

The Significance of Sea-level Rise for the Continuation of States and the Identity of their People

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Abstract

This article considers the legal institutions which give people identity and may anchor them to particular places. But what happens to that identity when "place" no longer exists? The focus of this article is the question of the legal status of those whose homelands disappear under the waves. Unlike persons displaced by war or political upheaval, as experienced after the Second World War, such persons do not fall within the usual understanding of the term "refugee". The erosion of the foundations of their identity has, in some cases, been gradual and incremental, but without territory can we talk of the sovereignty of states or the citizenship of individuals? Is the latter "place bound" or does citizenship mean more than just affiliation or "rootedness" to a particular place? Does nationality depend on a nation and if so, what is it that makes a nation? These questions are pertinent to all those whose homelands may disappear as a result of natural disasters or rising sea levels. They are particularly, but not only, relevant to people in the Pacific living on low-lying atolls such as in Tuvalu, Kiribati and parts of the Solomon Islands. In the Pacific, exchanges among strangers start with the question "Where are you from?" Can a person be a Pacific islander if he or she has no island? This article considers how that will be answered by those who are from lands under the seas, and what changes may have to be made to the international legal frameworks that determine identity in these circumstances.

Keywords

Pacific islands; climate change; sea-level rise; atolls; identity; refugees; plural legal systems; nationhood.

1 Introduction

Among the many concerns related to climate change is that of sea-level rise, and it has been suggested that "although they have done little to contribute to global warming, Pacific islanders may face some of the most dire consequences of rising seas."¹ While the coastal zones of most islands will be impacted,² the countries that have been identified as most vulnerable to climate change are Kiribati, Marshall Islands, Tokelau and Tuvalu, while in Solomon Islands five reef islands have already been lost to the rising sea.³ Sea-level rise in these countries threatens not only the sustainability of land occupation but also identity, because, as suggested by Hawaiian geographer Chip Fletcher: "The Micronesians and Polynesians (and one might add Melanesians) are place-based cultures. The bones of their ancestors are buried in these places. The land is considered a family member ... Moving would mean leaving behind one's culture, one's family, and the very basis of one's identity."⁴ As Anote Tong, the former President of Kiribati, has said: "We've often described ourselves as the frontline country to the problem of climate change, because we will be the first ones to fall. If nothing is done, we will no longer exist."⁵ The question explored in this article is whether, without a land base, a state which has already existed and been recognised by the international community ceases to exist, or can a people continue as a nation without their land? This article focusses on the Pacific island states: not only because they are vulnerable to the consequences of climate change but also because of their plural legal systems, in which personhood or sense of identity is governed not just by formal laws, and where indeed, while national identity might be important at times such as the World Cup, the Olympics, or the Pacific Games, on an everyday level the focus of identity is more likely to be family, community, village, island, linguistic group, religious affiliation and so on, and where status and personhood are as likely to be determined by custom and customary laws as state laws.

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¹ Schiffman 2017 <https://e360.yale.edu/features/as-seas-rise-tropical-pacific-islands-face-a-perfect-storm>; Bossy 2019 <https://www.scidev.net/asia-pacific/news/nearly-all-pacific-islanders-vulnerable-to-sea-level-rise/>.

² See Mimura 1999 *Clim Res* 137; Nunn 2013 *Singap J Trop Geogr* 143.

³ Andrew *et al* 2019 *Plos One*.

⁴ Quoted in Schiffman 2017 <https://e360.yale.edu/features/as-seas-rise-tropical-pacific-islands-face-a-perfect-storm>.

⁵ Quoted by CBC Radio 2017 <https://www.cbc.ca/radio/thecurrent/oct-28-2013-1.290920/should-international-law-recognize-climate-change-refugees-1.2909202>.

That is not to suggest that formal laws are not important. Indeed, the formal legal identity of people is often determined by their relationship to a place. This, for example, is encountered when one must complete forms for immigration: place of birth, place of residence, country of origin, and so on. Sometimes an association with place is implied rather than expressed, such as in a response to citizenship or the place a passport was issued. The premise that people are legally attached in some way to place is also found in a raft of legislation, ranging from laws determining tax liability to the validity of a marriage or the determination of succession laws. The jurisdictional reach of a country's legal system is also anchored by its land (and to a less extent its sea) either as a practical reality or a legal fiction - as in the case of aircraft, ships, or diplomatic buildings in other countries. The courts have similarly developed the idea that individuals may be under the control of a state or a particular jurisdiction even when they are on alien land or at sea, for example, if they are under the control of or accountable to a particular authority or state (for example, the actions of members of the armed forces on foreign territory).⁶

This construction of the legal identity of individuals is closely affiliated with the legal identity of states. The two are not synonymous, in so far as the recognition of a state also has far-reaching political implications, but the identity of states is territorially grounded in terms of boundaries, jurisdiction and sovereignty. In plural legal systems, of course, the state may not be the only source of "jurisdiction": a customary chief or council of elders may have much greater control and influence at a local level and on a daily basis than any institutions or agencies of the state, and while there may be a cross-over between the formal and informal legal systems, equally they may operate in relatively autonomous realms.⁷

It is also the case that, in an increasingly global world, there may be a "withering away" of the state, at least in some respects. A recent example can be seen in the United Nations General Assembly proposal under Resolution 69/22 on the "Development of an internationally legally binding instrument under the *United Nations Convention on the Law of the Sea* on the conservation and sustainable use of marine biological diversity in *areas beyond national jurisdiction*" (emphasis added).⁸ Similarly, the development

⁶ Szydlo 2012 *Int Crim L Rev* 271.

⁷ Seumanutafu *Law Reform in Plural Societies*.

