

# Framing Labour Mobility Options in Small Island States Affected by Environmental Changes

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**Abstract** It has been forecast that up to forty nation-states are at risk of disappearing due to rising sea levels related to climate warming. Such a situation would lead to a form of statelessness never experienced before in history and would raise serious concerns about migration as well as important legal questions. Although often mentioned in the media by NGOs and other international bodies, this issue has rarely been addressed by legal scholars or by social scientists specialized in migration studies. This chapter examines the available literature on the topic and presents basic geographic data to assess the validity of the danger. We then discuss the legal frameworks and policies that could be developed to mitigate the threat of climate change related statelessness, a concept that remains in need of clarification under both international law and human rights law. This chapter seeks to explore legal means to deal with populations displaced by the adverse impacts of climate change, that are consistent with a state's existing international legal obligations. The ongoing debate about this challenge aims to identify normative measures to secure a legal status for forced migrants, who risk becoming stateless when their state disappears.

**Keywords** Disappearing states · Environmental related statelessness · Adaptation measures · Migration strategies · Human rights

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## 11.1 Introduction

The 2014 report of the Intergovernmental Panel on Climate Change (IPCC) (AR5, WGII) indicates that climate-change impacts can, in extreme cases, threaten the territorial integrity or viability of states, leading to new forms of statelessness (Adger et al. 2014, p. 20). This possibility has been noted in several studies. Yamamoto states that "...several island nations will probably become submerged in the course of the next century, forcing the relocation of their inhabitants to other countries" (2010, p. 1). McLeman observes that the predicted rise in sea level "... holds the prospect of something for which no direct modern-day analog exists—the disappearance of the habitable land mass of an entire nation, and the rendering of its population physically stateless" (2013, p. 198).

This phenomenon of disappearing states is very present in political, media-centred, and academic spheres, and the *climate refugee* is being called the canary in the environmental coal mine (McAdam 2010). The disappearance of states as a result of climate change brings with it a new form of statelessness never experienced before, which raises serious concerns about migration and important legal questions (Park 2011). As mentioned by Black et al.: "If sea-level rise were to engulf a small island state, for example, it would raise issues of sovereignty, and questions of who is responsible for displaced populations" (Black et al. 2011, p. 448). On this basis, questions need to be addressed in light of current environmental changes: What are the risks of these Atlantis-style predictions for the future? Is it possible that entire nation states will be submerged? What are the legal implications and the potential adaptation solutions if sovereign nations disappear? and How can human mobility options play a role in environmentally affected settings?

This chapter first examines the literature on the topic and presents basic geographic data that allows the danger to be accurately gauged (Piguet 2012; McAdam 2010). We then discuss the legal frameworks and migration policies that could be developed to mitigate climate-change-related statelessness, looking at the interplay between different levels of governance (regional, bilateral and domestic). We will also briefly examine already explored avenues such as adaptation measures to prevent migration and compensation schemes to finance adaptation—forms of restorative measures (under the rubric of loss & damage). We then turn to less explored avenues where migration is seen as a strategy to reduce vulnerability, and to bilateral and regional mobility schemes that could be seen as complementary to other adaptation processes. Finally, we will address the complexity of the interaction between environmental changes, labour mobility, and development, taking into consideration social, economic, and human rights implications to identify mechanisms for lawful movements across borders and their practical implementation.

## 11.2 The Phenomenon of Disappearing States: A Physical Science Perspective

Climate change and rising sea levels are a source of great concern for the planet. It leads to images of polar bears on melting ice sheets and nation states vanishing under water. Our objective is to estimate future sea-level rise and assess its impact on coastal countries to better understand which ones are at risk for total submersion. In its 2013 assessment report (AR5, WGI), the IPCC predicts different rates of sea-level rise by the year 2100, according to four Representative Concentration Pathways (RCPs). The ranges vary from 0.44 [0.28–0.61]m (RCP2.6), 0.53 [0.36–0.71]m (RCP4.5), 0.55 [0.38–0.73]m (RCP6.0) to 0.74 [0.52–0.98]m (RCP8.5) (IPCC 2013, p. 1180). The worst-case scenario is a rise of almost one metre by the end of the 21st century. Even though the rise in the sea level will not be uniform around the globe, approximately 95 % of the ocean area will experience a rise by the end of this century (IPCC 2013, p. 1140). The countries considered in this chapter are all located in the ocean areas where the rises will be greatest (IPCC 2013, p. 1195; Nurse et al. 2014).

There is also the possibility that the IPCC predictions are low, especially if one considers recent studies about the collapse of Antarctica's ice sheets and of glaciers melting faster than predicted. These phenomena could lead to a sea-level rise of more than 3 metres (Joughin et al. 2014; Rignot et al. 2014). Other studies have also shown that IPCC predictions could be low. Researchers gathered the opinions of 90 sea-level experts and concluded that the rise could be in the order of 0.7–1.2 m by 2100 and 2–3 m by 2300. This would jeopardize the survival of many coastal cities and low-lying island states (Horton et al. 2014). However, it is not only rising sea levels but also coastal erosion, high tides, worsening floods, cyclones, and ocean acidification that threaten the coastal areas (IPCC 2013).

