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Holly D. Lange

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# CLIMATE REFUGEES REQUIRE RELOCATION ASSISTANCE: GUARANTEEING ADEQUATE LAND ASSETS THROUGH TREATIES BASED ON THE NATIONAL ADAPTATION PROGRAMMES OF ACTION

Holly D. Lange<sup>†</sup>

*Abstract:* Rising ocean levels in the South Pacific threaten thousands of inhabitants with displacement. Many of these small Pacific island states lack available land to internally accommodate displaced individuals. Thus, thousands of “climate refugees” will be forced to move off their island homes and, without provisions of adequate land rights, will most likely end up in refugee camps in other countries.

Climate change exemplifies an inherently global challenge. Developed countries produce disproportionately more greenhouse gases, and developing countries lack resources to adequately respond to climatic displacement. International treaties establish a legal responsibility to assist developing states adapt to climate change. However, these treaties inadequately provide support to vulnerable Pacific states like Kiribati, a low-lying South Pacific island nation. The Kiribati-United States Friendship Treaty, the South Pacific Regional Environment Programme Agreement, and the United Nations Framework Convention on Climate Change all suggest legal responsibilities for the United States and other developed states to assist Kiribati’s climate adaptation efforts, but each treaty regime ultimately fails to elicit international response because the terms are vague and lack enforcement mechanisms. A future treaty regime based on the National Adaptation Programmes of Action must establish a system to respond to climatic displacement by creating adequate land rights provisions.

## I. INTRODUCTION

The effects of climate change may displace two hundred million people both internally and across national borders by the middle of the twenty-first century.<sup>1</sup> In recent years, increased frequency and severity of natural disasters pushed people from their homes on an unprecedented scale.<sup>2</sup> Rising ocean levels, in particular, will likely displace thousands of the world’s first climate refugees<sup>3</sup> in the South Pacific. Rising ocean levels

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<sup>†</sup> The author would like to thank Professor Sylvia Kang’ara for her guidance, the editorial staff at the *Pacific Rim Law & Policy Journal* for their assistance, and her friends and family for their constant support.

<sup>1</sup> See Office of the United Nations High Comm’n for Refugees, *Forced Displacement in the Context of Climate Change: Challenges for States Under International Law*, May 20, 2009, <http://www.unhcr.org/4a1e4d8c2.html> (last visited May 22, 2010) [hereinafter UNHCR, *Forced Displacement*].

<sup>2</sup> Dana Zartner Falstron, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 2001 COLO. J. INT’L ENVTL. L. & POL’Y 1, 4 (2001).

<sup>3</sup> The term “climate refugee” will be used throughout this Comment to refer to individuals displaced by the effects of climate change. The term has been criticized for sacrificing the dignity of displaced persons and over-simplifying climatic displacement. See Jane McAdam and Maryanne Loughry, *We Aren’t Refugees*, INSIDE STORY: CURRENT AFF. AND CULTURE, June 30, 2009, <http://inside.org.au/we-arent->

could cover whole Pacific island nations, and upon displacement, these nations of climate refugees will require land rights elsewhere to establish functioning communities.<sup>4</sup>

In the South Pacific, more than half of the population lives less than one and a half kilometers from the shore,<sup>5</sup> and within twenty years, the most heavily populated areas in many South Pacific nations may become uninhabitable.<sup>6</sup> Kiribati's citizens, the I-Kiribati,<sup>7</sup> who live on low-lying coral atolls scattered across two million square miles in the Pacific Ocean, are particularly susceptible to climatic displacement.<sup>8</sup> Already the I-Kiribati experience the effects of rising ocean levels. What will happen to the I-Kiribati as the ocean consumes their nation? Where will they go? What refuge and resources will the international community provide? Without adequate land rights provisions, these people will be scattered throughout the world in temporary refugee settlements, lacking the resources or collateral to improve their livelihoods and establish functioning communities.

Climate refugees require adequate land right provisions in future treaties to ensure effective international resettlement. In this Comment, the phrase "land rights" refers to relocation and livelihood reestablishment assistance provided through vested property interests, housing, citizenship, or other mechanisms designed to ensure climate refugees adequate resettlement tools. These land rights could be created in other nations through the establishment of new sovereign territories, or by providing climate refugees citizenship. Land ownership and relocation assistance provide climate refugees the opportunity to adapt to their new surroundings and establish productive communities.<sup>9</sup>

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refugees/ (last visited Apr. 10, 2010). In fact, Kiribati's President Tong has said he objects to his people being labeled environmental refugees, claiming that the title "refugee" comes with a stigma. See NOW with David Brancaccio, *Paradise Lost*, PUBLIC BROADCASTING SERVICE (Dec. 12, 2008), <http://www.pbs.org/nw/shows/449/index.html> (last visited May 22, 2010). The author of this Comment does not intend any disrespect and simply uses the term "climate refugee" as a succinct way to refer to someone displaced by climate change.

<sup>4</sup> The effects of climate change will also cause extensive internal displacement. However, this Comment addresses international climatic displacement, where entire nations will be displaced, requiring land rights abroad. See William Gumede, *Copenhagen is a Disaster for Africa*, ABBAY MEDIA (Ethiopia), Dec. 23, 2009, <http://abbaymedia.com/News/?p=3131> (last visited Apr. 10, 2001).

<sup>5</sup> See AlexT., *Commonwealth MPs Call for Action on Climate Change*, COMMONWEALTH CONVERSATION, Oct. 15, 2009, <http://www.thecommonwealthconversation.org/2009/10/commonwealthmps-call-for-action-on-climate-change/> (last visited Apr. 10, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> Citizens of Kiribati refer to themselves as "I-Kiribati."

<sup>8</sup> *Paradise Lost*, *supra* note 3.

<sup>9</sup> See Simon Levine and Judy Adoko, *Land Rights and Displacement in Northern Uganda*, HUMANITARIAN EXCHANGE MAG., July 2006, available at <http://www.odihpn.org/report.asp?id=2813>.

“Studies produced at the request of the World Bank demonstrate that one of the rudimentary causes of poverty and income inequality is unequal access to and possession of [land] assets.”<sup>10</sup> Despite the value of land rights, the international community is far from recognizing their necessity. While existing climate change treaties neglect land rights, they do provide possible platforms for delineating the land rights necessary to support successful relocation. Specifically, the Friendship Treaty between the United States and Kiribati, the South Pacific Regional Environment Programme (“SPREP”) Agreement, and the United Nations Framework Convention on Climate Change (“UNFCCC”) all establish legal responsibilities for developed states to provide assistance to Kiribati to ensure security, protect the environment, and provide adaptation mechanisms for climatic displacement.<sup>11</sup> Each of these international agreements establishes tenuous legal responsibilities for developed states to aid or compensate Kiribati for the negative effects of climate change, but each treaty regime fails to elicit a response from the international community, and none of the treaties discuss land rights provisions for climate refugees. The existing framework established through the UNFCCC’s National Adaptation Programmes of Action (“NAPA”) plan provides a valuable platform for developing future provisions of land rights for climate refugees.

This Comment explores the climate challenges facing Kiribati, which exemplify the need for establishing land rights in international agreements. Part II details the reality and effects of rising ocean levels in the South Pacific generally and Kiribati specifically. Further, Part II outlines the necessity of land rights for climate refugees and explores possible specific characteristics of land rights provisions. Part III discusses the international legal mechanisms that could address climatic displacement and land rights, emphasizing the benefits of treaties. Part III also considers existing international treaties that create tenuous legal responsibilities for developed states to provide assistance to address climatic displacement, including the Friendship Treaty, the SPREP Agreement, and the UNFCCC. Part IV discusses why these legal obligations are inadequate and what future agreements ought to include, focusing particularly on land rights provided through a new treaty based on the National Adaptation Programme of Action system.

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<sup>10</sup> Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Property in Developing Nations*, 36 GEO. WASH. INT’L L. REV. 1109, 1110 (2004); Nancy Birdsall & Juan Luis Londono, *Asset Inequality Does Matter: Lessons From Latin America* 15 (Inter-America Dev. Bank, OCE Working Paper 1997).

<sup>11</sup> See *infra* Part III.B.

## II. KIRIBATI FACES DAUNTING CLIMATE CHALLENGES THAT COULD DISPLACE THE ISLAND'S ENTIRE POPULATION

No nation is safe from climate change, and the effects are already visible around the world with more frequent and severe storms, desertification, and rising ocean levels.<sup>12</sup> The consequences of climate change<sup>13</sup> will be especially severe in the South Pacific where rising sea levels threaten to overtake low-lying islands in the next century.<sup>14</sup> Widespread displacement results in refugee camps with significant health and security risks.<sup>15</sup>

### A. *Anthropogenic Release of Greenhouse Gases Causes Global Warming*

Human behavior since the Industrial Revolution resulted in increased levels of greenhouse gases.<sup>16</sup> The scientific community largely agrees that greenhouse gases, particularly carbon dioxide, alter the Earth's natural systems.<sup>17</sup> While skeptics insist that these climatic changes are part of a natural global cycle,<sup>18</sup> this Comment starts from the position that the climate is changing as a result of human behavior.

Rising sea levels represent one of the most serious consequences of global warming.<sup>19</sup> Water expands as it warms, and warmer waters both

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<sup>12</sup> See Richard Neil Ilagan, *Obama Administration: Global Warming Effects are Everywhere*, DAILY CONTRIBUTOR, June 17 2009, <http://dailycontributor.com/obama-administration-global-warming-effects-are-everywhere/5565/> (last visited Apr. 5, 2010).