⁸ *United Nations General Assembly Resolution: Development of an Internationally Legally Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity on Areas beyond National Jurisdiction* UN Doc A/RES/69/292 (2015).

of concepts such as the "creative commons" and the "global commons" suggests developments which are not boundary-constrained. The erosion of the primacy of states in international law is also seen in the increasing recognition and influence of non-state entities such as the United Nations, the World Health Organisation or the World Trade Organisation and the acknowledgment of group rights across physical or state boundaries – for example the rights of indigenous people.⁹ Jurisdiction is also conferred on non-state institutions such as the International Criminal Court, or on third state parties through agreements relating to international arbitration. While these examples do not remove states as the key players in international law, they are relevant in so far as the central question of this article is whether the identity of a people can survive the physical loss of their land. In other words, is land a pre-requisite for a state to exist, and can individuals continue to exist as a separately recognised "people" with citizenship of that state if the continued existence of the state is in doubt?

In order to address this issue, this article considers first the place of land in determining the identity and existence of states in international law and in the supreme national law of some Pacific island states: the constitution. Secondly, it examines the extent to which territory determines individual status in the laws relating to citizenship in order to examine whether this aspect of legal status can survive an absence of land. Thirdly, the article considers the current international law which applies to situations where people leave their homelands and the inadequacies of this law where people leave because their lands are under water or are threatened by rising seas. Bearing in mind that identity is not solely determined by legal status, fourthly, the article turns to alternative articulations of personal and collective identity, particularly the social construction of nation, in order to determine if and to what extent this can survive the loss of land. The article concludes by reflecting on whether there are enough non-territorial foundations to support identity even when islands are lost. In other words, is there legal space to recognise people as having a distinct identity even when uprooted by rising seas?

The methodology adopted is doctrinal, drawing on a range of published resources in the public domain which, while primarily law based, also include other disciplines and perspectives. A comparative approach between international law and regional approaches is adopted and the article engages with the plural legal systems of Pacific island states to arrive

⁹ *United Nations Declaration on the Rights of Indigenous Peoples* UN Doc A/RES/61/295 (2007).

at conclusions which are relevant to the localised context of the legal issues raised.

2 The place of land in determining the identity and existence of states

Since the mid-seventeenth century and the Peace of Westphalia (1648) states have been the subject of international law, although the treaties of Westphalia did not define states or territories and indeed boundaries remained unsettled and fluid until at least the eighteenth century,¹⁰ and continue to be contested – particularly maritime boundaries. The *Montevideo Convention on the Rights and Duties of States* in 1933 set out several requirements for Statehood. The criteria of the Convention are: a permanent population; a defined territory; government; and the capacity to enter into relations with other States. To this might be added recognition. Although recognition by itself will not be enough for the conferral of statehood, it may be increasingly important in situations where states are threatened with extinction.¹¹

The requirement of territory was not new and has been endorsed subsequently.¹² For example, writing in 2006 Crawford states:

Evidently States are territorial entities ... the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory.¹³

But Crawford has also written that:

A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.¹⁴

The Montevideo criteria, however, have been challenged on the grounds that they are descriptors of existing states rather than requirements.¹⁵ Kelsen, for example, held that the territory of a state was simply the space in which the legal order operated.¹⁶ Even those supporters of the criteria

¹⁰ Wong 2013 *Melb J Int Law* 1, 7.

¹¹ Warbrick 1981 *ICLQ* 586.

¹² See Wong 2013 *Melb J Int Law* 1, 7 and references cited therein.

¹³ Crawford *Creation of States in International Law* 46.

¹⁴ Crawford *Creation of States in International Law* 5.

¹⁵ See Jain 2014 *Stan J Int'l L* 16.

¹⁶ Kelsen 1941 *Harv L Rev* 69-70.

leave open the definition of each element, creating a degree of uncertainty, but also fluidity.

It has also been argued that there is a distinction between the acquisition of statehood and the maintenance of that status.¹⁷ Recognised grounds for the extinction of a state are a merger with another state, the voluntary absorption of one state into another, and the breaking up of one state into several.¹⁸ None of these are helpful in the case of islands disappearing under the seas. There is, moreover, a presumption in favour of the continuation of states once recognised as such, even if their governments are in exile or unable to control their countries (failed states).¹⁹ The extinction of states undermines the stability of the international legal order and so tends to be resisted. Loss of the indicia of statehood will not therefore automatically lead to a state's being regarded as extinct. Indeed, internationally, states recognised by the UN continue to exist as members until and unless they are suspended or expelled by the General Assembly.

While it has been suggested that territory reflects "the identity ... of the society as a whole"²⁰ and those threatened by sea-level rise have themselves referred to the extinction of the state,²¹ others have suggested that firstly, the diminishing utility of territory for statehood means that it is not necessary for the continuation of that status. Secondly, the absence of any clear international law on the requirements for continuation rather than creation may mean that territory is not a necessary pre-requisite, and thirdly, the continued recognition of states is not dependent on territory.²²

Indeed, it has been suggested that the state as a "legal construct" or as Marek has argued "not a tangible phenomenon of the physical world, but a construction of the human mind which has joined all these elements into a single and separate whole",²³ "may be projected on the plane of time for certain purposes although its physical and political existence has ceased."²⁴ In other words, international law may, as it has done in the past, "prop up" a state, if there are sufficient objective and existing reasons. Although

¹⁷ Wong cites two examples of states being recognised without territory: the Holy See and the sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta. Wong 2013 *Melb J Int Law* 11. While the latter may be only an international body with legal personality, the status of the Holy See is unclear.

¹⁸ Wong 2013 *Melb J Int Law* 17.

¹⁹ Talmon *Recognition of Governments*.

²⁰ Sharma *Territorial Acquisition* 4.

²¹ Wong 2013 *Melb J Int Law* 22-23.

²² Jain 2014 *Stan J Int'l L* 16.

²³ Marek *Identity and Continuity of States* 588.

²⁴ Brownlie *Principles of International Law* 78.

historically this approach has been adopted to deal with the "winding-up" of states, it could possibly be used in the longer term to deal with states inundated by rising seas whose people occupy land in host states. Once a state has acquired autonomously governed territory or its citizens have ceased to hold a distinctive citizenship the measures would no longer apply, either because in the former case special measures were no longer necessary or, in the latter case, because its people are no longer identified by their affiliation with the previous state but assimilated into the new host state.

The concept of state, however, exists not only in international law: it is reflected, shaped and articulated in different elements of domestic legal systems. In those states that emerged from colonial rule, the foundation of the newly independent state is the constitution.