A large proportion of the world's population lives on coastlines and many coastal megacities are at risk (Adamo 2010). Of the coastal countries, the Netherlands, Bahrain, Azerbaijan, Denmark, and Vietnam have the largest land area with an elevation less than 5 m above sea level in proportion to the country's total land area. According to data from the World Bank,<sup>1</sup> these countries have respectively 59, 39, 20, 18, and 18 % of their total land area with an elevation less than 5 m. While this is substantial, it is still impossible for them to be submerged by the end of this century. A study by Dasgupta et al. (2009) looks at the coastal vulnerability of 84 developed countries and the effects of rising sea levels. If there is a one metre rise, the worst hit coastal countries would be Vietnam (approximately 5 % of land area affected), Qatar (less than 3 %), Belize, The Gambia, and Bangladesh (where less than 2 % of land area would be submerged). On that basis, where a risk of complete submersion exists, it applies only to island countries at which we will now take a closer look.

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<sup>1</sup><http://data.worldbank.org/indicator/AG.LND.EL5M.ZS>.

### 11.3 Which States Are at Risk of Complete Submersion?

Three successive Assessment Reports of the IPCC note that small island states are among the most vulnerable to the effects of climate change. “Sea-level rise poses one of the most widely recognized climate-change threats to low-lying coastal areas. This is particularly important in small islands where the majority of human communities and infrastructure is located in coastal zones with limited on-island relocation opportunities especially on atoll islands” (Nurse et al. 2014, p. 5). A report mapping the effects of climate change on human migration projected that 40 small island states could be submerged by 2100 because of the global rise in sea level (Warner et al. 2009). “For countries made up entirely of low-lying atolls, sea-level rise, ocean acidification, and increases in episodes of extreme sea-surface temperatures, compromise human security for existing or larger numbers of people. With projected high levels of sea-level rise beyond the end of this century, the physical integrity of low-lying islands is under threat” (Adger et al. 2014, p. 20). Some islands are particularly vulnerable to rises in sea level (e.g., Tokelau, Niue) and some have already disappeared under water (e.g., Holland Island, New Moore/South Talpatti) or been evacuated (e.g., Carteret Islands). However, none of these islands are sovereign nations: Tokelau is a territory of New Zealand, Niue is a self-governing state in free association with New Zealand (Niueans are New Zealand citizens), Holland Island is part of the U.S., New Moore/South Talpatti is administered by India and claimed by Bangladesh, and Carteret atoll is part of Papua New Guinea. While these cases are important, they have not led to statelessness.

The purpose of this section is to determine which countries could disappear in the coming decades, leading to a new form of statelessness. Using the maximum elevation of countries, Piguët (2012) conducted a comprehensive review of countries’ risks and drew up a preliminary list of threatened states—all of which were among the Association of Small Island States (AOSIS). With updated sources of data on maximum elevation and population, there are six independent island states that have a maximum elevation of less than 100 m (see Table 11.1).

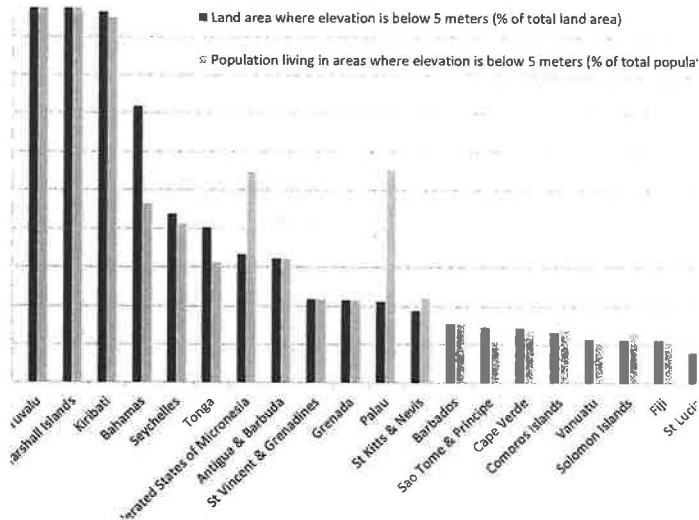
**Table 11.1** Island states with maximum elevation < 100 m

Countries	Highest point (m)	Population
Maldives	2.4	393,595
Tuvalu	4.6	10,782
Marshall Islands	10	70,983
Bahamas	63	321,834
Nauru	65	9,488
Kiribati	81	104,488

<https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html>

<http://en.wikipedia.org/wiki/Niulakita>

<http://www.peakbagger.com/https://www.cia.gov/library/publications/the-world-factbook/>



