The World of Small States 1

Petra Butler
Caroline Morris *Editors*

Small States in a Legal World

The World of Small States

Volume 1

Series editors
Petra Butler
Wellington, New Zealand

Caroline Morris
London, United Kingdom

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Petra Butler • Caroline Morris
Editors

Small States in a Legal World

Editors
Petra Butler
Faculty of Law
Victoria University of Wellington
Wellington, New Zealand

Caroline Morris
School of Law
Queen Mary University of London
London, United Kingdom

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Preface

The World Bank Group defines small states as 'as countries that . . .have a population of 1.5 million or less. . .'.[1] Of the world's 195 commonly recognised sovereign states, 40 countries, or 21% of the total number of states, come within this definition.[2] Small states can be found in all corners of the world. However, most small states are found in the Pacific, the Caribbean, and the African Indian Ocean. Reflecting their global distribution, they are diverse in culture, geography, history, land area, levels of income, and economy. The majority of small states are island states. Some are isolated; others are landlocked or neighbours of much larger states. Many of them have been under colonial rule and have transplanted or mixed legal systems that reflect their colonial experience and heritage. A few are high-income countries; however, the majority are middle- or low-income countries. Some have fragile governance and are conflict-affected; others have lived under stable rule for centuries. Some small states are commodity exporters, while others have service and tourism-based economies.

Because of their size, small states face a set of common challenges including a vulnerability to external economic impacts such as changing trade regimes; many also have restricted ability to diversify their economic activity. They have generally limited public and private sector capacity. In particular, they face challenges in providing a complete legal and judicial infrastructure. They have an enhanced need for regional co-operation to combat any pressure international law and globalisation exert on them. Small island states are also particularly vulnerable to climate change.

[1]Operations Policy and Country Services, The World Bank (2016), p. ix. The series editors note that the definition is not uncontested. See Maass (2009), pp. 65–83.

[2]For the purpose of this series, the series editors include some territories within the definition of small states that are not classified as states as a matter of international law. These territories are geographically and culturally distinct entities that share the characteristics of small states, including the British Crown Dependencies of the Isle of Man, Jersey, and Guernsey and British Overseas Territories such as Gibraltar and the Pitcairn islands.

However, small states provide us with a unique opportunity to understand and gain insights not only into the experiences of larger states[3] but also, and more generally, concepts of governance, economics, cultural studies, sociology, and many other disciplines. They are often sites of social development and innovation since they are able to react more flexibly and more rapidly to challenges. They often have an influence in the world disproportionate to their size.

Despite the opportunities small states present in regard to the research and the study of pressing global problems, such as climate change, and also long-standing questions relating to ethics, legal pluralism, and colonialism, and international relations, scholarship, particularly legal scholarship, is relatively scarce. There are individual books on issues relating to small states,[4] and articles focusing on one or more small states can be found in general journals;[5] but small states research was in need of an interdisciplinary series devoted to showcasing and disseminating scholarship on small states. *The World of Small States* series, under the general editorship of Petra Butler and Caroline Morris, co-director of the Centre for Small States at Queen Mary University of London, is committed to publishing monographs and edited collections addressing small states issues in the areas of law, economics, politics, and international relations. We also welcome approaches from scholars in other disciplines.

The first volume of this series, *Small States in a Legal World*, is dedicated to some of the fundamental legal issues faced by small states. The volume begins with Geoffrey Palmer exploring the question whether a dystopian future for small island states and their unique culture can be avoided given the disproportional impact of climate change on them in 'Small Pacific Island States and the Catastrophe of Climate Change'.[6] The chapter explores that question by examining the likelihood of inundation from the sea and its consequences, by analysing whether the Paris Agreement will assist small island states and what the consequences of failure are. The chapter further discusses some of the human rights and the security issues that arise in regard to climate change in particular for small island states. The chapter is complemented by Alberto Costi and Nathan Jon Ross' chapter on 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future'.[7] The authors discuss the consequences of climate change and the disappearance of small island states on the status of states under international law.

In Part II, *Small States: Challenges and Adventures in Law*, the reader can become acquainted with the diversity of issues that can be examined through the lens of the small state. In 'Competition Law and Policy in Small States', Lino

[3]Veenendaal and Corbett (2014), pp. 527–549.

[4]See, for example, Angelo (2014), Berry (2014), Briguglio (2014), Farran and Forsyth (2015), Corrin and Bamford (2015), and Thorhallsson (2000).

[5]It has to be noted some journals are, by virtue of their location, predominantly dealing with small states research and issues, such as the *Journal of South Pacific Law* or the *Caribbean Law Review*.

[6]Chapter 1, pp. 3–20.

[7]Chapter 6, pp. 101–138.