3 The place of land in the self-declaration of states evidenced in Pacific island constitutions

If one looks at statements of statehood in the constitutions of newly independent Pacific island states, reference to the territory of the new state is mixed.²⁵ For example, Fiji declares itself to be "a sovereign democratic State" founded not on land but on certain values set out in section one of the *Constitution*. There is no reference to the territory of Fiji in Chapter One, which sets out "The State". Even in the Preamble land is referred to only in respect of indigenous Fijians (iTaukei) and Rotumans in respect of Rotuman lands. The common theme linking all Fijians (indigenous and non-indigenous) is recognition of the culture, customs, traditions and language of the Fijian peoples. Similarly, in the *Constitution of Niue* and that of Vanuatu there is no reference to the physical composition of the state.

In contrast the *Constitution of Tuvalu* sets out in Section 2 "the area of Tuvalu" including the geographical coordinates.²⁶ This specificity may be due to the fact that Tuvalu was carved out of the former colony of the Gilbert and Ellice Islands, although the *Kiribati Independence Order*, 1979 makes no similar provisions. The area of Tuvalu includes land and sea, inland waters, rocks and reefs. The section also includes a provision stating that "Nothing in this section (the area of Tuvalu) prevents a law from proclaiming

²⁵ This is not to suggest that there are no other references to land and resources in constitutions, because there are, but the focus here is on the self-identification of the state - as a state in - the written constitution.

²⁶ The *Constitution of the Independent State of Samoa*, 1960 is similarly specific – see s 1(2) but refers to the islands that comprise Samoa only.

jurisdiction of Tuvalu, complete or partial over any area of land or water or any airspace above, or prevents a law from having extra-territorial effect ..." (section 2(4)). The Preamble to the *Tuvalu Constitution*, however, suggests that being Tuvaluan extends beyond ties to land. In particular, the third paragraph of the Preamble states that "the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities." As will be suggested, it is these dimensions of identity which may be significant for the continuation of Tuvalu as a people and a nation if they are forced to leave their low-lying islands.

In those countries consisting of many islands, the loss of one or two of them due to sea-level rise or natural disasters such as earthquakes or volcanoes is unlikely to threaten the continued existence of the state, especially where its identity is founded on the bringing together of different island groups. This is the case in the Federated States of Micronesia. Here the Preamble declares that the *Constitution* is "To make one nation of many islands ... the seas bring us together, they do not separate us. Our islands sustain us, our island nation enlarges us and makes us stronger." The waters of the Micronesian archipelago are declared to be internal waters and the Federated States territory includes "the seabed, subsoil, water column, insular or continental shelves, airspace over land and water and any other territory or waters belonging to Micronesia by historic right, custom or legal title."²⁷ Similarly, in the *Constitution of Palau*, although the Preamble refers to the islands of Palau as "our homeland", section one, which refers to territory, includes not only references to the islands of the archipelago but also to "the internal waters, the territorial waters ... the seabed, subsoil, water column, insular shelves and airspace over land and water." The markers for the baseline of the archipelago include specified reefs (which are presumably under water at least some of the time). The idea of peoples brought together by the seas that surround them finds a resonance in the words of Epli Hau'ofa, referred to later in this article.

4 To what extent does territory determine national identity in formal law?

While the written constitutions may define the state, in many legal systems a person's legal status is largely but not solely determined by formal law. In

²⁷ Section 1 of the *Constitution of the Federated States of Micronesia*, 1978.

plural legal systems, however, individual or group religion, culture and social hierarchies, customary law and traditional practices may also determine status. These may be recognised in the formal legal system either specifically, for example, through the incorporation of traditional councils of chiefs or elders into constitutional governance,²⁸ or indirectly through the acknowledgment of customary law.²⁹ Conversely, traditional leaders or indigenous cultures may operate entirely outside the formal legal system.³⁰ In most cases it is the customs of a particular place, determined geographically, which govern these matters, especially where, as in Melanesia and Micronesia, customs are not homogenous. However, there are examples of customs attaching more to people than to place, so that when people relocate they take their customs and social hierarchies with them. Consequently, for example, one finds custom chiefs in the urban-settlement areas of Vanuatu. Similarly, unique and blended cultural practices are observed among the people in the Pacific diaspora.³¹

In order to determine the extent to which the formal law determines status with reference to land, a comparative examination was undertaken of the text of legislation relating to citizenship. If one looks at the citizenship laws of Tuvalu, Kiribati, Palau and Solomon Islands (all countries under threat from sea-level rise) it appears that land is of secondary importance and applies primarily to those seeking citizenship by naturalisation because of a residence requirement. Those who are citizens by birth acquire that status through genealogical links, marriage or adoption. Familial relationship is the dominating factor. In Palau there is no reference to residence for citizens by birth,³² and while there is reference to descent there is no need to establish that ancestors or parents were born in the country. For some classes of citizens in Solomon Islands it is necessary to show they were born "in Solomon Islands".³³ This is not insurmountable, however, in so far as there are other routes to citizenship, including under section 22: "Every person born on or after Independence Day, whether within or outside Solomon Islands, shall become a citizen of Solomon Islands at the date of his birth if at that date either of his parents, is or would but for his death have been, a citizen of Solomon Islands."

²⁸ For example, the House of Ariki in Cook Islands or the Malvatumauri in Vanuatu.

²⁹ This is found in a number of Pacific island legal systems: see Powles 1997 *JPacS* 61; Corrin and Paterson *Introduction to South Pacific Law*.

³⁰ An example might be the status of "Big Men" in Melanesia. See Sahlins 1963 *Comp Stud Soc Hist* 285; White and Lindstrom *Chiefs Today*.

³¹ See Simati-Kumar *Next Generation of Pacific Diaspora from Blended Backgrounds*.

³² Article III of the *Constitution of the Republic of Palau*, 1981.

³³ Chapter III, Art 20(1) of the *Constitution of Solomon Islands*, 1978.

