

## THE SINKING NATION OF KIRIBATI: THE LONELY STAND AGAINST STATELESSNESS AND DISPLACEMENT FROM RISING OCEANS

### Introduction

Because of rising sea levels from global warming, the entire population of the small, low-lying central Pacific island state of Kiribati will need to relocate to a distant land. In Kiribati President Anote Tong's words, "We need to begin [the migration process] now ... because [we] will either be dead or drown."<sup>1</sup>

Climate change seriously impacts 325 million people, kills 300,000 people, and costs the world \$125 billion every year.<sup>2</sup> By the year 2100, global average sea levels may rise up to 1.9 meters, wiping out low-lying island nations, making large parts of Bangladesh uninhabitable, and increasing the chance that major coastal cities like New York will flood.<sup>3</sup> Forty-three small island countries are particularly vulnerable to rising sea-levels, and some, like Kiribati, may end up entirely underwater.<sup>4</sup>

Kiribati, which sits only 6.5 feet above sea level on average, is particularly vulnerable to wholenation displacement, as rising sea levels would render most of it uninhabitable.<sup>5</sup> Because fewer than a quarter of residents have jobs, most I-Kiribati (Kiribati citizens) depend on employed relatives and foreign aid.<sup>6</sup> Kiribati's 95,000 inhabitants suffer from significant overcrowding, low incomes, poor sanitation, and severe pollution.<sup>7</sup> As sea levels continue to rise, Kiribati will run out of fresh drinking water and become uninhabitable long before the islands are submerged.<sup>8</sup> The country will eventually face widespread population displacement and de facto statelessness, and Kiribati may no longer have a permanent population.<sup>9</sup>

Other countries should help I-Kiribati transition to life in a new nation-state by giving these displaced people an opportunity to pursue an education and acquire work skills and by according them the same rights as permanent residents in that nation. The international community should aid Kiribati in tackling the effects of climate change by providing more affordable loans and grants to Kiribati; coordinating humanitarian and emergency relief efforts in times of displacement; and helping I-Kiribati relocate to ensure that their human rights are protected.

### I. Obstacles to Migration: The Lack of Refugee Status

The U.N. Convention relating to the Status of Refugees ["Refugee Convention"] emphasizes protecting persons who are "unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."<sup>10</sup> I-Kiribati would not meet the "refugee" definition because "persecution" does not include adverse climate impacts.<sup>11</sup> Even if "persecution" included climate change impacts, the Refugee Convention requires that it be for reasons of race, religion, nationality, or membership in a particular social group; however, climate change impacts do not discriminate.<sup>12</sup> Furthermore, "refugees" must be treated adversely by their government withholding assistance, contributing to the environmental harm, or targeting specific groups.<sup>13</sup> Because

Kiribati's government has not significantly contributed to climate change and its policy does not negatively impact parts of its population, I-Kiribati must successfully show that industrial countries that failed to reduce greenhouse gas emissions are the persecutors.<sup>14</sup>

Supreme courts around the world have held that the Refugee Convention does not cover people searching for better living conditions or victims of natural disasters, no matter how devastating the natural disaster or whether the home state is unable to provide assistance.<sup>15</sup> The Organization of African Unity (OAU) Convention and Cartagena Declaration in Latin America include in their definitions of refugees persons who are displaced by "events seriously disturbing the public order," but require the presence of an actual, rather than future, threat.<sup>16</sup> Although the International Court of Justice in *Gabcikovo-Nagymaros Project* considered environmental protection a vital part of contemporary human rights doctrine, it did not explicitly recognize an independent human right to a safe environment.<sup>17</sup>

