

Washington Journal of Environmental Law & Policy

Volume 4 | Issue 1

7-1-2014

Climate Change: Disappearing States, Migration, and Challenges for International Law

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Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. J. ENVTL. L. & POL'Y 1 (2014).

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CLIMATE CHANGE: DISAPPEARING STATES, MIGRATION, AND CHALLENGES FOR INTERNATIONAL LAW*

Sumudu Atapattu **

*“There is now little doubt that humans will be forced to adapt to the impacts of a warming world. There is also little doubt that the poorest people in the poorest countries will bear most of the burden of adapting to climate consequences they had almost no role in creating. As the United Nations Development Programme (UNDP) has explained, “[i]n the Netherlands, people are investing in homes that can float on water. The Swiss Alpine ski industry is investing in artificial snow-making machines,” but “[i]n the Horn of Africa, ‘adaptation’ means that women and young girls walk further to collect water....”*¹

-Margaux J. Hall & David C. Wiess

ABSTRACT: This Article discusses two inter-related issues: the legal implications of climate-induced migration and the phenomenon of ‘disappearing states’ through the lens of four case studies, Kivalina, Inuit, the Maldives, and Tuvalu. As early as 1990, the Intergovernmental Panel on Climate Change (IPCC) recognized that the greatest single impact of climate change may be on human migration. With sea level rise, Small Island States face the prospect of losing their territory. The Article discusses the challenges that these two issues pose for international law.

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* The author prepared the original version of this article for the University of Wisconsin Law School workshop on “Adapting to Climate Change: Devising a Novel Legal Framework for Climate Migration,” November 9–10, 2012. She presented it at the LSA Annual Meeting, May 2013, Boston, MA and at the University of Washington Journal of Environmental Law & Policy Symposium: “Climate-Migration, Local Conditions and Law: Food Security, Land Tenure and Gender Symposium,” February 8, 2014. The article has been revised for publication.

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1. Margeaux J. Hall & David C. Wiess, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT’L L. 309 (2012).

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I. INTRODUCTION

Climate change poses unprecedented challenges for the international community and international law. There is scientific consensus that climate change is unequivocal and the human contribution to climate change is also firmly established.² The consequences of climate change are far reaching and will affect every state in the global community, whether rich or poor, big or small, strong or weak. Yet, it is no secret that some states and communities will experience the adverse effects of climate change more than others. Specifically, Small Island States,³ low-lying cities, and poor and indigenous communities would suffer more than others. The legal response to date has focused primarily on mitigation.⁴ However, in this generation and the next, adaptation will play a bigger role than mitigation as the greenhouse gases that are already present in the atmosphere will continue to cause adverse consequences.⁵ Many forms of adaptation exist, and people have adapted to harsh environmental conditions for centuries. One form of

2. Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in *Climate Change 2013: The Physical Basis* (T.F. Stocker et al. eds., 2013) (hereinafter IPCC) *available at*: http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf.

3. The Small Island Developing States (SIDS) emerged as a loose coalition during the UN Conference on Environment and Development in 1992. *About SIDS*, UN CONFERENCE ON SMALL ISLAND DEVELOPING STATES, <http://www.sidsnet.org/about-sids> (last visited June 6, 2014). They formed themselves into the Alliance of Small Island States (AOSIS) mainly to lobby in relation to climate change. <http://aosis.org/> (last visited June 6, 2014).

4. See U.N. Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107; Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 (hereinafter UNFCCC).

5. IPCC, *supra* note 2, at 27; Hall & Wiess *supra* note 1.

adaptation, albeit extreme, is migration.⁶ It may provide the only option for Small Island States, which are facing inundation caused by sea level rise.

The Intergovernmental Panel on Climate Change (IPCC) recognized, as early as 1990, that human migration could be the greatest single impact of climate change.⁷ Normally, people rarely migrate solely for environmental reasons, but in the event of inundation caused by climate change induced sea level rise, migration (or planned relocation) may be the only option available to the inhabitants of Small Island States.

This Article discusses the phenomenon of “disappearing states,” climate migration, and the challenges they pose for international law through the lens of four case studies: Kivalina, the Inuit, the Maldives, and Tuvalu. Kivalina is a small village in Alaska. The Inuit are an indigenous group that spans several countries of the Arctic. Both of these communities are situated in the Global North. The Maldives and Tuvalu are Small Island Developing States. Both Kivalina and the Inuit resorted to legal action to seek relief for damage associated with climate change,⁸ while Tuvalu has threatened legal action.⁹ In contrast, the Maldives has taken a policy approach and lobbied its cause at the U.N.¹⁰ These communities and countries were selected to show the indiscriminate nature of climate change and the geographical range of its impacts; whole nation states as well as vulnerable communities in both developing and developed countries would

6. Some argue that people resort to migration when other forms of adaptation have failed. See, e.g., JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012); see also R. McLeman & B. Smit, *Migration as an Adaptation to Climate Change*, 76 CLIMATIC CHANGE 31 (2006).

7. See generally Intergovernmental Panel on Climate Change, *Summary for Policymakers*, in Climate Change: The IPCC Impacts Assessment 3 (W.J. McG. Tegart et al. eds., 1990) available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>.

8. Michelle Kaminsky, *Island Nations May Sue US over Climate Change*, LEGALZOOM, <https://www.legalzoom.com/lawsuits-settlements/more-litigation/island-nations-may-sue-us> (last visited May 19, 2014); Kalinga Seneviratne, *Tiny Tuvalu Steps up Threat to Sue Australia, U.S.*, INTER PRESS SERVICE, Sept. 5, 2002, <http://www.ipsnews.net/2002/09/environment-tiny-tuvalu-steps-up-threat-to-sue-australia-us/>.

9. *Id.*

10. See *Maldives: Climate Change Actions*, MALDIVES EMBASSY TO BELGIUM AND MISSION TO THE EUROPEAN UNION, <http://www.maldivesmission.eu/topics/climate-change>.

be affected. This Article does not intend to underestimate the severe impacts of climate change in other parts of the world or on other vulnerable communities.

II. CASE STUDIES

A. *Case Study One: Kivalina*

The village of Kivalina, Alaska, with its 400 residents, is located on the tip of a low-lying barrier island on the Chukchi Sea, approximately eighty miles north of the Arctic Circle.¹¹ The residents are primarily Inupiat Eskimo and the village has a maximum elevation of ten feet above sea level.¹² “According to the United States Army Corps of Engineers (USACE), environmental changes associated with global warming have exacerbated flooding and erosion threats to Kivalina.”¹³ In 2006 the USACE concluded that the situation in Kivalina was “dire” and the entire town must be relocated and estimated that it would cost between \$123–249 million.¹⁴

In 2008, Kivalina filed a lawsuit in the United States District Court for the Northern District of California against twenty oil, coal, and electric utility corporations, arguing that these corporations bear responsibility for the adverse effects experienced by Kivalina’s residents as a result of the large quantities of carbon dioxide these corporations emit.¹⁵ Kivalina alleged a public nuisance claim under federal common law as well as private and public nuisance claims under California law. They also alleged the defendants committed a civil conspiracy by knowingly misleading the public about the science of global warming. Specifically, they alleged that the defendants’ individual and collective greenhouse gas emissions contribute to global warming, and were substantially interfering with the plaintiffs’ public rights to use and enjoy public and private property. Because the injuries are

11. Dustin Till, *Threatened by Rising Seas, Native Village Seeks Lifeline in Federal District Court*, MARTEN LAW. (Mar. 26, 2008), available at <http://www.martenlaw.com/newsletter/20080326-village-seeks-lifeline>.

