

# **Not Waving but Drowning: Climate Change, Human Rights and Small Islands**

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## **Introduction:**

Last month the Intergovernmental Panel on climate Change (IPCC) issued a [special report](#) on the impacts of global warming of 1.5 C above pre-industrial levels with a focus on the strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty.

That report was a wake-up call - with global warming likely to reach 1.5 C between 2030 and 2052 if it continues to increase at the current rate, we are only around a decade away from the potential impacts the report warns of. But the current position with the sum total of States' nationally determined contributions puts us on track for around 3C warming – more than the 2 degrees agreed in Paris roughly twice that aspired to.

The IPCC report suggests that sea levels will rise by 0.26 to 0.77 m by the end of the Century even with 1.5 C warming and that sea level rise will continue beyond 2100 with marine ice sheet instability in Antarctica and/or

irreversible loss of the Greenland ice sheet potentially resulting in multi-metre rise in sea level over hundreds to thousands of years.

If you live on an island close to sea-level, these figures have a very real meaning. The report points out that “Increasing warming amplifies the exposure of small islands, low-lying coastal areas and deltas to the risks associated with sea level rise for many human and ecological systems, including increased saltwater intrusion, flooding and damage to infrastructure.” And says that a reduction of 0.1m in global sea level rise implies that up to 10 million fewer people would be exposed to related risks. But for many small island states such as Kiribati, the Maldives, the Marshall Islands and Tuvalu with a combined population of around half a million people, 1.5 C is already too much.

### **What are the impacts of climate change on human rights of islanders?**

The science and the complexities of technical discussions and international processes around climate change can sometimes make climate change seem abstract and distract from the real impact on the ground. So, what I want to talk about today, is the human cost of climate change as it’s being felt right now in small islands, particularly Small Island Developing States (SIDS) and the ways that human rights law is being or could be used to help

provide creative and effective solutions that will affect people's lives now and in the future.

Climate change is an issue for all of us and the human impacts of climate change are already being felt across the world with droughts and extreme weather events causing food insecurity, conflict and forced migration in places as diverse as the Middle East, Latin America and the Arctic. Small islands are on the front line of these issues facing particular risks which require careful thought and complex solutions on a practical and legal level.

So, what do the human rights impacts of climate change look like?

Extreme weather events such as hurricanes are a serious threat to the right to life of people in small islands. Last year alone, the estimated death toll from the Atlantic Hurricane season was over 3,300 people, many of them on small Caribbean islands that were particularly badly hit by a series of hurricanes including Irma and Maria (whose names have now been retired because of the high damage costs and loss of life). But loss of life is not the only risk to human rights in these situations.

The devastation to homes and basic infrastructure by this kind of disaster also has serious implications for other rights in affected territories. Even in relatively affluent places, the economic and human cost is huge. In the

British Virgin Islands, for example, over a third of the island's 7,000 homes were destroyed by Hurricane Irma and the cost of the hurricane is estimated to be \$3.6 billion over three times its GDP. Guaranteeing security and preventing looting were a real challenge to the island in the aftermath of the Hurricane.

The problems of providing basic health services, ongoing education, food, shelter and security following such a devastating event are even more difficult in countries with limited resources. For vulnerable people such as children, the elderly, people with disabilities, pregnant women or those at risk of sexual exploitation, the potential risks for human rights are even more severe.

In some cases, post-disaster recovery has been used as an excuse to remove land rights for private investment. For example, in the island of [Barbuda](#), all land had been held communally since the emancipation of slaves in 1834 by the British who then governed the island. In 2007, this was codified in law in 2007 in the Barbuda Land Act which says that "All land in Barbuda shall be owned in common by the people of Barbuda," and "No land in Barbuda shall be sold." However, following Hurricane Irma which decimated the island, the Government of Antigua and Barbuda has used the disaster as an excuse to bring in draft legislation removing communal land rights in Barbuda without consultation. Such a drastic change in land ownership raises serious

concerns for the economic, social and cultural rights of the most vulnerable people in Barbuda at a time of crisis.

But the impact of climate change is not limited to dramatic events. In some areas, the gradual but worsening impact of global-warming is already putting lives at risk. For example, it has contributed to increasing temperatures, earlier snowmelts and thinning ice packs in the Arctic, where crossing frozen bodies of water is essential for transportation and subsistence living. A [study published in 2014](#) looked at 307 “falling through ice” (FTI) incidents affecting 449 people in Alaska from 1990-2010. The study noted that: “Subsistence activities such as hunting, fishing and gathering are critical components of the culture and life of many people living in the Arctic, and travel over fresh and saltwater ice is often essential for these activities. FTI events are an enduring hazard in the Arctic, and residents practicing subsistence lifestyles face relatively high exposure to water hazards throughout the year, including during the winter. In addition to the potential for injury and death, the risk of FTI events can cause equipment loss, decrease harvest success and adversely affect mental health.” More than half the events involved transportation by snow machine and mortality rates were markedly higher for Alaska Native people than for all Alaskans. The study concluded that falling through ice was a climate change related risk to health and life in the

Arctic which was particularly critical for vulnerable populations such as the Alaska Native population.

