

# THE DISAPPEARANCE OF KIRIBATI : OPTIONS AND SOLUTIONS

*Legal Paper*

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The Intergovernmental Panel on Climate Change and the Stern Review warn that climate change will cause large-scale human displacement.<sup>1</sup> While precise figures are disputed, Myers estimates up to 200 million people will be affected by 2050.<sup>2</sup> However the threat to small island states, such as the Republic of Kiribati, is most concerning considering their territory's literal disappearance is inevitable. The complete loss of territory and its population is unprecedented and the eventual displacement of the people of Kiribati (the I-Kiribati) raise grave uncertainty. While it is accepted climate change causes displacement, there is no consensus on how to define people forced to migrate as a result of climate change. For the purpose of this paper the term 'climate change induced displacement' will be used. This is because of its clear and specific focus on people displaced across state borders due to climate change, thus reflecting the circumstances of the I-Kiribati. Despite the reality of mass displacement, the international community has not addressed this uncertainty and there are limited legal and policy responses available to the I-Kiribati under the existing framework. Upon examination of the limited responses, the best response available to the I-Kiribati is voluntary migration as it protects individual rights. Part A of this paper will explain why the

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<sup>1</sup> See Intergovernmental Panel on Climate Change, *Climate Change 2007 - The Physical Science Basis: Working Group I Contribution to the Fourth Assessment Report of the IPCC*, Cambridge University Press, Cambridge, 2007; *Climate Change 2007 - Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Fourth Assessment Report of the IPCC*, Cambridge University Press, Cambridge, 2007; and *Climate Change 2007 - Mitigation of Climate Change: Working Group III Contribution to the Fourth Assessment Report of the IPCC*, Cambridge University Press, Cambridge, 2007 ; Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge University Press, Cambridge, 2007.

<sup>2</sup> Norman Meyers, 'Environmental Refugees: An Emergent Security Issue,' *13<sup>th</sup> Economic Forum*, Prague, May 2005.

I-Kiribati face displacement, evidenced by the causation between climate change and displacement in the context of Kiribati and how climate change already impacts the enjoyment of the I-Kiribati's fundamental human rights. Given this reality, Part B examines the possible solutions for the I-Kiribati's inevitable displacement, illustrating that the legal protections available under the existing framework, in particular the refugee convention, complementary protection and statelessness, and the policy responses available, self-governing and *en masse* relocation, are not sufficient responses. Considering the efficacy of each solution and issues of sovereignty, individual and cultural rights, this paper demonstrates that voluntary migration provides the most likely and practical response under the existing framework. However, other states, in particular Australia and New Zealand need to actively participate in this approach through bi-lateral migration agreements to ensure its success.

## I PART A

### *A Kiribati's Vulnerability to Climate Change*

The greatest challenge for Kiribati is the effects of climate change. Kiribati has a population of over 100, 000 people.<sup>3</sup> It is a low-lying pacific island nation composed of 33 islands; of these 21 are uninhabited. Atolls are low-lying and predominantly made up of coastline, making them especially vulnerable to sea-level rise. The effects of climate change on coastal erosion, agriculture, the economy, water supply and health, are already affecting I-Kiribati, rendering Kiribati one of the first counties in danger of becoming uninhabitable because of climate change.<sup>4</sup>

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<sup>3</sup> Office of the Republic of the President of Kiribati, *Climate Change - Relocation*, Office of the Republic of the President of Kiribati <<http://www.climate.gov.ki/category/action/relocation/>>

<sup>4</sup> Office of the Republic of the President of Kiribati, *Climate Change - Effects*, Office of the Republic of the President of Kiribati <<http://www.climate.gov.ki/category/effects/>>

Global warming contributes to the rise in sea-levels in two ways: the melting of ice sheets and glaciers and the resulting expansion of ocean waters and storm surges.<sup>5</sup> The rise of sea-levels and increase in storm surges makes low-lying Kiribati particularly vulnerable to complete submersion because there is no high ground where the I-Kiribati can seek refuge. Instead they remain exposed to sudden inundation. The loss of coral reefs also threatens atoll countries like Kiribati because the reefs act as a protection against the ocean waves and storms.<sup>6</sup> This in turn leads to coastal erosion, not just of the beaches, but also of the land.<sup>7</sup> Coastal erosion and rising sea levels are not merely a future risk, but a phenomenon which is already having an impact. Kiribati is experiencing the effects of this, with people losing both their homes and the agricultural land, which is relied on for food.<sup>8</sup> While there is a direct causal link between climate change and the degradation of Kiribati's territory, the indirect effect of climate change on the I-Kiribati's living conditions and human rights is arguably more important. This is because, while inundation is a future threat, the more pressing concern is for the I-Kiribati's living conditions, which deteriorate with the environmental degradation.