Because displaced I-Kiribati likely would not have refugee status, they run risks of interdiction, detention, and expulsion if they attempt to cross an international border.<sup>18</sup> Furthermore, I-Kiribati migrating to another state may find themselves without work rights, basic health care, or social services.<sup>19</sup> Fortunately, the Refugee Convention does not explicitly preclude recognizing environmental harm that amounts to persecution,<sup>20</sup> leaving room for change in refugee law to accommodate this new circumstance. Also, Article 6 of the International Covenant on Civil and Political Rights protects the basic, non-derogable right to life.<sup>21</sup>

## II. Statehood

If Kiribati loses de jure statehood, I-Kiribati would become stateless persons under the definition in Article 1 of the 1954 Statelessness Convention.<sup>22</sup> The 1933 Montevideo Convention on the Rights and Duties of States, which reflects customary international law, establishes the four criteria for statehood.<sup>23</sup> A de jure sovereign state should have a permanent population, a defined territory, a government that governs the defined territory, and a capacity to enter into relations with other states.<sup>24</sup> When Kiribati's permanent population becomes migratory and lives under another state's jurisdiction, Kiribati will fail the current statehood criteria. In response, President Tong has proposed establishing a small government outpost of up to a few hundred people on the island of Banaba at its highest point to retain de jure statehood.<sup>25</sup>

However, "[a] state is not necessarily extinguished by substantial changes in territory, population, or government, or even, in some cases, by a combination of all three."<sup>26</sup> International law strongly presumes that states continue to exist even when it does not have a government for a short time.<sup>27</sup> Based on historical state practice, other states will likely recognize Kiribati even after it fails to meet all four statehood criteria, at least for some time.<sup>28</sup>

Although Kiribati could lease territory from another state to reconstitute itself within another state, the island nation would function as its own state only if the host state formally ceded the land.<sup>29</sup> This conferred jurisdiction must include rights to become a citizen, migrate, work, access health care, and access social security.<sup>30</sup> In March 2012, Kiribati began negotiations to buy nearly 6,000 acres of Vanua Levu, Fiji, for \$9.6 million from a church group,<sup>31</sup> but Kiribati needs a state to cede territory to gain the requisite state jurisdiction. A landless Kiribati government could still diplomatically represent its citizens nationally, but would not be able to fulfill its treaty obligations.

Although the right to a nationality is contained in Article 15 of the Universal Declaration of Human Rights, states are not required to confer citizenship.<sup>32</sup> The Final Act of the 1961 Convention on the Reduction of Statelessness states that de facto stateless persons should be treated the same way as de jure stateless persons, but only binds the states that signed it.<sup>33</sup> However, based on the Permanent Court of International Justice's opinion in *Acquisition of Polish Nationality*, Kiribati residents living in another state's territory for an extended time may acquire that new nationality, depending on whether that state limits its citizenship to foreign nationals.<sup>34</sup>

## III. Recommendations

An international treaty creating climate-exile status for displaced citizens of physically unviable states to migrate to another country could help I-Kiribati. However, such a treaty would result from compromise, would require other states to enforce it, and would be overly simplistic, ignoring many pressing concerns of the new refugee class, like education, job attainment, and

health. An interagency approach from the United Nations would be more effective because it can draw from varying disciplines of expertise.

Other states in the international community hesitate to help small island states because they don't want to transfer their own sovereign territory or spend resources to assimilate the migrants into their society; this can unreasonably burden poorer states.<sup>35</sup> They could nonetheless help I-Kiribati by modeling their systems on Swedish or Finnish asylum law, which both extend residence permits to people unable to return to their state of origin because of an environmental disaster, when internal migration is not possible.<sup>36</sup> However, these helpful measures are only the first steps states can take to help I-Kiribati; climate exiles must also gain substantive rights. The nonbinding United Nations Millennium Declaration declares aspirational values and principles that the international community should strive to reach.<sup>37</sup> Under customary international law, no state may use its territory to cause serious injury by fumes to another state's territory.<sup>38</sup> In accordance with the Millennium Declaration, and because they contributed more to global warming, higher-polluting states should carry the burden in protecting the human rights of Kiribati migrants and help them resume normal life in a new state.<sup>39</sup> These states should permit I-Kiribati to gain dual citizenship so they may have the right of residence, health care, and other benefits accorded only to citizens. An ideal framework would be consistent with international human rights law and international refugee law that affirms non-discrimination and respects the cultural rights of communities like the I-Kiribati.