Briguglio of the Islands and Small States Institute shows, using Malta as a case study, that there are many factors associated with a small domestic market that have a bearing on competition law and policy.[8] Baldur Thorhallsson of the Centre for Small State Studies in 'Small States in the UNSC and the EU: Structural Weaknesses and Ability to Influence' investigates the methods and tools that small states can use to influence decision-making in the European Union and the United Nations Security Council.[9] 'The Impact of EU Law in Luxembourg: Does Size Matter?' by Michèle Finck[10] provides a case study for Thorhallsson's observations and an example, as Finck argues, of a state whose relationship with the EU can be viewed through the framework of size. Thorhallsson's observations are again tested in 'The Taxation of Small States and the Challenge of Commonality'[11] where Ann Mumford argues that by asserting a commonality of interest, smaller states may be able to perform beyond expectations in the international tax sphere and influence negotiations to the same extent as larger states. A common claim in studies of small states polities is that small size increases social cohesion and reduces the distance between citizens and their politicians. Therefore, small states should be model democracies. Derek O'Brien in his chapter 'Small States, Colonial Rule and Democracy' tests this perception by examining the state of democracy in the Caribbean and the reasons for it.[12] Tamasailau Suaalii-Sauni in 'Legal Pluralism and Politics in Samoa: The Faamatai, Monotaga and the Samoa Electoral Act 1963' examines the importance of being able to read cultural nuance in these socio-political reports and events and its relevance to understanding custom, the potential negative effects caused by the ambiguities created by the ad hoc blending of Samoa's fa'amatai (chiefly) and parliamentary democratic systems, and the lack of attention that theology has received in examinations of legal pluralism in the Pacific.[13]

The final part, *The Legal Profession in Small States: Education, Practice, and Regulation*, discusses aspects of the legal profession in the Pacific, Malta, Jersey, the Seychelles, and Cyprus. Trust in the legal system, in particular in its independent and ethical operation, is one of the cornerstones of a democratic state. In small societies, those issues are particularly pertinent. Since investment will more readily flow if a state has a robust legal profession and judiciary, the issues arising in regard to legal education and legal practice in small states are also one of economic development. The problems faced by the legal profession across the small states of the South Pacific and the various regulatory models that may be adopted to deal with ethical and other breaches of professional standards are examined by Nilesh Bilimoria in 'Choices for the South Pacific Region's Bar Associations and Law

[8] Chapter 2, pp. 23–34.

[9] Chapter 3, pp. 35–64.

[10] Chapter 4.

[11] Chapter 5.

[12] Chapter 7, pp. 139–163.

[13] Chapter 8, pp. 165–187.

Societies?'.[14] Nikitas Hatzimihail in 'On Law, Legal Elites and the Legal Profession in a (Biggish) Small State: Cyprus' explores the question of how size is impacting on the role—and functions—of law and lawyers in a small state that has a mixed legal system.[15] Seán Donlan, David Marrani, Mathilda Twomey, and David Zammit in 'Legal Education and the Profession in Three Mixed/Micro Jurisdictions: Malta, Jersey, and Seychelles' explore legal education and training and the legal profession in three mixed/micro jurisdictions: Malta, Jersey, and Seychelles.[16] The chapter considers how insiders in these jurisdictions look abroad to jurists and doctrine, judges and jurisprudence, and legislators and legislation, as well as foreign-trained practitioners, to orient their studies and practice. The effect of such external influences in small jurisdictions, the authors argue, is profound, especially in explicitly mixed traditions.

The general editors would like to thank all those involved in bringing the first volume of *The World of Small States* to fruition: the authors; the anonymous peer reviewers; Laura James and Niall Rand, LLB (Hons) graduates of Queen Mary University of London, who tirelessly and meticulously did a considerable part of the formatting, cite-checking, and additional research; and, finally, the team at Springer, especially Brigitte Reschke and Manuela Schwietzer, who responded enthusiastically to the series proposal and provided invaluable guidance along the way.

Wellington, New Zealand — Petra Butler
London, UK — Caroline Morris
November 2016

References

Angelo T (2014) Seychelles Digest. Law Publications, Seychelles
Berry D (2014) Caribbean integration law. Oxford University Press, Oxford
Briguglio L (ed) (2014) Building the resilience of small states: a revised framework. Commonwealth Secretariat, London
Corrin J, Bamford D (2015) Courts and civil procedure in the South Pacific. Intersentia, Cambridge
Farran S, Forsyth M (2015) Weaving Intellectual Property Policy in small island developing states. Intersentia, Cambridge
Maass M (2009) The elusive definition of the small state. Int Polit 46(1):65–83
Operations Policy and Country Services, The World Bank (2016) World Bank Group engagement with small states: taking stock. World Bank, Washington DC, p ix
Thorhallsson B (2000) The role of small states in the European Union. Ashgate, Aldershot
Veenendaal W, Corbett J (2014) Why small states offer important answers to large questions. Comp Polit Stud 48(4):527–549

[14]Chapter 11, pp. 245–264.
[15]Chapter 10, pp. 213–244.
[16]Chapter 9, pp. 191–212.

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About the Contributors

Nilesh Bilimoria is an assistant lecturer in the School of Law at the University of the South Pacific. He was formerly a senior legal officer with the Fiji Human Rights Commission and is currently a PhD candidate in the Faculty of Law at Queensland University of Technology.

Dr Lino Briguglio is professor of economics in the Faculty of Economics, Management and Accountancy at the University of Malta. He is the director of the Islands and Small States Institute and the Gozo Centre at the University of Malta. He has represented the Maltese government in many United Nations meetings, including the UN Global Conference on the Sustainable Development of Small Island States and the World Summit for Sustainable Development.

Alberto Costi is an associate professor in the Faculty of Law, Victoria University of Wellington, New Zealand. He is also the secretary-general of the International Law Association, New Zealand Branch, and vice president of the New Zealand Association for Comparative Law.