<sup>13</sup> The terms "climate change" and "global warming" will be used interchangeably throughout this Comment.

<sup>14</sup> Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107, 113 (2004); See Lester R. Brown, *Rising Sea Level Forcing Evacuation of Island Country*, EARTH POL'Y INST., Nov. 15, 2001, [http://www.earthpolicy.org/index.php?plan\\_b\\_updates/2001/update2](http://www.earthpolicy.org/index.php?plan_b_updates/2001/update2) (last visited Apr. 5, 2010).

<sup>15</sup> David A. Martin, *Migration and Refuge in the Twenty-First Century: A Symposium in Memory of Arthur Helton: A New Era for U.S. Refugee Resettlement*, 36 COLUM. HUM. RTS. L. REV. 299, 317 (2005).

<sup>16</sup> Sarah A. Peay, *Joining the Asia-Pacific Partnership: The Environmentally Sound Decision?* 18 COLO. J. INT'L ENVTL. L. & POL'Y 477, 479 (2007).

<sup>17</sup> Anthony Oliver-Smith, *Climate Change and Population Displacement: Disasters and Diasporas in the Twenty-First Century*, in ANTHROPOLOGY AND CLIMATE CHANGE: FROM ENCOUNTERS TO ACTIONS 117 (Susan A. Crate & Mark Nuttal eds., 2009); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (S. Solomon et al. eds., 2007) [hereinafter IPCC REPORT 2007]; Naomi Oreskes, *The Ivory Tower: The Scientific Consensus on Climate Change*, SCIENCE, Dec. 3, 2004, at 1686, <http://www.sciencemag.org/cgi/content/full/306/5702/1686> (last visited Apr. 5, 2010).

<sup>18</sup> See Doug L. Hoffman, *Global Warming Predictions Invalidated*, RESILIENT EARTH, Nov. 5, 2009, <http://www.theresilientearth.com/?q=content/global-warming-predictions-invalidated> (last visited Apr. 5, 2010).

<sup>19</sup> Oliver-Smith, *supra* note 17, at 117.

directly cause ocean levels to rise and cause ice to melt at the polar caps.<sup>20</sup> A 2007 Intergovernmental Panel on Climate Change (“IPCC”) report conservatively estimates that sea levels could rise between nearly one foot and 1.9 feet by the end of the twenty-first century.<sup>21</sup> “The crux of the sea level issue is that it starts very slowly but once it gets going it is practically unstoppable.”<sup>22</sup> Even if international society reaches zero emissions, sea levels will continue to rise at a steady rate for centuries.<sup>23</sup> Thus, the international conversation surrounding climate change responses must adequately consider the effects of global warming and shift the policy debate to adaptation mechanisms, including methods to respond appropriately to climatic displacement.

*B. Kiribati Faces Serious Climate Impacts as a Vulnerable, Low-Lying Pacific Island*

Kiribati’s geography, political history, and economy leave the country vulnerable to the effects of climate change. Kiribati consists of thirty-three tiny coral atolls, dispersed over nearly two million square miles, straddling the equator between Hawaii and Australia.<sup>24</sup> Despite its expansive ocean territory, the habitable land in Kiribati would fit within New York City’s limits,<sup>25</sup> and only 100,000 people live in Kiribati.<sup>26</sup> Kiribati struggled with foreign occupation until its independence in 1977, and the islands remain plagued by economic and political instability.<sup>27</sup>

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<sup>20</sup> John H. Knox, *Symposium: Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 479 (2009).

<sup>21</sup> IPCC REPORT 2007, *supra* note 17; Cristine Russell, *First Wave: The presidents of Two Island Nations Draft Escape Plans, Anticipating Sea Level Rise*, SCIENCE NEWS, Feb. 28, 2009, at 24.

<sup>22</sup> See Gerard Wynn, *Two Meter Sea Level Rise Unstoppable*, REUTERS (Oxford), Sept. 30, 2009, <http://www.reuters.com/article/idUSTRE58S4L420090930> (last visited Apr. 10, 2010).

<sup>23</sup> Denis Culley, Note, *Global Warming, Sea Level Rise and Tort*, 8 OCEAN & COASTAL L.J. 91, 99 (2002); *What can you do about a Vanishing Nation? See “The President’s Dilemma,” Coming Up on BBC World*, INT’L FUND FOR AGRIC. DEV., Dec. 11, 2009 [hereinafter IFAD], <http://www.ifad.org/media/video/kiribati/index.htm> (last visited Apr. 5, 2010); Wynn, *supra* note 22.

<sup>24</sup> CIA WORLD FACTBOOK, AUSTRALIA-OCEANIA: KIRIBATI, <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> (last visited Feb. 11, 2010); *Paradise Lost*, *supra* note 3.

<sup>25</sup> New York City’s limits measure approximately 320 square miles. CHRISTINA WONG, PHYSICS FACTBOOK: AREA OF NEW YORK CITY (Glenn Elert ed., 2002), <http://hypertextbook.com/facts/2002/JordanLevine1.shtml> (last visited Apr. 10, 2010).

<sup>26</sup> The population of New York City, according to the 2008 Census Bureau Estimate, is 19,490,297. NYC.gov, Population: Current Population Estimate, <http://www.nyc.gov/html/dcp/html/census/popcur.shtml> (last visited May 22, 2010); IFAD, *supra* note 23.

<sup>27</sup> See *Kiribati-History*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/Asia-and-Oceania/Kiribati-HISTORY.html> (last visited Apr. 10, 2010); CIA WORLD FACTBOOK, *supra* note 24.

Kiribati is one of the least developed Pacific Islands with a wildly fluctuating economy highly dependent on foreign aid.<sup>28</sup> The islands' valuable phosphate reserves were exhausted at the time of independence, and further economic development is constrained by a shortage of skilled workers, a weak infrastructure, and remoteness from international markets.<sup>29</sup> Tourism provides more than one-fifth of Kiribati's gross domestic product ("GDP"), and twenty to twenty-five percent of the GDP comes from foreign financial aid.<sup>30</sup> With inadequate resources to respond to climate change,<sup>31</sup> the effects of climate change will disrupt the daily lives and health of the I-Kiribati, eventually forcing migration off the islands. However, most I-Kiribati will not be able to purchase new land abroad.

1. *Climate Change Damages Agriculture, Biodiversity, Economics, Health, and Culture on Kiribati*

A 1.9 foot rise in sea level would dramatically alter life on Kiribati through direct encroachment of water and saltwater intrusion into soil and freshwater sources.<sup>32</sup> Most of the islands of Kiribati are less than two meters above sea level.<sup>33</sup> Two uninhabited Kiribati islands, Tebua and Bikeman, have already vanished completely.<sup>34</sup> In the coming decades, rising ocean levels will "drown" Kiribati, forcing displacement of the I-Kiribati.<sup>35</sup>

Inhabitants of low-lying islands in the South Pacific like Kiribati face serious, daily effects of climate change including: loss of land, loss of homes, storm surges, damaged marine ecosystems, disrupted food sources, compromised fresh drinking water, and loss of livelihoods connected to the ocean or tourism.<sup>36</sup> For example, scientists predict that salinization will make low-lying Pacific Islands uninhabitable long before water actually

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<sup>28</sup> CIA WORLD FACTBOOK, *supra* note 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Culley, *supra* note 23, at 106.

<sup>32</sup> IFAD, *supra* note 23; IPCC REPORT 2007, *supra* note 17.

<sup>33</sup> Gillespie, *supra* note 14, at 113.

<sup>34</sup> Rebecca Tsosie, *The Change of Environmental Justice: Taking Stock: Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1637 (2007); *Paradise Lost*, *supra* note 3; Daniel Williams, *There's Debate About the Causes, But Rising Seas Are Lapping Away the Edges of Tiny Island Nations-and Could Eventually Drown Them*, TIME PACIFIC, Aug. 27, 2001, <http://www.time.com/time/pacific/magazine/20010820/climate.html> (last visited Apr. 10, 2010).

<sup>35</sup> See David Perlman, *Oceans Rising Fast, New Studies Find*, SF GATE, Mar. 24, 2006, [http://articles.sfgate.com/2006-03-24/news/17284797\\_1\\_level-rise-sea-ice-sea-level](http://articles.sfgate.com/2006-03-24/news/17284797_1_level-rise-sea-ice-sea-level) (last visited Apr. 10, 2010).

<sup>36</sup> Ruth Gordon, *The Climate of Environmental Justice: Taking Stock: Climate Change and the Poorest Nations: Further Reflections on Global Inequity*, 78 U. COLO. L. REV. 1559, 1595 (2007); Tsosie, *supra* note 34, at 1636.

overtakes the islands.<sup>37</sup> The islands' porous coral foundations allow saltwater intrusion into freshwater sources.<sup>38</sup> Saltwater intrusion into freshwater and the soil destroys agricultural productivity.<sup>39</sup> In addition to damaging agriculture, salinization also causes a loss of adequate drinking water.<sup>40</sup>

Rising ocean levels impact island lifestyle beyond the direct effects on agriculture and human health.<sup>41</sup> With livelihoods changed by a loss of tourism and a loss of fishing resources, island inhabitants will be forced to seek alternative lifestyles and employment opportunities.<sup>42</sup>

## 2. *Rising Ocean Levels Force Coastal Communities from their Homes*

With threats to agriculture, biodiversity, the economy, health, and culture on Kiribati, its citizens must consider eventual relocation. Most of Kiribati's 94,000 shoreline village residents face the prospect of displacement; some have already relocated from century-old sites.<sup>43</sup> Kiribati's President Anote Tong says of relocation, "We're doing it now . . . it's that urgent."<sup>44</sup> President Tong actively addresses the international displacement of the I-Kiribati, proposing relocation in Australia and New Zealand.<sup>45</sup> When Tong was asked whether he would eventually divide his people among other nations, Tong replied, "The question is, do I have a choice?"<sup>46</sup>

### C. *Adequate Land Rights are Essential for Successful Climatic Relocation Efforts*

When island nations like Kiribati are displaced due to rising ocean levels, land rights must be carefully considered and incorporated into the international response to ensure successful relocation efforts. In the South

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<sup>37</sup> IFAD, *supra* note 23.