While residence in the country tends to be a common characteristic of naturalisation criteria, even here there are several matters which are taken into account alongside residence. For example, in Tuvalu there are nine criteria, including one which allows the Citizenship Committee to take any other matters into account.³⁴ Besides residence, it is clear from the legislation in all three countries that familiarity with and respect for the culture and customs of the country are important; as well as an ability to speak the local language. Other requirements are good character, economic self-sufficiency, knowledge and understanding of the rights, privileges and duties of being a citizen, and allegiance to the country where citizenship is being sought.

Moreover, a loss of citizenship is triggered not by loss of land or abandonment of residency but rather by taking up citizenship elsewhere, or by carrying out acts in another country which are incompatible with citizenship - such as serving in the armed forces, voting in elections, standing for elected office, taking an oath of allegiance to the other country and so on.³⁵ Even then, deprivation may be at the discretion of the national citizenship authority. While a person may renounce his or her citizenship, for example where another citizenship or nationality is adopted,³⁶ or have it revoked by the authorities, this is not something that happens automatically on the loss of territory.

It is also possible of course for states to amend their citizenship laws to accommodate particular categories of persons where it may be advantageous to do so. For example, dual citizenship may be permitted, curtailed periods of residence might be allowed, or fast-track passports issued to particular categories of persons. An example can be found in the 2016 amendment to the *Citizenship Act* in Papua New Guinea, which makes new provisions for the naturalisation of those who fall into the categories of "sportsman" and "investor". In such cases, residence and therefore locus no longer seem to be requirements.

5 International law and loss of homeland

The situation being considered in this article is distinguishable from the experience of people who claim refugee status because of conflict or

³⁴ Section 6 of the *Citizenship Act*, 1979 (Tuvalu) Cap 24.05. See similarly s 7(2) of the *Citizenship Act*, 1979 (Kiribati) Cap 8A; *Citizenship Act* 17 of 2018 (Solomon Islands).

³⁵ See for example in s 7 of the *Citizenship Act*, 1979 (Tuvalu).

³⁶ See s 8 of the *Citizenship Act*, 1979 (Tuvalu).

persecution. There is an overlap, however, as the United Nations High Commission for Refugees was also instrumental in drafting not only the *Convention on the Status of Refugees*, 1951, but also the *Convention on the Status of Stateless Persons*, 1954.³⁷ This latter Convention defines a "stateless person" as a person "who is not considered as a national by any state under operation of its law". The Convention provides minimum standards for the rights and treatment of such persons but does not afford them rights identical to those of the nationals of the state in which they are physically present. It is clear from the Convention guidance notes that protection as a stateless person is not the same as possession of a nationality. While a stateless person is entitled to be afforded certain rights and protection by countries that are signatories to the Convention, they must apply separately for nationality.³⁸

In the Pacific, only Fiji and Kiribati are parties to the 1954 Convention. This is interesting in so far as both countries have a shared experienced of the relocation of people. The Banaban people were relocated from Banaba (Ocean Island) in the then Gilbert and Ellice Islands (today Kiribati) to Rabi Island (Fiji) at the end of the Second World War to facilitate phosphate mining in Banaba by the British Phosphate Commission, the British having annexed the island in 1900. Ocean Island subsequently became virtually uninhabitable because of the environmental degradation caused by mining activity. For many years Banabans maintained a continuing link with Kiribati,³⁹ but their history has not been altogether positive and Rabi Island is still a backwater of Fiji. While the Convention was not in force at the time of the relocation of Banabans by the British colonial administrators, the experience may well have prompted these two countries to engage more closely with statelessness than their Pacific neighbours.

The historical background to both these Conventions was clearly the disruption of the Second World War and the displacement of millions of people. The scope and provisions are directed at the practical task of protecting and accommodating stateless persons or those fleeing persecution. There is, unsurprisingly, no reference to persons made stateless by the loss of their state as a result of an environmental impact. Indeed, where persons claim to be environmental refugees they may be

³⁷ Australia is a signatory, but not New Zealand.

³⁸ In 1961 a further *Convention on the Reduction of Statelessness* was approved, and the UN High Commissioner for Refugees has called for the eradication of statelessness by 2024.

³⁹ See special provisions in the *Constitution of Kiribati*, 1979.

regarded by the receiving state as stateless persons or illegal migrants.⁴⁰ Any claim to refugee status will be contested, not least because the grounds of such claims do not fall within the accepted criteria.

6 The question of status in the absence of land

In recent years there has been a growing body of work on whether environmental refugees can or should be able to claim refugee status.⁴¹ Most recently this has been supported by a ruling by the United Nations Human Rights Committee acknowledging a legal basis for refugee protection for those whose lives are imminently threatened by climate change.⁴² The claim is premised on the compulsion to leave a homeland because of an environmental threat. Although the UN High Commission on Refugees has broadened the scope of the definition of refugees, the key legal criterion for refugee status arising from fear of persecution in their country of origin on one of the five convention grounds (race, religion, nationality, membership of a particular group or political opinion) remains a determining factor. To date, litigation to claim the status of "climate change refugee" has not been successful,⁴³ although the Supreme Court in New Zealand did suggest (obiter) that there might in future be the possibility "that environmental degradation resulting from climate change or other natural disasters could ... create a pathway into the Refugee Convention or protected person jurisdictions."⁴⁴ Even if this were to be the case, there is

⁴⁰ See the situation of Bangladeshi farmers fleeing to India. Ahmed "Environmental Refugees and Environmental Distress Migration" 302.

⁴¹ See e.g. Westra *Environmental Justice*; Mayer *Concept of Climate Migration*; McAdam *Climate Change*.

⁴² Su 2020 <https://www.climatechangenews.com/2020/01/29/un-ruling-climate-refugees-gamechanger-climate-action/> commenting on the ruling in CCPR/C/D/2728/2016.

