

Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati

Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu

ABSTRACT. This Essay examines the nexus of climate change (including related natural phenomena such as ocean acidification) and self-determination, particularly for low-lying atoll states and other entities at the front lines of climate change. The Essay begins by briefly surveying the current state of international law and literature on self-determination. The authors adopt a view of the right of peoples to self-determination as a *jus cogens* norm, which all members of the international community are obligated to respect and uphold for all peoples. The Essay highlights the linkages between that view of self-determination and the enjoyment of several core human rights that are dependent on a healthy environment. Prominent among these is the right of a people, under international law, to freely dispose of their natural resources as they see fit, in pursuit of that people's economic, social, political, and cultural development. The Essay then unpacks this argument by examining two case studies. The first case study centers on French Polynesia, where people's vulnerabilities to climate change and related natural phenomena hamper their right to freely dispose of their natural resources. The second case study examines the Republic of Kiribati, where climate change and related natural phenomena pose a risk to the Republic's status as a state, at least under a classic conception of international law, because they have led to a defeatist narrative regarding the Republic's future. Left unchecked, this conception risks becoming a self-fulfilling prophecy, undermining the people of Kiribati's right of self-determination. However, the Government and the people of Kiribati have resolved to resist defeatist narratives that undermine their sovereignty.

INTRODUCTION

Climate change and related natural phenomena, along with their associated costs, have been discussed from many angles, including increasingly from a

human rights perspective.¹ But one right that has not been as thoroughly explored, despite being heavily implicated by climate change, is the right of peoples to self-determination. The right of peoples to self-determination is a fundamental right in international law, amounting to a *jus cogens* norm. All members of the international community are obligated to respect and uphold this norm for the benefit of all peoples, regardless of those peoples' colonial status.

A healthy environment is crucial to the full exercise of the right to self-determination, particularly for the peoples of island nations. A key component of self-determination is the right of peoples to permanent sovereignty over their natural resources. In addition, self-determination includes the attainment of economic, social, and cultural development in a manner that is dependent on the enjoyment of several core human rights, many of which are themselves dependent on a healthy environment. But these core human rights – and, by extension, the right of peoples to self-determination – are threatened by climate change and related natural phenomena. As sea levels rise, fresh-water sources turn salty, the ocean acidifies, and storms of historic intensities rage, island nations may become unlivable, and their peoples may be forced to emigrate. In exchange for acceptance by host countries, these peoples may very well lose their right to self-govern. The existential threats of climate change and related natural phenomena risk generating a discourse of defeatism that insidiously undermines the permanent sovereignty of peoples over their natural resources and, by extension, the right of those peoples to self-determination.

Upholding the *jus cogens* norm of the right of all peoples to self-determination will therefore require countries around the world to address climate change and associated phenomena that are increasingly preventing full expression of this right. It will also require new conceptions of self-determination in the event that rising sea levels erode the physical territories to which self-determination has historically been tied.

This Essay considers two case studies to explore the effects of climate change and related natural phenomena on the right to self-determination: one of French Polynesia, and the other of the Republic of Kiribati. The former is currently inscribed by the United Nations (U.N.) as a non-self-governing territory; the latter is an independent state with a history of colonial rule. Both entities grapple with various challenges to their ability to exercise permanent sovereignty over their natural resources, including for the related purposes of socio-economic

1. See, e.g., HUMAN RIGHTS AND CLIMATE CHANGE (Stephen Humphreys ed., 2010); Daniel Bodansky, *Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT'L & COMP. L. 511 (2010); John Knox, *Human Rights Principles and Climate Change*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW (Cinnamon P. Carlarne et al. eds., 2016); Pamela Stephens, *Applying Human Rights Norms to Climate Change: The Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49 (2010).

development and self-determination. But climate change and related natural phenomena pose particular challenges to their respective efforts.

I. SELF-DETERMINATION AS A *JUS COGENS* NORM

In general international law, the international community accepts and recognizes certain norms from which no derogation is permitted.² These so-called *jus cogens* norms are primarily derived from customary international law—that is, the widespread practice of states undertaken from a sense of legal obligation—as well as from treaty provisions and general principles of law. Through a brief summary of existing law and literature, this Part examines the status of the right of peoples to self-determination as a *jus cogens* norm under international law.

In the wake of World War II, states adopted the U.N. Charter, which emphasizes “respect for the principle of equal rights and self-determination of peoples.”³ In connection with measures to promote international economic and social cooperation, Article 55 of the Charter deems the “creation of conditions of stability and well-being” to be a prerequisite for the enjoyment of the right of self-determination.⁴ Additionally, in discussing the trusteeship system established by the Charter to administer and supervise non-self-governing territories and trust territories placed thereunder by international agreements after World War II, Article 76(b) underscored that a key objective of the trusteeship system is

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their *progressive development towards self-government or independence* as may be appropriate to the particular circumstances of each territory and its peoples and the *freely expressed wishes of the peoples concerned*, and as may be provided by the terms of each trusteeship agreement.⁵

The language in the Charter provided the foundation for later efforts by the international community to concretize self-determination as a right under international law, particularly through declarations by the U.N. General Assembly (UNGA). In the December 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the UNGA acknowledged that all peoples have the right to self-determination and identified modes and measures through

2. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

3. U.N. Charter art. 1, ¶ 2.

4. *Id.* art. 55.

5. *Id.* art. 76(b) (emphasis added).

which this right could be operationalized and implemented, particularly by member states of the UNGA, with respect to non-self-governing territories and trust territories under the U.N.'s purview.⁶ A decade later, the UNGA adopted, by consensus, the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations. This resolution stressed that "the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations" embraces the right of all peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."⁷ The resolution also established the duty of every state "to respect this right in accordance with the provisions of the Charter."⁸

The international community has also taken steps to recognize and concretize the right to self-determination outside the context of the UNGA. This was particularly evident in the 1966 adoption of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are both generally considered by the United Nations to be core international human rights instruments.⁹ Article 1(3) of both instruments recites the right of all peoples to self-determination, as defined in the 1960 UNGA Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁰ Both the ICCPR and the ICESCR tie this right to, among other things, the right of all peoples to, "for their own ends, freely dispose of their natural wealth and resources."¹¹ And both insist that in "no case may a people be deprived of its own means of subsistence."¹² Both instruments and the relevant UNGA resolutions underscore the right of all peoples to self-determination as including, among other things, their right to pursue economic, social, and cultural development, including in connection with the dispensation of their natural resources.

6. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

7. G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

8. *Id.*

9. See *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [https://perma.cc/F7FH-V8D6].

10. International Covenant on Civil and Political Rights art. 1, ¶ 3, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 3, Dec. 11, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

11. ICCPR, *supra* note 10, art. 1, ¶ 2; ICESCR, *supra* note 10, art. 1, ¶ 2.

12. ICCPR, *supra* note 10, art. 1, ¶ 2; ICESCR, *supra* note 10, art. 1, ¶ 2.

The right to self-determination has also been repeatedly recognized and applied by the International Court of Justice (ICJ). The Court has applied this right particularly in the context of post-World War II decolonization and the adoption of the U.N. Charter. In discrete passages in its advisory opinions on Namibia (South West Africa),¹³ Western Sahara,¹⁴ and the Chagos Archipelago,¹⁵ the ICJ has recognized the right to self-determination as a fundamental human right. The Court has found this right to be applicable to, among other things, the process of decolonization and the freedom of all peoples to determine their political status and pursue their own economic, social, and cultural development. The right extends to peoples in non-self-governing territories and trust territories.

