

The Unprecedented “Sinking Island” Phenomenon: The Legal Challenges on Statehood Caused by Rising Sea Level

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Now more than ever, the effects of climate change are well and truly under the microscope of the world. The low-lying “sinking island” states of the Pacific Ocean are perhaps the most vivid and dramatic examples of the intense effects climate change can have upon human civilisation. This article intends to delve into the international law surrounding what may happen to a state which ceases to exist due to climate change, which requires an in-depth look at the law involved in the creation and dissolution of states. Much of the discussion is theoretical and is anchored in the abstract, due to the unprecedented nature of this issue. The article’s primary focus is on what exactly makes a state, and what potentially viable options these “sinking islands” have, if they hope to retain their statehood, sovereignty and unique culture.

1. INTRODUCTION

Climate change is widely discussed and debated in a range of spheres: policy, science, social sciences, law, media and economics. All perspectives seem to approach our changing climate from different viewpoints. While the wide-ranging discussions across a number of forums can leave observers unsure of the actual effects of climate change, there is no doubt that climate change is

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causing the sea level to rise.¹ In fact, the trend of sea-level rise is proportional to changes in global warming.²

In recent years, the “sinking island paradigm” has emerged as one of the latest and perhaps most paradigmatic images of today’s post-modern global environmental crisis.³ Countries such as Kiribati, the Maldives and Tuvalu are facing the very real possibility of having their land rendered uninhabitable due to rising sea levels, which raises many interesting questions, both practically and legally.

Looking at climate change overall, governments, NGOs and the general public all have reason for concern, with the increase in severe weather events, as well as generally rising temperatures, highlighting the dangerous path we are on. While it is clear that climate change and the consequence of sea-level rise will create serious practical issues for those individuals who inhabit low-lying “Titanic states”,⁴ the submergence of these islands also raises a variety of complex legal issues. Indeed, these difficult questions will likely have to be addressed in the near future, as it has been suggested that by the end of this century a number of low-lying small island states will be completely uninhabitable due to sea-level rise.⁵ While this article intends to look at the international law surrounding what may happen to a state which ceases to exist due to climate change, this will inevitably lead into discussion about surrounding international legal principles of statehood.

Climate change and the resulting rising seas create an unusual and unique threat to the existing territory of low-lying island nations. It is predicted that climate change will affect many countries through desertification, extreme weather, flooding, and a range of other potentially devastating events. It follows that if climate change affects certain areas badly enough, the territory affected will be rendered unliveable, forcing mass migration of societies. The most extreme example of this is the “sinking island” countries, which will force many communities to seek a new life on an entirely different land mass. Although predictions vary on exactly how long some of these susceptible countries may

1 M Vermeer and S Rahmstorf “Global sea level linked to global temperature” (2009) 106(51) *Proceedings of the National Academy of Sciences* 21527.

2 P Nunn *Climate, Environment and Society in the Pacific During the Last Millennium* (Developments in Earth & Environmental Sciences, vol 6, Elsevier, Amsterdam, 2007) at 2–3.

3 AT Camprubi *Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff, Leiden, 2016) at 1.

4 J Barnett and J Campbell *Climate Change and Small Island States: Power, Knowledge and the South Pacific* (Earthscan, London, 2010) at 168.

5 Intergovernmental Panel on Climate Change *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (Cambridge University Press, Cambridge, 2007) at section 5.5.

have, it is clear that it will occur eventually. This raises questions as to the continued statehood of these countries, and what befalls their people.

The author acknowledges that a large percentage of civilisation could be displaced due to sea-level rise, especially those who inhabit coastal cities. Indeed, we are already seeing the effects of flooding in places such as Florida⁶ and Venice.⁷ However, the focus of this article is to examine the impact on small island states' statehood, which could disappear when the entire island's territory submerges, or becomes uninhabitable due to partial inundation.

