

# **In a Rising Sea of Uncertainty:**

## **A Call for a New International Convention to Safeguard the Human Rights of Citizens of Deterritorialized Asia-Pacific Small Island-States**

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## I. INTRODUCTION

The planet is warming, both on the surface and in the oceans.<sup>1</sup> Warmer surface temperatures result in faster rates at which ice caps and glaciers melt, while warmer ocean temperatures lead to thermal expansion of salt-water molecules.<sup>2</sup> The cumulative effect of increased melting and thermal expansion is significantly higher sea levels, with a predicted global mean rise of twenty-six to eighty-two centimeters by 2100.<sup>3</sup>

Sinking beneath these rising seas are the small island-states of the Asia-Pacific region (“APSISs”).<sup>4</sup> All are least developed countries (“LDCs”) receiving assistance from the United Nations (“UN”).<sup>5</sup> Their low-lying landmasses render them the states most vulnerable to the effects of higher sea levels.<sup>6</sup> The most catastrophic effect would be deterritorialization, which could occur as early as 2050.<sup>7</sup>

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1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE THIRD ASSESSMENT REPORT OF THE IPCC 3 (2001), *available at* <https://www.ipcc.ch/ipccreports/tar/wg2/> [hereinafter IPCC, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY] (noting that by 2100, global mean surface temperatures are expected to warm from one to three and half degrees above 1990 levels due to increases in greenhouse gas concentrations).

2. BRIAN DAWSON AND MATT SPANNAGLE, THE COMPLETE GUIDE TO CLIMATE CHANGE 334 (2009).

3. IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 8, Table SPM.2 (2013), *available at* [http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5\\_SPM\\_FINAL.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf) [hereinafter IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS].

4. See Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, ASIA PACIFIC ISSUES, Jan. 2011, at 2, *available at* <http://www.eastwestcenter.org/sites/default/files/private/api098.pdf> (“The Asia Pacific region, with its many low-lying islands, is often deemed climate change ground zero.”). For the purposes of this Note, the Asia-Pacific region encompasses all the low-lying small island states in the Pacific Ocean as well as the Maldives, which is located in the Indian Ocean.

5. See U.N. OFF. OF THE HIGH REP. FOR LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES, *About the Small Island Developing States*, <http://unohrlls.org/about-sids/> (last visited Feb. 20, 2014) [hereinafter *About Small Island Developing States*].

6. IPCC, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY, *supra* note 1, at 845; see Ilan Kelman, *Island Evacuation*, FORCED MIGRATION REV., Oct.

The Fifth Assessment Report of the Intergovernmental Panel on Climate Change (“IPCC”) finds that “it is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century.”<sup>8</sup> It further finds that “[i]t is *very likely* that there is a substantial anthropogenic contribution to the global mean sea level rise since the 1970s”<sup>9</sup> stemming principally from greenhouse gas (“GHG”) emissions.<sup>10</sup> Since APSISs contribute less than one percent to the global GHG emissions total,<sup>11</sup> their deterritorialization by anthropogenic sea level rise, whether by actual submersion or other consequences that render APSISs uninhabitable (e.g., loss of viable food and water resources), implicates acute inequities from a human rights perspective. Consequent to deterritorialization, APSIS citizens will see the national sovereignties of their home states undermined.<sup>12</sup> In addition, they will be forced to seek permanent refuge within other states. As they will be emigrating from LDCs, they will be forced to do so with little or no means to pay for the costs of relocating and reestablishing their homes and livelihoods.<sup>13</sup> When such a despoilment of personal, social, financial, and government support systems occurs, the most basic human rights of displaced APSIS citizens—food, shelter, work, education, nationality—are put in jeopardy, thus triggering the need for protection under international law.<sup>14</sup>

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2008, at 20, *available at* <http://www.fmreview.org/en/FMRpdfs/FMR31/FMR31.pdf> (“Examples of entire island countries which are threatened by sea level rise are Kiribati, the Maldives and Tuvalu.”).

7. See Burkett, *supra* note 4, at 4.

8. IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, *supra* note 3, at 17 (emphasis in original). “Extremely likely” connotes 95% to 100% certainty. *Id.* at 4 n.2.

9. *Id.* at 19 (emphasis in original). “Very likely” connotes 90% to 100% certainty. *Id.* at 4 n.2.

10. John Church et al., *Ice and Sea-Level Change*, in GLOBAL OUTLOOK FOR ICE & SNOW 153, 158 (Joan Eamer ed., U.N. Envtl. Programme 2007), *available at* [http://www.unep.org/geo/geo\\_ice/PDF/full\\_report\\_LowRes.pdf](http://www.unep.org/geo/geo_ice/PDF/full_report_LowRes.pdf).

11. See IPCC, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY, *supra* note 1, at 845.

12. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 707 (2007), *available at* [http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4\\_wg2\\_full\\_report.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf) [hereinafter IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY].

13. See *About Small Island Developing States*, *supra* note 5.

14. For a comprehensive list of human rights that could be undermined in the event of deterritorialization, see Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/index.shtml> [hereinafter UDHR].

International law in its current form, however, inadequately protects the human rights of displaced APSIS citizens since it has not yet resolved two key questions. First, what is the international legal status of persons of deterritorialized APSISs? Are they rendered stateless, or do they remain citizens of a state whose territory is no longer inhabitable?<sup>15</sup> Second, what obligation does the international community have to protect displaced APSIS citizens' human rights in light of the protections it has previously accorded stateless persons and refugees, who, like displaced APSIS citizens, have been subjected to forced displacement and extraterritorial resettlement?

The consequences of anthropogenic sea level rise are already being felt in several parts of the Asia-Pacific region, where many have been forced to relocate.<sup>16</sup> The international community, therefore, cannot afford to wait until the exodus of APSIS citizens begins before deciding to act. Anthropogenic sea level rise and its inequitable impacts upon citizens of deterritorialized APSISs is a global problem, necessitating a global response tailored to the plight of these people.<sup>17</sup> The objective of this Note is to propose that such a response should come in the form of a new international covenant: a "Convention Relating to the Status of Citizens of Deterritorialized Asia-Pacific Small Island States" (hereinafter "APSIS Convention"). This proposed Convention would provide answers to the two unsettled questions in international law regarding displaced APSIS citizens' legal status and the international community's obligations to safeguard their human rights. To answer the first question, an APSIS Convention would provide that deterritorialized APSISs are entitled to retain their statehoods and have their governments operate *ex situ*—that is, from within the borders of another state. To answer the second question, the APSIS Convention would require that party states (1) fulfill for displaced APSIS citizens three human rights principles—the right to a nationality; the right of self-determination; and the right to housing, land, and property—which underlie the 1951 UN Convention Relating to the Status of Refugees<sup>18</sup> (hereinafter "Refugee

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15. Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE LAW 345, 353 (2011), available at <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/coliver/345-374%20Burkett.pdf>.

16. Burkett, *supra* note 4, at 3.

17. *See id.* at 6 ("Small island states, facing imminent challenges to their statehood and the likely need for substantial, if not total, relocation, deserve a swiftly executed initiative tailored to their plight.").

18. U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Refugee Convention].

Convention”) and the 1954 UN Convention Relating to the Status of Stateless Persons (hereinafter “Stateless Persons Convention”)<sup>19</sup>; and (2) give effect to the international environmental law principle of “common but differentiated responsibilities.”

