

Stateless but Sovereign:
Legal Frameworks for Deterritorialized Nations,
The Case of Kiribati and Tuvalu

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In 1933, the Montevideo Convention defined the criteria for statehood: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” (Montevideo Convention, Article 1). However, the consequences of climate change force us to question this definition and perhaps reinterpret it. Sea-level rise, a result of global warming, is a threat to small island states, leading to deterritorialization. States like Kiribati and Tuvalu have experienced and continue to experience sea-level rise; scientific research has even recognized the risk of complete submersion by the end of the century. Martin Perry, co-chair of Working Group II of the Intergovernmental Panel on Climate Change (IPCC), agrees that “half a metre of sea level rise is a *heck* of a lot for islands like that” (Sanderson). This situation implies several consequences for the nation and its population. The sinking of the islands threatens the states’ existence under the Montevideo Convention. This gives rise to many questions: Is a state able to survive without land? Are the populations eligible to become refugees due to climate-related reasons? Will they lose their nationality? Is the state still able to have a voice in international gatherings? This essay will try to unpack these questions and examine the legal consequences for deterritorialized states. I will focus solely on the cases of Kiribati (only 21 islands are inhabited out of 33) and Tuvalu (only 8 islands are inhabited), using them as examples. Both are already facing the challenges of rising sea levels, making them relevant to our discussion. I will try to answer: **To what extent does the current international law system fail to protect the statehood and human rights of populations affected by sea level rise, and what should be done to improve their conditions?** Waiting for a state to disappear shouldn’t be the solution; measures have to be undertaken before it happens. International law needs legal innovation to ensure the sovereignty of the sinking islands.

To address this question, I will first inspect the current situation in Kiribati and Tuvalu to understand how they are affected by sea-level rise and challenges to deterritorialized

statehood, and what initial actions they are taking to address these issues. Then this essay will analyze the human rights situation for people in deterritorialized nations. Eventually, I will focus on legal pathways for safeguarding the sovereignty and rights of sinking nations in the long term.

I. Understanding the Crisis Facing Kiribati and Tuvalu and First Legal Responses to Their Deterritorialization

Sea-level rise is one of many consequences of climate change. It mostly happens because of the melting of ice sheets and glaciers and the thermal expansion of water. Often, sea-level rise creates instability for some states and their populations. The “Blue Planet” is witnessing the exacerbation of environmental disaster that endangers its inhabitants and future generations. According to the IPCC, Kiribati and Tuvalu are the primary victims of sea-level rise in the Pacific Ocean (Raj, 2). Their infrastructure and economy are highly vulnerable to rising sea levels. Scientific research estimates the rate of rise in Tuvalu to be 3.9 mm/year and 2.1 mm/year in Kiribati (Raj, 19). Furthermore, a 2014 *Guardian* article discusses the population's expectation that Kiribati will disappear or become uninhabitable in approximately thirty years (*The Guardian*). Considering these data, sea-level rise is a significant threat to the future of these islands through the risk of complete deterritorialization. This threat must be taken seriously as it will have unprecedented consequences.

With the submersion of Kiribati and Tuvalu, their nations' cultures could also disappear. Many South Pacific islanders refer to their land through a maxim: “*Land is life, without land there is no life*” (Kwa, 2). The population is very attached to its land and cannot conceive a life away from its territory. Unfortunately, they will be forced to leave and become climate refugees in other countries. This idea will be further developed in the next section of this essay, where I will discuss the threats to human rights faced by climate migrants. Before the total sinking of the islands, these states will suffer from economic instability with the

rupture in agricultural productivity (Grote Stoutenburg, 42). Natural disasters and floods threaten harvests and will destroy a large amount of agricultural production, with the sea-level rise reducing the territorial space for economic activity. Thus, Kiribati and Tuvalu are experiencing the end of their nation; this is highlighted by the speech made by Tuvalu's minister, Simon Kofe, at the COP26 with his knees deep in water to emphasize the crisis (*The Guardian*).