2. STATEHOOD

Fundamental to the modern international legal framework is the concept of the state. States are both the subject and primary object of international law and possess ultimate rights of participation in both the creation of international law and in the construction and operation of the international legal system.⁸ Defining statehood is not always black and white. In the past, there have been many unsuitable attempts at outlining the term "state" within treaties. However, there is still no straightforward interpretation of state⁹ or statehood.¹⁰

In the 19th century the emergence of states was viewed alongside the constitutive theory which upholds recognition as a crucial element to establish statehood. According to this theory, an entity is called a state only when already existing and recognised states recognise the new state as such.¹¹

In the modern era, the Montevideo Convention on the Rights and Duties of States is generally viewed as the leading doctrine of state definition.¹² The

6 K Loria "Miami is racing against time to keep up with sea-level rise" (12 April 2018) Business Insider <<https://www.businessinsider.com/miami-floods-sea-level-rise-solutions-2018-4/?r=AU&IR=T>>.

7 S Maes "Venice Faces Its Worst Floods in 10 Years — and Climate Change Could Cause More" (31 October 2018) Global Citizen <<https://www.globalcitizen.org/en/content/venice-flood-climate-change/>>.

8 R Rayfuse and E Crawford *Climate Change, Sovereignty and Statehood* (Sydney Law School, Legal Studies Research Paper No 11/59, University of Sydney, 2012) at 2.

9 *Report of the International Law Commission on the work of its First Session* Supplement No 10 (A/925), UN Doc A/CN.4/13 (12 April 1949).

10 S Park *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States* (Legal and Protection Policy Research Series, UNHCR Doc PPLA/2011/04, May 2011).

11 M Gagain "Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the 'Constitution of the Oceans'" (2012) 23 *Colo J Int'l Envtl L & and Pol'y* 77 at 88.

12 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

classic formulation of statehood is contained in art 1 of the 1933 Convention, which is regarded as reflecting the current customary international law.

The four elements of statehood are: a defined territory; a permanent population; an effective government; and the capacity to enter into relations with other states.¹³ While all four criteria would seemingly need to exist for a state to come into existence, the lack of all four may not mean a state dissolves. Since the establishment of the United Nations Charter in 1945, there have been very few cases of the extinction of states, and a strong presumption exists on the continuity of existing states.¹⁴

Within this article, the key elements of each of the above criteria of statehood, which are highly relevant to the “sinking island” situation, will be briefly highlighted. It is important to note that, in reality, the criteria are not completely theoretical, and determining the existence of a state has been described as a “mixed question of law and fact”.¹⁵

2.1 Defined Territory

Setting the legal concepts aside, a defined territory would be seen by the majority of the public as the most obvious criterion for a country to exist. States are, of course, territorial entities,¹⁶ and the remaining conditions on the statehood checklist (permanent population, an effective government, and the capacity to enter into relations with other states) become increasingly difficult to fulfil without a defined territory for a government to govern over, or a population to exist in. It has been stated that the development of a state is closely linked to the ability to exercise effective control over a defined territory.¹⁷

In spite of this, it is of course correct to say that states can continue to function even when their governments operate from outside national territory,

13 J McAdam *Disappearing States, Statelessness and the Boundaries of International Law* (UNSW Law Research Paper No 2010-2, University of New South Wales, 2010) at 6.

14 O Schachter “State Succession: The Once and Future Law” (1993) 33 *Virginia Journal of International Law* 253.

15 H Waldock *General Course on Public International Law* (Librairie E Droz, Geneva, 1962) at 5–6 cited in J Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 717.

16 J Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 46.

17 A Zadeh “International Law and the Criteria for Statehood: The Sustainability of the Declaratory and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of States” (LLM Thesis, Tilburg University, The Netherlands, 2011) at 21.

such as has been seen with “governments in exile”,¹⁸ although this usually occurs in temporary or exceptional situations.¹⁹

As a side note, while “defined territory” is one criterion of statehood, and though territory ultimately may disappear as a result of rising sea levels, it is more probable that the other indicia of statehood — a permanent population, an effective government, and the capacity to enter into relations with other states — will have been challenged prior to this occurrence.²⁰ It is this author’s opinion that issues such as effective government or lack of population are likely to be the first criteria called into question, which will occur well before the entire country has “sunk” due to rising sea levels.

