
Book Reviews

Michael B. Gerrard and Gregory E. Wannier (eds). **Threatened Island Nations.**

Legal Implications of Rising Seas and a Changing Climate. Cambridge:
Cambridge University Press, 2013. Pp. 666. ISBN: 9781107025769.

There is growing evidence that climate change-related impacts like rising sea levels, higher storm surges, and changing rainfall patterns are exacerbating existing vulnerabilities like poverty, isolation, and resource scarcity, and may eventually leave small island states uninhabitable, causing the displacement of entire populations. Among those particularly at risk are low-lying coral atoll states like Kiribati, Tuvalu, and the Republic of the Marshall Islands in the Pacific Ocean, and the Republic of the Maldives in the Indian Ocean.

Small island states have been active participants and leaders in climate change negotiations over the past two decades. Often acting collectively through the Alliance of Small Island States (AOSIS), they have drawn regional and international attention to the impacts of climate change on their territories and populations, adopting the Male' Declaration on the Human Dimension of Global Climate Change,¹ initiating a Human Rights Council Resolution on Human Rights and Climate Change,² contributing to the adoption of a General Assembly Resolution on the security implications of climate change,³ proposing that states request an Advisory Opinion from the International Court of Justice on state responsibility for transboundary climate change harms,⁴ and contributing to expert forums on climate change and displacement.⁵

The edited collection under review marks a fruitful collaboration between a small island state and the academic community. Emerging from a conference co-hosted by the Marshall Islands and Columbia Law School in May 2011, *Threatened Island Nations* is a timely and thorough contribution to a rapidly expanding debate. The authors address the unprecedented legal and practical challenges faced by the Marshall Islands and other low-lying small island states, whose territory may become uninhabitable as the impacts of climate change continue to bite. In doing so, they highlight the challenges presented by climate change to the concepts and principles that underpin international law, including statehood, sovereignty, territorial integrity, and self-determination.

While these challenges are attracting increasing international attention, they continue to invite more questions than answers. Speaking before the Security Council in 2011, for example, UN High Commissioner for Refugees António Guterres asked, '[w]here will these people go if and when it becomes impossible for them to remain in their own country?... [H]ow will they retain

¹ Male' Declaration on the Human Dimension of Global Climate Change, 14 Nov. 2007, available at: www.ciel.org/Publications/Male_Declaration_Nov07.pdf (last accessed 20 Jan. 2014).

² Human Rights Council Res. 10/4: Human Rights and Climate Change, 25 Mar. 2009. See also Human Rights Council Res. 7/23: Human Rights and Climate Change, 28 Mar. 2008.

³ GA Res. 63/281, 11 June 2009.

⁴ See, e.g., 'Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases', *UN News Centre* (22 Sept. 2011).

⁵ See, e.g., UNHCR Expert Roundtable on Climate Change and Displacement, 'Summary of Deliberations on Climate Change and Displacement' (22–25 Feb. 2011); McAdam, 'Pacific Islanders Lead Nansen Initiative Consultation on Cross-Border Displacement from Natural Disasters and Climate Change', *Brookings: Up Front* (30 May 2013).

their national identity? Is the world ready to accept the idea of a state without a territory?'.⁶ A year earlier, Ronald Jumeau, Seychelles Ambassador to the United States and United Nations, wondered, 'When you relocate and you lose your country, what happens? What's your status in the country you relocate to? Who are you? Do you have a government there? Government of what?'.⁷

Threatened Island Nations makes a bold attempt to address these and other questions from the perspective of international, regional, bilateral, and domestic law. It 'aims to provide a comprehensive summary of the legal issues at play and of legal options for the future' (at 4) and, true to its word, its contributors draw on a potentially overwhelming range of law, including refugee law, human rights law, the principle of *non-refoulement*, environmental law, maritime law, the climate change governance framework, the World Heritage Convention, the United Nations' trusteeship system, the Guiding Principles on Internal Displacement, temporary protection mechanisms, and domestic immigration and land use legislation.

While the inclusion of so many disparate legal perspectives could well have resulted in a fragmentary, disjointed collection, this effect is mitigated by the structure of the book. Editors Michael Gerrard and Gregory Wannier have skilfully woven together the chapters in three main thematic sections. The first focuses on questions of territory, statehood, and sovereignty. How can small island states maintain their territorial and maritime claims in the face of rising sea levels, and at what point will they cease to be recognized as states under international law? The second identifies possible solutions to the issue of climate change-related displacement, taking into account the constraints imposed by national immigration policies and political will. Some contributors propose the adoption of new legal norms, while others rely on existing legal frameworks. The third and final section considers whether there are any legal remedies available to these states or their citizens. Can anyone be held (legally or morally) responsible for the displacement of small island populations?