Additionally, the ICJ has affirmed that respect for the right of peoples to self-determination is an obligation *erga omnes*, meaning that each member of the international community has an obligation to the rest of the international community to respect the exercise of the right of peoples to self-determination.¹⁶ Indeed, this right is arguably a peremptory norm of international law (a *jus cogens* norm), establishing a sort of heightened obligation *erga omnes* from which there can be no derogation.¹⁷ Further, the ICJ has stressed that the “right [of peoples] to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances.”¹⁸ This right, then, is both expansive and flexible, and takes into consideration both the specific needs and circumstances of the peoples seeking to exercise the right and the obligations of the international community in supporting that exercise.¹⁹

The concept of self-determination remains the subject of some considerable debate among international-law practitioners, scholars, and jurists, including in terms of the concept’s precise definition and the instances in which the concept

-
13. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21).
 14. See Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 54-59 (Oct. 16).
 15. See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. General List no. 169, ¶ 144 (Feb. 25) [hereinafter Chagos Advisory Opinion].
 16. See, e.g., *id.* at ¶ 180; Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30); see also Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Second Phase, 1970 I.C.J. 3, ¶ 33 (Feb. 5).
 17. Rep. of the Int’l Law Comm’n on the Work of Its Fifty-Third Session, at 85, U.N. Doc. A/56/10 (2001) (providing a non-exhaustive list of *jus cogens* norms “that are clearly accepted and recognized includ[ing] the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the *right to self-determination*”) (emphasis added).
 18. Chagos Advisory Opinion, *supra* note 15, ¶ 158.
 19. The international community’s obligations can be fulfilled in various ways, including through the UNGA and other multilateral processes.

applies. James Crawford, for example, considers self-determination to be a “principle concerned with the *right* to be a state.”²⁰ By contrast, as this Part indicates, the U.N., the ICJ, and various human rights instruments take a more expansive view of self-determination that is not limited to the creation of new states, secession, or some other form of “external” self-determination, but also includes “internal” or “softer” forms of self-determination. In this Essay, we take the view that self-determination includes the right of a people, whether or not they already constitute a state, to choose freely their own political system and pursue their own economic, social, and cultural development.

II. SELF-DETERMINATION IN THE FACE OF CLIMATE CHANGE

This Part argues that the right to self-determination is a conglomerate right requiring, among other things, the full enjoyment of multiple subsidiary rights, including social, cultural, and economic rights. More specifically, the social and cultural rights to life,²¹ adequate food,²² water,²³ health,²⁴ an adequate standard

20. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 130 (2019).

21. See, e.g., Convention on the Rights of the Child art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; African Charter on Human and Peoples’ Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 4, Nov. 22 1969, 1144 U.N.T.S. 143 [hereinafter ACHR]; ICCPR, *supra* note 10, art. 6; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948). A devastated natural environment poses mortal dangers to human populations, thus threatening their right to life.

22. See, e.g., Convention on the Rights of Persons with Disabilities arts. 25(f), 28(1), Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]; CRC, *supra* note 21, art. 24(c); ICESCR, *supra* note 10, art. 11. Rising global temperatures undermine agricultural production at lower latitudes and raise the potential for widespread food shortages, especially in poorer regions of the world. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS OF IPCC SPECIAL REPORT ON CLIMATE CHANGE AND LAND APPROVED BY GOVERNMENTS A.2.8, A.5.6 (2019), https://www.ipcc.ch/site/assets/uploads/sites/4/2019/12/02_Summary-for-Policymakers_SPM.pdf [<https://perma.cc/DNB2-RCJT>].

23. See, e.g., CRPD, *supra* note 22, art. 28(2)(a); CRC, *supra* note 21, art. 24(2)(c); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 14(2)(h), 1249 U.N.T.S. 13 [hereinafter CEDAW]. Climate change exacerbates droughts, floods, and the intrusion of saltwater into coastal water wells in low-lying islands, thereby undermining the right to water. See INTERGOV’T PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS OF IPCC SPECIAL REPORT ON GLOBAL WARMING OF 1.5°C APPROVED BY GOVERNMENTS B.2.3 (2018), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments> [<https://perma.cc/DRQ2-MNSF>] [hereinafter IPCC 1.5].

24. See, e.g., CRPD, *supra* note 22, art. 16(4); CRC, *supra* note 21, art. 24; CEDAW, *supra* note 23, art. 12; ICESCR, *supra* note 10, art. 12; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 5(e)(iv), 660 U.N.T.S. 195 [hereinafter

of living (including adequate housing),²⁵ the productive use and enjoyment of property,²⁶ and cultural practices and traditions²⁷ are all necessary precursors to the full enjoyment of the right to self-determination. Therefore, undermining any one of these subsidiary rights undermines the right to self-determination. From this perspective, rampant anthropogenic greenhouse gas emissions—resulting in climate change and ocean acidification that have profoundly negative effects on the social, cultural, and economic rights of many peoples globally—violate the right to self-determination.

And indeed, anthropogenic greenhouse gas emissions threaten each of these subsidiary rights. Rising global temperatures, a warming and acidifying ocean, greater intensity and frequency of storms, sea-level rise, and other effects of anthropogenic greenhouse gas emissions threaten natural environments, endanger human life (including on coastlines), imperil food and water systems, and undermine the ability of peoples to enjoy suitable standards of living, including the enjoyment of cultural practices and natural-resource-based economic sectors. The right to a healthy environment, or at least to the resources therein, as recognized in a number of nonbinding instruments²⁸ and by multiple international

ICERD]; European Social Charter art. 11, Oct. 18, 1961, 529 U.N.T.S. 89. Climate change imperils water security, access to food, and the containment of diseases such as malaria, thereby diminishing health standards for those affected. See IPCC 1.5, *supra* note 23, at B.5, B.5.2.

25. See, e.g., CRC, *supra* note 21, art. 27(3); CEDAW, *supra* note 23, art. 14(2); ICESCR, *supra* note 10, art. 11; ICERD, *supra* note 24, art. 5(e)(iii). Sea-level rise, tropical cyclones, and other impacts of climate change threaten coastal settlements, particularly in low-lying islands and atolls where populations have little choice but to establish households on the coasts. See INTERGOV'TL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS OF IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE APPROVED BY GOVERNMENTS A.9 (2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2019/11/03_SROCC_SPM_FINAL.pdf [<https://perma.cc/FY8U-9BTE>].
26. See, e.g., ACHR, *supra* note 21, art. 21; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. 9. Climate change, biodiversity loss, and other major stressors on the natural environment pose particular challenges to indigenous peoples and local communities, who traditionally own, manage, use, and/or occupy about a quarter of global land area, including as community property. See Rep. of Plenary of Intergov'tl Science-Policy Platform on Biodiversity & Ecosystem Servs. on Work of its Seventh Session, at 6, U.N. Doc. IPBES/7/10/Add.1 (May 29, 2019).
27. See, e.g., ICCPR, *supra* note 10, art. 27. Cultural and traditional practices that are connected to land and sea are undermined by climate change and other harmful impacts on the natural environment.
28. See, e.g., U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 1, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992) ("Human beings are . . . entitled to a healthy and productive life in harmony with nature."); U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) ("Man has the

and human rights courts,²⁹ is also implicated in the overarching right to self-determination and is clearly adversely affected by climate change.

The U.N. Human Rights Council (UNHRC) has explicitly stated that “environmental damage can have negative implications . . . for the effective enjoyment of human rights.”³⁰ In a landmark set of fourteen mapping reports, John H. Knox, the independent expert (later special rapporteur) on human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, analyzed the U.N. human rights bodies and mechanisms, international human rights treaties, regional human rights systems, and international environmental instruments to fully assess the connections between human rights and a healthy environment.³¹ Knox’s reports established “overwhelming support” for the above UNHRC statement, noting that “[v]irtually every source reviewed identifies rights whose enjoyment is infringed or threatened by environmental harm.”³²

Another key component of the right to self-determination is the right to permanent sovereignty over natural resources. This requires, among other things, that all peoples have the right “for their own ends, [to] freely dispose of the[] natural wealth and resources” within their respective territories.³³ While this particular right has been stressed with respect to territories and peoples experiencing decolonization (a process that usually requires, among other things, suitable access to natural resources in order to enhance institutions in a progressive manner and facilitate self-determination), it is a right held by all peoples, regardless of colonial status. Indeed, it has been argued that this right applies not

fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being . . .”).

29. See, e.g., Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 91 (Sept. 25) (Weeramantry, Vice-President, writing separately) (“The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173 (Aug. 31, 2001) (affirming the collective rights of the Awas Tingni indigenous peoples to enjoy and utilize their environment and its resources); Human Rights Committee, E.H.P. v. Canada, Comm. No. 67/1980, para. 7, U.N. Doc. CCPR/C/OP/1 (Oct. 27, 1982) (recognizing environmental harms as potentially violating the right to life, as established in the ICCPR).

30. Human Rights Council Res. 16/11, U.N. Doc. A/HRC/RES/16/11, at 2 (Apr. 12, 2011).

31. John H. Knox (Special Rapporteur on Human Rights & Envtl. Issues), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

32. *Id.* ¶17.