2.2 Permanent Population

States are not only territorial entities, but they also consist of groups of individuals. Therefore, a permanent population is another necessary requirement for statehood, and just as there is no minimum requirement for size of territory, there is also no minimum population requirement.²¹ The notion of a “permanent” population simply means that it cannot be transitory.²² For the purposes of this article, the material question is whether a state no longer meets this criterion when a large percentage, or all, of its population relocates to outside the state’s original territory.

It is also noteworthy that the international community has accepted that a population need not be restrictively defined in order to be considered permanent, nor does it need to be located in one designated place for any specific duration of time.²³ Therefore, when the territory reaches a point of partial inundation, there might be a period of time when the majority of the population are relocated and some members are “coming and going”, in essentially a nomadic state of occupation. Under international law, the population criterion will likely still be fulfilled at this time.

There is little academic discussion on the “population” criterion of the Montevideo Convention, simply because it is the least debatable. Unlike the question of whether or not a functioning government exists, which has much more grey area, and is therefore a harder requirement to establish.

18 See further discussion on “governments in exile” below in part 4.

19 D Bell and L Dennen “The System of Governments in Exile” (1944) 232 *Annals of the American Academy of Political and Social Science* 134.

20 McAdam, above n 13, at 4.

21 Zadeh, above n 17, at 22.

22 McAdam, above n 13, at 8.

23 P Epstein “Behind Closed Doors: ‘Autonomous Colonization’ in Post United Nations Era — The Case for Western Sahara” (2009) 15 *Ann Surv Int’l & Comp L* 107.

2.3 Exercise of Power and Right to Self-Determination

The existence of a permanent population on a given territory is in itself insufficient for statehood. The third requirement for statehood is the existence of a government capable of exercising independent and effective authority over the population and the territory.²⁴

While the Montevideo Convention technically outlines the third criterion for statehood as the state must have a government, it is recognised that the term “government” is too restrictive and that it must be understood as the “exercise of power”.²⁵ The importance that is attached to the criteria of exercise of power and independence is understandable considering the predominantly decentralised nature of international law. Since international law lacks a central executive body with the power to enforce compliance with international obligations, compliance with these obligations must often be guaranteed by the states themselves.²⁶ Obviously, for a country to operate effectively, it must be able to autonomously exercise its authority within its own borders.

This Montevideo criterion does not intend to be restrictive, and is obviously adaptive to the situation. In the context of the sinking island states, that adaptive capacity can be made good use of, since it is not probable its government will be able to function in the same way it exists today.

2.4 Capacity to Enter into Legal Relations

Although being a separate requirement of statehood, it is clear that the capacity to enter into legal relations with other states cannot arise unless the requirements of government and independence have been established. For this reason, capacity to enter into foreign relations is sometimes referred to as a consequence of rather than a criterion for statehood.²⁷

Essentially, it requires the government of the state in question to hold enough autonomy to enter into binding agreements, without being subject to the authority of another state. Independence is key to both exercise of power and entering into legal relations. The term “independence” does not just refer to an independent government upon establishment, but also the presumption of a state with a continuing autonomy, which is able to meet its international obligations.

Looking at the way in which this criterion affects the “sinking” states, it will be necessary for their governments to ensure there is limited interference

24 Zadeh, above n 17, at 23.

25 B Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 2006) at 184.

26 Zadeh, above n 17, at 23.

27 R Hajjaj *International Recognition Evolving Statehood Criterion: Comparative Analysis of Palestine and Kosovo* (Central European University, Budapest, 2012) at 8.

from other governments in their decision-making. This could be particularly difficult if they are being “hosted” by another country temporarily, or have become overly reliant on a neighbouring country.

