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WHEN THE LEVEE BREAKS: CLIMATE CHANGE, RISING SEAS, AND THE LOSS OF ISLAND NATION STATEHOOD

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Climate change is causing and will continue to cause unprecedented changes for humanity. These changes will disproportionately impact small island and atoll states like Kiribati and the Maldives. Both states are vulnerable to climate change due to a combination of low average elevation, lack of sustainable groundwater, and economic dependence on existing coastlines. By using the United Nations (UN) Trusteeship system as a framework for enabling the continued international relevance, the two deterritorialized nations can continue to provide for their peoples. The traditional elements of statehood, first codified in the Montevideo Convention of 1933, define “states” as entities with territory, a permanent population, a government in control, and capacity for international relations. After climate causes irreversible harm to these island states, neither will maintain their status as a state under international law. UN Trusteeship is a mechanism which directly addresses transitional entities that the international system does not define as states. By using the existing mechanisms of international law contained in the UN Charter, the international community can mitigate the effects of a climate change crisis for its most vulnerable members.

I. INTRODUCTION

The tide washes over what was once home to tens of thousands of people in the island country of Kiribati; remnants of the former capital Tarawa are visible at low tide as the ruins emerge from beneath the sea. It may sound like science fiction, but the facts of climate change are undeniable; the seas are rising, and bringing with them untold difficulties for residents of small island states¹ dependent on oceans for their survival.² Ultimately, the prognosis for the denizens of these island nations –

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1. See, e.g., WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 46 (6th ed. 2011) (comparing the term “state,” used to refer to the governing political entity which is a unit of international law, with the word “nation,” which is used to describe a unified people with common language, culture, and history).

2. See, e.g., THE WORLD BANK, ACTING ON CLIMATE CHANGE & DISASTER RISK FOR THE PACIFIC (2013),

such as the Maldives and Kiribati – is grim, but with enough preparation a crushing humanitarian catastrophe may be avoided.³ However, even in the best-case scenario for the citizens of the Maldives and Kiribati, their governments will still face an existential crisis.⁴ The question of existence for these states strikes at the core of the international community's understanding of statehood.⁵

There is a presumption of continuity for states in the international system.⁶ Even when states are referred to as being “failed states,” they are still unequivocally referred to as members of the existing order of the international system.⁷ However, these failed states are often examples of a government simply losing control of a portion of its territory.⁸ What happens when a government is disaggregated from its territory – losing its territory completely – or the people controlled by a government no longer reside on the state's physical territory?⁹ Kiribati and the Maldives are facing this question as sea levels rise and climate change will render their territory uninhabitable over the next century.¹⁰

<http://documents.worldbank.org/curated/en/354821468098054153/pdf/808690Revised000Box379874B00PUBLIC0.pdf> (analyzing, generally, the risks created by climate change for Pacific islands).

3. See Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, UNHCR Legal and Protection Policy Research Series, U.N. Doc. PPLA/2011/04 (May 2011) [hereinafter Park].

4. See, e.g., Justin Worland, *Meet the President Trying to Save His Island Nation from Climate Change*, TIME (Oct. 9, 2015), <http://time.com/4058851/kiribati-climate-change/> [hereinafter Worland] (“In Kiribati . . . even a moderate rise [in sea level] could be catastrophic. And the island nation is also at risk from an expected increase in the number of extreme weather events, such as storms and typhoons.”)

5. See, e.g., LILIAN YAMAMOTO & MIGUEL ESTEBAN, *ATOLL ISLAND STATES AND INTERNATIONAL LAW: CLIMATE CHANGE DISPLACEMENT AND SOVEREIGNTY 1* (2014) [hereinafter YAMAMOTO & ESTEBAN] (discussing the need to closely examine international legal principles in light of the increasing threat of climate change); MICHAEL B. GERRARD & GREGORY WANNIER, *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 4* (2013) [hereinafter GERRARD] (“One fundamental question that will affect these islands is what happens to the nations themselves if their island territories become uninhabitable.”)

6. See JANE MCADAM, *Disappearing States, Statelessness, and the Boundaries of International Law*, in *CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 105, 111* (2010) [hereinafter *Disappearing States*] (quoting JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW 715* (2d ed. 2006)).

7. See, e.g., YAMAMOTO & ESTEBAN, *supra* note 5, at 208 (suggesting that the case of Somalia as a ‘government in exile’ is one in which the international system still supports the government as a State).

8. See *id.* (“The difference between an Atoll Island State whose territory disappeared and a government-in-exile is that while the latter would have the possibility of restoring its power over a determined territory, the former cannot expect to recover its current territory.”)

9. Cf. Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States, art. I, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (agreeing that “the state as a person of international law should possess . . . (a) a permanent population [and] (b) a defined territory”).

10. See REPUBLIC OF MALDIVES MINISTRY OF ENVIRONMENT, ENERGY AND WATER, NATIONAL ADAPTATION PROGRAM OF ACTION (NAPA) iii (2007), <http://unfccc.int/resource/docs/napa/mdv01.pdf> [hereinafter NAPA] (quoting Maldivian President Maumoon Abdul Gayoom as saying that the largest threat to the Maldives remains global climate change and sea level rise); Worland, *supra* note 4 (quoting Kiribati President Anote Tong as saying that the physical islands of Kiribati face grave danger from climate change). See YAMAMOTO & ESTEBAN, *supra* note 5, at 35 (discussing broadly the geophysical effects of climate change on atoll island states).

This Note argues that both Kiribati and the Maldives will lose the legal status of statehood because they will no longer fulfill the criteria of the Montevideo Convention defining elements of a state, specifically due to their lack of a permanent population able to reside on some defined territory. Part II of this Note begins by summarizing some of the science on sea level rise, and the prognosis for Kiribati and the Maldives.¹¹ Part II then provides an overview and context of the understanding of “statehood” in international law, specifically referencing the Montevideo Convention, United Nations (UN) Convention on the Law of the Sea, and UN Charter.¹² Finally, Part II applies the understanding of statehood to the current situation facing island nations, and discusses both the UN Trusteeship system and precedent for non-state sovereign actors.¹³ Part III then analyzes the continuing international relevance of the displaced people of the Maldives and Kiribati, and predicts that the states will become a new form of post-climate “nation” as sub-state, *sui generis* international entities.¹⁴ Next, Part III analyzes the UN Charter and applies UN Trusteeship principles to Kiribati and the Maldives.¹⁵ Part IV discusses what can be done mitigate the effects of climate change in order to save atoll island states and their people.¹⁶ Finally, Part V of this Note concludes that the likely humanitarian catastrophe caused by rising sea levels will ultimately result in the loss of statehood for Kiribati and the Maldives.¹⁷

II. BACKGROUND: THEORIES OF STATEHOOD FOR ATOLL ISLAND NATIONS

A. The Physical Effects of Climate Change

The earth’s climate is changing and higher temperatures bring an increase in sea level.¹⁸ It is difficult to accurately project the margin of total sea level rise due to scientific margin of error, political uncertainty, and the sheer complexity of climate science.¹⁹ Despite this uncertainty, experts have identified two primary causes for sea level rise: thermal expansion and melting glaciers.²⁰ Different projections range from as little as an 18-centimeter rise in sea level up to an almost 200-centimeter rise in average sea level.²¹ Altogether, an average projection of a

11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. *See infra* Part II.C.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. *See infra* Part IV.

17. *See infra* Part V.

18. Mary-Elena Carr, Madeleine Rubenstein, Alice Graff, & Diego Villarreal, *Sea Level Rise in a Changing Climate: What Do We Know?*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 15, 15 (Michael B. Gerrard & Gregory Wannier eds., 2013) [hereinafter Carr].

19. *See, e.g.*, Jason A. Lowe & Jonathan M. Gregory, *A Sea of Uncertainty*, NATURE REPORTS: CLIMATE CHANGE (Apr. 6, 2010), <http://www.nature.com/climate/2010/1004/full/climate.2010.30.html> (discussing the uncertainty inherent in climate change forecasts).

20. *See Carr, supra* note 18, at 31.

21. *Id.* at 32–35.

100-centimeter rise in sea level “seems unavoidable,” while a rise of 200 centimeters or higher is possible.²²

There are few states more vulnerable to rising seas than Kiribati and the Maldives.²³ Both have low average elevations²⁴, a majority of their populace in low-lying areas²⁵, and groundwater aquifers vulnerable to saltwater intrusion.²⁶ A rise in sea levels would result in massive destruction of vital infrastructure and economic production.²⁷ Worst case scenario predictions would leave the Maldives entirely underwater, and the centers of population for Kiribati completely flooded.²⁸ Even if the Maldives and Kiribati escape complete inundation, they will likely become uninhabitable due to groundwater salinization.²⁹

Island nations like the Maldives and Kiribati are already among the most geographically³⁰ and socioeconomically vulnerable³¹ states in the world. This means that they are pre-positioned to feel the effects of climate change more acutely due to the lack of economic resources required for an effective response.³² Even if Kiribati and the Maldives do not disappear completely, they will experience unprecedented emigration as increasing ecological pressures reduce the habitability of atoll islands.³³ By the year 2100, it is entirely conceivable that “most or all inhabitants [of small island states] will be forced to migrate.”³⁴

22. *Id.* at 37.

