

NELA essay competition winner and runner up

The essays in this issue were entered in the 2011 Environmental Law Essay Competition. Kate Browne's essay, 'Climate change and statelessness: the disappearance of small island states' was scored highest by the judging panel of the nearly 20 entries received. Congratulations Kate! For her efforts, Kate has been awarded \$1 000 and a year's membership of the National Environmental Law Association commencing 1 July 2012.

Glen Wright's analysis of the national electricity market and the environment was ranked second, and was highly commended by the judging panel. Congratulations Glen!

The essay competition was open to any student enrolled at an Australian tertiary institution (including undergraduate and postgraduate programs). Essays of 3000–5000 words that had been submitted for assessment in a unit on environmental law were eligible, and encouraged. Essays could be on any topic in the discipline of environmental law provided they related broadly to the theme 'are we headed in the right direction?'

Here is Kate's essay, with Glen's following:

CLIMATE CHANGE AND STATELESSNESS: THE DISAPPEARANCE OF SMALL ISLAND STATES

by Kate Browne

We live in constant fear of the adverse impacts of climate change. For a coral atoll nation, sea level rise and more severe weather events loom as a growing threat to our entire population. The threat is real and serious, and is of no difference to a slow and insidious form of terrorism against us.

Saufatu Sopoanga, Prime Minister of Tuvalu, at the 58th Session of the
United Nations General Assembly New York, 24th September 2003¹

Introduction

Climate change is already occurring, and those who will suffer the most from the effects of it are overwhelmingly those who carry the least responsibility for the causes of it.² There is perhaps no greater example of this inequality than in the case of those small island states whose very existence is threatened by the effects of climate change, particularly sea level rise.³ There is a strong possibility that some of the residents of these island states may become effectively stateless, as the territory of their nation-state becomes uninhabitable or completely inundated due to the effects of climate change.⁴ While migration is generally regarded as an 'option of last resort', and mitigation and adaption measures are currently the focus of the states under threat, it is important to examine the legal issues in order for forward planning to occur.⁵ International law, as it currently stands, offers little guidance as to the legal

1 Saufatu Sopoanga, *Tuvalu and Global Warming* (20 November 2010) Tuvalu Online <<http://www.tuvaluislands.com/warming.htm>>.

2 Mimura et al, 'Small islands' in M.L. Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge University Press, 2007) 687.

3 It is acknowledged that climate change is 'not the sole contributing factor to island states' vulnerability', as it is also due to a combination of 'socio-economic conditions...natural resource and space limitations...and the impact of natural hazards': Jane McAdam and Ben Saul, 'An insecure climate for human security? Climate-induced displacement and international law' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 357, 367.

4 Elizabeth Burleson, 'Climate Change Displacement to Refuge' (2010) 25(1) *Journal of Environmental Law and Litigation* 19, 29.

5 Ben Farrell, *Pacific Islanders face the reality of climate change... and of relocation* (14 December 2009) United Nations Human Rights Commission for Refugees <<http://www.unhcr.org/4b264c836.html>>.

status of these potentially stateless persons and the nature of the rights protections they are owed by the states in which they seek asylum, and the international community as a whole. As a result, these individuals may find themselves in a form of 'legal limbo' with no guarantee of anything more than basic rights entitlements.⁶

This essay begins by examining the legal status and rights these individuals may hold under international law, in particular under the various refugee and statelessness conventions. It briefly explores the concept of 'statehood' and the legal status of the state, if it becomes uninhabitable. The ways in which current refugee and statelessness law could accommodate, or be expanded to include, the individuals rendered stateless in this manner, are then discussed. Next, the essay examines other, less settled, possibilities under current international law to provide for the rights protection of these individuals, including: international human rights law and the right to self-determination; complementary protection; the responsibility to protect; and international environmental law. The inadequacy of the current international (and national) rights protections for these individuals will be highlighted by a case study considering Australia's current responsibilities and plans for protection of those persons left stateless by climate change induced events. Finally, some of the possible solutions to the problem, or ways of dealing with it, will be canvassed.