3. WHEN DOES A STATE EXIST?

The law on the dissolution of states provides that states may be dissolved as a consequence of merger with another state, absorption into an existing state, annexation, or dismemberment of an existing state.²⁸ However, in the history of the UN, there have been almost no incidents of total extinction, either voluntary or involuntary, of a state. States have carried on, in some form or another, but almost none have ceased to exist in their entirety. Thus, the presumption under international law is towards continuance of some kind — either as part of another, pre-existing state, or an entirely new successor state.²⁹

A distinct body of law regarding the parameters of the continuance of states exists. It consists of the customary law on state succession, universally held as complex and frequently unsettled,³⁰ and the treaty rules on state succession, which include the Vienna Convention on Succession of States in Respect of Treaties³¹ and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.³²

While a significant proportion of this law is not directly related to this article’s current analysis of climate change and the challenge of extinction of a state, we can nonetheless draw some general principles and rules regarding state dissolution and succession from these instruments and from state practice. When looking at the process involved with a dissolving state, it is clear that there is an expectation for the dissolving state to arrange the exact contours of its obligations under treaty law, and fulfil its legal obligations in regard to property and debts. This ensures the successor state is aware of its new, and continuing, obligations. Therefore, it is clear that international law operates with a strong presumption towards the state enduring as a legal entity and, in some form, continuing its obligations under treaty law.³³

28 Crawford, above n 16, at 702.

29 K Marek *Identity and Continuity of States in Public International Law* (2nd ed, Librairie E Droz, Geneva, 1968).

30 M Craven “The Problem of State Succession and the Identity of States under International Law” (1998) 9 *Eur J Int’l L* 142.

31 Vienna Convention on Succession of States in Respect of Treaties 17 ILM 1488 (1978).

32 Vienna Convention on Succession of States in Respect of State Property, Debts and Archives 22 ILM 306 (1983).

33 Rayfuse and Crawford, above n 8, at 6.

However, in the context of the possible dissolution of a state due to climate change, the law on state succession can only provide guidance up to a point. The most pressing issue for states facing extinction due to climate change is arguably not the questions of treaty obligations and debts, but rather, the very existence of the state altogether. The law on state dissolution and succession, as it stands, is designed to deal with a state voluntarily changing its borders, changing its government, the extent of its territorial control, and reconstituting itself in an altered but still recognisable form. Central to this problem is that such reconstitution is always essentially within, or at least contiguous with, the territory in which the predecessor state originally existed.³⁴

That is to say, none of the states that have dealt with the process of dissolution were also confronted with the prospect of losing their territory entirely. For example, when the former Yugoslavia began to break up, Slovenia and Croatia reconstituted themselves within the boundaries of what had been “Yugoslavia”. They were not forced to arbitrarily choose some other part of Europe, or some other continent, to establish the new state.³⁵ In fact, there are a variety of academic explanations regarding state succession which centre on the presumption of an existing territory being transferred. For example, succession has been described as a “transfer of territory from one national community to another”.³⁶ This description clearly does not envision a “disappearing State”.

Unfortunately, total loss of territory caused by sea-level rise is the issue facing small island nations, and their territory will be non-existent in the near future. When total population displacement does occur, the nation in question will be forced to leave their territory indefinitely, with no realistic hope of return.

They have not chosen to dissolve their state, but they nonetheless have, of course, lost the fundamental Montevideo criteria, as there is no longer a permanent population living in a defined territory under effective control. Therefore, the question arises: can the country still be considered a sovereign state? If the territory was submerged, and the entire population relocated, would the state still exist in its previous form, in an “adapted” form, or has it simply vanished? These questions are central to international legal issues and statehood issues that are presented by the effects of climate change.

34 McAdam, above n 13, at 14.

35 P Smither “The Breakup of Yugoslavia, 1990–1992” (Milestones in the History of US Foreign Relations, Office of the Historian, 2008).

36 D O’Connell *State Succession in Municipal Law and International Law* (2nd ed, Cambridge University Press, Cambridge, 1967) at 12.

4. THE CHANGING WORLD DILEMMA — STATELESSNESS AND CLIMATE CHANGE

Can states still “exist” separate from their territory? The decision in the *Island of Palmas* arbitration would seem to answer in the negative.³⁷

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

However, the “sinking island” phenomenon presents a complication that suggests previous international law may not be applicable. In addition, despite the black-and-white definitive precedent outlined by the above decision, state practice does suggest that states can continue to exist separate from their territory. One such example of this is the use of “governments in exile”.