Dr Seán Donlan is associate professor and deputy head of school in the School of Law at the University of the South Pacific. He is a founding member of the micro jurisdictions research network *Nexus* and president emeritus of *Juris Diversitas*.

Dr Michèle Finck is a fellow in the Department of Law at the London School of Economics and a lecturer in EU law at Keble College, University of Oxford. She was formerly a visiting research scholar at New York University.

Dr Nikitas Hatzimihail is associate professor and vice-chair of the Department of Law at the University of Cyprus. He is also an affiliated senior researcher at the Université Libre de Bruxelles. He has served as advisor to the government of Greece on the Aegean and Islands Policy.

Dr David Marrani is the director of the Institute of Law in St Helier, Jersey, and a founding member of the micro jurisdictions research network *Nexus*.

Dr Ann Mumford is a reader in taxation law at the Dickson Poon School of Law at King's College London. She is a founding member of the *FemTax* network of international, feminist tax law professors.

Dr Derek O'Brien is a reader in law at the School of Law and a member of the Small Jurisdictions Service at Oxford Brookes University. He has served in the attorney general's chambers of the Cayman Islands and has advised the Foreign and Commonwealth Office and the Inter-American Development Bank on the provision of legal services in the British Overseas Territories and the independent countries of the Commonwealth Caribbean.

Sir Geoffrey Palmer QC is a distinguished fellow of the New Zealand Centre for Public Law and the Law Faculty at Victoria University of Wellington, New Zealand. He has served as attorney general, minister of justice, leader of the house, deputy prime minister, and prime minister of New Zealand. He was made a member of the Global 500 Roll of Honour by the United Nations Environment Programme. For eight years, he was New Zealand's commissioner to the International Whaling Commission.

Nathan Ross is a research fellow in international law and PhD candidate at Victoria University of Wellington, New Zealand, and a barrister and solicitor of the High Court of New Zealand.

Dr Tamasailau Suaalii-Sauni is an associate professor in the Department of Sociology at the University of Auckland, New Zealand. She regularly advises on Pasifika issues to numerous New Zealand bodies, including the Ministry of Health, the NZ Families Commission, and the Alcohol Advisory Council of NZ.

Dr Baldur Thorhallsson is professor and head of the Faculty of Political Science at the University of Iceland. He is also Jean Monnet chair in European Studies and Programme and research director at the Centre for Small States Studies at the University of Iceland.

Dr Mathilda Twomey is the chief justice of the Supreme Court of Seychelles. She is admitted to the Bar of England and Wales and practised as an attorney-at-law in Seychelles. She was a member of the Constitutional Commission of Seychelles which drafted the present Constitution of Seychelles in 1993.

Dr David Zammit is a senior lecturer and head of the Department of Civil Laws in the Faculty of Laws at the University of Malta. He is a fellow of the Royal Anthropological Institute and executive editor of the *Mediterranean Journal of Human Rights*.

Part I
2015 Keynote Lecture

Chapter 1
Small Pacific Island States and the Catastrophe of Climate Change

Geoffrey Palmer

1.1 Introduction

The international community decided at Paris in December 2015 to take some action to combat climate change. Given that the *United Nations Framework Convention on Climate Change* was agreed at the Earth Summit at Rio de Janeiro in 1992 and prior to Paris there were 20 Conferences of the Parties (COPs) to the Convention with little of substance achieved, one is entitled to ask whether the actions decided upon in 2015 are too little and too late. The twin pivots around which climate change policy revolves are mitigation and adaptation. To mitigate it is necessary to keep global warming by the end of this century to less than 1.5 °C and even then there will be adverse consequences, the increase in sea levels being particularly pertinent to small island states. If mitigation is not successful adaptation will have to do all the work. The consequences of climate change fall unevenly upon nations; some will fare better than others. Few will be worse affected than the small island states of the Pacific.

I will traverse the issues faced by small island states by exploring the following points:

- the vastness that is the Pacific
- the nations in the Pacific at greatest risk
- what the science says about the likelihood of inundation from the sea and its consequences
- what has the Paris agreement done to assist them?
- what are the consequences of failure?
- some discussion of human rights issues and the security issues.

G. Palmer (✉)
Faculty of Law, Victoria University of Wellington, Wellington, New Zealand
e-mail: geoffrey.palmer@vuw.ac.nz

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The issue with which I will leave you is this: can we avoid a dystopian future for Small Island States and their unique cultures?

1.2 The Pacific

When in Europe I am always struck by how small Europe is and how close the countries are to each other. It takes a New Zealander about 3 h to fly to eastern Australia (one of our closest neighbours). To Hawaii it is more than 9 h. To the United States mainland 12 h. And most places on the Pacific Rim take 10 h. The Pacific is one large ocean, covering a vast distance. So I will limit this inquiry to Oceania. By that expression I mean Australia, New Zealand, Papua New Guinea, Micronesia, Melanesia and Polynesia. Thirty million people live in Oceania. As you can see there are many islands. Oceania includes some of the smallest and most remote countries on the planet. They are not well known outside the region and not easily made the subject of global attention.

The Pacific Island Forum is the regional political association that covers many of these countries. Members include: Australia, Cook Island, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Tonga, Tuvalu, and Vanuatu. Associate Members include: New Caledonia, French Polynesia. Observers include: Tokelau, Wallis and Futuna, American Samoa, Timor Leste, Northern Mariana Islands.