23. See YAMAMOTO & ESTEBAN, *supra* note 5, at 1 (listing the states most vulnerable to climate change. Other states include Tuvalu, Nauru, and the Marshall Islands).

24. See *Climate Hot Map: Republic of Kiribati*, UNION OF CONCERNED SCIENTISTS, <http://www.climatehotmap.org/global-warming-locations/republic-of-kiribati.html> (last visited Mar. 2, 2016) [hereinafter *Climate Hot Map: Kiribati*] (stating that most of Kiribati’s land area lies less than “a few feet” above sea level, while the capital, Tarawa, is entirely below three meters above sea level); *Climate Hot Map: Republic of Maldives*, UNION OF CONCERNED SCIENTISTS, <http://www.climatehotmap.org/global-warming-locations/republic-of-maldives.html> (last visited Mar. 2, 2016) [hereinafter *Climate Hot Map: Maldives*] (stating that no ground surface in the Maldives is above three meters, and eighty percent of the country’s land area is below one meter above sea level).

25. See, e.g., THE WORLD BANK, CITIES, SEAS, AND STORMS: MANAGING CHANGE IN PACIFIC ISLAND ECONOMIES 19 (2000) (identifying Tarawa, the capital of Kiribati, as housing forty-five percent of the country’s population yet being below an average elevation of three meters above sea level).

26. YAMAMOTO & ESTEBAN, *supra* note 5, at 40.

27. See, e.g., NAPA, *supra* note 10, at 23 (noting that the location of critical economic infrastructure along the coast, including tourist resorts, harbors, international airports, and utilities, makes it particularly vulnerable to rising sea levels).

28. Compare YAMAMOTO & ESTEBAN, *supra* note 5, at 39 (stating that a so-called “high” scenario for sea level rise includes predictions of up to a two-meter rise in sea level), with *Climate Hot Map: Maldives*, *supra* note 24 (stating that the average elevation of the Maldives is less than one meter), and *Climate Hot Map: Kiribati*, *supra* note 24 (stating that the average elevation of Kiribati is less than three meters).

29. YAMAMOTO & ESTEBAN, *supra* note 5, at 77–78.

30. See NAPA, *supra* note 10, at 1.

31. Carr, *supra* note 18, at 15 (explaining the need for resources to adapt to the changing climate; these are resources which many of the poorest island states do not have to invest).

32. *Id.* at 54.

33. See Park, *supra* note 3, at 9 (“In any event, the territory would become completely uninhabitable long before its full disappearance, forcing the population . . . into exile.”)

34. MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 396 (Frank

B. The Definition of Statehood

To question the future of the island states is to question the definition of statehood itself.³⁵ There is no agreed-upon definition of a “state” in international law.³⁶ This could be explained by the rarity of this question in practice.³⁷ Still, there are two competing theories of statehood that permeate international law: the “constitutive” theory³⁸ and the “declarative” theory.³⁹ The declarative theory is widely accepted as a better analysis for the question of statehood, and is codified by the Montevideo Convention of 1933.⁴⁰

1. The Montevideo Convention

The Montevideo Convention on the Rights and Duties of States stipulates that a state, as a “person” of international law, must have four qualifications: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”⁴¹ While these criteria are not absolute, they are intrinsically interlinked with one another.⁴² For example, even if the territory were still physically capable of being habitable, if it were not continuously occupied by the population then it would not meet the Montevideo criteria.⁴³ The disaggregation of the population and territory would mean that the Montevideo criteria were no longer fulfilled, even though there remains territory controlled by the same government responsible for a group of people.⁴⁴

Each of the four Montevideo criteria has been interpreted by international jurists and scholars.⁴⁵ A ‘defined territory’ means some portion of the earth’s

Laczko & Christine Aghazam eds., 2009).

35. See GERRARD, *supra* note 5, at 6 (introducing the questions of sovereignty that arise when considering the future of these ‘sinking’ island states).

36. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 4–5 (2d ed. 2006) [hereinafter CRAWFORD] (discussing theories of statehood and the debate about what constitutes a State).

37. See *Disappearing States*, *supra* note 6, at 5–6.

38. See CRAWFORD, *supra* note 36, at 19–22 (stating that the constitutive theory of statehood holds that states themselves are responsible for determining which entities may be known as states; in other words, recognition of an entity by states *constitutes* the entity’s statehood).

39. See *id.* at 22–26 (stating that the declarative theory is the more generally accepted theory of statehood, and interprets the question of statehood as an objective test rather than subjecting it to the political whims of international relations). See also *Deutsche Continental Gas Gesellschaft v. Polish State*, 5 I.L.R. 11, 13 (1929) (“The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.”)

40. See Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 403 (1999) (stating that although there are alternative views, the objective criteria expressed in the Montevideo Convention remain the most widely accepted theory of statehood).

41. Montevideo Convention, *supra* note 9, art. I.

42. UN High Commissioner for Refugees (UNHCR), *Climate Change and Statelessness: An Overview*, Submission dated May 15, 2009 to the Ad Hoc Working Group on Long-Term Cooperative Action under the UN Framework Convention on Climate Change (June 1–12, 2009), <http://www.refworld.org/docid/4a2d189d3.html>.

43. *Id.*

44. *Id.* at 2.

45. See Rafaela S. Goncalves da Rosa, *Statelessness, Statehood and Climate Change in*

surface, regardless of imprecise boundaries or competing territorial disputes.⁴⁶ Territory must also be habitable and capable of supporting economic activity.⁴⁷ The requirement of a population means that there must be a permanent set of residents within a given territory.⁴⁸ However, there is no requisite minimum number of residents.⁴⁹ There is only a requirement that a “significant” number of residents be permanent rather than nomadic.⁵⁰ There has been no direct definition of what counts as a significant proportion of the population, though there are some states that have nearly as many nationals living outside their borders as living within them.⁵¹

The ‘government’ criterion is predicated on two factors: the actual exercise of authority and the right to exercise that authority.⁵² This requirement is also intimately connected with the ideas of territory and sovereignty, and is defined in large part by the nature and extent of control.⁵³ Finally, the capacity for entering into relations with other states integrates two other requirements together: independence and an effective government.⁵⁴ In fact, some academics and jurists see this criterion exclusively through the lens of independence, and even name ‘independence’ as the “central criterion for statehood.”⁵⁵ Capacity is thus often simply a consequence of statehood.⁵⁶

2. The United Nations Convention on the Law of the Sea

Island state ideas of territory and resources are intimately bound with the sea that surrounds them.⁵⁷ The UN Convention on the Law of the Sea (UNCLOS) can

International Law: The Case of the Low-lying Islands 11 (June 2013) (unpublished LL.M. thesis, Tilburg University) (on file with Tilburg University Library) [hereinafter da Rosa] (analyzing the meaning of the Montevideo criteria); see CRAWFORD, *supra* note 36, at 45–62 (discussing in detail each of the four factors, including how they have been interpreted and providing examples of how they have been applied).

46. da Rosa, *supra* note 45, at 11 (citing Philip C. Jessup’s argumentation before the U.N. Security Council regarding admission of Israel to the UN and North Sea Continental Shelf (Ger. v. Den. & Neth.), 1969 I.C.J. Rep. 3, ¶ 32 (Feb. 20)).

47. See United Nations Convention on the Law of the Sea art. 121, ¶ 3, Dec. 10, 1982, 1833 U.N.T.S. 397 (“Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”); see also *infra* Part II.B.2.

48. *Disappearing States*, *supra* note 6, at 112.

49. *Id.*

50. Park, *supra* note 3, at 5.

51. See, e.g., *Disappearing States*, *supra* note 6, at 112–13 (describing the cases of Samoa and Tonga, which have 56.9% and 46% of nationals residing outside their territory, respectively).

52. CRAWFORD, *supra* note 36, at 57.

53. *Id.* at 57–59 (analyzing as an example the new state of the Republic of the Congo in 1960, and the struggles its nascent government faced in gaining and maintaining control).

54. da Rosa, *supra* note 45, at 14.

55. See CRAWFORD, *supra* note 36, at 62 (quoting Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928)) (“Sovereignty in the relations between States signifies independence.”).