As we have just studied, some nations are threatened by sea-level rise and may be at risk of losing their territory completely. This poses a challenge to statehood. This section will examine the current International Law (IL) and its position on this issue. The Montevideo Convention stated the criteria for statehood in Article 1: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States." (Montevideo Convention). Thus, a submerged island would not satisfy parts (a) and (b) of the definition, which implies its loss of statehood authority under IL (Lapas, 11). We could argue that, this document implicitly recognizes that as soon as the statehood criteria are lost, the nation will be excluded from international participation (Grote Stoutenburg, 314). The international community could reinforce this by stripping the island state of its international legal personality (314). Thus, sea-level rise would terminate a small island's territorial, governmental, and personal aspects. Under IL, a "deterritorialized" island state will lose its statehood. The chance of statehood is left in the hands of other states to recognize the newly-submerged islands (Grote Stoutenburg, 387). Historically, some atolls have disappeared, but not entire nations have yet; this is the case for Kiribati and Tuvalu. Because IL has no precedent for a state that loses its territory, it has not figured out a solution to address future submerged states (329).

States at risk of submersion undertake strategies to prevent total loss of authority. Two options have already been proposed as direct responses to maintain statehood: purchasing land to

relocate its population to a livable territory, and the digital nation strategy. These two responses are different in the level of recognition internationally and on the degree of recognition from the international law. Firstly, the purchase of new lands could contribute to the maintenance of statehood. Through legal purchases of territory, submerged states could maintain a territory and therefore the recognition of other, non-submerged states. In 2014, for instance, Kiribati's government purchased land in Fiji to secure a future territory in case sea-level rise caused the entire island to sink (Hermann et al., 232). Scholars have interpreted this strategy in various ways; some view it as an economic and political strategy, while others see it as an effort to defend indigenous culture or a solution to future migration due to rising sea levels (Hermann et al., 233). I will take the former as the main objective, as it allows for future resettlement without losing international recognition. However, the two reasons stated above are the benefits of this strategy, which does not require the population to migrate to foreign states, losing their status as Kiribati citizens. But the purchased land is also, though less than Kiribati, vulnerable to sea-level rise and is also relocating its own population.

Secondly, the creation of digital states is a potential way to preserve national identity. This is the case for Tuvalu, which proposed a Digital Nation Initiative during COP27 through Simon Kofe, Tuvalu's former Minister of Foreign Affairs (Augé). The objective is to build islands in the metaverse using photographs and videos. It is an intangible form of nation that connects Tuvaluans from wherever they migrate, and it will be an opportunity for future generations to know what Tuvalu used to look like before the consequences of climate change (Augé). Yet, this strategy lacks actual legal authority internationally. The digital version doesn't replace the exact characteristics of a state. Tuvalu's voice will still be heard, but not in the legal framework. However, we must admit the cultural benefits of implementing this process.

Kiribati and Tuvalu are examples of countries that have been affected by the negative consequences of sea-level rise. As victims, they have already taken some actions to maintain

their presence in the international scene. The following section will examine how the consequences of sea-level rise harm human rights. I will take a legal perspective on my analysis, discussing the current limits of IL and offering suggestions on how to address them.