12. *Id.*

13. *Id.*

14. *Id.*

15. Petition at 45, *Kivalina v. ExxonMobil*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-1138).

indivisible, the plaintiffs requested that the court find the defendants jointly and severally liable for the damages resulting from public nuisance, conspiracy, and concerted action.¹⁶ The plaintiff's argued that:

While the global warming to which defendants contribute injures the public at large, Kivalina suffers special injuries, different in degree and kind from injuries to the general public. Rising temperatures caused by global warming have affected the thickness, extent[,] and duration of sea ice that forms along Kivalina's coast. Loss of sea ice, particularly land-fast sea ice, leaves Kivalina's coast more vulnerable to waves, storm surges[,] and erosion. Storms now routinely batter Kivalina and are destroying its property to the point that those living on Kivalina must relocate or face extermination.¹⁷

Ultimately the district court dismissed the case on several grounds, which included the political question doctrine and lack of standing.¹⁸

On appeal, the United States Court of Appeals for the Ninth Circuit held that federal common law of nuisance has been displaced by the Clean Air Act and that if a cause of action is displaced, it also displaces all remedies.¹⁹ It noted that "the Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has, therefore, displaced federal common law."²⁰ It further noted that the fact that the damage occurred before the EPA acted to establish greenhouse gas standards does not alter the analysis and concluded that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. The court was, however, mindful of Kivalina's perilous situation:

Our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstances must rest in

16. *Id.*

17. *Id.*

18. *Kivalina v. ExxonMobil*, 663 F. Supp. 2d 863 (N.D.Cal. 2009).

19. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849, 858 (9th Cir. 2012).

20. *Id.* at 856.

the hands of the legislative and executive branches of our government, not the federal common law.²¹

Judge Pro, concurred, noting that once federal common law is displaced, state nuisance law becomes available unless it is preempted by federal law. Thus, Kivalina could pursue any remedies under state law to the extent they are not preempted. Judge Pro further noted that Kivalina had not met the burden of proof in this case, i.e. tracing their injuries to the Appellees.²² The judge pointed out that Kivalina itself has acknowledged that there are many thousand emitters worldwide and the greenhouse gases have been emitted for over hundreds of years. Yet, seeking to hold these particular defendants solely responsible may not be equitable:

It is one thing to hold that a State has standing to pursue a statutory procedural right granted to it by Congress in the CAA to challenge the EPA's failure to regulate greenhouse gas emissions which incrementally may contribute to future global warming. . . . It is quite another to hold that a private party has standing to pick and choose amongst all the greenhouse gas emitters throughout history to hold liable to millions of dollars in damage.²³

The inhabitants of Kivalina are currently waiting to be relocated.²⁴ Their condition is dire, but because there are plans to relocate them eventually, no effort has been made to allocate money to improve their current living conditions.²⁵ For example, the inhabitants lack safe drinking water and sanitation and continue to suffer from something they did not contribute to.²⁶ One may well ask, is this just?

21. *Id.* at 858; see also Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 NYU REV. L. & SOC. CHANGE 357 (2011).

22. *Kivalina*, 696 F.3d at 869.

23. *Id.*

24. According to historic records, reference has been made to the need to relocate Kivalina as far back as 1905. Joshua Griffin, Presentation University of Washington Journal of Environmental Law & Policy Symposium: Climate-Migration, Local Conditions and Law: Food Security, Land Tenure and Gender Symposium (Feb.8, 2014).

25. *Id.*

26. *Id.*

B. *Case Study Two: The Inuit*

The Inuit are a linguistic and cultural group inhabiting the Arctic region in four countries: Russia, United States, Canada, and Greenland.²⁷ They share a common culture characterized by subsistence harvesting of food, travel on snow and ice, and traditional knowledge of and adaptation to Arctic conditions. Unfortunately, the consequences of climate change, which are more pronounced in the Polar Regions than anywhere else in the world, threaten their traditional way of life.²⁸ These threats include: (a) thinner sea ice, later freezes, and earlier and more sudden thaws; (b) unreliability of traditional knowledge regarding safety of sea ice; (c) changes in snowfall patterns; (d) melting of permafrost at an alarming rate; (e) loss of sea ice, resulting in increasingly violent storms hitting the coastline; (f) changes in precipitation and temperature resulting in sudden spring thaws that release large amounts of water leading to floods; and (g) weather becoming increasingly unpredictable.²⁹ Moreover, increased temperatures and sun intensity have heightened the risk of previously rare health problems such as skin cancer, sunburns, and cataracts. Game animals' habits are changing and they are moving to new locations, which pose travel problems for the Inuit people.³⁰

In its 2005 petition to the Inter-American Commission of Human Rights, the Inuit Circumpolar Conference pointed out that although the US is the largest contributor to greenhouse gas emissions in the world,³¹ it has repeatedly declined to take measures to reduce its emissions.³² Increased greenhouse gas concentrations due to human activity have contributed to the

27. See *Beginning of the Inuit Circumpolar Conference*, <http://inuitcircumpolar.com/section.php?ID=15> (last visited May 19, 2014).

28. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States at 33, available at: <http://inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>. [hereinafter Inuit Petition]

29. These impacts are documented in great detail in their petition to the Inter-American Commission on Human Rights filed against the United States in 2005. *Id.*

30. *Id.*

31. Since then China has overtaken the United States as the largest emitter. See *China Overtakes U.S. in Greenhouse Gas Emissions*, NEW YORK TIMES (June 20, 2007) <http://www.nytimes.com/2007/06/20/business/worldbusiness/20iht-emit.1.6227564.html>.

32. See Inuit Petition, *supra* note 28.

changes in global temperatures. These increased temperatures have resulted in the impacts described above which, in turn, have led to the violation of several of the Inuit's human rights: right to life, health, culture, physical integrity, security, means of subsistence, right to choose one's residence, freedom of movement, and inviolability of the home. Thus, the Conference argued that the United States is in violation of human rights and environmental obligations. It requested that the Commission make an onsite visit to investigate the harms suffered by the Inuit; hold a hearing; prepare a report declaring the United States bears internationally responsibility for violations of rights affirmed by the American Declaration of the Rights and Duties of Man³³ and other international law instruments; recommend that the United States adopt mandatory measures limiting its greenhouse gas emissions; establish and implement, in coordination with the petitioners, a plan to protect Inuit culture and resources as well as a plan for Inuits to better adapt to the impacts of climate change; and provide any other relief that the Commission considers appropriate and just. The Commission declined to hear the petition, but did hold a hearing on climate change and human rights.³⁴

The Kivalina and Inuit cases demonstrate the pitfalls of using litigation to seek relief for damage caused by climate change. Causation, multiple emitters, multiple sources, standing, remedies, and even causes of action are some of the obstacles these petitioners have to overcome.³⁵ On the other hand, even if such cases fail to bring relief to the petitioners, they may have a broader impact—such litigation gives a human face to the problem; it brings home the fact that climate change is already taking place and people are already suffering. Such legal efforts also bring attention to the problem and may even influence international negotiations and diplomacy.³⁶

33. Organization of American States [OAS], Charter of the Organization of American States art. 3(l), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

34. See *Inter-American Commission on Human Rights to Hold Hearing on Global Warming*, EARTHJUSTICE (Feb. 6, 2007) <http://earthjustice.org/news/press/2007/inter-american-commission-on-human-rights-to-hold-hearing-on-global-warming>.

35. See RICHARD LORD ET AL., CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 23–49 (Ben Boer et al. eds., 2012).

36. See David Hunter, “The Implications of Climate Change Litigation for

C. Case Study Three: The Maldives

In its submission to the Office of the U.N. High Commissioner for Human Rights, the Maldives contended that as a Small Island State, it is especially vulnerable to the impacts of climate change.³⁷ Some of these impacts were identified as sea level rise causing permanent inundation and flooding; increases in sea and surface temperatures causing changes to island and marine ecosystems; increases in intensity of extreme weather events; changes in precipitation, which can exacerbate the effects of sea-level rise; increases in sea temperature causing damage to coral reefs and other aquatic life; increased salinity; destruction of rainwater storage tanks and sanitation systems; displacement of people; and transmission of diseases.³⁸

Stressing that many of their protected rights could be violated as a result of climate change, the Maldives articulated that the international community faces a dual challenge: to ensure that the multilateral climate change negotiations discuss human rights considerations and that the international human rights discourse incorporates climate change considerations.³⁹

The Republic of Maldives proclaimed in its National Adaptation Program of Action (NAPA)⁴⁰ that over eighty percent of its total land area is less than one meter above the sea level, and forty-four percent of the population lives within 100 meters of the coastline. Consequently, “the small size, extremely low elevation[,] and unconsolidated nature of the

International Environmental Law-Making” in *Adjudicating Climate Change: State, National, and International Approaches* 357 (William Burns & Hari Osofsky eds., 2009).

