational Principle 4: Disaster Risk Reduction*

ASEAN states must attempt to limit the damage caused by climate-enhanced disasters. Without such efforts, the number of climate displaced will exceed current expectations as disasters increase in intensity and duration.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *GDP (Current US\$)—Korea, Rep., Thailand*, WORLD BANK GRP. OPEN DATA, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=KR-TH> (last visited Feb. 1, 2022).

²⁴⁶ For example, all parties could report their progress on capacity building and implementation on a yearly basis at an annual climate migration conference hosted by a revolving member state.

Building resilience, reducing hazard exposure, and providing for response and recovery are necessary to reduce the impact on both short-term and long-term displacees.²⁴⁷

The Sendai Framework for Disaster Risk Reduction provides priorities for actions to reduce these impacts. This framework lists four priorities: (1) the importance of understanding disaster risk; (2) strengthening disaster risk governance to manage disaster risks; (3) investing in disaster risk reduction to enhance resilience; and (4) enhancing disaster preparedness for supporting effective disaster response and improving recovery, rehabilitation, and construction.²⁴⁸ If applied at the regional and national levels, these priorities may help to reduce the number of climate displacees due to the presence of robust state-oriented resiliency programs. We propose that an ASEAN climate migration framework include the following language to address disaster risk reduction:

We recognize the importance of implementing efforts to reduce the risk of disasters in limiting the number of climate displacees and will abide by the tenants of the Sendai Framework for Disaster Risk Reduction and any subsequent global frameworks for disaster risk reduction, as well as share relevant methodologies and information, so as to facilitate proactive preparation for and the reduction of the impacts of natural and human-enhanced disasters at the national level.

This language accomplishes several goals, the foremost being the recognition of the importance of disaster risk reduction. The Sendai Framework also provides an ideal starting point for developing framework language on this topic. However, the most meaningful aspect of this language is the explicit requirement that states take proactive steps to limit the number of climate displacees and to prepare for disasters. This proactive approach requires that countries act quickly based on the best available knowledge, rather than waiting for disasters to occur. This is especially important for

²⁴⁷ The Sendai Framework was adopted by resolution by the United Nations General Assembly following the U.N. World Conference on Disaster Risk Reduction. *See* G.A. Res. 69/283, annex II, Sendai Framework for Disaster Risk Reduction 2015–2030 (June 3, 2015).

²⁴⁸ *Id.* annex II at 24.

ASEAN states due to the increasing frequency of climate-enhanced disasters in the region.²⁴⁹

5. *Foundational Principle 5: Financial Reality*

The costs of providing for displaced persons are high. The UNHCR noted that in 2018 the funding gap for global displacement continued to widen to \$4.5 billion USD.²⁵⁰ This figure relates to more than 71.4 million people of concern (including refugees, IDPs, returnees, and stateless persons from a variety of geographic locations).²⁵¹ This quantity pales in comparison to the nearly 180 million persons that will soon be displaced by environmentally related pressures.²⁵² A financial element must be embedded within an ASEAN climate migration framework to address this issue or else such a framework will not fulfill its purpose.

Unfortunately, no dedicated financial resources are available to address migration issues outside of those provided by organizations such as the UNHCR. A dedicated funding source is needed for ASEAN states given the scope of the potential humanitarian fallout that massive climate displacement will cause. An ASEAN climate migration framework is an ideal instrument for the development of such a migration-focused financial resource. We propose that an ASEAN climate migration framework include the following language to address the financial component of climate migration:

In recognition of the incalculable value of human life and the financial costs in supporting that life, we agree to support the development of a regional funding resource for climate displaced support.

This language does not accomplish as much as other principles, but it serves an important purpose. It first highlights a HRBA by underlining the value of every human life. It continues by recognizing the importance of establishing a regional funding resource for climate displaced. However, it

²⁴⁹ See *infra* Introduction. For example, as of 2013 the Asian Development Bank estimated that there were increases in major flooding events, and that Asia is now twenty-five times more likely than Europe or North America to experience a natural disaster. See generally, ASIAN DEV. BANK, THE RISE OF NATURAL DISASTERS IN ASIA AND THE PACIFIC 5 (2013).

²⁵⁰ *Refugees Bear Cost of Massive Underfunding*, U.N. HIGH COMM'R FOR REFUGEES (Oct. 2018), <https://www.unhcr.org/en-us/news/briefing/2018/10/5bbc57d94/refugees-bear-cost-massive-underfunding.html>.

²⁵¹ *Id.*

²⁵² See *id.*

does not establish a regional funding resource. Instead, it aims to support the development of a regional funding resource that will be agreeable to the states. This approach recognizes the high cost of supporting refugees, IDPs, and other displacees, and the reality that there are limited funding resources currently available and varying degrees of political will regarding this issue.

These five foundational principles affirm the importance of a HRBA to an ASEAN climate migration framework and underscore select principles whose incorporation is vital to the success of any migration framework. These foundational principles set the stage for operational principles that adopt important legal and awareness considerations.