**Fig. 11.1** Land area and population at risk in small island states <http://data.worldbank.org/indicator/AG.LND.EL5M.ZS> and <http://data.worldbank.org/indicator/EN.POP.EL5M.ZS/countries>

Going one step further, we cross-referenced data from the World Bank. Figure 11.1 shows that, while many island countries have low percentages of land area with elevations less than 5 m and low percentages of population living in these areas, the Maldives, Tuvalu, the Marshall Islands, and Kiribati have higher percentages on both counts. Indeed, the entire land area of the Maldives and Tuvalu is less than 5 m in elevation and thus 100 % of the population lives in areas with an elevation less than 5 m. The figures for the Marshall Islands are 99 % for land area below 5 m and for population living in areas with an elevation under 5 m. Kiribati's figures are 97 and 95 %, respectively. The fifth country on the list is the Bahamas, which has lower percentages of 72 and 47 % respectively. According to Piguët (2012), the topography of the Bahamas and their economic wealth make their disappearance unlikely.

The sea level could rise two metres by 2100 if global air temperatures rise 4 °C or more (McLeman 2013). This means that countries such as the Maldives and Tuvalu would almost entirely disappear under water. Indeed, having as its highest point a dune 2.4 m above sea level at an unnamed location on Villingili Island on Addu atoll, the Maldives might have most of its territory submerged. Nevertheless, the island city and capital Malé should endure thanks to 3.5-m-high sea walls,

financed by Japan. The population density of Malé per square kilometre is high—the country is the 7th densest of the world's independent countries, and Malé atoll is the 4th most densely populated island in the world.<sup>2</sup> The situation in Tuvalu, a country of three reef islands and six atolls and a land area of only 26 km<sup>2</sup>, might be even worse because they have no protective dikes. Tuvalu's highest point is on the uninhabited island of Niukalita, and all other atolls are low lying. The Marshall Islands have a maximum elevation point of 10 m. This is on Likiep atoll, home to a few hundred people. The mean altitude of all atolls in the Marshall Islands is 2.1 m above sea level. Two thirds of the population lives on Ebeye and Majuro islands, Ebeye being the 5th most densely populated island in the world.<sup>3</sup> We also considered Nauru and Kiribati in our list of at-risk countries because, even though they have higher maximum elevation points, these points are located in inhospitable places. Indeed, a large percentage of Nauruans live on the coastal perimeter at low altitudes and cannot move to the higher plateau, which is uninhabitable because of phosphate mining.<sup>4</sup> Kiribati is a country made up of widely scattered islands and atolls and is the only country in the world that lies in all four hemispheres—north, south, east and west.<sup>5</sup> It is composed of 32 atolls and a solitary coral island, Banaba. This island is the location of the country's highest elevation point and where a few hundred people live. The rest of the Kiribati residents live in the country's lower areas. In the past, Banaba Island, like Nauru, was a site of phosphate mining which forced some residents to relocate to Fiji (Edwards 2013).

Our assessment of places in the world where the impacts of climate change could lead to a new form of statelessness reveals that only five countries are threatened with complete submersion or with becoming uninhabitable. It must be recognized that some low-lying islands could become uninhabitable before they are completely submerged (Julca and Paddison 2010). This is a limited phenomenon that might affect about 600,000 people in the Indian Ocean and Pacific Ocean. Nevertheless, it requires careful attention, and intelligent planning and strategies. It also raises several legal issues: "...the retreat of coastlines as a result of the submergence of low-lying areas, small islands and atolls, as well as coastal erosion, could significantly alter the reference line for the determination of a coastal state's legal zones in the ocean, termed the baseline" (Houghton et al. 2010). Now that we have assessed which countries could potentially disappear, we will discuss the legal implications that flow from this issue and the possible solutions.

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<sup>2</sup>[http://gadling.com/2011/07/07/top-ten-most-crowded-islands-in-the-world/?icid=main|htmlws-main-n|dl8|sec1\\_inlk3|218442](http://gadling.com/2011/07/07/top-ten-most-crowded-islands-in-the-world/?icid=main|htmlws-main-n|dl8|sec1_inlk3|218442).

<sup>3</sup>[http://gadling.com/2011/07/07/top-ten-most-crowded-islands-in-the-world/?icid=main|htmlws-main-n|dl8|sec1\\_inlk3|218442](http://gadling.com/2011/07/07/top-ten-most-crowded-islands-in-the-world/?icid=main|htmlws-main-n|dl8|sec1_inlk3|218442).

<sup>4</sup><http://unfccc.int/resource/docs/natc/naunc1.pdf>.

<sup>5</sup><http://www.eoearth.org/view/article/172199/>.