To achieve its objective, this Note will proceed as follows. It will first describe the current plight of APSISs. The focus here will be on APSISs’ geographic vulnerabilities to anthropogenic sea level rise, their efforts to mitigate and adapt to its consequences, and, given the disparate GHG emissions between APSISs and industrialized states of the Asia-Pacific region, anthropogenic sea level rise’s inequitable impacts upon displaced APSIS citizens. The following section will describe the current gaps in international law with respect to displaced APSIS citizens, namely that neither the Stateless Persons Convention nor Refugee Convention will be open to displaced APSIS citizens, notwithstanding the common elements of forced displacement and extraterritorial resettlement that exist in the plights of refugees, stateless persons, and displaced APSIS citizens. Lastly, this Note will explain why the three aforementioned human rights principles of the Stateless Persons and Refugee Conventions as well as the international environmental law principle of common but differentiated responsibilities should serve as the foundation for a new APSIS Convention in order for it to sustain the human rights of those under its auspices with the same effectiveness and concern as the Stateless Persons and Refugee Conventions.

## II. ANTHROPOGENIC SEA LEVEL RISE AND THE PLIGHT OF APSISs

Regions are already experiencing the consequences of anthropogenic sea level rise, particularly the Asia-Pacific region. In

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19. U.N. Convention Relating to the Status of Stateless Persons, *adopted* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960), *available at* <http://www.unhcr.org/3bbb25729.pdf> [hereinafter *Stateless Persons Convention*]. Another convention concerning statelessness—the 1961 U.N. Convention on the Reduction of Statelessness—sets forth “the means of avoiding stateless.” U.N. High Comm’r for Refugees, *Objectives and Key Provisions of the 1961 Convention on the Reduction of Statelessness* (Oct. 1, 2001), <http://www.unhcr.org/3bd7d3914.html>. The Stateless Persons Convention, on the other hand, establishes “the legal framework for the standard treatment of stateless person.” U.N. High Comm’r for Refugees, *Objectives and Key Provisions of the 1954 Convention Relating to the Status of Stateless Persons* (Oct. 1 2001), <http://www.unhcr.org/3bd7d3394.html>. Accordingly, this Note will discuss only the Stateless Persons Convention, given its focus on how stateless persons must be treated under international law.

Papua New Guinea, for instance, anthropogenic sea level rise forced all 2,600 inhabitants of the low-lying Carteret Islands to migrate to Bougainville, another of the state's islands.<sup>20</sup> Villages in Vanuatu and Fiji also had to relocate further inland because of storm and saltwater damage, and erosion.<sup>21</sup>

As sea levels continue to rise, internal migration will become an increasingly less viable resettlement option for citizens of APSISs. They will instead be forced to relocate to other states.<sup>22</sup> To explain why this is so, this section will discuss the lack of topographic prominence in APSIS geography which renders them highly susceptible to deterritorialization by anthropogenic sea level rise. Specific focus will be on the topographies of the Maldives, Tuvalu, and Kiribati. This section will also highlight APSISs' considerable efforts to mitigate and adapt to the consequences of anthropogenic sea level rise. It will conclude by describing the disparate GHG emissions between industrial states in the Asia-Pacific region and APSISs to evince anthropogenic sea level rise's ineluctable impacts upon displaced APSIS citizens.

#### *A. APSISs' Geographic Susceptibilities to Sea Level Rise's Effects, as Exemplified by the Maldives, Tuvalu, and Kiribati*

As is the case with a significant number of APSISs, the low-lying geography of the Maldives, Tuvalu, and Kiribati renders them vulnerable to even the slightest rise in sea level. Eighty percent of the Maldives' landmass rises no more than one meter above sea level.<sup>23</sup> Of the state's 1,190 coral islands, the highest point is just 2.4 meters.<sup>24</sup> Similarly, the highest point found on Tuvalu's nine coral islands is five meters,<sup>25</sup> and

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20. Burkett, *supra* note 4, at 4.

21. OLI BROWN, *MIGRATION AND CLIMATE CHANGE* 26 (Ilse Pinto-Dobernig ed., Int'l Org. for Migration 2008), available at [http://www.iisd.org/pdf/2008/migration\\_climate.pdf](http://www.iisd.org/pdf/2008/migration_climate.pdf); Serafina Silaitoga, *Villagers to Move into New Homes*, THE FIJI TIMES ONLINE, Jan. 15, 2014, <http://www.fijitimes.com/story.aspx?id=256963/>.

22. Burkett, *supra* note 15, at 352.

23. *The World Factbook: Maldives*, CENT. INTELLIGENCE AGENCY, [https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf\\_mv.pdf](https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_mv.pdf).

24. *Id.*

25. *The World Factbook: Tuvalu*, CENT. INTELLIGENCE AGENCY, [https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf\\_tv.pdf](https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_tv.pdf).

Kiribati's highest point stands at 81 meters.<sup>26</sup> With an absence of higher ground on which to seek refuge from rising sea levels, these citizenries will be forced to flee their homelands and seek permanent resettlement in other states.

*B. APSISs' Efforts to Mitigate and Adapt to Anthropogenic Sea Level Rise*

Due to their geographic vulnerabilities to anthropogenic sea level rise, APSISs have gone to great lengths, both collectively and individually, to mitigate and adapt to its effects. Collective mitigation and adaptation efforts include: (1) forming the Alliance of Small Island States, the purpose of which is to serve as an "ad hoc lobby and negotiating voice for small island developing states within the United Nations system";<sup>27</sup> (2) imploring the UN Security Council to recognize climate change as an international security threat, one which APSISs claim is as great a threat to international security as that posed by nuclear proliferation and global terrorism;<sup>28</sup> and (3) acceding to many multilateral environmental treaties, including the UN Framework Convention on Climate Change ("UNFCCC") and Kyoto Protocol,<sup>29</sup> the Vienna Convention for the Protection of the Ozone Layer and its protocols and amendments,<sup>30</sup> and the Stockholm Convention on

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26. *The World Factbook: Kiribati*, CENT. INTELLIGENCE AGENCY, [https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf\\_kr.pdf](https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_kr.pdf).

27. *About AOSIS*, ALLIANCE OF SMALL ISLAND STATES, <http://aosis.org/about-aosis/> (last visited Feb. 20, 2014).

28. Marcus Steven, Op-Ed, *On Nauru, a Sinking Feeling*, N. Y. TIMES, July 18, 2011, <http://www.nytimes.com/2011/07/19/opinion/19stephen.html>. Permanent UN Security Council Members China and Russia, the world's biggest and fourth biggest emitters of GHGs, blocked these efforts to have climate change recognized as an international security threat. Ed King, *China and Russia block UN Security Council Climate Change Action*, RESPONDING TO CLIMATE CHANGE (Feb. 19, 2013, 8:40 AM), <http://www.rtcc.org/2013/02/18/china-and-russia-block-un-security-council-climate-change-action/>.

29. Secretariat of the U.N. Framework Convention on Climate Change, *Status of Ratification of the Convention*, [https://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](https://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) (last visited Mar. 7, 2014); U.N. Framework Convention on Climate Change, *Status of Ratification of the Kyoto Protocol*.

30. Ozone Secretariat, *Status of Ratification for the Montreal Protocol and the Vienna Convention*, [https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=1&mtdsg\\_no=XXVII-2&chapter=27&lang=en#Participants](https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=XXVII-2&chapter=27&lang=en#Participants) (last updated Nov. 12, 2013).



Persistent Organic Pollutants.<sup>31</sup> Independent APSIS mitigation and adaptation efforts include: (1) submissions of National Adaptation Programmes of Action,<sup>32</sup> which provide a process under the UNFCCC for LDCs to “identify priority activities that respond to their urgent and immediate needs with regard to adaptation to climate change”;<sup>33</sup> (2) the respective announcements of the Maldives and Tuvalu that by 2020 they will become the first carbon-neutral states by relying solely on renewable energy resources;<sup>34</sup> and (3) plans of the Tuvaluan and Kiribati governments to build upon existing migration options to other nearby countries, namely Australia and New Zealand, “thereby building up ‘pockets’ of their communities abroad.”<sup>35</sup>

### *C. Anthropogenic Sea Level Rise’s Inequitable Impacts upon Displaced APSIS Citizens*

Comparing GHG emissions of APSISs with those of the industrialized states in the Asia-Pacific region illustrates the inequities that anthropogenic sea level rise imposes upon APSISs and their citizens, namely deterritorialization, forced migration, and extraterritorial resettlement. In 2011,<sup>36</sup> the Maldives emitted 1.07 million metric tons of

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31. Secretariat of the Stockholm Convention, *Status of Ratification*, <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatories/tabid/252/Default.aspx> (last visited Mar. 8, 2014).