For low-lying islands, hurricanes are not the only threat. Kiribati is an island nation made up of 33 coral atolls and reef islands no more than 2m above sea level scattered across a wide area in the South Pacific. In 2015, a tidal surge swept over an ocean embankment smashing through the hospital and maternity ward so that terrified women had to be evacuated to the school on higher ground. A 2013 [World Bank study](#) on the potential impact of climate change on the Kiribati atoll of Tarawa gives an apocalyptic view of the future decades for the island. Roads would be washed away, devastating the economy; degradation of coral reefs, damaged by warming water, would mean stronger waves hitting the coast, increasing erosion, and disrupting a food supply heavily dependent on fish supported by the reefs. Higher temperatures and rainfall changes would increase the prevalence of diseases like dengue fever and ciguatera poisoning while damage to infrastructure would make it even harder to provide health services. Rising sea levels are likely to worsen erosion, create groundwater shortages and increase the intrusion of salt water into freshwater supplies. Aside from the risk of the islands being completely submerged by rising sea levels, the impacts of climate change are already making some islands uninhabitable.

## What happens when an island is no longer habitable?

The potential for an island or an entire island state to become uninhabitable due to climate change raises extremely complex practical, legal and political questions. But they are questions we can no longer put off answering. While internal displacement of islanders within a larger State poses human rights and security challenges, particularly for the vulnerable populations most likely to be affected, it is the need for external displacement that poses the most difficult legal challenges.

The term “climate refugee” has become colloquial shorthand to describe those who are obliged to leave their homes because of the impact of climate change. But while the numbers of people forced to move because of food insecurity or other factors arising out of climate change increase, they are not captured by international law definitions which do not recognise such a category of refugees.

But increasingly cases are being brought that challenge this situation. One of the most well-known [cases](#) involved a man who had moved from Kiribati to New Zealand with his family in 2007. When his visa expired, Mr. Teitiota claimed that he was entitled to be recognized as a refugee *“on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change”*.

The Immigration and Protection Tribunal (IPT) dismissed Mr. Teitota's appeal. Although it noted that *"the limited capacity of South Tarawa to carry its population is being significantly compromised by the effects of population growth, urbanisation, and limited infrastructure development, particularly in relation to sanitation. The negative impacts of these factors on the carrying capacity of the land on Tarawa atoll are being exacerbated by the effects of both sudden onset environmental events (storms) and slow-onset processes (sea-level-rise)."* It decided that Mr Teitota had *"undertaken what may be termed a voluntary adaptive migration,"* so his migration wasn't *"forced."*

The IPT looked at the concept of persecution in international refugee law which usually involves a failure of the state to prevent human rights abuses by its own agents or non-state actors. But it noted that *"this requirement of some form of human agency does not mean that environmental degradation, whether associated with climate change or not, can never create pathways into the Refugee Convention or protected person jurisdiction."*

The IPT didn't find that the evidence showed the environmental conditions Mr T and his family would face if they returned to Kiribati were *"so parlous that his life will be placed in jeopardy, or that he and his family will not be able to resume their prior subsistence life with dignity."* Importantly, it found that, the effects of environmental degradation on his standard of living

were being faced by the population generally, and it had not been suggested that the Kiribati government has failed to take adequate steps to protect the appellant from harm. So, he couldn't be considered as a refugee for the purposes of the Refugee Convention.

The case went all the way to the New Zealand Supreme Court which agreed with the IPT's conclusions. But while Mr Teitota's challenge was unsuccessful, the Supreme Court explicitly underlined the fact that its decision in this case should not be taken as ruling out the possibility of granting refugee status in another appropriate case. And, while changes in international law may be slow in coming, last year the New Zealand Government announced that it was looking into [creating a visa category](#) specifically designed for Pacific peoples displaced by climate change. As the reality of displacement due to climate change grows, there will be an increasing need for the international community to open legal avenues to those who can no longer remain in their homelands.

An even more fundamental problem for some small island states is the risk that their territory could be entirely submerged. International law sets out the key formal characteristics of statehood in the 1933 Montevideo Convention on the Rights and Duties of States. According to 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.”

The phenomenon of climate change and rising sea-levels means that urgent and careful thought needs to be given to what the legal and political consequences are for a State that no longer fulfils all these requirements, either because the remaining territory can no longer support a permanent population or because the entire territory is submerged.

This type of “state death” is something that international law has not yet had to address.<sup>1</sup> Aside from the very practical questions associated with re-settlement of populations, it raises fundamental issues around the right to self-determination enshrined in the UN Charter and international human rights instruments – the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development. What happens to a “people” when their land no longer exists?

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<sup>1</sup> For a detailed analysis of this issue, see James Ker-Lindsay (2016) Climate Change and State Death, *Survival*, 58:4, 73-94

Some Pacific islands have already taken steps to try to address the future problem of resettlement. For example, the former President of Kiribati, Anote Tong arranged for [the purchase of land in Fiji](#) in 2014 to provide a refuge for the people of Kiribati in anticipation of the gradual submersion of his country. The land is currently used for agriculture, addressing the issue of food security in the meantime. The former government of Kiribati was the first to take such a step, but others such as the Maldives and Tuvalu have looked into similar solutions.