33. ICCPR, *supra* note 10, at 173; ICESCR, *supra* note 10, at 5; see also G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962) (establishing rights and restrictions for national sovereignty over natural resources).

just to peoples who remain under foreign or colonial authority, such as non-self-governing territories, but also to so-called “post-colonial” peoples who are currently independent but nevertheless have colonial histories.³⁴ A healthy environment is necessary in order for peoples to enjoy the right to permanent sovereignty over natural resources. A people cannot exercise sovereignty over natural resources when the environment that bears those resources is not healthy and is therefore less capable, or entirely incapable, of producing those resources. Therefore, the right to sovereignty over natural resources, too, is threatened by climate change and related natural phenomena.

III. THE INTERSECTION OF SELF-DETERMINATION AND CLIMATE CHANGE: CASE STUDIES

Upholding the *jus cogens* norm of the right of peoples to self-determination will require each state to work to address climate change and related natural phenomena that are increasingly hampering the full expression of this fundamental right. We believe this obligation is particularly incumbent on states that have some degree of control over the well-being of peoples of non-self-governing territories and communities, especially if those territories and communities are challenged by climate change and related natural phenomena. This obligation is in line with the “sacred trust” conferred onto states with a degree of control, as reflected in Article 73 of the U.N. Charter. But all states are under an obligation *erga omnes* to assist in the full expression of the right.

The interplay between self-determination and climate change is particularly vivid in two case studies: that of French Polynesia, a self-governing country within the French Republic, currently inscribed with the United Nations as a non-self-governing territory; and that of the Republic of Kiribati, a sovereign and independent state that was, at one point in its history, under British colonial authority. The two case studies will examine the extent to which the adverse effects of climate change and related natural phenomena (including ocean acidification) undermine the right of the peoples of French Polynesia and Kiribati to self-determination. The case studies are addressed in turn.

34. Nicolaas Schrijver, *Self-Determination of Peoples and Sovereignty Over Natural Wealth and Resources*, in *REALIZING THE RIGHT TO DEVELOPMENT* 95, 96-98 (U.N. Human Rights Office of High Comm’r ed., 2013), https://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf [<https://perma.cc/6PWA-F79Y>].

A. French Polynesia

French Polynesia, an overseas community within the French Republic located in the South Pacific Ocean,³⁵ is comprised of 121 islands grouped in five culturally distinct archipelagos.³⁶ The community is populated by 276,300 people and comprises over five million square kilometers of exclusive economic zone, an area as large as Western Europe.³⁷ The islands of French Polynesia did not form a political unit prior to French rule in 1901.³⁸

France ruled French Polynesia as an overseas territory from 1901 until 1958, when the French government held a referendum on independence among all its overseas territories.³⁹ Rather than voting for full independence, the people of French Polynesia voted to join the French Community.⁴⁰ There has not been any

35. See 1958 CONST. art. 74, (Fr.) (referring to “collectivités d’outre-mer”).

36. See Loi organique 2004-192 du 27 février 2004 portant statut d’autonomie de la Polynésie française [Law 2004-192 of February 27, 2004 on the autonomous status of French Polynesia], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 2, 2004, p. 4, 183 [hereinafter OSL 2004] (stating that French Polynesia is comprised of the Leeward, Windward, Tuamotu, Gambier, Marquesas, and Austral Islands). While the Leeward and Windward Islands are listed separately, they belong to the Society Islands grouping.

37. *Polynésie Française en Bref—2018 (French Polynesia at a Glance—2018)*, INSTITUT DE LA STATISTIQUE DE LA POLYNÉSIE FRANÇAISE (2019), <http://www.ispf.pf/docs/default-source/publi-pr/polybref-2018.pdf> [https://perma.cc/TX5S-4RS]. The exclusive economic zone of a coastal state, as defined in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), is a maritime area that extends no more than “200 nautical miles from the baselines from which the breadth of the territorial sea [of the coastal state] is measured.” United Nations Convention on the Law of the Sea art. 57, Dec. 10, 1982, 1833 U.N.T.S. 397. UNCLOS provides the coastal state with a list of sovereign rights, jurisdiction, and duties in its exclusive economic zone. *Id.* art. 56.

38. ERIC CONTE, *UNE HISTOIRE DE TAHITI : DES ORIGINES A NOS JOURS* 145-248 (2019).

39. Independence, a status voted upon by a concerned population in France, is a form of self-determination under Article 53(3) of the Constitution of France, as interpreted by a 1975 decision of the Constitutional Council. Conseil constitutionnel [CC] [Constitutional Council] decision No. 75-59DC, Dec. 30, 1975, J.O. 182 (Fr.). The French government has the power to decide whether to organize a referendum and choose how to read its results, but only the concerned population can express its wish to remain in or leave the French Republic. See Semir Al Wardi, *Democracy in French Polynesia*, in *POLITICS, DEVELOPMENT AND SECURITY IN OCEANIA* 83, 85 (David Hegarty & Darrell Tryon eds., 2013).

40. The results of the referendum indicated that 64.42% of voters preferred to join the French Community rather than claim full independence. *Les résultats du referendum et leurs conséquences*, HISTOIRE DE L’ASSEMBLEE DE LA POLYNÉSIE FRANÇAISE, <http://histoire.assemblee.pf/articles.php?id=739> [https://perma.cc/2Z8E-5WFS]; *Le Referendum Voulu Par de Gaulle en 1958*, HISTOIRE DE L’ASSEMBLEE DE LA POLYNÉSIE FRANÇAISE, <http://histoire.assemblee.pf/articles.php?id=739> [https://perma.cc/U36T-TK9J]. The French Community is at the heart of the Constitution of France. The French Community (Communauté française) replaced the French Union (Union française), which was created under Title VIII of the

other vote of a similar nature organized for French Polynesia since the 1958 referendum.⁴¹ However, the topic is regularly discussed among French Polynesians, in particular during local election campaigns,⁴² and there have been informal and formal requests for a new referendum.⁴³

In 1986, French Polynesia was granted “internal autonomy status” from France,⁴⁴ a status that recognizes, *inter alia*, a separate Polynesian identity and the right of the Polynesian people to adopt their own anthem, flag, and currency.⁴⁵ Since then, the rights associated with French Polynesia’s autonomous status have continued to expand. In 1996, the territory gained control of its

1946 Constitution of France (“The French Union is made up, on the one hand, of the French Republic which includes metropolitan France, the overseas departments and territories, and on the other hand, associated territories and states.”) (authors’ translation). Article 1 of the 1958 Constitution of France provides that the “Republic and the peoples of the Overseas Territories who, by an act of free determination, adopt this Constitution, establish a Community. The Community is founded on the equality and solidarity of the peoples who form it” (authors’ translation).

41. SEMIR AL WARDI, *TAHITI ET LA FRANCE: LE PARTAGE DU POUVOIR* 312 (1998); ALAIN MOYRAND, *DROIT INSTITUTIONNEL DE LA POLYNÉSIE FRANÇAISE*, 550 (2d ed. 2012).

42. There are two main political groups in French Polynesia: autonomists and independentists. While the independentists go further than the autonomists in their desire to accede to full independence, even the autonomists do not necessarily embrace the idea that French Polynesia is part and parcel of France. Rather, both independentists and autonomists consider the French State to be an exogenous power. The current autonomous status of French Polynesia reflects this complex relationship. Similarly, the political status of French Polynesia and the “areas of competence” granted to French Polynesia depend on relationships between French and French Polynesian leaders. The management and exploitation of resources can be affected by these interpersonal relationships. For a more in-depth analysis of French Polynesia’s political status and relationship with France, see Al Wardi, *supra* note 39.

43. While no referendum on self-determination has been organized since 1958, some analysts and politicians see the results of recent elections as indicative of the population’s views on the matter because of the division between the autonomists and the independentists. See AL WARDI, *supra* note 41, at 312; MOYRAND, *supra* note 41, at 550; Sémir Al Wardi, *Twenty Years of Politics in French Polynesia*, 44 J. PAC. HIST. 195 (2009). In June 2013, Gaston Flosse, a longstanding leader of the autonomist party and the newly reelected French Polynesian President, had the French Polynesian Assembly vote to request a self-determination referendum from the then-President of France, François Hollande. The 2013 election campaign had centered on the issues of decolonization and independence. The incumbent, former President and independentist party leader Oscar Temaru, lost the election. Flosse’s referendum request was thus a direct response to the population’s apparent lack of desire for independence. See *La Polynésie Française Demande à Hollande un Referendum d’Autodétermination*, TAHITI INFOS (June 1, 2013), https://www.tahiti-infos.com/La-Polynesie-francaise-demande-a-Hollande-un-referendum-d-autodetermination_a75511.html [<https://perma.cc/5TEP-TTE6>].