### *B Adverse Impacts of Climate Change to the Full Enjoyment of I-Kiribati's Human Rights*

The environmental degradation caused by climate change has adverse impacts on many of the I-Kiribati's fundamental human rights. These have been summarised into three broad

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<sup>5</sup> International Climate Change Adaption Initiative, 'Pacific Climate Change Science Program: Current and Future Climate Change of Kiribati' *CSIRO* (2011) 7.

<sup>6</sup> Elizabeth Ferris, Michael Cernea and Daniel Petz, 'On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries' (The Brookings Institution – London School of Economics Project on Internal Displacement, 2011) 15.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

categories. Most of these rights were already threatened; however climate change has severely exacerbated these issues.

### 1. *Impact on the Right to Food and Water*

Climate change directly affects Kiribati's agriculture crops in three ways; saltwater intrusion, loss of land due to inundation and changes in rainfall.<sup>9</sup> This has far reaching consequences, affecting the I-Kiribati's food security. Moreover, the projected loss of land will contribute to population density and health problems, placing more pressure on the limited agricultural land available. This is particularly problematic as the agriculture industry is the main source of economic activity,<sup>10</sup> thus climate change is indirectly affecting employment security. The fresh water reduction and pollution means the I-Kiribati have limited access to fresh water.<sup>11</sup> As such Kiribati no longer has food or water security, leading to a variety of social, cultural and economic issues.

### 2. *Impact on the Right to Health*

The land shortages caused by climate change has aggravated population and health problems in Kiribati, particularly on the island of Tarawa. Population growth on Tarawa is predicted to double in the next 17 years.<sup>12</sup> This population pressure is compounded by the loss of living space due to coastal erosion. As a result, people are squatting in Tarawa's main water lens where freshwater gathers when rain seeps through the ground. This lens is the main source of fresh water for the population and is being contaminated by those living in it, leading to the

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<sup>9</sup> Office of the Republic of the President of Kiribati, *Climate Change - Agriculture*, Office of the Republic of the President of Kiribati <<http://www.climate.gov.ki/category/effects/agriculture/>>

<sup>10</sup> Ibid.

<sup>11</sup> Office of the Republic of the President of Kiribati, *Climate Change - Water*, Office of the Republic of the President of Kiribati <<http://www.climate.gov.ki/category/effects/water/>>

<sup>12</sup> Bernard Lagan, 'Kiribati: A Nation Going Under', *The Global Mail* (online), 15 April 2013 <<http://www.theglobalmail.org/feature/kiribati-a-nation-going-under/590/>>

possible spread of disease.<sup>13</sup> Furthermore, Kiribati has the highest infant-mortality rate in the Western Pacific, with many babies dying of chronic diarrhoea caused by waterborne and faeces-related illnesses, arguably resulting from the contaminated water lens.<sup>14</sup> While these are not directly caused by climate change, it has exacerbated these health problems.

### 3. *Impact of Climate Change on the Right to Self-Determination*

The I-Kiribati face the complete submersion of their island nation. As such, it is necessary to determine how to respond to a nation whose land is increasingly uninhabitable and will eventually disappear. This reality raises concerns for Kiribati's sovereignty and how to ensure the protection of their cultural, social and political rights when they are eventually forced to relocate. These issues are compounded by the choice of migration by Government of Kiribati's response to climate change.<sup>15</sup>

With insufficient mitigation efforts, certain inundation and human rights concerns increasing, it is evident the I-Kiribati will eventually have to leave their country. However, climate induced displaced persons face many obstacles in seeking refuge in new territory.

## II PART B

Despite the reality of displacement and the need to migrate, there are limited legal protections and policy responses available under the existing framework. Most of these responses are flawed or not viable. Voluntary migration is the exception.

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<sup>13</sup> Ibid.