32. The U.N. Framework Convention on Climate Change’s database of submitted National Adaptation Programmes of Action, including those from APSISs, is available at [https://unfccc.int/adaptation/workstreams/national\\_adaptation\\_programmes\\_of\\_action/items/4583.php](https://unfccc.int/adaptation/workstreams/national_adaptation_programmes_of_action/items/4583.php).

33. Secretariat of the U.N. Framework Convention on Climate Change, *National Adaptation Programmes of Action: Background Information*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/adaptation/workstreams/national\\_adaptation\\_programmes\\_of\\_action/items/7572txt.php](http://unfccc.int/adaptation/workstreams/national_adaptation_programmes_of_action/items/7572txt.php) (last visited Feb. 20, 2014).

34. Duncan Clark, *Maldives First to Go Carbon Neutral*, *The Observer*, Mar. 14, 2009, at 14, available at <http://www.theguardian.com/environment/2009/mar/15/maldives-president-nasheed-carbon-neutral>; Bonnie Malkin, *Tuvalu Plots World’s First Zero Carbon Output by 2020*, *THE TELEGRAPH* (July 20, 2009, 2:25 PM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/tuvalu/5871093/Tuvalu-plots-worlds-first-zero-carbon-output-by-2020.html>.

35. Jane McAdam, *‘Disappearing States’, Statelessness and the Boundaries of International Law*, at 5, University of New South Wales Law Research Paper No. 2010-2 (2010) (internal quotations omitted), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1539766](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539766).

36. 2011 emissions levels are used as a comparative snapshot because 2011 is the most recent year that the U.S. Energy Information Administration has total CO<sub>2</sub>

carbon dioxide (“CO<sub>2</sub>”),<sup>37</sup> the principal GHG from human activities,<sup>38</sup> to the global total of 32,578.65 million metric tons.<sup>39</sup> Kiribati likewise emitted insignificant amounts of CO<sub>2</sub> in 2011, contributing 0.06 million metric tons to the global total.<sup>40</sup> The most recent year for which Tuvalu’s carbon emissions data is available is 1994, in which it emitted 0.05 million metric tons of CO<sub>2</sub>.<sup>41</sup> As Tuvalu has no heavy industry, that figure has likely changed little, if at all.<sup>42</sup>

The GHG emissions of the industrialized states of the Asia-Pacific region, by contrast, are drastically higher. The United States, for instance, emitted 5,490.63 million metric tons of CO<sub>2</sub> in 2011.<sup>43</sup> This figure places the United States behind only China, whose 2011 total CO<sub>2</sub> emissions were 8,715.31 million metric tons.<sup>44</sup> Other major emitters of GHGs in the Asia-Pacific region in 2011 include India (1,725.76 million metric tons of CO<sub>2</sub>, third most of all states); Japan (1,180.62 million metric tons of CO<sub>2</sub>, fifth most); and Australia, (392.29 million metric tons of CO<sub>2</sub>, fifteenth most).<sup>45</sup>

Of course, the United States, China, India, Japan, and Australia have much greater populations than APSISs; thus, their CO<sub>2</sub> emissions totals will be much greater than APSISs, whose populations number in the tens and hundreds of thousands. Still, the broad disparities remain even on a per capita emissions basis.<sup>46</sup> In 2011, the United States,

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emissions and per capita emissions data available for each state compared in this section except for Tuvalu.

37. *Total Carbon Dioxide Emissions from the Consumption of Energy*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/cfapps/ipdbproject/iedindex3.cfm?tid=90&pid=44&aid=8&cid=regions&syid=1980&eyid=2011&unit=MTCDPP> (last visited Mar. 8, 2014) [hereinafter *Total Carbon Dioxide Emissions*].

38. *Carbon Dioxide Emissions*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/climatechange/ghgemissions/gases/co2.html> (last visited Mar. 8, 2014).

39. *Total Carbon Dioxide Emissions*, *supra* note 37.

40. *Id.*

41. U.N. Climate Change Secretariat, *Emissions Summary for Tuvalu*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/files/ghg\\_data/ghg\\_data\\_unfccc/ghg\\_profiles/application/pdf/tuv\\_ghg\\_profile.pdf](http://unfccc.int/files/ghg_data/ghg_data_unfccc/ghg_profiles/application/pdf/tuv_ghg_profile.pdf) (last visited Mar. 8, 2014).

42. Malkin, *supra* note 34.

43. *Total Carbon Dioxide Emissions*, *supra* note 37.

44. *Id.*

45. *Id.*

46. See IPCC, CLIMATE CHANGE 2001: ADAPTATION, MITIGATION AND VULNERABILITY, *supra* note 1, at 867 box 17-3 (observing that the average per capita emissions rate for island states in the Pacific region is approximately 0.96 metric tons of CO<sub>2</sub> per year, or one-fourth of the average global per capita rate of 4.02 metric tons).

Australia, Japan, and China had per capita CO<sub>2</sub> emissions of 17.62, 18.02, 9.26, and 6.52 metric tons, respectively.<sup>47</sup> Only India had a 2011 per capita CO<sub>2</sub> emissions rate comparable to those of APSISs. Whereas the Maldives' 2011 per capita CO<sub>2</sub> emissions rate was 2.71 metric tons and Kiribati's was 0.59 metric tons, India's 2011 per capita CO<sub>2</sub> emissions rate fell in the middle at 1.45 metric tons.<sup>48</sup> Equally low was Tuvalu's 1994 per capita CO<sub>2</sub> emissions rate of 0.61 metric tons.<sup>49</sup>

In light of these figures, the inequities are stark. APSIS citizens, though they reside in states with the lowest GHGs emissions in the world, are the people most imperiled by the environmental consequences that such emissions beget. Citizens who live in high emitting states, on the other hand, will be affected far less drastically.<sup>50</sup>

That adaptation and mitigation will at best provide only short-term relief further underscores anthropogenic sea level rise's inequitable impacts upon displaced APSIS citizens. The continuing costs of implementing adaptation projects will likely "[become] prohibitive, and a significant proportion of a[n] [APIS's] economic wealth."<sup>51</sup> Likewise, employing mitigation as a means to prevent the deterritorialization of APSISs will prove ineffective. According to the IPCC, it is "virtually certain" that sea levels will continue to rise,<sup>52</sup> perhaps for many centuries,<sup>53</sup> even if all GHG emissions ceased immediately.<sup>54</sup>

If anthropogenic sea level rise does render APSISs' territories uninhabitable, then, in the words of the President of Vanuatu, Kalkot Matas, "the United Nations and its members will have failed in their first

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47. *Per Capita Carbon Dioxide Emissions from the Consumption of Energy*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/cfapps/ipdbproject/iedindex3.cfm?tid=90&pid=45&aid=8&cid=regions&syid=1980&eyid=2011&unit=MMTCD>.

48. *Id.*

49. See Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 LA. L. REV. 151, 166 (2012).

50. See Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, Apr. 25–May 6, 1994, *Report of the Global Conference on the Sustainable Development of Small Island Developing States*, U.N. Doc. A/CONF.167/9, Annex II (Oct. 1994), available at <http://www.un.org/documents/ga/conf167/aconf167-9.htm>.

51. See IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, *supra* note 12, at 706.

52. IPCC, THE PHYSICAL SCIENCE BASIS, *supra* note 3, at 20. "Virtually certain" connotes 99–100% certainty. *Id.* at 2 n.2.

53. *Id.* at 28.