56. da Rosa, *supra* note 45, at 14.

57. Cf. Latif Nasser, *When Island Nations Drown, Who Owns Their Seas?*, BOSTON GLOBE (Oct. 19, 2014), <https://www.bostonglobe.com/ideas/2014/10/18/when-island-nations-drown-who-owns-their-seas/hyH9W5b1mCAyTVgwIFh7qO/story.html> (analyzing the question of ownership for island state exclusive economic zones, and suggesting that the “large and valuable” maritime zones are vital to the

be a useful lens through which to view questions of territory in an evaluation of statehood.⁵⁸ Importantly, the UNCLOS does not explicitly state whether the low-water coastline mark created by states is capable of moving.⁵⁹ What is left to be determined is whether these baselines can move to the point of extinguishing any maritime claim at all.⁶⁰ Some academics⁶¹ have proposed simply freezing the ambulatory baseline at its current point, and thus maintaining current maritime claims without worrying about future reduction of a state's ability to access its ocean resources.⁶²

While this solution may allow an island state to continue accessing its maritime resources, it does not resolve the question of that state's continued existence.⁶³ UNCLOS is only open to states; only states under international law may legally possess maritime zones in the first place.⁶⁴ If an atoll state disappears, the uninhabitable rocks it leaves behind do not constitute a sufficient claim to the seas that surround them.⁶⁵ The maritime claims alone are not a sufficient substitute for the combination of territory, population, and government.⁶⁶

C. *Falling Short of Statehood*

If a state at some point does not meet the criteria for statehood, then it can no longer be considered a state under international law.⁶⁷ This Note will (1) apply the Montevideo criteria to the situation of Kiribati and the Maldives, then (2) describe non-state sovereign entities, such as indigenous peoples, the Order of Malta, and the Holy See.

culture and economy of island states).

58. See Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States 3* (2009) (unpublished manuscript, University of New South Wales Research Paper), <http://ssrn.com/abstract=1412028> [hereinafter Rayfuse] (analyzing the continued existence of Tuvalu, and arguing that freezing the coastal baseline under the UNCLOS can be a way to legally provide for resources for sinking states).

59. *Id.* at 3 (discussing academic and textual interpretations of the convention, all of which conclude that the border must "be ambulatory").

60. *Id.* at 4 ("The difficulty with the theory of ambulatory baselines [in the context of rising sea level] is immediately apparent.").

61. See, e.g., David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 *ECOLOGY L. Q.* 621, 650 (1990); Alfred H. A. Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37(2) *NETH. INT'L L. REV.* 207, 225 (1990).

62. See Rayfuse, *supra* note 58, at 5–6.

63. *Id.* at 6 ("Even assuming a freeze on the outer limits of maritime zones, however, this does not entirely dispose of maritime zones in the context of disappearing states.").

64. *Id.*

65. United Nations Convention on the Law of the Sea, *supra* note 47, art. 121, ¶ 3, ("Rocks which cannot sustain human habitation . . . shall have no exclusive economic zone or continental shelf.").

66. See *id.*

67. Cf. Montevideo Convention, *supra* note 9, art. I (defining a state by its constituent four criteria).

1. Applying the Montevideo Criteria

The future does not seem promising for Kiribati and the Maldives.⁶⁸ Applying the elements of a state in international law⁶⁹ to a “post-climate”⁷⁰ incarnation of both Kiribati and the Maldives, neither state will be able to show the presence of habitable territory or permanent population.⁷¹

It seems likely that both governments will continue to exist even after territory is lost or becomes uninhabitable.⁷² Both Kiribati and the Maldives are actively making plans for the continuity of their peoples, which implies that the governments will continue to exist in order to oversee the transition.⁷³ Further, the international presumption of state continuity means that the international community will not seek to externally extinguish the governments of deterritorialized peoples⁷⁴, and the individual presumption of a desire for power implies that the government will not dissolve itself.⁷⁵ Finally, there is a long history of deterritorialized governments, if not a long history of deterritorialized states recognized under international law.⁷⁶

Next, the ability to enter into foreign relations or, alternatively, ‘independence,’ presents a slightly more difficult question. Current members of the international system are assumed to be stable.⁷⁷ While this does not in itself mean those entities remain states in fact, it does mean that other states around the world will likely continue to treat them as international equals.⁷⁸ This facet of statehood could be more complicated depending on the form in which Kiribati and the Maldives elect to weather the climate storm.⁷⁹ If they are housed on the territory of another state in

68. See *supra* Part II.A (describing the high probability of inundation for both island states).

69. See *supra* Part II.B (defining and discussing the Montevideo elements: an effective government, the ability to enter into international relations, territory, and permanent population).

70. See Maxine A. Burkett, *The Nation Ex-Situ*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 89, 92, 107 (Michael B. Gerrard & Gregory E. Wannier eds., 2013) [hereinafter Burkett] (describing the use of the term “post-climate” as a situation after disasters precipitated by climate change force a fundamental reorganization for certain societies).

71. See *infra* Part II.C.1.

72. See CRAWFORD, *supra* note 36, at 56–58 (discussing how the requirements for a “government” under the Montevideo Convention are generally loose and hinge on both the right to govern and the ability to govern; the assumption of continuity for states implies the continuity of their government).

73. See, e.g., Worland, *supra* note 4 (discussing plans to provide for the preservation of the state after inundation from sea level rise). See also NAPA, *supra* note 10 (detailing plans to deal with the effects of climate change).

74. CRAWFORD, *supra* note 36, at 667 (stating that international law is based on the assumption of state continuity).

75. Cf. JAMES LEE RAY, *AMERICAN FOREIGN POLICY AND POLITICAL AMBITION* 35 (2d ed. 2014) (stating that a primary assumption of political actors is the desire to retain positions of power).

76. See, e.g., YAMAMOTO & ESTEBAN, *supra* note 5, at 203–06.

77. CRAWFORD, *supra* note 36, at 667 (discussing the international system with the assumption that states will continue to recognize governmental entities as states even after declarative factors of statehood may be absent).

78. See *id.* at 19–26 (identifying issues with the constitutive theory of statehood as opposed to the declarative theory of statehood).

79. See, e.g., Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood* 10 (Sept. 2011) (unpublished manuscript, University of Sydney Legal Studies Research Paper 11/59), <http://ssrn.com/abstract=1931466> [hereinafter Rayfuse & Crawford] (suggesting multiple alternatives for

any situation other than outright cessation or purchase of land, then there would be a level of legal sovereignty that supersedes the displaced governments.⁸⁰ This would raise difficult questions of sovereignty.⁸¹

The question of territory is the most referenced issue concerning post-climate existence of states; the phrase ‘modern day Atlantis’ summons a striking image.⁸² Territory is also undeniably intertwined with what it means to be a state.⁸³ Kiribati has an enviable position among atoll island states: with a high point of above 80 meters on one sparsely inhabited island, the entirety of the state’s territory is unlikely to disappear.⁸⁴ The Maldives face a much grimmer outlook: with a high point less than three meters above sea level, rising seas might truly cover it completely.⁸⁵ Ultimately, “a State without a territorial basis, however tiny it may be, is inconceivable.”⁸⁶

Even if the waves do not completely inundate the territories of Kiribati and the Maldives, the requirement of population could prove difficult to sustain.⁸⁷ In a situation where the groundwater has been compromised, infrastructure destroyed, arable land reduced, and economic opportunity lessened, those people who still have some bit of land might choose to seek a life elsewhere.⁸⁸ Without a permanent population, the territory has no meaning in an analysis of statehood.⁸⁹

Once a current state has lost territory, population, or both, it can no longer be deemed a state.⁹⁰ For Kiribati and the Maldives, research shows that by the end of

populations escaping climate change, including relocation to the territory of a sovereign state).

80. *See id.* (assuming that the sovereign entity would cede “some degree” of jurisdictional control to the deterritorialized nation).

81. *See, e.g.,* Compact of Free Association, U.S.-Palau, Title 3, Art. I, § 312, Jan. 10, 1986, 100 Stat. 3672, https://photos.state.gov/libraries/palau/5/home/rop_cofa.pdf (agreeing on a mutual relationship – a compact of free association – between the United States and the sovereign state of Palau in order to delegate certain aspects of sovereignty from Palau to the United States, such as military defense).

82. *See, e.g.,* *Disappearing States*, *supra* note 6, at 105 (“Predictions of whole countries disappearing Atlantis-style beneath the waves raise fascinating legal issues.”).

83. *See id.* at 112 (quoting notable international jurist Philip C. Jessup, “There must be some portion of the earth’s surface which [a state’s] people inhabit and over which its government exercises authority.”); *see also* *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) (“International law, the structure of which is not based on any super-State organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.”).