37. Submission of the Maldives to the Office of the U.N. High Commissioner for Human Rights under Human Rights Council Re. 7/23 (Sept. 25, 2008), *available at* http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf.

38. *Id.*

39. *Id.*

40. According to the UNFCCC website, “National adaptation programmes of action (NAPAs) provide a process for Least Developed Countries (LDCs) to identify priority activities that respond to their **urgent** and **immediate** needs to adapt to climate change – those for which further delay would increase vulnerability and/or costs at a later stage.” *National Adaptation Programmes of Action*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/national_reports/napa/items/2719.php (last visited June 11, 2014).

coral islands place the people and their livelihoods at very high risk from climate change, particularly sea level rise.”⁴¹ The Program states:

The scarcity of land in the Maldives, the smallness of the islands and extreme low elevation makes retreating inland or to higher grounds impossible. Building setback has limited utility and beach replenishment may only be a temporary remedy for beach loss. Unless expensive coastal protection measures are undertaken the human settlements face the threat of inundation.⁴²

The NAPA also acknowledges that human pressures such as population increase and human intervention including land reclamation are aggravating the problem. While the NAPA deals with diverse issues (e.g. tourism, fisheries, water resources, food security, human health, and flood protection),⁴³ it fails to address the issue of relocation en masse, despite the fact that the Prime Minister of the Maldives had on several occasions referred to the need to buy land to relocate its people.⁴⁴ In 2009, he even held an underwater cabinet meeting to draw attention to the issue of climate change.⁴⁵

D. *Case Study Four: Tuvalu*

In his address to the U.N. General Assembly in September 2003, the Prime Minister of Tuvalu, Saufatu Sopoanga, stated: “We live in constant fear of the adverse impacts of climate change. For a coral atoll nation, sea level rise and more severe weather events loom as a growing threat to our entire population. The threat is real and serious, and is of no

41. National Adaptation Program of Action, Republic of Maldives (2007), 19, available at <http://unfccc.int/resource/docs/napa/mdv01.pdf>.

42. *Id.* at 22.

43. *Id.*

44. James Burgess, *Maldives Buying Land in Australia as Preparation for Mass Migration*, OILPRICE (Jan. 10, 2012, 10:43 PM) <http://oilprice.com/Latest-Energy-News/World-News/Maldives-Buying-Land-In-Australia-As-Preparation-For-Mass-Migration.html>; *Sinking Island's Nationals Seek New Home*, CNN.COM ASIA, (Nov. 11, 2008, 1:53 AM) <http://edition.cnn.com/2008/WORLD/asiapcf/11/11/maldives.president/>.

45. *See Maldives Government Highlights the Impact of Climate Change . . . by Meeting Underwater*, MAILONLINE (Oct. 20, 2009, 8:44 AM) <http://www.dailymail.co.uk/news/article-1221021/Maldives-underwater-cabinet-meeting-held-highlight-impact-climate-change.html>.

difference to a slow and insidious form of terrorism against us.”⁴⁶

Tuvalu, formerly known as the Ellice Islands, is a Polynesian island nation located in the Pacific Ocean, midway between Hawaii and Australia.⁴⁷ It comprises three reef islands and six true atolls. Its population of 10,544 makes it the third-least populous sovereign state in the world. In terms of physical land size, Tuvalu is the fourth smallest country in the world.⁴⁸

In its NAPA, Tuvalu refers to the need to take adaptation measures in relation to coastal areas, water resources, biodiversity, agriculture, human health, and natural disasters.⁴⁹ Like the Maldives, it too does not refer to relocation as an option, despite recognizing its vulnerability to natural disasters:

The islands of Tuvalu rarely exceed three meters in height. There is no high ground on the islands to escape to during a tsunami or tidal wave. The combination of minimal land, high population density, and no high ground to escape to in an event of a disaster makes Tuvalu one of the most vulnerable nations in the world to natural hazards, especially in regards to rising sea levels and extreme events due to climate change.⁵⁰

Tuvalu, like other Small Island States, is at the risk of total submergence due to sea level rise associated with climate change. Unlike developed states, its contribution to climate change is negligible. Despite this, these small island states are at the risk of losing everything they have, including their territory, culture, sovereignty and the entire population. Several years ago, Tuvalu toyed with the idea of instituting legal action in the International Court for Justice (ICJ) against the United States and Australia.⁵¹ Currently, spearheaded by Palau, Small Island States are exploring the possibility of

46. Statement by Prime Minister and Minister of Foreign Affairs of Tuvalu, U.N. GAOR, 58th Sess., 10th plen. mtg. at 21, U.N. Doc. A/58/PV.10 (Sept. 24, 2003).

47. *Tuvalu*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Tuvalu> (last visited May 15, 2014).

48. *Id.*

49. Tuvalu's National Adaptation Program of Action (2007), *available at* <http://unfccc.int/resource/docs/napa/tuv01.pdf>.

50. *Id.* at 30.

51. *See Seneviratne, supra* note 8.

getting the General Assembly to request an advisory opinion from the ICJ on the legal obligations of states in relation to climate change.⁵²

Sea level rise associated with climate change and subsequent inundation of low-lying states will not happen overnight. We may still have a small window of opportunity to adopt contingency plans and adaptation plans; however, the longer we wait, the harder it will become to plan for this eventuality. Moreover, these islands could become uninhabitable long before they become submerged.

III. CHALLENGES FOR INTERNATIONAL LAW

Climate change will pose many challenges for international law, some of which are demonstrated by the common strands that run through the case studies above: loss of land (including total submergence in some instances) and the disappearance of entire states, and the potential mass relocation of people. While international law has provisions on state succession, it does not have a legal framework for dealing with complete disappearance of a state because the world has yet to deal with this phenomenon.⁵³ Associated with this reality is the issue of relocating entire populations. What happens to the population of a disappearing state? Where would they go? Should such relocation be part of an organized program of migration (for example, as part of adaptation plans under the U.N. Framework Convention on Climate Change (UNFCCC)) or should this be left to the judgment of each individual? If this is an individual decision, displaced populations may be at the mercy of developed states that are responsible for causing the problem in the first place. As the discussion below shows, such displaced populations do not have any legal protection under contemporary international law and individuals could even face deportation for entering other countries illegally. If relocation is to be done collectively, it will require the

52. Press Conference, U.N. News Service, Request for International Court of Justice Advisory Opinion on Climate Change, (Feb. 3, 2012), available at http://www.un.org/News/briefings/docs/2012/120203_ICJ.doc.htm.

53. See U.N. High Commissioner for Refugees, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, 19, U.N. Doc. PPLA/2011/04 (May 2011).

cooperation of the entire international community, or, at a minimum, regional cooperation.

Apart from the populations of Small Island States, there is some consensus that migration of people due to consequences of climate change will take place around the world.⁵⁴ Much of this migration is likely to be temporary and internal.⁵⁵ In some instances, particularly in places like Africa where international borders are rather porous, cross-border migration is a possibility.⁵⁶ In such situations, conflicts over scarce resources are likely to exacerbate already volatile situations. The next section discusses the legal ramifications of each of these situations, except internal migration, which is not governed by international law.

54. See IPCC, *supra* note 2; see also Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 369 (2009).

55. See MCADAM, *supra* note 6 at 193.

56. Movement of people across borders associated with recent conflicts in Africa is a good example.

A. *The “Disappearance” of States*

Under customary international law, an entity needs to satisfy four criteria to be recognized as a “state.” These criteria are codified in the 1933 Montevideo Convention on Rights and Duties of States as: (a) a defined territory; (b) a permanent population; (c) an effective government; and (d) the capacity to enter into relations with other states.⁵⁷ While recognition by other states is not mentioned as a criterion, it is an implicit requirement as the capacity to enter into relations with other states depends on whether an entity is recognized as a state or not. Recognition tends to be a political decision.