44. *Id.* at 286 (authors’ translation).

45. *Id.*

exclusive economic zone.⁴⁶ In 2004, French Polynesia became an “overseas country” within the French Republic,⁴⁷ a designation that allows French Polynesia to “self-govern[] freely and democratically” by its elected representatives and through local referenda.⁴⁸ The organic statutory law of French Polynesia further provides that the French Republic guarantees the autonomy of French Polynesia and will facilitate “the evolution of this autonomy, so as to lead French Polynesia in a sustainable economic, social and cultural development, with respect to its own interests, its geographical specificities and its population’s identity.”⁴⁹ While the French state still retains many oversight powers, in line with the French constitutional principle that France is an indivisible whole,⁵⁰ the 2004 organic

-
46. See Loi organique 96-312 du 12 avril 1996 portant statut d’autonomie de la Polynésie française [Law 96-312 of April 12, 1996 on the autonomous status of French Polynesia], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 23, 1996, NS 217 (stating in article 7, paragraph 4 that “French Polynesia “regulates and exercises the right to explore and exploit natural biological and nonbiological resources in internal seas . . . and waters subjacent to the territorial sea and the exclusive economic zone”) (authors’ translation).
47. While French Polynesia was defined as a French “overseas country” in Article 1 of OSL 2004, *supra* note 36, the French Constitutional Council struck down this categorization as legally invalid because of the underlying Constitutional principle that France is a unified and indivisible state. Conseil constitutionnel [CC] [Constitutional Council] decision No. 2004-490DC, Feb. 12, 2004, J.O. 4420 (Fr.). This decision reaffirms a former Constitutional Council decision. Conseil constitutionnel [CC] [Constitutional Council] decision No. 2000-428DC, May 4, 2000, J.O. 6976 (Fr.). Despite these decisions, many French Polynesians feel themselves to be part of a distinct nation, and many see the French State, referred to as “Hau Farani,” as an exogenous power. See, e.g., Al Wardi, *supra* note 39, at 86.
48. OSL 2004, *supra* note 36, art. 1 (authors’ translation). The 2004 law was amended in 2007, 2011, and again in 2019 to strengthen French Polynesia’s autonomous status as an overseas country. Loi organique 2007-1719 du 7 décembre 2007 tendant à renforcer la stabilité des institutions et la transparence de la vie politique en Polynésie française [Law 2007-1719 of December 7, 2007, to reinforce institutional stability and transparency in political life in French Polynesia], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 8, 2007, p. 19,890; Loi organique 2011-918 du 1er août 2011 relative au fonctionnement des institutions de la Polynésie française [Law 2011-918 of August 1, 2011 on the functioning of French Polynesian institutions], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2011, p. 13,225; Loi organique 2019-706 du 5 juillet 2019 portant modification du statut d’autonomie de la Polynésie française [Law 2019-706 of July 5, 2019 modifying the autonomous status of French Polynesia], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 2019.
49. OSL 2004, *supra* note 36, art. 1 (authors’ translation).
50. Hervé R. Lallemand, The 2004 French Polynesian Statute: Legal Consequences on Maritime Issues 20-41 (June 1, 2009) (unpublished L.L.M. thesis, University of the South Pacific) (on file with authors).

statutory law and its subsequent amendments introduced novel constitutional autonomy in French Polynesia.⁵¹

As discussed previously, a key component of the right to self-determination is the right to permanent sovereignty over natural resources and the right of peoples “for their own ends, to freely dispose of the natural wealth and resources” within their respective territories.⁵² In French Polynesia, the elaboration and implementation of frameworks, policies, and plans with regard to natural resources demonstrate the French Polynesian government’s ownership in setting its own development path. The organic statutory law of French Polynesia defines its domain as covering all public goods that have no owners on land, including in all rivers, lakes, and aquifers.⁵³ It also provides that the French Polynesian government enjoys the rights to explore and exploit biological and nonbiological natural resources, including inland waters, soils, and adjacent waters of the territorial seas and the exclusive economic zone.⁵⁴ The exercise of French Polynesia’s rights and duties—including the rights of exploration and exploitation of biological and non-biological natural resources as well as the duty to support the social, economic, and cultural development of its people—is supported and facilitated by a set of policy frameworks and pluri-annual action plans.⁵⁵ These are adopted by the government and implemented by administrative departments, along with institutional partners, including the French state, townships, civil society, and private stakeholders.⁵⁶ Over twenty strategies and policy plans,⁵⁷ as well as legal codes and frameworks that regulate and facilitate the management and exploitation of French Polynesia’s resources (including an energy-climate plan, an

51. As provided by OSL 2004, *supra* note 36, art. 7, to be applicable in French Polynesia, national French laws must expressly state their applicability to French Polynesia. Even if France has expressly stated the applicability of a law to French Polynesia, the French Polynesia Assembly can repeal or change a national French law, insofar as it affects French Polynesia, if the law interferes with matters pertaining to French Polynesia as established by the Constitutional Council. OSL 2004, *supra* note 36, art. 12. This implementation of the legal principle of “legislative specialty” is one of the additional benefits accorded to French Polynesia by OSL 2004.

52. ICCPR, *supra* note 10, art. 1, ¶ 2; ICESCR, *supra* note 10, art. 1, ¶ 2.

53. OSL 2004, *supra* note 36, art. 47(1).

54. *Id.* art. 47.

55. 1 PRESIDENT DE LA POLYNESIE FRANÇAISE, RAPPORT DU PRESIDENT DE LA POLYNESIE FRANÇAISE A L’ASSEMBLEE DE LA POLYNESIE FRANÇAISE 102-30, 162-70 (2019), <https://www.presidence.pf/wp-content/uploads/2018/08/Rapport-du-Président-année-civile-2017-TOME-1.pdf> [<https://perma.cc/Q28W-2TPQ>].

56. *Id.*

57. *Id.* at 4-14 (providing a table of contents noting the strategies and plans).

offshore-fishing policy, and a framework for sustainable domestic transport), have been developed to date.⁵⁸

The realization of these development goals, however, faces many challenges, including the adverse impacts of climate change and ocean acidification. Already, French Polynesia has seen an increase in average temperature of one degree Celsius over the past thirty years and a sea level rise of about 1.2 centimeters per year for the past two decades.⁵⁹ In addition, episodes of El Niño have contributed to mass-bleaching events that take a toll on the health of coral reefs.⁶⁰

As an island country, French Polynesia is particularly vulnerable to climate change and ocean acidification. The tourism sector has focused its marketing on the exceptional beauty of the French Polynesian environment, its turquoise waters and colorful reefs being the main attraction.⁶¹ Degradation of these ecosystems will diminish the destination's value.⁶² Fisheries will also be impacted:

58. 2 PRESIDENT DE LA POLYNESIE FRANÇAISE, RAPPORT DU PRESIDENT DE LA POLYNESIE FRANÇAISE A L'ASSEMBLEE DE LA POLYNESIE FRANÇAISE 11 (2019), <https://www.presidence.pf/wp-content/uploads/2018/08/Rapport-du-Président-année-civile-2017-TOME-2.pdf> [<https://perma.cc/8XR4-3F6R>]. Activity and spending reports are provided on an annual basis to the Assembly of French Polynesia pursuant to statutory law. See OSL 2004, *supra* note 36, art. 155.

59. CREOCEAN, L'ÉTAT DE L'ENVIRONNEMENT EN POLYNESIE FRANÇAISE 215 (2015), **Error! Hyperlink reference not valid.** <https://creocean.fr/sites/default/files/Diren-etat-environnement-integral.pdf> [<https://perma.cc/2QGC-7J4X>].

60. *Id.* at 216.

61. See INSTITUT DE LA STATISTIQUE DE LA POLYNESIE FRANÇAISE, TABLEAU DE BORD: TOURISME (2019), <http://www.ispf.pf/docs/default-source/tb-tourisme/tb-2019-t1.pdf?sfvrsn=4> [<https://perma.cc/68QD-GME6>]; see also MINISTERE DU TOURISME DE LA POLYNESIE FRANÇAISE, STRATEGIE DE DEVELOPPEMENT TOURISTIQUE DE LA POLYNESIE FRANÇAISE 2015-2020, at 12-26 (2015).