⁴³ See *Ione Teitiota v Chief Executive of Ministry of Business Innovation and Employment* [2013] NZHC 3125; *Ione Teitiota v Chief Executive of Ministry of Business Innovation and Employment* [2014] NZCA 173; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107; and an overview by Buchanan 2015 <https://www.loc.gov/law/help/climate-change-refugee/new-zealand-climate-change-refugee-case.pdf>, which includes reference to a number of other unsuccessful claims. Teitota's case was considered by the UN Human Rights Committee – see Su 2020 <https://www.climatechangenews.com/2020/01/29/un-ruling-climate-refugees-gamechanger-climate-action/> commenting on the ruling in CCPR/C/D/2728/2016 - which ruled against him on the grounds that his life was not at imminent risk.

⁴⁴ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 para 13. The current New Zealand government is also looking at a special class of refugee visa: Pearlman 2017 <https://www.straitstimes.com/asia/australianz/new-zealand-creates-special-refugee-visa-for-pacific-islanders-affected-by-climate>.

currently no agreed definition of the term "environmental or ecological refugees". Essam El-Hinnawi, a UN Environment Programme expert, defined environmental refugees in 1985 as: "people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life".⁴⁵ The International Organisation for Migration issued a working definition in 2008: "Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently and who move either within their country or abroad."⁴⁶ Arriving at an internationally agreed definition is difficult not only because of the many ways in which environmental change can impact on people's livelihoods but also because creating a new class of migrants could exacerbate the challenges already faced by other classes of migrants and the countries to which they migrate.⁴⁷

Whatever descriptors are used, there are concerns about negative connotations which run counter to the plea by ex-President Tong of Kiribati that what is required is migration with dignity before people are forced off their land due to sea-level rise.⁴⁸ For example, the labels suggested include (besides environmental refugee or migrant): "forced environmental migrant", "environmentally displaced person", "environmental displacee", "eco-refugee", "ecologically displaced person" and so on.⁴⁹ Besides the fact that the label "refugee" is legally inaccurate, it is also resisted by Pacific islanders themselves, who reject the negative connotations associated with these terms.⁵⁰

This is not to suggest that the international community is inactive. In 2012 Norway and Switzerland led The Nansen Initiative to build consensus on a "Protection Agenda" to address the needs of those displaced as a result of

⁴⁵ Hinnawi 1985 <https://digitallibrary.un.org/record/121267>.

⁴⁶ IOM 2008 https://publications.iom.int/system/files/pdf/mrs-31_en.pdf. See also Docherty and Giannini 2009 *Harv Envtl L Rev* 349.

⁴⁷ In 2017 it was estimated there were 258 million international migrants: Apap 2019 [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf).

⁴⁸ Tong 2016 <https://www.climatechangenews.com/2016/06/21/anote-tong-migration-is-the-brutal-reality-of-climate-change/>.

⁴⁹ Boano, Zetter and Morris 2008 <https://www.rsc.ox.ac.uk/files/files-1/pb1-environmentally-displaced-people-2008.pdf> 4.

⁵⁰ McAdam and Loughry 2009 <http://insidestory.org.au/we-arent-refugees/>.

disasters and climate change.⁵¹ The Pacific was part of the regional consultation process organised by the initiative. This was held in Cook Islands in 2013, and culminated in a report⁵² which recognised that the movement of people needed to be openly discussed because "For too long the issue of mobility as a result of disaster and climate change has remained in the 'too hard' basket."⁵³ But it was also affirmed that "movement and relocation must be facilitated in a manner that respects the dignity of all people involved in the process."⁵⁴

The endorsement of the "Agenda for the Protection of Cross-border Displaced Persons in the Context of Disasters and Climate Change" by 110 countries in October 2015 marked the end of the original Nansen Initiative.⁵⁵ However, the work of the project continued through a number of Sustainable Development Goals partnerships, including that with the South Pacific Regional Environment Programme (SPREP) and others; the Sendai Framework for Disaster Risk Reduction, 2015; the *Paris Agreement on Climate Change*, 2015; and the World Humanitarian Summit in 2016. In November 2020 Switzerland announced a further cooperation project to address climate change and migration in the Pacific.⁵⁶ Finding "space" both theoretically and practically for those forced to uproot remains a challenge that is as yet unanswered by current legal frameworks, but the problem might be addressed by considering an alternative approach.

7 Self-determination of identity without land

It is well documented that Pacific Islanders are people of place. Indeed, the report referred to above drew attention to the saying "blood and mud are mixed together to provide identity – this highlights the deep connection that

⁵¹ See McAdam 2016 *UNSWLJ* 1518.

⁵² Nansen Initiative 2013 https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR_Human_Mobility_Natural_Disasters_and_Climate_Change_in_the_Pacific.pdf.

⁵³ Nansen Initiative 2013 https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR_Human_Mobility_Natural_Disasters_and_Climate_Change_in_the_Pacific.pdf 24.

⁵⁴ Nansen Initiative 2013 https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR_Human_Mobility_Natural_Disasters_and_Climate_Change_in_the_Pacific.pdf 24.

⁵⁵ For the report of the Global Consultation Conference which led to this, see Nansen Initiative 2015 <https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/menschenrechte-menschliche-sicherheit/Nansen-GCR2015-screen.pdf>.

⁵⁶ Angelicas 2020 <https://reliefweb.int/report/cook-islands/switzerland-and-pacific-islands-region-cooperate-climate-change-and-migration>.

our Pacific people have with their land";⁵⁷ but this is not the only aspect which is recognised as constructing identity. Ancestry, family and cultural practice are also important.⁵⁸ While not immutable,⁵⁹ these dimensions are broad and can contribute to maintaining identity in the case of dislocation from place.

The situation envisaged in this article is distinguishable from that where people have been dispossessed of their lands as a result of force, as experienced by many indigenous peoples encountering colonial settlement. In post-colonial times some of these peoples have reclaimed their lands or had them returned. Others continue to claim lands taken from them. In these cases, the land they claim continues to exist physically although it may, as in the case of Ocean Island, be uninhabitable for a variety of reasons. The experience of these displaced people is relevant, however, to determining whether a people continues to exist as a clearly identified distinct group in circumstances where they have lost their land. In the case of the Banabans, although many have been assimilated into the Fijian way of life, have intermarried and moved to other parts of Fiji, there continues to be separate legal provision for Banabans as a minority in Fiji, and the older generation of Banabans, now dying out, dreams of returning to their homeland.