<sup>38</sup> See *Water Plan Helps Sinking Kiribati Stay Afloat*, PACIFIC ISLANDS BROAD. ASS'N, Mar. 3, 2009, <http://sealevelrise.blogspot.com/2009/03/water-plan-helps-sinking-kiribati-stay.html> (last visited Apr. 10, 2010).

<sup>39</sup> Gordon, *supra* note 36, at 1595, 1596; Tsosie, *supra* note 34, at 1636.

<sup>40</sup> Tsosie, *supra* note 34, at 1636.

<sup>41</sup> See Jonathan Adams, *Rising Sea Levels Threaten Small Pacific Island Nations*, N.Y. TIMES, May 3, 2007, available at [http://www.nytimes.com/2007/05/03/world/asia/03iht-pacific.2.5548184.html?\\_r=1](http://www.nytimes.com/2007/05/03/world/asia/03iht-pacific.2.5548184.html?_r=1).

<sup>42</sup> Gordon, *supra* note 36, at 1597; Gillespie, *supra* note 14, at 114; *Paradise Lost*, *supra* note 3.

<sup>43</sup> See *Climate Change Pushes Kiribati Underwater*, GSTAAD PROJECT, June 15, 2008, <http://gstaadblog.wordpress.com/2008/06/15/climate-change-pushes-kiribati-underwater/> (last visited Apr. 10, 2010).

<sup>44</sup> *Id.*

<sup>45</sup> Knox, *supra* note 20, at 498.

<sup>46</sup> *Paradise Lost*, *supra* note 3.



Pacific, people view their ancestral land plots as part of themselves and part of their families.<sup>47</sup> Thus, land on Kiribati is not considered a fungible commodity.<sup>48</sup>

In its set of Key Messages and Recommendations to State Parties to the UNFCCC, the Office of the United Nations High Commissioner for Refugees (“UNHCR”) explained the necessity of assisting climate-induced migrations.<sup>49</sup> In order to accommodate climate-induced migrants, states receiving climate refugees must provide adequate land rights.<sup>50</sup> Secure land rights facilitate economic development including increasing productivity, improving efficiency of land use, increasing access to credit, increasing investments in the land, increasing the value of the land, reducing environmental degradation, and creating political stability.<sup>51</sup> These benefits allow climate refugees to resettle successfully.

Despite its necessity, creating treaty regimes and international solutions to climatic displacement remains daunting. Individual landowners will lose their land due to rising ocean levels. If international legal mechanisms do not include adequate land rights provisions, climatic displacement will result in climate refugee camps scattered around the world. Providing land ownership and adequate land rights allows families to produce their own food, raise money, take out loans, and improve their economic positioning.<sup>52</sup> Without land rights, climate refugees from low-lying islands like Kiribati will remain a transient population, continually dependent on the international community to supply basic services.<sup>53</sup>

Efforts to provide land rights to climate refugees face a number of challenges, beyond acquiring funding and assistance from developed states. Governments and non-governmental organizations involved in the relocation

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<sup>47</sup> See RON CROCOMBE, *Overview: The Pattern of Change in Pacific Land Tenures*, in LAND TENURE IN THE PACIFIC 3 (Selwyn Artangai et al. eds., 1987). This Comment makes generalizations about the overall necessity of adequate land rights provisions, without delving into the unique make-up of individual South Pacific land tenure systems, which vary dramatically from island to island in modern nations.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> UNHCR, *Forced Displacement*, *supra* note 1.

<sup>50</sup> “States should consider establishing alternative forms of protection for those persons who do not qualify as refugees but whose return is not feasible or not reasonable due to circumstances in the place of origin an/or personal conditions, including particular vulnerabilities. They should ensure that migration.” *Id.*

<sup>51</sup> Tim Hanstad, Roy L. Prosterman & Robert Mitchell, *Poverty, Law and Land Tenure Reform*, in ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 36, 36 (Roy L. Prosterman et al. eds., 2009).

<sup>52</sup> Roy L. Prosterman & Tim Hanstad, *Land Reform in the Twenty-First Century: New Challenges, New Responses*, 4 SEATTLE J. SOC. JUST. 763, 763 (2006).

<sup>53</sup> See Dale Buscher, *Why Refugees Need to Make a Living*, HUFFINGTON POST, Aug. 11, 2009, [http://www.huffingtonpost.com/dale-buscher/why-refugees-need-to-make\\_b\\_256589.html](http://www.huffingtonpost.com/dale-buscher/why-refugees-need-to-make_b_256589.html) (last visited Apr. 10, 2010).

and land rights provision process must be mindful of mistakes of past relocation efforts, appropriate titling systems, and location selection.<sup>54</sup>

1. *Relocation Projects Must Avoid the Mistakes of Past Projects in Selecting a Location and Supporting the Relocated Community*

In providing land ownership in new locations, governments must be careful not to fall into the same traps as historic relocation efforts. Government policies to redistribute significant plots of titled land in isolated areas tend to produce high concentrations of poverty.<sup>55</sup> For example, in World Bank funded dam projects that include forcible removal programs like the Narmada Dam in India,<sup>56</sup> individuals have been stripped of their land and placed in resettlement colonies that lack sufficient services and economic opportunities for the colony inhabitants.<sup>57</sup> Further, past resettlement programs have proven extremely costly with establishment of agricultural production in the new region, development of infrastructure, and construction of housing, schools, and hospitals.<sup>58</sup>

2. *Relocation Sites Play a Vital Role in Determining the Success of a Project*

Because entire Pacific states like Kiribati will be displaced by climate change, selecting a destination for relocation in foreign nations presents an additional challenge. Where should the land come from? Acquiring existing public land seems like a natural solution, but the land may be inadequate, squatters may use the land already, and the land could be distant from existing communities and infrastructure.<sup>59</sup> Land ought to be acquired through market-based mechanisms, whereby governments, international organizations, or beneficiaries acquire land through the market, buying and selling the land like any private actor.<sup>60</sup> Voluntary sale of land results in

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<sup>54</sup> This section assumes that someday climate change will displace entire South Pacific nations, forcing entire countries to relocate abroad.

<sup>55</sup> Atuahene, *supra* note 10, at 1119.

<sup>56</sup> Patrick McCully, *Resolution on Narmada and the World Bank on the Occasion of the Fiftieth Anniversary of the World Bank*, 26 BULLETIN CONCERNED ASIAN SCHOLARS 90 (1994), available at <http://criticalasianstudies.org/assets/files/bcas/v26n04.pdf>.

<sup>57</sup> Dana L. Clark, *Boundaries in the Field of Human Rights: The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 213 (2001).

<sup>58</sup> Roy L. Prosterman, *Redistributing Land to Agricultural Laborers*, in ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 123 (Roy L. Prosterman et al. eds., 2009); Clark, *supra* note 57, at 221.

<sup>59</sup> Prosterman, *supra* note 58, at 125.

<sup>60</sup> *Id.* at 129.

fewer conflicts, and the land may be carefully selected. Locations must be geographically strategic, located near sources of employment, productive land, and infrastructure.<sup>61</sup> Ultimately, the quality of the resettlement location plays a major role in the success of the relocation.<sup>62</sup>

Despite challenges associated with acquiring adequate land rights, selecting land location, and acquiring adequate funding, these measures are necessary to prevent climate refugees from living in refugee camps around the world without the means to improve their positions. Land rights represent a vital component in future legal regimes that address climate change and climate displacement for people like the I-Kiribati.

### 3. *Successful Relocation Projects Require Participation by the International Community*

The displacement of entire nations represents an unprecedented international emergency, and the international community must prepare to respond adequately. As discussed below, treaties represent the appropriate international legal mechanism to facilitate the relocation of displaced populations. As such displacement is an inherently international problem, treaties appropriately provide a binding international solution.

Countries may decide to opt into future climate treaties for a number of reasons. First, countries may feel that their own security interests will be served.<sup>63</sup> In fact, the United States Department of Defense acknowledges that global warming represents the biggest threat to national security.<sup>64</sup> With the United States' heightened interest in security in the past few years, the United States could decide to sign onto a climatic displacement treaty.<sup>65</sup> "Desperation breeds violence," and countries could avoid internal and international disputes by providing land rights to climate refugees.<sup>66</sup>

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<sup>61</sup> Atuahene, *supra* note 10, at 1120.

<sup>62</sup> *Id.*

<sup>63</sup> Michael J. Kelly, *Ten Questions: Responses to the Ten Questions*, 35 WM. MITCHELL L. REV. 5059, 5062 (2009).

<sup>64</sup> *Id.*

<sup>65</sup> See Kate Sheppard, *National Security Emphasis Could Inspire Support for Climate Bill*, GRIST, July 22, 2009, <http://www.grist.org/article/2009-07-22-national-security-support-climate-bill-john-warner/> (last visited Apr. 10, 2010).