## 11.4 Legal Implications: A New Form of Environmentally Related Statelessness?

The debate about the new form of statelessness resulting from *disappearing* countries raises many issues. There are the institutional issues—with the disappearance of territories, the institutions of a modern state will disappear. And there are the human issues—with increased human mobility, there will be a need for their protection and support. The Pacific island states are focusing on the legal frameworks and policies that could be developed to mitigate the threat of climate-change-related statelessness. These frameworks require clarification under international law and human rights law. To this end this chapter seeks to explore legal means for dealing with populations displaced as a result of the adverse impacts of climate change that are consistent with states' existing international legal obligations. Finally, addressing the question of statelessness, this chapter aims to offer new insights related to the studies on the impacts of climate change on vulnerable states. The focus is on the legal instruments available, in particular at the national and regional level, to recognize and protect those who have migrated or who will be forced to leave their homes.

## 11.5 Human Rights Implications for Population of Small Islands Nations at Risk of Becoming Stateless

In 2004, the UN Human Rights Council (formerly the UN Commission on Human Rights) addressed the situation of small island states in danger of vanishing completely by adopting the working paper *The Human Rights Situation of Indigenous Peoples in States and Territories Threatened with Extinction for Environmental Reasons* which states: “Whilst members of the UN...are used to addressing issues of State succession, it would appear that the extinction of a state, without there being a successor, is unprecedented ...” (CHR 2004, para. 6).

The notion of state extinction requires reference to the criteria for the identification of the modern concept of the state. According to traditional understanding, statehood is determined by the following requirements: territory, population, government, and the ability to enter into relations with other states (Park 2011; Crawford 2006). The current debate is about whether changes affecting one of these basic criteria will automatically result in the state's extinction (Gagain 2012; Raestad 1939).

The historical development of the concept of state extinction shows that the disappearance of one of the *so-called elements* of statehood is relevant to the assessment of the existence (or not) of a state. However, it remains an open question under international law “...whether the loss of state's entire land mass due to rising

sea level means the entity ceases to be a state” (Gagain 2012). The possibility of a state being submerged has been examined by Marek, who argued that only if the “...loss of territory is either total or very considerable...” could this exception affect the identity and continuity of the state (Marek 1954). This analysis has been criticized as unhelpful. It is generally acknowledged that there is a lacuna in international law in this regard, and the situation, in which small island states find themselves, is unprecedented (Jain 2014; Wong 2014). To address this legal grey area, the modern doctrine is more oriented toward a presumption “...against the extinction of states once firmly established” (Crawford 2006; Wong 2014). The UN Charter endorses the assumption of the continuity of states and identifies the extinction of a state as an exception in international law. This aspect of the international legal system leads to a situation in which the extinction of a state may arise only in *exceptional circumstances* (Park 2011).

Recently, it has been argued that the physical disappearance of a state could be a new form of statehood of *de-territorialized entities* (Rayfuse 2009a, b) or of *nations ex situ* (Burkett 2011). From this perspective, de-territorialized states could exist and would have a diffuse population with a government located anywhere in the world (Rayfuse 2009a, b; Burkett 2011). In this case, international law would have to recognize *de jure* statehood even if the states have ceased to exist as *de facto* states (Jain 2014; Rayfuse 2009a, b).

What is crucial to this debate, however, is the legal status accorded to the affected population. The main risk is that members of the population could be deprived of their nationality and all related rights. The deprivation of citizenship raises serious concerns in terms of the enjoyment of civil, political, and economic rights (e.g., the right to diplomatic protection, the right to stay, to enter and to return).

The legal definition of statelessness in international law, according to of the *Convention Relating to the Status of Stateless Persons* (article 1, 1954), is “...a person who is not considered as a national by state under the operation of its law.” Some scholars adopt a broad definition including *de jure* (as described above) and *de facto* stateless persons (e.g., the case of an individual having a nationality but unable to enjoy the protection of a government). In addition, statelessness may be absolute (at birth) or relative (if a person has lost his or her nationality), and the situation may be one of individual or mass statelessness. This last situation is most relevant to this analysis, in fact cases of mass statelessness may be related to territorial changes or state practices (McAdam 2012).

In this context, the United Nations has made several efforts to reduce statelessness. Article 15 of the Universal Declaration of Human Rights states that “everyone has the right to a nationality” and “no one shall be arbitrarily deprived of his nationality.” In 1954, the Protocol on Stateless Persons, drafted as an addendum to the 1951 *Refugee Convention*, became a convention (1954 *Convention on the Status of Stateless Persons*), which makes a clear distinction between *de facto* and

*de jure* statelessness. Furthermore, the United Nations General Assembly adopted the *Convention on the Reduction of Statelessness* in 1961, which entered into force in 1975 and was ratified by only a few states. According to this Convention, the UN High Commissioner for Refugees is responsible for guaranteeing international protection of individuals claiming the rights of the Conventions (UN Resolution 3274 XXIX and Resolution 31/36).

