



Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate

**Summary Paper for Columbia Conference
May 23-25, 2011**

This conference will convene legal and policy experts from around the world to address legal questions arising from the impacts of global climate change, particularly rising sea levels, on small island nations. The below topics will be discussed during the three-day conference. Several of these questions remain unresolved in international law, and so no hard conclusions can be offered; however, the participants will propose tentative predictions under the status quo, as well as exploring a range of methods for altering the status quo through legal innovation, diplomatic activity, and active planning.

One key goal of the conference is to build and strengthen bridges between academic expertise and avenues of political response. While there may not be immediate answers to fully resolve these complex topics, and a diverse range of views may be presented, urgency demands that creative engagement be mobilized. The complex, long-term risks can be reduced through immediate results in practical adaptation measures as well as global action in reducing harmful emissions. Nevertheless, the time has now come for increased dialogue and understanding of such difficult long-term risks, fully acknowledging their deep sensitivity.

Although there are inevitable inaccuracies in any climate-related prediction, the consensus is that without any remediating activity the Marshall Islands and other low-lying island nations around the world could become uninhabitable in a matter of decades – a serious security risk which can no longer be ignored. Sea level rise will be particularly acute in the Pacific and other island regions where increased intensity and severity of weather patterns, including “King Tide” events, may overwhelm domestic infrastructure and water supplies, as well as local ecosystems. Another climate impact that will particularly harm these nations will come from ocean acidification, which could kill off local coral species (among the most diverse in the world), depleting fish reserves and potentially further undermining the physical stability of the islands.

If permanent communities are forced to move elsewhere, however unacceptable such a scenario may be, unprecedented questions arise under customary international law about the legal status of both the nations and their citizens. Specifically, can a deterritorialized state maintain sovereignty in international law if its citizens live exclusively within another country’s borders, and how does this change if the land is completely submerged versus merely becoming uninhabitable? Further, what becomes of the citizens of a deterritorialized nation, and will they have access to secondary citizenship in any new destinations? Customary international law resolves sovereignty issues as a mixed question of law and fact, looking for a defined territory, permanent population, effective government, and some degree of international recognition. In this context, the first two considerations will pose the greatest burden for states wishing

to maintain sovereignty. However, there is limited precedent in the international system for deterritorialized states; and existing sovereignty requirements, as customary law, may be overridden by an international consensus to redefine statehood.

Of particular concern to many of these islands is continued access to their maritime territories, particularly their Exclusive Economic Zones (EEZs), which provide critical fishing rights and access to other marine resources. As currently set by the United Nations Convention on the Law of the Sea (UNCLOS), EEZs extend 200 nautical miles from the shore. However, the Convention is not clear regarding permanent boundaries, and so, from one perspective, traditionally EEZs would recede along with the coast if sea levels rose. Several scholars have suggested alternatives to this, which include agreeing to freeze baselines (at current shore extent) or set exact EEZ boundaries, artificially propping up coastlines, reinterpreting UNCLOS, and in certain conditions entering bilateral agreements. This problem is particularly severe for small islands, because substantial marine territory – as much as 40,000 square nautical miles - could be threatened with the submersion of a single island, and because the potential loss of sovereignty could also affect their rights to maintain any marine territory. Resolving these issues may require legal innovations both within and outside of the UNCLOS framework, and may call into question current conceptions of sovereignty.

If certain small island nations become uninhabitable, their populations will have to move somewhere, but it remains unclear where they would go. On the international level, refugee law as defined by the 1951 Convention on Refugees perhaps might not apply to persons displaced by climate change (although subsequent clarifying agreements applying to Africa and the Americas might), and there is no international obligation for any particular country to take in such migrants. Similarly, protections in the United States and Europe for victims of environmental disasters are temporary, and leave no path to full residency. In response, individual nations may turn to existing agreements and relationships with potential destination countries. Domestic immigration laws in certain countries may also be used.

Options also exist in international institutions to provide more aid and support to climate-displaced peoples. Traditional institutions that could be integral to this effort include the International Organization on Migration and the United Nations High Commissioner for Refugees. The United Nations Framework Convention on Climate Change (UNFCCC) may also be of potential use in organizing resettlement activities. This is particularly true following the outcome of the 2010 Conference of the Parties in Cancun, which recognized the importance of “measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement...at national, regional and international levels.” The UNFCCC could perhaps address aspects of this issue through its loss and damage work plan, including aspects relating to slow onset effects. Some scholars have suggested that such reinterpretation and utilization of existing treaties and institutions are sufficient to address existing adaptation needs. Others disagree and have instead called for a new convention to protect the rights of environmentally displaced peoples. The proposals vary in their application and administrative structure, but all create refugee-like protections for qualifying environmental victims.

If people are forced to resettle, many have argued that they should be able to recover damages for harms received. However, the authority for such litigation remains unclear. Substantively, there are several possible bases for establishing a violation of international law, including breach of treaty claims

under the UNFCCC, the human right of self-determination, the duty under the World Heritage Convention to “preserve natural and human heritage,” UNCLOS protections against ocean acidification, and theories in tort and certain other areas of the law. To the extent that violations are established, there is some question whether damages or injunctive relief are most appropriate, and there may be important questions to be addressed in defining an appropriate remedy, if indeed, one exists.

A more difficult question is which courts could hear such claims and enforce remedies, if such remedies are possible. The International Court of Justice is empowered by Chapter XIV of the UN Charter as the principal judicial organ of the UN, but with limited powers, including advisory opinions; and certain treaties, including the UNFCCC (Article 14.6), offer similarly advisory commissions which could perhaps hear such cases. Access to domestic courts in key major emitters is similarly uncertain. Some have argued that domestic courts established by the small island nations themselves may provide an alternative source of jurisdiction; but such efforts remain mostly theoretical.

If, indeed, resettlement is a politically acceptable scenario (and it may not be), questions also arise around exactly how any resettlement would be organized. Preparations should be made far in advance of any actual movement, and could come in three stages. First, basic housing and life-supporting infrastructure would be planned. Second, the political relationships between displaced nationals and host states would need to be resolved, including questions of joint citizenship, access to social services (including healthcare and education), and what level of autonomy such communities might have. And finally, community cohesion would be important. Any new communities should do more than provide housing; they should be structured to promote livelihoods and preserve critical familial and community bonds. An especially complex issue in a resettlement scenario may include addressing personal and cultural identification with land, including conceptions under traditional customary law. Many different mechanisms for organizing this process are possible, from local ordinances to international planning.

This conference poses a range of challenging legal questions – and active planning should be no less ambitious. Many island nations have expressed interest in transformative shifts to low-carbon pathways, including, for some, carbon neutrality both to ensure energy security as well as to spur global action by larger nations. Scholars are examining design options to effect such an immediate and fundamental energy shift in island nations. Further, resettlement should always be considered a last, worst-case scenario, even if it is an acceptable scenario. Several scholars are examining innovative, long-term adaptation options so that island nationals can remain on their homelands for as long as possible. Design possibilities range from island-wide structural projects such as sea walls and large-scale sand imports, to more individualized solutions in innovative housing design. On more remote, less-populated islands such activities may be more difficult or complex.

To enable any necessary physical and social changes, small island governments would need to update existing institutions to prepare administratively for sea level rise and possible relocation. Possibilities to be discussed at the conference include addressing property systems to account for changing landscapes, developing new budget priorities, establishing targeted insurance regimes to allow for individual recovery, and above all, informing populations about risks and future contingencies.

This conference will seek to address many of the above legal questions, and to begin the critical dialogue for resolving those which cannot now be answered.