While in the case of the Banabans this is unlikely to happen, the example illustrates what commentators have recognised as the "social construction" of nationhood, rather than the view that a nation is a political community of an established state⁶⁰ or that it is a synonym for "state".⁶¹ This alternative view of nation focusses on language and culture, including "a system of ideas and signs and associations and ways of behaving and communicating."⁶² As Brubaker, Loveman and Stamatov have stated, with reference to race, ethnicity and nation:

They are ways of understanding and identifying oneself, making sense of one's problems and predicaments, identifying one's interests, and orientating one's action. They are ways of recognising, identifying, and classifying other

⁵⁷ Nansen Initiative 2013 https://www.nanseninitiative.org/wp-content/uploads/2015/07/OR_Human_Mobility_Natural_Disasters_and_Climate_Change_in_the_Pacific.pdf 24.

⁵⁸ Spickard "Pacific Islander Americans and Multiethnicity" 40-55. Also see Macpherson and Macpherson "Children of Samoan Migrants in New Zealand" 70; McGavin 2014 *Contemp Pac* 126.

⁵⁹ See for example the analysis of Norton 1919 *Man* 741; Keesing 1989 *Contemp Pac* 19.

⁶⁰ Developed by writers such as Cobban *Nation State and Self-determination*.

⁶¹ See for example Ting 2008 *Nationalism Ethn Polit* 453; Moltchanova 2007 *J Soc Philos* 255; and essays in Otto and Thomas *Narratives of Nation in the South Pacific*.

⁶² Gellner *Nations and Nationalism* 6.

people, or construing sameness and difference, and of 'coding' and making sense of their actions'.⁶³

In the Pacific the idea of the "social construction" of nation can be seen in a number of ways ranging from references to shared culture or ways of doing (for example the *Fa'aSamoa* or *anga faka-Tonga*);⁶⁴ to collectives which may be formal or informal, such as tribes or island people (for example Small Nambas and Big Nambas on the island of Malekula in Vanuatu); or racial groups (such as Indo-Fijians). A sense of collective identity is also found among the people of the Pacific diaspora, even if at times this may be a forced homogeny, for example through the use of "Pasifika" in New Zealand for Pacific islanders in general, or where the collective may in fact be dominated by one cultural and linguistic group such as the Samoans in New Zealand.⁶⁵

While there are no fixed definitions of nation or nationhood,⁶⁶ it has been suggested that "the nation state has always been imagined as a space of distinct belonging, founded on a particular history and expressing a unique and much cherished culture",⁶⁷ and in a global context this is continually evolving.⁶⁸ In the Pacific a way forward might be to adopt the perspective of writers such as Eveli Hau'ofa, who emphasised the interconnectedness of Pacific island peoples across Oceania, rather than the smallness of land masses.⁶⁹ In particular Hau'ofa focussed on Pacific islanders' "ability to act with relative autonomy in their endeavors to survive reasonably well within the international system in which they have found themselves".⁷⁰ This suggests an innate ability to retain a Pacific identity despite the ways in which external laws and systems seek to frame concepts such as state and citizen.

⁶³ Brubaker, Loveman and Stamatov 2004 *Theory and Society* 47. International examples can be found in the Jewish nation, and features of national identity in Northern Ireland and Scotland in the UK. In the Pacific the claim of native Hawaiians to nationhood based on sovereignty, self-determination and self-sufficiency, but premised on indigenous cultural practice rather than a state-centric paradigm is an example. See Goodyear-Ka'ōpua 2011 *Affinities*.

⁶⁴ The Samoan and Tongan "way" of living one's life.

⁶⁵ New Zealand census suggests that by 2021 there will be around 520,000 persons of Samoan ancestry in New Zealand, exceeding the number of the indigenous Maori population. Perrott 2007 <https://www.nzherald.co.nz/lifestyle/pasifika-identity-or-illusion/S3LE56AV4WSZKUHJUTAIUNXSFA>.

⁶⁶ See Podoksik 2017 *J Polit Philos* 303.

⁶⁷ Anderson *Imagined Communities* 49.

⁶⁸ See Croucher 2003 *Int Stud Rev* 1.

⁶⁹ Hau'ofa 1994 *Contemp Pac* 147.

⁷⁰ Hau'ofa 1994 *Contemp Pac* 149-150.

The impact of loss of territory has moreover prompted calls for abandoning "a uniform model of the state, founded historically upon the territorial rights of a 'unified' and self-determining people."⁷¹ In the Pacific there are already the foundations to do this because as Hau'ofa points out about the islanders of Oceania:

Their universe comprised not only land surfaces, but the surrounding ocean as far as they could traverse and exploit it, the underworld with its fire-controlling and earth-shaking denizens, and the heavens above with their hierarchies of powerful gods and named stars and constellations that people could count on to guide their ways across the seas.⁷²

In 2008 the leaders of the Pacific islands endorsed the Niue Declaration on Climate Change, in which the importance of retaining the Pacific's social and cultural identity was emphasised.⁷³ Ideally this would be in their own territories, and climate change would be addressed through policies of mitigation and adaptation. The possibility of unavoidable relocation cannot be ruled out, however. The issue is therefore how the Niue Declaration can be given effect if the lands are below the seas.

8 Looking to the future

It has been suggested that there are three reasons why statehood is important for island states.⁷⁴ Firstly, membership of the UN and access to the International Criminal Court are key to the forming and maintenance of international contacts and networks, and access to justice at an international level is essential for states which are vulnerable. Arguably, once achieved through the recognition of a sovereign state, these are not instantly lost once that state loses its land. Secondly, the state is integrated with links to land and the culture of island people. However as indicated above, while land is certainly important to the identity and culture of Pacific people it is not the only identifier. Thirdly, "the consequences of extinction are unclear."⁷⁵ In particular, it is uncertain what international rights and obligations will remain. In the context of Pacific islands a key concern is the potential loss of their seas and maritime rights, which are of significant value to island states.⁷⁶

⁷¹ Skillington 2016 *Social Sciences*.

⁷² Hau'ofa 1994 *Contemp Pac* 152.