54. See Lonnie Thompson: *Expert Q & A*, PBS, (Aug. 3, 2009), <http://www.pbs.org/wgbh/nova/sciencenow/0405/04-ask.html>.

and most basic duty to a Member and its innocent people, as stated in Article 1 of the Charter of the United Nations.”<sup>55</sup> That duty is to “maintain international peace and security.”<sup>56</sup> Currently, however, international law contains significant gaps that must be addressed before the international community can sufficiently perform its most fundamental responsibilities to citizens of deterritorialized APSISs.<sup>57</sup>

### III. CURRENT GAPS IN INTERNATIONAL LAW REGARDING DISPLACED APSIS CITIZENS

In the event of deterritorialization, international law in its current form does not confer upon APSIS citizens any formal legal status or protections. While two multilateral treaties, the Stateless Persons and Refugee Conventions, offer protections to persons who, like citizens of deterritorialized APSISs, have been forced to relocate to another state, this section will explain why these conventions will not be open to displaced APSIS citizens. Such an explanation is essential to understanding the necessity of a new APSIS Convention as a means to remedy the current gaps in international law regarding citizens of deterritorialized APSISs.

#### A. *Citizens of Deterritorialized APSISs Cannot Avail Themselves of Protections of the Stateless Persons Convention*

The UN High Commissioner for Refugees (“UNHCR”), who has a “formal mandate to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people,”<sup>58</sup> would likely deem that the protections of the Stateless Persons Convention are inapplicable to citizens of deterritorialized APSISs because these individuals would not satisfy the legal definition of “stateless person,” even though they will

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55. U.N. GAOR, 63rd Sess., 11th plen. mtg. at 6, UN Doc. A/63/PV.11 (Sept. 26 2008), available at [https://disarmament-library.un.org/UNODA/Library.nsf/11298c5c8b17d907852573f40068d2a7/ed9b1927f235f6038525756a004c8123/\\$FILE/A-63-PV11.pdf](https://disarmament-library.un.org/UNODA/Library.nsf/11298c5c8b17d907852573f40068d2a7/ed9b1927f235f6038525756a004c8123/$FILE/A-63-PV11.pdf).

56. U.N. Charter art. 1, para. 1.

57. For a discussion on how the United States could modernize its refugee laws, which presently track international refugee law, in order to fulfill its legal and moral responsibilities to environmental migrants, such as citizens of deterritorialized APSISs, see Brianna Compton, *The Rising Tide of Environmental Migrants: Our National Responsibilities*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 357 (2014).

58. *Stateless—UNHCR Actions*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c16a.html> (last visited Sept. 18, 2014).

“literally be without a physical state.”<sup>59</sup> The Convention defines a “stateless person” as someone “who is not considered as a national by any State under the operation of its law.”<sup>60</sup> The definition of a “state” and how it can dissolve, then, is important for determining whether someone is “stateless.” International law defines a “state” as having four elements: (1) a defined territory, (2) a permanent population, (3) an effective government, and (4) the capacity to enter into relations with other states.<sup>61</sup> The Stateless Persons Convention contemplates the dissolution of a “state” only through the ways in which states have historically done so: through absorption by another state; merger with another state; or the collapse of a state, out of which several new states emerge.<sup>62</sup> In the event of the actual physical disappearance of a state, however, it seems unlikely that the Stateless Persons Convention would treat such citizens as *de jure* stateless.<sup>63</sup> There is no legal precedent on which such a determination could be based,<sup>64</sup> and the Stateless Persons Convention will likely consider citizens of deterritorialized APSISs not to be “stateless” but still citizens of states, albeit ones which are no longer inhabitable.<sup>65</sup>

The UNHCR would most likely interpret the Stateless Persons Convention in this manner because of the “strong presumption” of the continued existence of a state in the event it no longer satisfies all four elements of the legal definition of a “state.”<sup>66</sup> States with governments in

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59. See Alexandra Harrington, *Citizens of the World*, 104 AM. SOC'Y INT'L L. PROC. 55, 57 (2010).

60. Stateless Persons Convention, *supra* note 19, art. 1, para. 1.

61. See Montevideo Convention on the Rights and Duties of States art. 1, *enacted* Dec. 26, 1933, 49 Stat. 3097, 3 Bevans 145 (entered into force Dec. 26, 1934), *available at* <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

62. McAdam, *supra* note 35, at 2.

63. *Id.* at 14.

64. U.N. High Comm'r for Refugees, *Climate Change and Statelessness: An Overview, Submission to the 6th Sess. of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the U.N. Framework Convention on Climate Change* (May 15, 2009), *available at* <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4a2d189d3>; McAdam, *supra* note 35, at 15 (“Few States even have a status determination procedure to identify stateless persons, by contrast to refugees. Accordingly, [the Stateless Persons Convention’s] practical application may be limited.”).

65. Roger Zetter, *The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People*, in *MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE* 385, 428 (Frank Lazcko & Christine Aghazarm eds., Int'l Org. for Migration 2009), *available at* [http://publications.iom.int/bookstore/free/migration\\_and\\_environment.pdf](http://publications.iom.int/bookstore/free/migration_and_environment.pdf).

66. See McAdam, *supra* note 35, at 6.

exile are one example of this presumption.<sup>67</sup> Another is found with states that, despite no longer having defined territories, are still recognized as coequal sovereigns by other states.<sup>68</sup> For instance, the Royal Order of Malta lost its territory in 1798 when Napoleon Bonaparte seized control of the Maltese Islands; now it performs its sovereign functions out of a few structures in Rome<sup>69</sup> while the Maltese Islands now comprise the sovereign state of Malta.<sup>70</sup> Even so, sixty states continue to recognize the Royal Order as being a fellow sovereign state.<sup>71</sup> Such examples suggest that APSISs deterritorialized by anthropogenic sea level rise will not see their statehoods extinguished, notwithstanding that they no longer satisfy the legal definition of “state.” In consequence, their citizens will be forced to resettle in another state, possessing few financial resources of their own and no protections under the Stateless Persons Convention to sustain their human rights.

### *B. Citizens of Deterritorialized APSISs Cannot Avail Themselves of the Refugee Convention’s Protections*

The Refugee Convention was ratified in response to the hundreds of thousands of people who were forced during World War II to seek refuge within the domains of other states because of the malicious and oppressive policies of their home state governments.<sup>72</sup> Originally, the Refugee Convention’s articles applied only to persons in Europe who fled events before January 1, 1951.<sup>73</sup> However, in 1967, the Protocol Relating to the Status of Refugees rendered the Convention’s articles applicable to all persons who satisfy the Convention’s four-pronged definition of “refugee.”<sup>74</sup> A “refugee” is someone who (1) has a “well-

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67. *Id.* at 10.

68. Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims Through the ‘Constitution of the Oceans’*, 23 *COLO. J. INT’L ENVTL. L. & POL’Y* 77, 92 (2012).

69. *Id.*

70. *The Maltese Islands*, GOVERNMENT OF MALTA, <https://www.gov.mt/en/About%20Malta/Maltese%20Islands/Pages/The-Maltese-Islands.aspx> (last visited Sept. 18, 2014).

71. Gagain, *supra* note 68, at 93.

72. See Guy Goodwin-Gill, *Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees*, at 1, U.N. AUDIOVISUAL LIBRARY INT’L LAW (2008), [http://legal.un.org/avl/pdf/ha/prsr/prsr\\_e.pdf](http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf).

73. See *id.* at 2.

74. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967), available at <http://www.refworld.org/docid/3ae6b3ae4.html>.

founded fear of being persecuted” (2) “for reasons of race, religion, nationality, membership of a particular social group or political opinion,” (3) “is outside the country of his nationality,” and (4) “is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>75</sup>

It is doubtful that displaced APSIS citizens would satisfy each of these prongs except for the one requiring a refugee to be outside of his or her home state,<sup>76</sup> but scholars debate this proposition. As posed by Frank Biermann and Ingrid Boas, professors of climate change governance and policy, “Why should inhabitants of some atolls in the Maldives who require resettlement for reasons of a well-founded fear of being inundated by 2050 receive less protection than others who fear political persecution?”<sup>77</sup> This section will proceed by examining the justifications for conferring “refugee” status on displaced APSIS citizens and explain why those justifications will not bring displaced APSIS citizens within the coverage of the Refugee Convention.