Looking briefly at the definition of a government in exile, if the government of a state has been forcibly displaced from its territory through belligerent occupation, the government in question is considered to remain the legitimate government and state, and thus retains its international personality, even though it does not have possession or jurisdictional control over either its population or its territory. Under international law, such exile must be accepted by the international community — that is, there should be no general acknowledgement of a change of circumstances. The government in exile must retain its accreditation with other governments and continue its representations in international organisations.³⁸

In light of this, it is possible to see how the Montevideo criteria do not have to be viewed as strict, and there is some necessary flexibility at times. Even so-called “failed states”, where all form of government and civil order seem to have disappeared, remain a state, even if only “on paper”.³⁹ Therefore, it is not hard to imagine a state that remains a state, even without fulfilling all the key Montevideo criteria, which is particularly relevant to nations who may be left with an uninhabitable territory.

It has been noted that “Territory is not necessary to statehood, at least after statehood has been established ... [it] appears to be the case that once an entity

37 *The Island of Palmas Arbitration (Netherlands v United States)* (1928) II RIAA 829 at 839 cited in Rayfuse and Crawford, above n 8, at 8.

38 Crawford, above n 16, at 691–692.

39 Rayfuse and Crawford, above n 8, at 9.

has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory.”⁴⁰

However, the above quote does stem from an instance where the territory has been *temporarily* lost, as opposed to the permanent devastation that is set to occur for the low-lying island nations affected by sea-level rise. Previous statehood-related disputes have occurred over boundaries, foreign occupation, or a temporary breakdown of governmental organisation. None of these situations deals adequately with the involuntary permanent removal of the population from its territory.

So, although there does exist some precedent on statehood issues, there is little guidance on total population displacement. Perhaps the most useful existing international law is the UN High Commissioner’s mandate, which includes information on the issue of internally displaced persons.⁴¹ However, this piece of law generally deals with “refugees”⁴² and also acts on the assumption that the refugees are relocating within their own country’s territory. It simply has to be accepted that the current situation affecting low-lying island nations is unprecedented, and suitable international instruments to address the complex legal positions of these countries are not available.

5. A KIRIBATI CASE STUDY — POTENTIAL PRACTICAL OPTIONS

The majority of the discussion within this article has been theoretical, with little discussion on practical options for the “sinking island” states. Choosing one such low-lying island nation to analyse (Kiribati), some practical options will be outlined that show a possible way forward for a nation facing a complex problem.

In this author’s opinion, there are two genuine alternative approaches. Both involve the relocation of Kiribati — which is not surprising as the existing territory will be uninhabitable. The suggestion that the entire populations of low-lying island states could be forced to move to other states due to the effects of rising sea levels is perhaps one of the most striking and well-known examples of the potential human impacts of climate change.⁴³

40 T Grant “Defining Statehood: The Montevideo Convention and its Discontents” (1999) 37 *Colum J Transnat’l L* 403 at 434.

41 C Phuong *The International Protection of Internally Displaced Persons* (Cambridge University Press, Cambridge, 2004).

42 The issue of whether those displaced by climate change are to be considered refugees is too wide for the ambit of this article.

43 Park, above n 10.

While two options will be outlined, this is clearly not an exhaustive list, and many academics have presented alternate options that this article will not touch on. However, based on research conducted in writing this article, and the author's opinion on the need to find a viable *long-term* solution for Kiribati, it is believed these approaches have a higher chance of success.

