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978-1-107-02576-9 - Threatened Island Nations: Legal Implications of Rising Seas and
a Changing Climate

Edited by Michael B. Gerrard and Gregory E. Wannier

Excerpt

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Part I INTRODUCTION

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1 Overview

Gregory E. Wannier and Michael B. Gerrard

1. Introduction

In December 2008, tidal surges during the seasonal high-tide period (“King Tide”) covered Majuro, an atoll serving as capital of the Republic of the Marshall Islands, which is situated just north of the equator and midway between Hawaii and Australia. These tides washed out roads, low-lying houses, and other coastal installations; severely damaged freshwater-dependent plant life; and caused \$1.5 million in damages (about 1% of the national economy). This event was not unique: the Republic of the Marshall Islands is one of the lowest lying countries in the world, sitting only a few meters above static sea level at its highest point, and as a result Majuro has become accustomed to such tidal events every decade or so. However, as carbon emissions continue to increase around the world, sea levels continue to rise and extreme weather events become more numerous and intense, flooding events such as the flooding in Majuro will become more common. The Marshallese people can cope with such flooding events every few years, but perhaps not if they occur every few months. Even more intense flooding than already experienced could imperil the lives and certainly the livelihood of much of the population. If current trends in greenhouse gas emissions continue, it is entirely possible that life on the Marshall Islands could become untenable by the end of the twenty-first century.

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The Republic of the Marshall Islands is just one of several nations facing existential threats; other nations, mostly in the Pacific and Indian oceans, also face threats to the habitability of all or most of their territory. These threats raise serious legal questions about the continued viability of these States as well as the provision of protections for individuals who may need to relocate.

This book enlists leading scholars from around the world in considering whether these threatened nations can continue to exist under these circumstances; in what form they would exist; where their citizens can and should move, if at all; how to pay for their adaptation and relocation; and who can be held responsible. In answering these questions, the authors have largely focused their analysis on practical implications of the legal issues discussed. Threatened nations must prepare themselves legally for a future without habitable territory, and there are resulting diplomatic and political steps each nation could pursue to strengthen its legal standing into the future. The chapters in this book highlight current legal authorities and then explain how they can be used. The volume aims to provide a comprehensive summary of the legal issues at play and of legal options for the future, which can then guide constructive legal and political activities.

2. Scientific Summary and Impacts

As the oceanographer Mary-Elena Carr and colleagues show in Chapter 2, by the end of the twenty-first century a one-meter rise in sea levels appears to be inevitable, regardless of efforts to reduce greenhouse gas emissions. A two-meter rise is possible, but a rise of four meters is unlikely. For an island that is mostly or entirely one or two meters above sea level at mean high tide, these are extremely worrisome projections, especially when one considers storm surges that can raise the waters still higher, as well as the possibility of a catastrophic tsunami.

Chapter 2 also demonstrates that sea level rise is only one of the ways that climate change will affect small island nations. Tropical cyclones are projected to have greater intensity. Both droughts and floods may

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occur more frequently. The droughts lead to shortages of drinking water and impair food supplies; the floods damage infrastructure, contaminate freshwater and agricultural soils with saltwater, and may compel evacuation. Both can damage local ecosystems and reduce biodiversity. The absorption of carbon dioxide by the oceans is leading to ocean acidification, which harms marine organisms with shells and the coral reefs that are critical physical barriers for atoll islands, serving as protection against storm surges and high waves.

Human activities on these islands may exacerbate some of these trends. Coastal construction often relies on dredging and other reef-degradation activities, which may aggravate the impacts of rising sea levels. Within an island nation, degrading conditions in smaller islands may lead to population migration to larger islands; for example, with the flight from the outer islands, the population of Majuro is increasing rapidly, straining its already limited resources.

Chapter 2 explains these and other issues, setting the stage for the inevitable legal questions that then arise.

3. Migration

In the coming decades and beyond, it is likely that the large populations of these islands, as well as those in other climate-sensitive areas of the world, will need to resettle in other areas. Estimating the magnitudes of this migration is very difficult. Sea level rise, increasingly severe weather patterns, and desertification are the environmental influences that are most likely to force people from their homes, but population movement often results from a combination of environmental, social, political, and economic factors. Some communities have more resilience and ability to stay in place than others in the face of external threats.

