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# The legal position of inhabited islands submerging due to sea level rise

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Ingediend door

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## Acknowledgment

I suppose this is the place to squeeze blood, tears and sweat from words to bring across just how daunting the task was I have been burdened with. I still relive the countless times friends and family asked me the same polite, yet also caringly sincere, question. With faces contorted slightly, in precisely the appropriate amount of agony, they uttered the words “how I was doing or if I would rather not talk about it?”. I always knew ‘it’ was not to be confused with anything else but thesis writing. I even grew accustomed to this social necessity directed towards so many students in their twenties. Each time, I could tell I was never fully able to answer that question in a satisfactory sullen manner when I gladly elaborated on what I had just, literally just, found out.

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## Acronyms

AF	Adaptation Fund
AOSIS	Alliance of Small Island States
AR4	Fourth Assessment Report
AR5	Fifth Assessment Report
ASPEI	Association of South Pacific Environmental Institutions Initiative
CDM	Clean Development Mechanism
COP	Conference of Parties
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
EEZ	Exclusive Economic Zone
EIA	Environmental impact assessment
EU	European Union
FFA	South Pacific Forum Fisheries Agency
FRY	Federal Republic of Yugoslavia
FSM	Federated States of Micronesia
G77	Group of 77
GCF	Green Climate Fund
GEF	Global Environment Facility
GHG	greenhouse gases
ICJ	International Court of Justice
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
LDC	Least Developed Country
LDCF	Least Developed Countries Fund
LOSC	United Nations Convention on the Law of the Sea
PAC	Pacific Access Countries
SCCF	Special Climate Change Fund
SFRY	Socialist Federal Republic of Yugoslavia
SICA	Central American Integration System
SIDS	Small Island Developing States
SPA	Strategic Pilot on Adaptation
SPREP	Secretariat of the Pacific Regional Environment Programme
START	SysTem for Analysis, Research and Training
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WG I	Working Group I of the Fifth Assessment Report
WG II	Working Group II of the Fifth Assessment Report
WG III	Working Group III of the Fifth Assessment Report



## Abstract

Klimaatverandering is vandaag niet meer weg te denken uit onze leefwereld. De gevolgen van klimaatverandering doen zich dan ook globaal en op elk niveau voor, al zal de ene bevolking en bijhorende staat al harder en anders getroffen worden dan de andere. Deze paper spitst zich toe op één van de meest langdurige en ingrijpende gevolgen van klimaatverandering, de stijging van het zeeniveau en specifiek de gevolgen daarvan op internationaal publiekrechtelijk vlak voor laaggelegen eilandstaten.

Het overspoelen van eilandstaten, waardoor deze elk lapje bewoonbaar territorium dreigen te verliezen, is een ongekend fenomeen. Het bezitten van territorium, een permanente bevolking, een overheid en de mogelijkheid om relaties aan te gaan met andere staten is volgens de criteria van de Montevideo Conventie echter cruciaal om een staat te zijn. Aangezien staten nog steeds de meeste privileges bezitten van alle internationale rechtspersonen, is het belangrijk te weten of een overspoelde eilandstaat nog een staat kan worden genoemd wanneer deze niet langer voldoet aan de Montevideo criteria.

Statenpraktijk toont aan dat de Montevideo criteria vele uitzonderingen kennen en meer geschikt zijn voor het ontstaan en niet het voortbestaan van staten zoals dat voor de eilandstaten aan de orde is. Om tot de continuïteit van staten te beslissen, moet een voortdurende erkenning als staat door andere onbetwiste staten in ogeschouw worden genomen waarbij de Montevideo criteria een indicatieve waarde hebben. Deze theorie van erkenning, naar analogie van de constitutieve theorie van erkenning voor de totstandkoming van staten, komt voort uit de niet-erkenning van gevolgen die voortkomen *ex injuria* of uit onrecht.

Er moet vermeld worden dat de bedreigde eilandstaten niet zonder territorium hoeven te vallen, gezien de mogelijkheden zoals het bouwen van artificiële eilanden, opkopen van land elders of samensmelten met derde staten. Wanneer het bezitten van bewoonbaar territorium echter geen optie meer is en de bevolking migreert, kan het label staat na een eventuele transitieperiode geen volwaardige optie meer zijn voor de eilandstaten. Het zou passender zijn deze wel nog te erkennen als internationale rechtspersonen die als zodanig een beperkter gezag uitoefenen. Via deze beperkte macht kunnen zij zoals een regering in ballingschap dan nog steeds hulp bieden aan hun over verschillende landen verspreide bevolking.

Zowel voor de eilanden die erkend blijven als staat, als deze die overgaan in een *sui generis* rechtspersoon, blijft het behouden van eigen maritieme zones een prioriteit. Dit kan mogelijk gemaakt worden door de huidige maritieme zones van de eilandstaten te fixeren.

Vaak behoren de getroffen eilandstaten echter tot de groep van minst ontwikkelde staten en zal er geen geld voorhanden zijn om de nodige maatregelen tijdig te kunnen nemen. Verzekeringsmechanismen en eeuwigdurende rechtszaken lijken enkel de toren problemen nog hoger te maken. Vandaar moeten de bestaande fondsen uitgebreid worden en doen de eilandstaten er goed aan nu reeds zoveel mogelijk multilaterale overeenkomsten te sluiten om zich te verzekeren van hun plaats in de internationale gemeenschap, het behoud van hun maritieme zones en een gestage migratie van hun bevolking.



© World under water

## PART I – INTRODUCTION

1. Time and tide wait for no man. There is no doubt climate change, already called a common concern of mankind in the eighties,<sup>1</sup> is causing the sea level to rise.<sup>2</sup> Sea level rise is even one of the longest-term consequences of climate change.<sup>3</sup> The submerged islands and islet Tebua Tarawa, Abanuea, Suparibhanga and Lochacharra can vouch for that.<sup>4</sup> Island states are now referred to as canaries in a coalmine<sup>5</sup> and titanic states<sup>6</sup> to indicate their looming troubled future. The billion-dollar question is what will happen to these states when their nicknames fully become reality.

2. The UN General Assembly (UNGA) has professed that it is deeply concerned about the security implications springing forth from climate change and sea level rise.<sup>7</sup> April 2014, Ban Ki-moon addressed the Pacific Island states by acknowledging: “[y]ou are on the front line”.<sup>8</sup> Seeing how climate change is one of mankind’s common concerns, global action is a prerequisite<sup>9</sup> to sustain a climate habitable for all species on earth, including humans.<sup>10</sup>

3. Global security, statehood, nationality and cultural identity will all be under siege when an island state submerges, or as often described *sinks*, due to sea level rise. For the purpose of this paper the focus goes out to the small island states’ statehood which could disappear when the entire island’s territory submerges. In addition, it cannot be ignored that even a partial inundation can render land territory uninhabitable.<sup>11</sup> This could in turn necessitate the relocation of an entire population,<sup>12</sup> once more

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<sup>1</sup> Resolution 43/53 of the General Assembly of the United Nations (6 December 1988), *UN Doc. A/RES/43/53* (1988); A. H. SOONS, “Effects of Sea Level Rise on Maritime Limits and Boundaries”, *NILR* 37 (1990), 207–232 (hereafter: SOONS, “Effects of Sea Level Rise”); D. D. CARON, “When Law makes Climate Change Worse: Rethinking the Law of Baselines in Light of Rising Sea Level”, *Ecology L.Q.* 17 (1990), (621) 621 (hereafter: CARON, “When law makes climate change worse”).

<sup>2</sup> IPCC, 2013: *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Change* [T.F. STOCKER, D. QIN, G.-K. PLATTNER, M. TIGNOR, S.K. ALLEN, J. BOSCHUNG, A. NAUELS, Y. XIA, V. BEX and P.M. MIDGLEY (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 11 and 23 (hereafter: IPCC, 2013: *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I*); M. VERMEER AND S. RAHMSTORF, “Global Sea Level Linked to Global Temperature”, *Proceedings of the Nat’l Acad. Sci.* 106 (2009), (21527) 21530; E. RIGNOT, I. VELICOGNA, M. R. VAN DEN BROEKE, A. MONAGHAN and J. T. M. LENAERTS, “Acceleration of the Contribution of the Greenland and Antarctic Ice Sheets to Sea Level Rise”, *Geophysical Res. Letters* 38 (2011), (1) 4; SOONS, “Effects of Sea Level Rise”, 207-232.

<sup>3</sup> IPCC, 2010: *Workshop Report of the Intergovernmental Panel on Climate Change Workshop on Sea Level Rise and Ice Sheet Instabilities* [T.F. STOCKER, Q. DAHE, G.-K. PLATTNER, M. TIGNOR, S. ALLEN, P. MIDGLEY (eds.)]. IPCC Working Group I Technical Support Unit, University of Bern, Bern, Switzerland, 1; J. BARNETT and A. W. NEIL, “Climate Dangers and Atoll Countries”, *Climatic change* 61 (2003), (321) 321 (hereafter: BARNETT and NEIL, “Climate Dangers”).

<sup>4</sup> Asian Disaster Preparedness Center, *Regional Training Manual on Disaster Risk Reduction for Coastal Zone Managers*, UNEP, 2009, [www.unep.org/disastersandconflicts/portals/155/disastersandconflicts/docs/drr\\_training/AIDCO\\_Regional\\_Training\\_Manual.pdf](http://www.unep.org/disastersandconflicts/portals/155/disastersandconflicts/docs/drr_training/AIDCO_Regional_Training_Manual.pdf), 43.

<sup>5</sup> *Environmental change and forced migration scenarios: Tuvalu and New-Zealand*, EACH, 2007, [www.ehs.unu.edu/file/download/7739.pdf](http://www.ehs.unu.edu/file/download/7739.pdf), 2 (hereafter: *Environmental change and forced migration*).

<sup>6</sup> J. BARNETT and J. CAMPBELL, *Climate change and small island states: Power, Knowledge and the South Pacific*, Londen, Earthscan, 2010, 168 (hereafter: BARNETT and CAMPBELL, *Climate change and small island states*).

<sup>7</sup> Resolution 63/281 of the General Assembly of the United Nations (11 June 2009), *UN Doc. A/RES/63/281* (2009).

<sup>8</sup> Secretary-General Ban Ki-moon, *Latest Statements: Dhaka, Bangladesh, 14 November 2011 - Secretary-General's remarks at opening of Climate Vulnerable Forum*, United Nations, 2011, [www.un.org/sg/statements/?nid=5682](http://www.un.org/sg/statements/?nid=5682).

<sup>9</sup> D. K. ANTON and D. SHELTON, *Environmental protection and human rights*, Cambridge, Cambridge University Press, 2011, 296 and Seventh session of the Human Rights Council of the United Nations, *UN Doc. A/HRC/7/L.21/Rev.1* (2008), 2.

<sup>10</sup> G. HARRIS, *Borrowed Time on Disappearing Land: Facing Rising Seas, Bangladesh Confronts the Consequences of Climate Change*, The New York Times, 28 March 2014, [www.nytimes.com/2014/03/29/world/asia/facing-rising-seas-bangladesh-confronts-the-consequences-of-climate-change.html?hp&\\_r=1](http://www.nytimes.com/2014/03/29/world/asia/facing-rising-seas-bangladesh-confronts-the-consequences-of-climate-change.html?hp&_r=1).

<sup>11</sup> R. RAYFUSE and E. CRAWFORD, *Climate Change, Sovereignty and Statehood*, Legal Studies Research Paper No. 11/59, University of Sydney, September 2011, 2 (hereafter: RAYFUSE and CRAWFORD, *Climate Change, Sovereignty and Statehood*).

<sup>12</sup> UNHCR, *Commemorating the Refugee and Statelessness Conventions: a compilation of Summary Conclusions from UNHCR's Expert meetings 2010-2011*, UNHCR, 2012, [www.unhcr.org/4fe31cff.html](http://www.unhcr.org/4fe31cff.html), 32; I. KELMAN, “Climate Change and Displacement : Island Evacuation”, *Forced Migration Review*

surrendering statehood to uncertainty.<sup>13</sup>

4. Will we still be able to refer to such sunken islands as states and which rights will they be entitled to? This is an issue without precedent,<sup>14</sup> for which international law in whichever form is unprepared.<sup>15</sup> There is no consensus on the topic in legal doctrine. One may reason it is crystal clear that sinking island states will no longer be called states by declaring that an almost literal example of the end of statehood is the one produced by natural causes such as a risen sea-level.<sup>16</sup> Another may turn to a broad interpretation of existing legislation and the creation of new legal regulations to support the continuance of the troubled states.<sup>17</sup> In an attempt to alleviate the uncertain legal future of these island states and to present possible legal opportunities, this paper takes a closer look at what will still put *state* in island state when the waves of climate change hit.

5. Part I, which is this part, introduces the reader to some essential background information on the more technical aspects of climate change and sea level rise, besides reflecting on the added value of the label statehood.

Part II continues to explore the notion of state and territory by taking a closer look at the applicable legal definitions or the lack thereof. The section of the paper is divided up into the most dominant statehood theory and alternative theories which may serve as a basis for a dividing classification of the international legal community. For each and every theory, its usefulness in relation to the troubled island states are of course the key focal point.

Part III of the paper mulls over some of the practical aspects of turning the proposed options of the preceding part into reality.

Lastly, part IV offers a conclusion on the discussed topics and a way forward.

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31 (2008), 20; R. SCHUBERT, H.J. SCHELLNHUBER, N. BUCHMANN, A. EPINEY, R. GRIEBHAMMER, M. KULESSA, D. MESSNER, S. RAHMSTORF and J. SCHMID, *Climate Change as a Security Risk*, London, Earthscan, 2008, 116 (hereafter: SCHUBERT et al., *Climate Change as a Security Risk*).

<sup>13</sup> BARNETT and CAMPBELL, *Climate change and small island states*, 168 and J. MCADAM, 'Disappearing states', *statelessness and the boundaries of international law*, unpublished paper, University of New South Wales Faculty of Law Research Series, 2010, 2 (hereafter: MCADAM, *Disappearing states*).

<sup>14</sup> D. FREESTONE, "International Law and Sea Level Rise" in R. CHURCHILL and D. FREESTONE (eds.), *International law and global climate change*, London, Graham & Trotman, 1991, 116 (hereafter: FREESTONE, "International law and Sea level Rise"). The few extinct states since 1945 (Czechoslovakia, German Democratic Republic, Hyderabad, Republic of Vietnam, Somaliland, Tanganyika, Yemen Arab and Yugoslavia) did not grow to be extinct because of loss of land. J. CRAWFORD, *The Creation of States in International Law*, Oxford, Clarendon Press, 2006, 715-716 (hereafter: CRAWFORD, *The Creation of States*).

<sup>15</sup> R. RAYFUSE, *International law and disappearing states: utilising maritime entitlements to overcome the statehood dilemma*, unpublished paper, University of New South Wales Faculty of Law Research Series, 2010, [http://works.bepress.com/rosemary\\_rayfuse/6/](http://works.bepress.com/rosemary_rayfuse/6/), 12 (hereafter: RAYFUSE, *International law and disappearing states*); T. DERUYTTER, "Klimaatvluchtelingen: doelloos op zoek naar erkenning. Onderzoek naar nieuw internationaal wetgevend initiatief", *Tijdschrift voor Milieurecht*, 2010, (203) 205 (hereafter: DERUYTTER, "Klimaatvluchtelingen").

<sup>16</sup> N. HORBACH, R. LEFEBER and O. RIBBELINK, *Handboek internationaal recht*, Den Haag, T.M.C. Asser Press, 2007, 175 (hereafter: HORBACH et al., *Handboek*).

<sup>17</sup> G. TSALTAS, T. BOURTZIS and G. RODOTHEATOS, *Artificial islands and structures as a means of safeguarding state sovereignty against sea level rise. A law of the sea perspective*, document in preparation of the 6th ABLOS Conference "Contentious Issues in LOSC - Surely Not?", 2010, [www.gmat.unsw.edu.au/ablos/ABLOS10Folder/S2P3-P.pdf](http://www.gmat.unsw.edu.au/ablos/ABLOS10Folder/S2P3-P.pdf), 16 (hereafter: TSALTAS et al., *Artificial islands*).

## I. 1. THE SCIENTIFIC LINK BETWEEN CLIMATE CHANGE, RISING SEA LEVEL AND SINKING ISLAND STATES

6. By no means does this paper intend to extensively unravel the scientific intricacies associated with climate change, though highlighting some aspects in modest language is desirable to fully frame the topic at hand. On this subject matter, the Intergovernmental Panel on Climate Change's (IPCC) Fifth Assessment Report (AR5) offers insight. AR5 is released in phases from 2013 on, until the last quarter of 2014. Working Group I (WG I) has dealt with the physical science basis of climate change. Working group II (WG II) focused on impacts, adaptation and vulnerability. Working Group III (WG III) delivered a report entirely dedicated to mitigation. The Synthesis Report is forthcoming and will be published in October 2014.<sup>18</sup>

7. This paper predominantly turns to the available WG I, II & III reports of AR5 and the Synthesis Report of AR4. Given the uncertain character of and significant differences between the data set forth by prognostic climate change models,<sup>19</sup> this paper will keep the use of exact numbers to the bare minimum, as does the IPCC which classifies results and predictions from *virtually certain* to *exceptionally unlikely*.<sup>20</sup>

8. Climate change has occurred before and is normally brought about by natural changes in the environment.<sup>21</sup> In our lifetime however, humanity influenced the process and altered its course.<sup>22</sup> More forward than in AR4,<sup>23</sup> AR5 clearly notes human influence has *extremely likely* been the dominant cause of global warming since the 1950's.<sup>24</sup> Normally, the earth's climate is fueled by solar radiation. The sun radiates energy at short wavelengths and when this solar energy reaches the earth's atmosphere, about 50 percent is absorbed by the earth. Another 20 percent is absorbed by the atmosphere. The last 30 percent is reflected back into space. To even out incoming and outgoing energy, the earth emits energy at long wavelengths, in the form of infrared radiation. This is where the greenhouse effect comes into play. A large amount of the infrared radiation does not reach outer space because it is absorbed by the atmosphere and re-emitted in all directions. The downward directed re-emissions are sent back to earth. So far, all has taken place as it should and the infrared radiation, which we experience as heat, keeps earth at a livable temperature.<sup>25</sup>

9. Enter humans. Human activity has strengthened the greenhouse effect by enlarging the amount of greenhouse gases directly or indirectly, thus trapping more heat near the earth's surface. In addition, the earth's land surface properties and vegetation, and so the absorbing and reflecting capacities of the earth,

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<sup>18</sup> IPCC, *Media Centre*, IPCC, [www.ipcc.ch/news\\_and\\_events/press\\_information.shtml](http://www.ipcc.ch/news_and_events/press_information.shtml).

<sup>19</sup> R.C.J. SOMERVILLE, "Science, Politics, and Public Perceptions of Climate Change" in A. BERGER, F. MESINGER and D. SIJACKI (eds.), *Climate change: Inferences from Paleoclimate and Regional Aspects*, Wien, Springer, 2012, 3-4.

<sup>20</sup> Exact numbers are not equipped for the climate change assessments, and the IPCC AR5 expresses interpretation of statistics in uncertain and careful language ranging from: virtually certain 99–100% probability, very likely 90–100%, likely 66–100%, about as likely as not 33–66%, unlikely 0–33%, very unlikely 0–10%, exceptionally unlikely 0–1%. Additional terms (extremely likely: 95–100%, more likely than not >50–100%, and extremely unlikely 0–5%).

<sup>21</sup> IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R. K. PACHAURI and A. REISINGER (eds.)]. IPCC, Geneva, Switzerland, 30 (hereafter: IPCC, 2007: *Climate Change 2007: Synthesis Report*).

<sup>22</sup> IPCC, 2007: *Climate Change 2007: Synthesis Report*, 36.

<sup>23</sup> *Ibid.*, 37 and 39.

<sup>24</sup> IPCC, 2013: *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I*, 17.