84. *See Kiribati*, ENCYCLOPEDIA BRITANNICA (Apr. 4, 2017), <http://www.britannica.com/place/Kiribati> (stating that Kiribati’s highest point is on Banaba, reaching 87 meters above sea level).

85. *Climate Hot Map: Maldives*, *supra* note 24.

86. ANTONIO CASSESE, *INTERNATIONAL LAW* 81 (2d ed. 2005).

87. *See supra* Part II.B.

88. *See supra* Part II.A.

89. *Cf. CRAWFORD*, *supra* note 36, at 52 (asserting that if states are territorial, then they must also be aggregates of individuals).

90. *Cf. Montevideo Convention*, *supra* note 9, art. I (requiring that an entity have both territory and population to be termed a “state”).

the century they will likely lose one or both of these key elements of statehood.⁹¹

2. Non-State Sovereign Entities: Indigenous Peoples, the Order of Malta, and the Holy See

There are many examples throughout the world of groups of people that had sovereignty and subsequently lost it; indigenous peoples, such as the Maori and the Inuit, remain cohesive cultural groups occupying traditional territory, yet lack the sovereignty of an independent state.⁹² When the people of Kiribati and the Maldives lose habitable islands to rising seas, the parallels with indigenous groups will be striking.⁹³ Under international law, indigenous peoples have the rights to autonomy, limited sovereignty, and self-determination.⁹⁴ Indigenous peoples also have the explicit right to a nationality.⁹⁵ Both the Inuit and Maori, as well as other indigenous nations, can claim some level of sovereignty below that of their respective 'host' states.⁹⁶ Indigenous nations show that ideas of national cohesion and autonomy are important even when the administration is not a state under international law.⁹⁷

Furthermore, there are also examples of state entities that lost territory, yet were subsequently granted some measure of sovereignty by the international community; both the Order of Malta⁹⁸ and the Holy See⁹⁹ were at one time sovereign state entities. The Order of Malta once occupied sovereign territory on the island of Malta where it constituted the government of the State of Malta.¹⁰⁰ Despite existing as an Order since 1050, it was removed from the island after ceding its territory to Napoleon in 1798.¹⁰¹ Regardless, it has retained international sovereignty despite no longer ruling over a true "state."¹⁰² It has been granted observer status at the UN

91. See *supra* Part II.A.

92. See Rayfuse, *supra* note 58, at 10–11.

93. *Id.*

94. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/Res/61/295, arts. 3–4 (Oct. 2, 2007).

95. *Id.* art. 6.

96. See *id.*; see also Peter Jull, *Building Nunavut: A Story of Inuit Self-Government*, 1 NORTHERN REV. 59 (1988) [hereinafter Jull] (discussing the history of the Inuit negotiations to obtain self-governance in the northern territories of Canada).

97. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/Res/61/295, arts. 3–6 (Oct. 2, 2007).

98. See generally Achim Maas & Alexander Carius, *Territorial Integrity and Sovereignty: Climate Change and Security, in the Pacific and Beyond*, in CLIMATE CHANGE, HUMAN SECURITY AND VIOLENT CONFLICT 651, 659 (Jürgen Scheffran et al. eds., 2012) [hereinafter Maas & Carius] (describing the Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes, and of Malta – more commonly known as the Order of Malta – as a precedent for a sovereign entity without territory).

99. YAMAMOTO & ESTEBAN, *supra* note 5, at 204–05 (analogizing the case of the Holy See from 1870 to 1929 – before the cessation creating the Vatican City – to those of the deterritorialized island states).

100. *Id.* at 203–04.

101. Rayfuse & Crawford, *supra* note 79, at 10.

102. *Id.* (stating that the order endures, headquartered in Rome, and is dedicated to the provision of medical care).

General Assembly, and is recognized as sovereign by approximately eighty states.¹⁰³

The Holy See¹⁰⁴ is another famous example of a non-state sovereign entity under international law. Although the Holy See possessed territory, the Papal States, for much of its early existence, this territory around Rome was annexed by the Kingdom of Italy in 1870.¹⁰⁵ This left the Holy See in a unique position: what had heretofore been a state, and still controlled vast amounts of money and resources, was without territory, and yet retained significant international influence as the Catholic Church.¹⁰⁶ As a solution to this legal conundrum, the international community continued to recognize the Holy See after 1870.¹⁰⁷ By 1929, the Lateran Treaties carved out the Vatican City State, a micro-state, to be placed under the sovereignty of the Holy See.¹⁰⁸

D. The UN Trusteeship System

The international community has already created systems for non-state, yet national, entities to participate in international politics with states: the trusteeship system.¹⁰⁹ The idea of international trusteeship first emerged as part of the League of Nations' plan to govern colonial territories previously administered by the German and Ottoman Empires after World War I.¹¹⁰ After World War II, the United Nations evolved the League of Nations' system into an international Trusteeship Council, governed by Chapters XII and XIII of the UN Charter.¹¹¹ Under the Charter, the trusteeship system has four overriding goals: (a) furthering international security; (b) promoting economic and social advancement of entities in trust; (c) promoting human rights and fundamental freedoms; and (d) ensuring sovereign equality for all UN member states in social and economic matters.¹¹² Political trustees, typically

103. *Id.*

104. The Holy See refers to the sovereign, ecclesiastical jurisdiction of the Pope and the government of the Catholic Church. The Vatican City, on the other hand, is the "mini state" which was created by the Lateran Treaty between the Holy See and Italy. Although related to the Holy See, the Vatican City is in fact a separate entity whose relationship with the Holy See is complex. *See generally* Kurt Martens, *The Position of the Holy See and Vatican City State in International Relations*, 83 U. DET. MERCY L. REV. 729, 730 (2006) [hereinafter Martens] (analyzing the relationship between the two entities as it pertains to international action).

105. YAMAMOTO & ESTEBAN, *supra* note 5, at 204.

106. *Id.*

107. Rayfuse, *supra* note 58, at 10.

108. *Id.*; *see generally* Martens, *supra* note 104 (discussing highly complex relationship between the Holy See and the Vatican City, including why the two entities are legally distinct and the status of each under international law).

109. *See, e.g.*, Henry H. Perritt, *Structures and Standards for Political Trusteeship*, 8 U.C.L.A. J. INT'L. L. & FOREIGN AFF. 385, 396-98 (2003) [hereinafter Perritt] (describing the structure of UN Trusteeship).

110. *See* Brian Deiwart, Note, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea be Applied to a Twenty-First Century Iraq?*, 14 IND. INT'L & COMP. L. REV. 771, 775-76 (2004) [hereinafter Deiwart] (discussing the League of Nations mandate system for trusteeship).

111. U.N. Charter arts. 75-91.

112. *Id.* art. 76 ("a. to further international peace and security; b. to promote the political, economic, social, and educational advancement of the inhabitants . . . c. to encourage respect for human rights and fundamental freedoms . . . d. to ensure equal treatment in social, economic, and commercial matters for

states administering territory during a post-colonial transition, act in order to hold the territory “in trust” for the benefit of the nationals of that territory, and must act in accordance with the principles of the trusteeship system.¹¹³

One of the most successful and most recent examples of UN political trusteeship is the UN Interim Administration Mission in Kosovo (UNMIK).¹¹⁴ UNMIK held responsibilities in trust for ambiguous beneficiaries, including “future generations of Kosovars,” and left a reversionary interest which was only defined in subsequent negotiations.¹¹⁵ The primary responsibilities of UNMIK included the following: (1) promoting self-government and the establishment of a new political entity in Kosovo; (2) overseeing provisional institutions “pending a political settlement;” (3) facilitating the process of determining the future status of Kosovo; (4) supporting humanitarian and disaster relief assistance; and (5) maintaining civil law and order.¹¹⁶

Although the objects of the system established in 1945 are different from the current, climate-change induced scenario (i.e., territory), the objectives are highly applicable to a post-climate situation.¹¹⁷ The UNMIK was tasked with several objectives that could be easily replicated for a post-climate deterritorialized nation.¹¹⁸ By repurposing the existing international structure, the government of a deterritorialized nation can retain international relevance to facilitate the support of its people, despite losing traditional statehood.¹¹⁹

III. ANALYSIS: THE DETERRITORIALIZED “NATION” AS A SUI GENERIS POLITICAL ENTITY

As a collection of rules made by states for states, international law is not effectively equipped to address the involuntary extinction of states.¹²⁰ This Note will (a) analyze the need for Kiribati and the Maldives to continue existing as deterritorialized nations; (b) discuss why UN Trusteeship is the best option under existing international law for Kiribati and the Maldives; and (c) show that there is international precedent for non-state sovereign actors.

