

# NOTES

## Where Do States Go When the Water Comes?

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## INTRODUCTION

Small island states in the Pacific are at the forefront of significant climate change questions. Many face the potential of territorial loss or uninhabitability due to sea level rise. Territory is one of the most consequential and accepted components of sovereignty (i.e., self-government) in the international system. As states face losing their culture, community, land, and livelihood, they also face losing their government's voice—their ability to advocate for their people and their interests on the international stage. While authority over a clear territory has been a component of sovereignty for hundreds of years, sovereignty has become more flexible over time, especially since the United Nations (U.N.) was founded.

This Note argues that, relying on the history of flexibility with the definition of sovereignty, the international community should support states in keeping their seats at the international table despite lost or uninhabitable territory. While some of the proposed solutions may challenge the status quo, the drastic impacts of climate change require novel solutions and international cooperation. This Note will proceed by first discussing the consequences small island states are facing because of climate change, including food scarcity, water shortages, and floods, as well as the push for migration as these issues worsen. Next, it will explore traditional notions of sovereignty and the international system's flexibility towards infringements on the traditional definition. Lastly, the Note will discuss five potential solutions and scenarios for small island states' sovereignty to persist: adaptation, artificial islands, deterritorialization, remedial territory, and placeholders. Ultimately, the elements of sovereignty are flexible and should be expanded to allow small island states to retain sovereignty in whatever pathway they view as most suitable to the needs of their citizens in the face of this novel threat.

## I. CLIMATE CONSEQUENCES

This Part will delve into two of the major buckets of consequences facing island states because of climate change. The first bucket includes the actual impacts to life in small island states, from food and water security to floods and harm to coastal communities, as well as loss of economic opportunity and cultural connections. The second bucket is migration, as islanders flee rising tides and the associated consequences and their homelands forge bilateral agreements to facilitate movement.

## A. THREATS TO ISLAND LIFE

Climate change impacts are felt acutely in small island developing states (SIDS) where sea level is rising at rates four times quicker than the global average.<sup>1</sup> Despite these states' negligible effect on climate change, they shoulder an outsized proportion of the consequences.<sup>2</sup> Within the last decade, SIDS like Micronesia and the Solomon Islands have discovered that some of their islands

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1. Laurence Caramel, *Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji*, GUARDIAN (June 30, 2014, 8:00 PM), <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu> [<https://perma.cc/VAK7-FN6W>].

2. See Lauren E. Sancken, *The Price of Sovereignty in the Era of Climate Change: The Role of Climate Finance in Guiding Adaptation Choices for Small Island Developing States*, 38 UCLA J. ENV'T L. & POL'Y 217, 219 (2020).

disappeared—the Solomon Islands alone has lost five islands to date, and stands to lose at least six more as entire populations flee small islands like Nuatambu, which has lost “half its inhabitable area since 2011.”<sup>3</sup> Anote Tong, the former president of Kiribati, noted that it was “too late” for his country, analogizing that it is akin to a canary who could serve as an early warning sign for others.<sup>4</sup> The climate consequences these nations face include loss of territory and property, extreme weather events, loss of economic resources, loss of freshwater and food supplies, and severed physical connections to homeland and culture.<sup>5</sup>

Some SIDS, such as the Republic of the Marshall Islands (RMI), are comprised of atolls—which are low-elevation islands encircling a lagoon and lacking protection from rising seas.<sup>6</sup> RMI, along with Kiribati, the Maldives, and Tuvalu, stand among the most at-risk nations.<sup>7</sup> Sea level rise is especially dangerous to these islands given “a combination of low average elevation, lack of sustainable groundwater, and economic dependence on existing coastlines.”<sup>8</sup> Average elevation in the Maldives is 1.5 meters, and 3–4 meters in Tuvalu and Kiribati.<sup>9</sup> Most SIDS lack the economic resources necessary to respond to climate change.<sup>10</sup> These small states face losing their culture, livelihood, and diplomatic cache.<sup>11</sup>

The Intergovernmental Panel on Climate Change (IPCC) has predicted with high confidence a grim fate for many of these islands, publishing data suggesting that many SIDS will be submerged within the next fifty to one hundred years.<sup>12</sup> Even before reaching this point, the territory will likely become uninhabitable, perhaps as early as 2050.<sup>13</sup> Though it is impossible to estimate exactly when territory would be completely inundated, the threat of losing habitability due to other climate impacts is pressing. Sea level rise happens gradually, but climate impacts like storm surges, frequent floods, food scarcity, or water scarcity pose threats that could make islands incompatible with habitation over the coming decades.<sup>14</sup>

The IPCC has found that climate change is accelerating temperatures, cyclone impacts, storm surges, droughts, sea level rise, coral bleaching, and changing

3. *Five Pacific Islands Lost to Rising Seas as Climate Change Hits*, GUARDIAN (May 10, 2016, 9:02 AM), <https://www.theguardian.com/environment/2016/may/10/five-pacific-islands-lost-rising-seas-climate-change> [<https://perma.cc/3UE4-2DG5>]; Emma Allen, *Climate Change and Disappearing Island States: Pursuing Remedial Territory*, BRILL OPEN L., Nov. 25, 2018, at 1, 2.

4. Caramel, *supra* note 1.

5. See Virginie K. E. Duvat et al., *Risks to Future Atoll Habitability from Climate-Driven Environmental Changes*, WIRES CLIMATE CHANGE, May/June 2021, at 1, 2; Allen, *supra* note 3, at 18.

6. See Duvat et al., *supra* note 5, at 2; Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 369 (2011).

7. James Ker-Lindsay, *Climate Change and State Death*, SURVIVAL, Aug.–Sept. 2016, at 73, 73.

8. Ben Juvelier, *When the Levee Breaks: Climate Change, Rising Seas, and the Loss of Island Nation Statehood*, 46 DENV. J. INT’L L. & POL’Y 21, 21 (2017).

9. Derek Wong, *Sovereignty Sunk? The Position of ‘Sinking States’ at International Law*, 14 MELBOURNE J. INT’L L. 346, 349 (2013).

10. See Juvelier, *supra* note 8, at 24.

11. Ker-Lindsay, *supra* note 7, at 73–74; see WORKING GRP. II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 2045 (Hans-Otto Pörtner et al. eds., 2022), <https://www.ipcc.ch/report/ar6/wg2/>.

12. See WORKING GRP. II, *supra* note 11, at 2045–46, 2055–56; Allen, *supra* note 3, at 2.

13. Wong, *supra* note 9, at 359; Burkett, *supra* note 6, at 351.

14. See Duvat et al., *supra* note 5, at 2, 12.

precipitation patterns on small islands.<sup>15</sup> Given that in the Pacific more than 50% of infrastructure is located within 500 meters of the low-lying coast, these consequences are harrowing.<sup>16</sup> On some islands, more than 95% of infrastructure is located in low-elevation coastal zones, and in RMI, for example, 61% of the population currently lives on land below annual flood levels, with flooding becoming more frequent.<sup>17</sup> As populations in several Pacific Islands have significantly increased over the last forty years, the population burdened by these consequences only continues to grow.<sup>18</sup> The IPCC predicts that as climate change weakens the islands and their surrounding environments, it will perpetuate vulnerability of islanders due to reduced resources like water, food, and economic opportunity.<sup>19</sup>

In the coming decades, atoll islands will likely experience catastrophic floods over the entire surface of the islands.<sup>20</sup> Freshwater access will decrease by a significant amount, threatening ecosystems and livelihoods, with groundwater availability potentially reduced by 70% over the next seventy years.<sup>21</sup> Predictions suggest that this will be exacerbated by droughts that will double in frequency.<sup>22</sup> Further, the frequency of natural disasters will accelerate from once every two decades to once per decade.<sup>23</sup>