This essay argues that those who may be left stateless as a result of their state's territory becoming uninhabitable due to the effects of climate-change are not left with adequate human rights protections or mechanisms under current international law. However, the complexities of the problems that will arise from this situation mean that they are unlikely to be solved by one homogenous solution. It may be best to address this deficiency with a combination of different approaches. One method would be to create a treaty or protocol explicitly setting out the legal status of those left stateless by climate-change and, to a wider extent, climate change-displaced persons more generally, guaranteeing 'basic human rights protections and humanitarian aid' and setting out the responsibilities of states.⁷ A second, more practical solution may be to focus on regional agreements, or bilateral agreements, that could include long-term planning for the management of the movement and resettlement of those who may become displaced or stateless. Both of these methods will require cooperation and displays of political will by the international community generally, and recognition by individual states of their responsibility to those left stateless. They will need to include forward-planning to allow for the peaceful transfer of people and to ensure that they are not rendered stateless and without adequate rights protections. Ideally, communities will be able to remain together in the event of migration or displacement and there are ways in which this can occur, but it may also be necessary, as a last resort, for individuals to seek asylum separately.

The issue of statelessness

The point at which a state ceases to exist may have important consequences for the legal status of those individuals seeking protection, in particular, whether they fall under the protection of the international statelessness regime. The very idea of statelessness, 'which is the reverse of nationality, is a negative concept and therefore difficult to prove and define'.⁸

⁶ Jane McAdam, 'From Economic Refugees to Climate Refugees? Review of *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* by Michelle Foster' (2009) 10(2) *Melbourne Journal of International Law*, 579, 589.

⁷ Burleson above n 4, 35.

⁸ Nehemiah Robinson, *Convention Relating To The Status of Stateless Persons: Its History and Interpretation* (1997) UN High Commissioner for Refugees, Part 2, art 1, para 3 <<http://www.unhcr.org/refworld/docid/4785f03d.html>>.

States have traditionally been viewed as being dependent upon the existence of ‘territorial space and its habitability’.⁹ Assuming that this remains the case, it is quite likely that those states that disappear or become uninhabitable will lose their claim to statehood. Article 1 of the *Montevideo Convention* supports this definition of statehood as requiring a ‘defined territory’.¹⁰ Yet it is by no means decided that an island that loses its territory will no longer be viewed as a state. Instead, the islanders may find themselves ‘in the unprecedented situation of being citizens of a state that no longer has territory’.¹¹ One possibility that has been raised for continuing the existence of a state in these circumstances is to acquire territory from another state.¹² While this solution has its appeal, in particular for the rights protections of the inhabitants, this is a rather ‘radical’ method that has practical limitations, in particular the willingness of a state to cede some of its territory and the cost barriers to the islanders.¹³ In addition, even if the state continued to exist relocated to another nation’s territory, it is unclear whether the government would be able to ‘ensure the rights which flow from citizenship’, including such basic rights as adequate identification papers.¹⁴ In that instance, issues of statelessness would remain cogent. Whether or not the state continues to exist after the disappearance of its territory is crucial for determining whether it can provide rights protections to its citizens. Whatever the outcome, it is likely that the state will be greatly weakened by the loss of its territory and so it is important to consider what rights protections its former citizens will hold under international law more generally.

Universal rights entitlements

The individuals who become stateless may be left ‘without a legal status’ and may risk the ‘enjoyment of basic human rights’.¹⁵ In the most extreme circumstances their very right to life¹⁶ may be threatened by rising sea levels; at any rate it is certain that their right to a nationality will be compromised.¹⁷ Under international law all human beings are entitled to basic human rights, regardless of their status as citizens or stateless persons.¹⁸ However, the problem often lies with the practical protection of those rights and the mechanisms available to individuals at state level.¹⁹ The degree of protection that these stateless persons would receive depends very much upon the laws of the particular state they seek refuge in, and which treaties have been ratified and implemented. It is unclear as to whether states have a duty to ‘actively protect’ the rights of non-citizens within their territory, though they are obviously not able to violate those rights.²⁰ Within any state, those who are nationals have stronger rights protections than those who are not, in particular the right not to be expelled from the state.²¹ In order to prevent violations of the rights of these persons rendered stateless, therefore, it is crucial for them to be able to either be recognised as refugees or become nationals of a new state.

9 McAdam and Saul, above n 3, 366.

10 *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 49 Stat. 3097 (entered into force 26 December 1934) art 1.

11 Stephen Humphreys, ‘Conceiving Justice: articulating common causes in distinct regimes’ in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2009) 299, 301.

12 Selma Oliver, ‘A New Challenge to International Law: The Disappearance of the Entire Territory of a State’ (2009) 16(2) *International Journal on Minority and Group Rights* 209, 214.