International law does not require the territory to be of a particular size⁵⁸ nor does it require a particular number of people to be present to satisfy the requirement of population.⁵⁹ According to Crawford, “*although a state must possess some territory, there appears to be no rule prescribing the minimum area of that territory.*”⁶⁰ He further notes that there is no rule requiring contiguity of the territory of the State, although fragmentation may make independence and control difficult to achieve.⁶¹ Since, according to Crawford “statehood implies exclusive control over *some* territory,”⁶² it would seem that territory, however small, is necessary for statehood. On the other hand, there is a strong presumption against extinction of states once they are firmly established so the disappearance of territory, by itself, may not lead to a loss of sovereignty.⁶³

Furthermore, in the *Island of Palmas* case, a seminal case on acquisition of title to territory before the Permanent Court of Arbitration, the Arbitrator stressed that “sovereignty is the right to exercise in regard to a portion of the globe. . .to the

57. See JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 45–46 (2nd ed., 2006); Karen Knop, *Statehood: Territory, People and Government*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 95, 95 (Crawford and Kostenniemi eds., 2012).

58. See LORI DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 256 n. 5 (4th ed., 2001).

59. *Id.* at 255 n.3 (referencing “mini states”).

60. See CRAWFORD, *supra* note 57, at 46 (emphasis added).

61. *Id.* at 47.

62. *Id.* at 48.

63. *Id.* at 715.

exclusion of any other State, the functions of a State.”⁶⁴ Thus, by all accounts, territory plays a crucial role in relation to statehood and sovereignty.

Importantly, territory does not mean only physical land. Under the 1982 UN Convention on the Law of the Sea, sovereignty extends to the territorial sea and the air space above that as well as over the exclusive economic zone (EEZ).⁶⁵ By creating the EEZ, the Convention brought a large area of the sea, which was previously part of the high seas, under the jurisdiction of states. This was an important development with regard to exploitation of marine resources. By losing land territory, states may also lose their maritime territory and its resources.

Moreover, membership in the U.N. is open to all peace-loving “states.”⁶⁶ Thus, sovereignty and statehood have important legal ramifications. For example, Palestine fulfills most of the criteria of statehood but is not a state; hence, it is not a full member of the UN.⁶⁷ There are many other entities in the international community which do not enjoy full statehood, yet function at the international level to some degree: Taiwan, Hong Kong, Tibet, the Holy See, the Vatican, etc.⁶⁸ In contrast to disappearing states, these entities do have physical territory.

What, then, is the situation if the territory disappears altogether? With regard to Small Island States,⁶⁹ this is a real

64. *Island of Palmas Case (Neth./U.S.)*, 2 RIAA 829, 839 (1928).

65. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter UNCLOS]

66. U.N. Charter, art. 4.

67. In November 2012 the U.N. General Assembly voted to upgrade the Palestine from permanent observer status to a “non-member observer state.” See, Press Release, U.N. News Service, General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations, (Nov. 29, 2012), available at: <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm>. See also, John M. B. Balouziyeh, *Palestinian Statehood under International Law*, LEXISNEXIS LEGAL NEWSROOM (JAN. 1, 2013, 9:33 PM) <http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2013/01/03/palestinian-statehood-under-international-law.aspx>.

68. For further information. See CRAWFORD, *supra* note 57, Chapters 13 and 14.

69. According to the SIDS webpage, there are forty Small Island States, see: *About Small Island Developing States*, U.N. CONFERENCE ON SMALL DEVELOPING STATES <http://www.sids2014.org/index.php?menu=1496> (last visited May 20, 2014). Wikipedia gives the number as fifty two. Small Island Developing States, http://en.wikipedia.org/wiki/Small_Island_Developing_States.

possibility due to creeping sea level rise associated with climate change. Given that these islands are only a few feet above the sea level, even a few inches rise in sea level can have a huge impact. Although McAdam critiques the notion of sinking islands as being sensationalistic and dramatic, she acknowledges that these islands will become uninhabitable due to increased severe weather events, intrusion of salt water and lack of fresh water coupled with unsustainable anthropogenic activities.⁷⁰ This raises two separate, yet inter-related questions: first, what is the fate of the population and secondly, what happens to the state itself once the territory disappears?

1. *Fate of the Population*

Under the UNFCCC, developed countries have pledged to assist developing countries that are particularly vulnerable to the adverse effects of climate change with the costs of adaptation and direct adverse effects.⁷¹ There is no doubt that Small Island States fall into this category as the Preamble to the UNFCCC addresses Small Island States specifically.⁷² Article 3 also acknowledges that those states that are particularly vulnerable to the adverse effects of climate change should be given full consideration.⁷³ Thus, it would seem that developed countries, which are responsible for historic emissions, have an obligation to at least provide sufficient funds to these countries to adapt. However, in the event where the territory is no longer habitable, does this obligation to help adapt extend to facilitating relocation?

While relocation en masse across international borders may not be the first option for many of the communities affected by climate change, in relation to Small Island States this may be the only option, if the state is to survive as a legal entity. After all, the world is faced with an unprecedented scenario.⁷⁴ In

70. See McADAM, *supra* note 6, at 126.

71. UNFCCC, *supra* note 4, at art. 4(4).

72. *Id.* at pmb. (“Recognizing further that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change.”).

73. *Id.* at art. 3(2).

74. See Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE LAW 345 (2011); Susin Park, “Climate

fact, it is proposed here that in order to preserve nationality, cultural identity, and territorial integrity, it may be better to relocate populations en masse, provided that this is done in a systematic, cooperative manner with the participation of the population concerned as part of adaptation plans. Additionally, it is proposed that individuals who do not wish to participate in an en masse relocation scheme and would prefer to avail themselves of existing labor migration opportunities should be given that option. This way, labeling populations as “climate migrants, refugees or displaced persons” can be avoided. However, this would require the close cooperation of every state, particularly those who are responsible for causing the problem in the first place. We could extend the common but differentiated responsibility principle⁷⁵ to cover this scenario but this is unlikely to be politically very palatable.

What is the role of the principle of self-determination here?⁷⁶ Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights espouse this right. Those Covenants state: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁷⁷ Notwithstanding the significance of this principle, its application outside the colonial/apartheid context is subject to some debate. It evolved as a right of people in non-self-governing territories to freely determine their political status. Outside this context, however, its application

Change and the Risk of Statelessness: The Situation of Low-lying Island States,” Legal and Protection Policy Research Series, UNHCR (May 2011) at 8 (noting that “loss of the entire territory of a state or the exile of the entire population and government is without precedent”).

75. The common but differentiated responsibility principle is incorporated in Principle 7 of the Rio Declaration. It recognizes the disparity in the global community and the disparate contribution to environmental problems by developed and developing countries. The original version of Principle 7 that sought to address historic responsibility for global environmental problems caused considerable controversy at the Rio Conference. Despite this, the CBDR principle is specifically incorporated in the UNFCCC and the obligations under it are based on this principle. See HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 464 (4th ed. 2011).

76. See MCADAM, *supra* note 6 at 147.

77. International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

is unclear.⁷⁸ For example, it is not clear whether ethnic minorities or other groups would qualify as “peoples” and what the “right” to self-determination would entail.⁷⁹ It must also be remembered that this is a collective right and not an individual one.⁸⁰

In the context of Small Island States, one can see the application of the right of self-determination in relation to a decision to relocate en masse, provided, of course, a suitable place has been offered by another state. Its application here should be rather uncontroversial given that the entire population is being asked whether they want to continue under the same sovereign, retaining their nationality, but on a different territory. Of course, problems might arise if the population wants to make any changes or if the state that is offering land lays down various conditions. It is not clear how these issues will be addressed because they are unprecedented and international law has not faced similar issues before. While one cannot exercise the right of self-determination to claim land from other states,⁸¹ given that as many as forty or more sovereign states would be affected, it is obvious that this issue cannot be dealt with on an ad hoc basis.

2. *Fate of Sovereign States*

International law does not envision a situation where states disappear altogether; it has rules on state succession where one entity will replace another or a new entity emerges, through cession, unification or dissolution.⁸² The international

78. As Damrosch et al. note: “The international instruments referring to a right of self-determination of “peoples” do not make clear whether the right applies outside the decolonization context, and if so, how to define “peoples” entitled to exercise the right.” DAMROSCH ET AL., *supra* note 58, at 273.