As climate change destroys reefs, fish consumed by islanders will lose their habitats and become scarce, decreasing food availability.<sup>24</sup> Other endemic species will become endangered or extinct, like the bokikokiko, a bird only found on Kiritimati, an island in Kiribati.<sup>25</sup> Islands like Kiritimati tend to be quite biodiverse, and the IPCC has found that “almost 50% of terrestrial species presently considered at risk of global extinction also occur on islands.”<sup>26</sup> While taking up roughly 2% of the earth’s land, islands are home to significant percentages of existing species, including 25% of global flora.<sup>27</sup> Food scarcity will also have a significant economic impact—some Pacific Island nations derive over 90% of their revenue from fees paid by tuna-fishing fleets in their territorial waters.<sup>28</sup>

Loss of territory means that SIDS may be unable to regulate their Exclusive Economic Zones (EEZs).<sup>29</sup> EEZs are marine zones stretching up to 200 nautical miles away from territory within which a state has exclusive authority, and as

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15. WORKING GRP. II, *supra* note 11, at 2045.

16. *See id.*

17. *Id.* at 2064; Duvat et al., *supra* note 5, at 14.

18. *See* Duvat et al., *supra* note 5, at 13.

19. WORKING GRP. II, *supra* note 11, at 2046.

20. *Id.* at 2055.

21. *See id.* at 2058; Duvat et al., *supra* note 5, at 12.

22. Duvat et al., *supra* note 5, at 9.

23. *Id.*

24. *Id.* at 1–2.

25. Becky Alexis-Martin, James Dyke, Jonathan Turnbull & Stephanie Malin, *How to Save a Sinking Island Nation*, BBC (Aug. 15, 2019), <https://www.bbc.com/future/article/20190813-how-to-save-a-sinking-island-nation> [<https://perma.cc/UX82-YNCW>].

26. WORKING GRP. II, *supra* note 11, at 2045.

27. *Id.*

28. *See id.* at 2065.

29. Sancken, *supra* note 2, at 224.

territory is subsumed by sea level rise, Pacific Island nations may lose the rights to these formerly profitable zones, as is further discussed in Part III.<sup>30</sup> EEZs are enormously important to small island nations—for example, Kiribati’s landmass is 811 square kilometers, but its EEZ is 3.5 million square kilometers; thus, the extinction of economic rights over the water, or the inability to regulate it, would be significant.<sup>31</sup>

With the loss of economic opportunities on the islands, the ability to survive may potentially become so low that the islands become economically uninhabitable.<sup>32</sup> Many Pacific Islands already import significant quantities of food, contributing to a rise in health problems, and imports are predicted to become more scarce when climate change increases the difficulty of accessing the islands.<sup>33</sup> As more international assistance arrives, and climate change increasingly threatens traditional sources of food, the islands’ economic reliance on few industries—particularly the regional fishing industry—adds to the alarm.<sup>34</sup>

Loss of territory would result in a loss of culture and community.<sup>35</sup> Cynthia Houniuihi, native to the Solomon Islands and president of Pacific Islands Students Fighting Climate Change, recognizes that her homeland is “disintegrating,” but accepting that fate is difficult: “I don’t want to show a picture to my child one day of my island. I want my child to be able to experience the same environment and the same culture that I grew up in.”<sup>36</sup> Breaks with the land will be painful, as cultures like the Marshallese have a spiritual connection to the land and believe their islands are the “root of their existence in the world.”<sup>37</sup>

The impacts of climate on habitability, biodiversity, economy, and culture, among other factors, will likely become unsustainable for island nations. Even before islands are swept beneath the sea, they may be deserted as residents flee for survival. Some scholars have argued that domestic attempts at solutions, rather than facing the likelihood of necessary migration, are absurd.<sup>38</sup> Some predict that within the twenty-first century, most or all residents of SIDS will be forced to migrate.<sup>39</sup> In the case that states are abandoned, uninhabited, or gone, it is unclear what status their citizens would retain, especially if they did not have a sovereign nation to advocate for them.<sup>40</sup>

30. *Id.* at 224, 237.

31. Philip G. Dabbagh, *Compacts of Free Association-Type Agreements: A Life Preserver for Small Island Sovereignty in an Era of Climate Change?*, 24 HASTINGS ENV’T L.J. 431, 437–38 (2018).

32. See Duvat et al., *supra* note 5, at 2, 6.

33. *Id.* at 5.

34. See *id.* at 5, 6.

35. See Juvelier, *supra* note 8, at 34.

36. Isabella O’Malley & Dana Beltaji, *UN Seeks Court Opinion to Strengthen Fight Against Climate Change in ‘Win’ for Island States*, PBS NEWS (Mar. 29, 2023, 3:32 PM), <https://www.pbs.org/newshour/world/un-seeks-court-opinion-to-strengthen-fight-against-climate-change-in-win-for-island-states> [<https://perma.cc/QNE5-SQJ4>].

37. Allen, *supra* note 3, at 18.

38. See, e.g., OLI BROWN, INT’L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 38 (2008).

39. See, e.g., Juvelier, *supra* note 8, at 24.

40. See Burkett, *supra* note 6, at 353.

## B. MIGRATION

Climate migration is a challenge threatening communities globally. This Note only discusses migration to contextualize the challenges facing inhabitants of these islands, as migration is effectively taken for granted in nearly all the solutions discussed in Part III by virtue of the fact that territory is becoming uninhabitable or may disappear.

Current estimates predict 200 million climate migrants by 2050.<sup>41</sup> The International Organization for Migration defines environmental migrants as people or groups “who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad.”<sup>42</sup> Climate migrants have been little-recognized but are a growing feature of the twenty-first century.

Formally, the only term applicable to these evacuees is “migrants,” as the international community refuses to recognize “climate refugees,” particularly due to fear that refugee aid for those fleeing climate disaster would leave less for those who are persecuted in their countries of origin.<sup>43</sup> The present definition of refugee was established by the 1951 Convention Relating to the Status of Refugees (and its 1967 Protocol), which narrows a refugee to one who, “owing to [a] well-founded fear of being persecuted . . . 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.”<sup>44</sup> Given the primary focus on persecution, those fleeing their homelands for fear of climate change are naturally excluded. Without being recognized as refugees, climate migrants are not eligible for various provisions, including funding, food aid, shelter, and schools.<sup>45</sup>

Migration not only destroys cultural links to homeland but is also costly and difficult.<sup>46</sup> Studies suggest that the cultural impact of climate migration from Pacific SIDS, where communities are small and cohesive, will be extremely destructive.<sup>47</sup> Unique cultural features, like Micronesia’s matrilineal society, Tuvalu’s emphasis on benefiting the community, or the various languages and dialects, may be lost as migrants assimilate.<sup>48</sup>

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41. See, e.g., BROWN, *supra* note 38, at 11.

42. *Id.* at 15.

43. *Id.* at 14.

44. U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 198 U.N.T.S. 137; Protocol Relating to the Status of Refugees art. I, ¶ 2, Jan. 31, 1967, 606 U.N.T.S. 267; see BROWN, *supra* note 38, at 13–14.

45. BROWN, *supra* note 38, at 36. For example, refugees authorized for resettlement in the United States are aided by resettlement organizations, as well as state and local governments, which help to enroll refugees in English classes, enroll children in schools, reach out to find work, find counseling, and provide a stipend for the refugee’s first three months in the country. *Refugees in America*, INT’L RESCUE COMM., <https://www.rescue.org/topic/refugees-america> [<https://perma.cc/MZM4-5RZ9>] (last visited Jan. 1, 2025).