1.3 Efforts by Vulnerable Nations

All nations are vulnerable to the threats from climate change but some are more vulnerable than others.

The Pacific Island Forum takes climate change seriously as an issue, more seriously than its most advanced members Australia and New Zealand have taken it so far. The most vulnerable countries have been critical of the stance taken by Australia and New Zealand on the issue, accusing them of not being real friends.[1] The Pacific Island Development Forum Summit headquartered in Fiji issued a very strong call for action on climate change a few days before the South Pacific Forum meeting.[2] The small island developing states know they are under the hammer despite having contributed very little to the cause of the climate change problem. In 2015 at Port Moresby Pacific Island Forum, leaders declared:[3]

[1] Australian Broadcasting Corporation (2015a, b).

[2] Pacific Islands Development Forum (2015a): This new grouping led by Fiji was formed because changing global and regional environment required new approaches to problem solving.

[3] Pacific Islands Forum Secretariat (2015b).

> ... that Pacific Island Countries and Territories are amongst the most vulnerable and least able to adapt and to respond; and the adverse consequences they face as a result of climate change, including the exacerbation of climate variability, sea level rise, ocean acidification, and more frequent and extreme weather events, are significantly disproportionate to negligible collective contribution to the global greenhouse gas emissions.

The Small Island Developing States (SIDS) of the world made concerted efforts to combine to bring maximum international pressure to bear long before the Paris meeting to ensure they were heard and their plight recognised. Their diplomatic efforts had success. In 2011 Palau's President urged the United Nations General Assembly to seek an advisory opinion from the International Court of Justice on whether states could be held liable for climate change under international customary law on transboundary harm.[4] The Alliance of Small Island States (AOSIS) had been active in the 20 previous COP meetings. The Maldives (in the Indian Ocean) was one of the founding members of this coalition of coastal and island nations highly vulnerable to climate change that was formed in 1990.

AOSIS states that it has a membership of 44 States and observers, drawn from all oceans and regions of the world: Africa, Caribbean, Indian Ocean, Mediterranean, Pacific and South China Sea. Thirty-nine are members of the United Nations, close to 28% of developing countries, and 20% of the UN's total membership. Together, SIDS communities constitute some 5% of the global population. Addressing the Security Council's Open debate on SIDS in 2015 the Secretary-General of the United Nations called for support of the nations in their actions to adapt to climate change.[5] The SIDS managed to secure much publicity in the run up to Paris and they certainly made a significant impact on the negotiations. AOSIS members at the Paris plenary started to sing Bob Marley's song 'Three Little Birds' repeating the refrain 'Every little thing gonna be all right' just before the final text was released; there was much cheering and applause.[6] Palau's ambassador to the EU and negotiator at Paris, Olai Uludong called the agreement 'remarkable'. The foreign minister of the Marshall Islands Tony de Brum spearheaded the High Ambition Coalition that secured support from 140 countries; 'it suddenly became the bus that everyone wanted to join' he said.[7] There were other expressions of relief from Pacific Island leaders at the result in Paris and the political achievement of these nations and the Paris agreement itself must be recognised and applauded after 20 failed attempts since 1992 at securing a meaningful international agreement. But just how meaningful Paris will be for these highly vulnerable nations must be analysed in a hard-headed way.

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[4]Toribiong (2011).

[5]Ki-moon (2015).

[6]Little (2015).

[7]Pacific Islands Forum Secretariat (2015b).

1.4 What the Science Says

After years of prevarication and scepticism about the reality of climate change the science about it now seems to be widely accepted. In political terms acceptance that climate change is a reality that must be faced up to may be the greatest achievement of Paris. Yet the truth was clear enough from the time that the first report of the Intergovernmental Panel on Climate Change (IPCC) appeared in 1990.

As New Zealand's Minister for the Environment I made several speeches in the Pacific warning Pacific Island countries of the dangers of inundation from the sea due to rises in sea level attributed to climate change. I said at the University of Papua New Guinea in May 1989:[8]

> In our neighbourhood are many small nations, rich in history, culture and language. There are several nations in the Pacific region that are made up totally of atolls. The entire land base of these vital, unique and important countries may one day be physically destroyed.

The authoritative 2014 IPCC report summary for policymakers states the reality this way:[9]

> Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming since the mid-20th century.

Dr. James Hansen[10] from NASA and other leading scientists published a chapter in December 2013, the abstract of which says:

> Rapid emissions reduction is required to restore the Earth's energy balance and avoid ocean heat uptake that would practically guarantee irreversible effects. Continuation of high fossil fuel emissions, given current knowledge of the consequences, would be an act of extraordinarily witting intergenerational injustice. Responsible policymaking requires a rising price on carbon emissions that would preclude emissions from most remaining coals and unconventional fossil fuels and phase down emissions from conventional fossil fuels.

It is Hansen, with others, who has published the most recent research on sea level rise; in an article titled 'Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2 °C global warming is highly dangerous'.[11] In it, the authors explain how they found that temperatures were less than 1 °C warmer than today in prior interglacial periods (we are currently in an interglacial period, i.e. not an ice age) and that the sea level was 5–9 m higher than it is today. So, previous forecasts of sea level rise may be far

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[8] Palmer (1990), p. 70.

[9] Intergovernmental Panel on Climate Change (2014a), p. 4.