II. Human Rights in Peril: The Legal Void Facing the Inhabitants of Sinking States

The rise of sea levels is harming the access to human rights of the inhabitants of sinking islands. Sea-level rise triggers climate migration, forcing populations living near the coast to relocate. This form of migration is one without return, as their homes will be completely submerged and inhabitable. The population is at risk of statelessness, which is a significant international legal concern. The process of application for permanent migration to a new state is almost always long and sometimes unsuccessful. Some states try to anticipate this situation. Tuvalu undertook some negotiations with Australia and New Zealand to welcome island-less Tuvaluans. Taking the latter, New Zealand agreed to a thirty-year immigration programme (Lapas, 20; Rayfuse, 285). It includes the acceptance of 75 Tuvaluans per year, but under the condition that those migrants should be “of good character and health, have basic English skills, have a job offer in New Zealand, and be under 45 years of age” (Lapas, 20). There are some successful attempts to protect the population's future, but they are limited. The age limit, for example, shouldn't be a consideration in the case of climate change migration, as Australia is already refusing to host them, and it will be challenging to find alternatives in the region. In those cases, it is usually entire families leaving together, thus if one member doesn't satisfy one of the visa conditions, that could separate them and have traumatic effects on the family. It should be understood, however, that New Zealand cannot realistically accept every climate refugee, and the country is already making a significant contribution to finding solutions. Other states should follow its example and prepare the venue for the future of stateless individuals.

Some issues remain even if the people of deterritorialized nations are integrated into new countries. Indeed, questions on self-determination outside of the home states should be

tackled. Self-determination refers to the unique right of peoples to form their own political, social, and economic entity without outside intervention. Scholars recognize that “[t]he extinction of sovereign island states due to anthropogenic climate change might ... violate fundamental norms of international law, such as the right to self-determination, or basic human rights” (Grote Stotenburg, 316). Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) acknowledges the fundamental right of “self-determination” for small communities, including climate-affected deterritorialized nations (ICCPR; Lapas, 30). Tuvalu's proposal to displace its population to a host country would create a conflicting situation in which distinct communities would compete with the host state's population over the exercise of their own rights of self-determination (Lapas, 27; Grote Stotenburg, 338). Such situations endanger the human rights of environmental refugees and thus should be addressed in international organizations' agendas.

A third challenge for populations on deterritorialized islands is the lack of international recognition of their status as asylum seekers. Refugee rights are developed under the 1951 Refugee Convention. However, climate refugees are not included in the definition provided in this Convention. Indeed, a refugee is understood as an individual “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality” (Refugee Convention, 14). This definition does not mention the possibility of becoming a refugee due to uninhabitable conditions in their city or country, which can be caused by climate change. To a certain extent, it can be understood that in 1951, climate migration was not yet relevant to international law, as climate change was not yet a part of international agendas. Nevertheless, no evolution of this definition has occurred since then.

This essay has just described how the rise of the sea level has undermined the human rights of its victims. To better understand this situation and provide suggestions later, I will examine a specific case study: *Teitiota v. New Zealand* (2020). In 2007, Mr. Teitiota, a Kiribati

citizen, arrived in New Zealand with his wife due to the effects of climate change, primarily sea level rise, on his living conditions in Kiribati (Bergova, 222). His permit expired, and he was forced to leave, but refused, as Kiribati would not be sustainable enough in the future (222). This case was brought before the New Zealand Immigration and Protection Tribunal after his application for refugee status was denied by an immigration officer. This refusal can be explained by the problem of including climate change as a legitimate and, most importantly, a legally justifiable reason for seeking refugee status. Because of this problem, Mr. Teitiota was deported to Kiribati in 2015 (222). The UNHRC reported that the “tribunal concluded that the author did not objectively face a real risk of being persecuted if returned to Kiribati” (UNHRC, 4).

I disagree with the tribunal's decision. His right to life is not taken into consideration. Still, the right to life is fundamental under Article 6 of the International Covenant on Civil and Political Rights (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”) Kiribati, as we already discussed in this essay, is likely to be submerged in twenty years. Thus, it cannot be concluded that the plaintiff did not face a real risk, he is already facing some consequences that would be worsened in the near future. With the rise in sea level, Teitiota explains that inhabitants are crowded, and the risk of violence is high; there is also a scarcity of resources (food and water) for everyone living there (HRC, 2). These two issues should be enough justification to prove the risk of going back to Kiribati. This case has highlighted the current legal issues faced by climate change refugees.