<sup>66</sup> Paul J. Smith, *Geography and the Boundaries of Confidence: Military Responses to the Global Migration Crisis: A Glimpse of Things to Come?* 23 FLETCHER F. WORLD AFF. 77, 79 (1999); *Desperation Breeds Violence in Haiti*, EURO NEWS, Jan. 18, 2010, <http://www.euronews.net/2010/01/18/desperation-breeds-violence-in-haiti/> (last visited Apr. 10, 2010).

Second, developed countries are responsible for causing climate change,<sup>67</sup> so assisting climate refugees takes on a compensatory nature.

### III. A NEW TREATY REGIME MUST BE CREATED TO OVERCOME THE INADEQUACIES OF EXISTING TREATIES AND ESTABLISH LAND RIGHTS FOR CLIMATE REFUGEES FROM COUNTRIES LIKE KIRIBATI

Current climate-related treaties fail to establish sufficient enforceable legal obligations to assist with climatic displacement for countries like Kiribati. No existing treaties explicitly mention climate refugees, yet a new treaty represents the most appropriate legal mechanism to provide land rights to climate refugees.

#### A. *Treaties Represent the Appropriate Legal Mechanism to Provide Land Rights to Climate Refugees*

Academics advance four international legal principles to address climate change.<sup>68</sup> Options for providing land rights include litigation, the “responsibility to protect” doctrine, human rights norms, and existing refugee laws. Ultimately, treaties represent the best method for responding to climatic displacement because these four options fall short of providing land rights for climate refugees.

##### 1. *Litigation to Provide Land Rights for Climate Refugees will not Adequately Respond to the Scope of Climatic Displacement*

Litigation is a possible mechanism for bringing climate-related claims, but litigation measures prove inherently ineffective. Litigation does not immediately address root problems of climatic displacement because litigation often only serves to identify punitive measures.<sup>69</sup> Also, litigation does not guarantee results—courts could decide that climate refugees are not entitled to land rights.<sup>70</sup> Further, states like Tuvalu, another low-lying Pacific state that threatened to bring suit based on climate change against the United States and Australia in the International Court of Justice (“ICJ”),

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<sup>67</sup> Paul G Harris, *Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27, 33 (1999).

<sup>68</sup> See *infra* Part III.A.1-4.

<sup>69</sup> Colleen P. Murphy, *National Interest: The “Bedbug” Case and State Farm v. Campbell*, 9 ROGER WILLIAMS U. L. REV. 579, 582 (2004).

<sup>70</sup> Martha Middleton and Viki Quade, *Corporations Hunt Ways to Cut Legal Costs*, 68 A.B.A. J. 523 (1982).

struggle with proving causation.<sup>71</sup> Developed states produce disproportionately more emissions, but it is difficult to prove in court that one developed nation's emissions caused particular consequences in another country.<sup>72</sup> Thus, litigation alone is inadequate to address climatic displacement and provide land rights; indeed, no case has been brought by an island state to establish land rights upon international displacement.

2. *The “Responsibility to Protect” Doctrine is not Established International Customary Law and Climatic Displacement Falls Outside its Limited Scope*

The international legal principle of a “responsibility to protect” (“R2P”) arguably could be invoked to provide land rights to climate refugees, although the doctrine probably does not extend far enough to cover climatic displacement. The International Commission on Intervention and State Sovereignty developed the idea of R2P in a 2001 report.<sup>73</sup> The central theme is that sovereign states have a responsibility to protect their citizens from catastrophe, but when states fail to live up to this obligation, the international community has a responsibility to protect suffering individuals.<sup>74</sup>

The doctrine typically applies to situations of mass murder, rape, and starvation where a domestic failure to react is “widespread and systematic,”<sup>75</sup> although arguments have been made that the doctrine should expand to include natural disasters.<sup>76</sup> However, reliance on R2P in the

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<sup>71</sup> Rebecca Elizabeth Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 121 (2005); GERMANWATCH, CLIMATE CHANGE CHALLENGES TUVALU 16 (2004), available at <http://www.germanwatch.org/download/klak/fb-tuv-e.pdf>.

<sup>72</sup> See Maggie L. Walsler, *Greenhouse Gas Emissions—Perspectives on the Top 20 Emitters and Developed Versus Developing Nations*, ENCYCLOPEDIA OF EARTH, October 5, 2009, [http://www.eoearth.org/article/Greenhouse\\_gas\\_emissions:\\_perspectives\\_on\\_the\\_top\\_20\\_emitters\\_and\\_developed\\_versus\\_developing\\_nations](http://www.eoearth.org/article/Greenhouse_gas_emissions:_perspectives_on_the_top_20_emitters_and_developed_versus_developing_nations) (last visited Apr. 10, 2010).

<sup>73</sup> Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 287 (2004).

<sup>74</sup> Carsten Stahn, *Notes and Comments: Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 AM. J. INT'L L. 99 (2007); INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, <http://www.iciss.ca/report-en.asp> (last visited Apr. 3, 2010).

<sup>75</sup> See ASIA-PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT, THE RESPONSIBILITY TO PROTECT AND THE PROTECTION OF CIVILIANS: ASIA-PACIFIC IN THE UN SECURITY COUNCIL 6 (2008), available at <http://www.r2pasiapacific.org/documents/Asia-Pacific%20POC%20june%2008.pdf>. The principle was first articulated following the genocides in Rwanda and Yugoslavia. Joe Lauria, *U.S. Backs Implementing U.N. Doctrine Against Genocide*, WALL ST. J., July 30, 2009 available at <http://online.wsj.com/article/SB124890587995691589.html>.

<sup>76</sup> Jarrod Wong, *Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism*, 84 TUL. L. REV. 219, 222 (2009).

climate change context is tenuous for two reasons. First, the principle has not yet ripened into widely accepted customary international law.<sup>77</sup> Second, even if the principle does become part of customary international law, climatic displacement challenges may extend beyond the scope of the doctrine's application.<sup>78</sup> Further, R2P has never provided land rights to displaced populations.

### 3. *Human Rights Norms Fall Short of Providing Adequate Land Rights to Climate Refugees Because of Inconsistent Enforcement*

A number of principles of international human rights law apply to the climate change challenge, including Articles 6 and 12 of the International Covenant on Civil and Political Rights, which guarantee a right to life and recognize the right of freedom of movement and choice of residence.<sup>79</sup> Additionally, because climate change directly compromises economic, social, and cultural rights, it also implicates Articles 6, 11, and 12 of the International Covenant on Economic, Social, and Cultural Rights, which guarantee a right to livelihood, food, water, housing, health and an adequate standard of living.<sup>80</sup> Climate change impacts each of these essential human rights through prevalence of disease, disturbed agricultural and water sources, displacement, and damaged systems relied on for livelihoods.<sup>81</sup>

However, the history of human rights adherence and enforcement suggests that human rights norms will not adequately provide land rights to climate refugees. States like Kiribati will face climatic displacement over the next ten decades due to rising ocean levels.<sup>82</sup> History indicates that human rights movements operate slowly,<sup>83</sup> and garnering enough support in the human rights community could prove difficult in the near future.<sup>84</sup> Further, human rights advocates may hesitate to divert valuable resources

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<sup>77</sup> Tyra Ruth Saechao, *Natural Disasters and the Responsibility to Protect: From Chaos to Clarity*, 32 *BROOK. J. INT'L L.* 663, 699 (2007).

<sup>78</sup> *Id.* at 707. Increasing awareness among all states regarding a responsibility to protect natural disaster victims would greatly assist international disaster relief, but given the political nature of international disaster response, achieving international cooperation is difficult. *Id.*

<sup>79</sup> International Covenant on Civil and Political Rights arts. 6, 12, Dec. 16, 1966, 6 *I.L.M.* 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>80</sup> International Covenant on Economic, Social, and Cultural Rights arts. 6, 11, 12, Dec. 16, 1966, 6 *I.L.M.* 360, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>81</sup> *Water Plan Helps*, *supra* note 38.

<sup>82</sup> Knox, *supra* note 20, at 479.

<sup>83</sup> Joel Ngugi, Professor, University of Washington School of Law, Lecture on the Law of Human Rights (Nov. 16, 2009).

<sup>84</sup> See Stephen Carley, *Limping Toward Elysium: Impediments Created by the Myth of Westphalia on Humanitarian Intervention In the International Legal System*, 41 *CONN. L. REV.* 1741, 1743 (2009).

toward climatic displacement, seeing the climate realm as more of a *scientific* than a *human* problem.<sup>85</sup>

Even if the human rights movement enveloped climatic displacement, the track record of human rights efforts reveals serious enforcement problems.<sup>86</sup> Human rights conventions<sup>87</sup> require reports only from member states, so nonmember states and unrecognized states avoid compliance with the conventions' provisions.<sup>88</sup> Also, international actors have inconsistently interpreted and incorporated human rights norms into domestic policies.<sup>89</sup> Ultimately, human rights norms do not guarantee land rights to displaced populations.<sup>90</sup>

#### 4. *Existing Refugee Laws are Inappropriate to Respond to the Unique Challenges Posed by Climatic Displacement*

Existing refugee laws seem to present a natural solution to climatic displacement, but serious long-term concerns preclude this option. The international community has been reluctant to label individuals displaced by climate change as "refugees."<sup>91</sup> "International refugee law . . . was not designed for those who are left homeless by environmental pressures," and ultimately, international law is unfit to deal with the millions of expected climate refugees.<sup>92</sup> Further, the circumstances surrounding climatic displacement are entirely distinct from circumstances surrounding political displacement, and a legal solution must consider the unique circumstances of climate refugees, who are not fleeing from a well-founded fear.<sup>93</sup> So far, only the Finnish and Swedish Aliens Acts recognize environmental refugees.<sup>94</sup> The majority of domestic asylum systems do not accommodate

<sup>85</sup> See Mario Osava, *Climate Change: Scientific Fact, Not Political Issue*, INTER PRESS SERVICE NEWS AGENCY (Rio De Janeiro), Dec. 19, 2009, <http://ipsnews.net/news.asp?idnews=49754> (last visited Apr. 12, 2010).