46. See BROWN, *supra* note 38, at 23.

47. WORKING GRP. II, *supra* note 11, at 2069.

48. See *id.*; PAC. AUSTRAL. LAB. MOBILITY, TUVALU AT A GLANCE (2022), <https://www.palmscheme.gov.au/sites/default/files/2022-04/PALM%20scheme%20country%20fact%20sheet%20-%20Tuvalu.pdf>.

From Kiribati, one in seven relocations are due to changes in environmental conditions.<sup>49</sup> Kiribati's government encourages "[m]igration with [d]ignity," motivating people to find legal migration pathways around the globe so they can escape the tides and establish themselves long before the last minute.<sup>50</sup> However, as migration due to climate will likely only increase, countries have been forging bilateral agreements facilitating movement. An agreement between Kiribati and New Zealand allows 150 of Kiribati's citizens (i-Kiribati) to migrate annually, so long as they can read, write, and speak English and have a job that can support them in New Zealand.<sup>51</sup> These sorts of agreements are not panaceas—the quota may be low, but it is not always met, whether because of New Zealand's rejection of unmerited applicants or islanders' hesitation to leave their families and homes.<sup>52</sup> New Zealand has a similar arrangement with Tuvalu, and neither agreement mentions environmental degradation.<sup>53</sup> More recently, a 2023 agreement between Tuvalu and Australia aimed at the climate crisis provides aid to Tuvalu for adaptation measures and grants permanent residency to 280 Tuvaluans annually.<sup>54</sup>

Migration is not a solution to the issue of continued sovereignty but is a path forward for citizens of small island states who can no longer see a sustainable future at home.

## II. SOVEREIGNTY

Sovereignty is the bedrock of the current international system. Sovereignty provides a country with respect from fellow sovereign nations and is, in effect, a requirement for membership at the United Nations. The traditional concept of sovereignty requires a permanent population, defined territory, a government, and the ability to enter relations with other states. Therefore, losing defined territory or failing to have a permanent population on that territory means a state would fail to meet this definition. SIDS face both scenarios. To explore proposed solutions for SIDS so they may continue existing, this Part will provide background on the traditional definition and benefits of sovereignty, then dive into the concept of territory, and finish by discussing the international system's history of flexibility with sovereignty.

### A. WESTPHALIAN SOVEREIGNTY

International sovereignty's origins are often traced back to the Peace of Westphalia in 1648, where European nations met to dissolve the Thirty Years'

49. Alexis-Martin et al., *supra* note 25.

50. *Id.*

51. *See id.*; Burkett, *supra* note 6, at 361; *Pacific Access Category Resident Visa*, N.Z. IMMIGR., <https://www.immigration.govt.nz/new-zealand-visas/visas/visa/pacific-access-category-resident-visa> [<https://perma.cc/PD4P-JUGD>] (last visited Jan. 1, 2025).

52. *See* Alexis-Martin et al., *supra* note 25.

53. *See* BROWN, *supra* note 38, at 39; N.Z. IMMIGR., *supra* note 51.

54. Sam Huckstep & Helen Dempster, *The Australia–Tuvalu Climate and Migration Agreement: Takeaways and Next Steps*, CTR. FOR GLOB. DEV. (Dec. 4, 2023), <https://www.cgdev.org/publication/australia-tuvalu-climate-and-migration-agreement-takeaways-and-next-steps> [<https://perma.cc/Q73X-3GFY>].



War and establish geographic boundaries.<sup>55</sup> Although it is not entirely the same nearly 400 years later, facets of the Westphalian model persist, particularly its emphasis on autonomy and territory.<sup>56</sup> Today, the international community remains organized by boundaries, over which governments generally maintain exclusive authority—the Westphalian model is its foundation.<sup>57</sup> Traditional sovereignty also includes aspects of mutual recognition and domestic control.<sup>58</sup> These factors and impacts are widely recognized by scholars.<sup>59</sup> Their entrenchment as norms in the international community means little has been done to challenge their continuity. By establishing borders and societies within them, traditional sovereignty led to the creation of national identities, and European imperialism spread this system to all other continents.<sup>60</sup>

The traditional definition of sovereignty appears in the 1933 Montevideo Convention, a 1933 treaty for the Americas, but is not defined in the subsequent U.N. Charter.<sup>61</sup> Despite this omission, every member of the U.N. is a sovereign nation, and the U.N. Charter proclaims the organization is “based on the principle of the sovereign equality of all its Members.”<sup>62</sup> According to the Montevideo Convention, state sovereignty was codified as requiring: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”<sup>63</sup> No other region or convention has echoed this codification, but its four qualifications remain internationally accepted.<sup>64</sup> A state at risk of losing its territory or becoming uninhabitable (i.e., losing its permanent population) would not fit this definition.

State sovereignty is necessary for U.N. membership, and for the international opportunities and special privileges that come along with a seat in the U.N. and the U.N. General Assembly.<sup>65</sup> Membership in the U.N. produces a cycle, whereby membership leads to domestic legitimacy, which leads to acceptance internationally, further entrenching the states and governments in their domestic and international roles.<sup>66</sup> U.N. privileges include the ability to take the bully pulpit in front

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55. See, e.g., Stephen D. Krasner, *Compromising Westphalia*, INT'L SEC., WINTER 1995–1996, at 115, 115.

56. See *id.*

57. See *id.* at 122.

58. See Stephen D. Krasner, *Rethinking the Sovereign State Model*, 27 REV. INT'L STUD. (SPECIAL ISSUE) 17, 17 (2001).

59. See *id.* at 20–21; Krasner, *supra* note 55, at 118–19; Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 149–50 (2004) (defining characteristics of a nation-state).

60. Christopher Rudolph, *Sovereignty and Territorial Borders in a Global Age*, 7 INT'L STUD. REV. 1, 5–6 (2005).

61. See Nagan & Hammer, *supra* note 59, at 155.

62. U.N. Charter art. 2, ¶ 1.

63. Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (1934).

64. See Wong, *supra* note 9, at 353.

65. See *id.* at 349; Allen, *supra* note 3, at 2.

66. See Ker-Lindsay, *supra* note 7, at 82.



of international peers and organizations and to secure international financing.<sup>67</sup> Sovereignty turns groups of people into nations, which in turn can represent their own interests.<sup>68</sup> Sovereignty also enables governments to foster culture, identity, and links to land.<sup>69</sup> Loss of sovereignty has the potential to result in the destruction of these features. States would lose the ability to advocate for themselves as a U.N. member on equal footing with other nations and the ability to exercise authority over their citizenry.<sup>70</sup>

Still, many scholars believe sovereignty has never been as black and white as the Westphalian model suggests.<sup>71</sup> States seldom attain exclusive authority over their territory, and the model's principles have not been strictly adhered to given the diversity of the international community.<sup>72</sup> As expat communities have grown within foreign nations, some scholars believe national identities have weakened, because those communities often retain links to their homelands.<sup>73</sup> This Note will expand on sovereignty's potential for flexibility in following sections.

Depending on whether scholars believe that sovereignty is entirely entrenched or more flexible, they differ on whether they believe that loss of territory would result in state extinction or perhaps in persistence of the state in a more abstract form.<sup>74</sup> Those in the latter category point to the "presumption of continuity" in the international system, whereby states are presumed to continue to exist even after some occupation by another state.<sup>75</sup> This has been justified as a method of promoting stability and order,<sup>76</sup> and suggests that when lands are overtaken by sea level rise, the international community might be understanding and allow the states to remain sovereign. The rationales of stability and order are fulfilled by allowing SIDS to remain part of the international community. However, the presumption of continuity is untested in situations where land is lost or uninhabitable forever, which could present complications for its invocation.