As we have just discussed, the lack of international recognition for deterritorialized peoples, combined with their decreasing access to human rights, raises questions about what can and should be done to improve their condition. This section will examine this issue, providing recommendations that range from easy to implement to the most challenging, but also the most significant, to observe concrete positive effects. As mentioned above, the 1951

Convention's definition of refugee looks outdated for our context and would need to be adapted. Climate refugees are victims of disruptions in their hometowns that force them to relocate; the obligation to leave their home for an external reason that endangers their lives and should be a sufficient reason to recognize them as refugees in other states. This first step is significant because they will be able to seek asylum legally in another state, however amending the Convention is a huge step. To some extent, adapting old treaties or other legal documents could be criticized as a limited action. That doesn't represent a significant change and could be overlooked unless a more concrete action is undertaken.

Another solution could be to implement new treaties or conventions that focus on the special situation of deterritorialized nations due to climate-related reasons, such as sea level rise. That process puts pressure on decision makers to include them in international debates and agendas. An international body focused on the human rights violations caused by climate change could be established to discuss how to ensure that stateless people continue to enjoy their human rights. Coordination between states is essential as the future status of some states is threatened. The participation of as many states as possible could be a significant step towards recognizing the threat of sea-level rise; the international scene should come to realize that it would have consequences for all of them. A court specialized in climate issues could be implemented by the international community. Regional or other specialized courts are already making it possible to create a court on climate change. Indeed, because a precedent exists with courts such as the European Court of Justice, we can assume that a regional court in the Pacific can be created to address that region's judicial issues. A court could be the forum where the voices of future climate migrants who are not heard in the international scene could speak.

In a nutshell, it's not just a question of states disappearing but also of populations suffering. The international community should consider their condition, as for now, climate migrants are not yet integrated into the category of refugees. Many actions can and should be taken to address the loss of human rights and self-determination.

III. Reimagining International Law for a Sinking World

Given the accelerating threat that sea-level rise poses to the territorial integrity and sovereignty of low-lying island states, this last section explores the future of international law by critically analyzing its current limitations and proposing innovative legal and institutional strategies to safeguard the statehood and rights of nations facing climate-induced disappearance. To envision the future of international law, I will first analyze some of its limitations. Human rights are endangered and must be guaranteed through an official legislative process, but international law also fails to address the loss of sovereignty related to climate change. Therefore, this part will examine the legal situation in statelessness cases and seek ways to create a legal framework for deterritorialized nations, such as Kiribati and Tuvalu, to maintain their sovereignty. While various international legal instruments, such as the 1951 Refugee Convention, and the ICCPR, are relevant to the broader challenges posed by climate change, the focus here is on the United Nations Convention on the Law of the Sea (UNCLOS), given its specific relevance to the legal implications of territorial loss due to sea-level rise. UNCLOS defines an island in Article 121 as a “naturally formed area of land, surrounded by water, which is above water at high tide” (UNCLOS). This definition grants islands the entitlement to maritime zones like the Exclusive Economic Zones (EEZ) (Oral, 3). Those zones are significant to a state’s economy for the resources that can be harvested and collected. Kiribati and Tuvalu apply to this definition and enjoy the same rights as any other States. However, sea-level rise threatens this status as the islands might not meet the “above water at high tide” requirement of the definition. It is also important to note that “climate change and sea-level rise did not figure in the negotiations on the UNCLOS” (Oral, 4). Hence, it is uncertain how UNCLOS can be applied in cases of rising sea levels. Islands unable to sustain human activity could lose economic rights from their EEZ and be disputed in the international scene if the law is unclear and vague. A Convention like UNCLOS should be more precise in

understanding how it can be applied to situations like deterritorialization due to climate change. This could involve clarifying how EEZ can be maintained despite the loss of land territories or introducing a legal framework to preserve the international personality of sinking states, thereby guaranteeing the continuity of rights and obligations under international law.

