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Recommended Citation

Kelley, Jeremy. "Climate Change and Small Island States: Adrift in a Raising Sea of Legal Uncertainty." *Sustainable Development Law & Policy* 11, no. 2 (2011): 56-57, 94-95.

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CLIMATE CHANGE AND SMALL ISLAND STATES:

ADRIFT IN A RAISING SEA OF LEGAL UNCERTAINTY

by *Jeremy Kelley**

In 1999, the rising sea level swallowed two islands of the nation Kiribati.¹ Rising sea level² is one of the effects of climate change to which small island nations are particularly susceptible.³ Considering that the average elevation of this nation of ninety thousand people on thirty-three islands and atolls⁴ is only about two meters above sea level,⁵ it is no surprise that Kiribati's President Anote Tong considers the rising sea a threat to the very existence of his nation.⁶ Taking a cue from a policy first announced by the Maldives, President Tong has suggested that the solution to his nation's disappearance could be purchasing land in another country to relocate the entire population of Kiribati.⁷ This unprecedented situation raises the question: what would be the legal status of an I-Kiribati or Maldives population on the run from the rising waters?

Estimates vary, but it is undisputed that current and future effects of climate change, including droughts, floods, desertification, and rising sea level, will displace millions each year.⁸ At least some displacement will occur across borders, especially when dealing with small islands nations.⁹ In spite of this potential for massive displacement, at present no international legal framework exists which will recognize and protect those displaced by environmental factors, even though the concepts of "environmental" and "climate" refugees have been contemplated since the 1980s.¹⁰

Two different approaches to the legal problems have been proposed. On one hand there have been voices calling for an expansion of the legal definition of "refugee" to incorporate environmentally displaced persons,¹¹ while others argue that a new and separate legal framework be created.¹² Island nations, while supportive of finding an international legal solution, are unwilling to wait for international consensus and are taking their own measures to avoid catastrophe.¹³

"Refugee" is a legal term, narrowly-defined by the 1951 UN Convention Relating to the Status of Refugees, protecting persons who fled their home country in fear of persecution for reasons of race, religion, political opinion, or ethnicity.¹⁴ In 2006, the Maldives proposed amending the Convention to include "climate refugee."¹⁵ Recently, the Bangladeshi Finance Minister called for "[t]he [C]onvention on refugees [to] be revised to protect [those displaced by climate change]."¹⁶ However, the UN High Commissioner for Refugees ("UNHCR") is concerned that the inclusion of environmental or climate refugee could potentially undermine the clarity of current standards.¹⁷ Further, UNHCR is already under pressure from host countries to reduce the burden of refugees¹⁸ and it is also concerned that renegotiation of the Convention could result in the lowering of existing protection standards.¹⁹



For these reasons, some argue that dealing with climate refugees calls for a new and independent legal framework.²⁰ Any new framework would need to draw upon widely agreed principles and connect the protection of those displaced with the broader international legal framework on climate change.²¹ The international instrument would also need to address the practicalities of enforcement and establishment of rights.²²

One proposed convention from the University of Limoges²³ recognizes different types of environmental displacement, protecting generally against "natural and technological disasters."²⁴ It calls for the creation of a monitoring agency akin to the UNHCR.²⁵ The convention would recognize the duty of the international community to assist a State that suffers from ecological disasters²⁶ and the right to "conserve the nationality of [the environmentally displaced person's] state of origin . . . and to acquire the nationality of the receiving state."²⁷ This last right is especially important for a nation such as Kiribati, where complete loss of territory could result in the destruction of its legal status as a nation.


Territory is one of the key elements of nationhood²⁸ and without physical territory under sovereign control, no nation can exist.²⁹ On the other hand, nationality is considered a fundamental right in international law.³⁰ How can this right be squared with permanent loss of sovereign territory and nationhood? It is unlikely that another nation would accept a cash payment to transfer the sovereignty of a part of its existing territory. Certainly, consideration would have to be made for those already settled upon the land.³¹ Without an existing legal framework,

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perhaps Kiribati and the Maldives are doing the right thing to proactively seek out alternatives.