62. Geomorphologically, French Polynesia is home to twenty percent of the world's atolls, most of them located in the Tuamotu Islands archipelago. Philippe Dufour, *Diversité des Atolls de Polynésie Française*, INSTITUT DE RECHERCHE POUR LE DEVELOPPEMENT (Fr.), **Error! Hyperlink reference not valid.** <http://www.atolls-polynesie.ird.fr/irdpoly/divatoll.htm> [<https://perma.cc/3R49-GUZQ>].

There are eighty-five atolls in French Polynesia, many of which are inhabited. *Id.* Intensification of droughts, cyclones, storm surges, ocean acidification, and increase in ocean temperatures are some of the main hazards that face these atolls and their inhabitants.

French Polynesian coral reefs are also suffering from increased ocean temperature and ocean acidification. CRÉOCÉAN, *supra* note 59, at 18. These dangers are particularly acute when combined with more localized stressors such as land-based pollution and overfishing. *Id.* at 18-19. Coral reefs, which cover fifteen thousand square kilometers of French Polynesian ocean floor, provide a habitat for a quarter of all marine life globally as well as protection for the atolls against storm surges and coastal erosion. *Id.* at 60. The benefits delivered by coral reefs in French Polynesia amount to about six billion FCFP in revenue to the country annually. *Id.* These ecosystems, however, are some of the most sensitive to the effects of climate change and

coastal fisheries will suffer from degradation of coral reefs, and offshore tuna fisheries will have to adapt to changes in the biomass and migration routes of the fish.⁶³ The pearl industry could also be hurt by increased sea temperatures and ocean acidification.⁶⁴

Climate change entails both direct and indirect costs. The economic consequences of extreme events are the most apparent and have already increased in severity and frequency. Twenty-four governmental orders recognizing the impact of natural disasters have been issued in the past ten years, compared to nine in the previous decade.⁶⁵ These orders unblock government funds to help victims of natural disasters and to reconstruct or repair damages to public infrastructure, such as roads, bridges, or ports.⁶⁶ In 2010, category-five Cyclone Oli cost the French Polynesian government at least six billion FCFP (about fifty to

ocean acidification. Given current trends, coral cover is likely to decrease by up to forty percent by 2100. *Id.* at 216.

63. Since the mid-1990s, offshore fishing, including for tuna, has been exclusively conducted by local companies and fleets, with locally manufactured vessels. In 2018, about twelve million euros worth of fish was exported, representing ten percent of total French Polynesian exports and twenty percent of the total yearly catch. Assemblée de la Polynésie Française, *Pacific Islands Parliaments Group—Conference 2019*, YOUTUBE (Sept. 11, 2019), https://www.youtube.com/watch?time_continue=5944&v=DngsvhJHPpQ [<https://perma.cc/KW8E-BLY4>]. While projections show that tuna stocks might be migrating to the waters of French Polynesia due to climate change, they also show that the biomass of these species is likely to decrease. See INNA SENINA ET AL., IMPACT OF CLIMATE CHANGE ON TROPICAL TUNA SPECIES AND TUNA FISHERIES IN PACIFIC ISLAND WATERS AND HIGH SEAS AREAS 3-4 (2018).
64. FRENCH POLYNESIA & ADEME, PLAN CLIMAT-ENERGIE DE LA POLYNESIE FRANÇAISE 13 (2012) http://www.polynesie-francaise.ademe.fr/sites/default/files/files/mediatheque/maquette_pce_2015-bdef_dble_page.pdf [<https://perma.cc/BNK2-AQGQ>] [hereinafter PLAN CLIMAT-ENERGIE]. The *pinctada margaritifera* is the French Polynesian pearl oyster. *Gestion Intégrée et Adaptation de la Perliculture en Polynésie Française dans le Contexte du Changement Global: Approche Environnementale, Économique et Sociale – POLYPERL*, AGENCE NATIONALE DE LA RECHERCHE, https://anr.fr/fr/projets-finances-et-impact/projets-finances/projet/funded/project/anr-11-agro-0006/?tx_anrprojects_funded%5Bcontroller%5D=Funded&cHash=f3dbb83492f61a8cfbaa5071d508f53 [<https://perma.cc/C9GZ-4GUT>]. *Pinctada margaritifera*, which are as shell-mollusks, are sensitive to temperature and pH levels. *Id.* A decrease in pH slows the growth of the oyster's shell and alters its internal surface. *Id.* While this does not necessarily directly threaten the survival of the oysters, the warming of the water restricts their metabolism and slows their growth, which in turn could endanger the long-term survival of the species in Polynesia. *Id.* In addition, warming can also impact the availability of food sources for the oysters and can contribute to an increase in pathogen levels that can harm the oysters. *Id.*
65. *Recherche d'un Texte*, LEXPOL, <http://lexpol.cloud.pf/LexpolRecherche.php?1> [<https://perma.cc/JKX8-RWJ8>].
66. Through Resolution 92-94 AT of June 1, 1992, as amended, French Polynesia has created a disaster-victims' aid account, which aims to support households in rebuilding homes that have been destroyed or severely damaged. In addition, the resolution requires the government to pay to rebuild and repair public infrastructure.

sixty million U.S. dollars).⁶⁷ If further events of similar magnitudes are repeated, they will likely cause French Polynesia significant financial distress.

Adapting infrastructure and the economic model can diminish these future costs and decrease the vulnerability of peoples and islands. This adaptation should be conducted through mainstreaming climate-change considerations in all sectors by adopting a climate-compatible, sustainable-development model. This should include shifting to a less fossil-fuel-dependent economic model;⁶⁸ diminishing the ecological footprint of public infrastructure, including maritime and coastal infrastructure; and building infrastructure that takes into account climate-impact projections.⁶⁹ Such adaptations, however, require significant economic means.

Currently, the development model of French Polynesia is strongly dependent on fossil fuels, particularly for maritime and air transportation.⁷⁰ Additional vulnerabilities include French Polynesia's dependence on imported consumable goods, the country's vast geography, and the heavy reliance on French Polynesia's capital, Papeete (which itself is remote from overseas ports), as the main transportation hub for the entire country.⁷¹ In addition to being subject to fluctuations in international oil prices, French Polynesian economic sectors, particularly tourism and exports (for instance, in tuna), could be negatively impacted by international efforts to limit carbon footprints. This could be especially true if French Polynesian transport industries cannot achieve the required technological advances necessary to comply with those efforts.⁷²

67. CRÉOCÉAN, *supra* note 59, at 208.

68. All sectors of the economy depend significantly on fossil fuels for maritime and air transportation as well as for electricity generation. As a result, when international oil prices surge, costs to the local economy increase. See PLAN CLIMAT-ENERGIE, *supra* note 64, at 15-20; see also EXPLICIT, MINISTÈRE DE L'ENVIRONNEMENT, DE L'ÉNERGIE ET DES MINES & PAE TAI PAE UTA, PLAN CLIMAT STRATEGIQUE DE LA POLYNÉSIE FRANÇAISE 50-61 (2012) [hereinafter PLAN CLIMAT STRATEGIQUE].

69. PLAN CLIMAT STRATEGIQUE, *supra* note 68, at 10. This plan is based on six thematic pillars: (1) sustainable mobility and robust transport systems; (2) diversification and reduced consumption of sustainable energy; (3) energy efficiency, resilience and responsibility of local production systems; (4) adaptation and resistance of infrastructure to climate and energy shocks; (5) strengthening natural and cultural heritage to urban pressures and climate shocks; and (6) integrating emerging risks and challenges into public policy. *Id.*

70. PLAN CLIMAT-ENERGIE, *supra* note 64, at 13; see also PLAN CLIMAT STRATEGIQUE, *supra* note 68, at 50-61.

71. PLAN CLIMAT STRATEGIQUE, *supra* note 68, at 50-75.

72. This is an emerging debate in the maritime transport sector in the Pacific, as exemplified for instance in the discussions held during the Pacific Ocean Alliance meeting from October 1-4, 2019 in Suva, Fiji. A report of the meeting will soon be available at <https://opocbluepacific.net>. The main question discussed during the meeting was whether the region should focus on decarbonizing the transport industry or on improving adequate transport services to

French Polynesians, including economic and political actors, are waking up to the urgent call to effectively engage in sustainable development. Climate change and ocean acidification pose significant obstacles for the French Polynesian people to achieve their ambitions and goals. While French Polynesia has not traditionally been a subject of the international narrative of existential threats posed by climate change (unlike the Republic of Kiribati, discussed below), the challenges posed by climate change on the development and self-determination of the people of French Polynesia are substantial. French Polynesia's status in the U.N. as a non-self-governing territory undermines its ability to obtain the additional aid assistance available to fully independent states, including from the Green Climate Fund and similar organizations. Self-determination is thus doubly affected. First, climate change and related natural phenomena may undermine the ability of the people of French Polynesia "for their own ends, to freely dispose of the natural wealth and resources" within their territory for economic, social, and cultural development,⁷³ a core component of the right of peoples to self-determination. This, in turn, compels continued French Polynesian economic dependence on the French state for climate-change adaptation aid and similar assistance⁷⁴ and makes any further political and legal powers gained more symbolic than functional. Regardless of whether French Polynesia, alone or with its institutional partners, rises to the challenges presented by climate change and associated natural phenomena, its efforts will only be successful if international partners participate in global mitigation efforts and implement international commitments to achieve sustainable development that leaves no one behind.