In one widely cited estimate, Norman Myers predicts that there will be approximately 200 million climate-change migrants by 2050 across the globe.¹ There is no widely cited estimate for migration specifically

¹ Norman Myers, *Environmental Refugees: An Emergent Security Issue*, 13th Economic Forum, May 2005, Prague. www.osce.org/documents/eea/2005/05/14488-en.pdf.

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from the island nations. However, as Katrina Wyman notes in Chapter 11, the total population of the four most threatened island nations is approximately 500,000, which is about one-third of the total number of migrants accepted annually by the United States, Australia, and New Zealand. Thus, although displacement of the population of threatened island nations will cause great hardship for the affected people and will necessitate legal and political innovation, it should not itself significantly strain the existing world immigration system if countries are willing to take in these people. The greater concern is the cumulative impact of climate-induced migration from much more heavily populated areas such as Bangladesh and portions of Africa.

4. Sovereignty and Territory

One fundamental question that will affect these islands is what happens to the nations themselves if their island territories become uninhabitable. Most of the small island nations have histories as colonies, trust territories, or the like, and have only achieved statehood and sovereignty in recent decades. United Nations membership was attained by the Republic of the Maldives in 1965, the Republic of Vanuatu in 1981, the Republic of the Marshall Islands and the Federated States of Micronesia in 1991, the Republic of Palau in 1994, the Republic of Kiribati and the Republic of Nauru in 1999, and Tuvalu in 2000.² Sovereignty in the international system is of course a source of pride for any society, but it provides more practical benefits as well. It allows countries to establish systems of laws and government to govern themselves, to levy taxes, and to incur debts to finance public projects. Membership in the United Nations gives nations the ability to negotiate agreements, secure funding for their people, vote for measures that benefit them in the short and long term, participate in international fora, and otherwise acquire and exert political influence

² United Nations, Member States of the United Nations, <http://www.un.org/en/members/index.shtml>.

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in the international community. In short, statehood provides access to privileges that many of the most threatened islands rely on to provide or acquire crucial services for their citizens.

Given the importance of sovereignty, the question then becomes how such sovereignty can be preserved; the answer involves both legal and equitable considerations. As Jenny Grote-Stoutenburg argues in Chapter 3, in the international law of statehood there is a tension between the principle of effectiveness – which asks whether a State has a territory, population, government, and independence – and the principle of legality, which holds that the extinction of States must not violate some fundamental norms of international legal order, called *jus cogens* norms. In other words, it is very possible that some of these countries may no longer meet the traditional requirements for statehood (permanent territory and population); however, other nations may well continue to recognize these nations for equitable reasons (and in fact may be legally obligated to do so), meaning that the indices of statehood can likely be preserved.

If these indices are preserved, it then becomes necessary to think about how they should be organized after the population has evacuated. This might most effectively happen via an *ex-situ* arrangement, as outlined by Maxine Burkett in Chapter 4, whereby country representatives are given full power as national leaders in international law and would manage and distribute national resources to a scattered population, or diaspora. Such a situation would necessitate the establishment of a government system, whose main task would be the administration of national assets for the benefit of its people; that is, a so-called trusteeship system. As Professor Burkett notes, one way to administer this trusteeship could be to establish it under the United Nations Trusteeship system, which has overseen similar arrangements in the past (albeit with mixed success). Key here would be constant and active engagement with the diaspora and its chosen representatives in administering the system, thereby respecting the sovereignty of the nation *ex situ*.

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The extent of the resources available to any nation *ex situ* depends heavily on its ability to continue to access marine territories, which provide critical fishing and mineral rights. As currently set by the Law of the Sea Convention (LOSC), exclusive economic zones (EEZs) ordinarily extend 200 nautical miles from a nation's low-tide mark. However, the LOSC does not delineate permanent boundaries, and so traditionally EEZs would recede along with the coast if sea levels rose. Of more concern to small island nations, substantial marine territory – as much as 40,000 square nautical miles – could be threatened by the abandonment of a single island, because the LOSC clearly disallows marine territory for uninhabitable rocks. As Ann Powers and Christopher Stucko discuss in Chapter 5, the loss of marine territory could severely affect revenue sources for island nations, for some of which fishery revenues account for up to 42% of their national economies.