#### B. TERRITORY

Territory is central to sovereignty. Borders delineate economic, social, and symbolic boundaries.<sup>77</sup> The chief authority, the government, within that territory is typically clear to all people living within its bounds.<sup>78</sup> Scholars posit that

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67. See Stephen D. Krasner, *Sovereignty*, 122 FOREIGN POL'Y 20, 20 (2001) (noting that U.N. members are "guarantee[d] access to international organizations and sometimes to international finance").

68. Rudolph, *supra* note 60, at 6.

69. See Wong, *supra* note 9, at 349–50.

70. See *id.* at 353; Rudolph, *supra* note 60, at 3.

71. See Krasner, *supra* note 55, at 145; Rudolph, *supra* note 60, at 16.

72. See Krasner, *supra* note 55, at 149–50.

73. Rudolph, *supra* note 60, at 12–13.

74. Compare Allen, *supra* note 3, at 4 ("[I]t is generally thought that extinction will occur where a state ceases to possess any viable territorial base."), with Burkett, *supra* note 6, at 363 (arguing for ex-situ nationhood—continued existence via a trusteeship system).

75. See Juvelier, *supra* note 8, at 22.

76. Wong, *supra* note 9, at 362.

77. See Rudolph, *supra* note 60, at 14.

78. See Krasner, *supra* note 58, at 22.

domestically, sovereignty is at its peak when the government ensures territorial security and economic growth.<sup>79</sup> However, this Note argues that territory should be decentralized as an essential factor for sovereignty, instead focusing on treatment of citizens and their identity in order to promote equality in the face of climate change.

Protecting territory and sovereignty has changed form over the past 400 years—whereas conquest was once commonplace, movement of goods and people is now the focus.<sup>80</sup> Presently, governments are facing the challenge of controlling flows of goods and people across their borders.<sup>81</sup> Some scholars have raised alarm bells about the impact of migration and globalization on sovereignty, believing they pose a risk to “social and political community” and are “eroding” state control and national citizenships.<sup>82</sup> They believe the border as a symbol helps maintain national identity and that migration is causing territory not just to remain a component of sovereignty, but to be among its central components.<sup>83</sup> Technology has also become a problem for sovereign nations as international connections increase and it becomes increasingly difficult to keep information in or out of a border.<sup>84</sup>

As the importance of territorial sovereignty grows, there is no real international precedent or legal regime for situations in which territory becomes uninhabitable or is lost.<sup>85</sup> Throughout history, the death of one state has always ushered in its successor, governing over the same land simply with a political facelift.<sup>86</sup> States have lost and gained parts of their territory, but the majority of territory has remained constant, and no state’s territory—whether since Westphalia or the founding of the U.N.—has ever been entirely wiped off the map or abandoned.<sup>87</sup>

Increasing global interconnectedness, posed as a challenge to sovereignty as discussed below, has perhaps begun to make the case for loosening the reins on the normative conception of sovereignty and instead contemplating greater flexibility by preparing the international system for a nation without territory or without inhabitable territory. Some scholars suggest that sovereignty and recognition should be based more on a human right to democratic governance, an authority supported by popular will, and the responsibility to protect its population from crimes against humanity.<sup>88</sup> If the normative understanding of sovereignty were

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79. See, e.g., Rudolph, *supra* note 60, at 12.

80. *Id.* at 7.

81. *Id.* at 1–2.

82. See *id.* (summarizing arguments made by scholars); Krasner, *supra* note 58, at 19–20 (same).

83. See Krasner, *supra* note 58, at 19–20.

84. See *id.* at 19.

85. Burkett, *supra* note 6, at 354.

86. See Ker-Lindsay, *supra* note 7, at 74. For example, the former Yugoslavia was replaced by Bosnia & Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. See *id.* at 76; *Yugoslavia and Successor States: Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia, Slovenia*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states/yugoslavia> [https://perma.cc/P4AM-3UHV] (last visited Jan. 1, 2025).

87. See Ker-Lindsay, *supra* note 7, at 78.

88. See Nagan & Hammer, *supra* note 59, at 165–66, 171; Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT’L L. 619, 624 (2005).

focused more on how people were treated by their government and on their identities, rather than territory, the concept could help support nations and citizens facing climate change, rather than strip them of equal footing on the international stage.

### C. FLEXIBILITY

In the post-U.N. era, the establishment or continuation of several international mechanisms has normalized certain infringements on the traditional notion of sovereignty, demonstrating that international understandings of sovereignty are more flexible than the term's definition might suggest. These mechanisms include the European Union (EU), Exclusive Economic Zones (EEZs), and international treaties that sovereign nations willingly agree and adhere to, thereby compromising their own authority.<sup>89</sup> Further, the International Commission on Intervention and State Sovereignty sought to change the requirement for U.N. membership from sovereign statehood to "recognition of a state 'as a responsible member of the community of nations.'"<sup>90</sup> The mere suggestion of this alternative understanding could set the stage for a readjustment of sovereignty which accepts climate change-ridden nations that no longer have territorial bases. Because sovereignty is concocted by international understanding, there is nothing preventing changes to sovereignty except international norms.<sup>91</sup>

Despite the continued dominance of the traditional notions of sovereignty, the international community has been flexible in allowing nations to retain sovereignty even when they have relinquished some control over their choices or lands. First, international conventions, which are voluntary, not only commit signatory nations to acting in certain ways but also often require reporting of progress, opening the nations up to inquiries by their peers and other international actors.<sup>92</sup> Second, the EU has gone beyond territory by creating a binding governing body with authority over its component states, and all are still respected as sovereign nations, despite the fact that they have ceded some authority over self-governance to the regional governing body.<sup>93</sup> Third, EEZs have bucked tradition by giving states exclusive, sovereign rights to the area of sea 200 nautical miles out from their coast.<sup>94</sup> While this sovereignty over EEZs is linked to their territory, it is ultimately sovereignty over an area without land. Ultimately, as Professor Krasner points out, "most of the states in the contemporary international system do not fully conform with the sovereign state model."<sup>95</sup>

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89. See Krasner, *supra* note 55, at 116, 133–34.

90. Slaughter, *supra* note 88, at 627 (quoting INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 13 (2001)).

91. See Krasner, *supra* note 55, at 117.

92. See *id.* at 124–25.

93. See *id.* at 133–34.

94. U.N. Convention on the Law of the Sea arts. 57–58, Dec. 10, 1982, 1833 U.N.T.S. 397.

95. Krasner, *supra* note 58, at 34.

Apart from self-imposed infringements on sovereignty, the concept has also changed in the modern era as transborder flows have increased.<sup>96</sup> Migration, particularly due to climate change, is increasing, and subnational groups—people whose identity is not primarily based on their national heritage—have grown in prominence.<sup>97</sup> Some scholars hypothesize that as cultural lines blur as a result of increasing migration and interconnectedness, territory will remain principally situated as a form of societal security.<sup>98</sup> This discounts the territory's risk of disappearance, something which has not been accounted for by most sovereignty scholars. Still, over the past several hundred years, sovereignty has remained intact despite violations of traditional normative sovereignty, such as the EU or EEZs.<sup>99</sup> Perhaps climate change will be no different.

Countries joining international treaties, or those in the European Union, are all placing voluntary restraints on their authority—and therefore on sovereignty. Island nations facing climate change and loss of territory are not choosing to restrain their sovereignty; it is being forced upon them. Any erosion of their sovereignty would have more to do with the choices of nations responsible for climate change. Further, being bound to international treaties or being a member of the EU comes with economic protection, security benefits, or provision of resources. SIDS, however, are being backed into a corner by climate change, to which they negligibly contribute, and the potential restriction of their sovereignty comes with no benefit. As the international community has been flexible with sovereignty in the cases above, it should remain flexible for those who bear a disproportionate burden compared to their impact and grant grace to small island developing states if and when their land is uninhabitable by allowing them to retain their sovereign status.