<sup>25</sup> U. CUBASCH, D. WUEBBLES, D. CHEN, M.C. FACCHINI, D. FRAME, N. MAHOWALD, and J.-G. WINTHER, "2013: Introduction". In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [T. F. STOCKER, D. QIN, G.-K. PLATTNER, M. TIGNOR, S.K. ALLEN, J. BOSCHUNG, A. NAUELS, Y. XIA, V. BEX and P.M. MIDGLEY (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 126 (hereafter: CUBASCH et al., "Introduction").

are increasingly altered. The changes which have by then taken place can again cause positive feedback. Positive feedback entails that initial change brought on by climate change will in turn kindle more changes of the same kind. For example, surface warming will cause ice to melt and alter the natural conditions of that area. In turn the mere exposure of underlying soil will further decrease the reflecting capacity of the earth's surface and so accelerate absorption of heat by the exposed land. As a result, even more ice will melt at an increased tempo. All these changes affect the earth's ecosystems.<sup>26</sup>

10. It is important to understand the phenomenon of global warming since it increasingly affects the ocean and sea level. The trend of sea level rise<sup>27</sup> is proportional to changes in global warming. The quantity of sea level rise has on average gone up from 1.8 mm per year from 1961 to 1992 to 3.1 mm per year from 1993 to 2003, though long-term trends differ per region.<sup>28</sup> The rise has been largely attributed to thermal expansion of the warming oceans and a decrease in glaciers.<sup>29</sup>

Predictions of sea level behavior in scientific reports, particularly when trying to assess how much ice Antarctica and Greenland<sup>30</sup> are to lose to the sea, are spiked with doubt.<sup>31</sup> Winds and currents can contribute to the redistribution of the water, thus instigating differences in sea levels regionally.<sup>32</sup> Furthermore, not only does the sea level vary naturally throughout the year, but in case of an increase, the exact consequences would also depend on the morphology of the seabed immediately offshore.<sup>33</sup>

11. Even more uncertainty sneaks into the climate change models due to the long lifespan of greenhouse gases.<sup>34</sup> Yet, despite vagueness of data, it is crucial to realize that even just moderate sea level rise<sup>35</sup> will already have severe impacts on low-lying islands. On this account, it is unmistakably clear that even the best-case predicted estimates of sea-levels are considerably higher in AR5, compared to those of AR4 of just five years ago.<sup>36</sup>

12. The most vulnerable nations in respect to sea level rise are islands made up out of reefs and atoll islands.<sup>37</sup> Low lying islands states are named as most vulnerable, not only given their geographic characteristics, but also given the fact that increased migrations from outer islands will increase the

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<sup>26</sup> CUBASCH et al., "Introduction", 127.

<sup>27</sup> The rise and fall of the sea level as such is a natural phenomenon and has occurred before in history. P. D. NUNN, *Developments in Earth and Environmental Sciences: volume 6 - Climate, Environment, and Society in the Pacific during the Last Millennium*, Amsterdam, Elsevier, 2007, 2-3.

<sup>28</sup> Y. TAMAKI, "Interdecadal Variability and Rising Trend of Sea Level Along the Japanese Coast" in IPCC, 2010: *Workshop Report of the Intergovernmental Panel on Climate Change Workshop on Sea Level Rise and Ice Sheet Instabilities* [T.F. STOCKER, Q. DAHE, G.-K. PLATTNER, M. TIGNOR, S. ALLEN, P. MIDGLEY (eds.)]. IPCC Working Group I Technical Support Unit, University of Bern, Bern, Switzerland, 213.

<sup>29</sup> IPCC, 2007: *Climate Change 2007: Synthesis Report*, 30; W. T. PFEFFER, J. T. HARPER and S. O'NEEL, "Kinematic Constraints on Glacier Contributions to 21st-Century Sea Level Rise", *Science* 321 (2008), (1340) 1341-1342.

<sup>30</sup> A melted Greenland Ice Sheet alone can amount to an additional 7 meters of sea level rise. IPCC, 2013: *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I*, 29.

<sup>31</sup> A. ARSANA and C. SCHOFIELD, "Climate change and the limits of maritime jurisdiction" in R. WARNER and C. SCHOFIELD (eds.), *Climate change and the oceans – Gauging the legal and policy currents in the Asia Pacific and beyond*, Cheltenham, Edward Elgar, 2012, 129 (hereafter: ARSANA et al., "Climate change and the limits of maritime jurisdiction").

<sup>32</sup> G. A. MILNE, W. R. GEHRELS, C. W. HUGHES and M. E. TAMISIEA, "Identifying the Causes of Sea Level Change", *Nature Geoscience* 2 (2009), (471) 472.

<sup>33</sup> ARSANA et al., "Climate change and the limits of maritime jurisdiction", 129.

<sup>34</sup> J. BROOME, *Climate matters – ethics in a warming world*, New York, W.W. Norton & Company, 2012, 28 (hereafter: BROOME, *Climate matters*).

<sup>35</sup> ARSANA et al., "Climate change and the limits of maritime jurisdiction", 130; M.-E. CARR, M. RUBENSTEIN, A. GRAFF and D. VILLARREAL, "Sea Level Rise in a Changing Climate: What Do We Know?", in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 33-34.

<sup>36</sup> Z. HAUSFATHER, *IPCC's New Estimates for Increased Sea-Level Rise*, *The Yale Forum on Climate Change & the Media*, Yale Climate Forum, 23 October 2013, [www.yaleclimatemediaforum.org/2013/10/ipccs-new-estimates-for-increased-sea-level-rise/](http://www.yaleclimatemediaforum.org/2013/10/ipccs-new-estimates-for-increased-sea-level-rise/).

<sup>37</sup> B.C. DOUGLAS, M.S. KEARNEY and S. LEATHERMAN, *Sea level rise: history and consequences*, San Diego, Academic Press, 2001, 203 (hereafter: DOUGLAS et al., *Sea level rise: history*).

pressure put on the remaining islands<sup>38</sup> and on their limited resources to adapt to the changes.<sup>39</sup>

For islands such as the Maldives with 80 percent of its landmass sticking out less than one meter above sea level, every millimeter counts.<sup>40</sup> Hence it will not surprise that the Maldives was also the first country to sign the Kyoto Protocol, which is hinged to the UN Framework Convention on Climate Change (UNFCCC).<sup>41</sup> Another example can be found in the island of Tonga which would be entirely flooded if the sea level rises only 1,033 meters,<sup>42</sup> let alone be made uninhabitable by just partial inundation. Clearly, there is no reason to doubt the need for action.<sup>43</sup>

13. In conclusion, even though, the notion of prevention may have been largely surpassed for climate change and subsequent sea level rise to a large extent,<sup>44</sup> it remains of the utmost importance to gather reliable scientific data as a means towards enhanced understanding of possible countermeasures.<sup>45</sup> Equally important, such research can help provoke political efforts<sup>46</sup> so as to install an appropriate adaptive view on the future.<sup>47</sup> Yet, with the precautionary principle in mind, a partial shortage of data<sup>48</sup> is not and may not be used as an impediment for urgently-needed, present day adaptive action.

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<sup>38</sup> C. D. WOODROFFE, "Reef-Island Topography and the Vulnerability of Atolls to Sea Level Rise", *Global & Planetary Change* 62 (2008), (77) 90.

<sup>39</sup> BARNETT and NEIL, "Climate Dangers", 322; P. D. NUNN, "Responding to the Challenges of Climate Change in the Pacific Islands: Management and Technological Imperatives", *Climate Research* 40 (2009), (211) 211; United Nations Framework Convention on Climate Change, *Climate Change: Small Island Developing States* (2005), 28, [http://unfccc.int/resource/docs/publications/cc\\_sids.pdf](http://unfccc.int/resource/docs/publications/cc_sids.pdf), 26–27 (hereafter: UNFCCC, *Climate Change: SIDS*).

<sup>40</sup> Republic of Maldives, *National Adaptation Plan of Action*, SIDS, 2006, [www.sids2014.org/content/documents/10Maldives%20National%20Adaptation%20Plan%20of%20Action.pdf](http://www.sids2014.org/content/documents/10Maldives%20National%20Adaptation%20Plan%20of%20Action.pdf), 33; Follow-up to the outcome of the Millennium Summit of the General Assembly of the United States (11 September 2009), *UN Doc. A/64/350* (2009), 20 (hereafter: *UN Doc. A/64/350* (2009)); UN office of the high representative for the least developed countries, landlocked developing countries and small island developing states, *Small Islands Developing States (SIDS) Statistics*, 2013, <http://unohrrls.org/custom-content/uploads/2013/09/Small-Island-Developing-States-Factsheet-2013-.pdf>, 17.

<sup>41</sup> Ministry of Home Affairs, Housing & Environment, Republic of Maldives, *First National Communication of the Republic of Maldives to the United Nations Framework Convention on Climate Change 2* (2001), <http://unfccc.int/resource/docs/natc/maldnc1.pdf>, 35.

<sup>42</sup> X, *The World Factbook: Tonga*, Central Intelligence Agency, [www.cia.gov/library/publications/the-world-factbook/geos/tn.html](http://www.cia.gov/library/publications/the-world-factbook/geos/tn.html).

<sup>43</sup> ARSANA et al., "Climate change and the limits of maritime jurisdiction", 129; C. SCHOFIELD and D. FREESTONE, "Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise" in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 150 (hereafter: SCHOFIELD et al., "Options to Protect Coastlines").

<sup>44</sup> IPCC, 2013: *Summary for Policymakers*. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I*, 27.

<sup>45</sup> SCHUBERT et al., *Climate Change as a Security Risk*, 177.

<sup>46</sup> A. POWERS, "Climate Change and pollution: Addressing intersecting threats to oceans, coasts and small island developing states" in D. LEARY and B. PISUPATI (eds.), *The future of international environmental law*, Tokyo, United Nations University Press, 33 (hereafter: POWERS, "Climate Change and Pollution").

<sup>47</sup> RAYFUSE and CRAWFORD, *Climate Change, Sovereignty and Statehood*, 13.

<sup>48</sup> This remains so despite an improvement in accuracy of climate change models since AR4. IPCC, 2013: *Summary for Policymakers*. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I*, 15.

## I. 2. IMPACT OF STATEHOOD

14. First things first, why should island states remain states? Since the Peace of Westphalia<sup>49</sup> a new categorization of the international community arose wherein the most dominant players were, and have remained, states.<sup>50</sup> Nonetheless, recent times have seen an increased recognition of peoples in their entirety as subjects of law, empowered by self-determination<sup>51</sup> and human rights.<sup>52</sup>

There has been a surge of international institutions bestowed with extensive powers and international personality.<sup>53</sup> However, these shifts in power have mostly come about with state acquiescence. It are states which consent to according power to an international organization and to recognize human rights. The only pertinent exception to the dominance of state power are *jus cogens* rules which are rules the international community believes to have the power to set aside a state's will.<sup>54</sup> Besides the *jus cogens* rules, which are few and at times unclear,<sup>55</sup> it cannot be denied that states still hold the reins of the international community.<sup>56</sup>

15. Sovereignty<sup>57</sup> is the most important consequential benefit of being a state. Sovereignty should not be confused with the supreme power within a state, as this represents only the tip of sovereignty. Nor should it be confused with the exercise of sovereign rights, as these rights can partly be exercised by a third state without the first state losing its sovereignty. Sovereignty also does not embody equal rights and competences amongst states in practice, as states have the right to restrict their own sovereignty if they please to do so.<sup>58</sup> Sovereignty is a compound term for the totality of powers and ensuing privileges which states possess under international law.<sup>59</sup> Derogation from these state privileges may never be presumed.<sup>60</sup>

16. Evidently, the powerful label of statehood has its reasons to be so desired. From statehood spring privileges, both on a domestic, as well as on an international level. Nonetheless, this privileged being has its Achilles heel as well. A state has a territorial and material sphere of validity, but a temporal one as well.<sup>61</sup> Despite the benefit of the presumption of continuity of statehood,<sup>62</sup> statehood can wane and disappear. When statehood vanishes, the privileges linked to the specific exclusive legal personality of a state will most likely suffer the same fate.

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<sup>49</sup> J. R. CRAWFORD, "State", in *The Max Planck Encyclopedia of Public International Law*, January 2011, online edition, §13-14 (hereafter: CRAWFORD, "State").

<sup>50</sup> S. M. CARBONE and L. SCHIANO DI PEPE, "States, Fundamental Rights and Duties", in *The Max Planck Encyclopedia of Public International Law*, January 2009, online edition, §1; Y. RONEN, "Entities that can be states but do not claim to be" in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press, 2013, 23.

<sup>51</sup> Resolution 2625 (XXV) of the General Assembly of the United Nations (24 October 1970), *UN Doc. A/RES/25/2625* (1970) (hereafter: Resolution 2625 (XXV)); M. KOSKENNIEMI, "National Self-Determination Today: Problems of Legal Theory and Practice", *ICLQ* 43 (1994), (241) 241.

<sup>52</sup> Art. 22 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85.

<sup>53</sup> J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, Oxford University Press, 2012, 115-116 (hereafter: CRAWFORD, *Brownlie's principles*).

<sup>54</sup> ASR, 43; A. ORAKHELASHVILI, *Peremptory norms in international law*, Oxford, Oxford University Press, 2006, 9.

<sup>55</sup> CRAWFORD, *The Creation of States*, 100-101.

<sup>56</sup> A. ORAKHELASHVILI, "The Position of the Individual in International Law", *Cal.W.Int'l L.J.* 31 (2001), (241) 245.

<sup>57</sup> R. JACKSON, *Sovereignty: The Evolution of an Idea*, Cambridge, Polity Press, 2007, x.

<sup>58</sup> CRAWFORD, *The Creation of States*, 33.

<sup>59</sup> ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 *ICJ Reports* 174, 180 (hereafter: *Reparations*); CRAWFORD, *The Creation of States*, 32.

<sup>60</sup> CRAWFORD, *The Creation of States*, 41.

<sup>61</sup> K. MAREK, *Identity and continuity of states in public international law*, Geneva, Librairie Droz, 1968, 5 (MAREK, *Identity*).

<sup>62</sup> CRAWFORD, *The Creation of States*, 701; MAREK, *Identity*, 548.



## ***I. 2. 1. International***

17. Sovereignty can be freely exercised but is limited by the mutual respect<sup>63</sup> states have for one another by promising not to cause harm outside their own national jurisdiction.<sup>64</sup> *Barnett*, a lead author of AR5, has liberally interpreted this stipulation so that it translates into a positive obligation states to do all within their power to avoid the loss of another state's sovereignty.<sup>65</sup> Tied to this principle is the obligation to refrain from threats or to use force against the territorial integrity or political independence of any state.<sup>66</sup> Surely, a state can exercise power over its own territory and also protect itself against hostile attacks, but even power within own lands is not absolute.<sup>67</sup> When crossing borders into foreign lands, states must comply with the rule of non-intervention.<sup>68</sup> Further limitations on the acts of states within their own territory can be found in head-of-state and consular immunities, as well as international law regarding human rights.<sup>69</sup>

18. Mutual respect between states is also paramount for the unique international relations between sovereign states via diplomacy and treaties. In principle, a state can exclusively regulate its internal affairs<sup>70</sup> and call upon internal rights and rules which include those regulating foreign policy.<sup>71</sup> Taking into account the vastness of the two latter privileges, a state can also be held responsible in the broadest sense of the word, for its actions vis-à-vis the international community as a whole and all states separately.<sup>72</sup>

19. Importantly, states can become full-fledged members of international organizations, thus getting access to fora which are ordinarily wholly state-controlled.<sup>73</sup> One of the largest international organizations, the United Nations (UN), often sets statehood as a prerequisite to take part in its inner workings. The UN International Court of Justice (ICJ) only considers states as applicants and defendants, rejecting all other candidates.<sup>74</sup> Furthermore, the fifteen members of the UN Security Council (UNSC), an institution of which the resolutions must be respected by all UN members, must be states. Lastly, as state practice is a necessary prerequisite to identify customary law,<sup>75</sup> states participate not only in the operation but equally in

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<sup>63</sup> Art. 2(1) United Nations, Charter of the United Nations of 24 October 1945, 1 UNTS XVI (1945) (hereafter: UN Charter); art. 4 Montevideo Convention on the Rights and Duties of States of 26 December 1933, 165 LNTS 19 (hereafter: Montevideo Convention).

<sup>64</sup> Art. 2(1) UN Charter; Principle 21 Declaration of the United Nations Conference on the Human Environment (16 June 1972), *UN Doc. A/Conf.48/14/Rev. 1*(1973) (hereafter: Stockholm Declaration); Resolution 2625 (XXV); art. 3 and 8 Montevideo Convention; S. STAHL, "Unprotected ground: the plight of vanishing island nations", *New York International Law Review* 23 (2010), (1)18-19 (STAHL, "Unprotected ground").

<sup>65</sup> BARNETT and NEIL, "Climate Dangers", 333.

<sup>66</sup> Resolution 2625 (XXV).

<sup>67</sup> ICJ, *SS Lotus* (France v Turkey) 1927 *PCIJ Series A* No. 10, 18-20 (hereafter: *Lotus*).

<sup>68</sup> HORBACH et al., *Handboek*, 160.

<sup>69</sup> C. SCHREUER, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", *EJIL* 4 (1993), 447-471.

<sup>70</sup> Art. 2(7) UN Charter.

<sup>71</sup> ICJ, *Case concerning military and paramilitary activities in and against Nicaragua* (*Nicaragua v. United States of America*), 1986 *ICJ Reports* 14, §265.

<sup>72</sup> CRAWFORD, *The Creation of States*, 44.

<sup>73</sup> A. CARIUS and A. MAAS, *Migration and global environmental change, PD15: creating space for action: options for small island states to cope with global environmental change*, document in preparation of the UK Government's Foresight Project, Migration and Global Environmental Change, 2011, <http://aka.bis.gov.uk/assets/foresight/docs/migration/policy-development/11-1149-pd15-creating-space-for-action-small-island-states>, 8 (CARIUS, et al., *Migration*); I. BROWNLIE, *Principles of public international law*, Oxford, Oxford University Press, 2008, 57-58 (hereafter BROWNLIE, *Principles*).

<sup>74</sup> Art. 34(1) Statute of the International Court of Justice of 26 June 1945, 1 UNTS 933 (hereafter: ICJ Statute).

<sup>75</sup> *The Case Concerning the Continental Shelf* (*Libya v. Malta*), 1985 *ICJ Reports* 13, 29; M. N. SHAW, *International law*, Cambridge, Cambridge University Press, 2008, 74 (hereafter: SHAW, *International law*).

the creation of the international legal landscape.<sup>76</sup>

## ***I. 2. 2. National***

20. On a national level, sovereignty entails the right to exercise jurisdiction over a state's population. This jurisdiction sticks to the population, even when they go abroad. Similarly, the state often retains a degree of jurisdiction over its nationals present on ships flying the state's flag, seeing how such a ship has a genuine link with the flag state.<sup>77</sup>

21. States may also exercise sovereignty over natural resources.<sup>78</sup> This entails exerting sovereign powers over - but not necessarily having ownership of<sup>79</sup> - territory, which comprises not only land, but also several maritime zones.<sup>80</sup>

22. In line with the evolution of historic state practice of dividing up maritime territory, the widely ratified United Nations Convention on the Law of the Sea (LOSC)<sup>81</sup> divides the sea up into various sections from internal waters to the high seas. Each zone pertains to different sovereign rights which vary in potency. The maritime zones are all measured from a baseline, which is usually the low-water line of a state's land territory.

States have the most extensive rights with respect to their internal waters, territorial sea and the airspace above those areas.<sup>82</sup> The sovereignty to be exercised in these zones resembles sovereign power exercised over land territory. The exclusive economic zone and the continental shelf each provide sovereign rights for the states which relate to respectively the waters and its resources, and the soil and subsoil and its resources.<sup>83</sup>

23. In conclusion, from statehood springs forth a wide array of privileges, most of which are exclusive to statehood and can therefore be irretrievably lost together with the statehood label.

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<sup>76</sup> I. BROWNIE, "Rebirth of Statehood" in M. EVANS (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe*, Aldershot, Dartmouth, 1997, 5.

<sup>77</sup> Art. 97 United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3 (hereafter: LOSC).

<sup>78</sup> Resolution 1803 (XVII) of the General Assembly of the United Nations (14 December 1962), *UN Doc. A/5217 (1962)* (hereafter: Resolution 1803 (XVII)).

<sup>79</sup> CRAWFORD, *The Creation of States*, 56.

<sup>80</sup> Art. 56 LOSC.

<sup>81</sup> On May, 6<sup>th</sup> 2014, the LOSC counted 166 parties.

<sup>82</sup> Art. 8 and 17 LOSC and P. H. KOOIJMANS and M. BRUS, *Internationaal publiekrecht in vogelvlucht*, Deventer, Kluwer, 2008, 47.

<sup>83</sup> Art. 56 and 77 LOSC.

## PART II – STATEHOOD

24. For a state to continue enjoying the privileges that come with statehood, they must continue qualifying as a state. When a state changes in any way, states can continue as the same state with the same state identity or opt for state succession, which encompasses a definitive replacement of a state by another.<sup>84</sup> Considering the proximity in nature of the terms of *enduring* state identity and *extinct* state identity,<sup>85</sup> they are judged by the same criterion of historical continuity according to international law.<sup>86</sup> Historical continuity signifies a preservation of a state's identity, despite any major territorial, demographic or political changes.<sup>87</sup> Subsequently, discontinuity signifies a complete loss of such state identity.

25. Discontinuity however is not easily achieved. Even if territory is lost or gained which is substantially greater in area than former state territory, this does not have to affect continuity.<sup>88</sup> Retained state identity and continuity promise status quo and the preservation of legal relations and commitments to their fullest still manageable potential. To the contrary, succession effectuates discontinuity, at the very least in fact if not in law.<sup>89</sup> This means that the succeeded state will be fully extinct.<sup>90</sup> This entails new beginnings for the successor state which will not have the legal rights,<sup>91</sup> nor the burdens and responsibilities which encumbered the now extinct state.<sup>92</sup> The only way legal obligations of the prior state can be transferred to the successor state is via a treaty which explicitly includes them.<sup>93</sup>

26. At times, the extinction of a state has been connected to the notion of abandonment.<sup>94</sup> However, the act of abandonment does not have to be brought into the equation here. Abandonment would require a state's intention and desire to abandon and formally renounce its title of statehood or its title of sovereignty over a particular territory.<sup>95</sup> As the island states have no desire of abandoning their statehood or their island, abandonment is not relevant for this topic.