79. *Id.* at 269.

80. The right to self-determination is affirmed in relation to indigenous people in the U.N. Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

81. See MCADAM, *supra* note 6 at 16; See also Susannah Willcox, *A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty*, 9 ESSEX HUMAN RIGHTS REV. 1 (2012).

82. See CRAWFORD, *supra* note 57, at 700–17; see also Susin Park, *supra* note 74, at 6 (pointing out that there have been a few cases of extinction of states which has occurred in the context of succession: “The situation of low-lying island States would be unique in this sense, inasmuch as there would, in principle, be no successor States in such cases”).

community needs to address the legal vacuum that would arise as a result of states disappearing due to consequences associated with climate change.⁸³ Over forty sovereign states are at the risk of losing their territory. Long before their territory disappears, however, their populations will have to be relocated. How the international community will address this issue would be crucial for the continuation of these states as sovereign nations. There are no uninhabited territories lying around—barring Antarctica⁸⁴—that states can “discover” and “occupy.” Every available territory is under the sovereignty of a particular state. Even more worrying is the fact that Small Island States, whose contribution to climate change is negligible and will continue to be so, will be at the mercy of those states that caused the problem in the first place. This raises important questions about equity and the application of the common but differentiated responsibility principle (CBDR). Under the legal regime governing climate change, the CBDR has been applied in relation to mitigation. Can we now apply it to adaptation, at least with regard to Small Island States whose plight is becoming increasingly precarious and who will be at the mercy of the international community?

The question, of course, arises as to what happens if the international community is not altruistic and does not provide territory to allow relocation en masse. What if states are prepared to take in citizens of Small Island States on an ad hoc basis, but do not allow them to retain their identity for fear of conflicts with their own citizens? In this situation, which seems to be the most likely (and realistic) scenario, the state could disappear when the territory disappears, along with its territorial sea and the EEZ. The population would lose its nationality, diplomatic protection (unless the recipient state extends citizenship) and other rights associated with nationality. Is this the fate of the Small Island States? If states were willing to sell part of their land to Small Island States that had enough purchasing power to buy such land, then there will be a fairly smooth transition to the new location, provided, of course, the new land could sustain their

83. Here I am referring to the physical disappearance of states—the international community could decide that, legally, these entities will continue as ‘states.’

84. Territorial claims to Antarctica are frozen and no new claims can be made. See Antarctic Treaty, art. v, Dec. 1, 1959, 402 U.N.T.S. 71.

traditional livelihoods, customs, etc. This will be particularly challenging with regard to indigenous communities whose traditional way of life is very much dependent on the land they inhabit.

The strong presumption that favors the continuity of an established state “suggests that acceptance of creative interpretations of law to recognize the continued existence of a state—particularly in this ‘unusual situation’—is plausible.”⁸⁵ If the presumption in international law is in favor of continued statehood, then is it possible to argue that existing states should continue even though it lacks physical territory? In other words, can a “deterritorialized statehood” exist?⁸⁶ If states cannot exist without physical territory, their populations will become stateless people.⁸⁷

3. *Nations Ex-situ*

Identifying these states as “endangered states,”⁸⁸ Burkett proposes a legal fiction of “nations ex-situ” to deal with this emerging category of states that could possibly disappear as a result of climate change.⁸⁹ She argues that:

Ex-situ nationhood would be a status that allows for the continued existence of a sovereign state, afforded all the rights and benefits of sovereignty amongst the family of nation-states, in perpetuity. It would protect the peoples forced from their original place of being by serving as a political entity that remains constant even as its citizens establish residence in other states. It is a means of conserving the existing state and holding the resources and well-being of its citizens—in new and

85. See Burkett, *supra* note 74, at 354 (positing that the phenomenon of endangered states “raises novel questions that may challenge the very foundation of Westphalian, or nation-state, sovereignty”) (footnotes omitted).

86. *Id.*; see also Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States*, UNIVERSITY OF NEW SOUTH WALES FACULTY OF LAW RESEARCH SERIES, paper 9 (2009).

87. See U.N. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 130 (based upon presumption against statelessness and envisaging a situation where people become stateless due to operation of law). See also, MCADAM, *supra* note 6, at 138–143.

88. See Burkett, *supra* note 74, at 354.

89. *Id.* at 345.

disparate locations—in the care of an entity acting in the best interest of its people.⁹⁰

She points out that in practice this would mean creating a governmental framework that could exercise authority over a diffuse people. Noting that others have called for the revival of the U.N. trusteeship system⁹¹ to administer the duties of a deterritorialized government, Burkett proposes “a hybrid structure that provides a permanent space for long-distance, and perhaps collaborative, governance of Nations Ex-Situ.”⁹²

Thus, nation ex-situ would be a new entity which could be based along the lines of the U.N. trusteeship system: “The government of ex-situ nations would sit in a permanent location and manage the affairs of the state at a distance.”⁹³ Other scholars have argued for an “authority” that could continue to manage the maritime zones of the disappeared states for the benefit of the displaced population.⁹⁴ It is not clear whether these maritime zones would automatically disappear if the territory that it is attached to disappears. Common sense dictates that maritime zones would disappear because the breadth of these zones is measured in relation to the land territory.⁹⁵ On the other hand, it can be argued that these zones are created by law so they will not disappear automatically. Of course, the drafters of the Law of the Sea Convention did not envisage this scenario when it was adopted 30 years ago.

90. *Id.* at 346 (borrowing from the concept of ex-situ conservation).

91. All territories under this system have now attained self-government or independence. See *United Nations Trusteeship Council*, <http://www.un.org/en/mainbodies/trusteeship/>.

92. *Id.*

93. *Id.*

94. See Rayfuse, *supra* note 86. However, current maritime zones are based on baselines that are linked to physical territory. See Charles Di Leva & Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries*, WORLD BANK, LAW & DEVELOPMENT WORKING PAPER SERIES, paper 5 (2007); 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 (2012).

95. UNCLOS, *supra* note 65.

B. *Climate Migration*

For centuries people have migrated for environment-related reasons.⁹⁶ Much of such migration has been voluntary. Forced migration and displacement is usually associated conflict. However, we are now faced with a new category of people: those who will be forced to migrate, whether internally or internationally, due to climate change.⁹⁷ Unfortunately, current international law does not protect them.

International law recognizes several categories of people and the legal protection accorded to them varies according to each category. Climate migrants do not fit within any of these categories.

Nationals: For purposes of international law, nationals are those who enjoy the citizenship of that particular state. It is nationality that links the state with the individual. This link also triggers certain rights vis-à-vis the state, including diplomatic protection, protection of human rights and protection from external aggression.⁹⁸

Refugees and asylum seekers: Sometimes the national state itself becomes the aggressor or persecutor and the international community must step in to take the role that is traditionally played by the state. In the case of persecution on the grounds of race, nationality, ethnic origin or place of birth, the individual has to seek refuge in a foreign state and if that individual succeeds in establishing this, he/she becomes entitled to refugee status in the receiving state.⁹⁹ This protection is afforded by the Geneva Convention Relating to the Status of Refugees.¹⁰⁰

96. See McLeman & Smit, *supra* note 6, at 31.

97. The estimates of such “climate refugees” have ranged from twenty million to two-hundred million by 2020. Compare Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, 357 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY OF LONDON 609–13 (2002) (two-hundred million), and David Adam, *50m Environmental Refugees by End of Decade, UN Warns*, GUARDIAN (Oct 12, 2005), <http://www.theguardian.com/environment/2005/oct/12/naturaldisasters.climatechange> 1 (fifty million) with HUMAN TIDE: THE REAL MIGRATION CRISIS, CHRISTIAN AID (2007), <http://www.christianaid.org.uk/images/human-tide.pdf> (one-hundred-and-five million).

98. See DAMROSCH ET AL., *supra* note 58, at 425.

99. Those who are seeking such protection are referred to as asylum seekers and people whose status has been decided are considered as refugees.

