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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

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THREATENED ISLAND NATIONS

Rising seas are endangering the habitability and very existence of several small island nations, mostly in the Pacific and Indian oceans. This is the first book to focus on the myriad legal issues posed by this tragic situation. If a nation is under water, is it still a state? Does it still have a seat at the United Nations? What becomes of its exclusive economic zone, the basis for its fishing rights? What obligations do other nations have to take in the displaced populations, and what are these peoples' rights and legal status once they arrive? Should there be a new international agreement on climate-displaced populations? Do these nations and their citizens have any legal recourse for compensation? Are there any courts that will hear their claims, and based on what theories? Leading legal scholars from around the world address these novel questions and propose answers.

Michael B. Gerrard is Andrew Sabin Professor of Professional Practice at Columbia Law School, where he teaches courses on environmental and energy law and directs the Center for Climate Change Law. He is also Associate Chair of the Faculty of Columbia's Earth Institute. Before joining the Columbia faculty in January 2009, he was partner in charge of the New York office of Arnold & Porter LLP, where he continues as Senior Counsel. He is author or editor of ten books, two of which were named Best Law Book of the Year by the Association of American Publishers: *Environmental Law Practice Guide* (twelve volumes, 1992) and *Brownfields Law and Practice: The Cleanup and Redevelopment of Contaminated Land* (four volumes, 1998). His other recent books are *The Law of Green Buildings* (with Cullen Howe, 2010), *The Law of Clean Energy: Efficiency and Renewables* (2011), and *The Law of Adaptation to Climate Change: U.S. and International Aspects* (with Katrina F. Kuh, 2012).

Gregory E. Wannier is a judicial clerk for the Hon. S. James Otero, United States District Court for the Central District of California. He largely edited this book while serving as Deputy Director of the Center for Climate Change Law at Columbia Law School. His research focuses include EPA regulation of greenhouse gases under the Clean Air Act, legal mechanisms for adapting to the effects of global climate change, implications of electricity grid reliability protections for energy resource development, the viability of market solutions to climate change, and national and international trade protections. He received his JD from Stanford Law School, where he served as president of the Environmental Law Society and editor-in-chief of the *Stanford Journal of Law, Science & Policy*, and he holds a Master's Degree in Environmental Policy from the E-IPER program at Stanford University, School of Earth Sciences.

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LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE

Edited by

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Columbia Law School

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U.S. District Court for the Central District of California



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Preface and Acknowledgments

In late 2009, Phillip H. Muller, then the Ambassador and Permanent Representative of the Republic of the Marshall Islands to the United Nations (and now the Minister of Foreign Affairs), approached Columbia Law School's Center for Climate Change Law. He posed a startling scenario: the seas are rising, and some decade – no one knows which – his country of twenty-nine coral atolls and five islands, located midway between Hawaii and Australia, is going to be under water. When that happens, a number of novel legal questions will arise. If a country is under water, is it still a state? Does it still have a seat at the United Nations? What becomes of its exclusive economic zone, and the fishing rights on which it depends for much of its livelihood? What countries will take in its displaced people, and what rights will they have when they arrive? Do they have any legal recourse against those states whose greenhouse gas emissions caused this plight?

We concluded that we could not answer these questions on our own, but that they had so much both practical importance and intellectual interest that they warranted an international conference of legal scholars. So Columbia and the Republic of the Marshall Islands decided to put on such a conference at Columbia. Columbia's Earth Institute provided a seed grant, and ultimately The World Bank, Australia, Israel, and South Korea's Global Green Growth Institute agreed to provide funding so that people from the Marshall Islands and other affected regions of the world could travel to New York and participate in the conference.

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The conference took place May 23–25, 2011. A total of 272 people registered from thirty-nine different countries; numerous Pacific nations as well as Asia, Africa, Europe, and the Americas were represented, and an additional 308 people registered for the live Webcast. Serious scholarly discussion occurred, and many connections were made as people from around the world met for the first time and discovered their common goals. A high point came during the formal conference dinner in the ornate rotunda of Columbia's Low Library. The Marshall Islands delegation (twenty-three strong) mounted the stage and sang a series of their nation's songs in Marshallese, led by then-President Jurelang Zedkaia on the ukulele. This highlighted the cultures that stand to be lost if the world does not solve this problem.

We invited the scholars who participated in the conference to contribute formal papers. This volume is the result. It is the first book written about the legal issues faced by island nations that are threatened by sea level rise, and it explores legal theories whose novelty, imagination, and complexity are as great as the problems they seek to tackle. All the chapters were written by lawyers (except for Chapter 2, which was written by scientists who present what is known about the nature and timing of sea level rise as it affects the island nations). Each chapter represents the views of its authors alone; the authors of other chapters, and the editors, may disagree with some of them, but in the spirit of open academic inquiry and the urgency of finding legal approaches to the crises felt by the affected populations, we felt it important to give a full airing to the theories presented.

Many people contributed to the creation of this book. Ambassador Muller and Caleb W. Christopher, Legal Advisor, were our primary liaisons to the Marshall Islands government and also helped organize M.B.G.'s memorable and illuminating trip to the Marshall Islands atolls of Majuro and Eniwetok in December 2010. Multiple members of Columbia Law School and University staff provided invaluable assistance organizing the conference that inspired this book. Julia Errea Ciarullo and Danielle Sugarman, two very talented lawyers, assisted with

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the preparation of the manuscript. Columbia University's Earth Institute, Environmental Law Clinic, and Climate & Society Program helped the Center for Climate Change Law. Klaus H. Jacob, Terry Liu, and Kristina Stege made special contributions. John Berger and David Jou of Cambridge University Press and Peggy M. Rote of Aptara, Inc., helped the book come into existence. Numerous Columbia University students performed cite checking and research tasks – Aurore Bouyer, Daniel Bregman, Kaitlin Cassel, Julia Christian, Nate Cross, Briana Dema, Angelina Liang, Sarah Steinfeld, Narayan Subramanian, Jessica Wentz, and Rose Winer – as well as Sarah Goldmuntz of Hamilton College. We are most grateful for all of this invaluable assistance.

M.B.G. would like to express his love and gratitude to his wonderful family for their help throughout this process – Barbara, David, and William.

G.E.W. is, as always, grateful to his family for their constant support. He also thanks Michael Wara for providing early-career guidance and advice in the arena of climate change law.