<sup>86</sup> Pamala Brondos, *International Law: The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221, 225 (1997).

<sup>87</sup> International conventions are treaties. CAL. DEP'T OF DEV. SERVICES, CONSUMER ADVISORY COMM., CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2009).

<sup>88</sup> Brondos, *supra* note 86, at 225.

<sup>89</sup> UNITED NATIONS ENABLE, INTERNATIONAL NORMS AND STANDARDS RELATING TO DISABILITY, <http://www.un.org/esa/socdev/enable/comp101.htm> (last visited Apr. 14, 2010).

<sup>90</sup> ICCPR, *supra* note 79; ICESCR, *supra* note 80.

<sup>91</sup> Bonnie Docherty and Tyler Giannini, Symposium, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 383 (2009).

<sup>92</sup> See Olesya Dmitracova, *Law Change Needed to Cover Climate Exiles: Lawyers*, REUTERS INDIA, Oct. 15, 2009, <http://in.reuters.com/article/worldNews/idINIndia-43164320091015> (last visited Apr. 12, 2010).

<sup>93</sup> UNHCR, *Forced Displacement*, *supra* note 1.

<sup>94</sup> [Swedish Aliens Act] 2005:716 (Swed.); [Finnish Aliens Act] ch. V 31 §, 537/1999, 22.2.1991/378, (Fin.).

environmental refugees, let alone climate refugees.<sup>95</sup> Further, when granted asylum, refugees are not provided land rights, so a new international legal mechanism must be created.<sup>96</sup>

5. *All Four Alternative Legal Mechanisms are Inappropriate to Respond to Displacement in Kiribati*

Ultimately, the challenges posed by climatic displacement are of a unique breed, and therefore, a new international treaty regime must be developed to create land rights for climate refugees like the I-Kiribati. Other available legal mechanisms are inadequate to address Kiribati's displacement because no appropriate forum exists for Kiribati to instigate litigation, the R2P principle does not extend far enough to cover displacement of I-Kiribati, human rights norms produce inadequate results, and there are no existing international climate refugee laws to respond to the displacement of low-lying island populations.

6. *Treaties Represent the Most Appropriate Response Mechanism to Address Climatic Displacement and Establish Land Rights for Climate Refugees*

Treaties<sup>97</sup> are the most appropriate international legal mechanism to provide land rights to displaced nations due to the inherently global nature of the climate problem, treaties' legally binding nature, treaties' voluntary nature, and the deliberate nature of the treaty negotiation process.<sup>98</sup> For a number of reasons, I-Kiribati displacement will best be addressed through a new international treaty guaranteeing land rights.

First, treaties create binding legal obligations.<sup>99</sup> Parties to a treaty internalize compliance, and compliance becomes the international norm.<sup>100</sup> Treaties become part of domestic law either automatically without implementing legislation or through domestic legislation.<sup>101</sup> Further, Article

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<sup>95</sup> See Jessica Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

<sup>96</sup> John Fredricksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 758 (2000).

<sup>97</sup> Treaties resemble binding contracts, which international parties enter freely. VAUGHAN LOWE, *INTERNATIONAL LAW* 19 (2007).

<sup>98</sup> See *id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1145-46 (2006).

<sup>101</sup> David Sloss, *Non-Self Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 9 (2002).



26 of the Vienna Convention on the Law of Treaties, which is well established and widely ratified, stipulates that every treaty in force is binding upon the parties and must be performed in good faith,<sup>102</sup> or else states can be found in violation of the treaty.

Countries breaching treaty obligations may be held liable under international law.<sup>103</sup> Treaty enforcement mechanisms come in both positive and negative forms.<sup>104</sup> Positive enforcement mechanisms create incentives for compliance, including monetary benefits, political capital, and transparency.<sup>105</sup> Negative enforcement mechanisms are punitive measures for non-compliance such as reparations, agreement withdrawal,<sup>106</sup> and membership sanctions.<sup>107</sup> Some treaty breaches also have domestic consequences. For example, in the United States, self-executing treaties automatically become part of domestic law.<sup>108</sup> Thus, in many instances, treaty rights and obligations may be enforced domestically.<sup>109</sup>

Second, treaty formation is a voluntary process often involving lengthy negotiations.<sup>110</sup> States entering agreements voluntarily are less likely to deviate from the carefully crafted terms of the treaty. Nations take treaty formation seriously because treaty breaches may have legal ramifications.<sup>111</sup> States engage in careful deliberation and negotiation to ensure that their interests will not be detrimentally impacted by positive or negative enforcement mechanisms.<sup>112</sup> This cautious approach works well regarding climatic displacement, an area of international law still undefined and full of uncertainty.

Third, the dissemination of treaties influences the formation of customary international law.<sup>113</sup> Customary law represents a set of international legal norms that become binding after routine state practice and

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<sup>102</sup> Convention on the Law of Treaties art. 26, July 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter Law of Treaties].

<sup>103</sup> See Economic Expert, Treaty, <http://www.economicexpert.com/a/Treaty.htm> (last visited Apr. 14, 2010).

<sup>104</sup> Julian Ouellet, *Knowledge Base Essay: Enforcement Mechanisms*, BEYOND INTRACTABILITY, Sept. 2004, [http://beyondintractability.org/essay/enforcement\\_mechanisms/?nid=140](http://beyondintractability.org/essay/enforcement_mechanisms/?nid=140) (last visited Apr. 12, 2010).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Tseming Yang, *supra* note 100, at 1137.

<sup>108</sup> Sloss, *supra* note 101, at 10.

<sup>109</sup> ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 79 (2005).

<sup>110</sup> Colin B. Picker, *A View From 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 183 (2001).

<sup>111</sup> LOWE, *supra* note 97, at 19.

<sup>112</sup> See generally LOWE, *supra* note 97.

<sup>113</sup> See generally Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 328, 349 (1987).

*opinio juris*<sup>114</sup> are established.<sup>115</sup> Thus, the treaty process will play an essential role in shaping future climatic displacement laws.

Finally, treaty development establishes a set of binding legal principles that parties adhere to without litigation on a case-by-case basis. States facing serious human impacts of climatic displacement require readily available assistance.<sup>116</sup> The most successful international laws do not require court action to secure observation.<sup>117</sup> Additionally, Article 18 of the Vienna Convention on the Law of Treaties mandates that states signing treaties must restrain from measures that would defeat the purpose and objective of the treaty.<sup>118</sup> Thus, without relying on litigation, signatories and parties must act in accordance with treaty provisions.

Despite these strengths, treaties are not a perfect model for providing land rights to displaced nations. The treaty negotiation process may be quite lengthy;<sup>119</sup> parties with less bargaining power may be disenfranchised or marginalized;<sup>120</sup> political considerations inevitably influence negotiations;<sup>121</sup> and treaty participation is voluntary.<sup>122</sup> Developed nations like the United States could simply refuse to engage in negotiations. However, absolute reliance on other available methods like litigation, invocation of R2P, human rights norms, and existing refugee law is inadequate.<sup>123</sup> Thus, formation of new treaties represents the best mechanism to address climatic displacement and ensure land rights for climate refugees.

#### B. *Existing Treaties Suggest Climate Solutions, but Future Regimes Must Go Further to Address Land Rights*

Existing international treaties suggest there is an international legal duty to respond to climatic displacement, but none of the treaties goes far enough to provide land rights to displaced island nations. Three treaties

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<sup>114</sup> *Opinio juris* refers to a states' adherence to an international legal norm out of a sense of obligation. Kane v. Winn, 319 F. Supp. 2d 162, 193 (D. Mass. 2004).

<sup>115</sup> LOWE, *supra* note 97, at 19.

<sup>116</sup> See *Islands Fight the Tide*, TVNZ, Jan. 22, 2009, <http://tvnz.co.nz/world-news/islands-fight-tide-2449866> (last visited Apr. 12, 2010).

<sup>117</sup> LOWE, *supra* note 97, at 135.

<sup>118</sup> Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG. 267, 275 (2007); Law of Treaties, *supra* note 103, art. 18.

<sup>119</sup> Picker, *supra* note 110, at 183.

<sup>120</sup> Kari Krosgeng, *National Resources Law: Resource Conservation: Minnesota v. Mille Lacs Band of Chippewa Indians*, 27 ECOLOGY L.Q. 771, 781 (2000).

<sup>121</sup> Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multiculturalism,"* 4 CHI. J. INT'L L. 223, 227 (2003).

<sup>122</sup> LOWE, *supra* note 97, at 19.

<sup>123</sup> See *supra* Part III.A.

outline potential legal obligations for developed states to provide assistance to victims of climatic displacement: the Kiribati-United States Treaty of Friendship and Territorial Sovereignty (“Friendship Treaty”), the South Pacific Regional Environment Programme (“SPREP”) Agreement, and the United Nations Framework Convention on Climate Change (“UNFCCC”). These three treaties offer some insight into potentially useful legal mechanisms and language; however, they all fall short of meeting the needs of persons displaced by climate change.