### III. SOLUTIONS

As noted, a sovereign state has never physically disappeared before.<sup>100</sup> Even if the land does not immediately disappear, but rather becomes uninhabitable, “[w]ithout a permanent population, the territory has no meaning in an analysis of statehood.”<sup>101</sup> This means that if an island state was uninhabitable, it could stand to lose its sovereignty and associated perks, like EEZs, even where some territory remained. Unfortunately, efforts in the U.N. to address these issues have been lacking, often eclipsed by more provocative topics like terrorism.<sup>102</sup>

Some scholars believe that despite territorial issues, the presumption of continuity will prevail, and governments will remain established elsewhere and be granted the respect of the international community.<sup>103</sup> Others point to the unprecedented nature

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96. Rudolph, *supra* note 60, at 3.

97. *See id.* at 13.

98. *See id.*

99. *See* Krasner, *supra* note 58, at 21; Krasner, *supra* note 55, at 116, 133–34.

100. Allen, *supra* note 3, at 2.

101. Juvelier, *supra* note 8, at 29.

102. *See* Slaughter, *supra* note 88, at 621.

103. *See* Juvelier, *supra* note 8, at 28.

of the problem and argue that the outcome of territorial extinction remains unclear.<sup>104</sup> A third group argues that island nations will “lose the legal status of statehood” after failing to meet the requirements of the Montevideo Convention.<sup>105</sup> These perspectives illustrate the wide range of outcomes facing SIDS when they lose their territory or become uninhabitable and the need for clarification on what their future as sovereign nations is to become. Yet, many of the SIDS, and those interested in their survival, are not passively waiting to learn the outcome, but actively trying to come up with solutions.

Leaning on sovereignty’s history of flexibility, notions of sovereignty should be expanded to accept several of these solutions. There are several potential avenues for SIDS to remain sovereign. The first is perhaps the simplest: some states may adapt successfully if provided sufficient aid. However, the four remaining solutions—artificial islands, deterritorialization, remedial territory, and placeholders—all require the international community to be flexible with the understanding of sovereignty, though some require greater deviation from the traditional notion of sovereignty than others. This Part will assess each option in turn, as well as their advantages and drawbacks.

#### A. ADAPTATION

The first solution considered is one where natural land does not become uninhabitable at all—where climate funds and adaptation measures reduce the impacts of climate change. SIDS have been advocating for aid for climate adaptation in the international arena, including addressing other world leaders from a podium in the ocean, leading the charge for a landmark U.N. resolution on climate, and renegotiating bilateral agreements to include significant increases in aid that can be used for climate adaptation.<sup>106</sup> However, material support has been slow to actualize, particularly given the financial cost of helping the island nations, where the monetary impact of rising seas outpaces the rest of the globe.<sup>107</sup> SIDS are largely reliant on international financing for climate change funding because they lack sufficient economic diversification and institutional wealth to adapt or relocate,<sup>108</sup> but they still have pathways to adaptation via international and bilateral channels or state measures.

The United Nations Framework Convention on Climate Change (UNFCCC) has funding mechanisms that provide developing nations struggling against climate change with financing, but short-term solutions have been more popular

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104. See Wong, *supra* note 9, at 348.

105. Juvelier, *supra* note 8, at 23.

106. *On the Frontlines of Climate Change, Small Island States Can Lead in Resilience*, WORLD BANK GRP. (Apr. 11, 2022), <https://www.worldbank.org/en/news/feature/2022/04/11/on-the-frontlines-of-climate-change-small-island-states-can-lead-in-resilience> [https://perma.cc/EFD2-5L4K]; O’Malley & Beltaji, *supra* note 36; THOMAS LUM, CONG. RSCH. SERV., IF12194, *THE COMPACTS OF FREE ASSOCIATION* (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12194> [https://perma.cc/4GL5-PCRB].

107. See Caramel, *supra* note 1.

108. WORKING GRP. II, *supra* note 11, at 2067.

than funding for long-term projects.<sup>109</sup> Like other international frameworks and mechanisms, commitments to funding the UNFCCC's channels for SIDS are non-binding and unenforceable, so commitments are often unmet.<sup>110</sup> One of these mechanisms, the Green Climate Fund, provides \$1 million in grants to each eligible country for project implementation and up to \$3 million for creating National Adaptation Plans.<sup>111</sup> Yet, that amount of money is a drop in the bucket, as are smaller funding sources like multilateral development banks and bilateral channels.<sup>112</sup> While international firms and foundations are investing in global conservation and environmentally friendly diversification of assets, few of these are targeted at aiding SIDS.<sup>113</sup>

Some SIDS can access aid for adaptation measures using existing bilateral channels, like Compacts of Free Association (COFAs). COFAs are bilateral agreements between the United States and three separate SIDS—the RMI, Federated States of Micronesia, and Republic of Palau—which author Philip Dabbagh argues can be used to secure financial aid for the coming decades.<sup>114</sup> The agreements are largely focused on security, aid, and migration, and were first drafted when the United States released the islands from trusteeship and the countries became independent.<sup>115</sup> The COFAs were renewed in March of 2024, including aid for the environment and climate change adaptation, with the RMI and Micronesia receiving roughly \$1 billion more in resources than their last COFAs granted.<sup>116</sup> These new COFAs will last until 2043.<sup>117</sup> The compacts also allow residents of the three islands to secure permanent residency in the United States, which, although not helpful for sovereignty, gives people a safe pathway to flee the sea level rise.<sup>118</sup> While expanding on bilateral arrangements like COFAs does not outright solve problems of sovereignty and territory, it provides a pathway for states to secure funding for infrastructure and aid that will help delay the problem as long as possible until a more permanent solution is found.

Alternatively, several nations have been making unilateral efforts to prepare for increased climate impacts. Kiribati is one of the most prominent.<sup>119</sup> The

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109. Sancken, *supra* note 2, at 219. Developed through an iterative, country-driven process, National Adaptation Plans identify medium- and long-term adaptation needs and develop strategies to address vulnerabilities stemming from climate change. *National Adaptation Plans*, UN ENV'T PROGRAMME, <https://www.unep.org/topics/climate-action/adaptation/national-adaptation-plans> (last visited Jan. 1, 2025).

110. Sancken, *supra* note 2, at 241.

111. *Id.* at 245.

112. *See id.* at 245–46; *Rich Nations Fail to Show the Money at Green Climate Fund Pledging Summit*, CLIMATE ACTION NETWORK INT'L (Oct. 5, 2023), [https://climatenetwork.org/2023/10/05/rich-nations-fail-to-scale-up-finance-at-green-climate-fund-pledging-summit/\[https://perma.cc/DH5W-7VWN\]](https://climatenetwork.org/2023/10/05/rich-nations-fail-to-scale-up-finance-at-green-climate-fund-pledging-summit/[https://perma.cc/DH5W-7VWN]).

113. *See* Sancken, *supra* note 2, at 248–49.

114. *Id.* at 222; Dabbagh, *supra* note 31, at 455–57.

115. Burkett, *supra* note 6, at 370; LUM, *supra* note 106.

116. *See* LUM, *supra* note 106.