The limits of UNCLOS are exacerbated by the Loss and Damage (L&D) false promise from the UNFCCC (United Nations Framework Convention on Climate Change). In 2013, the Warsaw International Mechanism for Loss and Damage was established to address the adverse impacts of climate change (Bhandari). However, L&D only has limited effects as there are no binding commitments. This tool is not actively contributing to improving the situation for soon-to-be deterritorialized nations, as the mechanism falls short of delivering the resources to support countries. L&D was promising to address economic losses, but it is limited in sovereign legal personality loss cases. In our context, neither UNCLOS nor L&D contribute to addressing the entirety of the deterritorialization issue. UNCLOS fails to assess the sea-level rise issue correctly, and some adaptation and revision of the document seem necessary. Legal inertia would only be beneficial for some powerful states that escape accountability, while harming vulnerable islands.

On a brief note, institutions like the International Tribunal for the Law of the Sea (ITLOS) play a significant role in reconciling both statehood rights and human rights. The UNCLOS established this independent institution, and thus it possesses a specific authority recognized by many member states. Under this institution, a Commission of Small Island States (COSIS) was established in 2021, and it included Tuvalu (Agreement for the Establishment of the COSIS on Climate Change and International Law, 2). The preamble of the Agreement for the Establishment of the COSIS on Climate Change and International Law acknowledges, “Alarmed by the catastrophic effects of climate change which threaten the survival of Small Island States, and in some cases, their very existence, recognizing that Climate Change is the Common Concern of Humanity” (4). Article 2, paragraph 2, focuses on the sinking islands and

their challenges and authorizes them to request an advisory opinion from ITLOS for legal questions (6). Thus, ITLOS could have a bigger role in the future and would be able to provide legal clarification on points of law. Tuvalu could thus ask the Tribunal for advisory opinions in anticipation of its complete loss of territory. In addition, ITLOS should hold member states accountable for reducing GHG emissions. This could be seen as the highest authority in discussing our issue. Something relevant to mention is that Small Island States are not only the most vulnerable actors to the risk of statelessness due to sea-level rise, but they are also considered very low-emitting countries. ITLOS should defend these states against the large emitters that are partly responsible for sea-level rise due to their contribution to climate change. But, does stopping climate change —if we can even consider this possible —solve the problem? Should the most significant contributor to climate change endorse a form of responsibility by hosting future refugees? It is tough to provide a complete answer to those questions, as it would be hard to guarantee that states would follow the requirements and not withdraw from accords if they don't serve their interests, like what Trump did by withdrawing from the Paris Agreement.

In international law, some changes are needed to address current issues related to sea-level rise and anticipate future ones. It is crucial to ensure that many actors participate. Current laws are vague or not adapted to the problems that some islands will experience soon. Litigation plays a critical role in preserving the statehood status of sinking island states. There are two levels of the litigation process: international and local. Both are necessary and can bring about actual positive change. Having states more aware of the dangers of climate change can contribute to our discussion on sea-level rise, as they may open up their discussions to include sinking states and take some responsibility for this issue. In addition, local courts may be better suited to address local problems with more expertise. Regional courts already exist in some parts of the world, such as in the Caribbean and Africa, which could be applied to our case. They demonstrate how localized legal mechanisms can address local challenges. A similar

court in the Pacific could offer island nations a platform to interpret and apply international law in response to climate-related threats. It would then be possible to rule in a more accessible and culturally informed way on issues such as state creation, population displacement and environmental damage.

The section above on human rights already mentioned the possibility of integrating a tribunal court specialized in climate change. Thus, within the scope of this essay, I will not reiterate this idea.

To conclude, Kiribati and Tuvalu are likely the first of several future victims of sea-level rise as they are threatened by complete deterritorialization. This issue raises challenges to the future displaced nations' human rights and the sovereignty status of those islands. Even if the primary victims take some actions to prepare for the catastrophe of total submergence, the most effective solution should be legal initiatives to adapt international law, with the support of courts and the international community. Adapting the existing rules is insufficient and would require the implementation of new legal treaties and organs. This opens the reflection on future climate change migrants and their challenges.

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