This collection provides a unique contribution to a field increasingly crowded with political theorists,⁸ geographers, and migration scholars,⁹ offering a refreshing legal counterpoint to a debate that is becoming increasingly polarized between sweeping claims of global justice and pragmatic accounts of 'migration as adaptation'.

Interestingly, however, it captures a similar debate occurring within the legal community, between those who propose the adoption of a new global treaty (for example, Hodgkinson and Young, ch. 10) and those who insist that the solution is to be found within existing law (McInerney-Lankford, ch. 8; Solomon and Warner, ch. 9; Wyman, ch. 11; Werksman, ch. 13).

⁶ Cited in Singh, 'Disaster Prevention Key to Stopping Climate Displacement', *UNISDR Secretariat* (19 Jan. 2012).

⁷ Interviewed by Neil Conan, 'Seychelles Sink as Climate Change Advances', *National Public Radio* (22 Sept. 2010).

⁸ See, e.g., Bradley, "'Migration in a Feverland": State Obligations Towards the Environmentally Displaced', 8 *J Int'l Political Theory* (2012) 147, at 157, fn.1; Kolers, 'Floating Provisos and Sinking Islands', 29 *J Applied Philosophy* (2012) 333; Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso', 27 *J Applied Philosophy* (2010) 359; Risse, 'The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth', 23 *Ethics and Int'l Affairs* (2009) 281.

⁹ See, e.g., Barnett and Adger, 'Climate Dangers and Atoll Countries', 61 *Climatic Change* (2003) 321; Campbell, 'Climate Induced Community Relocation in the Pacific: The Meaning and Importance of Land', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010), at 5; Connell, 'Losing Ground? Tuvalu, the Greenhouse Effect and the Garbage Can', 44 *Asia Pacific Viewpoint* (2003) 89; Morteux and Barnett, 'Climate Change, Migration and Adaptation in Funafuti, Tuvalu', 19 *Global Environmental Change* (2009) 105; Shen and Gemenne, 'Contrasted Views on Environmental Change and Migration: the Case of Tuvaluan Migration to New Zealand', 49 *Int'l Migration* (2011) 224.

Some combine a pragmatic analysis of existing legal obligations with an insistence on moral imperatives arising from duties of fairness, equality, and international justice (Stoutenburg, ch. 3; Burkett, ch. 4; Wood *et al.*, ch. 16), or draw our attention to the underlying object and purpose of international legal principles (Rayfuse, ch. 7). Others rely on the inherent flexibility of international law (Schofield and Freestone, ch. 6) and the potential for the development of new legal principles or mechanisms (Rayfuse, ch. 7; Schofield and Freestone, ch. 6; Millar, Gasgoine and Caldwell, ch. 14).

Curiously, several of the contributors (for example, McInerney-Lankford, ch. 8; Solomon and Warner, ch. 9; Bialek and Ariel, ch. 15) fail to – or only fleetingly – address the unique set of problems faced by the inhabitants of low-lying small island states, including loss of collective political, legal, and cultural identity, statehood, sovereignty, and self-determination. Instead, they examine the broader range of challenges confronting all those facing climate change-related displacement, including lack of adaptive capacity, loss of home, shelter, and livelihoods, access to legal rights and remedies, the siloed nature of international organizations and legal frameworks, difficulties in establishing state responsibility, and so on.

This review focuses on those chapters that (a) pay close attention to the specific issues faced by *Threatened Island Nations* (rather than including them as an after-thought), and (b) provide an indication of the breadth of legal scholarship in this field, from pragmatic analyses of existing law to visionary accounts of the law as it should be.

In earlier work, Katrina Wyman draws on moral cosmopolitanism and liberal egalitarianism to argue for the recognition of a right of safe haven or resettlement for the populations of small island states.¹⁰ In this volume, however, she offers a pragmatic analysis of the role that existing immigration law might play in facilitating the resettlement of small island populations. Wyman urges readers to focus on the ‘potential utility of building on the existing immigration policies of likely destination countries’ and to see the adoption of a new legal instrument ‘as a backstop rather than a top priority’ (at 338). She provides a useful two-tiered model for identifying and adapting migration channels to suit the needs of displaced small islanders (at 345–350). At a minimum, host states must have the capacity to admit sufficient numbers of islanders, and must facilitate permanent rather than temporary migration. Preferably, host states should also provide access to financial support, health care, and social services, and immigration mechanisms should be embedded in a durable legal framework that is resistant to changes in popular opinion.