<sup>14</sup> Kiribati Climate Change Study Team, 'Republic of Kiribati National Adaption Program of Action' (*Environment and Conservation Division*, Ministry of Environment, Land and Agriculture Development, Tarawa , January 2007) 19.

<sup>15</sup> Office of the Republic of the President of Kiribati, above n 3.

## *A Legal Protections*

The I-Kiribati do not have the right to enter another state unless they fall within a category of migrant which obliges a state to give protection. The existing international obligations to give protection found in; refugee law, complementary protection under human rights law and the law of statelessness, are not able to give sufficient protection to the I-Kiribati and therefore are not viable responses. A key reason for this is Kiribati will become uninhabitable long before it disappears and the effects of climate change are indirect and varied. Therefore the traditional dichotomy of ‘voluntary’ and ‘forced’ migration will be difficult to apply. However each response is inadequate for differing reasons.

### *1. Refugee Convention*

The term climate change or environmental refugee is sometimes used to refer to those forcibly displaced by climate change. However, this term falsely indicates refugee status extends to climate change induced displaced persons. The definition of refugee is found in the 1951 Refugee Convention<sup>16</sup> in conjunction with the 1967 Protocol<sup>17</sup> (The Refugee Convention). It requires an individual to show a well-founded fear of persecution for a convention ground.<sup>18</sup> There are a number of reasons the I-Kiribati, do not fall within this definition.

Firstly, climate change is not a convention ground and therefore a claim based on the adverse impact of climate change generally, would not meet the definition. While it could be argued that the I- Kiribati fall within the convention ground ‘particular social group’ this would be difficult to establish. This is because the I-Kiribati would have to be connected by a

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<sup>16</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>17</sup> *Protocol Relating to the Status of Refugees* 606 UNTS 267 (entered into force 4 October 1967).

<sup>18</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) Art 1A(2).

characteristic other than the risk of persecution,<sup>19</sup> which they are not for the purposes of the convention.

Secondly, it is difficult to characterise climate change as persecutory. While climate-related harm is generally a breach of socio-economic rights, as illustrated by the aforementioned violations suffered by the I-Kiribati, it is becoming increasingly clear such violations are not serious enough to amount to persecution. Courts around the world have found those fleeing natural disaster, famine or bad economic conditions, do not fall within the definition of refugee under the convention.<sup>20</sup> In particular, climate change refugee applications fail on the basis that the harm feared does not amount to persecution and there is no differential impact. This was recently illustrated in *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment*<sup>21</sup> where the New Zealand High Court rejected a Kiribati man's climate change based application for refugee status. The court found the human rights violations faced by the I-Kiribati as a result of climate change did not amount to persecution under the Refugee Convention. Moreover the court found that even if there was persecution, "that persecution is indiscriminate rather than based on one of the five Convention grounds."<sup>22</sup> To date there is no New Zealand, Australian, Canadian, United Kingdom, United States or European authority which had extended the protection of the Refugee Convention to include a person solely affected by climate change. As the I-Kiribati do not meet the persecutory threshold and a court has already determined an I-Kiribati in particular does not meet the definition of refugee, it is unlikely they could successfully seek protection under the Refugee Convention.

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<sup>19</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 341 (Dawson J).

<sup>20</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Dawson J); *Minister for Immigration v Haji Ibrahim* (2000) 204 CLR 1, 48-9 (Gummow J); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 499-500 (Lord Hope).

<sup>21</sup> [2013] NZHC 3125 (26 November 2013).

<sup>22</sup> *Teitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125 (26 November 2013), [55].

The 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*<sup>23</sup> and the 1984 *Cartagena Convention*<sup>24</sup> expand the refugee definition of a refugee. While neither overtly protects ‘climate change refugees,’ refugee applications by I-Kiribati may be more successful under these treaties because of their breadth.