B. Republic of Kiribati

Kiribati—including its exclusive economic zone, which is one of the largest in the world—covers over 3.3 million square kilometers,⁷⁵ an area larger than

remote communities. The tradeoff between environmental consciousness and social equity is particularly poignant given that currently available technology cannot successfully meet both objectives.

73. ICCPR, *supra* note 10, art. 1, ¶ 2; ICESCR, *supra* note 10, art. 1, ¶ 2.

74. For instance, total French state expenditures in French Polynesia in 2017 amounted to FCFP 185 billion. French Polynesian government expenditures amounted to FCFP 134 billion, some of which was directly funded by French state expenditures. *French Polynesia at a Glance – 2018*, *supra* note 37.

75. As described in Kiribati's national development policy. GOV'T OF KIRIBATI, KIRIBATI DEVELOPMENT PLAN 2016-2019 (2016), <http://www.mfed.gov.ki/sites/default/files/Kiribati%20Development%20Plan%202016%20-%202019.pdf> [https://perma.cc/8PB5-YPSQ] [hereinafter KDP].

India's landmass.⁷⁶ Kiribati's land area, however, is proportionately miniscule. It has thirty-three islands, twenty-one of which are inhabited, spread among three archipelagos with a total land area of only 810 square kilometers.⁷⁷ As a collection of atolls, most of Kiribati is coastal. The land area barely rises above two meters on average, reaching three meters at its highest point, and islands average a few hundred meters at their widest.⁷⁸

Kiribati emerged from the Gilbert and Ellice Islands, former colonies of the British Empire colonized in 1915. In October 1975, with the agreement of the Gilbert Islands, the Ellice Islands separated from the rest of the colony to become Tuvalu. The Gilbert Islands attained full internal self-governance on January 1, 1977.⁷⁹

After attaining self-governance, the government of the Gilbert Islands proceeded toward independence as part of its exercise of the right to self-determination. In late November 1978, at a constitutional conference in London, it was agreed that, subject to the approval of the United Kingdom (UK) Parliament, the Gilbert Islands should become an independent republic within the British Commonwealth.⁸⁰ On July 12, 1979, the Kiribati Bill was presented to the UK Parliament to enable the Gilbert Islands to achieve independence.⁸¹ Passage of the bill ushered in the birth of a new state: the Republic of Kiribati.

Relevant to our current inquiry, during the debate in the UK Parliament on the Kiribati Bill, there were extensive discussions of how the government and people of Kiribati would survive without strong economic prospects and without the support of the British government.⁸² The passage of the bill and the forty years of peaceful governance that followed are a tribute to the resourcefulness and hard work of the government and people of Kiribati.

-
- 76. *Countries Compared: Total Area in Square Kilometers*, NATIONMASTER, <https://www.nationmaster.com/country-info/stats/Geography/Area/Total> [https://perma.cc/2345-33EM] (noting that India has an area of 3.29 million square kilometers).
 - 77. *The World Factbook: Kiribati*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html> [https://perma.cc/BT4B-4JMU]. This is roughly equivalent to an area four times the size of Washington, D.C. *Id.*
 - 78. See Maryanne Loughry & Jane McAdam, *Kiribati: Relocation and Adaptation*, 31 FORCED MIGRATION REV. 51, 51-52 (2008); John F. Marshall & G. Jacobson, *Holocene Growth of a Mid-Pacific Atoll: Tarawa, Kiribati* 4 CORAL REEFS 11, 11-17 (1985).
 - 79. Tearinaki P. Tanielu, *When Rising Sea Levels Question Sovereignty and Statehood: Lessons Learned from Kiribati* (2017) (unpublished M.A. thesis, University of Southampton) (on file with authors).
 - 80. 398 Parl Deb HL (5th ser.) (1979) col. 1593 (UK) [hereinafter Hansard Record], https://api.parliament.uk/historic-hansard/lords/1979/feb/19/kiribati-bill-hl#S5LV0398Po_19790219_HOL_226 [https://perma.cc/ZRV9-9YMD].
 - 81. Kiribati Independence Order 1979 (UK).
 - 82. Hansard Record, *supra* note 80, at col. 1593.

The impact of climate change, particularly sea-level rise, is not a new problem for the government of Kiribati. As early as the 1980s, when the consequences of global warming, shifting long-term weather patterns, and sea-level rise began to gain traction in political affairs globally,⁸³ the threats of climate change were a concern for the government of Kiribati.⁸⁴ Various reports⁸⁵ have demonstrated that Kiribati's crops are becoming less productive, fresh water is becoming increasingly scarce,⁸⁶ shorelines are eroding,⁸⁷ and land will become progressively inundated with sea water.⁸⁸ The plight of the peoples of Small Island Developing States⁸⁹ due to climate change have been extensively documented.⁹⁰ These effects range from rising sea levels that can erode and inundate coastal areas,⁹¹ to salt-water intrusions that destroy limited freshwater resources and damage food crops,⁹² to entire islands sinking and whole nations "disappearing."⁹³ These

-
83. See Dale Jamieson, *Ethics, Public Policy, and Global Warming*, 5 GLOBAL BIOETHICS 31, 31-42 (1992); Stephen Schneider, *The Global Warming Debate: Science or Politics?*, 24 ENVTL. SCI. & TECH. 432, 432-35 (1990).
84. Babera Kirata O.B.E., Minister of Home Affairs & Decentralisation of Kiribati, Kiribati Country Statement Delivered at the Small State Conference on Sea Level Rise (Nov. 16-18, 1989), <http://www.islandvulnerability.org/slr1989/kiribati.pdf> [<https://perma.cc/334K-FES2>].
85. See, e.g., INTERGOV'TL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2014); IPCC 1.5, *supra* note 23.
86. See, e.g., John P. Cauchi et al., *Climate Change, Food Security and Health in Kiribati: A Narrative Review of the Literature*, 12 GLOB. HEALTH ACTION 1 (2019).
87. See, e.g., John Corcoran, Implications of Climate Change for the Livelihoods of Urban Dwellers in Kiribati 36, 267 (2016) (unpublished Ph.D. dissertation, University of Waikato) (on file with authors).
88. See, e.g., Elfriede Hermann, *Climate Change and Worries over Land: Articulations in the Atoll State of Kiribati*, in ENVIRONMENTAL TRANSFORMATIONS AND CULTURAL RESPONSES: ONTOLOGIES, PRACTICES, AND DISCOURSES IN OCEANIA 49 (Eveline Dürr & Arno Pascht eds., 2017).
89. A list of such states can be found on the U.N. website. *Small Island Developing States*, UNITED NATIONS, <https://sustainabledevelopment.un.org/topics/sids/list> [<https://perma.cc/7GH3-3ZZB>].
90. See, e.g., Silja Klepp & Johannes Herbeck, *The Politics of Environmental Migration and Climate Justice in the Pacific Region*, 7 J. HUM. RTS. & ENV'T 54 (2016).
91. Taberannang Korauaba, Media and the Politics of Climate Change in Kiribati: A Case Study on Journalism in a "Disappearing Nation" (Feb. 28, 2012) (unpublished master's thesis, Auckland University of Technology) (on file with authors).
92. *Id.*
93. James Ker-Lindsay, *Climate Change and State Death*, 58 SURVIVAL 73 (2016); Kenneth R. Weiss, *Leader of Island Nation Advocates Exit Strategy for Rising Seas*, NAT'L GEOGRAPHIC, <http://news.nationalgeographic.com/2015/03/150310-pacific-atoll-kiribati-anote-tong-climate-change-rising-seas> [<https://perma.cc/2QKR-9JMP>].

physical impacts are well understood by the government of Kiribati, which has promulgated national adaptation policies to address them.⁹⁴

What has rarely been discussed in climate discourse or media articles is the impact of the *narrative* of climate change as an “existential threat” on the right of peoples to self-determination. Such a narrative, while well-meaning, is risky and creates policy uncertainty. How can a state decide its future, and the future of its people, if its future is limited and even doomed? How can a people enjoy the right to self-determination, as provided for under the U.N. Charter, if such a right is undermined by the uncertainty of the country’s continued existence? How can the component right to permanent sovereignty over natural resources be exercised if we take this narrative of total demise at face value?