100. Geneva Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 2545.

Internally displaced people: Sometimes people are displaced internally due to conflict, natural disasters, etc., but do not cross an international border. Such displacement is usually temporary but in conflict situations people have been displaced for years and sometimes multiple times.¹⁰¹ In this situation, they are still subject to the protection of their national state but since they are displaced from their home they should be afforded some protection. The U.N. Guiding Principles of Internal Displacement,¹⁰² a soft law instrument, provide guidance as to how such people should be treated.¹⁰³

Migrants: Those who cross an international border but are not fleeing persecution, civil strife, or a natural disaster are migrants. They are generally considered as economic migrants in search of better conditions of life. However, it is not always easy to establish a clear demarcation between economic migrants and others. Migration refers to the movement of people and is a catch-all phrase to encompass everybody who moves from his/her place of origin. Sometimes, of course, migration is not voluntary. Even if migration seems voluntary, when all the circumstances are taken together, migration can be deemed forced.

As Professor McAdam points out, it is important to conceptualize migration correctly as the legal response to climate migration would depend on its accurate conceptualization.¹⁰⁴ As the above discussion shows, the reason why people migrate is very relevant for the applicable legal regime. She identifies five questions that must be addressed in this regard: (a) whether the movement is voluntary or involuntary; (b) the nature of the trigger; (c) whether international borders are crossed; (d) whether there are political incentives to characterize it as climate migration; and (e) whether movement is driven or aggravated by factors such as discrimination.¹⁰⁵ Given the predicted consequences of climate change, particularly in relation to Small Island States, it is likely that sizeable populations will have to be relocated to

101. NORWEGIAN REFUGEE COUNCIL, INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2009 (NINA M. BIRKELAND ET AL. EDS., 2010).

102. *Id.* U.N. Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

103. NORWEGIAN REFUGEE COUNCIL, *supra* note 101.

104. *See* MCADAM, *supra* note 6, at 17.

105. *Id.*

less vulnerable areas. Estimating the magnitude of the problem is rather difficult because people rarely move solely for environmental reasons.¹⁰⁶ Sea level rise, severe weather events and desertification coupled with poverty, lack of prospects and rising cost of living are most likely reasons to force people to move.¹⁰⁷ Provided the international community is altruistic and open about welcoming citizens from Small Island States (other legal issues aside), problems are likely to arise if people start migrating from heavily populated areas such as Bangladesh due to their sheer numbers and possible cultural and religious differences in the receiving state. While it is likely that much of initial migration will be internal, cross border migration will result where the state cannot cope with internal migration or where international borders are rather porous.

In order to decide on an appropriate legal framework, it is useful here to base our discussion on the typology developed by Walter Kalin, U.N. Secretary-General's Representative on the Human Rights of Internally Displaced Persons, setting out the diverse scenarios that could be encompassed within "environmental displacement": (a) the increase of severe weather events (hydro-meteorological)—movement here is likely to be internal and temporary; (b) government-initiated planned evacuations to safer areas—movement here is likely to be permanent and internal; (c) environmental degradation and slow onset disasters—this may be a trigger for people to move voluntarily; (d) Small Island States—where the land is no longer habitable, permanent relocation to other countries would be necessary even if the country is not yet inundated; and (e) displacement associated with conflict over natural resources—resource-based conflicts can be particularly challenging and where scarcity cannot be resolved, conflicts and displacement can be protracted.¹⁰⁸ If one were to adopt this typology, the critical area for the purposes of international law would be scenario (d) above. However, movement across international borders associated with (c) and (e) above cannot be ruled out.

106. See Sheila C. McAnaney, *Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement*, 87 NYU L. REV. 1172, 1180–81 (2012).

107. See THREATENED ISLAND NATIONS 7 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

108. *Id.* at 19.

Most migration will be internal, temporary and gradual.¹⁰⁹ Migration en masse in the face of a disaster would be temporary even where an international border is crossed. It has been argued that it is not necessary to devise a legal regime governing “climate migrants” as existing labor migration schemes will be sufficient to cover them.¹¹⁰ This argument unfortunately ignores the plight of Small Island States and the fact that these populations will have to be relocated en mass at some point.

As has been repeated often in scholarly writings, the current international legal regime covers only political refugees.¹¹¹ The Geneva Convention Relating to the Status of Refugees defines a refugee as a person who:

[o]wing to a 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 to the protection of that country. . . .¹¹²

Despite arguments to the contrary,¹¹³ by no stretch of imagination can this be interpreted as encompassing those

109. See MCADAM, *supra* note 6, at 16 and McAnaney, *supra* note 106.

110. See MCADAM, *supra* note 6.

111. The subject of environmental/climate refugees has attracted considerable literature. See generally, Myers, *supra* note 97; 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. & POL'Y 1 (2001); Brooke Havard, *Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law*, 18 VILL. ENVTL. L. J. 65 (2007); MOLLY CONISBEE & ANDREW SIMMS, ENVIRONMENTAL REFUGEES: THE CASE FOR RECOGNITION (David Nicholson-Lord ed. 2003); Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMGR. L. J. 855 (2000); Tamer Afifi and Koko Warner, *The Impact of Environmental Degradation on Migration Flows Across Countries*, U.N. UNIVERSITY, paper 5 (2008); Jane McAdam, *Environmental Migration Governance*, UNIVERSITY OF NEW SOUTH WALES FACULTY OF LAW RESEARCH SERIES, paper 1 (2009); CAMILLO BOANO, FMO RESEARCH GUIDE ON CLIMATE CHANGE AND DISPLACEMENT (2008), <http://www.forcedmigration.org/guides/fmo046>; Gil Marvel Tabucanon, *Migration for Environmentally Displaced Pacific Peoples: Legal Options in the Pacific Rim*, 30 UCLA PAC. BASIN L. J. 55 (2012); Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365 (2007); Stephen Castles, *Environmental Change and Forced Migration: Making Sense of the Debate*, (U.N. High Commissioner for Refugees, New Issues in Refugee Research Paper No. 70, 2002).

112. See Geneva Convention, *supra* note 100, at art. 1.

113. See Jessica Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 NYU ENVTL. L. J. 480 (1998); Falstrom, *supra* note 111, at 22

who may be displaced by climate-related events or even environmental events. Neither is it feasible to amend the definition to cover such people. Those who advocate for amending the Geneva Convention must take the specific context in which it was adopted into consideration and see whether the existing framework can be stretched to cover another category of people unrelated to the original objective and in a totally different context. If the international community is serious about protecting the category of people who will be displaced as a result of climate change, then it makes sense to do so within the legal framework governing climate change or adopting a separate legal regime altogether.¹¹⁴

The African Union Convention on Internally Displaced Persons is the only international treaty that comes closest to recognizing people displaced by climate change.¹¹⁵ It defines “internally displaced persons” as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or *natural or human-made disasters*, and who have not crossed an internationally recognized State border.¹¹⁶

Here again, however, the event must amount to a disaster and the convention only covers those internally displaced.

While recognizing and providing for a category of people called “climate refugees” (or whatever legal term is adopted) could distract attention from the urgent need to reduce emissions, it is important to recognize that the emissions that are already in the atmosphere will continue to cause adverse effects in the coming years, even if the international

(referring to scholars who argue for expanding the Geneva Convention but proposing a separate convention).

114. See Falstrom, *supra* note 111 (advocating the adoption of a separate legal regime); Docherty & Giannini, *supra* note 54; discussion *infra* Part III.C; Fabrice Renaud et al., *Control, Adapt or Flee: How to Face Environmental Migration* 34 (U.N. University, Interdisciplinary Security Connections No. 5, 2007) (arguing against expanding the Geneva Convention).

115. African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Oct. 23, 2009, 49 I.L.M. 86.

116. *Id.* (emphasis added).

community were to stop all emissions today.¹¹⁷ Thus, for the present generation and the next, adaptation will be more important than mitigation. Mitigation and adaptation must go hand in hand—with regard to mitigation, the international community is already racing against time. Their options are getting more and more limited and their emission reductions will have to get more and more drastic as the window of opportunity the international community has is getting increasingly narrower.