27. Has the current division of the international community surpassed its expiration date<sup>96</sup> or is it actually functioning smoothly and eliminating those entities no longer fit to be a state? The various possible futures island states could encounter when they no longer have land territory must be investigated. Firstly, the retention of the unchanged Westphalia world order based on the principle of effectiveness is considered. Secondly, this paper investigates alternative theories of statehood in partial abandonment of the principle of effectiveness, to see what really constitutes a state and brings about statehood, in a perhaps altered and deterritorialized form.

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<sup>84</sup> CRAWFORD, *Brownlie's principles*, 423.

<sup>85</sup> MAREK, *Identity*, 1.

<sup>86</sup> A. ZIMMERMAN, "Continuity of States", in *The Max Planck Encyclopedia of Public International Law*, August 2006, online edition, §1-2 (hereafter: ZIMMERMAN, "Continuity"); MAREK, *Identity*, 3.

<sup>87</sup> CRAWFORD, *The Creation of States*, 668-669.

<sup>88</sup> *Ibid.*, 673.

<sup>89</sup> ZIMMERMAN, "Continuity", §6.

<sup>90</sup> MAREK, *Identity*, 7-9.

<sup>91</sup> CRAWFORD, *The Creation of States*, 35.

<sup>92</sup> MAREK, *Identity*, 11.

<sup>93</sup> *Ibid.*, 13.

<sup>94</sup> D. WONG, "Sovereignty sunk? The position of 'sinking states' at international law", *Melbourne Journal of International Law* 14 (2) (2013), 13 (hereafter: WONG, "Sovereignty sunk").

<sup>95</sup> BROWNLIE, *Principles*, 124; M. G. KOGEN, "Territory, Abandonment" in *The Max Planck Encyclopedia of Public International Law*, November 2008, online edition, §3 and 6.

<sup>96</sup> M. KOSKENNIEMI, "The future of statehood", *Harvard International Law Journal* 32 (1991), (397) 397.

## II. 1. DOMINANT STATEHOOD THEORIES

28. The entire lifetime of a state is at the mercy of uncertainty, since international law does not truly offer clear-cut rules on state emergence, continuation<sup>97</sup> and extinction.<sup>98</sup> Given this fact, international law tends to cling to the regulations concerning the most defined area of the three which is the creation of a state. The rules on state creation<sup>99</sup> are thus allowed to transgress their area of expertise and delve into the largely uncharted territory of state continuity and state extinction.<sup>100</sup>

29. In the past, many unsatisfactory attempts have been made to outline the term *state* in treaties, but still there is no straightforward definition of state<sup>101</sup> or statehood.<sup>102</sup> In the 19<sup>th</sup> century the emergence of states was viewed in light of the constitutive theory which upholds recognition as a crucial element to establish statehood. According to this theory, an entity is called a state only when already existing and recognized states, recognize the new state as such.<sup>103</sup>

In the 20<sup>th</sup> century's *Deutsche Continental Gas Gesellschaft* case, there was a breakthrough towards a more stable, egalitarian and systematic classification of legal entities<sup>104</sup> when the tribunal stated “[a] State does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory”.<sup>105</sup> This view on the matter represented state practice of those days<sup>106</sup> and was eventually copied by the Montevideo Convention<sup>107</sup> which added a more consequential criterion to the three existing criteria of territory, population and exercise of power.

The newest and fourth condition centers on the capacity to enter into international relations.<sup>108</sup> For a long time the creation of a state has been described not as a matter of law, but as one of fact. This rationale still lingers today. In that view, the foundation of the statehood conditions of the Montevideo Convention is not legality but effectiveness. This translated into the key capability and fourth criterion to act as a self-governing and independent entity in relation to other states.

30. The Montevideo Convention and legal doctrine<sup>109</sup> classify the act of recognition as a mere declaration of the recognizing state in order to specify that the latter accepts the legal personality of the

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<sup>97</sup> CRAWFORD, *The Creation of States*, 37.

<sup>98</sup> MAREK, *Identity*, 7.

<sup>99</sup> I. ZIEMELE, “States, Extinction of” in *The Max Planck Encyclopedia of Public International Law*, May 2007, online edition, 558, §1 (hereafter : ZIEMELE, “States, Extinction”); MAREK, *Identity*, 7.

<sup>100</sup> ZIEMELE, “States, Extinction”, §1.

<sup>101</sup> The ILC refused to attempt defining a *state*. Report of the International Law Commission on the work of its First Session, 12 April - 9 June 1949, Supplement No. 10 (A/925), UN Doc. A/CN.4/13 and Corr. 1-3 (1949), 289.

<sup>102</sup> CRAWFORD, *The Creation of States*, 40; S. PARK, *Climate change and the risk of statelessness: the situation of low-lying islands*, in *Legal and protection policy research series*, UNHCR Doc. PPLA/2011/04 (May 2011), 4 (hereafter: PARK, *Climate change and the risk of statelessness*); T. D. GRANT, “Defining statehood: the Montevideo Convention and its discontents”, 37 *Colum. J. Transnat’l L.* 1999, (403) 404 (hereafter: GRANT, “Defining Montevideo”).

<sup>103</sup> M. GAGAIN, “Climate change, sea level rise and artificial islands: saving the Maldives’ statehood and maritime claims through the ‘constitution of the oceans’”, *Colorado Journal of International Environmental Law and Policy*, vol. 23 (2012), (77) 88 (hereafter GAGAIN, “Climate change, sea level rise”).

<sup>104</sup> M. A. BURKETT, “The Nation Ex-Situ” in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 106 (hereafter: BURKETT, “The Nation Ex-Situ”).

<sup>105</sup> Germano-Polish Mixed Arb. Trib., *Deutsche Continental Gas Gesellschaft v. Polish State*, *Ann. Dig. (5)* 1929/30, 11.

<sup>106</sup> J. G. STOUTENBERG, “Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States” in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 57 (hereafter: STOUTENBERG, “Thresholds of effective statehood”).

<sup>107</sup> Montevideo Convention.

<sup>108</sup> Art. 1 Montevideo Convention.

<sup>109</sup> CRAWFORD, *The Creation of States*, 25 and BROWNLIE, *Principles*, 89.

other entity as a state, and all rights and duties determined by international law incumbent on a state-to-state relationship.<sup>110</sup> The recognizing act only functions as a secondary check to ensure that reality coincides with the available international standard conditions of statehood to a certain extent.<sup>111</sup> As a consequence, recognition is not viewed as evidence of, but only as a strong indication of already established statehood.<sup>112</sup> The Badinter Arbitration Commission agreed with that reasoning: “the existence or disappearance of the State is a question of fact; [...] the effects of recognition by other States are purely declaratory.”<sup>113</sup>

In addition, state practice does not feature a broadly acknowledged duty to recognize.<sup>114</sup> The act of recognition is rather regarded as a political and optional public act of state.<sup>115</sup> Contrary to the declarative theory and its egalitarian motive, the constitutive theory could be more easily ruled by subjective opinions of states. The inclination towards complete discretion of recognizing states in the constitutive theory has resulted in the dominance of the declaratory theory and the Montevideo criteria<sup>116</sup> in international law today.<sup>117</sup>

## II. 2. MONTEVIDEO CRITERIA

31. As mentioned, the Montevideo conditions pertain specifically to the topic of state creation.<sup>118</sup> This entails they can perhaps not be justly extended to state continuation. On the other hand, the Montevideo Convention does seem to be formulated to allow an interpretation of wide application, since statehood conditions are presented as having to be continuously fulfilled.<sup>119</sup> In *Las Palmas*, the tribunal acknowledged that the prerequisite of effectiveness, which is the base for the Montevideo criteria, must continue to be present, after the creation of a state.<sup>120</sup>

32. Recalling the four elements of the Montevideo definition of statehood, “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”<sup>121</sup> These elements were also evoked by the Arbitration Commission of the Peace Conference on Yugoslavia in 1991 which declared that “the State is commonly defined as a community which consists of a territory and a

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<sup>110</sup> Art. 6 Montevideo Convention; Badinter commission, Opinion 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (29 November 1991), 92 ILR 165 (hereafter: Badinter, Opinion 1); T. MEGIDDO and Z. NEVO, “Palestinian independence in a post-Kosovo world” in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press, 2013, 188 (hereafter: MEGIDDO et al., “Palestinian independence”).

<sup>111</sup> HORBACH et al., *Handboek*, 160-161.

<sup>112</sup> CRAWFORD, “State”, §44.

<sup>113</sup> Badinter, Opinion 1.

<sup>114</sup> CRAWFORD, *The Creation of States*, 22.

<sup>115</sup> Brownlie, *Principles*, 6<sup>th</sup> edition, 89-90.

<sup>116</sup> CRAWFORD, *The Creation of States*, 45; E. CRAWFORD and R. RAYFUSE, *Climate Change and Statehood*, in R. RAYFUSE and S. V. SCOTT (eds.), *International Law in the Era of Climate Change*, Cheltenham, Edward Elgar, 2012, 246, 198; GRANT, “Defining Montevideo”, 413-414; P. MALANCZUK, *Akehurst's modern introduction to international law*, New York, Routledge, 1997, 75; SHAW, *International law*.

<sup>117</sup> GAGAIN, “Climate change, sea level rise”, 88.

<sup>118</sup> UNHCR, *Climate Change and Statelessness: An Overview*, Submission to the AWG-LCA 6 under the UNFCCC, 1–12 June 2009, Bonn, 19 May 2009, UNFCCC, <http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>, 1 (hereafter: UNHCR, *Climate change and statelessness*).

<sup>119</sup> Art. 1 Montevideo Convention.

<sup>120</sup> Permanent Court of Arbitration, *Island of Palmas Arbitration (Netherlands v United States of America)*, 2 RIAA 829, 839 (4 April 1928) (hereafter: *Palmas Arbitration*).

<sup>121</sup> Art. 1 Montevideo Convention.

population subject to an organized political authority”.<sup>122</sup> Seeing how territory is one of those elements to be fulfilled, the entire being of a state can be threatened and lead to state extinction given loss of territory due to the submergence thereof.

33. Hereafter, all elements of statehood will be looked into and not just the notion of territory which is at first sight primarily at risk for the island states. The motivation for this lies in the question of a possible hierarchy between the four conditions of statehood. Furthermore, by viewing all conditions, a clearer picture will be portrayed of how well accepted these conditions are as a whole in international law given their application in state practice.

## ***II. 2. 1. Defined territory***

34. Before stating that territory has disappeared or not, it must first be clear what exactly the term territory covers. Does land stop being territory due to its inundation, despite the fact that it is still tangibly there, though covered with water?

35. Black’s Law dictionary describes territory as “[a] geographical area included within a particular government’s jurisdiction; the portion of the earth’s surface that is in a state’s exclusive possession and control”.<sup>123</sup> The Bouvier’s Law Dictionary and Concise Encyclopedia’s definition of territorial property reads: “The land and water over which the state has jurisdiction and control whether the legal title be in the state itself or in private individuals.”<sup>124</sup> In the *Re Duchy of Sealand* case the Administrative Court of Cologne specified: “[O]nly structures which make use of a specific piece of the earth’s surface can be recognized as State territory”.<sup>125</sup> The notion of *earth’s surface* is a constant in these definitions and allows for maritime zones to be included in the definition of territory. What is more, nothing prohibits territory of solely encompassing maritime territory.

36. There are however contrasting views, which interpret territory as consisting of land exclusively. As remarked, the Montevideo statehood theory heeds the effectiveness principle. The effectiveness prerequisite demands that a state territory acts as a functional aspect of a state. It is the physical area where sovereign powers can be exercised over a permanent population.<sup>126</sup> *Cranford* also argues the notion of territory should not be viewed as such, but that the statehood requirements of population and territory are to be read together.<sup>127</sup> *Jessup* notes “[o]ne cannot contemplate a state as a kind of disembodied spirit”.<sup>128</sup> From a historical point of view this can be explained due to the fact that a tangible piece of land was an elementary component of exercise of power, whereas in the future this component might be superfluous to effectively exercise power. Territory would then not seem required for statehood.

Today however, populations are not known to be able to sustainably and effectively survive on the earth’s surface which is submerged. Thus, for a state to wield its power effectively within the boundaries of the Montevideo criteria, it must first and foremost have a territory.<sup>129</sup> For now, land-based territory, however

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<sup>122</sup> Badinter, Opinion 1, 165.

<sup>123</sup> “Territory”, in B. A. GARNER and H. C. BLACK, *Black’s Law dictionary*, online edition, 2009.

<sup>124</sup> “Territorial property” in J. BOUVIER and F. RAWLE, *Bouvier’s Law Dictionary and Concise Encyclopedia*, online edition, 1856.

<sup>125</sup> Administrative Court of Cologne, *Re Duchy of Sealand* (1978), 80 ILR 683, 685 (hereafter: *Re Duchy of Sealand*).

<sup>126</sup> B. A. SIMMONS, “Trade and Territorial Conflict in Latin America: International Borders as Institutions”, in M. KAHLER and B. F. WALTER (eds.), *Territoriality and conflict in an era of globalization*, Cambridge, Cambridge University Press, 2006, 255.

<sup>127</sup> CRAWFORD, *Brownlie’s principles*, 128.

<sup>128</sup> 383<sup>rd</sup> meeting of the Security Council of the United Nations (2 December 1948), *UN Doc. S/PV.383* (1948), 11.

<sup>129</sup> BROWNLIE, *Principles*, 105.

not indispensable, seems necessary. In fulfillment of the effectiveness criterion and with respect to the island states, at least part of a state's territory would have to be habitable for the entirety of the state to remain functional and effective. This could either be a piece of habitable land elsewhere or a part of the island itself which is kept habitable in an artificial manner.

37. The effectiveness background of the Montevideo criteria seems to lean towards an interpretation of territory as land territory as this has historically always been the physical basis where communities, power and so a state arose. The etymological explanation of the word territory backs this claim up. The term territory, derived from the Latin *territorium* from *terra*, signifies land, or the part of the earth's surface that is not covered by water.<sup>130</sup>

38. Clearly, the exact content of the term territory can diverge and its confinement to land territory by the effectiveness principle and so the Montevideo Convention could be questioned. However, given the current prevalence as land territory, it must be scrutinized as such, whilst leaving the door open for territory to be filled in exclusively by maritime territory in the future.

## II. 2. 1. 1. Land territory

39. Historically, in light of the development of statehood, the term land territory was first shaped in the Middle Ages and gradually transformed in the seventeenth century after the religious wars and after signing the Peace of Westphalia treaties<sup>131</sup> to fit the modern state system.<sup>132</sup> There exist several theories about how to consider a state's relationship with the concept of land territory. The first theory regards territory as state property, the second as a specific attribute of the state and the third as the spatial scope of a state's legal order.

*Marek* argues that the first theory would require that a total loss of territory would not affect the state, as loss of property does not alter an owner inherently. This is misleading and requires clarification. For if a home-owner sells his only house, will you still call him a home-owner? However, the person without a home still has the characteristic ability to once more become a home-owner. When viewed in this manner, as this paper purports it should be, *Marek's* statement is acceptable. Given the fact that the Montevideo Convention explicitly includes the territory criterion as an inherent part to constitute statehood, loss of territory must alter a state's character, otherwise the criterion of territory might just as well not exist. Therefore, the view that territory is mere accessory property cannot be justified. The same opinion is reflected in doctrine which has rightly abandoned the property theory.<sup>133</sup>

Likewise, the second theory which considers territory as a specific attribute of a state can also not be upheld. Taking into account the allowed flexibility of state boundaries, state territory cannot be seen as a rigidly and distinctly formed attribute of a state. For this reason the second theory is held as invalid as well.<sup>134</sup>

The third theory remains, and its pragmatic character seems perfectly in line with the principle of effectiveness. Land territory, as the current principal spatial sphere of the exercise of power, turns the

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<sup>130</sup> *Territorium*, Oxford Dictionaries, [www.oxforddictionaries.com/definition/english/territory](http://www.oxforddictionaries.com/definition/english/territory).

<sup>131</sup> The treaties were two separate, identical treaties signed at Münster and Osnabrück which formed one legal instrument. A. NUSSBAUM, *A concise history of the law of nations*, New York, Macmillan, 1954, 86.

<sup>132</sup> HORBACH et al., *Handboek*, 161-168; CRAWFORD, *Brownlie's principles*, 116.

<sup>133</sup> MAREK, *Identity*, 19.

<sup>134</sup> *Ibid.*, 19.

criterion of territory into an add-on to the criterion of exercise of power. This means that the requirement of territory is rather regarded as the object of independent governmental control and not as a distinct separate criterion.<sup>135</sup>

40. When it comes to the characteristics of land territory, there are no particular mandatory qualities. This means the territory criterion as such would remain fulfilled even if the island would be uninhabitable or when an island would be downgraded to a rock.<sup>136</sup> Just as land which is reclaimed through use of dykes, also an artificial island could serve as territory,<sup>137</sup> since it has historically been assimilated with naturally formed islands with respect to its ability to serve as tangible territory.<sup>138</sup>

Yet, doctrine is far from unanimous on this topic<sup>139</sup> and especially doubts the possibility of viewing artificial installations as land, since the mentioned historical link is not present for artificial installations which are not directly connected to the seafloor. On this account, the president of Kiribati has expressed its plan to relocate its population to floating artificial installations bought from Japan, which could present issues on the fulfillment of the territory criterion.<sup>140</sup> A clarification on the legal position of artificial structures as territory, which this paper supports, needs to be put on the international agenda.

At first sight, also low-tide elevations as described in article 13.1 LOSC could equally count as land territory, were it not for the decision of the ICJ in the *Bahrain v. Qatar* case on maritime delimitation wherein the Court stated “It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands *or other land territory*”.<sup>141</sup> This judgment is said to remain true, even if the low-tide elevation would be home to lighthouses or similar installations remaining above high tide.<sup>142</sup>

41. Still, even if a piece of territory endures, of course, some legal implications will rise from partial loss of land territory in any case. *Impossibilium nulla obligatio* entails that treaty obligations specifically related to a part of territory can no longer create obligations or rights for a state if that piece of territory is no longer part of the state.<sup>143</sup> On the other hand, an alteration of treaty-limits can simultaneously entail an automatic extension of treaties’ effects over newly gained state territory.<sup>144</sup>

Foreseeing a possible loss of a treaty’s object, the Vienna Convention on Law of Treaties allows for a party to end a treaty if it has become impossible to execute the treaty due to permanent disappearance of an object crucial to the agreement.<sup>145</sup> Once again, territory is clearly hinged to the ability to exercise power, which could underline the already mentioned merely supporting role of territory.

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<sup>135</sup> CRAWFORD, *The Creation of States*, 52.

<sup>136</sup> Art. 121.3 LOSC.

<sup>137</sup> TSALTAS et al., *Artificial islands*, 15-16.

<sup>138</sup> For example as the Maldives have created the artificial island Hulhumalé, which is part of its territory. This assimilation is to be viewed separately from the artificial islands’ lack of the ability to generate anything but a 500 meters safety zone. The artificial island regime originated in the 1930 Hague Codification Conference and the International Law Commission’s draft for the first Law of the Sea Conference in 1958, where the assimilation is present. STOUTENBERG, “Thresholds of effective statehood”, 63.

<sup>139</sup> GAGAIN, “Climate change, sea level rise”, 113-114.

<sup>140</sup> Global Conference on Oceans, Coasts, and Islands, *Global oceans conference 2010: ensuring survival, preserving life, improving governance: summary report*, 2010, [http://globaloceanforumdotcom.files.wordpress.com/2013/06/goc5\\_summary.pdf](http://globaloceanforumdotcom.files.wordpress.com/2013/06/goc5_summary.pdf), 16 (hereafter: Global Conference on Oceans, *Global oceans conference 2010*).

<sup>141</sup> ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, 2001 *ICJ Reports* 40, §260. Italics added.

<sup>142</sup> R. LAVALLE, “Not Quite a Sure Thing: The Maritime Areas of Rocks and Low Tide Elevations under the UN Law of the Sea Convention”, 19 *Int’l J. Mar. & Coastal L.* (2004), (43) 53.

<sup>143</sup> MAREK, *Identity*, 23.

<sup>144</sup> For example: the extension of US territory in the 19<sup>th</sup> century for which the preexisting UK-US treaties were instantly valid. MAREK, *Identity*, 17.

<sup>145</sup> Art. 61.1 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331 (hereafter: VCLT).