Ultimately, the issue is not merely that the I-Kiribati do not fall within the definition of refugee, but this is actually an ineffective framework for the I-Kiribati. The refugee framework does not adequately address the issues of pre-emptive movement occurring in response to climate change, nor issues surrounding maintenance of culture and statehood where the whole community of Kiribati will have to relocate.<sup>25</sup>

## 2. *Complementary Protection Under Human Rights Law*

Human Rights Law expands states protection obligations beyond the *Refugee Convention* for particular rights violations; this is called complementary protection. The effects of climate change affect multiple human rights and therefore subsequent protections.<sup>26</sup> For the purpose of this paper consideration will be limited to the violation of the I-Kiribati’s right to life. This right is outlined in article 6 of The *International Covenant on Civil and Political Rights* (ICCPR),<sup>27</sup> which gives rise to non-refoulement obligations under complementary protection. Due to this obligation it is one of the strongest sources of protection for climate change-related claims within the complementary protection framework. Nonetheless,

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<sup>23</sup>1001 U.N.T.S. 45 (10 September 1969).

<sup>24</sup>*Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, OEA/Ser.L/V/II.66/doc.10, rev. 1 (22 November 1984).

<sup>25</sup> Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 51.

<sup>26</sup> See Owen Cores-Holland, *The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR*, (2008) 9(2) *Melbourne Journal of International Law*.

<sup>27</sup> The *International Covenant on Civil and Political Rights* (ICCPR) signed 16 December 1966, U.N.T.S. No. 14668, vol 999 (entered into force 16 December 1976).



assuming these rights are found to have been violated in the case of Kiribati, such claims still face two significant obstacles. Firstly, establishing the requisite degree of imminence, and secondly, whether climate change is sufficient for the legally required threshold of harm.

The United Nations Human Rights Committee (UNHRC) held that to be considered to have experienced an *ICCPR* violation the person ‘must show with that an act or an omission of a state party has already adversely affected his or her enjoyment of such right, *or that such an effect is imminent*.’<sup>28</sup> Therefore, existing complementary protection does not address pre-emptive and staggered movement, which, in the case of slow onset climate change, is problematic. Imminence was discussed by the UNHRC in relation to nuclear testing and was found to be an insufficient basis for a potential threat to life claim because such a threat was not sufficiently imminent.<sup>29</sup> McAdam argues that climate change applications are weak given it is more contentious and a less forceful threat than nuclear weapons.<sup>30</sup>

Finally the slow-onset context of climate change makes it difficult to amount to a determination of ‘harm’ within the complementary protection framework. To find whether complementary protection applies, a decision-maker determines whether returning an individual would amount to the breach of a protected right. Kolmannskog and Trebbi argue that within the slow-onset context, the focus should not be on why someone left but if the ‘gradual degradation has reached a critical point where they cannot be expected to return.’<sup>31</sup> Therefore it is necessary to consider the potential harm rather than actual harm already suffered. However, even if decision-makers were to focus on the potential harm as opposed to the cause of that harm, it is still unclear if the I-Kiribati could benefit from complementary

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<sup>28</sup> *Aalbersberg v The Netherlands Communication* No 1440/2005 (12 July 2006) UN Doc CCPR/87?D/1440/2005 (14 August 2006) Para 6.3.

<sup>29</sup> Jane McAdam, above n 25, 85.

<sup>30</sup> *Ibid*, 84.

<sup>31</sup> Kolmannskog and Trebbi, ‘Climate Change, Displacement and Protection: A Multi-Track Approach’ (2010) 92 *International Review of the Red Cross*, 713.

protection under human rights law. While the more debilitated Kiribati becomes, the greater chance the I-Kiribati will have in making this a successful claim, waiting is of little practical use to the I-Kiribati. In 2008, President Anote Tong stated;

We want to begin that [migration] now, and do it over the next twenty, thirty or forty years, rather than merely, in fifty to sixty years time, simply come looking for somewhere to settle our one hundred thousand people because they can no longer live in Kiribati, because they will either be dead or drowned. We begin the process now...<sup>32</sup>

Thus waiting for a stronger claim of ‘harm’ is evidently not a viable response for the I-Kiribati.

It is worth noting that some states have opted for more comprehensive complementary protection however, these regimes are not regulated at international law. For example, Finland provides protection to foreign nationals who cannot return safely because of an environmental disaster.<sup>33</sup> However in the context of Kiribati, where the effects of climate change are slow onset rather than fast onset disasters, this is unlikely to be a realistic option.

While it is possible to make claims under complementary protection, it is unlikely they would be successful. Even if they were successful, they would not be so until it was too late to be of any value. Therefore complementary protection is not a sufficient response for the I-Kiribati.