5.1 Population Relocation to Another Sovereign State

Kiribati's average height above sea level of just 2 metres (6.5 feet) leaves the country susceptible to sea-level rise.⁴⁴ There is general consensus that the territory of Kiribati as we know it will be uninhabitable in the near future. A potential solution is that the population is relocated to the territory of another sovereign state, and either integrated into the community as citizens of that new state, or else given a portion of territory within that second state, and given some degree of jurisdictional control over the territory.⁴⁵ The concept is not at all unrealistic, and in 2014 the government of Kiribati purchased 20 square kilometres on Vanua Levu, an island off the coast of Fiji, which is about 2000 kilometres away from Kiribati.⁴⁶

However, this clearly raises some complications in regard to the continuing existence of Kiribati as an independent state. They will also likely lose access to the marine resources within the territorial control of their existing land territory, and face significant financial issues in consequence. Indeed, many of the island nations derive the bulk of their national income from their location, such as the Maldives, which had 1.3 million tourists visit the island in 2017.⁴⁷ The economy of Kiribati depends heavily on remuneration from fishing licences, and the relocation of the entire population to a Fijian island most likely means they will no longer have access to similar marine resources, unless a suitable deal is able to be established with Fiji.⁴⁸

In spite of the complex nature of a sunken state "re-emerging" somewhere else, there does not appear to be any international legal precedent that prohibits a migrated state from taking shape by continuing its prior state identity in a new

44 D Gray "Tide of humanity, as well as rising seas, laps at Kiribati's future" (13 June 2013) Reuters <<https://www.reuters.com/article/us-kiribati-climate/tide-of-humanity-as-well-as-rising-seas-lap-at-kiribatis-future-idUSBRE95C04L20130613>>.

45 Rayfuse and Crawford, above n 8, at 10.

46 L Caramel "Besieged by the rising tides of climate change, Kiribati buys land in Fiji" *The Guardian* (online ed, London, 1 July 2014) <<https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>>.

47 M Nasheed "Maldives records 1.3 million tourists in 2017" *Maldives Times* (online ed, Maldives, 20 January 2018) <<https://maldivestimes.com/maldives-records-1-3-million-tourists-in-2017/>>.

48 F Taylor *Kiribati: Country Partnership Strategy* (Asian Development Bank, Mandaluyong, Philippines, 2010).

environment or by relinquishing its prior state identity and forming an entirely new state altogether.⁴⁹

Theoretically, Kiribati could establish its statehood on a plot of land purchased or voluntarily given to Kiribati by the state currently governing that territory.⁵⁰ Therefore, using the land that Kiribati has purchased from Fiji, Kiribati could continue to exist as a state via a multilateral treaty, similar to the former creation of territorial regimes in peace treaties. As long as non-parties are not affected by this agreement, there is no reason this arrangement cannot go ahead.⁵¹

While this is an enticing option for Kiribati, it needs to be taken into account that it will be difficult to find a state willing to sacrifice some of its territory without benefiting greatly themselves. Although Kiribati has purchased land in Fiji, at this stage the transaction is purely financial, and many more steps need to be taken both politically and legally before progress can be made on the statehood front.

Assuming Fiji, or any other nation, is not open to the option of providing land to the Kiribatians, there is the option of territory being provided to an island state with the attached sovereign powers remaining with the hosting state. This concept has been seen before in international law, with Australia offering the people of Nauru the option to settle on an Australian island.⁵²

The issue with this path is that it becomes increasingly difficult for the relocating state to envisage a future where they merge with another jurisdiction while still ensuring their own personalised culture is not tainted. Ultimately, this is why Nauru declined the offer, and continues to exist as their own entirely independent state.⁵³

Theoretically, it would be possible for one state to “lease” territory from another, although one might query the extent to which power could then be freely exercised sufficiently to meet the other requirements of statehood in such a case: while a state might be afforded jurisdiction over that territory, it would not be unencumbered by the “landlord” state’s territorial jurisdiction unless expressly obtained from the previous sovereign.⁵⁴ However, this approach also

49 H Schoukens *The Legal Position of Inhabited Islands Submerging due to Sea Level Rise* (Universiteit Gent, Belgium, 2014).

50 D Wei, R Dawes and I Maxwell “Receding Maritime Zones, Uninhabitable States and Climate Exiles: How International Law Must Adapt to Climate Change” (Unpublished Paper for Field, vol 9, 2011) at 5.

51 Crawford, above n 16, at 505.

52 International Court of Justice *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Memorial of the Republic of Nauru, vol 1 (April 1990).