Other states should also help I-Kiribati adapt to the migration process by offering them a chance to attain education and acquire work skills through work visas and permanent residency, allowing I-Kiribati a successful transition into a new society. Additionally, states should offer migration pathways that allow I-Kiribati to have the same rights as permanent residents in that state. Staggered migration to another state would ease the transition for later migrants and ease the financial burden on the host state. International institutions in general should develop a long-term plan to gradually relocate I-Kiribati; coordinate humanitarian and emergency relief efforts in times of displacement; address the needs of those relocating; and establish specific human rights protections.

The United Nations can help Kiribati by forgiving its membership dues on the condition that these payments go towards funding an exit strategy for its citizens; Kiribati currently pays full dues.<sup>40</sup> The United Nations could also create a specialized agency or fund specifically for states that will be physically unviable in the future, which parallels the joint IMF-World Bank's "Debt Relief Under the Heavily Indebted Poor Countries Initiative."<sup>41</sup> Such an initiative could provide loans or grants to the poorest states so they can help tackle the problems associated with climate change.

## Conclusion

Rising sea levels will eventually render the low-lying island state of Kiribati uninhabitable. Without refugee status or Kiribati statehood, displaced I-Kiribati may find themselves without basic necessities to survive in another state. Because Kiribati's government did not persecute I-Kiribati by withholding assistance, contributing to the environmental harm, or targeting specific groups, they are unlikely to have refugee status. Furthermore, Kiribati may cease to be a state when its permanent population becomes migratory and it cannot persuade another state to cede territory, if other states stop recognizing Kiribati as a state.

An interagency approach from the United Nations can effectively address I-Kiribatis' educational, job attainment, and health concerns when they need to move. The international community can grant Kiribati more affordable loans, and coordinate humanitarian and emergency relief efforts. Meanwhile, higher-polluting states can help I-Kiribati by extending residence permits, citizenship, education, and work opportunities to them. Kiribati's people face considerable difficulties, but the international community can do a lot to help their situation.

## Footnotes

<sup>a1</sup> Bobby Yu is a second-year law student at the University of Arizona James E. Rogers College of Law and an Associate Editor for the *Arizona Journal of Environmental Law & Policy*. He graduated from the University of California, Los Angeles (UCLA) in 2006 with Bachelor of Arts degrees in history and economics.

- <sup>1</sup> Duncan Wilson, *Interview: Climate Change ... Nobody Is Immune*, Islands Business, [http://www.islandbusiness.com/islands\\_business ...](http://www.islandbusiness.com/islands_business...) (last visited Nov. 20, 2012) (quoting Anote Tong, President, Kiribati).
- <sup>2</sup> Global Humanitarian Forum, *Human Impact Report: Climate Change -- The Anatomy of a Silent Crisis* 18 (2009).
- <sup>3</sup> Christoph Schwarte & Ruth Byrne, *International Climate Change Litigation and the Negotiation Process -- Working Paper 9* (2010), available at [http://www.field.org.uk/files/FIELD\\_cclit\\_long\\_Oct.pdf](http://www.field.org.uk/files/FIELD_cclit_long_Oct.pdf).
- <sup>4</sup> Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* 687 (Martin Parry et al., eds. 2007).
- <sup>5</sup> Brian Reed, *Climate Change and Faith Collide in Kiribati*, NPR (Feb. 16, 2011), <http://www.npr.org/2011/02/16/133650679/climate-change-and-faith-collide-in-kiribati>.
- <sup>6</sup> Jane McAdam, *Climate Change, Forced Migration, and International Law* 124-25 (2012).
- <sup>7</sup> *Id.*
- <sup>8</sup> U.N. High Comm'r for Refugees, *Summary of Deliberations on Climate Change and Displacement*, ¶ 30 (April 2011).
- <sup>9</sup> McAdam, *supra* note 6, at 119-20.
- <sup>10</sup> Convention Relating to the Status of Refugees art. 1, Apr. 22, 1945, 189 U.N.T.S. 150.
- <sup>11</sup> McAdam, *supra* note 6, at 10.
- <sup>12</sup> *Id.* at 46.
- <sup>13</sup> *Id.* at 44-47.
- <sup>14</sup> *Id.* at 45.
- <sup>15</sup> *Id.* at 46; see, e.g., *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 732 (Can.); *Minister for Immigration v. Haji Ibrahim* [2000] 204 CLR 1, 48-49 (Austl.); *Horvath v. Secretary of State for the Home Department*, [2001] 1 A.C. 489 (H.L.) 499-500 (appeal taken from Eng.).
- <sup>16</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, Sept. 10, 1969, 1001 U.N.T.S. 45; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. 3(3), Nov. 22, 1984.
- <sup>17</sup> *Gabcíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 91 (Sept. 25).
- <sup>18</sup> McAdam, *supra* note 6, at 1.