Other international instruments deal with the protection of the right to nationality. These include articles 24 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR), article 9 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), and the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States*. This last document, adopted by the International Law Commission (ILC) in 1999, expressly affirms the duty of states to prevent statelessness in the context of state succession.

Although there are several international instruments in place to prevent the risk of denationalization, international law still indicates that states have the discretion to establish the conditions to acquire and lose citizenship. Binding instruments have been ratified by only a few states, and other instruments lack implementation. It would be interesting to consider the option of allowing dual citizenship and safeguarding the cultural ties to countries of origin (Nansen Initiative 2013).

Even if statehood formally continues and members of the affected population are able to keep their nationality, some key issues and protection concerns remain. These issues were highlighted by the *Report of the Nansen Initiative Pacific Regional Consultation* "...to encourage review, as part of regional processes, of existing admission and immigration policies [...] to ensure the full respect of the human rights of people admitted in the context of voluntary migration, forced displacement and planned relocation; ratify and implement relevant international human rights instruments" (Nansen Initiative 2013).

As recently reported by the Special Rapporteur on the Human Rights of Migrants (SRHRM), the population of these at-risk islands may not have an adequate standard of living, or the right to water and a healthy environment. Adaptation measures need to be adopted by both the states-of-origin and the states-of-destination (SRHRM 2012). For example, the 2007 National Adaptation Programme of Action adopted by Kiribati under the *United Nations Framework Convention on Climate Change* clearly illustrates a "general deterioration in the state of health of the population" (e.g., increasing cases of fish poisoning and diarrhea) as a direct result of sea-level rise (Immigration and Protection Tribunal New Zealand 2013, NZIPT 800413 [para. 10–11]). As noted by the Immigration and Protection Tribunal of New Zealand, the exposure of island populations to natural hazards in the context of climate change has already had an effect on basic human rights (e.g., destruction of personal and community property, increasing salinity of fresh water) and the situation will only get worse (e.g., increase in dengue fever, increase in human stress) (AD (Tuvalu) 2014, NZIPT 501370-371).

## 11.6 Evolution of State Practices Developed by Low-Lying Island States

Numerous endeavours are being made to cope with the risks of statelessness using a twofold approach: there are the efforts to prevent the situation of statelessness by allowing citizens to maintain their nationality and remain in their homes; and there are the attempts to improve the situation of potentially stateless persons by developing and improving migration options available at bilateral and regional levels.

### 11.6.1 Overview of Adaptation Measures

Adaptation measures are those strategies which address the immediate effects of environmental degradation. These measures can be long term or they can be temporary such as building sea walls (e.g., Great Wall of Malé) or reinforcing coastlines. Some states, such as the Maldives and Kiribati, are looking at longer-term initiatives to retain their sovereignty and rights as a state. The president of Kiribati has recently bought land on Vanua Levu (Caramel 2014). The Maldives have opted to build an artificial island (Hulhumale) to overcome their potential loss of statehood and maritime zones. However, the legal status of this artificial island remains unclear (Gagain 2012). Gagain has made the point that such islands cannot be considered states according to the *UN Convention on the Law of the Sea*. This instrument seems to exclude artificial islands from the definition of an island, namely land “naturally formed” (art. 121 *United Nations Convention on the Law of the Sea*—LOSC). Under international law, there is a general right to construct artificial islands, but it is not possible “to endorse them as ‘defined territory’” so as not to generate maritime zones (Gagain 2012). As suggested by Gagain, this solution would require amending the LOSC to expand the legal status of artificial islands as a viable solution to preserve statehood and to perpetuate maritime claims (Gagain 2012).

Even if a legal solution, such an amendment in the LOSC, could be identified, there remain some significant challenges. For example, the financial costs involved with most adaptive measures are prohibitive and many of the affected countries lack sufficient capacity, having poor infrastructures and scarce financial resources. It is in this context that a lively debate has emerged about responsibilities and compensations. As part of the Cancun Adaptation Framework, parties looked at ways to address loss and damage associated with climate-change impacts in vulnerable countries. After two years of deliberation on this issue, COP19 (November 2013) established the *Warsaw International Mechanism for Loss and Damage associated with Climate-Change Impacts* as the main vehicle under the Convention (See

decision 2/CP.19).<sup>6</sup> We acknowledge the importance of such mechanisms but wish to explore other complementary avenues linking migration and climate change adaptation.

### ***11.6.2 Migration Strategies to Reduce Vulnerability***

Threatened small island states, often referred to as sinking islands, are aware that they have a rôle to play in the emerging discourse on the normative implications that environmental factors have for contemporary rule making and for the structures of migration governance (Kaelin and Schrepfer 2012; Nansen Initiative 2013).