117. *Id.*

118. Dabbagh, *supra* note 31, at 458.

119. *See* Caramel, *supra* note 1.



government of Kiribati purchased several thousand acres on Fiji with the intention of providing more elevated land for their population of 110,000 to move to should their islands become uninhabitable, despite lacking an agreement with Fiji for such a move.<sup>120</sup> However, the purchased land is presently being used for commercial agriculture, so if sustenance becomes scarce on Kiribati's islands, they can import crops from the land they own in Fiji.<sup>121</sup> Other island nations have been building seawalls, implementing early warning systems, and safeguarding fresh water supplies.<sup>122</sup> Rarer are projects to use modern technology to artificially elevate islands, as governments attempt to find creative ways to fund this expensive type of project.<sup>123</sup>

Adaptation methods are often preferable to local communities, who would justifiably rather not incur the economic and cultural hardships of migration and relocation.<sup>124</sup> SIDS, along with intergovernmental organizations like the World Bank, have developed climate change adaptation plans, which create frameworks for steps nations can take to adapt and become more resilient, with the intent of staying afloat.<sup>125</sup> However, as the previous Part explored, climate change may be accelerating too rapidly, the islands may be too low, and costs may be too prohibitive for adaptation to be a realistic outcome. By the time that territory is gone, it may be too late.

#### B. ARTIFICIAL ISLANDS

Another potential solution to lost territory is the possibility of constructing artificial islands. The United Nations Convention on the Law of the Sea (UNCLOS) defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>126</sup> Building artificial islands, therefore, might present a question about what amounts to “territory” as part of international law's conception of sovereignty, given they may not be “natural,” as required by the UNCLOS definition. However, providing continued sovereignty over an artificial island built for climate purposes is not an enormous leap to ask the international community to take.

The concept of artificial islands has been explored by several SIDS. Some have expanded territory by building seawalls or enlarging beaches, among other artificial constructions, but these trend closer to protection mechanisms and do not present a sovereignty question given the fact that they are extensions of natural territory.<sup>127</sup> The Maldives built an artificial island next to its capital, though it is

120. *Id.*

121. Madeleine Keck, *This Land Was Meant for Kiribati's Climate Refugees. Now It Will Provide the Island Nation with Nutritious Food*, GLOB. CITIZEN (Feb. 25, 2021), <https://www.globalcitizen.org/en/content/fiji-land-kiribati-farming/#:~:text=A%205%2C500%2Dacre%20region%20located,for%20the%20people%20of%20Kiribati> [https://perma.cc/4WSU-Y2UL].

122. WORKING GRP. II, *supra* note 11, at 2075; WORLD BANK GRP., *supra* note 106.

123. *See* WORKING GRP. II, *supra* note 11, at 2076.

124. *Id.*

125. WORLD BANK GRP., *supra* note 106.

126. U.N. Convention on the Law of the Sea art. 121, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 397.

127. *See* Dabbagh, *supra* note 31, at 451.



only three meters above sea level.<sup>128</sup> The island is already inhabited by tens of thousands of residents, and may soon have the capacity to hold hundreds of thousands.<sup>129</sup> However, as the only successful project of its kind to date for SIDS, building an artificial island has proven to be expensive, and may be harmful to surrounding environments and still fairly susceptible to climate change.<sup>130</sup> The Maldives' new island cost \$400 million, paid for by funds from Saudi Arabia, China, and the United Arab Emirates, which in turn caused disquiet internationally, along with suggestions that this was a form of colonialism.<sup>131</sup>

Kiribati's former president suggested the island nation was looking into artificial land, at least to keep control of its EEZ (without which other countries could engage with Kiribati's former territorial waters), and Kiribati was in talks with the United Arab Emirates, though it appears these conversations may have stalled.<sup>132</sup> At the time, the project was estimated to cost \$100 million, and was marketed simply as a temporary measure until the nation found a more permanent solution.<sup>133</sup> Yet, this project is comparable in cost to other protective measures on existing islands—building a temporary seawall to protect just one atoll in the RMI is also estimated to cost \$100 million.<sup>134</sup> That is almost half of the nation's gross domestic product.<sup>135</sup> If artificial islands are comparably priced and a longer-lasting solution, they might be worth the investment.

If the international community takes the position that “territory” must be naturally generated, then this artificial pathway does not solve the problem. Yet, the presumption of continuity and flexibility of sovereignty suggests that the international community might not raise qualms about artificial islands. Given that EEZs—which give states sovereign authority over areas that are natural but not territory—are accepted, similar flexibility should extend to artificial islands which are territory, but not natural. The analysis of sovereignty in Part II demonstrates that what is truly important to sovereignty is that a state has established territory—not whether that territory is naturally occurring. This solution should also be ratified by the U.N. via a resolution before more projects are completed, so that states can feel more secure in investing in artificial islands, and UNCLOS should be amended to reduce its focus on natural land. Ultimately, to face climate change, certain past conventions in international law *will* have to shift, and when

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128. Allen, *supra* note 3, at 5.

129. See Dabbagh, *supra* note 31, at 451.

130. Allen, *supra* note 3, at 5.

131. Sancken, *supra* note 2, at 228.

132. See Peter Dockrill, *Pacific Nation Kiribati Considers Building 'Artificial Islands' to Escape Rising Seas*, SCIENCE ALERT (Feb. 23, 2016), <https://www.sciencealert.com/pacific-nation-kiribati-considers-building-artificial-islands-to-escape-rising-seas> [https://perma.cc/4PH8-NSJ7]; Susan Llewelyn Leach, *When the Waters Are Rising...*, MEDIUM (May 8, 2017), <https://medium.com/cities-the-future/when-the-waters-are-rising-6b9eab90774e>.

133. *Id.*

134. Sancken, *supra* note 2, at 226.

135. *GDP (Current US\$) – Marshall Islands*, WORLD BANK GRP., <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?iframe=true&locations=MH> [https://perma.cc/9Y84-6HD2] (last visited Jan. 2, 2025).

considered against an option like remedial territory—which requires territorial sacrifice from the donor and an unfamiliar habitat for the donees—this solution requires less sacrifice from all parties and should be something the international community eagerly adopts.

With funding primarily coming from other countries, there could be questions about who the territory genuinely belongs to and whether the donee nations truly have authority over their land. However, given the recent U.N. General Assembly resolution (discussed in Section III.D), which implored countries to strengthen their commitments to climate change, the wealthy and powerful nations which contribute to the severe climate effect felt by SIDS could make good on this resolution by funding artificial islands and supporting their legitimacy as sovereign territory.<sup>136</sup>

### C. DETERRITORIALIZATION

Under the deterritorialization theory, a state would retain a government, which would hold assets in a trust for its people, despite the fact that its territory is abandoned or has disappeared. This is somewhat similar to a popular suggestion among scholars: reviving the U.N. Trusteeship System as a means for governments to continue supporting citizens.<sup>137</sup> The Trusteeship System was a mechanism for administering territories from afar “for the benefit of the inhabitants of that territory.”<sup>138</sup>

The most prominent scholar on the issue is Maxine Burkett, who argues for “*ex-situ* nationhood” whereby countries continue to exist with the rights and benefits of sovereignty and with citizens represented internationally, despite the elimination of territory and the fact that citizens are dispersed globally.<sup>139</sup> She argues that a trusteeship system could support this system of perpetuation, with the governments of nations *ex-situ* sitting “in a permanent location and manag[ing] the affairs of the state at a distance.”<sup>140</sup> Burkett believes that migration and “trans-boundary loyalties” have set the stage for a disconnect between citizenship and residence, and therefore the transition to a deterritorialized state is not unthinkable.<sup>141</sup> *Ex-situ* nationhood would focus on preserving culture, community connection, and the “security and well-being” of its people.<sup>142</sup> This outcome, if realized, would provide political support and a voice to those who were forced to migrate. Burkett argues that migrants from SIDS, knowing they remain

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136. See *infra* Section III.D.

