

Climate change, Small Island States and international law: the new frontiers of international justice

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Abstract

Climate change has brought about a new frontier in international law, challenging traditional concepts such as the causes for granting the right to asylum and sovereignty due to the loss of territory [1]. The impact of climate change is evident, particularly in small island states where sinking causes the loss of territory, which threatens the loss of sovereignty and habitable land and triggers human migration (the climate refugees emergency) [2]. These aspects have undoubtedly raised complex legal issues that international law struggles to adequately address. Ergo, the desperate need to develop a new frontier of international law that ensures the sovereign status and provides compensation for climate-induced loss of territory and recognition of climate refugees [3]. Shedding light on the plight faced by small island states presents readers with the rationale for an intersectional understanding of global sustainable development that is much needed to achieve the Sustainable Development Goals (SDGs) by 2030. Furthermore, the aspect of inclusiveness of small island states in an effort to leave no one behind.

Keywords

Climate Change, Small Island States, Climate Justice.

1. Sovereignty and loss of territory

As a general principle under international law, the recognition of a state as such is given by the simultaneous existence of a supreme authority over a territory and a population.

Climate change now threatens the very existence of small island states due to rising sea levels and severe weather events: many of these territories are located just a few feet above sea level and are at high risk of territorial loss [4]. According to a 2020 study by the University of California, Los Angeles (UCLA) small island

states face the very real prospect of losing their sovereignty if their territory were submerged under the sea [5].

The situation becomes more precarious for self-determining small island states (the right, under international law, to freely determine their political, economic and cultural future). The Colombia Human

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Rights Law Review notes that the self-determination and sovereignty of small island states are inexorably tied to their territories [6]. Their territories provide the basis for their existence, identity and self-governance, which are fundamental to the realization of their right to self-determination [7]. Nevertheless, whether self-determined or not, small island states are facing the loss of territory caused by rising sea levels and extreme weather conditions threatening the loss of territory and statehood [8].

For example, Kiribati is a self-determined small island state made up of 33 atolls and reef islands [9]. It now faces an existential threat of territorial loss due to rising sea levels and coastal erosion. The Kiribati Government has taken adaptive measures, such as building sea walls, relocating communities, and promoting sustainable development. Unfortunately, the loss of territory threatens to undermine Kiribati's right to exercise self-determination and maintain its sovereignty [10].

The Maldives, a small island state and independent country is facing the same difficult situation as Kiribati due to the effects of climate change [11]. The United States Geological

Survey reports that, at current rates of global warming, 80% of the Maldives is expected to be inhabitable by 2050 [12].

Loss of territory is something not new in international law where a state loses its territory as a result of an enemy invasion.

Another example is given by The Sovereign Order of Malta, which is a special body under international law, as it has exercised sovereign powers over territories in the past [13]. In this case, the loss of the last governed territory (Islands of Malta) due to Napoleon, did not result in the total loss of sovereignty for this entity that still benefits from a special status in its headquarters, such as limited immunity from other jurisdictions.

In this case, the survival of some sovereign powers granted to this order may be understood with the desire of the nations that defeated Napoleon to restore the status quo after the wars won by Napoleon himself. Other Orders (such as the Teutonic Order). did not follow the same destiny and when they lost the territories that they ruled, they lost their sovereign status too.

Other examples include governments in exile when

a country is annexed after a defeat in war as happened for many nations in Europe during World War II. In these cases, however, governments in exile are temporary phenomena in which the governments in exile will return or not depending on the outcomes of the war.

Climate change with the submergence of the territories of small island states is creating a new challenge because while at-risk states purchase lands from other states to relocate their populations, this does not mean that the purchased lands will be subject to the sovereignty of the purchasing state. On the other hand, the loss of territory puts at risk the fact that these states will be recognized as such while their lands will be submerged. This will also lead to the economic exploitation of the waters of the seas when the lands will be submerged because they could no longer be considered exclusive marine areas of the disappeared states.

2. The predicament of climate refugees

The 2020 study from the University of California, Los Angeles (UCLA) also finds that there is no overarching govern-

ing framework for climate refugees – either for cross-border or internally displaced persons due to climate change [14].

The existing legal framework, primarily the 1951 Refugee Convention, is unable to protect climate-induced migrants. The Convention's definition of a refugee grounded on persecution based on race, religion, nationality, or political opinion does not encompass climate-related displacement [15]. This gap has led to calls for the inclusion of climate migrants in international refugee laws, the development of new legal instruments, and the exploration of innovative legal solutions to protect those displaced by climate change. However, these mostly operate on a regional, rather than international, scale. For example, the 1969 Organization for Africa Unity Convention on Refugees (OAU) and the 1984 Cartagena Declaration on Refugees include climate migrants among those fleeing due to “events seriously disturbing public order” [16].