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<sup>32</sup> President Anote Tong in D. Wilson, ‘Climate Change: Nobody is Immune’ *Islands Business* (online) 2008 <[http://www.islandsbusiness.com/islands\\_business/index\\_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl](http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=18087/overrideSkinName=issueArticle-full.tpl)>

<sup>33</sup> Office of the United Nations High Commissioner for Refugees, ‘Forced Displacement in the Context of Climate Change: Challenges for States Under International Law’, Submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under The UNFCCC (AWG-LCA 6), 19 May 2009.

### 3. *Statelessness*

The submersion of Kiribati provides an interesting challenge to the concept of a 'state' under international law and whether the I-Kiribati would be considered stateless, thus receiving protection under the statelessness treaties.<sup>34</sup> However, neither of these considerations provide practical responses. This is because there is 'a strong presumption against the extinction of states once firmly established'<sup>35</sup> and therefore it is unlikely that the international community would recognise Kiribati had ceased to exist. Additionally there is no precedent to establish what would or should be the international response to the I-Kiribati in respect to statelessness. Such a determination will depend on the point at which the progressive deterioration of living conditions on the island will amount to a determination they are uninhabitable. At present it is unclear how to determine what amounts to statelessness in this context. Arguably, such recognition, if it were to arise, would not occur until long after the population had moved, as it requires Kiribati to have become uninhabitable. Lastly, the statelessness treaties are poorly ratified<sup>36</sup> making them a less attractive option. As the I-Kiribati would have already had to use another means of protection, the application of the law of statelessness is impractical and of little benefit.

While there are arguments to create a legal instrument for climate change displaced persons, such an instrument is unlikely to eventuate in the near future. Therefore it is unnecessary to discuss this as a possible resolution for the I-Kiribati. It is important to note that individual

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<sup>34</sup> *1954 Convention relating to the Status of Stateless Persons* 360 UNTS 5158 (entered into force 6 June 1960) ; *The 1961 Convention on the Reduction of Statelessness* 989 U.N.T.S. 175, (entered into force Dec 13, 1975).

<sup>35</sup> J Crawford, *The Creation of States in International Law*, (Oxford University Press, 2<sup>nd</sup> ed, 2006) 715.

<sup>36</sup> Jane McAdam, 'Disappearing State' on *Oxford University Press' Academic Insights for the Thinking World* , (30 March 2013) <<http://blog.oup.com/2013/03/disappearing-states-climate-change-international-law-pil/#sthash.Sk9hpRSQ.dpuf>>

state action is taking place under the Nansen initiative.<sup>37</sup> However this is a political discussion and while positive, is yet to be a practical response, especially as it appears to focus on fast-onset climate changes, such as natural disasters. As such rather than advocating for a new legal framework this paper is limited to determining practical responses available under the existing framework.

## *B Policy Responses Available Under the Existing Framework*

### *1. Self-Governing*

The President of Kiribati has proposed the establishment of a small government outpost on Kiribati's only high ground, Banaban Island, to enable the retention of Kiribati and control over its resources.<sup>38</sup> The I-Kiribati have highlighted their key concern is the retention of their concept of 'home', this being land, community and identity, as opposed to preserving the political entity of the state.<sup>39</sup> As there is an ability to retain a small outpost population and the I-Kiribati appear to value cultural rights over political rights, self-governance in free association with another state, is a possible option.

Self-governance is a well-established model in the Pacific. However, while it has been successful between the Cook Islands and New Zealand, in that case there were historical ties between the states, something that Kiribati does not have with the most likely partnering states; which are Australian and New Zealand. Thus it may be more difficult to find a willing state to enter into this relationship with. McAdam cites concerns that the I-Kiribati would be unwilling to move to this model when they only recently achieved independence.<sup>40</sup> However,

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<sup>37</sup> See generally The Nansen Initiative: Disaster-Induced Cross-Boarder Displacement (2014) (online) <<http://www.nanseninitiative.org>>

<sup>38</sup> Jane McAdam, above n 25, 153-154.

<sup>39</sup> J McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspective* (Hart Publishing 2010) 126.

<sup>40</sup> Jane McAdam, above n 25, 156.

given the options available and the ability for the retention of their culture and concept of 'home' under such an agreement, this is a minor concern.