Beyond purchasing land, one plan currently underway is to secure “merit-based relocation.”³² Island nationals would be trained in needed professions (e.g. nursing) in other countries, with the ability to stay and seek citizenship there.³³ In this way, pockets of I-Kiribati community would be built up worldwide, facilitating future resettlement.³⁴ Furthermore, with removal of much of the population, it would be possible to build up one island and use it to “anchor” the sovereignty of the nation in the event of drastic sea level rise.³⁵ However, even if the state continued to exist in legal terms³⁶ it is unclear how it would function.³⁷

The best choice may be for an island nation to be absorbed into another nation, using its own sovereignty to pay for relocation.³⁸ For example, in exchange for control of Kiribati’s sovereign territory, India could accept Kiribati’s population and provide resettlement assistance such as language training, vocational training, and financial aid.³⁹ An end to nationhood, incorporation and relocation of an island nation in exchange for the sovereign control of its resources and maritime zone would then benefit both parties.⁴⁰

The world will see an increase in environmentally displaced persons in the coming years. Room must be made for them with the creation of a new and separate legal framework.⁴¹ However, this will take time. In the meantime, small island nations are best served to take matters into their own hands. 

Endnotes: Climate Change and Small Island States

¹ Alex Kirby, *Islands Disappear Under Rising Seas*, BBC NEWS (June 14, 1999), <http://news.bbc.co.uk/2/hi/science/nature/368892.stm>.

² Compare INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 409 (2007) [hereinafter IPCC], <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-chapter5.pdf> (estimating sea level rise of 28-43 centimeters (11-17 inches) by 2100), with Richard Black, *Forecast for Big Sea Level Rise*, BBC NEWS (April 15, 2008), <http://news.bbc.co.uk/2/hi/7349236.stm> (noting that new research suggests the IPCC estimates may be too conservative and real sea level change could be closer to 150 centimeters (59 inches) by 2100).

³ IPCC, *supra* note 2, at 690-91, <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter16.pdf> (“Many small islands are highly vulnerable to the impacts of climate change and sea-level rise. They comprise small land masses surrounded by ocean, and are frequently located in regions prone to natural disasters, often of a hydrometeorological and/or geological nature. In tropical areas they host relatively large populations for the area they occupy, with high growth rates and densities. Many small islands have poorly developed infrastructure and limited natural, human and economic resources, and often small island populations are dependent on marine resources to meet their protein needs. Most of their economies are reliant on a limited resource base and are subject to external forces, such as changing terms of trade, economic liberalisation, and migration flows. Adaptive capacity to climate change is generally low, though traditionally there has been some resilience in the face of environmental change.”).

⁴ CIA, THE WORLD FACTBOOK 339 (2010).

⁵ Secretariat of the UN Permanent Forum on Indigenous Issues, N. Austl. Indigenous Land & Sea Mgmt. Alliance, *International Expert Group Meeting on Indigenous Peoples & Climate Change*, at 3, U.N. Doc. 2007/WS.3 (April 4, 2008) (“Kiribati almost entirely consists of low lying atolls with an average elevation below 2 meters (6.5ft). The small island of Tebua in Tarawa used to be a landmark for fishermen. It cannot be seen any more—it is now knee-deep under water! Kiribati suffers the effects of king tides that wash through the islands from one side to the other with great ease. It is now a common factor in Kiribati to have king tides with waves of 2.8 meters high!”).

⁶ Subramaniam Sharma, *Kiribati Islanders Seek Land to Buy as Rising Seas Threaten*, BLOOMBERG (Feb. 8, 2009), <http://www.bloomberg.com/apps/news?pid=21070001&sid=a0kuXMSiCBhg>.

⁷ *Id.*; see also Randeep Ramesh, *Paradise Almost Lost: Maldives Seek to Buy a New Homeland*, GUARDIAN (Nov. 10, 2008), <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change> (noting President Mohamed Nasheed statements that multiple nations are receptive of the idea of selling land to Maldives); IPCC, *supra* note 2, at 688-716 (detailing the adverse ways in which climate change will affect and possible render uninhabitable small islands).