1. *The Friendship Treaty Indicates a Legal Responsibility to Provide Relocation Assistance, but the United States is Unlikely to Act*

The United States has a strong historical presence in Kiribati.<sup>124</sup> Upon Kiribati’s independence in 1979, the United States signed the Friendship Treaty with Kiribati, relinquishing U.S. claims to Kiribati’s Phoenix and Line Islands.<sup>125</sup> Language in the text of the Friendship Treaty creates potential legal obligations for the United States to assist Kiribati in environmental crisis caused by rising ocean levels.<sup>126</sup>

First, Article 2 of the Friendship Treaty promises U.S. assistance in emergencies, as well as over-arching development aid.<sup>127</sup> Article 2 states that the United States will provide assistance to Kiribati through collaboration “on matters of mutual concern and interest in time of need.”<sup>128</sup> Since this particular Friendship Treaty has never been called upon in court, there is no precedent against using the language in an expansive manner.<sup>129</sup>

With rising oceans impacting every level of society, Kiribati faces a dire “time of need.”<sup>130</sup> Climatic displacement qualifies as an issue of “mutual concern” given the global effects of climatic displacement, and the United States could interpret the Friendship Treaty to prompt provision of climate-specific aid to Kiribati, including land rights. Climate change impacts Kiribati’s fisheries resources, and the United States has an economic

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<sup>124</sup> See AllGov, Nations, Kiribati, <http://www.allgov.com/nation/Kiribati> (last visited Mar. 16, 2010).

<sup>125</sup> *Id.*

<sup>126</sup> See Treaty of Friendship and Territorial Sovereignty, U.S.-Kiribati, Sept. 20, 1979, 35 U.S.T. 2095 [hereinafter Friendship Treaty].

<sup>127</sup> *Id.* art. 2. “The two Governments, in the spirit of friendship existing between them, shall consult together on matters of mutual concern and interest in time of need, and in particular, to promote social and economic development, peace, and security in the Pacific region.”

<sup>128</sup> *Id.*

<sup>129</sup> *Wickes v. Olympic Airways*, 745 F.2d 363, 366 (6th Cir. 1984) (discussing the roles that friendship treaties have played historically).

<sup>130</sup> See *supra* Part II.B.

interest in South Pacific fisheries.<sup>131</sup> Collaboration prompted by mutual concern could be invaluable for Kiribati, using U.S. resources to put together adaptation and land rights plans.

Second, Article 2 suggests that through promoting “social and economic development, peace, and security in the Pacific region,”<sup>132</sup> the United States could provide aid for relocation and land rights. Economic development and peace tangentially relate to climatic displacement, but climate change directly affects security on the island.<sup>133</sup> The language of the treaty does not specify the nature of the threat to security to which the United States is obligated to respond.<sup>134</sup> Rising ocean levels pose a threat to Kiribati’s security; indeed, rising sea levels could completely wipe out the nation.<sup>135</sup>

Despite the responsibilities suggested by Article 2, the United States has no binding responsibility for a number of reasons. First, the treaty was designed to transfer occupied territories back to Kiribati.<sup>136</sup> Second, any indications of “security” provisions relate to militaristic security.<sup>137</sup> The United States’ presence in Kiribati was directly linked to militaristic operations and goals.<sup>138</sup> The Senate ratified the treaty during the Cold War era,<sup>139</sup> when security concerns dominated the international agenda.<sup>140</sup> When a U.S. court interprets international treaties, the court gives effect to the intent of the treaty parties,<sup>141</sup> and climate refugees were not a problem at the time the treaty was signed because concern for climatic displacement emerged only in recent years.<sup>142</sup> Third, the Treaty uses qualifying language

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<sup>131</sup> U.S. Dep’t of State, Background Note: Kiribati, <http://www.state.gov/r/pa/ei/bgn/1836.htm> (last visited Apr. 12, 2010). Kiribati has a \$9.8 million fish, shark, seaweed industry, and the U.S. is one of the five largest importers of Kiribati’s marine industry. *Id.*

<sup>132</sup> Friendship Treaty, *supra* note 126, art. 2.

<sup>133</sup> *See supra* Part II.B.

<sup>134</sup> Friendship Treaty, *supra* note 126, art. 2.

<sup>135</sup> *See supra* Part II.B.

<sup>136</sup> Friendship Treaty, *supra* note 126, art. 2.

<sup>137</sup> *Pacific Island Treaties: Hearing Before the Comm. on Foreign Relations*, 97th Cong. 1 (1982) (hearing to consider Senate advice and consent to ratification of the Kiribati-U.S. treaty, signed at Tarawa, Sept. 20, 1969, to provide for U.S. recognition of the Republic of Kiribati (formerly Gilbert Islands) sovereignty, to assure nondiscriminatory access to Kiribati fishing grounds which supply fish to American Samoa canneries, and to protect U.S. security interests).

<sup>138</sup> *Kiribati-History*, *supra* note 27.

<sup>139</sup> *See A Concise Time-Line of the Cold War 1945-1992*, 3AD.COM, <http://www.3ad.com/history/cold.war/timeline.cold.war.htm> (last visited Apr. 12, 2010).

<sup>140</sup> *See generally* Allison Ehlert, *Between Empire and Community: The United States and Multilateralism 2001-2003*, 21 BERKELEY J. INT’L L. 731, 732 (2003).

<sup>141</sup> *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 185 (1982). Parties to a treaty refer to the states that negotiated, signed, and ratified a treaty.

<sup>142</sup> NORMAN MYERS, ENVIRONMENTAL REFUGEES: EMERGENT SECURITY ISSUE (2005), [http://www.osce.org/documents/eea/2005/05/14488\\_en.pdf](http://www.osce.org/documents/eea/2005/05/14488_en.pdf) (last visited Apr. 14, 2010).

such as “mutual concern,” “mutual interest,” and “best efforts.”<sup>143</sup> The United States could argue that rising ocean levels and climatic displacement are not of “mutual concern” or “mutual interest.” The United States may also suggest that their existing efforts are indeed “best efforts,” absolving itself of any additional obligation. Fourth, Kiribati would have a difficult time enforcing the obligations in the treaty, particularly because the United States is not subject to ICJ jurisdiction.<sup>144</sup> Finally, U.S. policy has been opposed to taking climate related action.<sup>145</sup> Given the current economic crisis, the United States is unlikely to direct climate assistance to Kiribati.<sup>146</sup>

However, the Friendship Treaty is instructive in future climate responses. If the United States decides to provide climatic assistance to Kiribati, it could rely on the language of the Friendship Treaty to garner political support for the decision. Further, Kiribati may approach the United States through diplomatic channels, using the Friendship Treaty as evidence for U.S. legal responsibility to provide land rights assistance upon displacement of the nation. However, the treaty lacks land rights language so it may not go far enough to respond to climatic displacement.<sup>147</sup>

## 2. *The SPREP Agreement Lacks Sufficient Enforcement Mechanisms*

Governments of the South Pacific region established SPREP to maintain environmental quality in the region, including climate change response, but like the Friendship Treaty, the SPREP Agreement will likely prove inadequate in providing land rights to climate refugees.<sup>148</sup> However, the treaty does suggest a regional legal responsibility to assist with climate adaptation.<sup>149</sup> The program promotes cooperation and provides assistance in order to preserve the environment; specifically, the Pacific Futures program under the SPREP aims to address South Pacific climate vulnerabilities.<sup>150</sup>

<sup>143</sup> Friendship Treaty, *supra* note 126, arts. II, V.

<sup>144</sup> John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Cases*, 19 DUKE J. COMP. & INT'L L. 263 (2009).

<sup>145</sup> See George Monbiot, *Why Do We Allow the U.S. to Act Like a Failed State on Climate Change?*, GUARDIAN, June 26, 2009, <http://www.guardian.co.uk/environment/georgemonbiot/2009/jun/26/us-obama-climate-monbiot> (last visited Apr. 12, 2010).

<sup>146</sup> See generally Interview by Toni Johnson with Kevin M. Conrad, United Nations Special Envoy on the Environment and Climate Change for Papua New Guinea (Oct. 8, 2008), [http://www.cfr.org/publication/17478/climate\\_change\\_expert\\_worries\\_financial\\_crisis\\_will\\_be\\_excuse\\_to\\_delay\\_action.html](http://www.cfr.org/publication/17478/climate_change_expert_worries_financial_crisis_will_be_excuse_to_delay_action.html) (last visited May 22, 2010).

<sup>147</sup> Friendship Treaty, *supra* note 126.

<sup>148</sup> South Pacific Regional Environment Programme Agreement, June 16, 1993, S. TREATY DOC. NO. 105-32, [hereinafter SPREP]; About South Pacific Regional Environment Programme, <http://www.sprep.org/sprep/about.htm> (last visited Apr. 12, 2010) [hereinafter SPREP website].

<sup>149</sup> SPREP website, *supra* note 148.

<sup>150</sup> See SPREP, *supra* note 148.