Problematically such a response still requires a significant amount of the population to leave Kiribati. Therefore issues of identity retention and migration options still arise under this response. Moreover states currently in such a partnership are not 'disappearing states' and therefore the legal and policy issues associated with lack of territorial existence have not been confronted. Thus, while this option allows state autonomy and a degree of culture and identity retention, it is a flawed response.

## 2. *En Masse Relocation*

This is the ideal response as it allows the improvement of the protection of the I-Kiribati individual rights while also ensuring the retention of culture and identity. However it is also the least practical and realistic.

Relocation is the permanent movement of a community where the important characteristics of the original community, including its social structure, legal and political systems and cultural characteristics are retained.<sup>41</sup> There have been at least 86 relocations of whole communities within the Pacific, 37 from environmental variability and another 13 from human-induced environmental degradation.<sup>42</sup> However, international relocation has not happened in the post-colonial era. In 2014, President Anote Tong announced the purchase of 20sq km on Banua Levu, a Fijian Island. The land was sold by the Church of England for \$8.77 million. Tong

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<sup>41</sup>John Campbell. 'Climate-induced Community relocation in the pacific: the meaning and importance of land,' in J McAdam, Jane (ed.), *Climate Change and Displacement: Multidisciplinary Perspective* (Hart Publishing 2010) 58-59.

<sup>42</sup> Jane McAdam, above n 25, 143.

told the Associated Press; "we would hope not to put everyone on [this] one piece of land, but if it became absolutely necessary, yes, we could do it."<sup>43</sup>

Therefore Kiribati now has the means for *en masse* relocation of its population; however the efficacy of such a solution is questionable. There is more to relocation than merely securing territory. Acquisition of land does not equate to immigration or citizenship rights for the I-Kiribati. Such automatic citizenship rights would require the cession of the land on a state to state level, which has not happened in this case. Moreover, it was a private sale of land from the Church, rather than from the Fijian Government to the Government of Kiribati. Therefore the Government of Fiji was not even involved in the sale, let alone handing over the title to that land. Thus despite already achieving a private property transaction, a transfer of sovereignty also had to take place to ensure to protection of the I-Kiribati's rights. Therefore while there is nothing at international law which prevents *en masse* relocation and the transfer of sovereignty of that land, the political likelihood of any State agreeing to this is remote at best.

Additionally, *en masse* relocation raises issues of sovereignty and human rights protection. Firstly, while the I-Kiribati have the right to self-determination, if done after relocating to another country, this right would probably give way to the territorial and state sovereignty of the host state. In other words, no State has a claim on another to cede territory, even where it is to permit that state's continued existence. McAdam has considered the leasing of territory in this context.<sup>44</sup> However, issues arise as to the extent to which the Kiribati Government could freely exercise their power over the I-Kiribati, and whether it would amount to the

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<sup>43</sup> Laurence Caramel, 'Besieged by the rising tides of climate change, Kiribati buys land in Fiji' *The Guardian* (online) 1 July 2014

<<http://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>>

<sup>44</sup> Jane McAdam, above n 25, 147.

requirements of statehood.<sup>45</sup> Kiribati could seek to obtain a bilateral agreement with Fiji which permits Kiribati to exercise some jurisdiction on the territory. This is currently done for diplomatic premises and military bases. However, the agreement Kiribati would seek would be drastically different from these examples. To function as a state the Kiribati Government must have ‘general control of its territory, to the exclusion of other entities not claiming through or under it.’<sup>46</sup> It is unlikely they would have such control over their land, and again, issues would arise as to whether Kiribati was still a State.

Secondly, the welfare of the I-Kiribati under such a response is unclear. The aforementioned international framework demonstrates that Kiribati migrants, as migrants due to climate change induced displacement, do not fit within the current system. Therefore if mass migration was to take place there would be no institution in charge of collecting their data, nor ensuring the provision of basic services. While Fiji announced in February that it would take Kiribati immigrants if their country was submerged,<sup>47</sup> the legal rights attached to accepting such immigrants are unclear. For example, if Fiji accepted the I-Kiribati without the transfer of sovereignty, which is the most likely outcome, this raises fundamental issues of identity, basic rights and self-determination. To ensure the protection of the I-Kiribati, McAdam argues it is imperative that they receive the right to remain in their new country, enjoy work and health rights, and be able to maintain their culture and traditions.<sup>48</sup> However, whether they would be afforded such rights is unclear, as is the legal status of Kiribati children born in the host country.