However, a legal solution that relies on co-opting and expanding existing migration channels – and is therefore premised on the idea of migration as a privilege rather than a right – cannot adequately address the issue of collective displacement. It may, for example, exclude the most vulnerable and marginalized: those who are poor, unskilled, elderly, or disabled, or do not meet requirements of ‘good character’. It also creates a relationship of inequality between island and host states, leaving the latter vulnerable to sudden changes in immigration quotas or privileges, or the unilateral termination of migration agreements. And, like the proposals for a new multilateral legal instrument that she herself critiques, Wyman’s solution faces the obstacle of political will: why should host states open their borders to fleeing islanders? While Wyman acknowledges these difficulties, the main incentive she offers host states for expanding migration channels is the fact that island migrants will address labour shortages caused by an ageing population (at 362–363). Yet this line of reasoning can only exacerbate the problems of exclusion and inequality raised above, by excluding those who are unable to work and leaving others dependent on the host state’s need for skilled, able-bodied migrants.

¹⁰ See, e.g., Wyman, ‘Sinking States’, in D. Cole and E. Ostrom (eds), *Property in Land and Other Resources* (2012), at 439.

Jacob Werksman provides a similarly thorough exploration of existing law, with the aim of identifying a legal avenue through which an obligation to reduce harmful greenhouse gas emissions might be recognized and enforced. However, his analysis is undermined by his initial assumption that ‘a convincing causal connection can be established between greenhouse gas emissions and specific environmental impacts’, allowing a complainant to demonstrate that the specific emissions of one state ‘directly caused’ a specific impact in another state (at 412). However, as the Intergovernmental Panel on Climate Change (IPCC) has observed, ‘determining whether a specific, single extreme event is due to a specific cause, such as increasing greenhouse gases, is difficult, if not impossible’.¹¹ Other difficulties with establishing causation are addressed by Stoutenburg in her earlier chapter (at 83–85). Thus, Werksman’s analysis, which shows promise in developing workable propositions for assigning legal responsibility, is weakened by his reluctance more fully to address the question of causation in assigning state responsibility.

At the other end of the spectrum, David Hodgkinson and his colleagues are vocal proponents of a new multilateral treaty regime.¹² In this volume, Hodgkinson and Young reject reliance on existing legal mechanisms, arguing that, ‘given the nature and magnitude of the problem that climate change displacement presents, ad hoc measures based on existing domestic regimes may lead to inconsistency, confusion and conflict’ (at 308). Indeed, as Wannier and Gerrard point out in their introduction, ‘it is almost universally acknowledged that existing institutions do not, and indeed cannot, provide a perfectly tailored solution’ to the complex issues facing small island states threatened by climate change (at 10).

Hodgkinson and Young therefore propose the adoption of a multilateral Convention for Climate Change Displaced Persons that would address the gaps in existing law by regulating both internal and cross-border climate change-related displacement. While Hodgkinson’s Convention has been thoroughly critiqued elsewhere,¹³ what becomes clear in this chapter is its cumbersome complexity. Despite describing the Convention as a single, stand-alone instrument, the framework proposed by Hodgkinson and Young not only seeks to regulate internal, external, sudden- and slow-onset displacement, but also includes the establishment of a global Climate Change Displacement Organization (CCDO) that would oversee the *en masse* designation of climate change displaced persons and the negotiation of ‘bilateral displacement agreements’ between small island and host states, as well as ‘regional and multidisciplinary collaborations across developed and developing states, including government and non-government organisations’, to facilitate decision-making and resettlement processes (at 311, 317–318).

This infrastructural complexity leaves Hodgkinson and Young with little conceptual space to develop their principles for guiding the resettlement of small island populations. While they nod briefly towards pivotal issues of self-determination and the ‘safeguarding of intangible culture’, Hodgkinson and Young are unable or unwilling to develop these distinctive and interesting principles further.

Perhaps the most intriguing proposals come from those who lie somewhere along the spectrum between Werksman and Wyman’s pragmatic use of existing law and Hodgkinson and Young’s insistence on a complex new body of law, including the creative use of existing law deployed by Jenny Grote Stoutenburg (ch. 3), Maxine Burkett (ch. 4) and Rosemary Rayfuse (ch. 7). Stoutenburg, for example, explores the tension between declaratory and constitutive

¹¹ Hegerl *et al.*, ‘Understanding and Attributing Climate Change’, in S. Solomon *et al.* (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), at 665, 696.

¹² See list of publications available at: www.ccdpconvention.com/documents.html (last accessed 20 Jan. 2014).

¹³ See, e.g., McAdam, ‘Swimming Against the Tide: Why a Climate Change Displacement Treaty is not the Answer’, 23 *Int’l J Refugee L* (2011) 2.

theories of statehood in international law. Given that small island states are likely eventually to fail to meet the thresholds of effective statehood set out in international law, does the international community have a duty to continue to recognize them as states, even while they lack a defined territory, permanent population, effective government, or the capacity for independence? Stoutenburg, drawing on principles of 'international justice and solidarity', argues in the affirmative: states have, if not a strict legal duty, then 'at least a moral imperative for the continued recognition of "deterritorialized" states' (at 85), where this constitutive recognition would 'preserve the statehood of the island state in the sense of a legal fiction' (at 66).