⁸ See Christian Aid, *Human Tide: The Real Migration Crisis*, at 6, 48 n.10 (2007) (estimating displacement of 250 million “[b]ased on an updated figure calculated by Dr Norman Myers. In 1995, Dr Myers suggested that between 150 and 200 million people would have to permanently leave their homes because of climate change (Norman Myers & Jennifer Kant, The Climate Inst.,

Environmental Exodus: An Emergency Crisis in the Global Arena (1995)). This was quoted last year in the UK Government’s *Stern Review on the Economics of Climate Change*, which described the estimate as being based on ‘conservative assumptions’. Dr Myers now believes that the true figure will be closer to 250 million. Christian Aid interview, 14 March, 2007.”). *But see* OLI BROWN, INT’L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 12 (Ilse Pinto-Dober-nig ed., 2008) (analyzing different estimates, including that of Norman Myers, Brown concludes that “the simple fact is that nobody really knows with any certainty what climate change will mean for human population distribution. Current estimates range between 25 million and 1 billion people [displaced] by 2050.”).

⁹ See generally UN HIGH COMMISSIONER FOR REFUGEES, CLIMATE CHANGE, NATURAL DISASTERS AND HUMAN DISPLACEMENT: A UNHCR PERSPECTIVE 2 (2009) [hereinafter UNHCR], <http://www.unhcr.org/refworld/docid/4a8e4f8b2.html> (noting that most environmental displacement will occur domestically and those displaced in this manner should be afforded protection and rights under the UN Guiding Principles on Internal Displacement, however, some displacement will occur across borders and, as such, protection cannot be afforded under the Guiding Principles).

¹⁰ ESSAM EL HINNAWI, UNEP, ENVIRONMENTAL REFUGEES 4 (1985) (“Environmental refugees are defined as those people forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural or triggered by people) that jeopardizes their existence and/or seriously affected the quality of their life.”).

¹¹ See, e.g., Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, ENVIRONMENT, Nov.-Dec. 2008, <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>; Harriet Grant et al., *UK Should Open Borders to Climate Refugees, Says Bangladeshi Minister*, GUARDIAN (Dec. 4, 2009), <http://www.guardian.co.uk/environment/2009/nov/30/rich-west-climate-change>.

¹² See, e.g., Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 1 (2002); LAURA WESTRA, ENVIRONMENTAL JUSTICE & THE RIGHTS OF ECOLOGICAL REFUGEES (2009).

¹³ See, e.g., Sharma *supra* note 6; Ramesh *supra* note 7.

¹⁴ U.N. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 150. (“[Any person] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

¹⁵ Biermann & Boas, *supra* note 11, at n.1 (citing to Republic of the Maldives Ministry of Env’t, Energy & Water, *Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Aug. 14-15, 2006)).

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¹⁶ Grant et al., *supra* note 11 (“It’s been through other revisions, so this should be possible.”).

¹⁷ UNHCR, *supra* note 9, at 9.

¹⁸ NORMAN MYERS & JENNIFER KANT, CLIMATE INST., ENVIRONMENTAL EXODUS: AN EMERGENCY CRISIS IN THE GLOBAL ARENA 151-53 (1995), <http://www.climate.org/PDF/Environmental%20Exodus.pdf>.

¹⁹ UNHCR, *supra* note 9, at 9.

²⁰ Different theories for a proposed framework exist. One has proposed modeling it on the Convention Against Torture. See Zartner, *supra* note 12, at 21 (“By following the structure of the Convention Against Torture, a new Convention could be drafted addressing the specific issue of environmentally displaced persons . . . focus[ed] not only on protecting those individuals . . . but [would also] require specific obligations from State parties to prevent the root causes from occurring.”). Others have focused on the connections between ecological integrity and human rights. See WESTRA, *supra* note 12, at 182 (“[T]he issues of ecological refugees are primarily, though not exclusively, ecological issues – that is, unless the interface between human rights and ecological integrity is accepted, it will not be possible to design instruments that will truly address the problem, or even use existing instruments to the best advantage of present and future migrants.”).