Other commentators have claimed that countries such as Kiribati have no hope of survival in their current, territorially delimited configuration. This approach implies that emigration is the only option for the people of Kiribati, though the sensitive subject of climate migration does not sit well with the government and people of Kiribati.⁹⁵ Many scholars have thoroughly discussed this subject,⁹⁶ albeit with some disdain for the implications it poses for the people of these countries, especially as with respect to the term “climate refugees.”⁹⁷ We say “disdain” because inaccurate commentaries on climate migration seem to suggest that local communities, in fear for their lives and livelihoods, are opting to emigrate. This is not accurate for much of the Pacific, as the majority of the people do not want to leave their homes “forever” and do not wish to lose connections with their ancestral land.⁹⁸ The loss of identity and the negative connotations associated with the term “refugee” are viewed with disfavor by impacted communities, including those in Kiribati.⁹⁹

94. See, e.g., KDP, *supra* note 75; GOV'T OF KIRIBATI, KIRIBATI JOINT IMPLEMENTATION PLAN FOR CLIMATE CHANGE AND DISASTER RISK MANAGEMENT (2014) http://www.mfed.gov.ki/sites/default/files/KJIP%20BOOK%20WEB%20SINGLE_o.pdf [<https://perma.cc/9489-HX3V>].

95. Klepp & Herbeck, *supra* note 90.

96. See, e.g., Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood*, in *INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE* (Rosemary Rayfuse & Shirley Scott eds., 2012); Roy Smith, *Should They Stay or Should They Go? A Discourse Analysis of Factors Influencing Relocation Decisions Among the Outer Islands of Tuvalu and Kiribati*, 1 J. N.Z. & PAC. STUD. 23 (2013).

97. See, e.g., Carol Farbotko & Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 GLOBAL ENVTL. CHANGE 382 (2012) (characterizing conventional climate refugee narratives as reductive and problematic).

98. Karen Elizabeth McNamara & Chris Gibson, ‘We Do Not Want to Leave Our Land’: Pacific Ambassadors at the United Nations Resist the Category of ‘Climate Refugees’, 40 GEOFORUM 475 (2009).

99. *Id.*

The legal implications of emigration are equally uncertain. For instance, Ioane Teitiota, a Kiribati national, became the first person to ever apply for asylum as a climate refugee when he made his claim in New Zealand in 2014. The New Zealand court dismissed the case and issued a deportation order against Teitiota, claiming an absence of legal principles that allow for recognition of climate refugees under the framework of the 1961 Convention Relating to the Status of Refugees.¹⁰⁰ Teitiota later filed an individual complaint against New Zealand with the U.N. Human Rights Committee, arguing that the court's decision violated Article 6 of the ICCPR, which recognizes and protects the right to life.¹⁰¹ The Committee determined that New Zealand had not violated Article 6. However, in a ground-breaking finding, the Committee acknowledged that "given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."¹⁰²

Additionally, there is the issue of statehood. A dire problem due to climate change could arise where an island state such as Kiribati, whose freshwater deposits and land have turned salty, can no longer sustain human habitation or economic life. According to Article 121 of the 1982 United Nations Convention on the Law of the Sea, such a landmass would arguably not be entitled to an exclusive economic zone or a continental shelf.¹⁰³ In other words, as a coastal state, it could lose much of its territory, a key indicator of statehood under international law. A recent essay by former Australian Prime Minister Kevin Rudd suggests allowing the people of Kiribati, Tuvalu, and Nauru to move to Australia and to obtain Australian citizenship. However, if all the citizens of Kiribati, Tuvalu, and Nauru become Australian citizens, Australia will gain the right to regulate and manage the exclusive economic zones of these sovereign nations.¹⁰⁴

100. See Kenneth R. Weiss, *The Making of a Climate Refugee*, FOREIGN POL'Y (Jan. 28, 2015), <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota> [https://perma.cc/A462-VB37].

101. *Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims*, U.N. Human Rights Office of the High Comm'r (Jan. 21, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482&LangID=E> [https://perma.cc/S8XT-HZTV].

102. U.N. Human Rights Comm., Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, at 9.11, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

103. UNCLOS, *supra* note 37; see also Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011); William C. G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 27, 42-43 (2006).

104. Kevin Rudd, *The Complacent Country*, KEVIN RUDD (Feb. 4, 2019), <http://kevinrudd.com/2019/02/04/the-complacent-country> [https://perma.cc/LX8D-U87K].

This suggestion was promptly rejected by Pacific Island leaders, but it provides evidence of how the narrative of the existential threats of climate change can generate discourse in a manner that threatens to undermine state sovereignty and the right of peoples to self-determination. It is inconceivable to contemplate that such a proposal could be seriously considered by the government of Australia, or any government for that matter, as it is highly “neocolonialist.” The former Prime Minister of Tuvalu described the proposal as “imperial thinking” and rebutted that “we [Tuvalu] are a fully independent country, and there is no way I’m going to compromise our rights to fisheries resources, our rights to our immediate resources.”¹⁰⁵ Such proposals erode the international legal corpus that defines the rights of the peoples of Kiribati, Tuvalu, and Nauru to self-determination.

In 2016, the incoming administration of the current President of Kiribati, Taneti Maamau, took an approach that challenges this prevailing narrative of climate change as an existential threat to island nations. President Maamau proposed a plan that would see the country transform, develop, and survive.¹⁰⁶ The plan does not accept climate change as an existential threat. Instead, the plan encourages the people of Kiribati to embrace the challenges that climate change will pose, and turn them into opportunities. It proposes that Kiribati should become the next “Singapore and Dubai” through a range of transformational development projects, mostly premised on marine resources and tourism. Some of the policy actions to realize these goals involve purchasing two jets to boost transportation for tourism, implementing infrastructure projects to upgrade the airport, and laying underwater cable to access high-speed internet. The plan can be viewed as overly optimistic, but it is nonetheless a strong political statement that Kiribati, as a sovereign nation, is not going anywhere. The plan also highlights that Kiribati’s most important resources are its people, and that it plans to develop its human resources to allow for a prosperous future in which the people of Kiribati will continue to live on their own land, in their own homes, on their own terms.

In the context of this Essay, Kiribati’s new approach is aligned with the concept of a people’s right to self-determination as enshrined under international law, particularly with respect to the people’s pursuit of economic, social, and cultural development, including the dispensation of natural resources. It is a political stance premised on international conventions and normative practices of states, as discussed in Part II. In that sense, this new approach dismisses any

105. Natalie Sauer, “Imperialist” Citizenship Idea Sparks Spat Between Australia and Pacific Islanders, CLIMATE HOME NEWS, <https://www.climatechangenews.com/2019/02/18/imperialist-citizenship-idea-sparks-spat-australia-pacific-islanders> [https://perma.cc/4GDF-VLSF].

106. GOV’T OF KIRIBATI, KIRIBATI 20-YEAR VISION 2016-2036 (2016), <http://www.mfed.gov.ki/sites/default/files/KV20%20VISION.pdf> [https://perma.cc/V9FK-D972].

conclusion that Kiribati would disappear as a result of climate change, with the understanding that “climate defeatism” can have practical implications on national development.¹⁰⁷ Countries such as Kiribati, which demonstrate cohesive “ontological” cultural identities,¹⁰⁸ will continue to exist as states even if some of their physical territory becomes uninhabitable.

One of the authors has observed that, as a response to the narrative of “sinking islands” and “disappearing nations,” it has become a practice of the government of Kiribati to refrain from entering into discussions and conferences focusing on these topics. This restraint does not necessarily indicate opposition to these conferences. Instead, in the absence of policy measures focused on topics of continued self-determination, and in line with the Kiribati 20-Year Vision policy,¹⁰⁹ the government of Kiribati would simply gain little by attending these conferences. Regardless of the adverse effects of climate change and related natural phenomena, the people of Kiribati have an inextinguishable right to self-determination in all its forms, including in connection with the dispensation of natural resources.