### *1. Justifications for Conferring “Refugee” Status on APSIS Citizens*

In their respective articles published in the Colorado Journal of International Environmental Law and Policy and the New York University Environmental Law Journal, Christopher Kozoll and Jessica Cooper posit that environmentally displaced persons (“EDPs”), which would include citizens of deterritorialized APSISs, fulfill all of the prongs that the Refugee Convention requires for a person to be deemed a “refugee.”<sup>78</sup> The “for reasons of” prong—establishes five bases for which a person can be persecuted: (1) race, (2) religion, (3) nationality,

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75. Refugee Convention, *supra* note 18, art. 1.

76. See Compton, *supra* note 57, at 372 (concluding that “[e]nvironmental refugees will find it impossible to qualify as a refugee under the 1951 Convention definition”).

77. See Frank Biermann and Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees* 8 (Global Governance Project, Working Paper No. 33, 2007), available at [http://www.sarpn.org/documents/d0002952/Climate\\_refugees\\_global\\_governance\\_Nov2007.pdf](http://www.sarpn.org/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf). Note, however, that Biermann and Boas “do not argue for an amendment and extension of the Geneva Convention to offer climate refugees exactly the same type of protection, but instead for a sui generis regime specifically tailored for climate refugees.” *Id.*

78. See Christopher Kozoll, Note, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT’L ENVTL. L. & POL’Y 271, 273 (2004); Jessica Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 486 (1998).

(4) membership of a particular social group, and (5) political opinion.<sup>79</sup> Cooper submits that EDPs fall within the fourth subset, “particular social group,” because they are “persons who lack the political power to protect their own environment,” leading them to become victims of environmental degradation.<sup>80</sup> Displaced APSIS citizens, then, could be viewed as persons who are politically powerless to stop anthropogenic sea level rise and the consequent deterritorialization of their home states, and as such they constitute a “particular social group,” enabling them to satisfy the “for reasons of” prong of the “refugee” definition.

The subsequent prong of the “refugee” definition requires a person to be “unable or, owing to such fear. . .unwilling to avail himself of the protection of that country.”<sup>81</sup> Kozoll contends that EDPs can satisfy this prong by showing that anthropogenic climate change forced them to flee their home states and weakened their governments so severely “that any purported protection would be ineffectual.”<sup>82</sup> Under this view, displaced citizens of deterritorialized APSISs could similarly show that anthropogenic sea level rise rendered their governments inoperable, thereby preventing them from receiving adequate governmental assistance and protection.

As for the “persecution” prong of the “refugee” definition, Kozoll and Cooper assert that EDPs have indeed been “persecuted”<sup>83</sup> because their forced displacement and extraterritorial resettlement is a consequence of industrial states’ governmental policies whereby those states refuse to mitigate their GHG emissions lest doing so would weaken their economies.<sup>84</sup> At the same time, these governments know

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79. See Refugee Convention, *supra* note 18, art. 1.

80. Cooper, *supra* note 78, at 522. Kozoll, on the other hand, posits that EDPs could satisfy any of the five bases for which a “refugee” can be persecuted under the “for reasons of” prong. See Kozoll, *supra* note 78, at 285–86. Such a contention is not very useful for establishing how displaced APSIS citizens, as a collective unit, could satisfy this part of the “refugee” definition, and so this part of the Note will focus on Cooper’s more relevant analysis.

81. Because Cooper’s note gives little treatment of this prong, this part of the Note will focus on Kozoll’s analysis.

82. See Kozoll, *supra* note 78, at 287.

83. *Id.* at 271; Cooper, *supra* note 78, at 486–87.

84. Indeed, there is a strong correlation between a state’s GHG emissions and economic strength. See Edgar G. Hertwich and Glen P. Peters, *Carbon Footprint of Nations: A Global, Trade-Linked Analysis*, 43 ENVTL. SCI. TECH. 6414, 6415 (2009) (“The [carbon] footprint is strongly correlated with per capita consumption expenditure.”); Marilyn A. Brown and Frank Southworth, *Summary of the February 2010 Forum Center for BioEnergy Sustainability (CBES): Shrinking the Carbon Footprint of Metropolitan American*, GEORGIA INST. TECH., <http://web.ornl.gov/sci/ees/cbes/forums/Summary0210.pdf> (“Historically, there is a close correlation between



that their industrial activities are causing unprecedented environmental degradation across the globe.<sup>85</sup> Such environmental degradation forces EDPs to flee their home states “out of absolute necessity” and seek refuge within other states—just like traditional refugees—because their home states can no longer carry out their primary purpose: “ensuring the well-being of their citizens.”<sup>86</sup> Under this rationale, displaced APSIS citizens could demonstrate that unprecedented sea level rise, knowingly caused by industrial state practices, has forced them “out of absolute necessity” to flee their home states and resettle abroad, and therefore they satisfy the “persecution” component of the “refugee” definition.

## 2. *Why Displaced APSIS Citizens Do Not Satisfy the Definition of “Refugee”*

Applying Cooper’s reading of the “refugee” definition’s “for reasons of” to displaced APSIS citizens, it is possible that they would be considered members of a “particular social group,” for they appear to be politically powerless to stop the deterritorialization of their homelands. It does not follow, however, that they will be persecuted by governments “for reasons of” such membership. This is particularly so in light of the history of the Refugee Convention and the form of persecution it envisions.

As mentioned, the Refugee Convention was ratified in reaction to the atrocities committed during World War II, during which certain classes of persons were systematically terrorized by their own governments on account of their memberships in particular social groups.<sup>87</sup> Since its enactment, the Refugee Convention’s protections have aided millions of people who have been forcibly displaced by war and conflict on account of race, religion, nationality, membership in a particular social group, and political opinion.<sup>88</sup> Prominent examples include Hungarian political refugees, who were forced to flee their home state because of their participation in the Soviet-crushed 1956 Hungarian Revolution, and the refugees of the Balkans crisis, who had to flee the

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carbon emissions and gross domestic product (GDP) with very few exceptions, like France.”)

85. Kozoll, *supra* note 78, at 274; Cooper, *supra* note 78, at 513.

86. See U.N. HIGH COMM’R FOR REFUGEES, *THE STATE OF THE WORLD’S REFUGEES 1997–98: A HUMANITARIAN AGENDA* 52 (Oxford Univ. Press 1997).

87. See *History of UNCHR*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Mar. 6, 2014) [hereinafter *History of UNCHR*].

88. *Refugees*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c125.html> (last visited Mar. 20, 2014).

region when they became targets of their own governments because of their ethnicity and religion.<sup>89</sup> As politically powerless as they might be to stop the effects of anthropogenic sea level rise, APSIS citizens are dissimilar to these examples. Their reasons for fleeing their home states will be environmentally rooted, not because any government has persecuted them “for reasons of” their memberships in an APSIS social group.

As for the “refugee” definition’s prong regarding the inability of a refugee to avail himself of the protection of his home state while outside of that state, the difficulty that arises in applying to Kozoll’s reading of it to displaced APSIS citizens is that, in the event of deterritorialization, their governments will likely relocate to and operate from other states. Doing so will permit their dispersed citizenries to receive at least some form of governmental services and protections, unlike traditional refugees.