[10] Hansen et al. (2013), p. 1.

[11] Hansen et al. (2016).

too conservative and the risks from global warming may be far greater than previously understood. Previous forecasts from the IPCC in 2013 predicted that sea levels will rise between half a metre and a metre by the end of this century. It seems clear from the most recent research, however, that these estimates will have to be revised upwards. The tipping point for icesheets in the Greenland ice sheet may arise at 1.6 °C above pre-industrial temperatures which is only 0.7 °C above today's temperatures.

I now wish to set out at length a draft of the problem definition on this subject by Nathan Jon Ross, a PhD student in law at the Victoria University of Wellington:

> The impacts from climate change on low-lying States are obviously acute. The common conception is "sinking islands". Due to thermal expansion of oceans and the melting of terrestrial ice and snow, sea level has risen and will continue to rise.[12] Indeed, the rate of sea level rise is increasing[13] and it is worse in the tropical Pacific, where many of the low lying States are situated, because the rate of increase in the region is up to four times higher than the global average.[14]
>
> However, the low-lying States are confronted by a much wider range of compounding climate change-related problems and it is worth pulling them together so readers have a more holistic understanding of their environmental situations.[15] Low-lying States are confronted by:

- Exacerbated weather extremes such as rainfall events and heat waves;[16]
- Flooding and inundation from sea-level rise and/or extreme weather events such as cyclones;[17]
- Marine water pollution and resulting salinisation of water supplies, agricultural lands and fresh water ecosystems;[18]
- Erosion of coastlines and coastal developments;[19]
- Bleaching and other damage to coral reefs, which compromises the ecosystem services they provide, for example, protecting island shores and providing habitat for marine species that are important to subsistence;[20] and

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[12] Intergovernmental Panel on Climate Change (2013), p. 1139.

[13] Ibid; Hansen et al. (2015), p. 20059.

[14] Intergovernmental Panel on Climate Change (2014b), pp. 1619–1620; The variability in the extent of sea level rise is due to local geology and changes in ocean currents, see Fitzpatrick (2013).

[15] Intergovernmental Panel on Climate Change (2014b), pp. 1613–1642: Note that these problems are generalised here and that natural systems are complex and there are some naturally occurring processes that mitigate some of these events. However, the processes that mitigate these impacts are generally outstripped by the climate change effects that create these effects so that the overall effect is clearly negative.

[16] Intergovernmental Panel on Climate Change (2013); McLeman (2008), p. 11.

[17] Intergovernmental Panel on Climate Change (2014b), s 29.3.1.1.

[18] Barnett and Adger (2003).

[19] Intergovernmental Panel on Climate Change (2014b), s 29.3.1.1; McLeman (2008), p. 11.

[20] Intergovernmental Panel on Climate Change (2014b), s 29.3.1.2.

- Damaged mangroves and sea grasses caused by the greater depth of the sea, thereby compromising the ecosystem services they provide, such as providing foods, materials, and habitat for other species that are important for subsistence.[21]

> From all of these environmental changes, there are human health impacts already observed, including:

- Direct mortality and injury from extreme weather events;[22]
- Increased incidences of diseases such as malaria and dengue fever;[23]
- Diseases from exposed landfill and burial sites following floods and inundation events;[24] and
- Compromised health from lack of access to freshwater and adequate nutrition.[25]

> As developing countries, there are domestic issues that also contribute to challenges in these low-lying States, but the scale of these compounding environmental changes is clearly enormous and they simply do not have the capacity to protect themselves. Hence, the UN General Assembly has recognised that there may be instances where adaptation *in situ* is simply not feasible. The IPCC has noted that "it has been suggested that the very existence of some atoll nations is threatened by rising sea levels"[26] and that "land inundation due to sea-level rise poses risks to the territorial integrity of small-island states".[27]
>
> There appears to be no definitive list of low-lying States that are the most at risk.[28] Although around 40 island nations face severe consequences,[29] the countries most often cited as being completely at risk are Tuvalu, Kiribati, the Marshall Islands and the Maldives.

Looking at the situation of these countries more closely I suggest we need to ask whether they can realistically be saved from the effects of climate change by any combination of mitigation and adaptation.

The highest points on these island nations are:

- *Kiribati*: 81 m.
  Kiribati comprises 1 island (Banaba) and 32 atolls. The highest point is on the island of Banaba, which is just 6 km long, and has been destroyed by phosphate mining. It supports a population of just 300. The original Banaban people now live on the territory of Fiji. In the atolls, where the remaining 112,000 people live, the highest point is just 2 m.
- *Tuvalu*: 4.6 m.

[21] Ibid.

[22] Intergovernmental Panel on Climate Change (2014b), s 29.3.3.2.

[23] Ibid.

[24] Foster (2014).

[25] Intergovernmental Panel on Climate Change (2014b), s 29.3.3.2.

[26] Intergovernmental Panel on Climate Change (2014b), Chap. 29.

[27] Intergovernmental Panel on Climate Change (2014b), Chap. 21.

[28] Park (2011), p. 2.

[29] Warner et al. (2009), s 3.7.

There are three reef islands and six atolls. The population is 10,837.

- *Marshall Islands*: 10 m.
  There are five islands and 29 atolls. The population is 56,719.
- *The Maldives*: 2.4 m, the lowest 'highest point' in the world.
  There are 26 atolls that make up the Maldives. The population is 402,071. The Maldives are situated in the Indian Ocean.