42. When it comes to the size of a state's land territory, there is no minimum of desired acreage,<sup>146</sup> making all sizes acceptable, from microstate to humongous state. The concept of territory, often mentioned in one breath with the principle of variable boundaries, is not very strict.<sup>147</sup> The principle of variable boundaries or state-limits, a concept born out of practical considerations, allows exactly that which its name spells out. State-limits are allowed to vary without modifying state identity and may even be disputed.<sup>148</sup>

A modification of boundaries can arise from natural causes, such as tides, but equally human causes, such as renewed treaty agreements.<sup>149</sup> When East Prussia was split off from Germany, the latter's statehood was never questioned. Likewise, fragmented territory cannot serve as an indication against the presence of valid statehood.<sup>150</sup> The Harvard Draft Convention on the Law of Treaties confirms this view by stating that no matter how much territory states lose – apart from a total loss<sup>151</sup> – the remaining territory should always be regarded as the essential part, the territorial nucleus.<sup>152</sup>

43. Unmistakably, this practical criterion of territory does not demand a strict application. Still, its flexibility does not stretch to infinity. *Marek* notes that with a complete loss of the material elements of a state, such as its territory, the extinction of a state can be taken for granted. She bases this exception to the allowed variability of state limits on the following. Firstly, a total loss of territory is no longer a difference of a certain degree, but rather a difference in kind. Secondly, without a territory a state can no longer effectively exercise power.<sup>153</sup> She even offers an example of such a clear-cut case: “an island which would become submerged”.<sup>154</sup>

44. Given the focus of this paper on loss of land territory as a threat to statehood, solutions for the loss of land are discussed in a thorough manner in the third chapter of part II, and are not included in this second chapter of part II. This is contrary to adaptations suggested for other statehood issues of the submerging island states relating to loss of maritime territory, exercise of power and independent state relations, which will be immediately included in this second chapter.

## II. 2. 1. 2. Maritime zones

45. A state has different maritime zones, each linked to a different set of sovereign powers of the coastal state. The width of maritime zones is measured from a state's baseline. This baseline usually identifies with the coastal low-water line since such a baseline will procure the most far-reaching maritime zones.<sup>155</sup> The natural low-water lines used as baselines and the zones measured therefrom are regarded as ambulatory.<sup>156</sup> Tidal activity set aside, a baseline will alter due to sea level rise. When the low-water line

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<sup>146</sup> HORBACH et al., *Handboek*, 161-168 and CRAWFORD, *The Creation of States*, 46.

<sup>147</sup> MAREK, *Identity*, 15.

<sup>148</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, 1969 *ICJ Reports* 3, §32.

<sup>149</sup> MAREK, *Identity*, 17.

<sup>150</sup> CRAWFORD, *The Creation of States*, 47.

<sup>151</sup> MAREK, *Identity*, 547.

<sup>152</sup> *Ibid.*, 22.

<sup>153</sup> *Ibid.*, *Identity*, 23.

<sup>154</sup> *Ibid.*, *Identity*, 7.

<sup>155</sup> ARSANA et al., “Climate change and the limits of maritime jurisdiction”, 134.

<sup>156</sup> US Supreme Court, *United States v. Alaska* (1997), 521 U.S. 1, 31; J. PETERS, “United States v. Alaska: Section 10 Permits, the Territorial Sea, and Federalism”, *Ocean & Coastal L.J.* 1 (1994), (59) 78-79; RAYFUSE, *International law and disappearing states*, 3.

moves inland, the maritime zones of the state will correspondingly decrease in size.<sup>157</sup> When a baseline disappears, this entails the former maritime zones associated with the sunken coastal state will be swallowed up by the high seas or a maritime zone governed by a nearby state.<sup>158</sup>

46. When baselines alter and maritime zones shrink, a loss of income ensues for small island nations as they are economically highly dependent on the natural resources,<sup>159</sup> in the form of minerals and fish, present in those zones.<sup>160</sup> An island complying with the LOSC conditions can spawn a territorial sea, a contiguous zone, an exclusive economic zone (EEZ) and a continental shelf.<sup>161</sup> A rock which cannot sustain human habitation or economic life can generate a territorial sea, but not an EEZ or continental shelf.<sup>162</sup>

Just how big the consequences are of a classification of land as a rock or island can be illustrated by the United Kingdom (UK) rock Rockall. Before signing the LOSC, the UK claimed this rock extended its fishing zone or EEZ. Upon signing the LOSC, which prohibits rocks to spawn an EEZ, the UK had to forfeit its claim and instead received an EEZ about 60.000 square nautical miles smaller, compared to its formerly claimed fishing zone.<sup>163</sup> Similarly, an expansion of maritime zones is just the thing China, Vietnam, the Philippines, Malaysia, Brunei and Taiwan are hoping for by all simultaneously claiming the Spratly Islands and/or the surrounding waters.<sup>164</sup> Though perhaps the most well-known example of an attempt to expand maritime zones by use of the classification of land as an island, is that of Okinotorishima, which is located in the North Pacific, south of Japan. Japan is said to have spent approximately 200 million USD on sea defenses, to keep two groups of boulders, located on a coral reef, above water. Japan defends this ensemble of reef and boulders to be an island capable of generating a territorial sea, an EEZ and a continental shelf. This claim is contested by other states, nevertheless Japan has not altered its assertions in any way.<sup>165</sup>

47. The issue of degrading into a rock is not the only foreseeable problem for the island states. Difficulties can also arise due to article 47 LOSC which defines archipelagic states, which are states formed by one or more archipelagoes such as Indonesia. The baselines of such states depend on various conditions. Specifically, the condition stipulating a minimum 1 to 9 land to water ratio, could become problematic to satisfy as archipelagoes submerge.<sup>166</sup>

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<sup>157</sup> C. SCHOFIELD, "Shifting limits? Sea levels rise and options to secure maritime jurisdictional claims", *CCLR* 3(4) (2009), (405) 415 (hereafter: SCHOFIELD, "Shifting limits").

<sup>158</sup> A. POWERS and C. STUCKO, "Introducing the Law of the Sea and the Legal Implications of rising Sea Levels" in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 133 (hereafter: POWERS and STUCKO, "Introducing the LOS").

<sup>159</sup> UN Office of the high representative for the least developed countries, landlocked developing countries and small island developing states, *Small Islands Developing States (SIDS) Statistics*, UN-OHRLIS, 2013, <http://unohrlis.org/custom-content/uploads/2013/09/Small-Island-Developing-States-Factsheet-2013-.pdf>, 11.

<sup>160</sup> POWERS and STUCKO, "Introducing the LOS", 131.

<sup>161</sup> R. LAGONI and D. VIGNES, *Maritime delimitation*, Leiden, Martinus Nijhoff, 2006, 154-155.

<sup>162</sup> RAYFUSE, *International law and disappearing states*, 3.

<sup>163</sup> C. SYMONS, "Ireland and the Rockall dispute: an analysis of recent developments", *IBRU Boundary and Security Bulletin* 6(1) (1998), (78) 83; G. XUE, "How Much Can a Rock Get?" in M. H. NORDQUIST, J. N. MOORE, A. H. A. SOONS and H. KIM (eds.), *The Law of the Sea Convention : US accession and globalization*, Leiden, Martinus Nijhoff, 358.

<sup>164</sup> R. W. SMITH and B. L. THOMAS, "Island Disputes and the Law of the Sea: An examination of Sovereignty and Delimitation Disputes", *Maritime Briefing*, 2(4) (1998), (1) 7.

<sup>165</sup> SCHOFIELD et al., "Options to Protect Coastlines", 155-156.

<sup>166</sup> R. RAYFUSE, "Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States" in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 174 (hereafter: RAYFUSE, "Sea level rise").

### II. 2. 1. 3. Saving maritime zones

48. There are several options for island states in order for them to try and retain their maritime zones. If no action is undertaken the current LOSC regime will wipe the islands' maritime zones off the charts when baselines alter and eventually disappear due to land inundation. The main idea is to freeze the existent maritime zones in one way or another.

It is disputed amongst scholars what exactly needs to be fixed, solely the outer limits of the maritime zone, the baseline or both.<sup>167</sup> If only the outer limits would be fixed and the baseline moved inwards, this would result in loss of inland waters consisting of internal and archipelagic waters, and an expansion of seaward waters. If the baseline were to be fixed, the seaward maritime zones remain the same, but the internal waters and the accompanying far-reaching sovereign jurisdiction would grow as land diminishes.<sup>168</sup> The second option is to be preferred, since even though internal waters and the concomitant powers would grow, they are only replacing the even further reaching sovereign powers over what was previously land territory.

49. This process of diminishing maritime zones will even be sped up, due to loss of several archipelagic islands of an archipelagic state,<sup>169</sup> low-tide elevations<sup>170</sup> within 12 nautical miles measured from the baseline, and fringing reefs,<sup>171</sup> which would otherwise all help spawn a larger maritime zone where the state has extensive sovereign rights.<sup>172</sup> An archipelagic state could be stripped of its right to draw archipelagic baselines all together, if it exceeds the maximum allowed length of a single baseline between two base points.<sup>173</sup>

#### *Straight baselines*

50. In principal the LOSC does not offer a correction for coastlines and so baselines specifically shifting severely due to climate induced sea level rise. Even so, articles 7.2 and 7.4 LOSC might lend a helping hand here as these articles encapsulate a correction to ambulatory baselines.<sup>174</sup> Taking into account economic considerations, these articles were made to deal with unstable coastlines caused by deltas *and other natural conditions*<sup>175</sup> by allowing the use of fictitious straight baselines.<sup>176</sup> The extra rules were created at Bangladesh's request because the erosion occurring at the Brahmaputra estuary was chipping away at the Bangladesh maritime zones.

If these articles were to be interpreted broadly and functionally,<sup>177</sup> sinking island states could also take advantage of these stipulations as a means to establish straight baselines where possible. Importantly, the existence of these articles supports the acceptability of a departure from the otherwise standard use of ambulatory baselines, when necessary as a result of practical considerations.

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<sup>167</sup> CARON, "When law makes climate change worse", 623 and SOONS, "Effects of Sea Level Rise", 225.

<sup>168</sup> J. STOUTENBURG, "Implementing a new regime of stable maritime zones to ensure the (economic) survival of small island states threatened by sea-level rise", *IJMCL* 26(2) (2011), (263) 275 (hereafter: STOUTENBERG, "Implementing a new regime").

<sup>169</sup> Art. 121.2 LOSC.

<sup>170</sup> Art. 13.2 LOSC.

<sup>171</sup> Art. 6 LOSC.

<sup>172</sup> SCHOFIELD et al., "Options to Protect Coastlines", 146-147.

<sup>173</sup> Art. 47 LOSC.

<sup>174</sup> TSALTAS et al., *Artificial islands*, 3.

<sup>175</sup> Art. 7.2 LOSC.

<sup>176</sup> Art. 7.5 LOSC.

<sup>177</sup> SCHOFIELD et al., "Options to Protect Coastlines", 159.

51. When using any other baseline than the standard, ambulatory kind, such as the straight baselines of article 7 LOSC, a declaration of those special baselines is required.<sup>178</sup> Naturally however, a state can't just claim the use of a straight baseline whenever and wherever it feels like it. The straight baseline must somehow stay associated with the actual low waterline and the coast.<sup>179</sup> Article 7 LOSC clearly states the conditions which must be adhered to when the use of a straight baseline is desirable.

The baseline can only be drawn between two elevations always rising above high tide or two points on low-tide elevations accommodating installations such as lighthouses<sup>180</sup> which need to rise above sea level at all times. These installations can come with a hefty price tag making them very likely out of the question for small island states with small or struggling economies.<sup>181</sup> Low-tide elevations without such installations are however also acknowledged if those points are accepted as such by the international community. Essentially, this condition should prove to be unproblematic when taking into account the already present recognition of low-tide elevations of various island states.<sup>182</sup>

### *Charts*

52. It has been proffered that the indirect fixation of baselines through use of article 7 LOSC is onerous and unnecessary.<sup>183</sup> Articles 5, 6, 16 and 47.8 LOSC could offer a more direct way of fixating or freezing baselines. These articles locate the baseline where it is marked on charts which are officially recognized by the coastal state. Such wording can be interpreted to mean that a chart containing baselines recognized by the coastal state itself, suffices to set those baselines in stone. Simply by not updating the officially recognized charts, the old charts and baselines could be retained.<sup>184</sup> The baselines would then be frozen as they are at the moment the relevant charts are deposited with the Secretary-General of the United Nations.<sup>185</sup> Admittedly, his solution is one based on practical measures, hardly making it a very reliable way to ascertain retention of precious maritime zones.

### *National legislation*

53. Ambulatory baselines could be avoided via national legislation as well. Pacific states could declare that the breadth of all maritime zones is measured from baselines that are proclaimed by subsidiary regulation in compliance with the LOSC every so often.<sup>186</sup> Alike the method of fixation with charts, these baselines will not alter until new legislation is declared. This technique is not a novel one and already features in Australian legislation for every Australian maritime zone.<sup>187</sup>

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<sup>178</sup> An up to date list of declarations can be found at *Maritime Space: Maritime Zones and Maritime Delimitation*, UN, [www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm) and ARSANA et al., "Climate change and the limits of maritime jurisdiction", 133.

<sup>179</sup> ARSANA et al., "Climate change and the limits of maritime jurisdiction", 134.

<sup>180</sup> R. RAYFUSE, *W(h)ither Tuvalu? International law and disappearing states*, unpublished paper, University of New South Wales Faculty of Law Research Series, 2010, <http://law.bepress.com/cgi/viewcontent.cgi?article=1151&context=unswwps>, 4 (hereafter: RAYFUSE, *W(h)ither Tuvalu?*); TSALTAS et al., *Artificial islands*, 11.

<sup>181</sup> PARK, *Climate change and the risk of statelessness*, 11.

<sup>182</sup> RAYFUSE, *International law and disappearing states*, 5.

<sup>183</sup> SCHOFIELD, "Shifting limits", 412.

<sup>184</sup> SCHOFIELD et al., "Options to Protect Coastlines", 162; RAYFUSE, "Sea level rise", 181.

<sup>185</sup> M. HAYASHI, "Sea Level Rise and the Law of the Sea: Legal and Policy Options", in TERASHIMA, H., (ed.), *Proceedings of the International Symposium on Islands and Oceans*, 2009, 160, [www.sof.or.jp/en/report/pdf/200903\\_ISBN978-4-88404-217-2.pdf](http://www.sof.or.jp/en/report/pdf/200903_ISBN978-4-88404-217-2.pdf), 71 (hereafter: HAYASHI, "Sea level rise").

<sup>186</sup> RAYFUSE, "Sea level rise", 184-185.

<sup>187</sup> Seas and Submerged Lands Act 1973 (Act No. 161/1973) (Au.), nrs. 7, 10(B), 12 and 13(B).

### *Declared continental shelf*

54. Besides the straight baselines of article 7 LOSC, article 76.9 LOSC allows another maritime delimitation line to be fixed through declaration. This particular delimitation line is the seaward cut-off line of the continental shelf. The continental shelf does not require a deposited declaration to exist, but it does require one to be fixed and exist beyond 200 nautical miles measured from the baseline. The LOSC only requires charts and other relevant information which permanently describe the outer limits of the continental shelf within the permissible limits of article 76, to be deposited with the UN Secretary-General. Permanent can be interpreted as permanent, or until a replacing permanent chart would be deposited by the coastal state.<sup>188</sup>

55. The alteration of a baseline would affect different continental shelves in different ways, since the zone can be delimited in more than one manner. Apart from overlapping claims for continental shelf zones which must principally be settled between parties,<sup>189</sup> the LOSC first of all provides for the continental shelf to stretch out for 200 nautical miles from the baseline, regardless the geographical characteristics of the shelf. Article 76 provides for a second and third delineating option as well, taking into account the actual geographical outer edge of the prolongation of landmass this time.

The second option sets the outer geographic edge of the continental margin at a maximum of 350 nautical miles measured from the baseline.

A third option sets the outer edge at a 100 nautical miles from the point where 2500 metre isobath is reached,<sup>190</sup> except when submarine ridges are present which are not components of the continental margin, such as plateaux, rises, caps, banks and spurs. The presence of such submarine ridges activates the cut-off line of 350 nautical miles measured from the baseline once again.<sup>191</sup>

56. It has been suggested that only in the case of undeclared continental shelves of up to 200 nautical miles, receding baselines will alter the continental shelf. It is reasoned that the declared delineation, using the geographical edge of the continental margin, will not perturb the continental shelf, regardless where the baselines lie.<sup>192</sup> The second part of that statement fails to take into account the scenario of article 76 LOSC wherein it sets a maximum limit of 350 nautical miles, which has the power to overwrite any permanently declared cut-off line of the continental shelf.

Despite the *permanence* of the declared continental shelves, it is clear from the LOSC commentary that the LOSC has wanted to install a certain definable limit which must be respected, eradicating the option of an infinite continental shelf.<sup>193</sup> If an island state's baselines recede, the total length of the continental shelf could surpass the 350 nm limit and thus the outer edge would be diminished in accordance with the limit. Even though the total size of the shelf would remain unaltered, the entire zone would shift towards the shrinking island, perhaps at the cost of losing profitable resources now located just outside the edge of the shifted continental shelf.

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<sup>188</sup> RAYFUSE, *International law and disappearing states*, 3.

<sup>189</sup> Art. 76.10 LOSC.

<sup>190</sup> This means, the outer edge of a coastal state's continental shelf can reach beyond 350 nautical miles. T. L. MCDORMAN, "The continental shelf beyond 200 nm: law and politics in the arctic ocean", *J. of transnational law & policy* 18(2), (155) 169.

<sup>191</sup> Art. 76 LOSC; S. N. NANDAN and S. ROSENNE, *United Nations Convention on the Law of the Sea 1982: A commentary – Volume II*, Dordrecht, Martinus Nijhoff, 1993, 874-875.

<sup>192</sup> POWERS and STUCKO, "Introducing the LOS", 129.

<sup>193</sup> S. N. Nandan and S. Rosenne (eds.) *United Nations Convention on the Law of the Sea 1982: A commentary – Volume II*, Dordrecht, Martinus Nijhoff, 1993, 874-875.

57. Hence, the alteration of baselines could affect both the undeclared continental shelf based on a maximum of 200 nautical miles and the declared continental shelf of a maximum of 350 nautical miles from the baseline. Therefore, also in the latter case, not only the outer edge, but the baseline as well should be fixed. The cautious action of the island states would be to deposit the appropriate charts at this moment, before its baselines recede or disappear.

### *Maintaining the status of island*

58. Further problems will be encountered when the island states are confronted with the LOSC definitions of an island and a rock. Two issues arise, the requirement of being able to sustain human habitation and the use of artificial installations to sustain the island.

59. According to article 121 LOSC an island should only be awarded the status of island as defined in the LOSC when certain conditions are fulfilled. An island is a naturally formed area of land, so excluding all artificially formed land,<sup>194</sup> surrounded by water and above water at high tide. An important stipulation to distinguish an island from a rock is the requirement of an island to be able to sustain human habitation or economic life.<sup>195</sup>

Guesses have been ventured as to the quantity of people needed for human habitation,<sup>196</sup> however such numbers are nowhere actually proscribed. Furthermore, as this issue is one viewed separate from the population condition for statehood under the Montevideo Convention, it is likely an island as defined in the LOSC can be shielded from a future as a rock, if only a few caretakers are able to sustain their livelihood on the island, as a permanent population or community is not asked for.<sup>197</sup>

60. It is mostly not accepted to utilize artificial constructions to try and turn the qualification of a rock or low-tide elevation<sup>198</sup> into the qualification of an island. On the other hand, the use of artificial installations to prevent an island from becoming a rock is generally tolerated.<sup>199</sup> The same can be said for land reclamation, which has helped nations such as the Netherlands to vastly extend land territory.<sup>200</sup> The question can be posed what exactly the tremendous difference is between artificially reclaimed land and artificially constructed platforms. Nonetheless, past jurisprudence has proven to be quite unyielding when it came to the condition of naturally formed land.<sup>201</sup> In addition, protest from other states can be easily envisioned when the artificial installations, used as points to retain the baseline and ensuing maritime zones are only linked to naturally formed land territory which has become submerged. Therefore an adaptation or clarification of the LOSC will of course offer the most certainty to island states seeking to fix their baselines through use of artificial installations.<sup>202</sup>

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<sup>194</sup> TSALTAS et al., *Artificial islands*, 11; GAGAIN, "Climate change, sea level rise", 82.

<sup>195</sup> CARIUS, et al., *Migration*, 7.

<sup>196</sup> This number was set on 50 by *Van Dyke*. J. VAN DYKE and D. BENNET, "Islands and the delimitation of Ocean Space in the South China Sea", *Ocean Yearbook* 10 (1999), (54) 79.

<sup>197</sup> STOUTENBERG, "Thresholds of effective statehood", 65.

<sup>198</sup> Art 13 LOSC.

<sup>199</sup> A.G. OUDE ELFERINK, "Artificial Islands, Installations and Structures", in *The Max Planck Encyclopedia of Public International Law*, July 2007, online edition, §4; C. R. SYMMONS, *Some Problems Relating to the Definition of "Insular Formations" in International Law: Islands and Low-Tide Elevations*, Durham, IBRU Maritime Briefing, 1995, 3; FREESTONE, "International law and Sea level Rise", 109 and 113; Schofield et al., "Options to Protect Coastlines", 157; SOONS, "Effects of Sea Level Rise", 222.