The most problematic aspect of Kozoll and Cooper’s theory as applied to displaced APSIS citizens relates to the “persecution” prong. APSIS citizens likely will not have been “persecuted” in the form that the Refugee Convention envisages.<sup>90</sup> That is, their experience will lack any direct, purposeful and malicious intent on the part of foreign or domestic governments to harm them. While the UNHCR acknowledges that “[t]here is no universally accepted definition of ‘persecution,’”<sup>91</sup> and, as Kozoll observes, there is “[n]othing in either international or national standards [that] explicitly disavows the idea that one may be persecuted through environmental harm,”<sup>92</sup> any environmental “persecution” that displaced APSIS citizens experience due to foreign governments’ refusals to mitigate GHG emissions would most likely be determined to be too attenuated to amount to the form of “persecution” that the Refugee Convention contemplates.<sup>93</sup> Rather, for environmental degradation to constitute such “persecution,” a state must actively

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89. See *History of UNCHR*, *supra* note 87.

90. See *Commission Staff Working Document: Climate Change, Environmental Degradation, and Migration*, at 17, COM (2013) 138 final (Apr. 16, 2013), available at [http://ec.europa.eu/clima/policies/adaptation/what/docs/swd\\_2013\\_138\\_en.pdf](http://ec.europa.eu/clima/policies/adaptation/what/docs/swd_2013_138_en.pdf) (“Firstly, it would be difficult to deem environmental degradation as ‘persecution’ in the sense envisaged in the convention.”).

91. U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. II, B(2)(b), para. 51 (1979, reedited in 1992), available at <http://www.unhcr.org/3d58e13b4.html>.

92. Kozoll, *supra* note 78, at 274.

93. See *Commission Staff Working Document: Climate Change, Environmental Degradation, and Migration*, *supra* note 90.

employ it with a direct, purposeful, and malicious intent to inflict harm upon one or more of the protected classes identified within the “refugee” definition.<sup>94</sup>

Saddam Hussein’s direct, purposeful, and malicious use of environmental degradation to harm the Marsh Arabs evinces the level at which environmental degradation crosses into the bounds of “persecution,” thus triggering the Refugee Convention’s protections. For 5,000 years, the Marsh Arabs, a group of Shi’a Muslims, based their livelihoods on the southern Iraqi marshes that formed where the Tigris and Euphrates rivers converge, and which spanned an area of 20,000 square kilometers.<sup>95</sup> During the 1991 Shi’a rebellion, Saddam Hussein lost control over much of this region.<sup>96</sup> To quell the rebellion, Hussein systematically drained the marshes to the point where all that remained was dry earth crusted in salt.<sup>97</sup> The livelihoods of the Marsh Arabs were so imperiled as a result that their population decreased from at least 250,000 to 40,000 in only three years.<sup>98</sup>

Including anthropogenic climate change as a legal form of “persecution” could have many unintended consequences. For one, doing so “would risk a renegotiation of the Convention, which, in the current situation, may undermine the international refugee protection regime altogether.”<sup>99</sup> Moreover, it could overstress the UNCHR’s capacity to adequately protect refugees.<sup>100</sup> As of July 2013, the UNCHR was

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94. Cf. Tara Weinstein, Note, *Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 GEO. INT’L ENVTL. L. REV. 697, 717–18 (2005) (“For environmental destruction to be prosecuted as a tool to commit genocide, the prosecutor must prove the underlying crime, which requires showing that the perpetrator had the specific intent to destroy the group, defined along religious, ethnic, national, or racial lines.”).

95. *Id.* at 715.

96. *Id.*

97. *Id.*

98. *Id.* at 716.

99. Office of the U.N. High Comm’r for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, Submission to the 6th Sess. of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the U.N. Framework Convention on Climate Change (May 20, 2009), available at <http://www.unhcr.org/4a1e4d8c2.html>.

100. DAVID HODGKINSON & LUCY YOUNG, IN THE FACE OF LOOMING CATASTROPHE: A CONVENTION FOR CLIMATE CHANGE DISPLACED PERSONS 4 (2012), available at <http://www.ccdpconvention.com/documents.html> (“Another concern with regard to affording protection to [climate change displaced persons] under the Refugee Convention is that to do so risks devaluing current protections for refugees.”).

charged with protecting 11.1 million refugees<sup>101</sup> with a budget of \$5.3 billion.<sup>102</sup> If the threshold at which environmental degradation amounts to persecution is loosened to include anthropogenic climate change's environmental degradation, the UNHCR could become flooded with hundreds of millions of EDPs who now satisfy the criteria of the "refugee" definition.<sup>103</sup>

#### IV. HOW TO CONFRONT THE GAPS IN INTERNATIONAL LAW WITH RESPECT TO CITIZENS OF DETERRITORIALIZED APSIS: A NEW APSIS CONVENTION

To fill the gaps in international law concerning citizens of deterritorialized APSISs, the international community should formulate and ratify a new international covenant that is tailored to the plight of displaced APSIS citizens. A global response by way of an APSIS Convention is essential because, "[a]bsent a binding legal agreement with international support, states' concerns about the integrity of their own borders are likely to inhibit them from responding swiftly and effectively" to this problem.<sup>104</sup> Although the Stateless Persons and Refugee Conventions do not address the legal quandaries surrounding displaced APSIS citizens, they nonetheless provide essential guidance as to how to formulate an APSIS Convention. Forced displacement and extraterritorial resettlement are common elements in the plights of stateless persons, refugees, and displaced APSIS citizens. The Stateless Persons and Refugee Conventions counter those elements through three underlying human rights principles: (1) the right to a nationality, (2) the right of self-determination, and (3) housing, land, and property rights. An APSIS Convention must do the same. An APSIS Convention must go one step further, however. Due to the global nature of anthropogenic climate change and the inequitable consequences that flow from the disparate amounts of GHG emissions from industrialized states vis-à-vis

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101. U.N. High Comm'r for Refugees, Mid-Year Trends 2013, at 6 (Dec. 19, 2013), <http://www.unhcr.org/52af08d26.html>.

102. *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c1a.html> (last visited Mar. 6, 2014).

103. See NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* 65 (Cambridge Univ. Press 2007) ("By the middle of the century, 200 million people may become permanently displaced due to rising sea levels, heavier floods, and more intense droughts.").

104. See Burkett, *supra* note 4, at 6.

APSISs, it must incorporate the international environmental law principle of common but differentiated responsibilities.

*A. Three Underlying Human Rights Principles of the Refugee and Stateless Persons Conventions that an APSIS Convention Must Incorporate*

*1. The Right to a Nationality*

The right to a nationality<sup>105</sup> is codified in the Universal Declaration of Human Rights (“UDHR”).<sup>106</sup> The UDHR affirms that “[e]veryone has the right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>107</sup> This basic human right must be reflected within the articles of an APSIS Convention because it “serv[es] as the basis for the enjoyment of many other rights.”<sup>108</sup>

The Refugee and Stateless Persons Conventions have many safeguards regarding stateless persons and refugees’ right to a nationality. First, in the articles pertaining to naturalization, both Conventions require that party states “shall as far as possible facilitate the assimilation and naturalization of [refugees or stateless persons]. . . [and] shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”<sup>109</sup> By providing such a requirement, the Conventions reflect the importance of the right to a nationality while acting to prevent this right from being undermined.

An APSIS Convention can both emulate and improve upon the ways in which the Refugee and Stateless Persons Conventions seek to uphold the right to a nationality. To emulate the Refugee and Stateless Persons Conventions’ nationality protections, an APSIS Convention must provide that APSIS citizens have the right to claim the nationality of their host states. A displaced APSIS citizen’s “claim to nationality in

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105. The UN High Commissioner for Refugees defines nationality as “a legal bond between a state and an individual.” *Stateless People*, U.N. HIGH COMM’R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c155.html> (last visited Mar. 7, 2014).

106. See UDHR, *supra* note 14, art. 15.

107. *Id.*

108. Panel Discussion, U.N. High Comm’r for Refugees, 50th Anniversary of the 1954 Convention Relating to the Status of Stateless Persons 1 (Oct. 6, 2004), <http://www.unhcr.org/415825134.pdf>.