As highlighted by the Nansen Initiative, the Pacific region has a “long history of mobility” and there is a high degree of “support provided to people through existing clan and kinship networks” that could support the cross-border relocation of these communities if needed as a last resort (Nansen Initiative 2013). Farkboto notes that citizens of small Pacific islands have a “...cultural identity as great travellers, inheritors of their ancestors’ remarkable achievements in navigating, sailing and settling throughout islands of the expansive Pacific Ocean” (Farkboto 2010 [p. 54]). According to studies, in 2010 around 850,000 migrants from Pacific small island states emigrated to New Zealand (350,000), the U.S. (300,000), Australia (150,000), and Canada (50,000) (Bedford and Graeme 2012).

Migration is a different strategy from previous measures undertaken. The implementation of different migration schemes may play a role in preventing forced displacement and in promoting voluntary movements from at-risk areas (Thomton 2011). The current focus is on exploring the risks associated with existing migration provisions. As stated by Castles, “...the objective of public policy should not be to prevent migration, but rather to ensure that it can take place in appropriate ways and under safety, security and legality” (Castles 2010 [245]). Contemporary patterns of migration, which are different at the national, regional, and international level, can be identified as responses to some of the protection needs and challenges of human mobility in the context of environmental changes (Tabucanon 2012).

The migratory profiles of these islands are heavily influenced by their historical background and the “remnants of colonialism” (Tabucanon 2012). They offer an opportunity to compare how different migratory strategies are evolving (at the bilateral and regional level) and the impact of formal and informal cooperation to overcome potential asymmetries in facilitating legal mobility. Eberhard has emphasized that migration strategies have traditionally been widely used by the citizens of low-lying states and their movements are clearly established by the economic interest of the countries of destination, mainly ex-colonial powers

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<sup>6</sup><http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>.

(Eberhard 2012). The agreements in place, as described later, reflect a market-based approach and mobility is strictly regulated by the immigration provisions of countries of destination. It might be that some people affected by environmental changes could migrate to states with which their countries have specific ties, whereas other people might not have this option and they risk being stranded in their home country (Nansen Initiative 2013).

There is a need to further explore the potential impacts of these measures as well as the significant human rights implications regarding mobility in the countries of destination (e.g., right to stay, right to return, right to health, right to housing) (Kaelin and Schrepfer 2012). More than statelessness, the contemporary debate must focus on specific challenges related to facilitating the legal admission of citizens of these submerged island states and how to secure their rights in the country of admission (Tabucanon 2012). In this context, the case of the disappearing states will join the more general discussion of whether or not there is a need for a new legal framework (Wyman 2013) as a promising opportunity for identifying how to assist and protect the affected population.

### ***11.6.3 Bilateral Labour Schemes as a Normative Framework to Facilitate Environmentally Induced Migration***

Destination countries do not have comprehensive instruments to recognize environmental changes as a legitimate reason to grant a permit for a migrant to stay. A few provisions are in place with limited options for specific cases, and these mechanisms are generally oriented to dealing with the immediate aftermath of a disaster. For example, the government of Australia adopted a specific “humanitarian stay visa (subclass 449) designed to respond to short-term humanitarian crises, and visa holders are expected to return home when the Australian Government considers it safe to do so” (Nansen Initiative 2013). Since 1990, the United States has also provided a Temporary Protected Status (TPS) for persons in need of protection as part of their immigration regimes (Tabucanon 2012). Protection is granted to people who are “temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions.” This applies only to those who are already in the United States when the TPS is granted and is only a short-term solution (Wyman 2013). In most cases, these instruments are discretionary in nature providing only temporary protection and permanent migration options are not available (Messick and Bergeron 2014; Dema 2012).

There was a recent decision, adopted by the Immigration and Protection Tribunal of New Zealand, to grant residence visas on humanitarian grounds to the citizens of

Tuvalu who claimed to be at risk of suffering adverse effects of climate change and socio-economic deprivation if deported to Tuvalu [AD (Tuvalu) (2014) NZIPT 501370-371]. This is a significant case because the tribunal explored whether the exposure to the impacts of climate change and environmental degradation could be retained as a “humanitarian circumstance” that “would make it unjust or unduly harsh for the appellant to be removed from New Zealand” (Ibid., para. 18). In its conclusion, the tribunal found exceptional circumstances of a humanitarian nature based on the dense family and community network (Ibid., para. 31) and it didn’t reach a conclusion on the climate change claim (Ibid., para. 33). In its reasoning, the tribunal noted that, “...as for the climate change issue relied on so heavily, while the Tribunal accepts that exposure to the impacts of natural disasters can, in general terms, be a humanitarian circumstance, nevertheless the evidence in appeals such as these must establish not simply the existence of a matter of broad humanitarian concern, but that there are exceptional circumstances of a humanitarian nature such that it would be unjust or unduly harsh to deport the particular appellant from New Zealand” (Ibid., para. 32). While the tribunal acknowledged that current and future impacts of environmental degradation “can constitute a circumstance of a humanitarian nature” (Ibid., para. 27), it didn’t establish its decision on these grounds. Nevertheless, this case has stimulated an innovative and revolutionary debate that may allow the regularization of the immigration status of people affected by environmental degradation in future decisions.