States such as Kiribati can make multiple arguments to this effect. First, Kiribati can argue that, once granted, recognition of statehood cannot be rescinded. Kiribati is a member of the Commonwealth, the United Nations, the Pacific Islands Forum, and the World Bank, among other multilateral organizations. The constitutions of most international and regional bodies appear to make no provision for rescinding membership, and there is no provision within the U.N. Charter for revoking membership for states that no longer exist. The closest the Charter comes to such a mechanism is a process of expulsion, under Article 6, for states that persistently violate the Charter’s principles, but this is distinct from expulsion due to a change in legal statehood status. Kiribati’s right to self-determination is linked to international recognition of its status as a sovereign independent state, a status that should not be altered by ominous projections of climate change.

Second, there is precedent in the international community according to which, once a territory is recognized as belonging to a state, this recognition

107. Some of these implications include, inter alia, undermining efforts to facilitate adaptation to climate change, creating new identities, and deterring investments in sustainable resource management. See Jon Barnett, *The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries*, 58 ASIA PAC. VIEWPOINT 3, 3-13 (2017).

108. This refers to the notion of culture and society, and how people living on small islands stay together and live in extended families, in support of one another. For a vivid description of this concept, see Epeli Hau’Ofa, *A NEW OCEANIA: REDISCOVERING OUR SEA OF ISLANDS* 2-16 (1993).

109 KIRIBATI 20-YEAR VISION, *supra* note 106.

cannot be rescinded for any reason.¹¹⁰ States including Somalia and Kuwait, for example, have continued to enjoy recognition as such, despite the lack of a competent government, and despite invasion and occupation that effectively eliminated those states' territory. In such instances, international law "artificially constructs the continuation of the state."¹¹¹ Kiribati can cite this precedent to counter suggestions that the country will experience sovereign demise due to the impacts of climate change and related natural phenomena on its territorial boundaries.¹¹² Arguably, the best possible compromise is one that would allow Kiribati and other similarly situated states to continue implementing their obligations and commitments under existing international conventions, while at the same time allowing such states to continue pursuing their economic, social, and cultural development, with some certainty that their right to exist is not undermined, and with the recognition that such development is integral to the continued exercise of the right of those peoples to self-determination.

For over forty years, the government of Kiribati has demonstrated conviction as it exercised the right to self-determination, despite initial reservations by the UK Parliament. It should continue to exercise that right, in pursuance of a prosperous, healthy, and peaceful future, in full exercise of permanent sovereignty over natural resources, without being hamstrung by narratives of climate-change defeatism. The international community must respect that right, in line with its status as a *jus cogens* norm.

110. As described under Article 1 of the Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 19 (1936).

111. Ker-Lindsay, *supra* note 93, at 79; *see generally* Jennifer Mitzen, *Ontological Security in World Politics: State Identity and the Security Dilemma*, 12 EUR. J. INT'L REL. 341 (2006) (proposing that states seek ontological security through routine relations with other states). Another interesting example is that of the Sovereign Order of Malta. *See generally* Rosemary G. Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma* (Nov. 8, 2010) (unpublished manuscript), <https://papers.ssrn.com/abstract=1704835> [<https://perma.cc/JL3E-JLV7>] [*hereinafter* Rayfuse, *Maritime Entitlements*]; *see also* Rosemary G. Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States* (Apr. 1, 2009) (unpublished manuscript), <https://papers.ssrn.com/abstract=1412028> [<https://perma.cc/ZA3Q-FT8U>] [*hereinafter* Rayfuse, *W(h)ither Tuvalu?*].

112. There are a number of conceptions of international law and disappearing states which cannot be covered in this Essay due to space constraints, including work on the "deterritorialized State" by Rosemary G. Rayfuse, *see* Rayfuse, *Maritime Entitlements*, *supra* note 111; Rayfuse, *W(h)ither Tuvalu?*, *supra* note 111, and work on the "ex-situ Nation" by Maxine Burkett, *see* Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011), and by James Ker-Lindsay, *see* Ker-Lindsay, *supra* note 93.

CONCLUSION

Climate change and related natural phenomena, the result primarily of rampant anthropogenic greenhouse gas emissions, challenge the fundamental right of peoples to self-determination. They pose particular challenges for peoples in non-self-governing territories like French Polynesia, who remain deeply reliant on the largesse of administering foreign powers in adapting to climate change and related natural phenomena. They also pose challenges for peoples in fully independent states like the Republic of Kiribati, who find their long-sought-after sovereignty challenged by the physical realities of climate change and related natural phenomena, as well as by the attendant defeatist narrative.

The international community as a whole must uphold the fundamental right to self-determination, which is a *jus cogens* norm. This will require concerted and effective efforts to mitigate anthropogenic greenhouse gas emissions to the extent necessary to minimize their social, economic, environmental, political, legal, and moral implications for the exercise of permanent sovereignty over natural resources and, by extension, the right of peoples to self-determination. It will also require new conceptions of self-determination in the event that the physical territories to which self-determination has historically been tied are eroded. Otherwise, climate change and related natural phenomena will compromise the satisfactory conclusions of French Polynesia's and Kiribati's respective journeys to full self-determination.

Tekau Frere is a French Polynesian consultant working primarily with the Office of the Pacific Ocean Commissioner as an adviser on U.N. ocean processes. In this capacity, she is continuing her working relationship with U.N. delegations of Pacific Small Island Developing States in New York, with whom, for six years, she collaborated on various ocean-related processes. This included securing a dedicated sustainable development goal for oceans, working on the SAMOA Pathway, and participating in the "BBNJ" negotiations. She previously held positions of adviser to the minister of environment and mining (2011-2013) and to the minister of land-use planning and public works (2009-2011) for French Polynesia, during which time she worked on climate change, marine, and land-use planning policies. Ms. Frere holds a Bachelor of Arts in Political Science from the University of California, Los Angeles, and a Master in International Affairs from Columbia University's School of International and Public Affairs. She is sincerely grateful to a long-time friend who has become an informal legal advisor and mentor, Dr. Herve Raimana Lallemand. She specially acknowledges the men and women (politicians, diplomats, scientists, civil society representatives, private sector representatives) who are dedicating their careers and lives to finding a

solution against climate change. Lastly, she would like to extend an enormous thanks to her two co-authors.

Clement Yow Mulalap is an international lawyer with a focus on the law of the sea, climate change law, and Indigenous Peoples law. Clement (or "Yow," as he is more commonly called on his home island of Wa'ab in the Federated States of Micronesia) has been the legal adviser for the Permanent Mission of the Federated States of Micronesia to the United Nations for nearly a decade, during which time he has helped author government submissions to the International Seabed Authority, the International Tribunal for the Law of the Sea, and various multilateral environmental processes; as well as represented the Federated States of Micronesia in negotiations for major multilateral environmental agreements. He holds a Bachelor's Degree in Economics from the University of Hawaii at Manoa, a J.D. (with a certificate in Asia-Pacific Legal Studies) from the William S. Richardson School of Law, and an LL.M. in International Legal Studies from New York University School of Law. Ancestors, elders, family, friends, colleagues, teachers, mentors, champions for the environment and future generations, co-authors: Thank you for your guidance, inspiration, and tremendous work on all our behalf. Karim magar magargad.

Tearinaki Tanielu is the Director for Multilateral Affairs of the Kiribati Ministry for Foreign Affairs and Immigration. He is a former United Nations – Nippon Foundation Fellow and an Alliance of Small Islands States Climate Change Fellow, during which time he was based in New York and followed negotiations on climate change and oceans. He has served as Advisor to the Kiribati Permanent Representative to the United Nations, and he currently serves as Consultant to the International Seabed Authority, on secondment from his Government. His areas of expertise include climate change, oceans governance, law of the sea, and natural resources development. He holds a Bachelor's Degree in Marine Geology and Coastal Processes from the University of Queensland, Australia, and a MSc in Politics and International Relations from the University of Southampton, U.K. Thanks to Professor Jack Corbett (University of Southampton) and Professor Jon Barnett (University of Melbourne) for discussions that encouraged and shaped the section on Kiribati for this essay, and to all colleagues who assisted in providing feedback. To the Yale Law Journal editors and his wonderful co-authors: Kam bati n rabwa!

The views and content expressed in this Essay are those of the authors and do not necessarily reflect the views of the Kiribati Ministry for Foreign Affairs and Immigration, the Government of the Republic of Kiribati, or the National Government of the Federated States of Micronesia.