A. The Need for “Post-Climate” Sovereign Relevance

When climate change irreparably alters the international order –likely within the next hundred years – the world will have entered a “post-climate” phase of

all Members of the United Nations and their nationals . . .”).

113. See Perritt, *supra* note 109, at 389.

114. See *id.* at 398 (“Kosovo was the zenith for UN-sponsored political trusteeship because this was the first time that the international community actually exercised sovereignty explicitly from the outset.”)

115. See *id.* at 402.

116. See S.C. Res. 1244, ¶¶ 11(a)–(k) (June 10, 1999).

117. Burkett, *supra* note 70, at 108–09.

118. See *id.* at 110.

119. See *id.* at 114; see also *infra* Part III.B.

120. Cf. Rayfuse & Crawford, *supra* note 79, at 5 (distinguishing between dissolution of states and extinction of states, and noting that “in the history of the UN, there have been almost no incidents of total extinction” of a state).

international law.¹²¹ For Kiribati and the Maldives, this transition will mean the end of their status as states under international law.¹²² However, this Note argues that both governments will continue to exist as deterritorialized nations due to the needs facing their populations: (1) the needs of their displaced populations; and (2) the need to control and regulate remaining maritime resources.

1. Statelessness and the Protection of Climate Change Refugees

Migration and displacement from low-lying islands is already beginning; climate change will only exacerbate the diaspora of island populations.¹²³ So far, the displacement is mostly taking place within existing borders of island states.¹²⁴ However, in a post-climate scenario many of these ex-states will be completely uninhabitable.¹²⁵ In this situation, the specter of statelessness looms over the survivors forced to relocate to other states.¹²⁶ Individuals displaced by climate change do not enjoy status as refugees under the current incarnation of the Convention Relating to the Status of Refugees,¹²⁷ and as such, their rights would be entirely dependent on the willingness of a host state to grant some durable legal status.¹²⁸

The continuity of governments of displaced nations¹²⁹ would provide a level of stability and international governance for dislocated people.¹³⁰ Nationality, as a concept under international law, has broadened significantly from its initial form of

121. See Burkett, *supra* note 70, at 107 (defining the term “post-climate” and discussing the possible situation of a “post-climate” world for the Republic of the Marshall Islands).

122. See *supra* Part II.C.

123. See Park, *supra* note 3, at 5 (discussing examples where islands have been abandoned by peoples, such as in Papua New Guinea where three different communities have already needed to be relocated within the state in order to avoid being inundated with seawater as a result of climate change).

124. *Id.*

125. See *supra* Part II.A–C.

126. See, e.g., YAMAMOTO & ESTEBAN, *supra* note 5, at 254 (analyzing the process by which individuals displaced from islands as a result of climate change would be rendered stateless under the Convention Relating to the Status of Stateless Person when their former state dissolved).

127. See Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 (defining a ‘refugee’ as a person that (1) has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” (2) “is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country,” and (3) “who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”). See generally Jane McAdam, *Climate Change Displacement and International Law Complementary Protection Standards*, UNHCR Legal and Protection Policy Research Series, U.N. Doc. PPLA/2011/03 (May 2011) [hereinafter *Climate Change Displacement*] (analyzing the Refugee Convention in light of the possibility of climate change refugees).

128. Park, *supra* note 3, at 16.

129. In the post-climate scenario, I will use the word “nation” to refer collectively to the people who were residents of a state that has ceased to exist due to climate change. The nation’s government is the entity that used to be a state, but has been reduced due to lack of territory/population, as discussed in *supra* Part II.

130. See YAMAMOTO & ESTEBAN, *supra* note 5, at 261 (discussing the need for continuity in nationality for the populations of small island states in order to avoid statelessness).

a state's control of its citizens to a norm of international law.¹³¹ In fact, under a modern interpretation of nationality, it is not solely up to traditional states to determine nationality.¹³² By continuing to exist, the governments of Kiribati and the Maldives will fulfill this right to a nationality.¹³³ Although questions remain as to the extent of their sovereignty, the peoples of the Maldives and Kiribati will continue to have needs that need to be addressed.

2. Protection of a Nation's Resources and Culture

A second reason for the governments of displaced nations to continue to exist is the need for some kind of structure to manage the cultural and physical resources left behind by the dissolving state.¹³⁴ This authority would be able to act as a trustee of these resources for the benefits of the nation of people, regardless of their final location.¹³⁵ Essentially, a form of international trusteeship can serve as an example for newly deterritorialized nations.¹³⁶ Although the purpose of historical trusteeship arrangements was focused on territory in a postcolonial context,¹³⁷ the structure and lessons of the UN and League of Nations system are applicable because they provide a level of international oversight and legitimacy for deterritorialized nations.¹³⁸ The international oversight of the UN Security Council or General Assembly will help facilitate international cooperation regarding the resettlement of the disappeared state's people, the persistence of the nation's culture, and the judicious use of the remaining maritime resources.¹³⁹

131. *Compare* Convention on Certain Questions Relating to the Conflict of Nationality Law art. 1, Apr. 13, 1930, 179 L.N.T.S. 89 ("It is for each State to determine under its own law who are its nationals."), *with* Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6) ("[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.").

132. *See* Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. ¶¶ 32–34 (Jan. 19, 1984) (considering that although traditional international law leaves nationality up to individual States, "contemporary developments" in international law – a movement towards more international governance, limitations on State power and limitations on unimpeachable sovereignty – imply that "matters bearing on nationality cannot today be deemed to be within [a State's] sole jurisdiction.").

133. *See* YAMAMOTO & ESTEBAN, *supra* note 5, at 258–59 (implying that without redefining the international conventions on statelessness, only the presence of an international actor can prevent statelessness for displaced island nations).

134. *See, e.g.,* Rayfuse, *supra* note 58, at 11 (suggesting that an "authority" would be needed in order to continue to manage maritime resources left behind in the territory of the sunken island State).

135. *See id.* (reasoning that the government of a deterritorialized state could continue to support its people through use of remaining resources).

136. *See, e.g.,* Perritt, *supra* note 109, at 389 (discussing trusteeship arrangements under the League of Nations and United Nations, and defining a trusteeship arrangement as one which is holding resources and territory for the benefit of a set of people).

137. *See id.* at 396 (stating that the UN trusteeship system focused on postcolonial territorial transitions).

138. *See* Burkett, *supra* note 70, at 109 (suggesting a trusteeship as a possible method of continuity for island nations).

139. *See, e.g.,* U.N. Charter arts. 86–87 (discussing the oversight structure of the trusteeship arrangement); *see also* Rayfuse & Crawford, *supra* note 79, at 12 (suggesting reasons behind a modern

Kiribati and the Maldives each have large maritime claims, which present both a source of possible disputes as well as a source of income for the subsequently disbursed nation.¹⁴⁰ Many scholars have proposed an agreement to freeze existing baselines under the UNCLOS in order to preserve resources for the dissolved states and prevent conflict over resources by neighboring, surviving states.¹⁴¹ In particular, the maritime resources left behind by the disappeared states provide an incentive for the government to continue to act on behalf of its people, and the income from these resources can provide much needed economic resources.¹⁴² For example, Kiribati¹⁴³ and the Maldives¹⁴⁴ each have extensive exclusive economic zones. Freezing the current coastal boundaries would have a substantial impact on the availability of future resources for Kiribati and the Maldives, and would help provide a continuing justification for the continuity of their governments in the form of deterritorialized nations.¹⁴⁵

B. Principles of International Trusteeship Can Assist in the Transition to a Deterritorialized Nation for Kiribati and the Maldives

The best way to preserve elements associated with state sovereignty for a deterritorialized nation is to revive the political trusteeship model popular for postcolonial territories throughout the 20th century.¹⁴⁶ The United Nations enshrined a system of political trusteeship in the UN Charter after World War II, attempting to ensure peace and security in territories transitioning through the procedures of self-determination towards self-government.¹⁴⁷ Specifically, territories imagined by the UN Charter as being eligible for trusteeship include: (a) trust territories under

application of the UN trusteeship system, including “to provide social, cultural, political, and economic support and guidance for a people forced to abandon their lands.”)

140. See Rayfuse, *supra* note 58, at 11–12 (illustrating that the preserved maritime zones require some entity to control them).

141. See *supra* Part II.B.2 for more detail on this proposal.

142. Rayfuse, *supra* note 58, at 11–12.

143. *Exclusive Economic Zones: How Some Countries are a Lot Larger Than They Appear*, BASEMENT GEOGRAPHER (Mar. 10, 2011), <http://basementgeographer.com/exclusive-economic-zones-how-some-countries-are-a-lot-larger-than-they-appear/> (stating that despite having only 811 square kilometers of land area spread across 33 islands, Kiribati actually has the twelfth-largest exclusive economic zone in the world - 3,441,810 square kilometers - due to the dispersion of its currently habitable territory.).