<sup>200</sup> SCHOFIELD et al., "Options to Protect Coastlines", 156.

<sup>201</sup> GAGAIN, "Climate change, sea level rise", 116.

<sup>202</sup> GAGAIN, "Climate change, sea level rise", 116; RAYFUSE, *International law and disappearing states*, 1.

## *Historic waters*

61. Another claim can be made via the historic waters doctrine.<sup>203</sup> This doctrine provides a title based on effective and continued exercise of governmental authority over an area, unhindered by other states.<sup>204</sup> The creation of a historic title takes time. An island state cannot simply fall back on prior possession, but would have to claim the particular area as historic waters for a certain period of time.<sup>205</sup> How long that period of time needs to be, is unclear. Though, as with the introduction of new customary law, at least some perceptible notion of time must pass.<sup>206</sup> Above all, a claim supported by the recognition of historical waters will most likely be met with protest as neither the 1958 Geneva Conventions on the Law of the Sea,<sup>207</sup> nor the 1982 LOSC cover or allow such use of historical waters.<sup>208</sup>

## *Updating the LOSC*

62. Instead of tinkering with old regulations to fit new situations, new regulations could be put in place. The LOSC does not explicitly enforce ambulatory baselines as the one and only baselines, and does explicitly allow for deviations based on practical considerations.<sup>209</sup> Hence, apart from trying to use existing LOSC articles, a new LOSC article could be inserted which could permanently fix maritime zones and baselines as they exist today given climate change-induced sea level rise.<sup>210</sup>

63. To amend the LOSC, each change must be brought to the negotiating table. Small island states make up 20 percent of the UN members giving them quite a bit of votes. It is foreseeable though that future negotiations would be plagued by political pressure making sure that maritime zones and particularly EEZs are redefined unfavorably for the island states, in the constant battle for more fish and other maritime resources.<sup>211</sup> In practice however, a LOSC amendment is viewed as fiction and will be extremely difficult to procure.<sup>212</sup> More faith can be placed in the adoption of a supplementary agreement, after the example of the UN Straddling Fish Stock Agreement.<sup>213</sup>

64. Another possibility consists of adding a sea level specific protocol to the UNFCCC.<sup>214</sup> In this respect it must however be noted that a UNFCCC protocol on sea level rise was already suggested and quickly dismissed in 1994.<sup>215</sup>

65. Alternatively, the UNGA could be addressed directly to create a resolution on stable maritime

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<sup>203</sup> ICJ, Fisheries Case (United Kingdom v. Norway), 1951 *ICJ Reports* 116, 130.

<sup>204</sup> ICJ, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 *ICJ Reports* 18, §100.

<sup>205</sup> C. R. SYMMONS, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, Leiden, Martinus Nijhoff, 2008, 101 (hereafter: SYMMONS, *Historic Waters*).

<sup>206</sup> SOONS, "Effects of Sea Level Rise", 224 and ICJ, North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1969 *ICJ Reports* 3, §74.

<sup>207</sup> Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958, 516 UNTS 216; Convention on the High Seas of 29 April 1958, 450 UNTS 11; Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958, 559 UNTS 285; Convention on the Continental Shelf of 29 April 1958, 499 UNTS 311.

<sup>208</sup> STOUTENBERG, "Implementing a new regime", 283; SYMMONS, *Historic Waters*, 1.

<sup>209</sup> STOUTENBERG, "Implementing a new regime", 284.

<sup>210</sup> FREESTONE, "International law and Sea level Rise", 110-114; RAYFUSE, *International law and disappearing states*, 5.

<sup>211</sup> BARNETT and NEIL, "Climate Dangers", 327; POWERS and STUCKO, "Introducing the LOS", 140.

<sup>212</sup> ARSANA et al., "Climate change and the limits of maritime jurisdiction", 148; HAYASHI, "Sea level rise", 87.

<sup>213</sup> RAYFUSE, "Sea level rise", 190.

<sup>214</sup> M. HAYASHI, "Sea Level Rise and the Law of the Sea: How can the Affected States be Better Protected", in C. SCHOFIELD, S. LEE and M.-S. KWON (eds.), *The Limits of Maritime Jurisdiction*, Leiden, Martinus Nijhoff, 2013, 625.

<sup>215</sup> D. FREESTONE and A. G. OUDE ELFERINK, "Flexibility and Innovation in the Law of the Sea: Will the LOS Convention Amendment Procedures Ever Be Used?", in A.G. OUDE ELFERINK (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden, Martinus Nijhoff, 2005, 218.

zones. The resolution would not be binding, but could have a great authority nonetheless.<sup>216</sup> The same course of action was taken by South Pacific Islanders when battling fishing techniques which employed large-scale driftnets resulting in overfishing. The islanders' concerns were picked up by the UNGA which went on to create three resolutions recommending a moratorium for the specific fishing technique.<sup>217</sup> Subsequently, nearly all states adopted measures to comply with the resolutions.<sup>218</sup>

### *Bilateral and multilateral agreements*

66. States could fix their existent maritime zones by agreeing upon them in a bilateral or multilateral treaty, through use of geographical coordinates.<sup>219</sup> Article 62.2(a) of the Vienna Convention on the Law of Treaties (VCLT)<sup>220</sup> dictates that such maritime boundaries will not alter due to a fundamental change in circumstances, unless both parties agree to alter them.

*Stoutenberg* argues that such an agreement would even be opposable to third states since maritime delimitation agreements belong to the category of objective contracts, which are able to set aside article 34 VCLT and to produce general *erga omnes* effects.<sup>221</sup> International doctrine does not agree on the scope of the theory of objective contracts which is mostly used in common law.<sup>222</sup>

At present time, it seems more prudent to conclude against such an automatic *erga omnes* effect of a bilateral or multilateral treaty freezing maritime zones. Therefore, it must be assumed article 34 VCLT is valid, and the relevant agreements would only offer certitude between the agreeing parties. States choosing to make these multilateral treaties must take their limited scope into account.

### *Enforcing maritime rights*

67. Another practical conundrum for island states is that of the administration of maritime rights. The island states must be able to exercise their maritime jurisdiction in an effective manner. Already today, island states often lack the necessary resources to enforce their rights in their vast EEZs.<sup>223</sup> This control, usually exercised through air and sea surveillance would grow much more costly when there is no nearby land base.

A solution could be found in cooperation with other island states. In this respect the South Pacific Forum Fisheries Agency (FFA) already coordinates enforcement measures amongst the Pacific Island States. Nonetheless, even with collective funds, the FFA struggles and in 2009 the only control exercised lasted for no more than ten days, and covered but 8 percent of the collaborating island states' collective EEZ.<sup>224</sup>

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<sup>216</sup> STOUTENBERG, "Implementing a new regime", 308.

<sup>217</sup> Resolution 44/225 of the General Assembly of the United States (22 December 1989), *UN Doc. A/Res/44/225* (1989); Resolution 45/197 of the General Assembly of the United States (21 December 1990), *UN Doc. A/Res/45/197* (1990); Resolution 46/215 of the General Assembly of the United States (20 December 1991), *UN Doc. A/Res/46/215* (1991).

<sup>218</sup> STOUTENBERG, "Implementing a new regime", 305-306.

<sup>219</sup> RAYFUSE, "Sea level rise", 186.

<sup>220</sup> SOONS, "Effects of Sea Level Rise", 222.

<sup>221</sup> STOUTENBERG, "Implementing a new regime", 279-280.

<sup>222</sup> A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2013, 228-229; I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, Manchester, Manchester University Press, 1984, 105-106.

<sup>223</sup> As allowed by art. 73 LOSC.

<sup>224</sup> J. JOHNSON, J. BELL and C. DE YOUNG, "Priority adaptations to climate change for Pacific fisheries and aquaculture: Reducing risks and capitalizing on opportunities", *Food and Agriculture Organization of the United Nations: fisheries and aquaculture proceedings* 28 (2013), 96; POWERS and STUCKO, "Introducing the LOS", 135.



### *The heart of a maritime zone*

68. Lastly, the very rationale of the creation of specific maritime zones must be taken into account. Regarding the EEZ for example, Judge *Vukas* explained in his declaration added to the *Volga* case, that the EEZ regime was codified to offer certainty to coastal fishing communities which are domestically and economically dependent on local fish.<sup>225</sup> Hence, granting a far-away migrated population an EEZ would eschew this particular justification for states to have an EEZ.

69. For several states, the issue of distance could be resolved through new LOSC regulations encouraging the use of an artificially constructed fall-out base, since the idea of a more common use of artificial islands and installations is on the rise. The LOSC could allow a specific exception from artificial islands' incapacity to spawn maritime zones. Yet, indeed, such a stipulation would have to be carefully tailor-made for the island states submerging due to climate change induced sea level rise, to keep flood gates closed to claims for maritime zones for artificial islands.

### *Fixation in time*

70. Precisely which baselines and outer edges of maritime zones must then be fixed? *Caron* suggests pinning down the baselines which are accepted at present in accordance with the LOSC.<sup>226</sup> This moment in time complies with the ITLOS Judge *Jesus*' reasoning which identifies the permanence of baselines once they have been established in compliance with the LOSC, undisturbed by factual changes.<sup>227</sup> Baselines can be considered in compliance with the LOSC when they feature in published charts and have been deposited with UN Secretary General.<sup>228</sup> Hence, this is another reason for island states to take the precautionary matter of clearly defining, publishing and depositing charts at present. This does not necessitate existing maritime boundary disputes to be resolved instantaneously, the delineation could be frozen with the overlapping claims included.<sup>229</sup>

### *Conclusion*

71. All of the above suggestions have their faults or difficulties, and most importantly, all the suggested solutions are only worth a discussion in the assumption that there is still a state to exercise jurisdiction over these maritime zones. Still, a narrow-minded view on the use and retention of maritime zones cannot be accepted, as these zones more often than not offer large revenues for the island states. As a result, employing fixed boundaries of maritime zones can offer economic leeway in negotiations for the island states with other states.

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<sup>225</sup> ITLOS, The "Volga" Case (Russian Federation v. Australia), case no. 11 (2002), Declaration of Vice-President Vukas, 2.

<sup>226</sup> CARON, "When law makes climate change worse", 622.

<sup>227</sup> J.L. JESUS, "Rocks, New-born Islands, Sea Level Rise and Maritime Space" in J. FROWEIN, K. SCHARIOTH, I. WINKELMANN and R. WOLFRUM (eds.) *Verhandeln für den Frieden, Negotiating for Peace*, Berlin, Springer, 2003, 602-603.

<sup>228</sup> HAYASHI, "Sea level rise", 84.

<sup>229</sup> RAYFUSE, *International law and disappearing states*, 6.

## ***II. 2. 2. Permanent population***

72. If it would be established that the failure to fulfill just one Montevideo condition would inevitably lead to the loss of statehood, then the element of population will most likely become problematic due to uninhabitable land<sup>230</sup> ravaged by security issues, partial inundation and erosion, tropical storms, a shortage of drinking water, ocean acidification,<sup>231</sup> and soil salinization long before the condition of territory will become problematic.<sup>232</sup>

73. According to the personality principle<sup>233</sup> there exists an obvious reciprocal link between a state and its citizens. The state exercises jurisdiction over its nationals and they can in return make use of the rights granted to them by the state. A state does not have to have a designated minimum number of nationals. Amongst the smallest of states are the Vatican City (839), Monaco (30.500), Liechtenstein (37.009) and the low-lying island states Nauru (9.434), Tuvalu (10.698) and Palau (21.108).<sup>234</sup> Furthermore, there is no obligatory ethnicity of a certain amount of people.<sup>235</sup>

74. Reference has been made to the permanence of a population which suggests the exclusion of a purely nomadic people.<sup>236</sup> In this regard it must be observed that 46 percent of the Tongan people and even 56.9 percent of the Samoan people live outside their state territory, whilst keeping their original nationality.<sup>237</sup> Those situations make it assumable that it is not impossible for nationals to live abroad from their original homeland and government.

75. Hinged on the criterion of population, it has been submitted that a state must have a certain degree of civilization. This criterion reflects ideas born and bred in times long forsaken. If this notion is at all still relevant, it ought to be interpreted as a demand for an acknowledgement of certain minimum conditions to maintain order and stability in the international community, regardless of faith or culture.<sup>238</sup> As such, the degree of civilization does not pose difficulties for the island states, for it is not the retention but rather the loss of statehood which will create disorder.

76. The sought after effectiveness of the Montevideo criteria must be brought to attention anew. In this respect, the Vatican and the Principality of Sealand should be considered.

The Principality of Sealand is housed on an artificial construction, a remnant of World War II. The German administrative court reflected on the claimed statehood of Sealand at a time when it was considered to be located in international waters off the British coast.<sup>239</sup> The Court stated that the 106 persons claiming to be Sealand nationals could in numbers serve as a population. However, those persons did not form a permanent population. They did not lead a communal life and only a handful of them

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<sup>230</sup> *Ibid.*, 2 and 4.

<sup>231</sup> *Frequently Asked Questions about Ocean Acidification*, Woodshole Oceanographic Institute (WHOI), [www.whoi.edu/OCB-OA/FAQs/](http://www.whoi.edu/OCB-OA/FAQs/).

<sup>232</sup> *UN Doc. A/64/350* (2009), 20; DOUGLAS et al., *Sea level rise: history*, 203; M. GORDON-CLARK, "Paradise lost? Pacific island archives threatened by climate change", *Archival Science* 12 (1) (2012), (51) 54 (hereafter: GORDON-CLARK, "Paradise lost?"); PARK, *Climate change and the risk of statelessness*, 9; POWERS, "Climate Change and Pollution", 21.

<sup>233</sup> CRAWFORD, *The Creation of States*, 161-165.

<sup>234</sup> *Estimates of 2013: "Population (Total)"*, The World Bank, 2013, <http://data.worldbank.org>; *The World Factbook*, Central Intelligence Agency, [www.cia.gov](http://www.cia.gov).

<sup>235</sup> CRAWFORD, *The Creation of States*, 167.

<sup>236</sup> SHAW, *International law*, 199 and MAREK, *Identity*, 18.

<sup>237</sup> For this reason the Samoan and Tongan people are already viewed as diasporas. BURKETT, "The Nation Ex-Situ", 101; J. CAMPBELL, "Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land" in J. MCADAM, *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, Hart, 2010, 64 (hereafter: CAMPBELL, "Climate-Induced Community").

<sup>238</sup> CRAWFORD, *The Creation of States*, 92.

<sup>239</sup> *Re Duchy of Sealand*

remained permanently on the island for maintenance purposes. Therefore Sealand could not be considered a state.

As for most theories, this criterion of population is also prone to exceptions based on special circumstances. Vatican City has always been recognized as a state by other states. Nonetheless, its residents do not fulfill the role of a community, as they are only welcome for long periods of time as long as they hold office. This demonstrates the great role recognition can play when it deems statehood ought to be granted to an entity, based on special circumstances. The special circumstances in the case of Vatican City undoubtedly lie in its peculiar relationship with the Holy See.<sup>240</sup>

Given the climate change-induced dangers threatening the island states, special circumstances seem abundantly present for them as well. This implies that if a small number of persons populated the island state in peril, whether in the form of a community or not, this would suffice to satisfy the criterion of population.

77. When statehood disappears, the connected nationality is likely to disappear with it. It must be clear that nationality does not have to coincide with statehood given the example of the League of Nations mandate states, but it often does. The mandate states were territories placed under the control of another country after World War I. The mandates existed in three different types, being A, B & C. The A mandates retained the most independence, but true to the lack of independent governance, the A mandates were not viewed as states. Still, the A mandates' people retained their existent nationality, instead of switching to the controlling state's nationality. This exemplifies that jurisdiction over a people does not always go hand in hand with the imposition of nationality.<sup>241</sup> Nationality is merely a possible consequence<sup>242</sup> of exercising power of a population by way of municipal law or treaty law.<sup>243</sup>

Admittedly, the mandate states were never meant to remain under the mandate, or the consecutive trusteeship system eternally. The island states could however lose their statehood forever. This suggests that a loss of nationality, at least after a certain period of time, will most likely occur.

78. The question is, exactly how undesirable is loss of nationality? According to the principle of prevention of statelessness, it should be avoided at all times.<sup>244</sup> Stateless persons<sup>245</sup> are much less protected than refugees who still have a nationality but have left their home country for reason described in article 1 of the Refugee Convention.<sup>246</sup>

A person, bereft of state and nationality is still an object of international law, but there is no longer a subject of international law responsible for him.<sup>247</sup> Therefore, statelessness should be avoided each time.<sup>248</sup> Furthermore, this case differs from most historical cases of statelessness, as there is no apparent successor state here to provide a new nationality upon state extinction. To make matters worse, the UNHCR has observed that upon loss of statehood, even if the island states would retain their statehood, its populations

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<sup>240</sup> J. DUURSMAN, *Fragmentation and the International Relations of micro-States: Self-determination and Statehood*, Cambridge, Cambridge University Press, 1996, 411 (hereafter: DUURSMAN, *Fragmentation*).

<sup>241</sup> CRAWFORD, *The Creation of States*, 43.

<sup>242</sup> *Ibid.*, 53.

<sup>243</sup> *Ibid.*, 52.

<sup>244</sup> UN Doc. A/64/350 (2009), 20.

<sup>245</sup> *Stateless People*, UNHCR, [www.unhcr.org/pages/49c3646c155.html](http://www.unhcr.org/pages/49c3646c155.html).

<sup>246</sup> Convention relating to the Status of Refugees of 18 July 1951, 189 UNTS 150.

<sup>247</sup> E. DAES and UNCHR, *Status of the Individual and Contemporary International Law*, New York, United Nations, 1992, 35.

<sup>248</sup> *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-first Meeting (29 November 1951)*, UNHCR (1951), Consideration 2.

would likely be regarded stateless in fact, if not in law.<sup>249</sup>

## II. 2. 2. 1. Climate change refugees

79. Displacement and forced migration<sup>250</sup> are national security issues for the small island states.<sup>251</sup> In 2008, the governments of Australia and New Zealand were approached by the Kiribati government which pleaded for the acceptance of its population as permanent refugees.<sup>252</sup> Unfortunately for Kiribati, there exists no universal duty for states to take in all refugees and grant them nationality, as this is part of national, not international law.<sup>253</sup>

80. The Convention on the Reduction of Statelessness might offer a tad more hope. Article 10 of this convention obliges state parties to the convention in the event of acquiring territory to make provisions to preclude the occurrence of statelessness or in absence thereof impose nationality on persons otherwise rendered stateless. This article will however only be relevant in the situation of state succession and if the states are both parties to this not very widely ratified convention.<sup>254</sup>

81. In general, States are only encouraged to prevent statelessness, for example by the ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States<sup>255</sup> and the Universal Declaration of Human Rights' (UDHR) right to a nationality.<sup>256</sup> These provisions are not binding, though they represent an authoritative view on this international legal topic and are often guidelines for new binding national or international regulations.<sup>257</sup>

82. Small island states are not unfamiliar with migration of their peoples due to normal climatological or social changes.<sup>258</sup> Where possible, islanders move to a different island belonging to their state, and they can continue to do so. There has already been a domestic migration of people moving from the Carteret islands to the close by Bougainville Island as a result of flooding.<sup>259</sup> The island states which have this option of domestic migration to another not or less threatened island have a serious advantage in the whole statehood issue.

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<sup>249</sup> UNHCR, *Climate change and statelessness*, 2.

<sup>250</sup> BROOME, *Climate matters*, 32.

<sup>251</sup> IPCC, 2014: *Summary for Policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [C. B. FIELD, V.R. BARROS, D.J. DOKKEN, K.J. MACH, M.D. MAstrandrea, T.E. BILIR, M. CHATTERJEE, K.L. EBI, Y.O. ESTRADA, R.C. GENOVA, B. GIRMA, E.S. KISSEL, A.N. LEVY, S. MACCrACKEN, P.R. MAstrandrea, and L.L. WHITE (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 12 and 21 (hereafter: IPCC, 2014: *Summary for Policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability*); J. RIERA, *Challenges relating to climate change induced displacement*, remarks for the International Conference "Millions of People without protection: Climate Change Induced Displacement in Developing Countries", 2013, [www.unhcr.org/5151bf239.html](http://www.unhcr.org/5151bf239.html), 1-7; C. DEWITTE, "At the water's edge: legal protections and funding for a new generation of climate change refugees", *Ocean & Coastal L.J.* 16 (2010), (211) 234.

<sup>252</sup> GORDON-CLARK, "Paradise lost?", 53.

<sup>253</sup> CRAWFORD, *The Creation of States*, 53; MCADAM, 'Disappearing states', 13; S. OLIVER, "A New Challenge to International Law: The Disappearance of the Entire Territory of a State", *Int'l J. on Minority & Group Rts.* 16 (2009), (209) 217 (hereafter: OLIVER, "A new challenge").