137. Juvelier, *supra* note 8, at 21; Wong, *supra* note 9, at 386; Burkett, *supra* note 6, at 365.

138. Burkett, *supra* note 6, at 363. The International Trusteeship System was originally established by the U.N. Charter to promote the interests of the Territories’ residents and supervise Trust Territories as they worked towards independence. The U.N. established a now-defunct Trusteeship Council to oversee the administration of the Territories and consider petitions from the Territories. *International Trusteeship System*, UNITED NATIONS, <https://www.un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> [<https://perma.cc/ED5V-BQ32>] (last visited Jan. 2, 2025).

139. Burkett, *supra* note 6, at 345, 364.

140. *Id.* at 345, 363.

141. *Id.* at 360.

142. *Id.* at 363.

represented internationally, will be able to persist in their sense of community instead of being forced to assimilate.<sup>143</sup>

Unlike the imperial-era trusteeship system, the trustees serving the nation ex-situ would be elected citizens, not a foreign state or U.N. body.<sup>144</sup> Burkett suggests that the U.N. and member states' role would only be to establish ex-situ nationhood, buttress it administratively and financially, and support its legitimacy in the international community.<sup>145</sup>

Ex-situ nationhood's big challenge is that unlike any of the other options, there is no alternative to territory. Rather, the theory just accepts that territory lost will not need any sort of replacement. This would put the presumption of continuity to a significant test because the most established examples of applying the presumption are not cases of disappearance or of uninhabitable land.<sup>146</sup> Ex-situ nationhood would rely in large part on the governments of other countries to accept a complete shift in the status quo—whereas with something like artificial islands, it is not a large leap for the “territory” component of sovereignty to appear met. Yet as some scholars argue, perhaps nothing should be done except allow continuity—that recognition, once granted, “cannot be rescinded.”<sup>147</sup> Despite its challenges, ex-situ nationhood is perhaps the simplest solution. Securing an ex-situ status for SIDS also means that should climate change begin to threaten the habitability of other, non-island states, they too can be ensured survival.

The international conception of sovereignty has historically been infringed upon by treaties and regional governing bodies. Recently, globalization has majorly changed flows of people, trade, and information. States are having a harder time retaining control of inflows and outflows at their borders. Sovereignty has been diminished, so a solution where a state governs from an international post should be accepted by the international community, particularly under the presumption of continuity and the history of flexibility. Given that the U.N. has never expressly stated territory is a component of sovereignty, SIDS could wait and hope to see if the first one to lose territory would retain their spot in the U.N. and their international voice. However, a more proactive approach could be to propose a new international definition of sovereignty to the U.N. General Assembly, which could include recognition from other countries, historic land, a government, and a population—though dispersed—made up of loyal citizens who identify with their homeland. With any of these solutions, residents stand to lose a lot, but it is of utmost importance that they do not lose their ability to advocate internationally.

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143. *See id.* at 369.

144. *Id.* at 363.

145. *Id.* at 364, 366–67.

146. *See* Michel Rouleau-Dick, *Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?*, 22 MELBOURNE J. INT'L L. 357, 365–72 (2021).

147. Ker-Lindsay, *supra* note 7, at 81.

## D. REMEDIAL TERRITORY

Another theory that has been advanced is providing remedial territory, or “territory transferred from responsible to injured states as redress for climate change induced deterritorialisation.”<sup>148</sup> Proponents argue that states largely responsible for climate change should be obligated to “provide a portion of their territory as reparation” for their internationally wrongful acts.<sup>149</sup> In effect, remedial territory theory would have a larger nation transfer part of its land to a state that has become uninhabitable from climate change, so the state can move its population to the new land and operate its government there as if that territory always belonged to them. This land would be under their full control, with no interference from the original state.

However, this theory is less realistic than certain others, as forcing a state to cede land is likely impossible, considering that international law is not truly binding. States would argue that while their emissions may have made some contribution, they alone were not responsible for all the sea level rise impacting SIDS, or for the greenhouse gasses negatively impacting the islands.<sup>150</sup> They would likely not be willing to turn over land as reparations for their climate impacts, particularly because it could be an unpopular measure with their citizens and they have no real obligation to accord with an international ruling.

One route SIDS could take in an attempt to acquire remedial territory would be to sue emitting nations in their own courts, if the emitting state allows them standing and if the state had a statute providing for damages. While there is no case directly on point, the United States has been sued by Pacific Islanders in U.S. court. In *People of Enewetak v. Laird*, former residents and descendants of residents from the RMI’s Enewetak Atoll sued the United States for failing to comply with the National Environmental Policy Act (NEPA) while exploding nuclear weapons on the island.<sup>151</sup>

At the time of the nuclear experiments, Enewetak was a Trust Territory of the United States, and residents had inhabited the island for centuries until their eventual removal to another atoll in 1947 to reduce their proximity to the thirty nuclear weapons tested off their shores.<sup>152</sup> While the government argued that the atoll did not fall under NEPA because it was not part of the “nation,” the court held that NEPA was not only restricted to the U.S. states but also included Trust Territories.<sup>153</sup> It then issued an injunction requiring that the government stop its ongoing scientific work on the atoll, as its small size meant any change to the island left a large impact.<sup>154</sup> The court also determined that the islanders had

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148. Allen, *supra* note 3, at 1.

149. *Id.*

150. *See id.* at 14.

151. 353 F. Supp. 811, 812–13 (D. Haw. 1973).

152. *Id.* at 813.

153. *Id.* at 819.

154. *Id.* at 820. NEPA provides a cause of action only for injunctive or declaratory relief, not for money damages. 42 C.F.R. § 137.309.

standing because the land affected was their ancestral homeland, despite the fact that they had not lived in Enewetak for decades.<sup>155</sup>

*People of Enewetak* provides a blueprint for suing polluting nations in their own courts, particularly for nations with which smaller states have imperialist ties. *People of Enewetak* establishes an argument for standing, even once citizens of SIDS can no longer inhabit their land. Although a similar suit for remedial territory under a statute like NEPA would not work, given that NEPA does not grant such remedies,<sup>156</sup> if a state codified environmental statutes providing damages for remediation then the success of the people of Enewetak demonstrates that sinking states could have a shot at suing for remedial territory. The case shows that SIDS can have success by using other countries' court systems, should appropriate laws be in place.

SIDS can also attempt to use international or regional courts and tribunals. After the Kenyan government evicted the traditional Endorois people from their homes on a lake to build tourist facilities and a national reserve, the regional African Commission on Human and Peoples' Rights ruled for the Endorois.<sup>157</sup> The Commission held that the eviction was a human rights violation and called on Kenya to provide the community with "restitution of their lands or other lands of equal extension and quality as redress."<sup>158</sup> However, the regional Commission cannot force Kenya to act, and in the years since the ruling, Kenya has refused to return the land to the Endorois.<sup>159</sup> The human rights argument from this case could be used as precedent to argue that states which contributed to climate change caused an indirect human rights abuse by forcing citizens of SIDS to abandon their homelands. But the outcome also demonstrates the issue with rulings from regional or international courts and tribunals—they cannot force states to act in the same way a national court could. Rulings like this may provide validation, cast shame on the polluting nation, and give a basis for a claim for remedial territory, but their actual outcome depends on the will of the polluting nation.

In March 2023, the U.N. General Assembly adopted a resolution, spearheaded by Pacific Island Vanuatu, calling for the International Court of Justice to "strengthen countries' obligations to curb warming and protect communities from climate disaster."<sup>160</sup> Vanuatu's leading role in this outcome exemplifies why it is important for states to keep their sovereignty. Vanuatu was able to

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155. *People of Enewetak*, 353 F. Supp. at 819–20.