I should note here that Tokelau comprises three atolls north of Samoa just 3–5 m above sea level, with a population of about 1400. About 9000 Tokelauans live in New Zealand now. Tokelau is part of the territory of New Zealand. So the people are New Zealand citizens and should be able to relocate. New Zealand provides assistance to Tokelau. But climate change challenges the future of Tokelau. There has been little discussion in New Zealand about this that I have been able to discern.

Although the height above sea level is important context, there is more to the story than just a consideration of this height above sea level, as indicated by the example of 81 m high Banaba Island being virtually uninhabitable. The wide range of environmental and social consequences of climate change, the idea of 'sinking states' is just one of the issues.[30] The key point is this: even if some *terra firma* remains with its head above water, it will not be in any condition to support a thriving human community. Ex situ adaptation is almost certainly inevitable.

Can these island nations be saved via a combination of mitigation and adaptation? According to the research by Hansen et al., it seems that sea-level rise—without any of the other adverse effects—will be enough to cause these countries to become completely uninhabitable. Kiribati President Anote Tong has already conceded that some of the atolls are already destined to be lost and hence runs a government policy called 'migration with dignity', which seeks to relocate people in a way that is conducive to community and positive contribution to the host country.[31]

The costs of in situ adaptation seem to be completely prohibitive. My colleague at Victoria University of Wellington, Alberto Costi, has published an article on small island states and statehood in which he concluded that:[32]

> While there are human-made options to prevent the effects of climate change on low lying atoll states, these are unrealistic and unaffordable. The Maldives has looked into island protection, but costs of US$6 billion for coastal protection, or US$500–1,000 million to elevate islands by one meter, were deemed too expensive. Atoll states in the Pacific, relying on an annual gross domestic product (GDP) ranging from US$27 million in Tuvalu to US $644 million in Vanuatu, would be similarly unable to afford such measures. In the current state of play, the disappearance of low lying atoll states is unlikely to be prevented through human-made techniques.

A more extreme solution proposed by some is to construct artificial islands. There are many engineering, environmental, social and cultural reasons why this

[30] Gerrard and Wannier (2015).

[31] Office of the President of Kiribati (2016).

[32] Costi (2014), p. 145.

option is not practical, but ultimately the astronomical cost will be a barrier. The idea that developing countries (even accounting for international aid) could construct artificial islands that are satisfactory for homes, economies and subsistence for hundreds of thousands of islanders appears to be in the realm of science fiction, particularly when contrasted with the relative ease of moving to other territory.

It is important to note that a great many countries will have serious problems of adaptation to face with inundations from the sea, it is widely recognised by scientists in New Zealand that this will be the most serious of all climate change issues for New Zealand.[33]

1.5 What Has the Paris Agreement Done for SIDS?

The political achievement at Paris was substantial, the legal achievement much less.

The Paris Agreement is long on aspiration and short on obligation. The negotiating strategy devised for Paris called for nations to make Intended Nationally Determined Contributions (INDCs).These were not intended to be and are not legally binding. As expected, the cumulative offers received at Paris fell well short of what will be required to keep the temperature below 2 °C by the end of the century, let alone 1.5 °C.

Since the objective of the 1992 Framework Convention on Climate Change is stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we obviously have a long way to go. We are not there yet or anywhere near. So in those terms Paris is not a success. The absence of binding targets on nations means there can be no effective enforceability of the INDC commitments, inadequate though they are.

This approach was deliberate on the part of negotiators, trying to avoid some of the traps that the Kyoto Protocol fell into. They tried to keep the developing countries in the tent and to accommodate the United States, where the prospect of securing Senate consent for binding targets looked hopeless, largely due to Republican party attitudes concerning climate change denial.

Thus, the issue is whether the Paris Agreement will after further iterations ripen into a success and achieve mitigation to the level required within the time available. That in turn will depend upon how far the political momentum generated at Paris will continue in order to ultimately produce sufficient binding obligations. The calculation was that an agreement with everyone on board was better than one where they were not, even if the price paid was to lower the level of ambition. The Paris Agreement can best be understood as a global commitment to a future continuing process to address climate change issues.

[33]Meduna (2015), pp. 34–35.

Lawyers deal in binding obligations. In order to find these, they look closely at the text. The text arising from Paris speaks with several voices. Analysing the binding obligations flowing from the negotiations and those which are aspirational may help in assessing the achievement. The Paris Agreement has some binding elements. And there are some binding elements of the Framework Convention and later instruments but many of these are not directly relevant to mitigation. And at this point mitigation is the critical issue.

Given the difficulties facing the negotiators and the failures of the past, the legal architecture of the Paris Agreement has impressive and interesting elements. Clearly, the strategic aim was to pull all nations into the Agreement by being very inclusive and avoiding division and confrontation. The strategy reminds me of the old nursery rhyme, 'Come into my parlour said the spider to the fly'. Once caught in the web the tentacles of the agreement will tighten later and it may be very difficult for nations to remove themselves because they would be likely to lose a lot of face. Shaming in its various forms remains one of the most potent of international sanctions.