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<sup>45</sup> Ibid, 148.

<sup>46</sup> Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 148.

<sup>47</sup> ‘Fiji Will Support Kiribati As Sea Level Rises’, *PR Newswire* (online) February 11, 2014

<<http://www.prnewswire.com/news-releases/fiji-will-support-kiribati-as-sea-level-rises-245034641.html>>

<sup>48</sup> Jane McAdam, above n 25.

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*En masse* relocation also raises the question of how to balance the rights of the relocating groups and those of the new community that they move to. The effects of dislocation can have a significant impact on the enjoyment of cultural and social rights by the resettled community.<sup>49</sup> Case studies of relocation in the Pacific, illustrate that the forced relocation of communities often results in a struggle to re-settle, owing to their strong relationship with their land.<sup>50</sup> This is even greater where the land is physically lost and immigrants cannot return. The effect of dislocation from home can last for generations and can have significant ramifications for maintenance and enjoyment of cultural and social rights by resettled communities.<sup>51</sup> At the same time, the rights of the host nation need to be considered with negotiation and consultation necessary if *en masse* relocation was to occur.

While recent statements by the Republic Fiji indicate the possibility for some or all of the I-Kiribati to migrate to Fiji, it is unclear the rights attached to this migration. Moreover Fiji itself is dealing with climate change displacement, undermining the permanency of this solution. Therefore, while mass migration would be ideal for the protection of the I-Kiribati's cultural rights, it is still very uncertain and highly unlikely the I-Kiribati would be afforded sovereignty within Fiji and without sovereignty this solution is similar voluntary migration.

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<sup>49</sup>IPCC, 'Human Security' in "Climate Change 2014: Impacts, Adaptation, and Vulnerability". *Working Group II Contribution to the IPCC 5th Assessment Report - Changes to the Underlying Scientific/Technical Assessment* 2014, 14.

<sup>50</sup> Ibid.

<sup>51</sup> Jane McAdam, above n 36.



### 3. *Voluntary migration*

This is the most viable solution under the existing framework and is already occurring. The Government of Kiribati has acknowledged that relocation of its people is inevitable and as such has adopted a migration with dignity policy.<sup>52</sup> This strategy involves two key components. Firstly, the Government has made efforts to create opportunities to enable migration for those who wish to do so. Through such migration opportunities, the Government hopes to lift the burden on resources within the country and to establish expatriate communities of I-Kiribati to absorb more migrants in the long term. Secondly Kiribati has raised the levels of qualifications available, so as to match those of surrounding countries, such as Australia and New Zealand.<sup>53</sup> This is to make the I-Kiribati more qualified and therefore more attractive migrants to surrounding countries. Such a policy also improves local services and eases current pressures, allowing some I-Kiribati to stay in the country for longer than otherwise possible. However, this policy poses its own set of issues.

As the environmental effects are slow-onset it is difficult to determine what constitutes economic migration, which is usually voluntary, and what constitutes displacement, presumably forced. As illustrated earlier, it is possible that those who leave in anticipation of the effects of climate change may face more adversity in trying to migrate than those who wait until there are no other options. Moreover it is likely that those who leave earlier will be the more healthy, educated and wealthy<sup>54</sup> leaving behind the more vulnerable groups to cope with a disintegrating nation.

Unfortunately, this solution does not respect the I-Kiribati's cultural rights. Many I-Kiribati want to retain their culture, which is arguably of particular importance when they have lost

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<sup>52</sup> Office of the Republic of the President of Kiribati, above n 3.

<sup>53</sup> Office of the Republic of the President of Kiribati, above n 3.

<sup>54</sup> Elizabeth Ferris, above n 6, 17.

their connection to the land. Individual voluntary migration, while it can create pockets of communities in other states, does not afford the retention of the I-Kiribati's cultural rights.

Additionally, migration requires other states participation to be successful. Professor Richard Bedford, a specialist in migration studies in the Asia Pacific, argues successful migration from Kiribati will require active dialogue with neighbouring countries.<sup>55</sup> The Australian and New Zealand Governments have failed to give Kiribati reassurance that the 'migration with dignity' policy and the action taken by the Kiribati Government to improve skill levels will advance I-Kiribati's migration applications. Bedford encourages Australian and New Zealand Governments to introduce migration concessions for countries like Kiribati.<sup>56</sup> Phil Glendenning, president of the Refugee Council of Australia has also urged the Australian Government to create a migration category in Australia for those fleeing the effects of climate change.<sup>57</sup> As yet, neither country has given such an indication.