53 W Kalin “The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework” (2011) 22 *Colo J Int’l Env’tl L & Pol’y* 375 at 392.

54 R Higgins *The Development of International Law* (Oxford University Press, London, 1963) at 24.

brings with it a range of complex issues, and the lack of guarantees for the indefinite inhabitancy of the lessee would mean Kiribati's future would always hang in the balance, with the host state holding all control.

While the option of relocating to another sovereign state may be viable, there is no certain solution available to any one country. The government of the Marshall Islands has decided to follow Kiribati's example and has purchased land within other jurisdictions. Others, such as Tuvalu, refuse to entertain the idea of leaving their land. In either case, the radical decision by the former President Tong of Kiribati highlights the dilemma of these low-lying nations.⁵⁵

5.2 Relocate Population to Artificially Created Island

There is also the possibility of relocating the population of Kiribati to an artificially created island. The technology available has developed to a level where this is not an unreasonable suggestion. For instance, we merely need to look at "The Pearl" in Qatar, or "The World" in Dubai for examples of artificial islands that sustain human life.

Kiribati has entertained this idea already, and has turned to the United Arab Emirates (UAE) for advice on building artificial islands in an effort to save the low-lying Pacific nation from rising sea levels.⁵⁶ The country's previous President Aote Tong stated that, despite global commitments on reducing carbon emissions, "the science continues to indicate that we will continue to go under water within the century".⁵⁷

Relocating the majority or all of Kiribati's population may allow the country to retain its statehood and exclusive economic zone, including the natural resources present around the island, although this will require some flexibility from existing marine international law. Under the United Nations Convention on the Law of the Sea, artificial islands are not able to have their own territorial waters or exclusive economic zones.⁵⁸ If artificial constructions are within 200 nautical miles of a coastal state, that state exercises jurisdiction.⁵⁹ In addition, the coastal state is the only entity entitled to authorise the construction of such artificial islands.⁶⁰ Due to the unprecedented situation, there is no clear guiding

55 Caramel, above n 46.

56 "Kiribati looks to artificial islands to save nation from rising sea levels" (17 February 2016) ABC News <<https://www.abc.net.au/news/2016-02-17/artificial-islands-perhaps-the-only-option-to-save-kiribati/7175688>>.

57 "Kiribati looks to artificial islands to save nation from rising sea levels", above n 56.

58 United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994), art 2.

59 Article 56.

60 Article 60.

authority as to what would occur if Kiribati constructed artificial islands, and their original territory later became submerged.

The proposal of an artificial territory is a “solution” which could work practically, but would need to be accompanied with a legal response as well — one which ensured the continuance of the rights of the state thus reconstituted.⁶¹ While the concept might sound like science fiction to some, Kiribati is currently in a dire situation, and its problems are highly likely to worsen, and an artificial island can be a feasible solution to accommodate the residents of Kiribati in their home island. Its construction and repopulation would require a large leap of faith by both international financiers and the inhabitants themselves, but it has the potential to provide a range of economic, social and environmental benefits both for the population and for the country.⁶²

At the very least, if relocating the entire population is not feasible, the “artificial” option may simply provide some sort of sentimental recognition of the land that once was. There has been a proposal to build a lighthouse or another construction on the island that will remain above seawater like a sort of sovereignty marker, as has been seen in other situations where countries are disputing the ownership of specific land.⁶³

It is crucial for Kiribati to explore adaption strategies beyond migration, and the country’s government has recognised that building islands may be one such solution.⁶⁴ It is clear that the problems caused by rising sea levels are extremely difficult to combat, and all potentially viable options need to be explored.

5.3 Overview of the Above-Proposed Options Available to Kiribati

The issues of statehood involved with Kiribati’s dilemma go far beyond simply attaining land and shifting their population to a new destination. Those who move to a new territory need to know that they can remain and re-enter the new country, enjoy work rights and health rights there, have access to social security if necessary, and be able to maintain their culture and traditions.⁶⁵

Whether Kiribati looks to move the population to the acquired Fijian land, or invests in artificial islands, the ownership of land alone does not resolve the wide variety of international legal issues, immigration and citizenship rights,

61 Schoukens, above n 49, at 37.

62 N Lister and E Muk-Pavic “Sustainable Artificial Island Concept for the Republic of Kiribati” (2015) 98 *Ocean Engineering* 78.