However, buying land for resettlement does not address the underlying questions of sovereignty and self-determination. While states may be willing to help with resettlement from neighbouring countries, or countries they have strong ties with, they may be much less willing to cede sovereignty over parts of their own territory. And, while SIDS are small in terms of land-mass and population, they are often large in terms of ocean area with valuable resources in their Exclusive Economic Zone (EEZ) under the UN Convention on the Law of the Sea. What will the legal implications be for those resources when the territory the EEZ is connected to disappears? Will resettlement come at the cost of control of resources in the EEZ which is fundamental to the peoples of SIDS?

**How can islands use human rights law to help them?**

SIDS bear the brunt of the effects of climate change despite the fact that they are relatively small contributors to the problem. The response to climate change needs to be global, but there are ways that islands are and could be using international law including international human rights law to push the international community to take steps to reduce climate change and to ensure that those most responsible for contributing to climate change are also those who must be responsible for providing solutions to the human rights impacts. This will need to include support to deal with climate driven migration and funds to address loss and damage.

International human rights law requires that human rights must be “real and effective” and there must be effective remedies for breaches of human rights. The fact that the causes and effects of climate change know no boundaries makes it difficult to think of effective remedies in traditional terms of territorial jurisdiction, rights holders and duty bearers. This means that human rights lawyers working in this area will need to explore innovative approaches that break new legal ground. The recent judgment in the [Urgenda](#) case in the Netherlands, for example, looked at the way failures to limit greenhouse emissions could be in breach of the country’s obligations to protect the right to life and the right to private and family life as guaranteed in the European Convention on Human Rights. And many small island states or

their people are already at the forefront of this. For example, the [People's Climate Case](#) suing the European Parliament and the Council of the EU for their failure to commit to an ambitious 2030 climate agenda and the potential impact that will have on human rights protected under the European Charter of Fundamental Rights and Freedoms includes a family from Fiji among the plaintiffs.

In 2011 [Micronesia sued the Czech Republic](#) over its plans to develop a coal-fired power plant citing the risk of climate change as a transboundary harm that would threaten the existence of the archipelago over 12,000 km away. While the challenge was unsuccessful in stopping the development, it did have political impact leading to the resignation of the Czech environment minister and opened up new avenues for challenge by affected states under international law. And Micronesia continues to be pro-active in seeking international legal solutions to the issue including pushing for the atmosphere to be included in the long-term programme of the International Law Commission. This year 115 countries expressed their desire for the legal implication of sea level rise should be placed on the active work programme of the International Law Commission and this has been captured in the [UN's Ocean omnibus resolution](#).

After the Cayman Islands were flattened by Hurricane Ivan in 2004, their new [constitution in 2009](#) recognised the importance of the environment to the Islands introducing constitutional protections for the environment such that: *“Government shall, in all its decisions, have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development.”* What this could mean in practice for governmental decisions in areas such as the financial services sector that could have significant implications for climate change globally remains to be seen. The increasing recognition of the interplay between the environment and human rights has led to similar provisions being included in many domestic constitutions and in international instruments such as the European Charter for Fundamental Rights.

## **Conclusion**

These developments could open the way for further targeted litigation with a focus on human rights protections in both domestic and international law. Whether this is done through domestic courts or with an international approach, for example seeking an advisory opinion from the ICJ, it will need lawyers and policy makers to look outside their silos and across borders and

oceans to explore ingenious new ways of tackling both the causes and the impacts of climate change.

Last week Ralph Regenvanu, Minister for Foreign Affairs for Vanuatu [announced](#) that the country is looking into the possibility of suing fossil fuel companies and industrialised countries for their role in creating climate change that will be devastating for Vanuatu and other SIDS. Small islands may be on the front line in terms of climate change impacts and may take the lead in the political and legal steps we need to take to address climate change, but as the metaphorical “canary in the coalmine”, we should heed the warning – climate change is a very serious threat for us all. As such, we all have a duty to find ways of preventing and mitigating it.

The answers are not yet clear and the response to climate change will need creativity from scientists, lawyers, policy makers and activists to make sure we understand the seriousness of the threat we are facing and the steps we need to take to address it. Mary Robinson, the former President of Ireland and UN High Commissioner for Human Rights, in her book “Climate Justice” focuses on the need for stories to drive change. The title of this talk is borrowed from a poem by the British poet, Stevie Smith which starts with the words:

*“Nobody heard him, the dead man,*

*But still he lay moaning:*

*I was much further out than you thought*

*And not waving but drowning.”*

The courts and international processes won't save us without a change in global culture. That requires all the tools we can find so I'd like to end with the powerful words of two climate change activists from islands on opposite sides of the world who are pushing the global dialogue on climate change through their poetry:

<https://350.org/rise-from-one-island-to-another/>