13 McAdam and Saul, above n 3, 374.

14 UN High Commissioner for Refugees, *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective* (14 August 2009) 5 <<http://www.unhcr.org/refworld/docid/4a8e4f8b2.html>>.

15 Mark Manly and Laura Van Waas, ‘The value of the human security framework in addressing statelessness’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 49, 50.

16 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 3.

17 Ibid art 15.

18 See, eg, ibid art 1: ‘All human beings are born free and equal in dignity and rights.’; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2, para 1: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 2(2).

19 Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 202.

20 Oliver, above n 12, 216.

21 Ibid.

Will they be protected under the refugee regime?

One method of ensuring greater rights protections for the islanders in the event of statelessness would be for them to be recognised as refugees able to claim asylum. This would mean they would have the extensive rights protections guaranteed under the *1951 Convention Relating to the Status of Refugees*.²² At first glance, however, there appear to be many obstacles that would prevent them from being recognised as refugees under the Convention. The *Refugee Convention* defines a refugee as an individual who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²³

The first issue is the meaning of ‘persecution’. While this term is not defined in the *Refugee Convention* itself, a general meaning has been developed under international law.²⁴ While the effects of rising sea levels on the islanders ‘may be harmful’,²⁵ it lacks the element of ‘motivation’ on the part of those who persecute.²⁶ In addition, the persecution must be by reason of the individual’s ‘race, religion, nationality, membership of a particular social group or political opinion’.²⁷ The problem with climate change-induced statelessness falling into this category is that the sea-level rise and other factors are ‘inevitably indiscriminate’.²⁸ It is highly unlikely, therefore, that these islanders would be able to fall within the strict definition of a refugee.

Some academics have argued that what is required is a fundamental re-thinking of what a refugee is, away from a focus on persecution and towards a broader conception to do with the ‘absence of state protection of the citizen’s basic needs’.²⁹ This definition would most likely include those individuals left without state protection as a result of territory loss. An example of a more wide-ranging definition of those who qualify as refugees is present in several regional refugee conventions, such as the Organization of African Unity’s (‘OAU’) *Convention Governing the Specific Aspects of Refugee Problems in Africa*³⁰ and the Latin American agreement, the *Cartagena Declaration on Refugees*.³¹ The *OAU Convention* extends the definition of refugee to include those who, owing to ‘events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge’.³² This definition could cover islanders who have experienced sea level rise that had clearly seriously disturbed the ‘public order’ in their country. However, it is unlikely that the *Refugee Convention* will be broadened in the near future, given the fact that states are generally unwilling to ‘accept any formal extension’ of the definition.³³

22 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘*Refugee Convention*’).

23 Ibid art 1A(2).

24 See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 90-130.

25 McAdam and Saul, above n 3, 371.

26 Goodwin-Gill and McAdam, above n 24, 91.

27 *Refugee Convention*, art 1A(2).

28 McAdam and Saul, above n 3, 372.

29 Andrew E. Shacknove, ‘Who Is a Refugee?’ in Hélène Lambert (ed), *International Refugee Law* (Ashgate, 2010) 163, 166.

30 Opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (‘*OAU Convention*’).

31 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (22 November 1984) Conclusion 3.

32 *OAU Convention*, art 1(2).

33 Goodwin-Gill and McAdam, above n 24, 134.

Will they be protected under the statelessness regime?

The international community has recognised that there will be some vulnerable individuals lacking state protections who are not able to fit within the narrow category of refugees, and are therefore left without the special rights protections refugees have as a result of the *Refugee Convention*.³⁴ This includes those individuals left stateless for various reasons. As a result, two international agreements were formed in an attempt to improve the rights protections of stateless persons: the *Convention Relating to the Status of Stateless Persons* ('1954 Convention'),³⁵ and the *Convention on the Reduction of Statelessness*.³⁶ The 1954 Convention is mainly concerned with providing a status for these stateless individuals, and ensuring basic rights protections. Of particular importance is the right to obtain identity documents,³⁷ along with the requirement for state parties to 'as far as possible facilitate the assimilation and naturalization of stateless persons'³⁸ and the limitations on the rights of states to expel non-citizens.³⁹