109. Refugee Convention *supra* note 18, art. 34; Stateless Persons Convention, *supra* note 19, art. 32.

the host state would be a reasonable right that would accompany resettlement,” and the granting thereof “would be consistent . . . with the individual right to a nationality set out in Article 15 of the [UDHR].”<sup>110</sup> Possessing the nationality of the host state will ensure that the host state treats displaced APSIS citizens on terms equal to those with which it treats its own citizens.<sup>111</sup> Codifying the right to gain the nationality of the host state is essential because the UDHR, while setting forth a right to a nationality, “does not carry a specific corresponding obligation on states to confer [it].”<sup>112</sup>

To improve upon the nationality provisions of the Refugee and Stateless Persons Conventions, an APSIS Convention must further provide that deterritorialized APSISs are entitled to retain their statehood statuses, what Maxine Burkett<sup>113</sup> terms “ex-situ nationhood.”<sup>114</sup> Ex-situ nationhood “is a status that allows for the continued existence of a sovereign state, afforded all of the rights and benefits of sovereignty amongst the family of states, in perpetuity.”<sup>115</sup> Crucially, it will permit people forced to migrate from deterritorialized APSISs to retain the citizenship of their home states. Doing so will shield displaced APSIS citizens against statelessness which could otherwise result if and until they obtained the nationality of the state in which they resettled. It would also provide them with the “psychosocial benefit of the perpetuation of [their] culture and traditional lifeways.”<sup>116</sup>

## 2. *The Right of Self-Determination*

The right of self-determination, enshrined in numerous international agreements, guarantees that “[a]ll peoples have the right of self-determination” and “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>117</sup> The consequences of anthropogenic climate change are

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110. Burkett, *supra* note 15, at 368 n.132.

111. *Id.* at 368–69.

112. Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1172 (1998).

113. Maxine Burkett is a professor of Climate Change Law and Policy and International Environmental Law at the University of Hawaii’s William S. Richardson School of Law.

114. Burkett, *supra* note 15, at 345.

115. *Id.*

116. *Id.* at 369.

117. *See, e.g.*, International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www.ohchr.org/en/professionalinterest/>

such that the existence of entire APSIS communities, including their right of self-determination, could be extinguished.<sup>118</sup>

Since persecution, statelessness, and deterritorialization equally endanger the right of self-determination, an APSIS Convention must include provisions similar to those that uphold the right of self-determination in the Refugee and Stateless Persons Conventions. First, the Refugee and Stateless Persons Conventions provide that party states “shall accord to [refugees or stateless persons] within their territories treatment that is at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.”<sup>119</sup> Religious freedom is crucial to one’s right of self-determination because the right of self-determination enables people to freely determine their political status, as religious freedom is often “central to the establishment of a political community.”<sup>120</sup> By extension, religious freedom is also crucial to the right of self-determination’s guarantee that people can freely pursue their economic, social, and cultural development.

Second, the Refugee and Stateless Persons Conventions safeguard the right of self-determination by guaranteeing the interdependent right of association.<sup>121</sup> The right of association operates similarly to the right of religious freedom by upholding the right of self-determination. That is, without association rights, refugees and stateless persons would see their economic, social, and cultural development greatly stunted. Other provisions in the Refugee and Stateless Persons Conventions that reinforce the right of self-determination require party states to accord to refugees and stateless persons wage-earning employment,<sup>122</sup> self-

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pages/ccpr.aspx; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [hereinafter ICESCR].

118. See SIOBHAN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 18 (World Bank 2011), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1>.

119. See Refugee Convention, *supra* note 18, art. 4; Stateless Persons Convention, *supra* note 19, art. 4

120. Rafael Domingo, *Religion for Hedgehogs? An Argument Against the Dworkinian Approach to Religious Freedom*, 2 OXFORD J. LAW & RELIGION 371, 373 (2013), available at [http://cslr.law.emory.edu/fileadmin/media/PDFs/Op-Ed\\_Pieces/Domingo\\_Religion\\_for\\_Hedgehogs.pdf](http://cslr.law.emory.edu/fileadmin/media/PDFs/Op-Ed_Pieces/Domingo_Religion_for_Hedgehogs.pdf).

121. See Refugee Convention, *supra* note 18, art. 15; Stateless Persons Convention, *supra* note 19, art. 15.

122. Refugee Convention, *supra* note 18, art. 17; Stateless Persons Convention, *supra* note 19, art. 17.

employment;<sup>123</sup> the ability to practice liberal professions;<sup>124</sup> public education access and recognition of foreign school certificates, diplomas, and degrees;<sup>125</sup> public relief and assistance;<sup>126</sup> equal labor treatment and social security;<sup>127</sup> and freedom of movement.<sup>128</sup> Displaced APSIS citizens, like refugees and stateless persons, must know that in their host states they can “enjoy work rights and health rights there, have access to social security if necessary, [and] be able to maintain their culture and traditions.”<sup>129</sup> An APSIS Convention, then, should mirror the aforementioned provisions of the Refugee and Stateless Persons Conventions to ensure the basic human right of self-determination for displaced APSIS citizens.

### 3. *Housing, Land, and Property Rights*

Housing, land, and property (“HLP”) rights, which are “widely recognised throughout international human rights and humanitarian law,”<sup>130</sup> embody the notion that all people “are meant . . . to live safely and securely on a piece of land, to reside within an adequate and affordable home with access to all basic services and to feel safe in the knowledge that these attributes of a full life will be fully respected, protected and fulfilled.”<sup>131</sup> Many international covenants contain HLP rights, including the Refugee and Stateless Persons Conventions.<sup>132</sup> The

123. Refugee Convention, *supra* note 18, art. 18; Stateless Persons Convention, *supra* note 19, art. 18.

124. Refugee Convention, *supra* note 18, art. 19; Stateless Persons Convention, *supra* note 19, art. 19.

125. Refugee Convention, *supra* note 18, art. 22; Stateless Persons Convention, *supra* note 19, art. 22.

126. Refugee Convention, *supra* note 18, art. 23; Stateless Persons Convention, *supra* note 19, art. 23.

127. Refugee Convention, *supra* note 18, art. 24; Stateless Persons Convention, *supra* note 19, art. 24.

128. Refugee Convention, *supra* note 18, art. 26; Stateless Persons Convention, *supra* note 19, art. 26.

129. McAdam, *supra* note 35, at 17.

130. Scott Leckie, *United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings: From Neglect to Tentative Embrace*, in HOUSING, LAND AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM 3, 9 (Scott Leckie ed., Cambridge Univ. Press 2009).

131. Scott Leckie, *Human Rights Implications*, FORCED MIGRATION REV., Oct. 2008, at 18, available at <http://www.fmreview.org/en/FMRpdfs/FMR31/FMR31.pdf>.

132. For additional examples, see UDHR, *supra* note 14, art. 17 (setting forth the right to own property and the right not to be arbitrarily deprived thereof); *id.* art. 25, para. 1 (establishing the basis for the right to adequate housing); ICESCR, *supra* note 117, art.



Refugee and Stateless Persons Conventions provide that, “as regards housing, the [Party States]. . . shall accord to [refugees or stateless persons] lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”<sup>133</sup> Moreover, these Conventions mandate minimum standards as to property rights, requiring that Party States “shall accord to a [refugee or stateless person] treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.”<sup>134</sup> To safeguard the HLP rights of displaced APSIS citizens, it is essential that an APSIS Convention include similar provisions.