⁷³ This was subsequently followed by the Kainaki II Declaration at a meeting of the Pacific Islands Forum in Tuvalu in 2019, but Forum leaders were unable to agree on a strong declaration.

⁷⁴ Wong 2013 *Melb J Int Law*.

⁷⁵ Wong 2013 *Melb J Int Law* 5.

⁷⁶ Under the *United Nations Convention on the Law of the Sea* (1982) (UNCLOS) rocks which cannot sustain human habitation generate limited maritime spaces, whereas islands which are capable of sustaining human habitation (even if uninhabited) have

Displaced persons may continue to exist and identify as a minority group in a foreign land, as illustrated by the Banabans in Fiji, but they may lose their distinctive identity as a people and their sovereignty as a state, particularly from the perspective of the international community. For Pacific island states which have emerged from colonial governance and claimed their own place on the international stage, this is important.

While several possible solutions have been proposed, it appears that presently international law does not provide the answer to the question of who people are if they lose their land. Yet it has been estimated that by 2050 there will be 150-200 million displaced persons due to climate change.⁷⁷ A draft Convention on the International Status of Environmentally Displaced Persons has been written by academics and researchers at Limoges, France.⁷⁸ The focus is on the rights of such displaced persons as human rights. The argument for a new convention rather than the amendment of the existing Refugee Convention is based on the historic foundations of the latter and the inordinate length of time it would take to redraft it. A human rights approach has the advantage that international law has already developed to cover the relations between individuals and states and not just that between states, and in some cases between individuals.⁷⁹ Similarly, there are international rights' instruments which not only confer on all peoples the right to self-determination,⁸⁰ but specifically on indigenous people the right to "autonomy or self-government" and to "nationality".⁸¹ Jurisprudentially, if human rights are recognised as being universally applicable, environmental refugees would be recognised as a deserving category by all signatory states. In the interim there are already human rights which might be more broadly interpreted to cover the challenges faced by those losing their lands, including the right to life and livelihood, to health, to culture, language and so on. Indeed, at its thirty-fifth session in

far more extensive maritime areas - but this is a matter beyond the scope of this article.

⁷⁷ Stern *Economics of Climate Change* 3.

⁷⁸ Prieur Date Unknown https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/prieur-convention_on_the_international_status_of_environmentally.pdf.

⁷⁹ The topic of the vertical and horizontal effect of human rights' instrument is beyond the scope of this article.

⁸⁰ See Art 1 of the *International Covenant on Economic, Social and Cultural Rights* (1966).

⁸¹ See Arts 1 and 6 of the *United Nations Declaration on the Rights of Indigenous Peoples* UN Doc A/RES/61/295 (2007). Also see the petition of Small Island States and NGOs at the Cancun 2010 Conference on Climate Change calling for a new protocol under the United Nations Framework Convention on Climate Change for the protection of the social, cultural and economic rights of climate forced migrants: Skillington 2016 *Social Sciences* 8.

July 2017 the Human Rights Council of the United Nations adopted a resolution on Human Rights and Climate Change which *inter alia* recognised the plethora of human rights threatened by climate change.⁸² Finding a human rights violation, however, raises three problems. First, which state has breached that right – given that climate change is attributable to many states. Secondly, and linked to this, there is the issue of causality. Unlike natural disasters such as earthquakes, tsunamis or volcanic eruptions, the inundation of land by the sea is a gradual occurrence. At what point does an island become uninhabitable, and is this in itself sufficient to say the state has lost its territory? Thirdly, what is an appropriate solution? The current narratives around the environmental crisis focus on building resilience, combatting the effects of climate change and, as envisaged by the draft convention above, facilitating relocation. One of the problems with the latter is the question of determining where to? The Draft Convention advocates freedom of choice but this is extremely unlikely to be feasible, at least in the Pacific, where there is very little public or state-owned land, minimal or no freehold, and where any apparently unused land that might have been described in colonial times as "waste and vacant" is invariably the property of customary landowners. While historically customary land-owners have allowed "incomers" onto their land, particularly but not solely in the islands of the same country, and while in many cases these incomers have been resident for several generations, the nature and extent of their rights in custom is often debated and sometimes contested. Their tenure is therefore precarious.

Skillington suggests that the principles of corrective justice could be used so that either those who are land-rich set aside land for those that are land-poor, or those most responsible for climate change and therefore rising sea levels contribute land for resettlement. While there may be international rhetoric which supports the call for "hosting" those relocated because of environmental disasters or climate change, both solutions are fraught with difficulties. The first, because sovereign states do not willingly give up land to other states, let alone cede sovereignty over such land. Even were they to do so this might not be the land of choice, or land that is viable for sustainable development. The second, because where land is not willingly conceded the causal connection between conduct and rising sea level might have to be conclusively established in courts of law or dedicated

⁸² *Human Rights Council of the United Nations Human Rights and Climate Change Resolution* UN Doc A/HRC/RES/35/20 (2017). Also see Su 2020 <https://www.climatechangenews.com/2020/01/29/un-ruling-climate-refugees-gamechanger-climate-action/>.

international tribunals. Courts such as the ICJ have until recently been reluctant to engage with environmental claims.⁸³ Even if people relocate to new lands, as has been suggested in the case of Kiribati,⁸⁴ the question of their continuing identity may need to be resolved; for example, issues of citizenship, language, dispute resolution forums and so on. Moreover, even if such land were to be found it is unclear if international law would regard this as meeting the criteria of territory for statehood. The acquisition of land under resettlement schemes is, moreover, premised on private property law rather than the international recognition of the exercise of government power. A state needs to have sovereignty over its territory, which a host state is unlikely to be keen to grant.⁸⁵ From the point of view of international recognition, a state must also be independent and not only semi-autonomous (compare Tokelau and Tuvalu, for example).⁸⁶ Consequently, while relocation may be one solution, it does not answer the issue of continuing statehood or citizenship.