<sup>254</sup> On 9 May 2014, the convention had 55 parties. Convention on the Reduction of Statelessness of 30 August 1961, 989 UNTS 175.

<sup>255</sup> Art. 1 and 4 of the Articles on Nationality of Natural Persons in Relation to the Succession of States of the International Law Commission, in Report of the International Law Commission on the work of its Fifty-fourth Session, *UN Doc. A/54/10*, Chapter IV (1991).

<sup>256</sup> Art. 15 Universal Declaration of Human Rights of 10 December 1948, UN Doc. A/RES/3/217 A (1948) (hereafter: UDHR).

<sup>257</sup> R.S. J. TOL and R. VERHEYEN, "State responsibility and compensation for climate change damages—a legal and economic assessment", *Energy Policy* 32 (2004), (1109) 1111 (hereafter: TOL et al. "State responsibility").

<sup>258</sup> BARNETT and NEIL, "Climate Dangers", 328; DERUYTTER, "Klimaatvluchtelingen", 204; MCADAM, 'Disappearing states', 4-5; E. HALL, *Vanuatu Village Relocated due to Rising Sea Levels*, ABC News, 6 December 2005, [www.abc.net.au/worldtoday/content/2005/s1524755.htm](http://www.abc.net.au/worldtoday/content/2005/s1524755.htm).

<sup>259</sup> N. MIMURA, L. NURSE, R.F. McLEAN, J. AGARD, L. BRIGUGLIO, P. LEFALE, R. PAYET, G. SEM, "Small islands" in M.L. PARRY, O.F. CANZIANI, J.P. PALUTIKOF, P.J. VAN DER LINDEN AND C.E. HANSON (eds.), IPCC, 2007: *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, Cambridge, UK, 708.

For the less fortunate islands, mass migration must be considered. On account of foreseeable migration, the President of Kiribati and his government have already worked out a plan in 2008 for a long-term relocation strategy for the inhabitants of Kiribati or I-Kiribati. The plan represents migration based on merits and with dignity, which entails the I-Kiribati would train themselves for jobs with great unemployment in the proposed new host state, so as to form an asset to the host state.<sup>260</sup>

83. Adaptation can and will most likely include evacuation of populations. At the moment, populations displaced by climate change do not fall under any special protection regime. It is for this reason, the islanders urge the international community to agree upon a regime to recognize the status of environmental refugees.<sup>261</sup> The sooner such a regime is agreed upon, the sooner migration flows can start and be kept small, controlled and steady.

## II. 2. 2. 2. National migration policies

84. Already in 2002, Tuvalu started taken planning action towards relocating its entire population over a period of 30 years. For this reason, Tuvalu asked its neighbours Australia and New Zealand to develop a policy welcoming Tuvaluans. The results were not marked by success. Neither New Zealand, nor Australia has entered into an agreement with Tuvalu in order to take on immigrants.

Australia explained its refusal by stating that an acceptance of environmental refugees from Tuvalu would be discriminatory, and furthermore stated that it wished to honor certain Pacific Islanders' wishes to stay put.<sup>262</sup>

When it comes to New Zealand, confusion on the acceptance of climate change refugees<sup>263</sup> has arisen for a while when media mistakenly reported news concerning the existence of such an agreement between Tuvalu and New Zealand wherein the latter would agree to take in climate change refugees of Tuvalu. New Zealand has set these falsities straight in a public statement making it perfectly clear that New Zealand would not create a lenient immigration policy for climate change refugees, regardless their nationalities. The reason for the confusion originated from New Zealand's Pacific Access Countries policy. This policy allows for a limited number of labour immigrants aged between 18 and 45 and their families from Kiribati, Tonga, Samoa, Fiji and Tuvalu to gain a residency permit in New Zealand. New Zealand emphasizes that this policy has no linkage with climate change, but finds its rationale in New Zealand's long term commitment and strong connection to the region.<sup>264</sup>

85. The existing national immigration policies do not offer much hope to environmental refugees in general,<sup>265</sup> nor in particular the sinking islands' climate change refugees.<sup>266</sup> This holds true despite the fact

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<sup>260</sup> *Reeling from Impacts of Global Warming, Small Island States Urge General Assembly to Take Comprehensive Action*, UN News, 25 September 2008, [www.un.org/News/Press/docs/2008/ga10754.doc.htm](http://www.un.org/News/Press/docs/2008/ga10754.doc.htm) (hereafter: UN News, *Reeling from impacts*).

<sup>261</sup> *Glossary of statistical terms: Environmental Refugee*, OECD, <http://stats.oecd.org/glossary/detail.asp?ID=839>; SCHUBERT et al., *Climate Change as a Security Risk*, 204-206.

<sup>262</sup> Australian Senate Hansard 15 (10 October 2005),

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22chamber/hansards/2005-10-10/0000%22>, 123.

<sup>263</sup> M. B. GERRARD and D.-T. AVGERINOPOULOU, "Development and the future of climate change law" in D. LEARY and B. PISUPATI (eds.), *The future of international environmental law*, Tokyo, United Nations University Press, 168 (hereafter: KOLMANNKOG et al., "Development"); V. KOLMANNKOG and F. MYRSTAD, "Environmental Displacement in European Asylum Law", *EJML* 11 (2009), (313) 325.

<sup>264</sup> *New Zealand's immigration relationship with Tuvalu*, New Zealand Ministry of Foreign Affairs and Trade, [www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php](http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php).

<sup>265</sup> D. C. BATES, "Environmental Refugees? Classifying Human Migration Caused by Climate Change", *Population and Environment* 23(5), (465) 475.

<sup>266</sup> T. G. PUTHUCHERRIL, "Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions", *Global Journal of Comparative Law* 1 (2013), (1) 10 (hereafter: PUTHUCHERRIL, "Change").

that the island people's numbers should not pose an unbearable strain on immigration inflow. The entire population of four of the most threatened island states consists of about 500.000 persons. That number relates to approximately 1/3 of the immigrants entering Australia, New Zealand and the USA, per year.<sup>267</sup>

Nonetheless, in 2007 a bill for an act to recognize refugees of climate change induced environmental disasters and to create a new visa category in Australia fell short of the support of the major political parties.<sup>268</sup> Up until today, these views remains unaltered, as in May 2014, the New Zealand Court of Appeal, dismissed a claim of a Kiribati national residing in New Zealand despite an expired work visa to be recognized as the very first climate change refugee. The court concluded its judgment by adding:

“No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.”<sup>269</sup>

86. A more unexplored option is the use of the link between associated states. Can associated states not call upon their connected state at all? Some island states, such as Palau, the Marshall Islands and the Federated States of Micronesia, are fully independent but have delegated several defense regulations, foreign affairs or other powers to another state. Other associated states, such as Puerto Rico, Niue, the Cook Islands and the Northern Mariana Islands, are largely independent entities but they are linked to New Zealand or the USA via association agreements.<sup>270</sup>

The 1974 Niue Constitution Act states “[i]t shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue.”<sup>271</sup> The USA has equally agreed to have “full authority and responsibility for security and defense matters in or relating to” the Federated States of Micronesia and the Republic of the Marshall Islands.<sup>272</sup> It seems New Zealand and the USA could be called upon to provide assistance to their associated state.

### ***II. 2. 3. Exercise of power and the right to self-determination***

87. The Montevideo Convention enumerates as its third criterion for statehood that a state must have a government. It is however agreed upon that the term government is too restrictive and that it must be understood as the exercise of power.<sup>273</sup> It is indeed so that the right to exercise power is usually exclusively bestowed upon a government, making that government an aid to the exercise of power by a state. Nonetheless, despite their strong connection, the terms exercise of state power and government aren't synonymous. This means, another manner of working is possible and the institution of government is not indispensable to the adequate fulfillment of this Montevideo condition.<sup>274</sup>

The right to exercise power can also be expressed through the right to self-determination,<sup>275</sup> which is

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<sup>267</sup> G. E. WANNIER and M. B. GERRARD “Overview” in M.B. GERRARD and G.E. WANNIER (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 6.

<sup>268</sup> Migration (Climate Refugees) Amendment Bill 2007, C2007B00149 (AustL).

<sup>269</sup> *Ioane Teitiota v Chief Executive of Ministry of Business and Innovation and Employment* (8 May 2014), NZCA 173 / 2014, §41.

<sup>270</sup> CRAWFORD, *The Creation of States*, 492.

<sup>271</sup> Niue Constitution Act 1974 of 29 August 1974, 1974 No 42, part 7.

<sup>272</sup> Compact of free association amendments act of 2003 of 17 December 2003, 117 stat. 2720, § 311 and 354(a).

<sup>273</sup> B. CHENG, *General principles of law as applied by international courts and tribunals*, Cambridge, Cambridge University Press, 2006, 184.

<sup>274</sup> HORBACH et al., *Handboek*, 162-163.

<sup>275</sup> SHAW, *International law*, 205-207.

firmly established as part of international law.<sup>276</sup> This concept greatly stresses substance over form of the exercised power. This *erga omnes* right<sup>277</sup> allows a certain unit of people<sup>278</sup> to freely modify and monitor their political situation in the manner they desire.<sup>279</sup> The UN has let the inhabitants of Pitcairn know its population of 50 would suffice as a group strong enough to use the right of self-determination in order to create a sovereign state.<sup>280</sup>

88. The criterion of exercise of power can be assessed by looking at the presence of a right to exercise power in a certain manner. This right is commonly used to install a legal order. Although a state has a legal order due to its political organization; not every legal order exists in the context of a state, since international organizations such as the European Union equally have a firmly established legal order.<sup>281</sup> Yet, even though a legal order is not unique to states, it is nonetheless essential to it.

89. The Montevideo Convention demands there to be an effective exercise of power with the object to govern state territory and population.<sup>282</sup> The criterion of exercise of power, albeit a criterion of functionality, remains a legal claim of right.<sup>283</sup> Therefore, the fact that an entity has the right to exercise power, but does not, cannot be viewed as satisfactory.

This is debatable since history has seen times where an entity was deemed to be a state by the international community, even though the government of the so-called state did not wholly and effectively control its own territory.<sup>284</sup> In 1960 Congo was unanimously recognized and qualified as a state and member of the UN whilst there was no effective independent exercise of power yet.<sup>285</sup>

When a state's government disbands or undergoes revolutionary changes and the state's power is not exercised as before, this does not mean that statehood will crumble instantly.<sup>286</sup> Those kinds of states will however be referred to as failed states. In the near past Belgium was allotted the name of a failed state for over a year, though even during that period Belgium nonetheless remained a state.<sup>287</sup> It has become more important to have the legal right to exercise authority than to be able to effectively exercise authority.<sup>288</sup>

90. This Montevideo criterion is obviously adaptive to the situation. In the context of the sinking island states that adaptive capacity can be made good use of, since it is not probable its government will be able to function in the same way it exists today. For this reason, this paper explores a union of a government ex-situ with the concept of cosmopolitanism.

### II. 2. 3. 1. Government *ex situ*

91. One can easily imagine difficulties would arise when trying to exercise effective governmental power over a submerged island state and a dispersed population. This situation can be described as one of

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<sup>276</sup> CRAWFORD, *The Creation of States*, 122.

<sup>277</sup> ICJ, Case concerning East Timor (Portugal v. Australia), 1995 *ICJ Reports* 102.

<sup>278</sup> CRAWFORD, *The Creation of States*, 124.

<sup>279</sup> SHAW, *International law*, 251-257.

<sup>280</sup> Resolution 2869 (XXVI) of the General Assembly of the United Nations (20 December 1971), *UN Doc. A/RES/2869* (1970).

<sup>281</sup> CRAWFORD, *The Creation of States*, 94-95.

<sup>282</sup> MAREK, *Identity*, 8 and CRAWFORD, *The Creation of States*, 55-56.

<sup>283</sup> CRAWFORD, *The Creation of States*, 61.

<sup>284</sup> HORBACH et al., *Handboek*, 164-165 and MAREK, *Identity*, 8.

<sup>285</sup> MCADAM, *'Disappearing states'*, 8 and CRAWFORD, *The Creation of States*, 57.

<sup>286</sup> CRAWFORD, *The Creation of States*, 34.

<sup>287</sup> MCADAM, *'Disappearing states'*, 6.

<sup>288</sup> CRAWFORD, *The Creation of States*, 57.

a failed state, but nevertheless a state it remains. The analogy is however upset by the fact that failed states are expected to bounce back to full-blown states, with an effective government. In order to avoid the issue of permanence of the altered form of exercise of state power, the island state could set up a permanent government *ex situ* if it can no longer remain in situ.

92. The government *ex situ* would be modeled on the historical examples of governments in exile or *ex situ*<sup>289</sup> which were brought about not only by internal events, such as revolutions or civil wars, but also external events, such as illegal annexation or belligerent occupation of territory. The continued recognition of a government driven away by external events is based on the notion of legality prevailing over the illegal use of force. The same legal base is however missing when it comes to a government driven away by internal events, seeing how states are free to choose a different government institution. Nonetheless international law still allows recognition of both types of governments *ex situ*.<sup>290</sup>

93. A state has a *jus repraesentationis omnimoda*e whether the government is *in situ* or in exile. The term in exile only points out the physical location of a government still in power and does not relate to a special, altered legal status.<sup>291</sup> A government which remains functional will be able to retain control over the state's property and financial affairs.<sup>292</sup> Furthermore the state in exile can continue to sign treaties, sustain diplomatic relations, ensure protection for its nationals,<sup>293</sup> bestow immunities and have jurisdiction over the state's nationals.<sup>294</sup> Lastly and specifically in the context of the island states, this government could deal with the revenues made from retained maritime zones, for example by trading in fishing licenses,<sup>295</sup> and divide it amongst its global citizens, for example to help fund relocation.<sup>296</sup>

94. Next to taking after governments in exile, governments *ex situ* fit the bill of a voluntary political trusteeship.<sup>297</sup> The historical concept of trusteeship was devised to guide trust territories to self-government in a postcolonial transitory time.<sup>298</sup> In the historical variant, the trustees were external United Nations member states. In this case also an external state, logically the state hosting the island state's government *ex situ*, could fill the position of temporary trustee with the goal to surrender governmental power to the *ex situ* government as soon as possible.<sup>299</sup>

95. An arrangement of internationalized territory<sup>300</sup> does not seem fit to handle the situation of the island states as this would place control in the hands of the UN and not a UN member state. This would result in taking sovereign powers away from the state or states aiding the sunken island state's population and government, as the UN itself has no territory to house the government *ex-situ*, which would be

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<sup>289</sup> D. WEI, R. DAWES and I. MAXWELL, *Receding maritime zones, uninhabitable states and climate exiles: how international law must adapt to climate change*, unpublished paper for FIELD, 2011, [www.field.org.uk/files/climate\\_exiles\\_dw.pdf](http://www.field.org.uk/files/climate_exiles_dw.pdf), 5 (hereafter WEI et al., *Receding maritime zones*); RAYFUSE, *International law and disappearing states*, 10.

<sup>290</sup> STOUTENBERG, "Thresholds of effective statehood", 68-69.

<sup>291</sup> MCADAM, *'Disappearing states'*, 11.

<sup>292</sup> S. TALMON, *Recognition of governments in international law*, 1998, Oxford, Oxford University Press, 115-116, 192-194 (hereafter: TALMON, *Recognition of governments*).

<sup>293</sup> MCADAM, *'Disappearing states'*, 17.

<sup>294</sup> *Ibid.*, 11.

<sup>295</sup> Together with its popular internet domain name *.tv*, fishing licenses make up a large part of government income. The latter procured 7.4 million AUD in 2010, when the total government revenues amounted to 25.7 Million AUD. *Tuvalu*, IMF Country Report No. 12/259, International Monetary Fund, September 2012, 21, [www.imf.org/external/pubs/ft/scr/2012/cr12259.pdf](http://www.imf.org/external/pubs/ft/scr/2012/cr12259.pdf).

<sup>296</sup> RAYFUSE, *W(h)ither Tuvalu?*, 11.

<sup>297</sup> H. H. PERRITT, "Structures and Standards for Political Trusteeship", *UCLA Journal of International Law and Foreign Affairs* 8 (2009), (385) 389 (hereafter: PERRITT, "Structures").

<sup>298</sup> PERRITT, "Structures", 396.

<sup>299</sup> BURKETT, "The Nation Ex-Situ", 112.

<sup>300</sup> Such as the Free City of Danzig, now known as the Polish city Gdansk. CRAWFORD, *The Creation of States*, 233 and 241.



unacceptable.

96. There has been no known case of a government in exile which has lost recognition or was severely limited in its work due to the fact that it was in exile. On top of that there is no clear legal definition for a government in exile so there are no absolute terms to comply with.<sup>301</sup> There is thus nothing standing in the way of an adjustment of the more familiar model of governments *ex situ*, to allow the governments to remain *ex situ* for a long period of time. In such a situation, the need for an agreement with the host state to avoid a clash of state competences, would present itself.<sup>302</sup> To regulate the latter, inspiration can again be drawn from the system of trusteeship,<sup>303</sup> wherein trustee agreements were made to divide powers between the trustee and the trust territory. The same could be accomplished in appropriate government *ex situ* agreements.<sup>304</sup>

### II. 2. 3. 2. Cosmopolitanism

97. Cosmopolitanism relates to a global citizenship for people scattered throughout the world from which rights are derived, surpassing the notion of territorial boundaries.<sup>305</sup> The closely related notion of diaspora of a people accords to people with citizenship of the world as well,<sup>306</sup> but these people retain a rootedness at the same time, since they are part of a group with a shared characteristic.<sup>307</sup> The Tibetan or Jewish diaspora<sup>308</sup> are the prime present-day examples of a people in diaspora.

When Tibet lost its independence to the P. R. China, the Dalai Lama fled Tibet in 1959, establishing a government in exile in India which, up until today, governs dispersed Tibetans in exile, which vote for a new parliament or new prime minister, just as they would have for an *in situ* government.<sup>309</sup> Thus the Tibetan government in exile provides proof of the viability of a government in exile's ability to govern its subjects, at least partially, even though they are located elsewhere.<sup>310</sup>

### ***II. 2. 4. The capacity to enter into relations with other states and state independence***

98. The newest Montevideo criterion with a focus on external state policy, has in substance been merged with art. 2(2) of the United Nations Charter to give it more of a backbone.<sup>311</sup> The criterion now embodies the capacity to enter into relations in an independent fashion,<sup>312</sup> without other states

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<sup>301</sup> STAHL, "Unprotected ground", 33.

<sup>302</sup> STOUTENBERG, "Thresholds of effective statehood", 70.

<sup>303</sup> BURKETT, "The Nation Ex-Situ", 90.

<sup>304</sup> *Ibid.*, 112.

<sup>305</sup> D. HELD, *Cosmopolitanism: Ideals and Realities*, Cambridge, Polity Press, 2010, 93- 97; M. A. MCKINLEY, "Conviviality, Cosmopolitan Citizenship, and Hospitality", *Unbound* 5 (2009), (55) 67 (hereafter: MCKINLEY, "Conviviality").

<sup>306</sup> MCKINLEY, "Conviviality", 68.

<sup>307</sup> A shared view to nurture, protect faith and serve the poor and the sick and representing the Lord, continues to strongly bind the Order of Malta. *Mission*, Order of Malta, [www.orderofmalta.int/the-order-and-its-institutions/225/mission/?lang=en](http://www.orderofmalta.int/the-order-and-its-institutions/225/mission/?lang=en).

<sup>308</sup> R. BRUBAKER, "The 'diaspora' diaspora", *Ethnic and Racial Studies* 28(1) (2005), (1) 2.

<sup>309</sup> J. YARDLEY, *Tibetan Exiles Elect Sobolov as New Prime Minister*, *The New York Times*, 27 April 2011, [www.nytimes.com/2011/04/28/world/asia/28tibet.html](http://www.nytimes.com/2011/04/28/world/asia/28tibet.html)

<sup>310</sup> *Tibet in Exile*, The Central Tibetan Administration: restoring freedom for Tibetans, <http://tibet.net/about-cta/tibet-in-exile/>.

<sup>311</sup> BROWNLIE, *Principles*, 73-74; J. CRAWFORD, "The Creation of the State of Palestine: Too Much Too Soon?", *EJIL* 1(1990), (309) 321 ; SHAW, *International law*, 202.

<sup>312</sup> Palmas Arbitration, 838.

meddling.<sup>313</sup> It is also said to materialize the ability and willingness of a state's ruling power to observe international law.<sup>314</sup> The ability of entering into relations with other states should not be regarded as an exclusive prerogative of a state ever since the creation of entities such as the European Union which possess this ability too.<sup>315</sup> Despite its non-exclusive character, the notion of independent relations remains quite an important one, especially when deciding upon state continuity, rather than state creation.<sup>316</sup>

99. In a perfect world a state is independent both on a formal level, which is sometimes referred to as a legal level,<sup>317</sup> and on a factual or actual level. Factual independence pertains to being self-sufficient. A multitude of situations are not regarded as insurmountable interfering factors for factual state independence, such as illegal intervention, a small size of resources or territory, and political alliances or policy orientation between states.<sup>318</sup> In practice, factual independence will only be scrutinized after serious concerns have arisen about the formal independence of a state.