Let me begin my analysis by starting at the end. Article 27 of the Agreement permits no reservations to it to be made. Nations can withdraw after 3 years from the date the Agreement entered into force. And the Agreement enters into force on the thirtieth day after the date 'on which at least 55 parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions having deposited their instruments of ratification, acceptance, approval or accession'.[34]

The agreement is open for signature from 22 April 2016 to 21 April 2017. It is open for accession from the day following the date upon which it is closed for signature. So it will be a long time before we will know who has signed up and who has ratified. And ratification is the act 'whereby a State establishes on the international plane its consent to be bound by a treaty'.[35] I judge it will be 2018 at the earliest before we receive the necessary ratification answers and can therefore analyse what the precise legal effect of the Agreement is. It does not seem in this case that signature alone will be sufficient for a State to be legally bound.

A cunning feature of the Agreement is that a great deal of activity will take place within the councils of the Convention system before ratification occurs. Much detailed and specialised machinery was set running in Paris and while much of this does not involve legal obligations imposed on States it does mean that a great deal of work will rapidly occur that is likely to make the nature of future decisions clearer and possibly easier for States to swallow.

The forward momentum is achieved by the bifurcated nature of the agreement. It comes in two parts. In a total package of 31 pages of text only 11 pages constitute the binding Paris Agreement. It is preceded by 19 pages of 'decisions' made by the COP. It was decided to adopt the Paris Agreement under the UNFCC although the

[34] United Nations Framework Convention on Climate Change (2015), art 21.

[35] United Nations Treaty Series (1969), art 2.

relationship between the Paris Agreement and the Convention is not on all fours. Some nations may adhere to one and not the other.

The dispute settlement mechanism for the Paris Agreement is the same as for the Convention itself. Disputes are likely to occur between nations and the effectiveness of the Agreement may depend on how efficient the method is in settling disputes. Over time the emphasis is likely to move to enforceability issues. Nations are enjoined to seek settlement of a dispute through negotiation or any other peaceful means of their own choice.[36] That mechanism stipulates that nations when ratifying the Agreement may state 'in respect of any dispute concerning the interpretation for application . . . it recognizes as compulsory ipso facto and without special agreement, in relation to any party accepting the same obligation . . . submission to the International Court of Justice and/or Arbitration'. Such declarations are not mandatory. Where the process does not produce a resolution after 12 months, the dispute is submitted to a conciliation commission, created upon the request of one of the parties. While this dispute settlement mechanism is not as strong as domestic law enforcement through municipal Courts, it is stronger than many international environmental treaties.

The first part of the document recording decisions of the COP also records the decision to establish an Ad Hoc Working Group on the Paris Agreement. That group will prepare for entry into force of the Agreement and oversee the implementation of a work programme. This will start in 2016.

There is a great deal in the non-binding text about INDCs and it notes that the 'much greater emission reduction efforts will be required in order to hold the increase in global average temperature to below 2 °C above pre-industrial levels by reducing emissions to 40 gigatonnes or to 1.5 °C above pre-industrial levels'. The COP also decided to invite the IPCC to provide a special report in 2018 on the impacts of global warming of 1.5 °C above pre-industrial levels and related global gas emissions pathways. The language in this part of the text evinces an intention to ratchet up the INDCs. The language requires parties to submit their INDC at least 9–12 months before the relevant COP. There is emphasis on both clarity and transparency. And there will be guidance for accounting of INDCs. Work in abundance is also ordered up from the Subsidiary Body for Scientific and Technological Advice. Other Committees of Expert groups are loaded with work. The Adaptation Committee also receives instructions.

Finance is the subject of heavy attention and more work. It is the same for technology development and transfer. Capacity building similarly for developing countries also receives a big work plan. There is also a capacity building initiative for transparency to build institutional and technical capacity to advance Article 13 of the Agreement. There is also activity around facilitating implementation and compliance. Resolution was also made to enhance the provision of urgent and adequate finance with a roadmap to be produced to secure USD $100 billion annually by 2020 for mitigation and adaptation.

[36]United Nations Framework Convention on Climate Change (2015), art 14(2).

Much of the language in the 19 pages of COP decisions talks of ‘requesting’, ‘encouraging’, ‘striving’ and similar hortatory language that speaks not the language of State obligation. But there emanates from the document a sense of urgency and vigorous activity on a wide range of fronts. The work seems designed to advance the Agreement itself in quite a rapid way. Plenty will happen quickly, as it needs to do.

All of this reflects the political break-through that Paris achieved. And much of the work is explicitly aimed at providing help to developing countries of a practical and useful sort. But activity, however well directed and however productive, is not in itself a substitute for binding legal obligations. Nevertheless, the flavour of Paris is to work towards binding legal obligations that will limit emissions. The first 19 pages of text were important in the sense they engender a feeling of activity. The bare features of the legal Agreement itself would have looked very thin without the COP decisions. The very lengthy ‘Decisions to give effect to the Agreement’ gives the impression of substantial even frenetic activity. Halting climate change could be the outcome in the future.

As for the Agreement itself, Article 2 provides there is a commitment to ‘holding the increase in global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change’. There are similar commitments to increasing the ability to adapt to climate change and foster climate resilience and making finance flow ‘consistent with a pathway towards low greenhouse gas emissions and climate-resilient development’. This general type of commitment can hardly be said to create any binding obligations on the States themselves. Article 2 is not a hard commitment to hold the increase to 1.5 °C and we do not know what ‘well below 2 °C’ may mean. There is a commitment to pursue efforts to hold the temperature increase to 1.5 degrees but that is not an obligation to achieve it. But all States are require to ‘undertake and communicate ambitious efforts’ as defined in the Agreement ‘with a view to achieving the purpose of the agreement’. And this process will be a progression over time.