- 19 See UN High Comm'r for Refugees, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States* 14, U.N. Doc. PPLA/2011/04 (May 2011) (by Susin Park).
- 20 McAdam, *supra* note 6, at 44-47.
- 21 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, No. 21, U.N. Doc. A/6316, at art. 6 (Mar. 23, 1976).
- 22 Paul Weis, *Nationality and Statelessness in International Law* 135 (2d ed. 1979).
- 23 Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19; McAdam, *supra* note 6, at 128.
- 24 McAdam, *supra* note 6, at 128.
- 25 *Id.* at 153-54.
- 26 James Crawford, *The Creation of States in International Law* 715 (2d ed. 2006).
- 27 *Id.* at 34.
- 28 McAdam, *supra* note 6, at 129; Crawford, *supra* note 26, at 721-22.
- 29 Crawford, *supra* note 26, at 56-59; Ian Brownlie, *The Rights of Peoples in Modern International Law*, 9 Bull. Austl. Soc. Leg. Phil. 104, 108 (1985).
- 30 McAdam, *supra* note 6, at 148.
- 31 Nick Perry, *Kiribati Global Warming Fears: Entire Nation May Move to Fiji*, Huffington Post (Mar. 9, 2012, 7:06 AM), [http://www.huffingtonpost.com/2012/03/09/kiribati-global-warming-fiji\\_n\\_1334228.html](http://www.huffingtonpost.com/2012/03/09/kiribati-global-warming-fiji_n_1334228.html).
- 32 McAdam, *supra* note 6, at 139, *discussing* Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (1948).
- 33 Convention on Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.
- 34 Crawford, *supra* note 26, at 53, *discussing* Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 at 15 (Sept. 15).
- 35 McAdam, *supra* note 6, at 152-53.
- 36 4 ch. 3 § Utlänningslag (Svensk författningssamling [SFS] 2005:716) (Swed.); Aliens Act § 88a (Act No. 301/2004, amended by 323/2009) (Fin.).
- 37 Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2, at 25-26 (Sept. 18, 2000).

38 Declaration of the UN Conference on the Human Environment, U.N. Doc. A/CONF/48/14/REV.1 (June 16, 1972).

39 *Id.*

40 Steve Coll, *Membership Dues*, *New Yorker* (Sept. 26, 2011), [http://www.newyorker.com/talk/comment/2011/09/26/110926taco\\_talk\\_coll](http://www.newyorker.com/talk/comment/2011/09/26/110926taco_talk_coll).

41 *Factsheet -- Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*, Int'l Monetary Fund (Sept. 30, 2012), <http://www.imf.org/external/np/exr/facts/hipc.htm>.