Some have contested the projected numbers of displaced:¹¹⁸ estimates vary from 20 million to 200 million by 2050.¹¹⁹ What is important, however, is not the exact number or the methodology that is adopted to count climate refugees. For, it is clear that no matter what methodology is adopted, the numbers will be in the millions, not hundreds. Although scholars such as McAdam have argued persuasively for effective *in situ* adaptation measures,¹²⁰ they have at the same time acknowledged that “in the absence of adaptation and migration strategies, there could be widespread population displacement from Small Island Nations rendered uninhabitable as a result of climate change impacts on their already fragile ecosystems.”¹²¹ As Burkett points out, “Large-scale migration of people and communities due to climate change may have a dramatic effect on the globe in the next half-century.”¹²² Even assuming that movement of people for

117. See Oli Brown, *Migration and Climate Change*, INTERNATIONAL ORGANIZATION FOR MIGRATION, no. 31, at 41 (2008) (stressing need to formally acknowledge the predicament of forced climate migrants and that a certain amount of forced migration is “locked in”).

118. See MCADAM, *supra* note 6, at 28 (referring to Norma Myer’s estimate of 150 million displaced by the middle of this century as emblematic of the alarmist approach); Richard Black, *Environmental Refugees: Myth or Reality?* (U.N. High Commissioner for Refugees, New Issues in Refugee Research Paper No. 34, 2001); David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees,”* 16 GEO. INT’L ENVTL. L. REV. 209 (2004); see also Axel Bojanowski, *Feared Migration Hasn’t Happened: U.N. Embarrassed by Forecast on Climate Refugees* SPIEGEL ONLINE, (Apr. 18, 2014, 2:52 PM) <http://www.spiegel.de/international/world/feared-migration-hasn-t-happened-un-embarrassed-by-forecast-on-climate-refugees-a-757713.html>.

119. See *supra* note 97.

120. See MCADAM, *supra* note 6, at 35.

121. *Id.* at 119–20.

122. See Burkett, *supra* note 74, at 348.

most part will be internal, temporary, and not en masse,¹²³ one cannot ignore the plight of people currently living in Small Island States who account for about 5 percent of the world's population.¹²⁴ If these territories become uninhabitable due to climate change or related causes at some point in the future, we will have to relocate these people en masse.¹²⁵ Already there are reports of a village in Fiji being relocated as a result of saltwater intrusion due to sea level rise.¹²⁶

How will international law deal with this situation? There may be many existing models to look at—protectorates, leasing of land, two forms of sovereigns existing together such as in the case of Native Americans in the US, governments in exile, trusteeships, etc. Legally, we may be able to come up with a workable framework; however, the crucial issue will be finding physical land to relocate people and set up a “state”. An ideal scenario would be where land is sold, leased or “donated” in a geographically similar area where people can settle down and continue their livelihoods that they are accustomed to.

On the other hand, it could be argued that the population could use this as an opportunity to free itself from shackles of poverty in the country of origin and seek opportunities elsewhere—this may mean acting individually but this is a possibility that one cannot rule out or exclude. If individuals want to explore opportunities elsewhere, they have the right to do so but they may not be able to avail themselves of the protection of their state in that situation or the state may not be in a position to protect them anyway. As Burkett points out, we may want to distinguish those who migrate from Small Island States from other climate migrants for several reasons: (a) inability to return to their homes; (b) collective migration; (c) predictable need for migration; and (d) a unique and

123. See MCADAM, *supra* note 6.

124. See *About the Alliance of Small Island States*, <http://aosis.org/about-aosis/> (last visited May 20, 2014).

125. As Professor Burkett points out: “For small-islanders, in particular, the perils of migration . . . is made worse by the loss of their state. In other words, while displacement within and across borders may be a compulsory journey for many “climate migrants,” small-islanders will be on the move absent a country — with all of its attendant legal, economic, and cultural markers — to which to return.” Burkett, *supra* note 74, at 348–49.

126. See Reports: *Fiji Latest Country to Relocate Climate Refugees*, ALLIANCE OF SMALL ISLAND STATES, (Jan. 29, 2014) <http://aosis.org/reports-fiji-latest-country-to-relocate-climate-refugees/>.

compelling moral element to their situation.¹²⁷ However, some of these criteria, particularly (a) and (c), may be applicable in relation to other climate migrants too—those currently living in low lying areas like Dhaka, Bangladesh, would be a good example. Such people could cross the border into India giving rise to, among other things, ethnic tensions.

C. *Proposals That Have Been Advanced*

Lack of a proper definition of or a legal regime governing environmental/climate refugees is certainly not due to a want of scholarly debate on the subject.¹²⁸ Rather, the field is replete with an overload of ideas and suggestions.¹²⁹ The persistent problem has been to get the international community rallied around the need to take action. Starting from “environmental refugees,” a term coined by El-Hinnawi in 1995 as “those who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption that jeopardized their existence and/or seriously affected the quality of life,”¹³⁰ controversy has surrounded both the terminology as well as the definition. Despite the flood of scholarly articles and books on the subject,¹³¹ no consensus has so far been reached on either issue.

127. Burkett, *supra* note 74, at 351.

128. I have explored this aspect in more detail elsewhere. Sumudu Atapattu, *Climate Change, Human Rights, and Forced Migration: Implications for International Law*, 27 WIS. INT’L L. J. 607 (2009); *see also*, MCADAM, *supra* note 6, at Chapter 7.

129. Climate migration has also attracted considerable literature. *See generally*, Docherty & Giannini, *supra* note 54; Marissa S. Knodel, *Wet Feet Marching: Climate Justice and Sustainable Development for Climate Displaced Nations in the South Pacific*, 14 VT. J. ENVTL. L. 127 (2012); GEETANJALI GANGULY, CLIMATE CHANGE, DISAPPEARING STATES AND FORCED HUMAN DISPLACEMENT: THE DESIRABILITY AND MERITS OF A PROTOCOL OR CONVENTION FOR PERSONS DISPLACED BY CLIMATE CHANGE (2011) *available at* <http://150.203.86.5/coast/events/environment/papers/ganguly.pdf>; David Hodgkinson et al., *Climate Change ‘Refugees’ and the Need for a Global Agreement*, 4 PUBLIC POLICY 155 (2009); Black, *supra* note 118; Elizabeth Burleson, *Climate Change Displacement to Refuge*, 25 ENVTL. L. & LITIG. 19 (2010); Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167 (2013).

130. Referred to in Fabrice Renaud, Janos J. Bogardi, Olivia Dun, Koko Warner, Environmental Degradation and Migration, *available at* http://www.berlin-institut.org/fileadmin/user_upload/handbuch_texte/pdf_Renaud_Environmental.pdf, who credit Lester Brown as the first proponent of environmental refugees; *see also* Knodel, *supra* note 129.

131. *See* authorities cited in *supra* note 128.

Proposals range from expanding the Geneva Convention on Refugees,¹³² on the one hand to adopting a separate, stand-alone convention on climate refugees,¹³³ on the other. In between lies the proposal to adopt a protocol on climate refugees either to the Geneva Convention or the UNFCCC even though climate refugees do not fit neatly within either legal regime.¹³⁴

The Draft Convention on the International Status of Environmentally-displaced Persons (“Draft Convention”)¹³⁵ proposed by the Interdisciplinary Centre of Research on Environmental, Planning and Urban Law is the most elaborate effort toward such a framework. Its objective is to establish a legal framework that guarantees the rights of environmentally-displaced persons and to organize their reception as well as their eventual return, in application of the principle of solidarity.¹³⁶ Each party is to protect environmentally displaced persons in conformity with human rights law.

The Draft Convention defines “environmentally-displaced persons” as “individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions, resulting in their forced displacement, at the outset or throughout from their habitual residence.”¹³⁷ A “sudden environmental disaster” is defined as “a rapidly occurring degradation of natural and/or

132. *Id.*

133. See Docherty & Giannini, *supra* note 54, at 350.

134. *Id.* at 50.

135. The Draft Convention on the International Status of Environmentally-displaced Persons (2010), *available at* <http://www.cidce.org/pdf/Draft%20Convention%20on%20the%20International%20Status%20on%20environmentally%20displaced%20persons%20%28second%20version%29.pdf>.