The status of their nation-state (as discussed above) will have an impact on whether the individuals left effectively stateless will be able to claim the rights protections under these conventions. Under art 1(1) of the 1954 Convention, a stateless person is someone who is 'not considered as a national by any State under the operations of its law'. This definition does not encompass the situation where a person may remain the national of a state, but may be unable to exercise that nationality due to the state's territory becoming uninhabitable or disappearing completely. This definition only extends to *de jure* statelessness, as it is a 'purely legal definition'.⁴⁰ The plight of the individuals left effectively stateless by the disappearance of their territory is more likely to fall under the definition of *de facto* statelessness, which is not covered by the statelessness conventions. *De facto* statelessness covers those individuals who 'have a nationality according to the law, but either this nationality is not effective or they cannot prove or verify their nationality'.⁴¹ Given the difficulties of classifying the status of their nation-state in the event of it becoming uninhabitable, it may be difficult for these individuals to qualify as stateless persons under the 1954 Convention. Perhaps the only way to ensure that these individuals would fit within the definition would be if the state 'formally withdrew nationality'.⁴²

Even if the individuals effectively rendered stateless were able to fit within the definition of the 1954 Convention, they would still only be granted 'a limited set of rights and protections'.⁴³ Neither of the statelessness conventions guarantee what is most required, the assumption of a new nationality, and, hence, rights protections under a new state.⁴⁴ In many states 'nationality is a practical prerequisite for accessing political and judicial processes and for obtaining economic, social, and cultural rights'.⁴⁵ In addition, there have been relatively few accessions or ratifications to the two conventions, diminishing the practical availability of the protections available under them.⁴⁶ It is important, therefore, to ensure that these individuals do not become stateless and hence lose important rights protections. This

34 *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) preamble.

35 Ibid.

36 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

37 1954 Convention, art 27, 28.

38 Ibid art 32.

39 Ibid art 31.

40 David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008) 84.

41 Ibid.

42 McAdam and Saul, above n 3, 374.

43 Weissbrodt, above n 40, 82.

44 Ibid 103.

45 Ibid 97.

46 There are currently 65 parties to the 1954 Convention and 37 parties to the Convention on the Reduction of Statelessness.

could be done through ‘acquisition of an effective nationality’ before the possible dissolution of their state, or even a flexible form of dual nationality for a ‘transitional period’.⁴⁷

Other possibilities for protection – a global responsibility?

There are a number of other, less settled, principles of international law that may provide some method of protection to these islanders, generally by recognising a form of global responsibility for the issue and its effects. These options may be useful in forming obligations for states to provide protection to these individuals or in re-thinking the way in which we approach the problem. This essay does not have the space to examine potential avenues of litigation, but those too may be able to play a role in creating a greater awareness of the rights and vulnerabilities these communities and individuals are facing.

The right to self-determination

One of the most important rights in international human rights law is the right to self-determination. This principle has taken form in many international rights agreements, such as the *International Covenant on Civil and Political Rights*,⁴⁸ the *United Nations Declaration on the Rights of Indigenous Peoples*⁴⁹ and the *International Covenant on Economic, Social and Cultural Rights*, where it is stated that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁵⁰

Those individuals and states at risk from losing their territory to climate change may have their right to self-determination threatened. This is perhaps the most important rights violation they may face and it would ‘seem unreasonable for a nation that has enjoyed well-established self-determination’ for so long to be suddenly deprived of this right.⁵¹ Despite being a central concept in international law, there have been many ‘differing interpretations’ of the meaning of self-determination and its application extends beyond simply self-governance.⁵² While it may prove practically difficult to continue the existence of a state on the ceded territory of another, and while, as Selma Oliver points out, the right to self-determination ‘cannot be used to back a claim to the acquisition of territory’, this right may still be useful in providing some protection to the islanders.⁵³ If the islanders were to settle in and become nationals of a new state, this right may become extremely important in ensuring that they could continue their cultural traditions and integrity with some degree of self-governance, albeit within the boundaries of the new state.⁵⁴

Complementary protection

Complementary protection encompasses the various protections granted by states to individuals who do not fulfil the legal definition of ‘refugee’, on the basis of some other international treaty or need.⁵⁵ Unlike their obligations under

⁴⁷ UN High Commissioner for Refugees, *Climate Change and Statelessness: A Overview* (15 May 2009) 3 <<http://www.unhcr.org/refworld/docid/4a2d189d3.html>>.