Within the framework of push and pull dynamics, countries significantly affected by environmental changes are elaborating mobility schemes to enhance the ability of people to move and, to some degree, to support growth in human capital investment (e.g., education) and entrepreneurial development—both of which would increase freedom of choice and productivity (Hess 2006).

The Republic of Kiribati frames the environmental-mobility nexus as a supra-national issue connecting all negotiation processes with the broad debate on climate-change adaptation (Sward and Codjoe 2012). The government of Kiribati has created education and training programmes so that people can contribute to the economy of their potential country of destination (Maas and Carius 2011). They have also developed strategies, such as Migration with Dignity, to promote migration as an adaptation strategy. In fact, the president of Kiribati is encouraging citizens to migrate now, before they are forced to leave. The aim is to encourage migratory flows to Australia and New Zealand where migrants can get high-level skilled jobs.

It is important to recall that Kiribati has strong links to Australia and New Zealand due to the British Phosphate Commission’s mining of phosphate deposits in these countries during the 20th century. This relationship has influenced the development and adoption of Kiribati’s mobility schemes (Bedford and Graeme 2012). At present, Kiribati is involved in several migration programmes. One such programme is the Pacific Seasonal Workers Pilot Scheme (PSWPS) promoted by Australia in 2008 to encourage seasonal workers to assist Australian employers in

the horticultural industry (World Bank 2014). According to this agreement, 2500 visas were made available over a period of three years for citizens of Kiribati, Papua New Guinea and Vanuatu. In 2007, New Zealand launched the Recognized Seasonal Employer Scheme that allowed up to 8000 overseas workers (from Kiribati, Samoa, Tonga, Tuvalu, the Marshall Islands, and Palau) to enter New Zealand for seven months in any 11-month period to work in the horticulture and viticulture industries (Thornton 2011). Another arrangement, the Pacific Access Category, reserves a special quota for citizens from Kiribati (including partners and children) to encourage permanent labour mobility to New Zealand (World Bank 2014; Thornton 2011). And in 2011, the United States adopted the Pacific Seasonal Worker Scheme that allows citizens of small Pacific islands to fill temporary or seasonal jobs in the U.S. (Tubacanon 2012).

A specific concern is the need for—but at the same time, the difficulty of—activating mobility schemes that are already in place. Evaluations to date have focused on the formidable obstacles to implementing temporary mobility schemes in the Pacific, particularly the Australian schemes (McKenzie and Gibson 2011; McKenzie 2010). A comprehensive analysis conducted by Hay and Howes identified several constraints linked to the poor implementation of these agreements. These include the absence of labour shortages in targeted sectors of agriculture and horticulture; the lack of information about the scheme; and the significant level of risk (e.g., risk of absconding) and cost (e.g., transaction costs) (Hay and Howes 2012; World Bank 2014).

An additional point highlighted by Oxfam is that “these schemes are unilaterally offered, and so can be modified or withdrawn at any time” (Oxfam 2009). The main risk is that seasonal work schemes do not adhere to core labour conventions and human rights standards. In particular, the *International Labour Organization (ILO) Conventions* specifically aimed at protecting migrant workers—Convention No. 97 (1949) and Convention No. 143 (1975)—and the *UN Migrant Workers Convention (UNMWC)* of 18 December 1990 have not been ratified by the Australian and Kiribati governments. Both the states-of-origin and states-of-destination engaging in bilateral migration schemes have to guarantee that these instruments respect the human rights of potential migrants. Most negotiations of bilateral initiatives avoid including specific provisions on the treatment of migrant workers in terms of social security and health-care rights. (ACP Observatory Migration 2012).

Other countries, particularly the Micronesian countries such as the Republic of the Marshall Islands (RMI), are strongly linked to the United States (Bedford and Graeme 2012). This may lead to a uni-directional mobility flow that might exacerbate the vulnerable situation of migrants due to the lack of reciprocity between the country of origin and the country of destination.

Citizens from the Marshall Islands, according to the Compact of Free Association Marshalllese (which includes citizens of Palau and Micronesia), have the right to live and work in the United States without a visa as non-immigrants...

but they do not have an automatic right to citizenship (Larson 1999–2000; Wyman 2013). In return, the government of the United States provides island states with specific kinds of economic assistance in exchange for full defence authority, which may affect the migration options available (Dema 2012). In fact, it has been reported that many migrants are at risk of becoming irregular migrants, thus subject to exploitation and unfavourable working conditions in the country of destination (Choo 2012).