136. *Id.* at art. 1. Solidarity is an emerging principle and encompasses an amalgam of existing principles: of cooperation, peaceful co-existence and humanitarian assistance. According to the UN Human Rights Council, “international solidarity is not limited to international assistance and cooperation, aid, charity or humanitarian assistance; it is a broader concept and principle that includes sustainability in international relations, especially international economic relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens.” U.N. Human Rights Council Res. 18/5, U.N. Doc A/HRC/18/L.12, (Sept. 23, 2011).

137. *Id.*

human origin,”¹³⁸ while a “gradual environmental disaster” is defined as “a slow, progressive or planned degradation of natural and/or human origin.”¹³⁹ It further defines “forced displacement” as “any temporary or permanent displacement made inevitable by environmental disaster, either within a State or from the State of residence to one or more receiving States, of individuals, families or populations.”¹⁴⁰

According to the Draft Convention’s Article 9, all persons confronted by a sudden or gradual environmental degradation have the right to move within or outside of their home state. The Article places an obligation on states not to hinder such displacement. It is interesting to compare this right with the right to choose one’s residence and the right *not* to be displaced.¹⁴¹ The draft convention further guarantees the right to water, housing, food, healthcare, work, culture, religion and education. It thus guarantees both civil and political rights and economic, social, and cultural rights recognized under international law. It provides that such displaced persons have the right to return when their place of origin is habitable and that they have the right to retain the nationality of the state of origin affected by an environmental disaster. It places obligations on the host state to facilitate their naturalization, if requested, and to not prosecute them if they enter the host country illegally.

This raises important issues related to migrants work status in host countries. Usually, people who are forced to migrate and certainly those who enter a country illegally (whatever the reason is) are not allowed to work in the host state. While basic humanitarian assistance is usually accorded to such people, the right to work and education are not available. This provision represents a derogation from this common practice as it envisages that migrants are entitled to request naturalization in the host state and the host state has an obligation to facilitate it; naturalization carries with it the right to work.

138. *Id.*

139. *Id.*

140. *Id.*

141. See Maria Stavropoulou, *The Right Not to be Displaced*, 9 AM. U. J. INT’L L. & POL’Y 689 (1994).

The draft convention embodies both positive and negative components. The definition of environmentally displaced persons refers to environmental disasters, whether they are sudden or gradual. It is unlikely that sea level rise associated with climate change amounts to an “environmental disaster.” Moreover, the definition of a gradual degradation refers to “a slow, progressive or *planned* degradation of natural and/or human origin.” It is not clear what action or event would amount to *planned degradation* of the environment. The Draft Convention lays down an elaborate institutional framework to implement its provisions including the establishment of a national commission on environmental displacement in each signatory state, a High Authority to hear appeals from the national commission, a World Agency for Environmentally-Displaced Persons (WAEP), and a conference of parties. Parties would be required to submit national reports to the Secretariat to be established under the proposed framework. In addition, it envisions the establishment of a World Fund for the Environmentally-Displaced (WFED) that would be supported by voluntary contributions as well as a mandatory tax based on the causes of sudden or gradual environmental disasters that give rise to environmental displacement.

While the proponents of the draft Convention have invested considerable time and thought in it, a closer look reveals several flaws: not only is the definition of an environmentally displaced person hard to implement, but the Convention would require an enormous commitment of resources from the host states, including provision of basic rights and needs, as well as providing free interpreters and translators. These new institutions would create additional costs on an already burdened bureaucracy in many countries. All of these issues raise the question whether there will be any political support for the adoption of such a convention. The economic and political stakes of ratification seem very high, particularly since the numbers of such displaced persons could run into thousands, if not millions. The main issue, however, is that this framework will not cover those currently living on Small Island States as the Draft Convention envisions the eventual return of these displaced populations to their homes when such return is possible. By not confining this to climate refugees, the drafters seem to opt for a more inclusive approach. However, it may prove to be rather unwieldy if every environmental disaster triggers mass migration. Others have

sought to distinguish between three categories of people: (a) environmentally motivated migrants; (b) environmentally forced migrants; and (c) environmental refugees.¹⁴²

Biermann and Boass, on the other hand, have proposed that those who are displaced by climate change should be treated differently due to their special character.¹⁴³ They define “climate refugees” as: “people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.”¹⁴⁴

These proponents restrict the application of climate refugees to three direct impacts of climate change: sea level rise, extreme weather events, and drought and water scarcity.¹⁴⁵ They also exclude four categories of impacts from a possible definition: (i) climate impacts that have only a marginal link with forced migration; (ii) forced migration as a result of measures taken in relation to mitigation or adaptation; (iii) migration due to other factors such as industrial accidents or natural disasters unrelated to human activities; (iv) migration due to indirect impacts of climate change such as conflicts over natural resources.¹⁴⁶ Biermann and Boass’ definition thus highlights one of the problems with defining climate refugees—it is difficult to establish the causal link between the event and climate change—extreme weather events such as flooding, prolonged droughts are a good example. While there is recognition that climate change will give rise to severe weather events both in relation to the frequency and the severity,¹⁴⁷ it is not possible to identify climate change as the *sole* cause.¹⁴⁸ Furthermore, there is also recognition that climate change will give rise to water and food scarcity,¹⁴⁹ which could lead to conflicts over these resources resulting in

142. See Renaud et al., *supra* note 129, at 1–9.

143. See Frank Biermann and Ingrid Boass, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, at 25–30 (Global Governance Working Paper No 33, 2007).

144. *Id.* at 8.

145. *Id.*

146. *Id.*; see also Atapattu, *supra* note 128.

147. See IPCC, *supra* note 2.

148. See Black, *supra* note 128, at 12–14; Lopez, *supra* note 103.

149. See Biermann & Boass, *supra* note 142, at 11.

forced migration in some instances. It is unfortunate that, according to this definition, such people will not fall into the category of climate refugees and, therefore, unable to benefit from the proposed legal framework.

IV. CONCLUSION

Climate change poses unprecedented challenges to the very core of the international legal order, threatening the foundations of international law. Nation-states, sovereignty and the gamut of rights and privileges that emanate from the notion of sovereignty will be threatened as a result of climate change, particularly in relation to Small Island States which are especially vulnerable to these consequences. Whatever may be the uncertainties related to climate change and climate migration, one thing is clear: the people of these endangered states cannot be left to fend for themselves alone simply because a vacuum exists in relation to their legal status. The international community should use this as an opportunity to design a new legal regime in relation to the various challenges posed by climate change. The international community may have to depart from the traditional notions of statehood, populations, sovereignty and nationality and devise a legal regime to govern those who will be displaced because their territory became submerged or because they were forced to migrate due to climate change. Whether they are called “nations ex situ,” “endangered states,” “states in exile” or “deterritorialized states,” a legal solution will have to be found to accommodate their new status.¹⁵⁰ As Burkett points out:

Climate change takes us to a legal frontier. In other words, novel scenarios push current legal fields to their extensive margins, and force consideration beyond their existing boundaries. Further, notions of consistency and finality, like the state-territory link, are increasingly moribund. . . . Yet, it is probable that the emerging legal architecture for climate change will contain overlapping

150. See Michael B. Gerrard & Gregory E. Wannier, *supra* note 107, who point out: “It is our moral duty as a society to prevent anthropogenic climatic change to the extent that we can and to help these threatened nations cope with the climate change that will occur despite our best efforts.” Of course, it is questionable whether we made our best efforts but it is clear that these states require the help of the international community.

instruments, specific to the circumstances of disparate peoples and environments. . . .The law would do well to embrace layers and inter-linkages — that is the essence of its successful transformation. Indeed, chasing coherence discourages experimentation in lawmaking, exactly what may be needed in the endangered-states context — and what will be a core element of post-climate governance.¹⁵¹

Although we may still have a window of opportunity to work on the issue of “endangered states” and their citizens collectively, the longer we wait, the harder it will become to get buy-in from states to devise a legal regime. However, considering our experience with climate change negotiations, the outlook is not very promising. As we continue the game of political finger pointing, can the international community afford to sit and wait for sovereign nations to be submerged leaving their populations stateless, landless and resourceless? Is this the legacy that awaits the Small Island States?

151. See Burkett, *supra* note 74, at 373.