100. Exercise of power shall be formally independent when it is constitutionally independent and it does not have to recognize an external higher rule of law, besides international law. Formal independence is, despite its name, not a concept judged strictly formalistic. State practice has proven that constitutional restrictions placed upon the state's freedom of action, municipal illegality of a state's government, treaty obligations, territorial concessions, the use of an agency to exercise governmental competence, the possession of joint organs for governmental functions and special relations resulting from the aftermath of devolution do not inhibit formal independence of a state.<sup>319</sup> Today for example, the diplomatic relations of Liechtenstein are governed by Switzerland, a situation which does not make Liechtenstein any less of a state.<sup>320</sup>

However in certain cases, state practice has indeed deemed entities formed under belligerent occupation, considerable illegality of the creation of a state and the vast long-term and external control of state affairs to be unmistakable indications of loss of formal independence.<sup>321</sup>

101. Again the notion of effectiveness applies. Therefore, it should be deemed relevant when the island state's government is verified against this Montevideo criterion. According to *Crawford*, failure to fulfill this criterion of independent state relations translates into a failure to exert effective state authority at all.<sup>322</sup>

102. In conclusion, there are no clearly delineated rules to be applied to this aspect of statehood. Once more, the effectiveness of a state must be judged afresh in every new context. The true challenge will lie in exposing the tipping point between the acceptable added external control and true alien dominance, eliminating any sort of independence and opening the door to puppet states.

Applying this conclusion to island states means the government *ex situ* will have to steer clear from too much interference from the state hosting the government *ex situ*, and the possibly numerous states hosting the government *ex situ*'s dispersed people.

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<sup>313</sup> Resolution 2625 (XXV); CRAWFORD, *The Creation of States*, 61.

<sup>314</sup> CRAWFORD, *The Creation of States*, 92.

<sup>315</sup> PARK, *Climate change and the risk of statelessness*, 6.

<sup>316</sup> CRAWFORD, *The Creation of States*, 63.

<sup>317</sup> STOUTENBERG, "Thresholds of effective statehood", 71.

<sup>318</sup> CRAWFORD, *The Creation of States*, 72-87.

<sup>319</sup> *Ibid.*, 67-71.

<sup>320</sup> DUURSMA, *Fragmentation*, 202.

<sup>321</sup> CRAWFORD, *The Creation of States*, 72-89.

<sup>322</sup> *Ibid.*, 92.

## II. 3. IN SEARCH OF LAND AND STATE IN FULFILLMENT OF THE MONTEVIDEO CRITERIA

### *II. 3. 1. Mitigation and limited adaptation when land territory is largely lost*

103. The threat of losing national sovereignty is a political topic on the UNFCCC list of dangerous changes caused by climate change.<sup>323</sup> Still the UNFCCC and the Conference Of Parties mainly focus on mitigation strategies which relate to the reduction of the sources or enhancement of the sinks of greenhouse gases, in order to try and slow down the adverse effects of climate change.<sup>324</sup>

True adaptation measures which embrace the need to adapt to certain unavoidable climate changes, require an adapted mindset both of developing countries, which do not wish to inhibit their development, and developed countries, which do not wish to severely adjust their existent lifestyle.<sup>325</sup> Nonetheless, this short-term attitude currently steers the international community. With regard to sea level rise, the focus needs to partly shift towards arrangements in view of far-reaching adaptation where the effects of climate change are acknowledged as a reality and dealt with accordingly to prepare the states to deal with worst case scenarios.<sup>326</sup>

104. Are island states truly aided by clinging on to mitigating measures, or is the issue only being slightly postponed? In a way, mitigating can be seen as a way to appease the island inhabitants and their economy. Assuagement and careful language are however not without cause. If island states are effectively labeled as titanic states or, dispensable canaries of a coalmine, then who will still lend a helping hand to a cause marked beyond help?<sup>327</sup>

105. Still it remains a fact that island states can contribute very little on the level of mitigating measures themselves, as they are not contributing to the bulk of the climate change inducing emissions.<sup>328</sup> The island states do however have a large role to play when it comes to adaptation measures since these can also take place at the local level.

Within the adaptive approach, states are suggested to follow the paths of retreat, accommodation and/or protection.<sup>329</sup> Only the first path suggests forsaking the territory because it has become uninhabitable.<sup>330</sup> Accommodating and protective policies can be classified amongst the more limited adaptation strategies.

106. Limited adaptive measures can be kept to the bare minimum, but they can also be quite far-reaching. For example, measures can range from sea grasses planted as beach nourishment to stabilize sediments, the construction of groynes and revetments,<sup>331</sup> to sea walls built several meters high to keep the

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<sup>323</sup> BARNETT and NEIL, "Climate Dangers", 327.

<sup>324</sup> Climate Change Secretariat, *Climate change: impacts, vulnerabilities and adaptation in developing countries*, UNFCCC, 2007, <http://unfccc.int/resource/docs/publications/impacts.pdf>, 24-25; STAHL, "Unprotected ground", 4 and 8.

<sup>325</sup> KOLMANNSSKOG et al., "Development", 166.

<sup>326</sup> Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, *UN Doc. A/HRC/10/61* (2009)(hereafter: *UN Doc. A/HRC/10/61*); BARNETT and CAMPBELL, *Climate change and small island states*, 175; N. MIMURA, "Vulnerability of island countries in the South Pacific to sea level rise and climate change", *Climate Research* 12 (1991), (137) 140-141.

<sup>327</sup> BARNETT and CAMPBELL, *Climate change and small island states*, 170.

<sup>328</sup> POWERS, "Climate Change and Pollution", 32.

<sup>329</sup> N. MIMURA and R. J. NICHOLLS, "Regional issues raised by sea-level rise and their policy implications", *Climate Research* 11 (1998), (5) 14.

<sup>330</sup> S.G. PHILANDER, *Encyclopedia of global warming and climate change*, California, Sage Publications, 2008, 889-892 (hereafter: PHILANDER, *Encyclopedia*).

<sup>331</sup> FREESTONE, "International law and Sea level Rise", 109 and 117-118.

rising tide at bay.<sup>332</sup>

Sea walls and measures alike are not all received enthusiastically. These hard measures, as opposed to soft measures, can distress coral reefs and diminish calcification rates, leading to even greater erosion for an unprotected part of the shoreline due to less coral build-up, so altering the natural sediment flow.<sup>333</sup> This can jeopardize the coral islands' natural ability to adapt to sea level rise.<sup>334</sup>

107. Furthermore, costly sea walls could shift funds to outer, uninhabited parts of the island simply in order to save forlorn stretches of land and maritime claims, when those funds are needed elsewhere.<sup>335</sup> This paper will not go into mitigating strategies much further as rising sea levels are already classified as unavoidable,<sup>336</sup> and thus mitigation for this particular climate change manifestation will not bring sufficient relief for several island states.

### ***II. 3. 2. Adaptation when habitable territory is entirely lost***

108. Adaptation can go beyond sea walls and translate into more extended measures in order for island states to retain their place as a state in compliance with the Montevideo Convention. Allowing state extinction of the threatened island states does not only entail injustice for the sunken island states but equally allows for *carte blanche* use of sovereign island state powers, if the attached statehood and responsibility would evaporate shortly anyway. This, together with the fear to describe island states as lost causes, might be a motive for the international community to retain these states and it might be the reason for the strong focus on mitigation, ignoring state extinction and the consequences for as long as possible.

109. Nonetheless, preventing island inundation and aiding the island states can even be an economically attractive measure as well. If the island states are able to retain part of their island territory and a part of, or their entire EEZ, they can use these assets to attract candidate states so as to create a mutually rewarding relationship.<sup>337</sup>

#### **II. 3. 2. 1. Land reallocation**

##### *Cessation of land*

110. There is nothing preventing a sunken state to physically reemerge elsewhere. This migrated state can take shape by continuing its prior state identity in a new environment or by relinquishing its prior state identity and forming a new state all together.

111. The island state can establish its statehood in a completely independent fashion on another plot of land, voluntarily given to the island state by the state currently governing that territory.<sup>338</sup> Creation of such a new state can take place via a multilateral treaty, similar to the former creation of territorial regimes in

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<sup>332</sup> POWERS, "Climate Change and Pollution", 33.

<sup>333</sup> PUTHUCHERRIL, "Change", 35

<sup>334</sup> SCHOFIELD et al., "Options to Protect Coastlines", 148.

<sup>335</sup> STOUTENBERG, "Implementing a new regime", 277.

<sup>336</sup> R. VERHEYEN and P. RODERICK, *Beyond adaptation: The legal duty to pay compensation for climate change damage*, WWF-UK Climate Change Programme Discussion Paper November 2008, [http://assets.wwf.org.uk/downloads/beyond\\_adaptation\\_lowres.pdf](http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf), 11 (hereafter: VERHEYEN et al., *Beyond Adaptation*).

<sup>337</sup> STAHL, "Unprotected ground", 37 and RAYFUSE, *International law and disappearing states*, 9.

<sup>338</sup> WEI et al., *Receding maritime zones*, 5.

peace treaties, as long as non-parties are not affected.<sup>339</sup> Since every patch of land on earth is already called for by a state, the rules of succession of states<sup>340</sup> will always have to be taken into account with regard to the current governing state.<sup>341</sup>

It is however doubtful that any state wants to give up part of its territory. Being forced politically, or otherwise, to do so by perhaps more powerful members of the international community would negate the principle of equality amongst states<sup>342</sup> and lead to neocolonialism.<sup>343</sup> In such a world order, universal law would only be as righteous as its subjects, where one would be more equal than the other.<sup>344</sup> So in the end, reminiscent of Israel's difficult history, this option can be written off as most likely destined to fail.

112. Another option consists of territory being provided to an island state with the attached sovereign powers remaining with the hosting state. Nauru was offered such a proposition in 1960. Nauru was offered to lodge its population permanently in Australia, New Zealand or Great Britain. Nauru refused out of the concern that its culture and own distinct nationality would be lost.

Three years later, Australia made another offer. This time it volunteered to give Nauru the option to settle on an Australian island and even promised to compensate all migration costs that needed to be made. Even though the Nauruan people were offered great liberties on the level of policy making, they declined because they would be obliged to switch to the Australian nationality.<sup>345</sup> Ultimately, they once more dismissed the proposition to safeguard Nauruan independence<sup>346</sup> and culture.<sup>347</sup>

113. In the 1870's, ten thousands of Icelandic people moved their home to Canada after a volcanic eruption had ruined their island and consequently their economy. Following this catastrophe, Iceland made a bilateral agreement with Canada. Canada provided the affected Icelanders with a piece of its land and allowed them to have rights as civilians of Iceland and Canada.<sup>348</sup> The appointed territory which received the name of New-Iceland was self-governed by elected Icelanders and so, kept a functional independence. In the end, New-Iceland became a part of the province Manitoba and integrated flawlessly into the whole of Canada.<sup>349</sup>

114. The question here is how Nauru will look back on its decision when it needs help most. At the moment, island states continue to hold on to their statehood identity.<sup>350</sup> Yet, this should not be mistaken for ignorance as they are very much aware of climate change threats, as exemplified by the Cabinet of the Maldives by convening a meeting underwater in full diving gear to draw attention to the dangers of a rising sea level.<sup>351</sup>

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<sup>339</sup> For example the creation of Albania in the Treaty of London in 1913. CRAWFORD, *The Creation of States*, 505 and 510; art. 34 VCLT.

<sup>340</sup> Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978, 1946 UNTS 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 7 April 1983, 22 ILM (1983) 306.

<sup>341</sup> MCADAM, *'Disappearing states'*, 5.

<sup>342</sup> CRAWFORD, *The Creation of States*, 504.

<sup>343</sup> S. PAHUJA, "The postcoloniality of international law", *Harr. Int'l L.J.* 46(2) (2005), (459) 459 (hereafter: PAHUJA, "Postcoloniality").

<sup>344</sup> G. ORWELL, *Animal Farm*, New York, Harcourt, 1954.

<sup>345</sup> ICJ, Case concerning Phosphate Lands in Nauru (Nauru v Australia), Memorial of the Republic of Nauru vol 1 (April 1990), §171.

<sup>346</sup> PARK, *Climate change and the risk of statelessness*, 7.

<sup>347</sup> MCADAM, *'Disappearing states'*, 18-19.

<sup>348</sup> B. MAYER, "The international legal challenges of climate-induced migration: proposal for an international legal framework", *Colorado Journal of International Environmental Law* 22 (2011), (357) 392.

<sup>349</sup> RAYFUSE, *W(h)ither Tuvalu?*, 8.

<sup>350</sup> W. KÄLIN, "Conceptualising Climate Induced Displacement – A challenge for International Law", Distinguished Lecture series 3, Maharniban Calcutta Research Group, March 2011, 20.

<sup>351</sup> A. SAEED, *From underwater, Maldives sends warning on climate change*, CNN, 17 October 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/10/17/maldives.underwater.meeting/>.

### *Leasing or buying land from another existent state*

115. Theoretically a state can lease land from another state. At present, lease contracts in international law are mostly employed to allow land-locked states access to sea,<sup>352</sup> however there are contracts with other aims such as the US lease of Guantánamo Bay.<sup>353</sup>

116. The Indonesian Minister of Maritime Affairs has announced he considers leasing or renting out 7.500 islands to climate refugees.<sup>354</sup> In such a situation, sovereignty over the area would remain with the lessor, though the lessee would receive jurisdiction. The division of powers could be altered since there are no binding international rules on lease and all will depend on the treaty governing the lease.<sup>355</sup>

117. In practice it will be difficult to draw the line of power in policy matters concerning the land territory and the new inhabitants. On top of that there might be a problematic lack of guarantees for an eternal stay of the lessee. In such a scenario nothing would hinder the lessor from evicting the entire population if the treaty does not run in perpetuity, which can be agreed upon.<sup>356</sup>

118. Buying land is an option as well. In 1867, the USA showed the world how it is done when it bought Alaska from Russia.<sup>357</sup> This possibility has already been considered by island states.<sup>358</sup> The president of Kiribati suggested this opportunity to the Kiribati parliament. Negotiations with Fiji are currently on-going for a plot of land fifteen times the size of the commercial heart and most populated area of Kiribati.<sup>359</sup>

In the past, Fiji has already sold two of its islands. It sold Kioa Island to the Vaitupu people of Tuvalu and Rabi Island to the Banaban people of Kiribati due to inhabitability of their prior islands. This inhabitability did have causes distinct from climate change.<sup>360</sup> Especially Kiribati has high hopes Fiji will come to their aid once more, especially as during a visit to Kiribati in 2014 the Fijian president announced “Fiji will not turn its back on its neighbours in their hour of need. [...] In a worst case scenario and if all else fails, you will not be refugees.”<sup>361</sup>

119. It must again be emphasized that by acquiring new territory, a new state could be founded, or the previous state identity could be continued in a different location. The last option would be the culturally preferable one and agrees with the presumption of state continuity. The state would simply continue its existence as always, despite the new geographical location of its territory. To nonetheless retain the island

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<sup>352</sup> Y. RONEN, “Territory, Lease” in *The Max Planck Encyclopedia of Public International Law*, July 2008, online edition, §2 (RONEN, “Territory, Lease”).

<sup>353</sup> RONEN, “Territory, Lease”, §3.

<sup>354</sup> N. DE MOOR, *International environmental law and migration: fitting the bill?*, unpublished paper for the 10<sup>th</sup> Annual Colloquium of the IUCN Academy of Environmental law on “Global Environmental Law at a Crossroads”, 7 and *Indonesia's rent-an-island answer to climate change*, ABC News, 3 June 2009, [www.abc.net.au/news/2009-06-03/indonesias-rent-an-island-answer-to-climate-change/1702492](http://www.abc.net.au/news/2009-06-03/indonesias-rent-an-island-answer-to-climate-change/1702492).

<sup>355</sup> RONEN, “Territory, Lease”, §1.

<sup>356</sup> MCADAM, *Disappearing states*, 16-17 and RONEN, “Territory, Lease”, §3.

<sup>357</sup> RAYFUSE, *W(h)ither Tuvalu?*, 7.

<sup>358</sup> United Nations Division for Sustainable Development, *Trends in sustainable development: Small Island Developing States* (2010), 39, [www.un.org/esa/dsd/resources/res\\_pdfs/publications/trends/trends\\_sids/Trends\\_in\\_Sustainable\\_Development\\_SIDS.pdf](http://www.un.org/esa/dsd/resources/res_pdfs/publications/trends/trends_sids/Trends_in_Sustainable_Development_SIDS.pdf), 7.

<sup>359</sup> *Government land purchase within grasp*, Office of the President Republic of Kiribati – Climate Change, 23 August 2013, [www.climate.gov.ki/2013/08/29/government-land-purchase-within-grasp/](http://www.climate.gov.ki/2013/08/29/government-land-purchase-within-grasp/); S. MOCEICA, *Kiribati's hunt for land*, The Fiji Times, 3 maart 2012, [www.fijitimes.com/story.aspx?id=194843](http://www.fijitimes.com/story.aspx?id=194843).

<sup>360</sup> GORDON-CLARK, “Paradise lost?”, 57 and E. FERRIS, M. M. CERNEA and D. PETZ, *On the front line of climate change: learning from and with pacific countries*, Project on Internal Displacement, Washington D.C., The Brookings Institution – London School of Economics, 2011, 26.

<sup>361</sup> *Fiji Supports Kiribati On Sea Level Rise*, Office of the President Republic of Kiribati – Climate Change, 11 February 2014, [www.climate.gov.ki/2014/02/20/fiji-supports-kiribati-on-sea-level-rise/](http://www.climate.gov.ki/2014/02/20/fiji-supports-kiribati-on-sea-level-rise/).

state's maritime zones of old, the techniques mentioned above could be useful.<sup>362</sup>

### II. 3. 2. 2. New land, artificially elevated points and *seasteading*

120. The president of Kiribati suggested lodging its government on a single highly elevated point of Kiribati to be able to retain its statehood and EEZ including the natural resources present. A different proposal advises to build a lighthouse or another construction on the island that will remain above seawater like a sort of sovereignty marker. This beacon would serve to demonstrate the *animus possendi* of the island state<sup>363</sup> and to claim back land if the sea level would ever drop again.<sup>364</sup>

This way the island state would suffer a mere temporary loss of territory. Accordingly, it would theoretically be able to preserve and resuscitate all previous international rights and duties. A theory which supports this line of reasoning is the *uti possidetis* doctrine. The modern concept of the doctrine was used so that pre-colonial territorial borders in Central and South America could resurface after the decolonization process of the nineteenth century.<sup>365</sup> The doctrine continued to characterize decolonization practices and again reappeared in 1992 to give Yugoslavia its original boundaries back.<sup>366</sup> On the concept of *uti possidetis* the Badinter commission noted the concept is fit to stretch beyond its former application in decolonizing times, implying that it can also be applied in instances of self-determination unrelated to decolonization.<sup>367</sup>

121. Another opportunity introduces itself in the form of land reclamation as for example the Netherlands have done to enlarge the Dutch coastal areas.<sup>368</sup> An even bolder project to retain statehood would consist of combining sovereignty markers with the construction of an artificial island in what are currently territorial waters, if in possession of the necessary funds. The Maldives have already grabbed this opportunity by building Hulhumalé as a safe haven in their own territorial waters.<sup>369</sup>

However, shaping entire islands through land reclamation, after the example of the Palm Islands and Hulhumalé, would be a very expensive and not a very durable option.<sup>370</sup> In addition, as discussed above, this solution could serve to satisfy the condition of territory to retain statehood, but is more problematic when it comes to generating maritime zones.

122. With *Seasteading*,<sup>371</sup> the same course of action is taken, but the artificial islands or installations are located in international waters. Currently there are no clear laws concerning the construction of sea-based communities and *seasteading*, which has made this practice accessible for just about anyone. British citizen Roy Bates has taken advantage of this legal gap by building the principality of Sealand about seven nautical miles from the British coast, an area which was formerly part of international waters. No state has recognized this micronation as a microstate, again emphasizing the importance of the act of recognition

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<sup>362</sup> RAYFUSE, *International law and disappearing states*, 8.

<sup>363</sup> PCIJ, Legal Status of Eastern Greenland (Denmark v Norway), 1933 PCIJ Series A/B No. 53, §96.

<sup>364</sup> CARIUS, et al., *Migration*, 8; J. N. MAOGOTO, "Somaliland: scrambled by international law?" in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press 2013, 215.

<sup>365</sup> BROWNLIE, *Principles*, 130.

<sup>366</sup> S. LALONDE, *Determining boundaries in a conflicted world: the role of uti possidetis*, Montréal, McGill-Queen's University Press, 2002, 3-4.

<sup>367</sup> Badinter commission, Opinion 2 on Questions Arising From the Dissolution of Yugoslavia (4 July 1992), 31 ILM. 1488, 1498.