⁴⁸ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

⁴⁹ GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (13 September 2008) art 3-5.

⁵⁰ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1.

⁵¹ Oliver, above n 12, 223.

⁵² S. James Anaya, *International Human Rights and Indigenous Peoples* (Wolters Kluwer, 2009) 73-74.

⁵³ Oliver, above n 12, 223.

⁵⁴ *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (30 September 1996) 125.

⁵⁵ McAdam, above n 19, 21.

the *Refugee Convention*, however, these protections are generally ‘loosely defined, *ad-hoc*, and not regulated’.⁵⁶ Jane McAdam argues for the existence of an extended application of the principle of non-refoulement under international human rights law in an effort to provide a stronger basis for complementary protection, suggesting that this imposes two obligations on states:

to refrain from removing persons to territories where they face a substantial risk of particular kinds of ill-treatment; and to provide such persons with a legal status equivalent to that of Convention refugees.⁵⁷

The rights guaranteed under complementary protection are again, however, at the discretion of states and their willingness to ‘adequately implement their international legal obligations’.⁵⁸ In addition, currently, it appears that climate-induced displacement would not fall within the scope of even an expanded notion of complementary protection, as it does not involve a breach of the right to protection from torture or inhuman or degrading treatment.⁵⁹ It is true, however, that informal or *ad-hoc* processes do exist in some states that allow some individuals to be provided with protection for varying humanitarian reasons. Due to the discretionary nature of this protection, however, it is not a reliable option for those left stateless, though it could form part of a more legally-binding regional or bilateral agreement.

Responsibility to protect

It has also been suggested that the paradigm of human security may be a useful tool to protect the rights of these stateless persons, through recognising an international ‘responsibility to protect’ ‘R2P’.⁶⁰ The concept of R2P encompasses an international duty to protect individuals whose states have failed to uphold their basic obligations.⁶¹ The scope and content of this international responsibility, however, remains somewhat ‘ambiguous’.⁶² In particular, if it is a general international responsibility then it may not fall on any state in particular and would therefore be rendered practically ineffective. It has been noted, however, that where there is an agent who has a close relationship with the individuals seeking protection, or is clearly the ‘most capable’ agent to carry out the protection, the responsibility to protect may fall on specific states or actors.⁶³ This situation could arguably apply to the relationship Australia has with various Pacific island states which are potentially at risk. While the ‘legal dimension’ of R2P remains uncertain, this concept may have a role to play in increasing pressure on the international community more generally, and also particular states, to ensure the rights protections of the islanders.⁶⁴

International environmental law

Other than the potential for litigation (which this essay will not be examining), international environmental law does provide some basis for international action to provide aid and protection to those individuals and states threatened

⁵⁶ Weissbrodt, above n 40, 120.

⁵⁷ McAdam, above n 19, 252.

⁵⁸ Ibid 254.

⁵⁹ McAdam and Saul, above n 3, 379.

⁶⁰ Ibid 401.

⁶¹ Luke Glanville, ‘Chapter Eight: The International Community’s Responsibility to Protect’ in Sara E. Davies and Luke Glanville, *Protecting the Displaced: Deepening the Responsibility to Protect* (Martinus Nijhoff, 2010) 185.

⁶² Ibid.

⁶³ Ibid 195.

⁶⁴ Ibid 196.

by the effects of climate change.⁶⁵ If the island states do decide to attempt to purchase or rent land in other nations in order to continue their existence this will be a costly exercise, requiring both the funds to purchase the land and to develop new infrastructure. It is possible that certain provisions in the *United Nations Framework Convention on Climate Change* 'UNFCCC' may be used to enable island states to receive aid and some form of protection for their inhabitants, from the international community more generally.⁶⁶ Article 4(1)(e) states that parties to the UNFCCC agree to 'Cooperate in preparing for adaptation to the impacts of climate change', while art 4(8) states:

In the implementation of the commitments in this Article, the Parties shall give full

consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on

(a) Small island countries

These provisions appear to form a solid basis for small island states to expect to receive adequate funding, at the very least, to provide for the circumstances of their forced removal. However, it is important not to read these provisions too widely or optimistically, and the adaptation programs and funding that have taken place so far under the convention have been limited to 'transfer of technology, support programmes, policy reform and other on-site changes', rather than long term funding and protection measures for those who may be displaced.⁶⁷ Again, while the UNFCCC may be a useful tool to raise awareness and form political will, it does not contain any binding obligations to provide aid or protection to these islanders.