D. Operational Principles

Operational principles for a climate migration framework reflect the reality that many regional and international agreements lack enforceability. This lack of enforceability is often based on the lack of recourse for issues that arise relating to the agreement, which can result in obligations not being met and agreements losing their utility. Relying on fundamental principles alone can generate a lack of enforceability, so operational principles based on the fundamental principles are required. We propose two initial operational principles to reduce the possibility of these problems occurring: (1) defining a climate displacee and (2) creating a legal oversight framework. We propose a third operational principle that serves to track climate displacees to ensure financial and humanitarian support is properly distributed. Lastly, we propose a fourth operational principle that requires countries to cooperate and consider the multinational impacts of private and public developmental actions.

1. Operational Principle 1: Defining a Climate Displacee

The definition of a climate displacee is an essential part of any climate migration framework. This definition needs to be broad enough to apply to those affected by both natural and human-enhanced disasters, while also recognizing that those experiencing the second- and third-order effects from these disasters are also considered. This definition is necessarily located towards the beginning of a climate migration framework and sets the stage for the remainder of the agreement. As stated previously, we propose that an ASEAN climate migration framework include the following definition of climate displacee:

A climate displacee is an individual compelled to migrate either by an alteration in their natural environment or an impact thereof traceable to climate.

This definition should be used exclusively in a climate migration framework to avoid any confusion associated with other proposed definitions. It is intentionally broad enough to fully encompass all those who may become climate displacees in the ASEAN region.

2. *Operational Principle 2: Legal Oversight*

Frameworks that lack enforceability provisions run the risk of becoming unenforceable. A climate migration framework for ASEAN states should include at least one provision that ensures that there is regional legal recourse for both states and climate displacees when issues arise. This legal recourse could come in several different forms, including an administrative oversight body that hears administrative requests, a regionally aligned human rights court,²⁵³ or the recognition of a pre-existing court, such as the European Court of Human Rights.

An administrative oversight body grants states and climate displacees the ability to address migration issues after climate-enhanced disasters. It can also provide a forum for disputes between member-states, which can be particularly valuable for disputes between origin and destination states. Such an administrative oversight body could also convene special meetings to consider the terms of an ASEAN climate migration framework and act as the administrative arm of the overall framework.

Creating an administrative oversight body is an ideal first step in generating legal oversight due to its ability to address this broad range of issues. We propose that an ASEAN climate migration framework include the creation of an administrative oversight body as follows:

Recognizing the importance of a forum for addressing grievances generated under the terms of this framework, we agree to found and fund an administrative body that provides an oversight function. This administrative body will be responsible for hearing administrative matters between climate displacees and member-states, and administrative disputes arising between the member-states. This administrative body will continue this

²⁵³ Such as the non-existent, but previously considered, Southeast Asian Court of Human Rights.

function until a permanent ASEAN Court of Human Rights is established, or such authority is acceded to a different legal body. In addition to providing legal recourse, this administrative body will maintain the authority to convene special meetings of the member-states to consider changes, modifications, issues, and updates proposed regarding the framework.

This language accomplishes several goals. It ensures that an administrative body that provides oversight functions are both founded and funded. It labels its primary function as that of hearing administrative matters brought before it by two major groups. However, it also recognizes that such an administrative oversight body is a stop-gap until a means of permanent legal recourse is developed or a different legal body assumes the role as a court of competent jurisdiction. This puts the final sentence into perspective, as an oversight body should not be expected to adjudicate legal matters for an extended period of time but should instead focus on improving and modifying the framework as needed.

At the time of this writing, few regional courts dedicated to human rights issues exist. The most well-known of these is likely the European Court of Human Rights. An ASEAN climate migration framework should create a similar court to adjudicate human rights issues, including regional climate migration issues. We propose that an ASEAN climate migration framework include the creation of a regionally aligned human rights court:

We further agree to develop and institute an ASEAN Court of Human Rights that will, in addition to hearing general human rights issues, adjudicate issues related to climate migration that occur under this framework.

This language provides for the creation of a regionally aligned court to address all human rights issues, including those related to climate migration. This type of court is ideal given the proposed HRBA basis for the ASEAN migration framework. This court could take several forms but would likely consist of both a court of first impression and an appellate court. In addition to considering purely legal issues, it could issue advisory opinions similar to the International Court of Justice (ICJ). If member-states find this language unacceptable, then an ASEAN climate migration framework could instead cede legal review authority to a different legal body such as the ICJ, provided the designated legal body accepts jurisdiction.

3. *Operational Principle 3: Tracking Displacement*

Tracking migratory patterns is nothing new (see Section I.B). We have been tracking human and animal movements for centuries because the data derived from these activities is valuable. The IOM tracks the migration of people in ASEAN states fairly regularly.²⁵⁴ An ASEAN climate migration framework should expand this capacity, because IOM's capacity may be overwhelmed by the scale of climate change-related human migration in the ASEAN region. ASEAN states should work in partnership with the IOM and similar organizations to develop their own capacity for tracking climate displacees throughout the region. This tracking will help focus relief efforts and guide future projects. We propose that an ASEAN climate migration framework include the capacity to track climate displacees through the following language:

We agree to develop and implement comprehensive climate migration tracking measures and processes in an effort to support and expand upon the tracking practices of other international and national actors.