The SPREP Agreement establishes an agenda cognizant of the challenges presented by climate change and rising ocean levels. Article 2(1) of the SPREP sets out an action plan creating a system for cooperation, assistance, and adaptation, although it does not specifically mention climatic displacement.<sup>151</sup> Article 3(5)(c) strengthens the program's ability to impact future climate-related efforts by establishing a commitment to future international environmental treaties.<sup>152</sup> The challenges associated with climate change are likely to become increasingly apparent in the coming decades, and SPREP involvement in future treaties ensures representation of South Pacific interests.<sup>153</sup>

However, critics may argue that the treaty will never induce an international response to climatic displacement. The agreement lacks enforceability mechanisms—there are no “punishments” for non-compliance. Further, the SPREP Agreement's primary utility was to establish the framework for an international organization, not to create legally binding environmental guidelines.<sup>154</sup> Finally, the SPREP Agreement, like the Friendship Treaty, is not specifically directed at climate change. Rather, the regime addresses environmental concerns broadly and says nothing about land rights or climatic displacement.<sup>155</sup>

Despite its vague language, the SPREP Agreement may impact future climate adaptation efforts because its member states include most South Pacific nations, as well as a number of developed states. The developed states are held to the same obligations as the Pacific states.<sup>156</sup> Ultimately, SPREP also lacks adequate lands rights action to assist displaced nations.<sup>157</sup>

### 3. *The UNFCCC Provides Mechanisms for Valuable International Collaboration, but the UNFCCC System Responds Slowly*

The UNFCCC emerged from the progressive development of the international environmental law movement, representing the most comprehensive effort to address climate change on an international level.

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<sup>151</sup> *Id.* art. 2, para. 1. “[P]romote cooperation in the South Pacific region and to provide assistance in order to protect and improve its environment and to ensure sustainable development for present and future generations. SPREP shall achieve these purposes through the Action Plan . . .” *Id.*

<sup>152</sup> *Id.* art. 3, para. 5(c). “The SPREP Meeting shall, through such mechanisms as it considers appropriate, consult and cooperate with the Meetings of Parties to: . . . (c) any other international or regional Agreement that may be concluded for the protection of the environment of the South Pacific region.” *Id.*

<sup>153</sup> Knox, *supra* note 20, at 479.

<sup>154</sup> SPREP, *supra* note 148, arts. 1, 2.

<sup>155</sup> SPREP website, *supra* note 148.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

International response to climate change began with the establishment of the Intergovernmental Panel on Climate Change in 1988.<sup>158</sup> The UNFCCC was adopted at the Rio United Nations (“UN”) Conference on Environment and Development in 1992 as a broad framework with general objectives and principles to be refined by future protocols and agreements.<sup>159</sup> One hundred and fifty-two governments, including the United States and the European Union, ratified the convention.<sup>160</sup> The UNFCCC’s language creates specific international legal obligations to assist climate adaptation,<sup>161</sup> and the framework provides a valuable platform for future adaptation treaties, including NAPA, a program aimed at providing least developed countries (“LDCs”) with adaptation program funding and assistance.

UNFCCC language indicates legally binding obligations on a scale much larger than the Friendship Treaty and the SPREP Agreement, but significant international response to climatic displacement has yet to materialize. The relevant sections of the UNFCCC indicate a common and shared concern for climate effects, “common but differentiated” contributions and responsive capacities, future climate dangers, necessary economic considerations, and an emphasis on adaptation mechanisms that could include land rights.<sup>162</sup> Each treaty provision, while vague, could be read to assist island states like Kiribati with climatic displacement and land rights acquisition.

The preamble of the UNFCCC recognizes the needs of the parties to the treaty.<sup>163</sup> The first line of the UNFCCC reads, “The Parties to this Convention, Acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind . . . .”<sup>164</sup> The treaty goes on to elaborate on the global nature of climate change, while indicating the different roles developed and developing states must take in addressing

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<sup>158</sup> Geoff Leane, *Climate Change in Oceania: Responses to the Kyoto Protocol*, in INTERNATIONAL LAW ISSUES IN THE SOUTH PACIFIC 162 (Geoff Leane & Barbara von Tigerstrom eds., 2005).

<sup>159</sup> Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?*, 20 COLO. J. INT’L ENVTL. L. & POL’Y 35, 43 (2008); Gordon, *supra* note 36, at 1583.

<sup>160</sup> William C. Burns, *Global Warming—The United Nations Framework Convention on Climate Change and the Future of Small Island States*, 6 DICK. J. ENVTL. L. & POL’Y 147, 173 (1997).

<sup>161</sup> Climate adaptation refers to the “process or outcome of a process that leads to a reduction in harm or risk of harm, or realization of benefits, associated with climate change.” See *Glossary of Climate Adaptation and Decision-Making*, PEOPLE AND PLACE, May 19, 2009, [http://www.peopleandplace.net/media\\_library/text/2009/5/19/glossary\\_of\\_climate\\_adaptation\\_and\\_decision-making](http://www.peopleandplace.net/media_library/text/2009/5/19/glossary_of_climate_adaptation_and_decision-making) (last visited Apr. 12, 2010).

<sup>162</sup> United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 31 I.L.M. 849, 1992 U.S.T. LEXIS 187 [hereinafter UNFCCC].

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

climate change.<sup>165</sup> The language “common but differentiated” indicates a recognition by developed states that part of their role in addressing climate change must be to provide assistance to countries with lower “respective capability,” such as small Pacific states like Kiribati.<sup>166</sup> The treaty specifically addresses the vulnerabilities of island nations, recognizing that “low-lying and other small island countries . . . are particularly vulnerable to the adverse effects of climate change.”<sup>167</sup> Thus, the preamble of the UNFCCC recognizes the unique position and vulnerability of South Pacific Islands, targeting these populations for action and assistance with climatic displacement. Such an acknowledgment hints at moral or ethical obligations to work to address climate change. However, this language falls short of being legally enforceable.

Article 4 contains more concrete legal obligations, suggesting further grounds for international climate relocation aid to small island states like Kiribati.<sup>168</sup> Essential for adaptation mechanisms like land rights provisions, Article 4(1)(e) encourages cooperation in addressing the effects of climate change in developing regions.<sup>169</sup> The article mandates that states shall “cooperate in preparing for adaptation to the impacts of climate change.”<sup>170</sup> “Cooperation,” taken in conjunction with the article’s reference to “common but differentiated responsibilities,”<sup>171</sup> highlights the responsibility for developed states to provide adaptation and relocation assistance to developing states like Kiribati.

The UNFCCC specifically addresses adaptation funding mechanisms in Article 4(4), reinforcing the role of developed states in providing necessary assistance to developing states.<sup>172</sup> Article 4(4) creates a binding legal obligation that developed countries shall help developing countries like

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<sup>165</sup> *Id.* “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.” *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> UNFCCC, *supra* note 162, art. 4.

<sup>169</sup> *Id.* art. 4, para. 1(e). “All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances, shall: . . . Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods.” *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> “The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.” *Id.* art. 4, ¶ 4.



Kiribati meet “costs of adaptation,” which could include land rights.<sup>173</sup> The article does not specify the type of adaptation required to receive funding, leaving specific determinations to the states involved. Such unspecified language allows developing states to stipulate their interests, including a request for land rights, but the language may not require developed states to listen.

Overall, the UNFCCC has been widely revered and ratified, but the treaty has not elicited significant international action. The document serves as a flexible mechanism to facilitate the development of future commitments and obligations, but the unspecified obligations also allow states, particularly developed states, to shirk responsibility.<sup>174</sup> The preamble and Articles 4(1)(e) and 4(4) all include language suggesting obligations to address climate change and provide displacement assistance, yet little action has been taken in the Pacific region to address the effects of climate change already impacting individuals. The UNFCCC also fails to adequately discuss land rights provisions upon international climatic displacement.<sup>175</sup>

C. *NAPA Provides a Feasible Adaptation Model to Provide Land Rights in Relocation Efforts*

Despite UNFCCC’s shortcomings, the UNFCCC Conference of the Parties process did produce NAPA, which provides a highly viable model for adaptation and land rights provisions.<sup>176</sup> The purpose of NAPA is to address the immediate needs of individual countries to adapt to the pressing challenges posed by climate change by providing technical support and project-specific funding.<sup>177</sup> In NAPA applications, countries stipulate their unique needs and request funding for particular adaptation projects that could include land rights development programs to assist displaced countries and host countries to work out relocation plans.<sup>178</sup> The program, available only to the least developed countries, provides funding from the Global

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<sup>173</sup> *Id.*

<sup>174</sup> H.W.O. Okoth-Ogendo, *Climate Change Adaptation and Mitigation: Exploring the Role of Land Reforms in Africa*, in *LAND USE LAW FOR SUSTAINABLE DEVELOPMENT* 61 (Nathalie J. Chalifour ed., 2007).

<sup>175</sup> UNFCCC, *supra* note 162.

<sup>176</sup> See Donald Goldberg & Katherine Silverthorne, *The Marrakech Accords*, AM. BAR ASS’N, Jan. 2002, <http://www.abanet.org/enviro/committees/climatechange/newsletter/jan02/goldberg.html> (last visited Apr. 12, 2010); Earth Negotiations Bulletin, <http://www.iisd.ca/vol12/enb12189e.html> (last visited Apr. 14, 2010).

<sup>177</sup> National Adaptation Programme of Action, Delivering as One, <http://www.napa-pana.org/> (last visited Mar. 16, 2010) [hereinafter NAPA website].