144. *Maldives*, BAY OF BENGAL PROGRAMME, http://bobpigo.org/text_7_Maldives.html (last accessed Mar. 4, 2016) (identifying that the Maldives has only 298 square kilometers of land area, yet claims 916,189 square kilometers of maritime exclusive economic zone territory).

145. See Rayfuse, *supra* note 58, at 11 (implying that resource governance would be a vital task for an authority to continue to exist on behalf of the deterritorialized nations).

146. See, e.g., Burkett, *supra* note 70, at 107 (“The political trusteeship system provides a helpful model for how to govern a nation without a habitable territory.”); see also Rayfuse, *supra* note 58, at 11 (suggesting that some kind of “authority” was needed to continue to manage maritime resource zones on behalf of the deterritorialized population).

147. See Perritt, *supra* note 109, at 71; *accord* Deiwert, *supra* note 110, at 778 (discussing the intent behind incorporating League of Nations principles into the UN Charter regarding trusteeship at the San Francisco Conference in 1945); see also *supra* Part II.D (addressing the principles of the UN Trusteeship system).

international control through the League of Nations “mandate” system;¹⁴⁸ (b) areas removed from control of Germany and Japan at the end of World War II; and (c) post-colonial territories placed into the UN system by their colonial sovereigns in order to facilitate transition.¹⁴⁹ This is a very general and ambiguous framework by which to create a legal system.¹⁵⁰ The third category, in particular, while clearly contemplating colonial territories placed into the system as a process towards achieving independence, contains language sufficiently broad to contemplate including many modern states as subjects of trusteeship.¹⁵¹ Ultimately, the goals of trusteeship were those of a “civilizing mission:” promoting the evolution of the entity to the point that trusteeship was no longer necessary to support the entity being held in trust.¹⁵²

The broad language of the UN Charter is key to applying trusteeship principles to small island states like Kiribati and the Maldives.¹⁵³ Further, the objectives and purposes stated by the UN Charter will also be furthered by extending the umbrella of trusteeship to cover states like Kiribati and the Maldives.¹⁵⁴ The key difference for the modern context of climate change induced trusteeship is the requirement of sovereignty; the UN system traditionally excluded territories that had become Member States, consistent with the principle of sovereign equality.¹⁵⁵ In order to re-think the system and apply it to the modern context, the principle of sovereign equality remains relevant; however, it is the trusteeship system that becomes the vehicle for recognition of the deterritorialized entities as sovereign entities rather than proof of their inferiority.¹⁵⁶ In other words, the trusteeship system is a way to ensure continued relevance and sovereign respect for Kiribati and the Maldives within the international system.¹⁵⁷

The climate-induced trusteeship arrangement could take the form of a UN

148. See Perritt, *supra* note 109, at 393 (analyzing the old League of Nations “mandate” system for international trusteeship and comparing it to the modern UN system).

149. U.N. Charter art. 77, ¶1 (“(a) territories now held under mandate; (b) territories which may be detached from enemy states as a result of the Second World War; and (c) territories voluntarily placed under the system by states responsible for their administration.”).

150. See Perritt, *supra* note 109, at 397–98.

151. See *id.* (suggesting that states being administered by other states could be included here, whether or not such administration was authorized by the Security Council, and expressly proposing situations such as those in Afghanistan, East Timor, and Iraq).

152. See Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of The Hague Regulations in the Evolution of International Trusteeship, and the Framework of Right and Duties of Occupying Powers*, 31 LOY. L.A. INT'L & COMP. L. REV. 85, 103 (2009) [hereinafter *From Trusteeship to Self-Determination and Back Again*] (describing the “twin objectives of trusteeship” as care and improvement of the territory held in trust by the international community.); see also YAMAMOTO & ESTEBAN, *supra* note 5, at 206–07 (analyzing Ralph Wilde’s assertion of the “civilizing mission” in reference to the modified trusteeship proposed for disappearing atoll island states).

153. See, e.g., Burkett, *supra* note 70, at 108–09.

154. See U.N. Charter art. 76 (stating four primary purposes of the trusteeship system; quoted *supra* note 97).

155. U.N. Charter art. 78.

156. See Burkett, *supra* note 70, at 109.

157. See *id.*

interim mission, much like traditional forms of UN trusteeship.¹⁵⁸ The most recent and most successful example of a UN trusteeship arrangement was in Kosovo in 1999.¹⁵⁹ This was a political arrangement by which the United Nations appointed an administration to run the affairs of a national political entity.¹⁶⁰ Similarly, the UN Trusteeship Council could also provide for a transitional mechanism for Kiribati and the Maldives.¹⁶¹ While the transition to a purely deterritorialized entity is a novel concept under international law, it is a similar process to that of a newly independent territory.¹⁶² For example, each of the responsibilities outlined in the Security Council resolution establishing UNMIK¹⁶³ has parallel applicability to the situation for Kiribati and the Maldives, and presents an apt analytical comparison given the lack of precedent for deterritorialized nations.

First, promoting self-government and the establishment of a new political entity would be a vital concern to the deterritorialized governments seeking to ensure continuity in whatever physical location they are able to inhabit. This could manifest itself by altering the structure of current political and economic institutions.¹⁶⁴ Second, overseeing provisional institutions “pending a political settlement” will be equally important for addressing concerns about continued citizenship and the change in circumstances for I-Kiribati or Maldivian citizens.¹⁶⁵ Third, “facilitating a political process”¹⁶⁶ for determining the future status of the Maldives and Kiribati will be of paramount importance in international relations, particularly in determining a method by which I-Kiribati or Maldivian citizens are represented diplomatically abroad.¹⁶⁷

Fourth, supporting humanitarian and disaster relief assistance, and equitably and effectively distributing money and other resources, is equally important in a

158. See Burkett, *supra* note 70, at 110; Cf. Perritt, *supra* note 109, at 401–02 (analyzing the UN Interim Mission in Kosovo (UNMIK), which was the trustee over the territory and people of Kosovo and held title to the property of the future state with the people as beneficiaries; the trusteeship system in Kosovo also contemplated ‘ambiguous’ beneficiaries such as ‘future generations’ of Kosovars.).

159. See Perritt, *supra* note 109, at 401–02.

160. See S.C. Res. 1244, ¶ 6 (June 10, 1999) (authorizing the Secretary General to appoint a representative to head a civil administration of Kosovo). See also *supra*, Part II.D (describing UNMIK and its objectives).

161. See, e.g., Burkett, *supra* note 70, at 111 (suggesting the possibility of an Interim Mission for the Republic of the Marshall Islands in order to assist in a climate change induced transition to a deterritorialized state).

162. *Id.*

163. See S.C. Res. 1244, ¶ 11(a)–(k) (June 10, 1999) (establishing the primary responsibilities of the international civil presence as including (1) promoting self-government, (2) overseeing provision institutions, (3) facilitating a transitional process, (4) supporting humanitarian relief, and (5) maintaining civil law and order).

164. Cf. Perritt, *supra* note 109, at 421–22 (noting that a trustee requires plenary authority to act as a governing regime, and often must change political and economic institutions in order to facilitate a transition).

165. Burkett, *supra* note 70, at 111.

166. S.C. Res. 1244, ¶ 11(e) (June 10, 1999) (“Facilitating a political process designed to determine Kosovo’s future status. . .”).

167. Rayfuse, *supra* note 58, at 11.

mass migration context as it is in a post-conflict territory.¹⁶⁸ Finally, maintaining civil law and order is important to resolve intra-nation legal disputes regarding property and concerns with the transition.¹⁶⁹ Of these, the most significant challenge for the interim mission would be the dual task of (a) ensuring diplomatic protection for nationals living in various states, and (b) negotiating relocation efforts for those nationals still seeking a new home.¹⁷⁰

Under the trusteeship system, the governments of Kiribati and the Maldives will be able to engage with the UN Mission in a process of evaluation and amendment.¹⁷¹ This will allow for the Trusteeship Agreement to be a living document, changing as the needs of the nation change throughout the transition to deterritorialized nation status.¹⁷² Ultimately, the trusteeship agreement will have to be one with a predetermined endpoint in order to underscore the transitional nature of the arrangement.¹⁷³ By making the agreement temporary, it signals to the international community the need for change in the legal system to accept the new, deterritorialized nation.¹⁷⁴ The UN trusteeship system was never meant to be a permanent replacement of sovereign and local governments; rather, it is a transitional authority lending legitimacy to new – or in this case, drastically changed – international entities.¹⁷⁵

C. International Law Precedent for Non-State Sovereign Entities Proves the Need for a New Trusteeship System

Although the international system is populated by sovereign, territorialized state entities, and traditional international law asserts that such states are the primary

168. See Vikram Kolmannskog, *Climate of Displacement, Climate for Protection?*, DANISH INSTITUTE FOR INTERNATIONAL STUDIES 6 (Dec. 2008), http://www.glogov.org/images/doc/NRC_Vikram_Kolmannskog.pdf (contemplating compensation from developed states through legal action as well as humanitarian assistance for resettlement and adaptation); Rayfuse, *supra* note 58, at 11–12 (discussing the distribution of remaining maritime resources as a substantial source of income for deterritorialized entities).