However, New Zealand's Pacific Access Category for immigration establishes an annual quota of Kiribati, Tonga and Tuvalu nationals who can be granted residence in New Zealand.<sup>58</sup> This can be seen as creating a gradual response to those displaced because of climate change, as eligible nationals come from states which are the most vulnerable to climate change induced displacement. However, New Zealand's migration office states that this is not an explicit policy to accept people due to climate change.<sup>59</sup> Moreover, the category

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<sup>55</sup> 'Kiribati man's claim as a climate change refugee denied in New Zealand' *ABC News* (online) 26 September 2013

<<http://www.abc.net.au/news/2013-09-26/an-kiribati-refugee-claim-dismissed/4982420>>

<sup>56</sup> Ibid.

<sup>57</sup> Bernard Lagan, 'Australia urged to prepare for influx of people displaced by climate change' *The Guardian* (online) 16 April 2013

<http://www.theguardian.com/environment/2013/apr/16/australia-climate-change-refugee-status>

<sup>58</sup> Immigration New Zealand, 'Pacific Access Category,' 11 July 2014

<<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>>

<sup>59</sup> New Zealand Ministry of Foreign Affairs and Trade, 'New Zealand's immigration relationship with Tuvalu' 9 December 2013

<<http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php>>

is only open to skilled migrants. Nonetheless this is a good example of a regional agreement which, overtly or inadvertently, develops migration assistance for climate change induced displaced persons. The policy accepts up to 75 Kiribati citizens a year<sup>60</sup> and while not a solution, it is an important step towards a more overt migration agreement between the two states.

While individual voluntary migration is possible under the existing framework and is being facilitated by the Kiribati Government and to an extent New Zealand, more direct facilitative measures must also be taken by receiving countries to make this a truly effective response. Nonetheless, voluntary migration is the most effective and practical response available under the existing framework; it is the most politically likely, allows the input of the I-Kiribati as to when and where they migrate to, ensures the protection of individual rights and provides a minimum protection of cultural rights.

### *Conclusion*

It is evident the I-Kiribati's fundamental human rights are violated as a result of the direct and indirect effects of climate change. While the government of Kiribati has taken measures to mitigate the effects of climate change it is too late for such action to stop the inundation of the state. Therefore, migratory adaptation is the key to the I-Kiribati's survival. However, as illustrated, climate change induced displacement is unlikely to trigger existing protection mechanisms under the refugee conventions, complementary protection or the laws of statelessness. Thus, while the I-Kiribati need to leave their country, they have no right to enter another country, despite staying in Kiribati allowing the continued violations of their human rights. While there is not a simple legal solution for disappearing states, such as

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<sup>60</sup> Immigration New Zealand, above n 57.

Kiribati, there are still possible responses under the international system. Of these responses the development of labour, educational and family migration policies through the Kiribati Government's 'Migration with Dignity' policy appears to best respond to the slow-onset nature of environmental degradation and best ensures the protection of the basic rights of those migrating. While the cultural rights of the I-Kiribati would undoubtedly suffer, the creation of 'pockets' of communities in other states would help to ensure that aspects of I-Kiribati culture and traditions continue. Although New Zealand, Australia and Fiji are yet to make actual contributions for voluntary migration, politically this is more likely to happen than the other responses. Voluntary migration also allows for greater security for those who remain, as the health and population pressures are reduced and migrated family members are given economic support through remittances, allowing a percentage of the population to remain in Kiribati for longer. For these reasons voluntary migration is the best response for the I-Kiribati. However, while voluntary migration is the best response, it will not succeed if not aligned with needs, rights and values of the I-Kiribati.<sup>61</sup> Therefore while other states must actively assist adaption measures, the type of measures pursued must also be supported by the I-Kiribati themselves. Climate change will lead to the disappearance of a nation, but through global participatory action it need not lead to the disappearance of a culture.

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<sup>61</sup> Jon Barnett and John Campbell, *Climate Change and Small Island States; Power, Knowledge and the South Pacific (Earthscan, 2010)* 17.

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