156. See *supra* note 154 and accompanying text.

157. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v. Kenya, No. 276/2003, Decision, African Court on Human and People's Rights [Afr. Ct. H.P.R.], ¶ 173, 238, 251, 268, 298 (Nov. 25, 2009), <https://achpr.au.int/sites/default/files/files/2022-11/achpr4627603eng.pdf> [<https://perma.cc/R28R-A68Z>]; Allen, *supra* note 3, at 17.

158. Allen, *supra* note 3, at 17.

159. Anthony Langat, *Kenya's Indigenous Communities Demand Action on Land Rights*, NEW INTERNATIONALIST (Feb. 8, 2024), <https://newint.org/kenya-indigenous-demand-land-rights> [<https://perma.cc/5ULA-5CUY>].

160. O'Malley & Beltaji, *supra* note 36; G.A. Res. A/77/L.58, at 1 (Mar. 1, 2023).

vocalize its interests and those of its neighbors and catalyze action.<sup>161</sup> Without representation in the U.N., it is highly unlikely that such a resolution would have been brought or passed. Just over ten years ago, a similar resolution brought by other SIDS failed, but this outcome demonstrates that attitudes about the reality of climate change have shifted, so much so that the United States did not object to the resolution as it might have just a few years ago.<sup>162</sup>

The primary challenge to the solution of remedial territory is obtaining it. States would have to have binding national statutes enforcing this solution. If a country did have one, *People of Enewetak* demonstrates that a suit in a nation's own courts is a route to forcing change. The alternative to national courts is regional and international proceedings, which face an inverse challenge where there may be a cause for a suit but change cannot be forced. Therefore, remedial territory requires cooperation with polluting nations to either subject themselves to a statute allowing for remediation or acquiesce to an international court ruling. The latter may be successful if the rest of the international community rallied around the outcome and shamed the country into compliance.

If this solution were to succeed, remedial territory would likely be acceptable by the international community from a sovereignty standpoint (so long as the ceding state truly retained no control), as the transplanted state would meet all four prongs of the Montevideo Convention and normative sovereignty. On the other hand, states may be reticent to recognize a remedial territory solution for fear it could be used against them in a future case.

Remedial territory would provide the donee state with sovereign land from which to operate, and the donor state would retain significant territory for itself, as Pacific Island nations are small in population and do not require great swaths of land. At minimum, states looking to save their sovereignty, and those supporting them, should lead a resolution at the U.N., which, if adopted, would codify in international law the idea that remedial territory is a viable replacement for territory affected by climate change. Therefore, should a larger state grant territory to a small island developing state, the framework would already exist for this solution to move forward smoothly.

#### E. PLACEHOLDERS

Some scholars have suggested using “placeholder[s]”—placeholders may be physical objects, like houses on stilts or a just a few members of the population—to mark sovereignty.<sup>163</sup> This could also ensure that countries hold on to their EEZs if their land fully sinks below the water.

Placeholders may also be intangible. The Pacific Island of Tuvalu has pioneered an interesting solution: planning to build itself, its island, and landmarks

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161. See O'Malley & Beltaji, *supra* note 36.

162. Michael Birnbaum, *How a Small Island Got World's Highest Court to Take on Climate Justice*, WASH. POST (Mar. 29, 2023, 3:04 PM), <https://www.washingtonpost.com/climate-solutions/2023/03/29/vanuatu-international-court-un/>.

163. Ker-Lindsay, *supra* note 7, at 78.



in the metaverse.<sup>164</sup> The country aims to preserve its history and culture digitally, as the country is increasingly subsumed by water—during high tide, up to 40% of the capital district floods.<sup>165</sup> This project includes digitally recreating the islands via satellite imagery, photos, and drone footage; capturing stories and experiences to retain its culture for future generations; reducing homesickness for older ones; and uploading governmental and administrative systems to the cloud.<sup>166</sup> The country’s Foreign Minister hopes that with its digitized counterpart, Tuvalu can “continue to function as a state” even if it loses its territory.<sup>167</sup> While it is unclear that international norms would be amenable to this outcome, several governments have conditionally agreed to continual recognition of Tuvalu.<sup>168</sup>

These placeholders would test the limits of what sovereignty understands territory to be. If the international community were willing to accept a digital or territorial marker as maintaining a state’s rights to sovereignty and the accompanying benefits, then SIDS could use these lower-cost methods to retain the benefits of sovereignty. Tuvalu’s initiative to have other governments sign onto its metaverse plan is a proactive way to ensure that recognition survives the eventual loss of territory. However, if numbers to that agreement remain low and the state becomes uninhabitable, SIDS like Tuvalu may find they lack the bargaining power or influence to maintain their sovereignty by that point. SIDS should continue advocating for multiple avenues of recognition and investigating potential unique solutions.

#### CONCLUSION

These solutions are vital for states that may face loss of territory or uninhabitability because without a path forward, former inhabitants of the islands will unjustly be deprived not only of their homelands and livelihoods but also of opportunities to self-advocate, which is one of the primary benefits of sovereignty. The international system deeply values sovereignty—it is required for U.N. membership, the premier symbol of statehood status that a country can have. Yet, sovereignty is not a static norm, and as the climate crisis intensifies, the international community must adapt by being more flexible with its definitions and traditional conceptions.

Prior to any of the SIDS becoming uninhabitable, a clear consensus allowing flexibility with the norms of sovereignty would provide security for SIDS and their citizens when the worst-case scenario comes to pass. Cooperating with other states or international organizations presents various avenues for potential

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164. Lucy Craymer, *Tuvalu Turns to the Metaverse as Rising Seas Threaten Existence*, REUTERS (Nov. 15, 2022, 5:22 PM), <https://www.reuters.com/business/cop/tuvalu-turns-metaverse-rising-seas-threaten-existence-2022-11-15/>.

165. *Id.*

166. Kalolaine Fainu, *Facing Extinction, Tuvalu Considers the Digital Clone of a Country*, GUARDIAN (June 27, 2023, 12:00 AM), <https://www.theguardian.com/world/2023/jun/27/tuvalu-climate-crisis-rising-sea-levels-pacific-island-nation-country-digital-clone> [<https://perma.cc/YV4X-DPP2>].

167. Craymer, *supra* note 164.

168. *Id.*



preservation of sovereignty. SIDS could build on current frameworks and treaties to ensure continuity. Pacific SIDS currently have a unique opportunity to leverage their location into assurances and aid from wealthier nations. The United States and China are both looking to maintain and expand allyship in the Pacific region.<sup>169</sup> SIDS can condition their allyship on the guaranteed support for initiatives to preserve sovereignty in the international arena.

Ultimately, SIDS and other nations can support alternatives to territory via financial support, by passing resolutions at the U.N. that will support continued sovereignty, by receiving remedial territory from other states, and by advocating for the presumption that despite lack of territory, the states' histories, governments, and citizens' rooted identities suggest that a version of sovereignty persists. SIDS in the Pacific are at the forefront of questions about sovereignty and territoriality, and despite their negligible contributions to the climate crisis, they will still bear the brunt of its impact. SIDS should not lose their seat at the international table because of a normative conception of sovereignty. The norms of sovereignty have been bent before, and flexibility with SIDS will not break the system.

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169. Simone McCarthy, *Why the Sparsely-Populated South Pacific Islands Have Become the Next US-China Contest*, CNN (June 6, 2022, 4:55 AM), <https://www.cnn.com/2022/06/06/asia/china-pacific-islands-wang-yi-intl-hnk/index.html> [<https://perma.cc/8ZVW-WQ5Q>].