An alternative suggested by Burkett is international recognition of the *ex-situ* nation.⁸⁷ This proposal recognised the possible dispersal of people from lands inundated by water and therefore loss of territory, but suggests that international law could accommodate the concept of an *ex-situ* nation by re-envisioning the state drawing on past recognitions of deterritorialised states (referred to above) and the experience of "contemporary deterritorialised groups and individuals" such as the people of the diaspora,⁸⁸ who maintain allegiances to people and culture despite being ex-patria. Referring to the Pacific, Burkett addresses the significant question of land as a key to

⁸³ See, however, the ICJ decision of 2 February 2018 in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) Compensation*, Judgment, ICJ Reports 2018, 15; Advisory Opinion (OC-23/17) Inter-American Court of Human Rights of November 15, 2017 requested by the Republic of Colombia (published 7 February 2018); Desierto 2018 <https://www.ejiltalk.org/environmental-damages-environmental-reparations-and-the-right-to-a-healthy-environment-the-icj-compensation-judgment-in-costa-rica-v-nicaragua-and-the-iacthr-advisory-opinion-on-marine-protection/>.

⁸⁴ Caramel 2014 <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>. The Kiribati government with the assistance of AOSIS bought 20 km² of land from the Church of England – made possible because Fiji has a small percentage of freehold land. The viability of the land has been questioned – see Ellsmoor and Rosen 2016 <http://www.devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111>.

⁸⁵ Ker-Lindsay 2016 *Survival* 78.

⁸⁶ There are variations of this in the Pacific; see for example the relationship between Cook Islands, Niue and New Zealand, or the Compacts of Free Association between the USA and Pacific Island states of Federated States of Micronesia, Palau and Marshall Islands.

⁸⁷ Burkett 2011 *Climate Law* 345.

⁸⁸ Burkett 2011 *Climate Law* 358.

identity, pointing out that migration across oceans and islands is also a feature of Pacific identity. Belonging, identity and connection to place persist despite one's being distant from "home" or indeed never having lived there. This migration, which will be accelerated due to climate change, will hold people together, but what of the nation state? Burkett suggests that despite the rising sea levels international law could "freeze" maritime boundaries, thereby conferring an economic foundation on nations *ex-situ*. This would, she suggests, be compatible with the objective of UNCLOS "to create and maintain stability, certainty, and fairness in the governance of the oceans."⁸⁹ It would also prevent a scramble by other nations to extend their maritime boundaries or a competition to manage such resources. Instead, the governance of the *ex-situ* state, including the governance of its marine resources, would vest in a "political trusteeship". The model for this type of government can be found in the UN International Trusteeship System, the distinction being that trustees would be elected citizens of the *ex-situ* nation and the nature of the trust determined by them. The Pacific region is, of course, no stranger to the UN trustee system, but this could work only if there was a clear and well understood distinction between this model and that used in colonial times. It is also the case that the trust, as an institution, is alien to the Pacific, and where used has had very mixed results, particularly in those countries where there is poor leadership, lack of transparency in the management of government funds, and political instability. At the same time any interference by outsiders, including the UN, might well be regarded with suspicion and/or resentment by Pacific islanders. Any such arrangement would, as Burkett points out, also have to have the support and recognition of the international community. Nevertheless, the trust concept is increasingly being mooted as the vehicle for managing the inter-generational benefits of various extractive industries (such as deep-sea mining) and the concept of the *ex-situ* nation is an attractive one.

While the international community considers solutions or bi-lateral negotiations take place, it might be time for Pacific island nations to consider how they define themselves. Within the plural legal systems of Pacific island states it would appear that land is less crucial as an identifier of state and/or the national identity of the individual in the formal law than in the informal or customary law. At the same time, however, the identification of individuals and peoples through shared customs, culture and language is multi-faceted, complex and (as demonstrated over centuries) adaptable and resilient. In taking forward the discussion of relocation which the Nansen

⁸⁹ Burkett 2011 *Climate Law* 362.

consultation brought "out of the basket", Pacific island states might consider what national laws and customs confer identity, whether any adaptations need to be made, or could be made, before the sea levels rise further, and whether their sense of self already goes beyond the confines of atolls, islands and archipelagos.

9 Conclusion

There is a danger that Pacific islands may be used as "climate-change canaries" in the eco-colonial discourse of climate scientists and environmentalists.⁹⁰ A Pacific solution which draws on Pacific understandings of people and place might offer an alternative narrative.

The Prime Minister of Tuvalu, speaking at the COP 14 conference in Poland in 2008, said "We are a proud nation of people ... We want to survive as a people and as a nation. And we will survive – it is our fundamental right." Much will clearly depend on near neighbours, the international community and the future re-shaping of international laws and concepts, but Pacific island states need not be victims of legal inaction especially when they have the wealth of plural legal systems to inform the development of the law and the articulation of identity. Indeed, it might be worth reiterating the words of Judge Cançado Trindade.⁹¹ Speaking of trends in legal doctrine in the twentieth century, he said that this doctrine had become "oblivious of the most precious constitutive element of statehood: human beings, the 'population' or the 'people'."⁹² If then it is people who "make" a state, then perhaps there is space in twenty-first century legal doctrine to accommodate those peoples who are uprooted by rising seas?

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⁹⁰ Farbotko 2010 *Asia Pacific Viewpoint* 47.

⁹¹ Cited in Wong 2013 *Melb J Int Law* 46.

⁹² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 403 553.

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List of Abbreviations

AJIL	American Journal of International Law
Clim Res	Climate Research
Comp Stud Soc Hist	Comparative Studies in Society and History
Contemp Pac	The Contemporary Pacific
Harv Envtl L Rev	Harvard Environmental Law Review
Harv L Rev	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
Int Crim L Rev	International Criminal Law Review
Int Stud Rev	International Studies Review
IOM	International Organization for Migration
J Polit Philos	Journal of Political Philosophy
J Soc Philos	Journal of Social Philosophy
JPacS	Journal of Pacific Studies
Melb J Int Law	Melbourne Journal of International Law
Nationalism Ethn Polit	Nationalism and Ethnic Politics
Singap J Trop Geogr	Singapore Journal of Tropical Geography
Stan J Int'l L	Stanford Journal of International Law
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNSWLJ	University of New South Wales Law Journal