To further protect HLP rights, an APSIS Convention should entitle displaced APSIS citizens to compensation for property and land lost as well as resettlement assistance, financially supported by both party states and APSIS governments, so that displaced APSIS citizens can acquire housing, land, and property in the states to which they have relocated.<sup>135</sup> As resettlement will likely be the only option available in the event of deterritorialization, measures must be in place so that homelessness will not result and host states will follow international human rights standards on adequate housing.<sup>136</sup>

### *B. The Necessary Addition of the Principle of Common but Differentiated Responsibilities*

While the plights of displaced APSIS citizens share many common features with those of refugees and stateless persons, there is an important distinction for which an APSIS Convention must account. All states, by virtue of their GHG emissions, will have contributed at some level to the forced displacement and extraterritorial resettlement of APSIS citizens. Contributing most are the developed states of North

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11, para. 1 (requiring party states to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions”).

133. Refugee Convention, *supra* note 18, art. 21; Stateless Persons Convention, *supra* note 19, art. 21.

134. Refugee Convention, *supra* note 18, art. 13; Stateless Persons Convention, *supra* note 19, art. 13.

135. *Cf.* Biermann and Boas, *supra* note 77, at 27 (calling for, among other things, voluntary resettlement programs as part of a climate change refugee protocol to the UNFCCC).

136. *See* Leckie, *supra* note 131, at 19.

America, Europe, and Asia, whose per capita and total GHG emissions are the highest in the world.<sup>137</sup> APSISs, on the other hand, are the states that contribute the least to anthropogenic climate change.<sup>138</sup> To address the inequitable consequences resulting from this stark emissions disparity, an APSIS Convention must take an additional step beyond that of mirroring the pertinent human rights principles of the Refugee and Stateless Persons Conventions; it must also reflect the international environmental law principle of common but differentiated responsibilities (“CBDR”).

The principle of CBDR directly addresses emissions disparity and provides that “in view of the different contributions to global environmental degradation,” developed countries must “acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment.”<sup>139</sup> This responsibility necessarily includes remedying the extraterritorial consequences attributable to their industrial activities.<sup>140</sup>

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137. See Biermann and Boas, *supra* note 77, at 16.

138. See IPCC, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY, *supra* note 1, at 845.

139. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, principle 7, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [hereinafter *Rio Declaration*]; see also U.N. Framework Convention on Climate Change art. 3, para. 1, opened for signature May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC] (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”).

140. See United Nations Conference on the Human Environment, June 5–16, 1972, Stockholm, Swed., *Declaration of the United Nations Conference on the Human Environment*, principle 21, U.N. Doc. A/Conf.48/14/Rev. 1, available at <http://www.un-documents.net/aconf48-14r1.pdf> (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”); *Rio Declaration*, *supra* note 139, art. 7; UNFCCC, *supra* note 139 (“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”).

To address the inequitable impacts that anthropogenic climate change will impose upon APSISs and their citizens, an APSIS Convention must require party states to bear common but differentiated responsibilities in supporting displaced APSIS citizens in their efforts to resettle abroad. The principal way to accomplish this would be through the Convention's funding structure. An APSIS Convention should establish an APSIS Global Fund, which will provide financial support for APSIS resettlement and assistance programs. An international agency, one that is newly or already established, would then be responsible for carrying out such programs, similarly to how the UNHCR oversees refugee and stateless persons resettlement and assistance programs.<sup>141</sup> In addition, the Fund would provide financial assistance to APSIS ex-situ governments in order for them to assist with their dispersed citizens' resettlement efforts.<sup>142</sup> Critically, contributions by party states to the Fund would be based on state-specific GHG emission levels as well as other equitable and practical considerations such as a state's gross domestic product per capita.<sup>143</sup> Such a system of fair and efficient financial burden-sharing would satisfy the "polluter pays" principle<sup>144</sup> and "ability-to-pay" principle.<sup>145</sup>

An APSIS Convention with a mandatory funding scheme based on GHG emissions and gross domestic product per capita may seem

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141. See *Assistance*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646cd4.html> (last visited Mar. 14, 2014); *Stateless – UNHCR Actions*, U.N. HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/pages/49c3646c16a.html> (last accessed Mar. 14, 2014).

142. Cf. Biermann and Boas, *supra* note 77, at 30 ("[I]n the case of sea-level rise refugees, the Climate Refugee Protection and Resettlement Fund reimburses the full agreed incremental costs of developing-countries occurred in protecting and relocating these refugees (no matter from which country they came), taking into account that a large part of the financial transfer will be channeled through international relief agencies and that these agencies will then be entitled to reclaim their costs.").

143. See GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, CLIMATE CHANGE AS A SECURITY RISK 211 (Christopher Hay & Seeheim Juggenheim trans., Earthscan 2008) (outlining this funding structure for a novel environmental migration fund), *available at* [http://ccsl.iccip.net/wbgu\\_jg2007\\_engl.pdf](http://ccsl.iccip.net/wbgu_jg2007_engl.pdf).

144. The "polluter pays" principle establishes "that the costs of pollution should be borne by the [party] responsible for causing the pollution." PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 228 (Univ. Cambridge Press 2012).

145. See *id.* The "ability-to-pay" principle is rooted in the notion that "those who are more able to bear the cost should pay." Michael Howard, *Sharing the Burdens of Climate Change: Environmental Justice and Qualified Cosmopolitanism*, in ETHICS AND GLOBAL ENVIRONMENTAL POLICY: COSMOPOLITAN CONCEPTIONS OF CLIMATE CHANGE 108, 110 (Paul Harris ed., Edward Elgar Publishing 2011).

politically untenable since it could deter high emitting states from acceding to it. Governments of industrialized states currently deny that they have any legal liability toward victims of anthropogenic climate change.<sup>146</sup> Nonetheless, political pressure from APSISs, which is becoming increasingly vocal and united in the front against anthropogenic climate change,<sup>147</sup> together with other members of the international community, could encourage industrialized states to abide by their heightened responsibilities under the principle of CBDR and accordingly “support resettlement and ensure that displaced islanders are compensated, directly or indirectly, for any deterioration in their quality of life.”<sup>148</sup> In addition, many high emitting states already donate substantial sums to support human rights programs. For instance, in 2013 the United States government contributed \$1,041,707,225 to the UNCHR’s fund, the most of any state party to the Refugee Convention, while the Japanese government contributed \$252,939,102, the Australian government \$57,522,352, and the Chinese government \$1,475,014.<sup>149</sup> Thus, there is reason to believe that these states would do likewise for an APSIS Global Fund.

## V. CONCLUSION

Perhaps as early as 2050 APSISs could see their low-lying territories rendered uninhabitable by anthropogenic sea level rise. GHG emissions, to which developed states contribute most, APSISs the least, are at the root of this scenario, the result of which is a uniquely inequitable human rights issue. Currently, however, there are no international legal protections and aid available to APSIS citizens in the event of deterritorialization. The international community, therefore, cannot respond reactively to this problem. Instead, it must consider enacting an APSIS Convention as a proactive means to safeguard the human rights of displaced APSIS citizens.

Although the Refugee and Stateless Persons Conventions will not be open to displaced APSIS citizens, they nonetheless provide essential guidance as to how to formulate an effective APSIS Convention. An APSIS Convention should mirror three of the Refugee and Stateless

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146. See Biermann and Boas, *supra* note 77, at 16.

147. See *supra* notes 27–35.

148. Burkett, *supra* note 4, at 5.

149. U.N. High Comm’r for Refugees, *Contributions to UNHCR for Budget Year 2013 as at 31 December 2013*, <http://www.unhcr.org/51c991a79.html> (last modified Feb. 4, 2014).

Persons Conventions' fundamental human rights principles: the right to a nationality, the right of self-determination, and HLP rights. Because states of the international community will all have contributed to some degree to the forced displacement and extraterritorial resettlement of APSIS citizens, an APSIS Convention must further include the international environmental law principle of CBDR. An APSIS Global Fund, which will finance resettlement and assistance programs as well as provide monetary support to APSIS ex-situ governments and their displaced citizens in order to facilitate their resettlement efforts, would be the principal means to embody this principle, as funding requirements will be based on a party state's GHG emissions and economic strength.