169. Burkett, *supra* note 70, at 111 (citing Perritt, *supra* note 109, at 421).

170. See MCADAM, *supra* note 6, at 11 (comparing the situation of a deterritorialized nation to that of a government in exile, and remarking on the vital need for diplomatic continuity).

171. See U.N. Charter art. 79 (“The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations.”)

172. Burkett, *supra* note 70, at 112.

173. Rayfuse, *supra* note 58, at 13 (suggesting that an “authority” set up to govern the transitional deterritorialized state would last between one generation, about 30 years, to one human lifetime, about 100 years); *contra* Burkett, *supra* note 70, at 113 (suggesting that the trusteeship arrangement would be permanent, and explicitly disagreeing with Rayfuse by stating that only a permanent trusteeship arrangement can guarantee necessary sovereignty).

174. See Rayfuse, *supra* note 58, at 13 (relating the need for temporal restrictions on trusteeship to the fact that international law will “have to be reconsidered and configured” to reflect the changing nature of the international system).

175. See U.N. Charter art. 76, ¶ (b) (promoting trust entities’ development towards self-governance and independence); Perritt, *supra* note 109, at 396 (stating that the trustee has the responsibility to promote movement towards self-governance and the extinguishment of the trusteeship).

subjects of and makers of international law, there is precedent in traditional international law for the deterritorialized sovereign entity.¹⁷⁶ In particular, the cases of the Order of Malta¹⁷⁷, the Holy See¹⁷⁸, and indigenous nations¹⁷⁹ are instructive examples when considering how a non-state sovereign entity can operate in the international system. These examples will show the stark differences between past non-state sovereign actors and the needs of a post-state deterritorialized nation like Kiribati or the Maldives.

1. Non-State Governments: The Sovereign Order of Malta and the Holy See (1870-1929)

The Order of Malta is one of the most famous examples of a deterritorialized sovereign entity.¹⁸⁰ The Order of Malta, as evidenced by the name, once occupied sovereign territory on the island of Malta where it constituted the government of the State of Malta.¹⁸¹ It has retained international relevance and sovereignty despite no longer being a true “state” since 1798.¹⁸² All of the Order’s land and buildings, such as its headquarters, outbuildings, and embassy buildings, have been granted extraterritoriality.¹⁸³ Furthermore, while the Order is not a state, it has nonetheless been granted observer status at the UN General Assembly and approximately eighty states recognize it as a sovereign entity.¹⁸⁴ The Order of Malta retains this international relevance due to its unique mission; similar to the International Committee of the Red Cross, another sovereign international entity, the Order of Malta can pursue humanitarian work without being seen as unduly associated with any particular state.¹⁸⁵ It is a sovereign entity in order to preserve its impartiality, as

176. See, e.g., Rayfuse, *supra* note 58, at 10–11 (citing examples of deterritorialized entities such as the Order of Malta and the Holy See, as well as referencing nations of indigenous peoples such as the Maori in New Zealand and the Inuit in Canada and the United States, which enjoy certain exemptions from the sovereignty of the surrounding state).

177. See Maas & Carius, *supra* note 98, at 659 (describing the Order of Malta as a precedent for a sovereign entity without territory).

178. See YAMAMOTO & ESTEBAN, *supra* note 5, at 204–05 (analogizing the case of the Holy See from 1870 to 1929 – before the cessation creating the Vatican City – to those of the deterritorialized island states).

179. See Rayfuse, *supra* note 58, at 10–11 (suggesting that the circumstances of indigenous nations are analogous to deterritorialized international entities).

180. See, e.g., YAMAMOTO & ESTEBAN, *supra* note 5, at 203 (introducing the Order of Malta in the context of a discussion about deterritorialized states in history).

181. *Id.* at 203–04.

182. Rayfuse & Crawford, *supra* note 79, at 10 (stating that the order endures, headquartered in Rome, and is dedicated to the provision of medical care).

183. See *id.* (using as examples of buildings granted extraterritoriality the Palazzo Malta in Rome, the residence of the grand master and location of government bodies, Fort Saint Angel, a building located on the island of Malta, and the Embassies of the Order to both Italy and the Holy See). See generally *About the Order of Malta*, SOVEREIGN ORD. OF MALTA (last visited Sept. 29, 2017), <https://www.orderofmalta.int/sovereign-order-of-malta/> (providing more background information as to the status of the order and the humanitarian activities the order undertakes; the official website of the Order of Malta).

184. Rayfuse & Crawford, *supra* note 79, at 11.

185. See CRAWFORD, *supra* note 6, at 231–32 (quoting a 1953 Papal Tribunal report on the status of

opposed to a sovereign entity due to its status as an ex-state.¹⁸⁶

The Holy See is another famous example of a deterritorialized sovereign entity under international law. Since 1929, the Holy See has had a territorial counterpart in the Vatican City; however, due to the complex relationship between the Holy See and the Vatican City, the debate over the legal status of each entity is neither settled nor satisfied in the legal community.¹⁸⁷ In fact, the international position of the Holy See has always been “independent of its territorial competence” due to the Pope’s position at the head of the Catholic Church.¹⁸⁸ Still, it is instructive to consider the comparisons with deterritorialized island nations because of the well-known status of the Holy See as a non-state sovereign entity.

Despite the precedent that both the Order of Malta and the Holy See provide for the concept of a deterritorialized sovereign legal entity, neither fully encompasses the complexity of the situation facing a small island state losing sovereignty.¹⁸⁹ The Order of Malta retained international sovereignty for the sole purpose of its humanitarian work, whereas a deterritorialized nation would necessarily operate on a much broader scale.¹⁹⁰ Similarly, the Holy See only retained international sovereignty due to its extremely unique position as representing the powerful Catholic Church.¹⁹¹ Neither Kiribati nor the Maldives has an analogous single purpose, and to provide for their peoples, both would need to exercise control over a broad range of objectives.¹⁹²

2. The Nations of Indigenous Peoples

In addition to deterritorialized international entities, the legal community also recognizes the concept of “non-territorial sovereignty;” for example, indigenous nations like the Maori and the Inuit can claim certain levels of sovereignty despite being more broadly subject to the laws of the state in which they are located.¹⁹³ In both of these instances, agreements between the indigenous nation and the territorial state have managed to carve out a virtual enclave.¹⁹⁴ In Canada, local politics actually resulted in the creation of an Inuit province: Nunavut. Created in 1999, Nunavut was the result of lengthy negotiations between Inuit leaders and the federal

the Order of Malta as saying that the Order’s sovereignty “is functional, that is to say, intended to assure the fulfilment of the scope of activities of the Order”).

186. *Id.* at 232.

187. YAMAMOTO & ESTEBAN, *supra* note 5, at 204–05 (describing how different legal thinkers classify either or both of these entities as a State, a *sui generis* entity comparable to the Order of Malta, or some kind of “other entity”).

188. CRAWFORD, *supra* note 6, at 226.

189. *See supra* Part III.A.

190. *See* CRAWFORD, *supra* note 6, at 232–33.

191. *See id.* at 226.

192. *Cf. id.* at 197 (suggesting that there are certain “special cases” of sovereignty to which the Order of Malta and the Holy See belong; these special cases exist outside the bounds of traditional international law whereas deterritorialized nations would seek act as States within it).