Case Study – Australia's role and responsibilities

As can be seen from the above discussions, the legal status of these islands and their inhabitants in the event of a loss of habitable territory is unclear. The implications of this uncertainty for the rights protections of these individuals can be examined through Australia's reaction to the issue to date and the plans it is making for future assistance.

Australia has a close connection with many of the Pacific Islands at risk, and is 'in no small way responsible' for climate change, the results of which may have devastating consequences for many island states.⁶⁸ Pacific islands located quite close to Australia, such as Kiribati and Tuvalu, are among those nations threatened with 'whole-nation displacement' due to the effects of climate change.⁶⁹ Australia has a clear moral duty to help protect the rights of these individuals, but whether as a country it will recognise this duty and choose to offer long-term protection, flexible migration options and the possibility of nationality is so far unclear, and depends to a large extent on political will.

Australia is a dualist state, which means that international treaties will only have effect within Australia if they are implemented into domestic law after ratification.⁷⁰ Although Australia is a signatory to the two statelessness conventions as well as the *Refugee Convention*, not all the commitments under these conventions have been implemented into domestic law. Even if these conventions were fully adopted in Australia, it is unlikely that they

⁶⁵ Oliver, above n 12, 225.

⁶⁶ Opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁶⁷ Oliver, above n 12, 226.

⁶⁸ Jon Barnett, 'Security and Climate Change' (2003) 13(1) *Global Environmental Change* 7, 12.

⁶⁹ McAdam and Saul, above n 3, 366.

⁷⁰ McAdam, above n 19, 204.

would be of great use to the Pacific Islanders in a climate change-displacement scenario. In New Zealand, a number of Tuvaluans have sought refugee status and have been rejected, on the basis that they cannot prove a well-founded fear of persecution. As the Refugee Status Appeals Authority notes, 'All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu', they are all 'unfortunate victim[s]' of the environmental forces, but do not qualify as refugees within the convention definition.⁷¹ It is likely to be the same situation in Australia. In addition, some of the island states themselves have rejected the label of refugee, believing that it connotes 'victimhood, passivity, and a lack of agency' and that it might lead to a loss of culture and national identity.⁷²

Stateless persons in Australia are aliens and able to be deported. The case of *Al-Kateb v Godwin* illustrates the vulnerability of the rights of stateless persons under Australian law.⁷³ Mr Al-Kateb was a stateless Palestinian who was held in immigration detention in Australia after failing to gain a protection visa. He was unable to be deported because the Australian authorities were not able to find a country to accept him, so he remained in detention for a number of years. The Australian High Court upheld this continued detention as constitutionally valid, regardless of whether it contravened basic human rights.⁷⁴ Statelessness would render the islanders open to human rights abuses, and, even if granted a basic set of human rights, their culture and identity would be at risk.

Australia appears not to have a flexible migration policy for these islanders at present. Instead, they are subject to the same 'non-discriminatory' policy as every other applicant.⁷⁵ Unfortunately, due to the generally 'low-skill' levels of the majority of Pacific Islanders, this has resulted in quite low levels of migration to date.⁷⁶ New Zealand, in contrast, has a number of policies in place to favour migration from the Pacific Islands, including the Pacific Access Category program, which currently allows '75 citizens of Kiribati, 75 citizens of Tuvalu and 250 citizens of Tonga to be granted residence in New Zealand each year'.⁷⁷ This is still a limited policy, however, which only accepts able-bodied adults between 18–45 years old.⁷⁸ Australia has helped to create the Asian Pacific Technical College, which aims to improve the vocational skill level of Pacific Islanders and hence increase their migration options, which is an important beginning.⁷⁹

Some of the Pacific Islands at risk have expressed a desire for progressive migration programs to countries such as New Zealand and Australia. Kiribati, for example, aims to 'slowly build up I-Kiribati communities abroad through the gradual, transitional resettlement of Kiribati citizens' so as to be able to build up a new community abroad and enable the continuation of their cultural identity and family networks.⁸⁰ Unlike most refugee situations, climate-change displacement for these Pacific Islanders will most likely not be sudden, but gradual, and hence can, and should, be planned for in advance.⁸¹ While everything needs to be done to attempt to prevent displacement from occurring, it must also be recognised that migration may be the only option for some of these island states. It is in Australia's best

71 *Refugee Appeal No. 72316/2000* (Unreported, Refugee Status Appeals Authority, New Zealand, C Parker (Member), 19 October 2000) [13].