The 2021 Migrants Can Make International Law Journal Article provides 5 categories of climate-induced migration, caused by [17]:

1. Sudden-onset disasters, e.g. flooding;

2. Slow-onset degradation, e.g. sea level rise;
3. Sinking of small island states;
4. High-risk zones declared dangerous for human habitation;
5. Forced displacement due to violence caused by the scarcity of essential resources such as water, arable land or pasture.

With the above-mentioned categories in mind, the need for international law that effectively recognizes climate migration is clear.

The delicate balance between a state's sovereign rights and its obligations under international human rights law is highlighted in the 2020 global landmark case *Ioane Teitiota v New Zealand*, heard by the United Nations Human Rights Committee (UNHRC) [18]. In this case, Ioane was seeking “climate refugee” status in New Zealand from Kiribati due to climate-induced threats. Ioane sought asylum because he faced land disputes and lacked safe drinking water due to the climate crises in Kiribati. His claim was rejected by the New Zealand Immigration Tribunal leading to his deportation. He subsequently lodged a complaint against New Zealand in

the UNHRC alleging a threat to his right to life under the International Covenant on Civil and Political Rights (ICCPR). The UNHRC ruling deemed Ioane's deportation legitimate as he did not face an immediate danger to his life in Kiribati. Nonetheless, the Committee recognized that climate change represented a serious threat to life and that this should be taken into account when examining appeals on deportation [19].

3. Climate justice

Most scientists agree that the primary cause of global warming is human activities [20].

These activities have been (and are) carried out by humanity to varying degrees. Western Countries, China and India are the countries that are causing most of the global warming. As often happens, those who are the most affected by global warming do not coincide with those who cause this phenomenon [21]. Furthermore, the ability to react to the damages created by global warming is strongly influenced by the economic power of the countries affected. In addition, climate change affects people differently: on the one hand, elderly people are more ex-

posed to change; the younger one, however, sees their future jeopardized by the risk.

All these differences push courts and lawmakers to find a way to protect those who are in a weaker position.

From all these considerations a new concept is delineating the meaning of justice, considering the climate perspective: climate justice is now a relatively new work that is gaining ground day after day.

4. Need to develop a new legal landscape

In conclusion, climate change is reshaping international law by expanding borders and requiring the evolution of legal norms to address the complexities of climate-induced migration. As the world faces the growing impacts of climate change, the development of a new legal border that balances asylum rights, sovereignty and land protection is crucial to addressing the challenges posed by this global phenomenon.

Even so, climate justice appears to be an effective way to unite nations in assisting those who are unfairly affected by the effects of climate change. The International Court of Justice (ICJ) is the world's highest

international court and the only principal UN organ, but it has yet to address the climate crisis, despite the March 2023 UN General Assembly adopted resolution [22]. The resolution calls on the ICJ to provide an advisory opinion on the obligations of states, under international law, to protect other states that are unfairly affected by the climate crisis. The ICJ is currently formulating a historic opinion on this topic to provide much-needed clarification on the obligations of states to protect the climate system under international law and on the legal consequences of harm caused to other states, including small island states [23].

On the other hand, judicial progress is evident in regional courts, while litigation has been used to address the impacts of climate change on human rights. For one, in April 2024, the European Court of Human Rights ruled that Switzerland violated the European Convention on Human Rights by failing to protect its citizens from climate change in a timely and appropriate manner [24].

A further example is the January 2023 request by Chile and Colombia to the Inter-American Court of Human Rights (IACtHR) seeking clar-

ification on the scope of state obligations to respond to the climate emergency under international human rights law, especially considering the vulnerability of communities in Latin America. The IACtHR has not yet issued a response [25]. It is hoped that the ICJ's upcoming advisory opinion will establish the much-needed international jurisprudence to be followed by regional courts for the benefit of present and future generations.

Another plausible recommendation is the case of *underwater self-determination as a justification for compensating climate migrants for their loss of independence*. A 2014 study from Mälardalen University suggests the adoption of a graduated understanding of "self-determination" in which climate migrants may still maintain their collective right to self-determination even after being forced to leave their home country [26]. This "deterritorialized state proposal" suggests that people of a vanishing island state could continue to exercise sovereign control over the abandoned territory. Then, when the last rock disappears, the territory will continue to exist under the sea. Thereafter, the people of the vanished

island state will continue to exercise sovereign control over what were their territorial wa-

ters. The author of the study argues that migrants can seek compensation for the loss of

independence *The downside: it is impossible to completely compensate for the loss of independence.*

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