63 *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) Permanent Court of International Justice Series A/B No 53 at 96.

64 “Kiribati looks to artificial islands to save nation from rising sea levels”, above n 56.

65 *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* UN Doc A/HCR/10/61 (15 January 2009) at 17–18.

or general human rights issues that may be present. Overall, it will lie with the outside international community to aid Kiribati, and adjust to the unusual situation of a country being given no option but to abandon their existing territory in response to climate change.⁶⁶

This may take the form of a series of sui generis treaties with the “new” states re-created due to climate change, in which the international community recognises their enduring statehood, despite their altered circumstances.⁶⁷ State practice does tend to suggest that there is likely to be a presumption of a state’s continuity for some time, even as the legal indicia of statehood begin to wane.⁶⁸ Whatever practical solution is settled on for Kiribati, the optimistic viewpoint is that it should be possible for the state to continue to act as an independent state, just in slightly altered physical form.⁶⁹

6. CONCLUSION

While the task of successfully navigating the legal and practical minefield of challenges presented may seem daunting to the “sinking island” states, there remains hope. In the author’s opinion, the biggest obstacle presented to the governments in question is in the relocation of their people, as clear protection gaps currently exist for those individuals facing displacement in the near future.⁷⁰ While the human component of the problem of disappearing island states is the most pressing one, regrettably, this is also where international law remains the most underdeveloped.⁷¹

Looking solely at the issue of statehood, the Montevideo Convention exposes the limitations of international law when it comes to statehood. However, there also appears to be room for flexibility, which will likely be required in order to ensure the statehood of the disappearing states is not drastically affected. Indeed, as recalled by the International Court of Justice in the 1949 Reparations case, “[t]hroughout its history, the development of international law has been influenced by the requirements of international life”.⁷² This article has attempted to show that while the regulations of statehood

66 Schoukens, above n 49, at 45.

67 Rayfuse and Crawford, above n 8, at 13.

68 McAdam, above n 13, at 21.

69 Rayfuse and Crawford, above n 8, at 11.

70 M Hill “Closing the Gap: Towards Rights-Based Protection for Climate-Induced Displacement in Low-Lying Small Island States” (2016) 20 NZJEL 43.

71 JG Stoutenburg *Disappearing Island States in International Law* (Brill Nijhoff, Leiden, 2015) at 445.

72 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 178.

may appear to be stringent at first, they are in fact malleable on occasion. Essentially, what might be required is some “stretching of the existing rules to apply to this unprecedented situation”.⁷³ Such a task invites the suggestion that new ways to represent the correlation between the physical world and the legal construct, other than by statehood, may have to be taken into consideration.⁷⁴ It is becoming clear to the global community that if we do not adapt our existing international laws to our changing environment, it will result in unjust outcomes for small island states, as it would strip their people of a whole set of rights, entitlements and the very identity they have every right to.⁷⁵

It is fair to say the law prefers certainties. However, a recurrent element in nearly all debate about climate change is uncertainty.⁷⁶ While there does not exist a simple legal solution to the “sinking island” problem, it is important to be aware that the international legal framework has the ability to adapt to unusual circumstances and has done so successfully in the past. It is clear that the negative living standard implications for the populations of these low-lying states could be devastating if not handled correctly. It is crucial that the international community does not turn its back on these vulnerable nations, and endeavours to remain active in their assistance, to ensure that the countries affected are given every opportunity to maintain a level of sovereignty and statehood.

73 Stoutenburg, above n 71, at 446.

74 Camprubi, above n 3, at 277.

75 R Witney “The Atlantis of the Modern World? The Legal Implications of Sea Level Rise for the Statehood of Small Island States” (2016) 20 NZJEL 77.

76 Rayfuse and Crawford, above n 8, at 13.