This language provides for the creation of climate migration tracking measures and procedures but does not state what exact efforts must be taken. This will allow for the development of flexible solutions, rather than imposing specific methods of data collection and information sharing. Additionally, this language notes that other parties already are engaging in migration tracking and that an ASEAN migration tracking system should seek to support these existing efforts.

4. *Operational Principle 4: Cooperation and Multinational Environmental Impact Assessments*

Cooperation between member-states is essential to a successful framework. This need for cooperation is fundamental in multilateral agreements as identified by Article 5 of the Kampala Convention. The second clause of this article calls on member-states to provide IDP-related assistance to one another.²⁵⁵ Article 10 of the Kampala Convention calls for parties to carry out socioeconomic and environmental impact assessments of proposed

²⁵⁴ See *Displacement Tracking Matrix*, IOM U.N. MIGRATION, <https://dtm.iom.int/> (last visited Feb. 1, 2022).

²⁵⁵ Kampala Convention, *supra* note 106, art. 5.

development projects prior to starting a project.²⁵⁶ Challenges will likely arise amongst member-states that are required to cooperate with one another while simultaneously being held responsible for the impacts of development activities.

This tension highlights one of the shortcomings of the Kampala Convention. Article 10 does not specify the nature of the required environmental impact assessment. If this assessment is conducted at the national level, then other member-states' concerns may not be considered, despite potentially sharing the same resources. If such an assessment is conducted at a multi-state level, then it may cause significant project development delays due to disagreements with the assessment process and the interpretation of its outcome. It may also cause states to raise sovereignty concerns, because multinational-level environmental impact assessments may limit nation-specific development and the use of resources.

We propose that an ASEAN climate migration framework account for these issues and require that states cooperate when developing environmental impact assessments through the following language:

We recognize that cooperation is essential to the success of any multilateral framework, and all states agree to cooperate with one another regarding the issues and challenges identified by this framework. All member-states also recognize the importance of internal and multi-state development, and how these developments impact the natural environment. We agree to conduct environmental impact assessments for any and all private and public development projects to ensure that additional climate displacements are not created by development actions. We further agree to engage in environmental impact assessments prior to the start of any project and ensure that such assessments are properly scoped. If it is determined through a state-enacted environmental impact assessment that a development activity affects more than one state, then the developing state agrees to submit the development activity for consideration and approval by all affected states prior to its initiation. If a dispute arises, the member-states to this framework agree to submit matters to its legal oversight body.

²⁵⁶ *Id.* art. 10.

This language accomplishes numerous objectives, the foremost being that the member-states agree to cooperate with one another on climate migration issues. This cooperation is put into perspective by including a requirement that parties engage in environmental impact assessments for all development activities. Based on the language of the Kampala Convention, these assessments are designed to reduce or eliminate the potential for development activities to create additional climate displacees. The proposed language differs from the language in the Kampala Convention, in that it accounts for how the difficulties inherent to one state's development activities affect other member-states. These effects are addressed by requiring that, if an internal environmental impact assessment determines that a development activity affects more than one state, the activity may be submitted for the other affected states to consider and approve. This language is designed to limit sovereignty concerns as it allows for states to conduct internal development if there are no external impacts. Lastly, this proposed language accounts for potential disputes arising from development, requires member-states to assess environmental impacts, and asks member-states to first submit matters and grievances to the previously proposed legal oversight body.

These operational principles provide recommendations that accompany the proposed foundational principles. Creating a legally binding definition of climate displacee, as well as a legal body that oversees the proposed ASEAN climate migration framework, provide the agreement with a vital enforceability mechanism. The migration tracking provision is similarly important because it ensures that climate displacees are tracked when moving and can help provide mitigation options to disaster-affected ASEAN states. The requirement that states cooperate to reduce the number of climate displacees and limit environmental harm while retaining national sovereignty affirms the need for continued development despite a changing climate spurred by anthropogenic change.

The combination of foundational and operational principles aims to ensure that an ever-increasing number of climate displacees receive much-needed protections. Once protected, it may be easier to incorporate these persons into the societies of destination countries, rather than rely on repatriation. This, in turn, will allow climate displacees to help improve the economies of destination states, which may also generate social and cultural benefits.²⁵⁷ If climate displacees are not recognized, they may become populations left behind by a destination state's development.

²⁵⁷ Wyman, *supra* note 10, at 207–211.

CONCLUSION

The need to create a legal definition of a climate displacee and develop principles for their protection is part of the new reality of global governance. Despite the importance of creating an ASEAN climate migration framework, there may still be a lack of political will and a desire not to be bound by additional international responsibilities.²⁵⁸ This is worrying given how climate change will impact ASEAN states, especially because such states are uniquely positioned to be at the forefront of primary, secondary, and tertiary climate change effects. Given this susceptibility, it is vital that ASEAN states follow the lead of other regional entities such as the African Union and demonstrate their understanding of climate change by considering this article's recommendations and developing the world's first cross-border regional climate migration framework.

²⁵⁸ Steffens, *supra* note 14, at 751–52.