193. Rayfuse, *supra* note 58, at 10–11.

194. *Id.* at 11.

government.¹⁹⁵ Even though the success of gaining an entire territory for self-governance is an outlier for indigenous communities, international law more broadly recognizes the sovereignty of indigenous peoples.¹⁹⁶ Specifically, Article 5 of the UN Convention on the Rights of Indigenous Peoples affirms that they “have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions.”¹⁹⁷ Thus, a certain level of independence is preserved despite the inability of the indigenous entity to fully govern within its own land.¹⁹⁸

Although indigenous peoples like the Maori and the Inuit do present certain parallels with the deterritorialized nations of the I-Kiribati and Maldivians, ultimately the differences outweigh the similarities. While indigenous communities still reside on their ancestral land despite having lost full sovereignty over it, the I-Kiribati and Maldivians will be displaced from their islands.¹⁹⁹ For the Maori and the Inuit, their sovereignty hinges on bilateral relations with their surrounding state – New Zealand and Canada, respectively – rather than on international acceptance.²⁰⁰ With Kiribati and the Maldives, the transition from a fully-accepted state to a newly-deterritorialized nation will require some level of international stability; acceptance on this level is best provided by the UN Trusteeship system because it allows the international community to legitimize the deterritorialized nation rather than address only the symptoms by providing for climate change refugees.²⁰¹

IV. RECOMMENDATIONS: IS IT TOO LATE TO ACT?

The ultimate effects of climate change on the oceans – sea level rise, increased acidity, saline intrusion into groundwater, increased ferocity and frequency of tropical storms – may now be unavoidable.²⁰² However dire this may seem for the territory and people of current small island states, there is still time to act to mitigate the impact of sea level rise. There are four paths of action, in particular, that the international community can take to prevent or ameliorate the plight of small island residents and small island governments facing climate change and potential loss of statehood. The first two address legitimacy and sovereignty issues for the state themselves, whereas the second two merely address the impending humanitarian

195. Jonathan D. Greenberg, *The Arctic World Environmental History*, 42 VAND. J. TRANSNAT'L L. 1307, 1310 (2009). See Jull, *Building Nunavut*, *supra* note 96, at 62–68 (discussing the history of the Inuit negotiations to obtain self-governance in the northern territories of Canada).

196. See G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples, arts. 4–5 (Sept. 13, 2007) (affirming the rights of self-determination and autonomy for indigenous communities).

197. *Id.* art. 5.

198. Burkett, *supra* note 70, at 98.

199. Compare Jull, *supra* note 96, at 59–60, with Climate Change Secretariat, U.N. Framework Convention on Climate Change, *Climate Change: Small Island Developing States*, 21 (2005), http://unfccc.int/resource/docs/publications/cc_sids.pdf [hereinafter *Climate Change*] (discussing the impacts of climate change on the most vulnerable states, including Kiribati and the Maldives).

200. See Rayfuse, *supra* note 58, at 10–11.

201. See Burkett, *supra* note 70, at 107–114; see also *supra* Section III.B (analyzing the UN Trusteeship system as it applies to Kiribati and the Maldives).

202. Carr, *supra* note 18, at 53–54.

refugee crisis. In order of likely effectiveness, the four options are the following: (1) sign a comprehensive international agreement on the status of states endangered by climate change;²⁰³ (2) explicitly incorporate states endangered by climate change into the mission of the UN Trusteeship Council;²⁰⁴ (3) support bilateral agreements between endangered states and safer nearby states;²⁰⁵ and (4) amend the 1951 Convention Relating to the Status of Refugees to include people displaced by climate change under the definition of a “refugee.”²⁰⁶

First, one of the only ways to create a truly binding regime in international law is to sign a multilateral treaty.²⁰⁷ By signing such an agreement, perhaps an “International Convention on the Existential Status of States Endangered by Climate Change,” the international community can lay to rest some of the academic speculation and confusion that surrounds the issues of a ‘modern Atlantis.’²⁰⁸ This agreement would have to include agreements on the legal status of the governments of the disappeared states, pathways to saving the residents of sinking islands, concerns about preserving the maritime claims and resources of the disappeared states, and enforcement provisions to force the richer and more powerful states to help the sinking island residents.²⁰⁹ Although such a convention would be politically difficult to achieve, it would be by far the strongest statement of support that the international community could send to those endangered by rising oceans.²¹⁰

If a binding multilateral instrument on the status of states endangered by climate change proves impossible, then the UN Trusteeship Council should take responsibility for the transition of endangered states.²¹¹ There would be a need for international legitimacy for the newly deterritorialized entities in a post-climate scenario.²¹² In light of this, one of the best options for international legitimacy outside of a new treaty or convention is the UN trusteeship system.²¹³ The system has a history of practiced transitional assistance, having instituted missions in post-

203. See Jane McAdam, *Environmental Migration Governance* 27 (2009) (unpublished manuscript, University of New South Wales Research Paper) (suggesting five “action lines” for a coordinated strategy to deal with the effects of climate change, including improving international legislation and creating a framework to recognize the environmental, social, and economic aspects of the issue).

204. Burkett, *supra* note 70, at 107–114.

205. See, e.g., Rayfuse, *supra* note 58, at 12 (identifying examples of bilateral negotiations between Tuvalu and Australia in October 2008 on the possibility of relocating Tuvalu’s entire population to Australia in the event of a climate catastrophe).

206. See *Climate Change Displacement*, *supra* note 127, at 55 (proposing the possibility of a protocol added to the Refugee Convention in order to give ‘climate refugees’ legal status and resettlement solutions).

207. See, e.g., Statute of the I.C.J., art. 38, ¶ 1 (listing international conventions as a primary source of international law for the court).

208. See, e.g., *Climate Change Displacement*, *supra* note 127, at 55 (discussing the possibility of a new convention to deal with the effects of climate change displacement).

209. *Id.*

210. *Id.* at 56 (describing the pragmatic difficulties and compromises that would surround the signing of a new international convention to deal with the impacts of climate change).

211. See *supra* Part III.

212. See, e.g., Rayfuse, *supra* note 58, at 11.

213. See Burkett, *supra* note 70, at 114.

colonial and newly self-determined political entities like Kosovo.²¹⁴ By creating trusteeship missions to oversee the transition for deterritorialized nations like Kiribati and the Maldives, the UN Trusteeship Council can stabilize international legitimacy for the new, *sui generis* nations.²¹⁵

If the Trusteeship Council proves politically unwilling to undertake transitional responsibility for small island states, the third option for endangered states is to negotiate bilateral agreements on the future of their communities.²¹⁶ This is a process which has already begun for many states threatened by climate change.²¹⁷ While this does not have the precedential force of a multilateral treaty, it is a way for governments to assure their peoples' future in a safe and legal manner.²¹⁸ This will also allow the host state to negotiate issues of sovereignty and control with the government of the deterritorialized nation. Despite the many concerns with an en masse relocation of an entire nation, this option will likely combine the most effective and pragmatic solutions for both Kiribati and the Maldives.²¹⁹

If there is no other solution through either bilateral or multilateral negotiations, then the multilateral community must at least amend the Convention Relating to the Status of Refugees to enable those displaced by climate change to obtain refugee status and legal status in states around the globe.²²⁰ By allowing those displaced from their homes to claim refugee status, it will ensure that the displaced nation can at the very least continue to live legally in a host nation.²²¹

V. CONCLUSION

After the waves wash over the abandoned territory of Kiribati and the Maldives, the international community will be able to reflect on the durability and sustainability of not only international environmental law, but also the system of statehood in international law itself. Kiribati and the Maldives will cease to be states, but will re-join the international community as *sui generis* deterritorialized nations, governing their peoples without the level of sovereignty associated with statehood. The overwhelming need for some kind of governmental structure to persist and oversee the transition for the Maldivian and I-Kiribati nations will ensure the existence of their governments, but the application of the traditional principles of statehood will prevent those governments from exercising full sovereignty as states in the international system.

Instead, the UN trusteeship system can provide structure and international legitimacy for Kiribati and the Maldives. Although there is precedent in the international system for non-state sovereign actors – such as indigenous

214. See Perritt, *supra* note 109, at 402–03 (describing the UN Mission in Kosovo as “the best example of a political trusteeship.”).

215. See, e.g., Burkett, *supra* note 70, at 113–14.

216. See Rayfuse, *supra* note 58, at 12.

217. See *Climate Change Displacement*, *supra* note 127, at 58.

218. *Id.* at 58–59 (asking fundamental questions about the viability of a bilateral relocation program, confirming the need for some kind of agreement framework in the event that relocation is necessary).

219. *Id.*

220. See *id.* at 55.

221. Park, *supra* note 3, at 13.

communities, the Holy See, and the Order of Malta – each of these differs drastically from the situation of a state facing extinction. In contrast, the experience of the UN Interim Mission in Kosovo can serve as an example of how an international administrative mission can assist in times of transition and lend legitimacy to unstable international situations.

This Note recommends that the international community take action now to prevent the catastrophic legal effects of climate change on small island states like Kiribati and the Maldives. This can be achieved through either a new international convention or through international recognition of trusteeship principles for post-climate states. Furthermore, if neither option is feasible, the international community should take steps to ameliorate the condition of climate change refugees from Kiribati and the Maldives. This can be done by supporting bilateral relocation agreements with non-threatened states, or even by amending the Refugee Convention to allow for the legal existence of climate change refugees.

Climate change is causing rising seas around the globe, with unprecedented impacts on the natural world. The international community should act now to save its most vulnerable members from legal and physical extinction.