In 2003, the government of the Marshall Islands amended the Compact of Free Association with the government of the U.S. RMI citizens are now no longer eligible for most non-emergency health care, and some states are suggesting health screening before migrants from RMI are allowed to enter the United States (Dema 2012). The 2003 amendments also added a strict immigration provision that allows the U.S. to unilaterally limit the length of time RMI citizens can stay (Dema 2012). This provision could, at any time, deprive RMI citizens of their rights and they could be deported at the discretion of the U.S. government “if the unilateral termination occurs” (Dema 2012).

## **11.7 Emerging Mobility Strategies: The Promising Role of Regional Regimes**

As we have noted, there has been much progress made in understanding the complex and multi-causal process of migration related to climate change. However, to date there has been scant study into normative and institutional frameworks to investigate how existing legal rules, in particular the trade-in-services negotiation process and labour mobility, can be applied or used to meet the challenges of human mobility as a result of environmental changes. It is not well known that, at a regional level, island states are trying to increase the ability of people to move by negotiating a variety of trade agreements.

In August 2010, the Pacific Forum Island Countries developed the Temporary Movement of Natural Persons (TMNP) programme to be included in the Pacific Island Countries Trade Agreements (PICTA). This allows increased movement of labour and skills-transfer in the region as a key part of the trade-in-services arrangements (PIDC 2010; ACP Observatory of Migration 2012). This scheme is particularly important to address some of the labour-mobility needs in the region. It could also be used to develop a regional framework for increased mobility to remove existing barriers to free movement and to respond to the effects of environmental changes. While this model can facilitate the temporary mobility of skilled migrants, it does not include the option of permanent residence. In addition, this scheme requires that an active role be played by both the country of origin and the country of destination, and many countries of origin have no provisions to deal with skilled labour mobility.

The negotiations for the adoption of the Pacific Agreement on Closer Economic Relations (PACER-Plus) between the Pacific Island Countries and Australia and New Zealand may provide a starting point for responding to migration induced by environmental changes in the Pacific. The best arrangements for the Pacific islands will need to include temporary labour-mobility provisions to grant access not only to skilled migrants but also to unskilled workers. According to the Office of the Chief Trade Adviser (OCTA): “It was argued that due to the economic differences between the parties and the fact that FICs (Forum Island Countries) stood to gain very little, if at all, from their liberalization commitments in trade in goods, services and investment, PACER-Plus had to contain substantive commitments on labour mobility and development assistance” (OCTA 2014).

Despite the progress made so far, the inclusion of labour-mobility provisions in the negotiation process has been slow, and important concerns still need to be addressed “...namely the legal status of commitments on labour mobility, the removal of the caps or a significant increase in the number of workers allowed each year under the RSE and SWP and the extension of the schemes to other sectors of interest to the FICs, including health care and construction” (OCTA 2014).

## 11.8 Conclusion

Even if the danger remains marginal because so few island states are under threat of complete submersion, the scenario discussed in this chapter offers a unique opportunity to identify how to assist and protect populations affected by environmental changes. This brief analysis has identified two legal gaps concerning the rights of citizens of disappearing low-lying islands: the risk that statehood will not continue to be recognized at the international level and the legal implications for the affected population if a new form of statelessness becomes a fact; and the lack of consistent bilateral migration schemes that grant individuals (or groups of individuals) the right to enter and to stay in another state in the case of environmental degradation.

Presenting migration as the inevitable and only possible solution could compromise local adaptation strategies. Migration options are not a comprehensive solution for all citizens of at-risk small islands states. Local populations are not necessarily willing to migrate, preferring adaptation strategies to secure their islands and receiving aid to strengthen these measures. Our preliminary outline of the emerging adaptation measures found a high level of legal uncertainty, and we are not confident that these instruments are suitable to enhance the adaptive capacity of these at-risk Pacific islands.

Our analysis of migration arrangements in place at the bilateral and regional levels has tried to deepen the understanding of these schemes in the context of environmental changes. As currently developed, these instruments may be not

adequate to provide effective responses to the challenges highlighted. We can see that they are mainly market-oriented, guarantee only temporary solutions, and may be insufficient to deal with large-scale migratory flows from vulnerable countries.

Even if seasonal-worker schemes are important instruments to increase mobility opportunities for people in the Pacific vulnerable to environmental changes, the priority for small island states is to develop national and bilateral migration policies, through which seasonal programs may lead to more permanent solutions based on clear rules. Another priority is to ensure that existing schemes guarantee that both countries of origin and of destination will secure and implement the human rights of migrants and will make provisions to reduce the vulnerability of these people.

Against this background, the PACER-Plus, together with the TMNP protocol, may provide a promising regional framework for extending a legislative response to the challenges of environmental migration. The emphasis of the debate could be on assisting small island states with increasing and diversifying their migration patterns by adjusting to the needs of both affected countries and receiving countries.

Finally, our analysis identifies the need for legal research that conceptualizes how human mobility can be linked with other policy objectives related to climate change adaptation and sustainable development. This would hopefully lead to comprehensive policy strategies and effective protective responses to climate degradation.

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