In response, Clive Schofield and David Freestone argue in Chapter 6 that precedent elsewhere may support the artificial preservation (or bulwarking) of islands to preserve existing claims. Japan most (in)famously bolstered Okinotorishima Island from a rock to a radar station that serves as a basis for a huge claim of territory to the south. Although other nations have repeatedly challenged this claim, it might be more difficult to mount a challenge to formerly habitable islands, for diplomatic reasons as well as equitable considerations.

In addition to physical responses to preserve existing land, innovations may be possible in the definition of baselines and territories. As Rosemary Rayfuse urges in Chapter 7, nations should define their baselines advantageously to avoid any loss of territory even as sea levels rise.

5. Protections and Solutions

If certain small island nations become uninhabitable, their populations will need to relocate somewhere. However, it remains unclear where they would go. The existing human rights regime and the patchwork of international protections for displaced peoples do not provide much

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direct guidance on this question, as Siobhan McInerney-Lankford makes clear in Chapter 8. Refugee law as established in the 1951 Convention on Refugees probably would not apply to climate migrants (although subsequent clarifying agreements applying to Africa and the Americas might), and there is no direct international obligation for any particular country to take in such migrants. Similarly, protections in the United States and Europe for victims of environmental disasters are temporary and leave no path to full residency. Human rights law may provide at least an avenue for assertions of rights, however; as McInerney-Lankford details, the patchwork of human rights standards, including the obligation to respect other nations, protect against human rights violations, and fulfill human rights in other countries, exerts at least a sort of legal obligation on large carbon-emitting States. However, human rights obligations are largely unenforceable in practice unless States accept them, taking away some utility (though not all, because of possible political/diplomatic effects) from the possibility of demonstrating human rights violations in the climate context.

Options also exist for international institutions to provide more aid and support to climate-displaced peoples. Traditional institutions that could be integral to this effort include the International Organization on Migration and the United Nations High Commissioner for Refugees. The United Nations Framework Convention on Climate Change (UNFCCC) may also be of potential use in organizing resettlement activities, as described by Michele Klein-Solomon and Koko Warner in Chapter 9. This is particularly true following the outcome of the 2010 Conference of the Parties in Cancun, which recognized the importance of “measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement... at national, regional and international levels.”³ Iona Millar and colleagues further suggest in Chapter 14 that the UNFCCC, more specifically its loss

3 United Nations Framework Convention on Climate Change, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (December 2010) ¶14(f).

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and damage mechanism, could be used to harness private sector funding and insurance protection for vulnerable parties.

As described earlier, existing frameworks offer some opportunities to arrange funding and resettlement options for the people of small island nations. However, it is almost universally acknowledged that existing institutions do not, and indeed cannot, provide a perfectly tailored solution to what will be a very difficult set of issues to resolve in the coming decades. In response, some scholars argue that a new international convention is required that would be tailored to the problem of climate migration. This group notably includes David Hodgkinson and Lucy Young, who outline their own proposal for a new climate-displacement treaty in Chapter 10 and highlight some of the major efforts made by other academics in the field. These and other proposals vary in their application and administrative structure, but all create refugee-like protections for qualifying environmental victims.

Other scholars, most prominently Jane McAdam, have argued instead that reinterpretation and utilization of existing treaties and institutions are the most effective and viable strategy, especially in view of the many varieties and causes of population migration and the political challenges inherent in reaching a new international agreement.⁴ Katrina M. Wyman makes this argument in Chapter 11 and turns the focus to existing agreements and relationships (formed for reasons other than climate change) between threatened nations and potential destination countries that allow migration. Domestic immigration laws in certain countries may also be used, and new bilateral agreements might be negotiated. The main arguments made by this set of scholars against reliance on a new international convention focus on the political difficulty associated with negotiating and obtaining individual countries' approval for a new convention; they argue that even if a new convention were approved it would be watered down to the point of ineffectiveness or simply not be adopted by the relevant countries, and they are concerned that efforts to

4 Jane McAdam, *Climate Change, Forced Migration, and International Law* (2012).