72 Jane McAdam and Maryanne Loughry, *We Aren't Refugees* (30 June 2009) Inside Story: Current Affairs and Culture <<http://inside.org.au/we-aren't-refugees/>>.

73 (2004) 219 CLR 562.

74 *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).

75 Jane McAdam, 'Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23(1) *International Journal of Refugee Law* 2, 22.

76 Charles W. Stahl and Reginald T. Appleyard, *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* (April 2007) Australian Government: AusAID, v <www.ausaid.gov.au/publications/pdf/migration.pdf>.

77 *Pacific Access Category* (29 November 2010) Immigration New Zealand <<http://www.immigration.govt.nz/migrant/stream/live/pacificaccess/>>.

78 Burleson above n 4, 27.

79 Stahl and Appleyard, above n 76, v.

80 Jane McAdam, 'From Economic Refugees to Climate Refugees?', above n 6, 583.

81 McAdam and Saul, above n 3, 570.

interest to ensure that these islanders do not become stateless, as 'the presence of large numbers of stateless persons in a given region can often produce regional instability'.⁸² The potential for conflict where displacement occurs has already been highlighted in the case where a 'program to relocate Palau residents has met with resistance as residents of larger islands forced newcomers back to submerging islands'.⁸³ Regional organisations like the Pacific Islands Forum are perfectly situated for creating regional plans and policy which will enable residents of threatened states to peacefully and orderly relocate to other states, with their human rights protected and their cultural identity intact.⁸⁴

Conclusion – future possibilities

Current rights protections are clearly inadequate to deal with these new international problems. The disappearance of an entire state's territory raises important questions in international law, both theoretical and practical, that remain unanswered. Conventional rights protections for those who are displaced, such as the refugee and statelessness conventions, fail to deal with this particular situation, or with climate change-displacement more broadly. In this scenario 'the traditional Western approach of individualized decision-making about protection on technical legal grounds seems highly inappropriate' to the scale of displacement, and the range of rights vulnerabilities at issue, including those of self-determination and nationality.⁸⁵

It is clear that the complicated circumstances and myriad issues raised by the potential disappearance of these states' territory cannot be easily dealt with or solved. What is required is flexibility and support, especially at a regional level. Countries located close to these threatened islands are obviously the most able to provide basic rights protections to these potentially vulnerable individuals and to ensure that their cultural rights are not irrevocably harmed by the loss of their state. Countries such as New Zealand and Australia have the means, and the responsibility, as high carbon polluting nations, to begin planning for the possible displacement of these states and individuals. More wide scale and flexible migration programs need to be implemented to allow for greater movement between the Pacific Islands and New Zealand and Australia, so as to ensure that skill levels are increased and a peaceful transfer of persons can occur steadily, minimizing cultural disruption. Organisations like the United Nations High Commissioner for Refugees also have a role to play in ensuring continuing rights protections and facilitating cooperation between the various states and other actors. While an international treaty setting out the basic rights protections of those left stateless or displaced by climate change would be helpful, its international scope would bring issues of its own, and would require strong international support that does not appear forthcoming.⁸⁶ It would also be unlikely to address the particular circumstances of these threatened states.

It is, perhaps, dangerous in this situation to view international law as the solution to all of these issues.⁸⁷ It can play a role, and an important one, in laying out the basic rights and protections of these individuals, but what is required to ensure full protection of their cultural identity and issues of self-determination is a cooperative approach, based at a regional level. Essentially, what is needed is a political response to grapple with these complex problems, a response that will require a great deal of forward-planning, flexibility and understanding.⁸⁸ This will require recognition on the part of the international community of a sense of shared responsibility for these individuals who may be left stateless and without adequate rights protections as a result of human induced climate change.

⁸² Weissbrodt, above n 40, 107.

⁸³ Burleson above n 4, 29.

⁸⁴ *Pacific Islands Forum Secretariat* < <http://www.forumsec.org.fj/index.cfm>>.

⁸⁵ McAdam and Saul, above n 3, 380.

⁸⁶ Jane McAdam, 'Swimming against the Tide', above n 75, 16.

⁸⁷ McAdam and Saul, above n 3, 403.

⁸⁸ *Ibid.*