The agreement itself comes closer to imposing specific obligations on States than the decisions of the COP, but many of the Articles contain principles rather than specific obligations. Nevertheless, there are hard law obligations to report and communicate about various matters such as each party being required to account ‘for their nationally determined contributions’, as required by Article 4, in quite defined ways. But in many of these Articles there remain large elements of discretion left to States, and gaps. Language such as ‘should’, ‘flexibility’, ‘strive’ and ‘aim’ and all the familiar weasel words of international agreements are employed.

Article 4 states ‘... parties aim to reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century ...’. This language contains an important commitment, the precise nature of which is

susceptible to a number of interpretations. What does 'balance' mean? It does not say 'net zero emissions' but does it mean that? And when will 'peaking' occur?

There is imposed a legal duty on parties to account for their emissions and to prepare every 5 years and communicate successive NDICs to reflect its highest ambition and each successive one 'will represent a progression' beyond the party's then INDC. (How binding this requirement will be is not easy to judge. What happens if nations fail to comply?) The special circumstances of developing countries and small island developing States is recognised in this Article. Accounting for INDCs is mandatory and parties 'shall promote environmental integrity, transparency, accuracy, completeness comparability and consistency, and ensure the avoidance of double counting'.[37] Each party to the Agreement is responsible for its emissions levels. Countries are obliged to pursue policies with the aim of achieving their pledges. As far as I can see there is no legal obligation on nations, although the Decisions text invites them to do so. The Agreement says they are to 'strive' to write a low emissions strategy by 2020.

Parties "should take action to conserve and enhance carbon sinks and reservoirs of GHGs, with an emphasis on forests. Parties 'are encouraged' to reduce emissions from deforestation.[38]

Parties are free to choose voluntary cooperation in implementation of INDCs with cooperative approaches that involve the use of internationally transferred mitigation outcomes. A mechanism is established by the Agreement to facilitate the market. It will be supervised by a body designated by the COP. Rules and procedures will have to be adopted. At the same time integrated, holistic and balanced non-market approaches and a framework to promote these are established by the Agreement, but without any detail. No mechanism has been set up to set an international carbon price, but it is possible a club approach by big emitters agreeing amongst themselves could cause such a price to emerge.

Adaptation is advanced by agreement on the 'global goal on adaptation of enhancing adaptive capacity strengthening resilience and reducing vulnerability to climate change'. Each party shall 'as appropriate engage in adaptation planning processes and the implementation of actions, including plans and policies'. There is encouragement to strengthen cooperation. Parties 'should' submit and update periodically an adaptation communication setting out its plan, actions and priorities. It is to be recorded in a public registry. There is nothing much here in the nature of hard law obligations.

Article 8 on loss and damage revolves around the Warsaw International Mechanism for Loss and Damage associated with climate change and this may be enhanced and strengthened. It is far from clear what will come out of the loss and damage work. But it may be a positive move that it has been separated from measures for adaptation to climate change. But it is made clear in the Decisions

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[37]Ibid, art 4(13).

[38]Ibid, art 5.

of the COP that the Agreement itself does not involve or provide a basis for any liability or compensation for loss and damage.

Article 9 deals with financial resources to assist developing countries; 'developed country parties shall provide financial resources to assist developing country parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention'. That is a legal duty but it is very generalised and lacks the specificity required for enforcement.

Article 10 is concerned with technology development and transfer; 'accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development'.

On capacity building Article 11 of the Agreement says capacity building 'should enhance the capacity and ability of developing countries ... and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing states to take effective climate change action ...'. No enforceable legal obligations arise here.

Article 12 is succinct. It erects a legal duty of cooperation 'to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement'.

If this Agreement solves the problem of climate change in the future it will be, in my opinion, because of the provisions in Articles 13 and 14 operating in conjunction with Article 4. Enhanced transparency is the goal of Article 13, which provides that 'an enhanced transparency framework for action and support, with built-in flexibility which takes into account parties' different capacities and builds upon collective experiences is hereby established'. Its purpose is 'to provide a clear understanding of climate change action in light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving parties' individual nationally determined contributions under Article 4, and parties' adaptation actions under Article 7 including good practices, priorities, needs, and gaps to inform the global stocktake under Article 14'.

There is a transparency of action and a transparency of support—both are established. The reporting requirements established for both of these is specific and is the subject of technical expert review. Provision of the required information and reporting is mandatory. This appears to be one of the most effective provisions in the Agreement and one likely to make a difference. A periodic global stocktake of the implementation of the Agreement is required every 5 years, the first being in 2023. This should be of material assistance in reaching the goal of the Agreement.

Article 15 provides for a mechanism to facilitate implementation and to promote compliance with the Agreement. An expert-based committee is established for this purpose. It must function 'in a manner that is transparent, non-adversarial and non-punitive'. Its procedures remain to be settled.

It is difficult to assess how all this will work or whether it will produce the desired outcome in time. It all depends upon continuing political will. And there are many geo-political problems that could knock the process all off-course. But it has