<sup>178</sup> *Id.*

Environment Facility (“GEF”)<sup>179</sup> and access to the Least Developed Countries Expert Group.<sup>180</sup> Preparation of a NAPA application involves various stakeholders, including local communities.<sup>181</sup>

To date, the NAPA program has received and accepted applications from forty-four of the least developed countries, including Kiribati.<sup>182</sup> Kiribati’s NAPA application requested funding for ten adaptation projects, including well improvement, coastal management, and agricultural development.<sup>183</sup> With only a few minor changes to the titles of the adaptation program components, Kiribati’s NAPA application was accepted and funded in its entirety.<sup>184</sup> Kiribati’s accepted NAPA program will have a direct impact in the country’s effort to adapt to rising ocean levels, but the program focuses on the most vulnerable sectors in the most populous locations, not climatic displacement.<sup>185</sup>

#### IV. RECOMMENDATIONS FOR IMPLEMENTING LAND RIGHTS PROVISIONS USING THE NAPA FRAMEWORK

The NAPA program provides a viable model for creating a new international treaty to address climatic displacement and provide land rights to displaced individuals from states like Kiribati. As currently outlined in the Marrakech Accords, the NAPA program places no monetary cap on requested contributions.<sup>186</sup> Notwithstanding the incredible potential of the NAPA program, some necessary changes should be made to the NAPA

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<sup>179</sup> The GEF is a global partnership among 179 countries, including the U.S., international institutions, non-governmental organizations, and the private sector. Global Environment Facility, List of States Participating in the Restructured GEF, <http://www.gefweb.org/interior.aspx?id=210> (last visited Apr. 12, 2010). Since 1991, GEF provided \$8.8 billion in grants and \$38.7 billion in co-financing for over 2,400 projects in more than 165 countries. *Id.* at [http://www.gefweb.org/interior\\_right.aspx?id=50](http://www.gefweb.org/interior_right.aspx?id=50) (last visited Apr. 12, 2010). See generally Mozaharul Alam, *The National Adaptation Programme of Action Process*, TIEMPO CLIMATE NEWSWATCH, <http://www.tiempocycleclimate.org/newswatch/feature071202.htm> (last visited Apr. 12, 2010).

<sup>180</sup> UNFCCC, CONFERENCE OF THE PARTIES SEVENTH SESSION, MARRAKESH ACCORDS AND THE MARRAKESH DECLARATION 228 (2001), [http://www.unfccc.int/cop7/documents/accords\\_draft.pdf](http://www.unfccc.int/cop7/documents/accords_draft.pdf) (last visited Apr. 12, 2010).

<sup>181</sup> *Id.* at 232.

<sup>182</sup> NAPA website, *supra* note 177.

<sup>183</sup> ENV’T & CONSERVATION DIV., MINISTRY OF ENV’T, LAND, AND AGRIC. DEV., REPUBLIC OF KIRIBATI NATIONAL ADAPTATION PROGRAM OF ACTION 36-39, 59-63 (2007), <http://www.unfccc.int/resource/docs/napa/kir01.pdf> (last visited Apr. 12, 2010).

<sup>184</sup> UNFCCC, NAPA Project Database, [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/napa\\_project\\_database/items/4583.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/napa_project_database/items/4583.php) (last visited Apr. 9, 2010).

<sup>185</sup> See Elisabeth Mealey, *International Coalition Tackles Impacts of Climate Change in Kiribati*, WORLD BANK, July 18, 2005, <http://www.worldbank.org/> (search “International Coalition Tackles Impacts of Climate Change in Kiribati” in the search bar) (last visited Apr. 12, 2010).

<sup>186</sup> J. Chris Larson, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT’L L. 495, 510 (2000).

program to provide land rights to climate refugees since NAPA focuses on immediate needs, not longer-term concerns.<sup>187</sup>

A. *NAPA Represents a Viable Framework to Provide Land Rights*

The NAPA program establishes a viable framework for an international treaty providing land rights to displaced nations due to its past success and engagement with local stakeholders. The track record of the NAPA program indicates an ability and willingness to provide LDCs, including Kiribati, with requested projects and funding.<sup>188</sup> With adequate increases in available funds, NAPA could be expanded to allow countries to request relocation assistance and land rights provisions.<sup>189</sup> The form of such assistance will vary by location and displaced nation, but local participation by threatened states ensures an authentic and appropriate response to the major challenges faced by climatic displacement of entire nations.<sup>190</sup> This philosophy of local participation could be expanded in a new international treaty, allowing host countries to engage in the process of establishing land rights.

B. *The NAPA System Should Be Developed in a New Treaty Regime, Distinct from the UNFCCC*

Although NAPA was developed under the UNFCCC, a new treaty regime should be created to provide land rights to displaced island nations like Kiribati. As the failed Copenhagen negotiations indicate,<sup>191</sup> the UNFCCC may be inadequate to respond to climatic displacement due to the “framework” nature of the convention and the convention’s lack of focus on climate adaptation. Since displacement of entire nations is an unprecedented international challenge, an entirely new treaty regime is appropriate. The new treaty must address the inadequacies of the Friendship Treaty, the SPREP Agreement, and the UNFCCC, with more definite language and enforcement mechanisms.<sup>192</sup> Rather than undermining or competing with existing NAPA efforts, the new treaty regime must work with the GEF and

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<sup>187</sup> NAPA website, *supra* note 177.

<sup>188</sup> *Id.*

<sup>189</sup> *See, e.g.,* Larson, *supra* note 186, at 510.

<sup>190</sup> UNFCCC, Chronological Evaluation of LDC Work Programme and Concept of NAPAs, [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/ldc\\_work\\_programme\\_and\\_napa/it\\_ems/4722.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/ldc_work_programme_and_napa/it_ems/4722.php) (last visited Apr. 14, 2010).

<sup>191</sup> *See* Sarah Clark, *Climate Boss Admits Copenhagen Failed*, AUSTL. BROAD. CORP. NEWS, Jan. 21, 2010, <http://www.abc.net.au/news/stories/2010/01/21/2797558.htm> (last visited Apr. 12, 2010).

<sup>192</sup> *See infra* Part V.

the UNFCCC member states to develop a system that adequately provides lands rights to displaced nations under NAPA. Parties to the new treaty would agree to support, either financially or with land grants, an expansion of the GEF and NAPA to include land rights provisions.

### C. *Recommended Improvements to the Existing NAPA System*

In order for NAPA to serve as the framework for providing land rights to climate refugees, some changes must be made to the existing NAPA system. First, the current scope of NAPA must be dramatically expanded beyond short-term projects to encompass permanent land rights.<sup>193</sup> “A remaining challenge is the link between current climatic risks and longer-term climate change.”<sup>194</sup> Countries thus far have limited their requests under NAPA to “immediate and urgent” concerns, and no country has requested land rights provisions or relocation assistance.<sup>195</sup> Second, support must be increased at the implementation stage of NAPA projects to ensure that projects are fully carried out.<sup>196</sup> Some nations complain that they lack adequate support in final project stages to complete the NAPA process.<sup>197</sup> Third, in order to encourage countries to host and provide land rights to climate refugees, the NAPA funding and project parameters must be expanded.<sup>198</sup> Currently NAPA applications may only be submitted by LDCs; however, providing land rights in new host countries requires new project and funding structures that can support the host countries.<sup>199</sup> Finally, NAPA applications should be more fully integrated into existing national development plans of host countries and countries facing displacement.<sup>200</sup> Integration will capitalize on existing efforts and resources, raise awareness, and promote coordination.<sup>201</sup> These four measures will allow a new treaty regime based on NAPA to accommodate the international influx of climate refugees and provide land rights to internationally displaced individuals.

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<sup>193</sup> See Bubu Pateh Jallow & Thomas Downing, *National Adaptation Programmes of Action: Priorities to Policies*, TIEMPO CLIMATE NEWSWATCH, <http://www.tiempocyberclimate.org/newswatch/comment080108.htm> (last visited Apr. 12, 2010) (listing what NAPA currently provides).

<sup>194</sup> *Id.*

<sup>195</sup> NAPA website, *supra* note 177.

<sup>196</sup> See Jessica Ayers, *Progress Implementing National Adaptation Programmes of Action*, TIEMPO CLIMATE NEWSWATCH, <http://www.tiempocyberclimate.org/newswatch/comment090517.htm> (last visited Apr. 12, 2010) (reaching this conclusion based on case studies).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> NAPA website, *supra* note 177.

<sup>200</sup> See Bubu Pateh Jallow, *Mainstreaming National Adaptation Programmes of Action*, TIEMPO, <http://www.tiempocyberclimate.org/newswatch/comment071118.htm> (last visited May 22, 2010).

<sup>201</sup> *Id.*

## V. CONCLUSION

Climate change causes rising ocean levels, which threaten the existence of low-lying Pacific states like Kiribati, and the international community must be prepared to respond. Developed states have a responsibility, as the perpetrators of climate change, to use available resources to assist developing states that imminently face displacement. International assistance or compensation, combined with local knowledge, education, and action allows island states to better respond to the threats posed by climate change.

A future treaty regime to provide land rights for nations displaced by rising ocean levels must react to the inadequacies of past international agreements and develop innovative approaches to emerging problems. Adequate land rights provisions in future displacement treaties will allow climate refugees to resettle successfully and improve their economic, social, and cultural positions. "It's a humbling prospect when a nation has to begin talking about its own demise, not because of some inevitable natural disaster . . . but because of what we are doing on this planet."<sup>202</sup> The international community ought to respond to "what we are doing on this planet," take responsibility, and assist Kiribati in addressing their "demise" appropriately. A new treaty, which expands the current NAPA model to provide land rights for victims of climatic displacement, will ensure that climate refugees have the opportunity to relocate successfully when entire nations disappear under rising ocean levels.

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<sup>202</sup> See Ray Lilley, *Climate Change 'An Issue of Human Survival' for Sinking Island Nation*, USA TODAY, June 5, 2008, [http://www.usatoday.com/weather/environment/2008-06-05-disappearing-new-zealand\\_N.htm](http://www.usatoday.com/weather/environment/2008-06-05-disappearing-new-zealand_N.htm) (last visited Apr. 12, 2010).