²¹ Biermann & Boas, *supra* note 11 (stating five principles under which an agreement would operate: 1) the objective of planned and voluntary resettlement and reintegration; 2) treatment and classification as permanent immigrants; 3) tailored to the needs of entire groups, not individuals; 4) targeted less toward the protection of persons outside their states than toward the support of domestic agencies to protect people within their territories; and 5) that protection is a global problem and a global responsibility).

²² VIKRAM ODEDRA KOLMANNKOG, NORWEGIAN REFUGEE COUNCIL, FUTURE FLOODS OF REFUGEES 31 (2008), http://www.nrc.no/arch/_img/9268480.pdf. The NRC is an independent, humanitarian non-governmental organization, which

provides assistance, protection, and durable solutions to refugees and internally displaced persons worldwide.

²³ Michel Prieur, *Projet de Convention Relative au Statut International des Déplacés de l’Environnement*, 4 REVUE EUROPÉENNE DE DROIT DE L’ENVIRONNEMENT 381 (2008) (author’s translation).

²⁴ *Id.* pmb1. ¶ 2.

²⁵ *Id.* art. 11.

²⁶ *Id.* pmb1. ¶ 15.

²⁷ *Id.* art. 7(2).

²⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: STATES § 201 (1987); Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

²⁹ Island of Palmas (U.S./Neth.) 2 R.I.A.A. 831, 838 (Perm. Ct. Arb. 1928) (“[S]overeignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State . . . Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exist therein, to the exclusion of another State, the functions of a State.”).

³⁰ Organization of American States, American Convention on Human Rights, art. 20, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; see also Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No.4 (Jan. 19, 1984).

³¹ For example, problems would arise as to the rights of those already on the land. Would they be resettled themselves? Who would pay? Would they be offered Kiribati citizenship? What happens if they refuse to move?

³² Laurie Goering, *Kiribati Officials Plan for ‘Practical and Rational’ Exodus From Atolls*, THOMAS REUTERS FOUND. ALERTNET (Dec. 9, 2009), <http://www.trust.org/alertnet/news/kiribati-officials-plan-for-practical-and-rational-exodus-from-atolls>.

³³ *Id.* (“We are proud people. We would like to relocate on merit and with dignity.”).

³⁴ *Id.* (“The hope, [Kiribati’s Foreign Minister] said, is that the families of immigrants could eventually qualify for immigration as well.”).

³⁵ Although this raises a number of issues as to whether such an island would be considered an “artificial island” in the eyes of the UN Convention on the Law of the Seas and what that would mean in terms of sovereignty. *See* Francesca Galea, *Artificial Islands In The Law of the Sea* (May 2009) (unpublished Doctor of Law dissertation, University of Malta), http://seasteading.org/files/research/law/ARTIFICIAL_ISLANDS_-_01.09.09_mod.doc.pdf.

³⁶ A “permanent population” is also a required element of a state. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: STATES, *supra* note 28; Montevideo Convention, *supra* note 28. Can a permanent population be one that is scattered worldwide? How many people need be on this built up island to continue the legal existence of a state?

³⁷ For example, how would the government be administered in such a situation? *See* CLEO PASKAL, *GLOBAL WARRING: HOW ENVIRONMENTAL, ECONOMIC, AND POLITICAL CRISES WILL REDRAW THE WORLD MAP* 225 (2010) (suggesting such a government could be run like a corporation managing the national resources for the citizens in exile who would act like stock holders, or alternatively, like the administrative systems set up to manage the land claim settlements of North American First Nations in Canada).

³⁸ *Id.* at 235.

³⁹ *Id.* at 235-36.

⁴⁰ *Id.*

⁴¹ The first steps have been taken with the proposed Limoges Convention, *see* Prieur, *supra* note 23. This proposal outlines a starting point for the conversation on rights of those displaced and the obligations on the international community.