However, like Wyman, who briefly gestures towards the moral duties of industrialized states to bolster her claims – by accepting island migrants, she argues, host states can 'partially discharge a moral debt owed to threatened island nations for contributing to climate change' (at 363) – Stoutenburg relies on but refrains from explaining or justifying the 'moral imperative' that compels states to continue to recognize their low-lying peers. What is the content of the principles of international justice and solidarity that Stoutenburg refers to, and what work are they doing in her argument? Existing bodies of law may not offer an adequate response to the threat posed by climate change to small island states, as most of the contributors to this collection attest. However, cursory references to moral duties cannot pick up the slack: more work is needed.

Burkett, following neatly on from Stoutenburg's account, proposes the recognition of a new category of state: the '*nation ex-situ*', a 'deterritorialized' sovereign entity led by elected representatives that governs its citizens even as they scatter across the world. A deterritorialized state, Burkett argues, provides a 'means of conserving the existing state and holding the resources and well-being of its citizens – in new and disparate locations – in the care of an entity acting in the best interests of its people' (at 90). It would retain its capacity to participate on an equal footing in the international community, maintain its maritime zones, provide diplomatic protection and consular services, protect (some of) the rights of its citizens, and provide a 'vital political and cultural nucleus' for its scattered population (at 107 ff).

Burkett argues that the strong presumption of the continuity of states in international law, coupled with the legal precedent set by the trusteeship system and alternative forms of statehood such as governments-in-exile, favours the widespread acceptance of 'creative interpretations of law to recognize the continued existence of a state' (at 94–95). Like Wyman and Stoutenburg, however, Burkett concludes that existing legal norms can provide neither sufficient content nor justification for the purposes of responding to the plight of small island states. She therefore turns to moral and political theory – in this case to ideas of cosmopolitanism and global citizenship – to further challenge 'neat' contemporary understandings of statehood, territory, and citizenship (at 99). Yet despite making an interesting foray into cosmopolitan theory, Burkett does not develop her normative arguments (there is no clarification, for example, of whether she is invoking moral, political, cultural, or legal cosmopolitanism), nor does she appear confident in relying on them to justify her concept of deterritorialized statehood and citizenship (if her arguments from the experience of cosmopolitanism and diaspora 'are not themselves convincing', Burkett invites us to return once more to the expansion of existing law (at 105)).

Perhaps the clearest message from this volume, despite having both feet firmly planted in the field of law, is that the complexity of the issues at hand calls for responsive, adaptive, preferably interdisciplinary analysis and solutions. As Burkett suggests (in an earlier paper on which her chapter draws substantially), 'if today the law strives for consistency, universality, and predictability, then the challenges of addressing climate change ... may instead require flexibility, individual application, and responsiveness'.¹⁴ While many of the chapters in this volume take

¹⁴ Burkett, 'The Nation *Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', 2 *Climate Law* (2011) 345, at 347.

interesting and provocative steps towards such an approach, more work is needed to develop and clarify their ideas, particularly those relating to the role of legal and moral theory in justifying the creative expansion of existing legal norms.

Individual Contributions

Gregory E. Wannier and Michael B. Gerrard, Overview;

Mary-Elena Carr, Madeleine Rubenstein, Alice Graff and Diego Villarreal, Sea Level Rise in a Changing Climate;

Jenny Grote Stoutenburg, When do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of 'Deterritorialized' Island States;

Maxine A. Burkett, The Nation *Ex-Situ*;

Ann Powers and Christopher Stucko, Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels;

Clive Schofield and David Freestone, Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise;

Rosemary Rayfuse, Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States;

Siobhán McInerney-Lankford, Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance;

Michele Klein Solomon and Koko Warner, Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks;

David Hodgkinson and Lucy Young, 'In the Face of Looming Catastrophe': A Treaty for Climate Change Displaced Persons;

Katrina M. Wyman, The National Immigration Policy Options: Limits and Potential;

Leslie A. Stein, Domestic Law for Resettlement of Persons Displaced by Climate Change;

Jacob David Werksman, Could a Small Island Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice;

Ilona Millar, Catherine Gascoigne and Elizabeth Caldwell, Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process;

Dean Bialek and Judah Ariel, Ocean Acidification: International Legal Avenues under the UN Convention on the Law of the Sea;

Mary Christina Wood, Stephen Leonard, Daniel Bartz and Nicola Peart, Securing Planetary Life Sources for Future Generations: Legal Actions Deriving from the Ancient Sovereign Trust Obligation;

Maketo Robert, Leonito (Jun) Bacalando Jr., Jasper Teulings, Kristin Casper, Jan Šrytr and Kristina Šabová, Transboundary Climate Challenge to Coal: One Small Step against Dirty Energy, one Giant Leap for Climate Justice.

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