<sup>368</sup> SCHOFIELD et al., "Options to Protect Coastlines", 156.

<sup>369</sup> TSALTAS et al., *Artificial islands*, 5.

<sup>370</sup> R. SPENCER, *The World is sinking: Dubai islands 'falling into the sea'*, The Telegraph, 20 January 2011,

[www.telegraph.co.uk/news/worldnews/middleeast/dubai/8271643/The-World-is-sinking-Dubai-islands-falling-into-the-sea.html](http://www.telegraph.co.uk/news/worldnews/middleeast/dubai/8271643/The-World-is-sinking-Dubai-islands-falling-into-the-sea.html).

<sup>371</sup> D. MUTABDZIJA and M. BORDERS, *Charting the course: toward a seasteading legal strategy*, unpublished paper for The Seasteading Institute, 2011, [www.seasteading.org/files/research/governance/Charting\\_the\\_Course\\_-\\_Toward\\_a\\_Seasteading\\_Legal\\_Strategy.pdf](http://www.seasteading.org/files/research/governance/Charting_the_Course_-_Toward_a_Seasteading_Legal_Strategy.pdf), 3.

when other precise legal regulations are absent.<sup>372</sup>

### II. 3. 2. 3. Merger

123. States can create important connections with other states in several manners.

124. Firstly, states can merge quite naturally by means of a planned and gradually effectuated migration<sup>373</sup> whereby a people makes the switch to the host state's nationality, or a dual nationality,<sup>374</sup> with approval of that host state.<sup>375</sup> No line will be drawn between the older and newer inhabitants of the nation.

125. Secondly, a politically independent state can enter into a free association,<sup>376</sup> such as the association present between the Cook Islands and New Zealand. In this scenario the associated state is a larger state which takes over certain, otherwise qualified as sovereign, far-reaching powers of the smaller island state. The relevant powers are usually situated within the sphere of defense and foreign relations. The agreement furthers balanced cooperation whilst the island state is able to predominantly continue to govern itself.

126. Thirdly, there is room for a certain amount of independence for entities or states which entirely become part of the only state in the picture. The range of independence can differ greatly by choosing for an incorporation, federation, confederation or devolution. When a state is incorporated, it will remain a clearly defined separate entity, similar to Hawaii's relation to the USA.

This is different for a confederation and federation<sup>377</sup> where the joining state will no longer be a separate entity.<sup>378</sup> The same is true for devolution, but in that case the joining territorial entity is even more intertwined with the central government of the state.<sup>379</sup> In the latter case, the range of autonomy of the territorial entity can differ from state to state and is completely dependent on the central government which has the exclusive power to grant the entity a form of authority.<sup>380</sup> In the end, states choose the specific *sui generis* political associations they wish to enter into, which do not need to conform to a specific category.<sup>381</sup>

127. The sinking island state could even offer its territory entirely to another state with more means to save the island territory and enter into a *sui generis* regime finding inspiration in the regimes of the old A, B or C mandate states or trust territories.<sup>382</sup>

128. Newly created relations between states do come with their own set of problems. The former island state population might try to reinstate traditions and independence of old by issuing a declaration of independence within their new home base. Despite differing opinions in legal doctrine,<sup>383</sup> there is nothing in general international law prohibiting issuance of a declaration of independence unilaterally without the

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<sup>372</sup> *History of Sealand*, Sealand, [www.sealandgov.org/history](http://www.sealandgov.org/history).

<sup>373</sup> UNHCR, *Climate change and statelessness*, 3.

<sup>374</sup> BURKETT, "The Nation Ex-Situ", 116.

<sup>375</sup> MCADAM, 'Disappearing states', 22-23.

<sup>376</sup> Resolution 1541 (XV) of the General Assembly of the United Nations (15 December 1960), *UN Doc. A/4651* (1960).

<sup>377</sup> MCADAM, 'Disappearing states', 19-21.

<sup>378</sup> CRAWFORD, *The Creation of States*, 483.

<sup>379</sup> *Ibid.*, 287.

<sup>380</sup> *Ibid.*, 327.

<sup>381</sup> *Ibid.*, 489.

<sup>382</sup> BURKETT, "The Nation Ex-Situ", 110.

<sup>383</sup> CRAWFORD, *The Creation of States*, 376.



approval of the parent state.<sup>384</sup> It has been suggested that such a declaration could be based on the right of self-determination of the population.<sup>385</sup>

With regard to self-determination, the Canadian Supreme Court declared that in truly extreme cases a right to external self-determination is valid.<sup>386</sup> What constitutes an extreme case remains to be decided when a specific situation arises, which does not offer much certainty. Alternatively, there exists a, though highly theoretical, doctrine of remedial secession wherein parts of the parent state claim secession based on severe human rights infringements.<sup>387</sup>

129. Contesting parties point towards an infringement of the principle of territorial integrity.<sup>388</sup> Nonetheless, even though strong, the principle of territorial integrity is not an absolute right, let alone a *jus cogens* norm. Outside of the colonial context, the right of self-determination is not widely accepted to give unilateral rights of secession to distinct parts of an independent state's territory.<sup>389</sup> The rule of self-determination should be applied internally via participation through the applicable constitutional system.<sup>390</sup> A balance may be found in the formation of a semi-autonomous region, which is not a state,<sup>391</sup> but has far-reaching powers, independent from the parent state.<sup>392</sup>

## II. 4. A WORLD ORDER AFTER AND BEYOND MONTEVIDEO

130. The thing with the Montevideo criteria is that since the criteria were consolidated, the meaning of state has altered through opinion and practice. The term state is bound to historical developments and so criteria for statehood have evolved in real-time and continue to do so. For that reason, they should be allowed to evolve not only in practice, but in theory as well.<sup>393</sup>

131. This chapter will first look into the accepted deviations from the Montevideo criteria. Afterwards a different cornerstone upon which statehood can be construed or continue, will be explored.

### *II. 4. 1. Exceptions to the Montevideo criteria*

#### II. 4. 1. 1. Temporariness of changes

132. Permanence as such should not be regarded as an inherent part of statehood. A state is not a permanent entity, otherwise international law need not bother dealing with its extinction, continuation or succession.

Once legitimately created, states may have as long or as short a lifespan as they please or are forced to

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<sup>384</sup> J. VIDMAR, "Unilateral declarations of independence in international law" in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press, 2013, 62 and 73 (hereafter: VIDMAR, "Unilateral declarations"); CRAWFORD, *The Creation of States*, 117.

<sup>385</sup> CRAWFORD, *The Creation of States*, 384.

<sup>386</sup> Supreme Court, *Secession of Quebec*, (1998), 2 SCR 217 (Ca.), §126.

<sup>387</sup> VIDMAR, "Unilateral declarations", 75.

<sup>388</sup> *Ibid.*, 62 and 73.

<sup>389</sup> CRAWFORD, *The Creation of States*, 415.

<sup>390</sup> *Ibid.*, 417.

<sup>391</sup> J. SUMMERS, "The internal and external aspects of self-determination reconsidered", in D. FRENCH (ed.), *Statehood and self-determination: reconciling tradition and modernity in international law*, Cambridge University Press, Cambridge, 2013, 242.

<sup>392</sup> WONG, "Sovereignty sunk", 27 and 31.

<sup>393</sup> GRANT, "Defining Montevideo", 408.

accept. In this respect, Zanzibar lasted only several months as an independent, fully functioning state and member of the UN. Unlike the five-days-state of British Somaliland, Zanzibar was truly meant to be a fully functioning state and its short-lived life was not part of a premeditated transition period.<sup>394</sup> Hence, the notions of time and permanence are not relevant as conditions of statehood on their own. Stability, rather than permanence is sought after in a state.<sup>395</sup>

133. Time does however have its value as a touchstone to judge situations wherein one or more Montevideo elements of statehood are no longer fulfilled.<sup>396</sup> *Marek* ascribes a permissible departure from Montevideo criteria and the effectiveness principle to the obvious temporariness of such a deviation.<sup>397</sup> Temporariness can also be found to play a role in the continued statehood of failed states. So it must be elucidated what is permanent and what is temporary.

When a nation is occupied and control is taken over by a foreign nation, there will not be a gap in the occupied nation's statehood history, whether it is occupied for one, ten or fifty years. The Baltic States, which were annexed by Russia for over 50 years, were continuously recognized as states during that period of time. It is safe to say, that in the event of an annexation, voluntary or not, it is never certain how long the annexation will last. Thus the temporariness or permanence of such an event is never predictable and continued recognition may depend more on other factors distinct from a lapse of time.

When a lapse of time is relevant in justifying a deviation from the Montevideo criteria, the qualification of the event as temporary makes sure the state is granted temporary permission to diverge from the Montevideo criteria without repercussions for its statehood. This qualification coincides with the fact that automatic extinction of states is not desired, especially when other states continue to recognize the state unable to fulfill the Montevideo criteria.<sup>398</sup>

134. Only when states are deemed absolutely defunct a resuscitation of their sovereignty is considered an ordeal with insurmountable obstacles.<sup>399</sup> However, once more, exceptions apply. State practice has shown that retention or revival of state identity without continuity is possible. In the case of Syria, its full UN membership, which is open to states only, revived in 1961 without any readmission procedure when it voluntarily seceded from its union with the United Arab Republic.<sup>400</sup>

This can be relevant in the present case of island states which no longer fulfill the criterion of territory. It is not unimaginable that the future may bring times wherein the relevant island states' land territory would resurface again. This would constitute a non-permanent lack of fulfillment of one or more of the Montevideo statehood criteria.

135. It could be argued that the possibility of temporariness together with states' reluctance to accept the demise of a state<sup>401</sup> could indicate that the island state ought to be regarded as continuous for, at least, a certain period of time after its submergence as there is no way of fully knowing if the submergence is only temporary. Context and scientific prognosis can help provide a factual background whereupon the

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<sup>394</sup> CRAWFORD, *The Creation of States*, 90.

<sup>395</sup> *Ibid.*, 91.

<sup>396</sup> *Ibid.*, 91.

<sup>397</sup> MAREK, *Identity*, 102.

<sup>398</sup> MAREK, *Identity*, 87 and CRAWFORD, *The Creation of States*, 694-695.

<sup>399</sup> CRAWFORD, *The Creation of States*, 699.

<sup>400</sup> *Growth in United Nations membership: 1945-present*, United Nations, [www.un.org/en/members/growth.shtml](http://www.un.org/en/members/growth.shtml)

<sup>401</sup> MAREK, *Identity*, 548.

acceptable duration<sup>402</sup> of the submerged island state may be calculated and tolerated.

136. More realistically speaking, temporary submergence of the island states, if it occurs at all, will be a track reserved for exceptions to the rule. So for the rule, which embodies permanent submergence or permanent uninhabitability of the island states, other exceptions or true alternatives to the Montevideo criteria, are called for if statehood is to be saved.

## II. 4. 1. 2. Non-recognition as reparation for internationally wrongful conduct

137. The duty of non-recognition of changes in population, territory or exercise of power of a state, and so the implied recognition of that state as it was before those changes, in essence forms an exception to the obligation to fulfill the Montevideo criteria. The duty of non-recognition is not derived from the notion of effectiveness, but rather from the notion of legality.<sup>403</sup> This duty is based on the Articles on Responsibility of States for Internationally Wrongful Acts (ARS)<sup>404</sup> as a measure to repair injustice brought on by a breach of peremptory norms.<sup>405</sup>

138. Within the regime of state responsibility framed by ASR, the duty not to recognize an illegitimate act and its consequences<sup>406</sup> represents a form of reparation of injustice. This duty is incumbent on all states in disapproval of a particular state's illegitimate actions. Articles 40 and 41.2 ASR encapsulate the duty of non-recognition of a serious breach of a peremptory norm.

*Crawford* agrees that the overruling nature of peremptory norms entails that an entity cannot be called a state, despite being effective, when in breach of a peremptory norm.<sup>407</sup> Peremptory norms or *jus cogens* rules<sup>408</sup> are stipulations of international law deemed so important by the international community that they stand at the top of the hierarchy of international regulations, trumping all others.<sup>409</sup>

139. This duty has been found beneficial to oppose recognition of changes of power brought about by revolution, racist policies, use of illegal force or actions in breach of the right to self-determination.<sup>410</sup> The duty has been applied in the past and was pushed by the UNSC which called upon all states to regard the declaration of independence of the Turkish Republic of Northern Cyprus, or of any Cypriot State other than the Republic of Cyprus, as invalid and to refrain from recognizing the creation of such an entity.<sup>411</sup>

The duty has often played a part in the non-recognition of the demise of states. To exemplify the latter, reference can be made to Kuwait and the Baltic States, which would have to have been regarded as extinct, were it not for the international community's duty not to recognize their new status as illegally annexed entities. These states are also known as resurrected states.<sup>412</sup>

140. Applied to this case, articles 40 and 41 ASR would make sure the extinction of the island states as

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<sup>402</sup> CRAWFORD, *The Creation of States*, 704.

<sup>403</sup> CRAWFORD, *The Creation of States*, 702; STOUTENBERG, "Thresholds of effective statehood", 59.

<sup>404</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the work of its Fifty-Third Session, Supplement No. 10, UN Doc. A/56/10 (2001) and as adopted in the Resolution 56/83 of the General Assembly of the United Nations of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4 (hereafter: ASR).

<sup>405</sup> STOUTENBERG, "Thresholds of effective statehood", 59.

<sup>406</sup> CRAWFORD, *The Creation of States*, 159-160.

<sup>407</sup> *Ibid.*, 96-173.

<sup>408</sup> ASR, 112.

<sup>409</sup> Art. 53 VCLT.

<sup>410</sup> VIDMAR, "Unilateral declarations", 62.

<sup>411</sup> Resolution 541 of the Security Council of the United Nations (18 November 1983), *UN Doc. S/RES/541* (1983), §7.

<sup>412</sup> CRAWFORD, *The Creation of States*, 669; ZIMMERMAN, "Continuity", §10.

a consequence of a serious breach of a peremptory norm, would not be recognized as lawful. This would instantaneously include a duty to continue recognizing the statehood of old of the island states. Before this duty can be imposed upon all states, not only the affected peremptory norm, but also the act of breaching it, must be identified.

### *Peremptory norms of law*

141. The concept of *jus cogens* or peremptory norms first arose in an explicit manner in the VCLT in 1969 as norms “accepted and recognized by the international community of States as a whole as [norms] from which no derogation is permitted”.<sup>413</sup> These norms may be seen as obligations of states *erga omnes*.

142. These peremptory norms have a clear place in international law, but it is not quite clear which norms may be called peremptory.<sup>414</sup> International obligations on climate change mitigation have been referred to as peremptory norms based on the UNFCCC’s universal ratification.<sup>415</sup> Such a bold statement should be taken with a grain of salt.

143. The main objective of the UNFCCC, as found in article 2 UNFCCC, is to stabilize greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system. Article 3 UNFCCC contains mere guiding principles. Article 4 UNFCCC implements a variety of publication, promotion, cooperation, consideration and communication obligations.<sup>416</sup>

Article 4 UNFCCC also contains a bit more substantial obligations on the creation of national climate change mitigation policies,<sup>417</sup> the assistance in costs of mitigation<sup>418</sup> and adaptation<sup>419</sup> and the transfer of technology.<sup>420</sup> Yet, even for the last enumeration of obligations, the exact content of the obligations is not specified by the UNFCCC. In addition, the latter obligations only pertain to developed countries, such as those included in Annex I or Annex II of the UNFCCC.

144. Therefore, only developed countries have acknowledged a willingness to take actual measures to reduce emissions, which is distinguishable from simply acknowledging the need for measures. Though, given the vague phrasing of the UNFCCC, the developed Annex I and II countries would only breach this peremptory norm on climate change mitigation if they take absolutely no mitigating measures at all.

The norm may deserve the qualification of peremptory, but today that qualification does not carry much weight. Thus, in this context, only the following suggested peremptory norms are deemed applicable: the right of self-determination, the permanent right of sovereignty over natural resources of states and fundamental human rights.<sup>421</sup>

### *Self - determination*

145. According to the International Covenant on Civil and Political Rights all peoples have the right to

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<sup>413</sup> Art. 53 VCLT.

<sup>414</sup> CRAWFORD, *The Creation of States*, 100-101.

<sup>415</sup> E. KOSOLAPOVA, *Interstate liability for climate change-related damage*, Den Haag, Eleven Publishers, 2013, 178. (hereafter: KOSOLAPOVA, *Interstate liability*)

<sup>416</sup> Art. 4.1, 4.6, 4.7, 4.8, 4.9 and 4.10 United Nations Framework Convention on Climate Change of 09 May 1992, 1771 UNTS 107 (hereafter: UNFCCC).

<sup>417</sup> Art. 4.2 UNFCCC

<sup>418</sup> Art. 4.3 UNFCCC

<sup>419</sup> Art. 4.4 UNFCCC

<sup>420</sup> Art. 4.5 UNFCCC

<sup>421</sup> CRAWFORD, *The Creation of States*, 100-101.

self-determination by which they may freely pursue economic, social and cultural developments and determine their political status.<sup>422</sup> Often however, the right to self-determination is only viewed as a right applicable for post-colonization periods to aid states which are on their way to become self-governing.<sup>423</sup> Consequently, the notion of self-determination is not accepted by all as a peremptory norm, though there remain a strong number of enthusiasts.<sup>424</sup> If the right could be definitively qualified as a peremptory norm, it would be breached to a certain extent when an island state population loses its state and statehood identity.<sup>425</sup> As a constituent of self-determination, the UNGA<sup>426</sup> and ICJ<sup>427</sup> recognize the right to permanent sovereignty over natural resources of states,<sup>428</sup> which include both land and maritime resources.<sup>429</sup> Also for this right, a breach would occur when an island state inundates.

### Human Rights

146. “If we fail our environment, we fail to protect our human rights”.<sup>430</sup> The link between human rights and environment has long been recognized, and remains a hot topic on the UN agenda.<sup>431</sup> Specifically when it comes to the climate change context, due regard must be given to human rights providing a right to nationality, property, food, water, health, home, political participation and cultural rights.<sup>432</sup> Even though strictly spoken only the right to life has been recognized as a peremptory norm, one cannot deny the associated rights, which are essential to give substance to the right of life.<sup>433</sup>

The right to life, liberty and security;<sup>434</sup> right to nutrition and an adequate standard of living;<sup>435</sup> right to

<sup>422</sup> Art 1(1) International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171 (hereafter: ICCPR).

<sup>423</sup> OLIVER, “A new challenge”, 223.

<sup>424</sup> Doctrine remains divided as to classify the right of self-determination as *jus cogens* or not. **Pro** can be found in: Art. 37 ASR and commentary, §3 Report of the International Law Commission on the work of its Fifteenth session, (A/5509), UN Doc. A/CN.4/163 (1999) (wherein the ILC had included the right to self-determination as an example of *jus cogens*, only precluding it from the final document, since the ILC decided against including examples, not wanting to limit the scope of *jus cogens*); H. G. ESPIELL, Special Rapporteur for the Thirty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (20 June 1978), UN Doc. E/CN.4/Sub.2/405/Rev.1 (1978), §74 (where Espiell clearly put the following, centered and in bold in his report: “Today no one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*.”; ICJ, Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v Spain), 1970 ICJ Reports 3, separate opinion of Judge Ammoun, 304; BROWNLEE, *Principles*, 511-512; D. RAIČ, *Statehood and the Law of Self-Determination*, The Hague, Kluwer Law International, 2002, 444 (hereafter: Raič).

**Contra** can be found in: A. CRISTECU, *The right to self-determination*, UN Doc. E/CN.4/Sub.2/404/Rev.1, (1981), §476; G.J. NALDI, “The case concerning the frontier dispute (Burkina Faso v Republic of Mali): Uti Possideti in an African perspective”, *International and Comparative Law Quarterly* 36(4) (1987), 902; M. POMERANCE, *Self-Determination in Law and Practice: the new doctrine in the United Nations*, The Hague, Martinus Nijhoff, 1982, 70.

<sup>425</sup> STAHL, “Unprotected ground”, 31.

<sup>426</sup> Resolution 1803 (XVII).

<sup>427</sup> Armed Activities on the Territory of Congo case (Democratic Republic of the Congo v Uganda), 2005 ICJ Reports 168, 251

<sup>428</sup> Art. 1.2 International Covenant on Economic, Social and Cultural Rights of 15 December 1966, 993 UNTS 3 (hereafter: ICESCR). In the Nauru v Australia case before the ICJ, Nauru relied on the above-mentioned right to permanent sovereignty over natural resources to gain compensation for its hollowed out lands through Australian phosphate mining when it was acting as Nauru’s Trustee. This case deserves two comments: for one, Nauru brought the claim before the Court relying on the rules governing trusteeship and secondly, the case never reached the merits but the states decided upon an amount of compensation themselves. ICJ, Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 ICJ Reports 240; BARNETT and NEIL, “Climate Dangers”, 331.

<sup>429</sup> STOUTENBERG, “Thresholds of effective statehood”, 78.

<sup>430</sup> “If we fail our environment, we fail to protect our human rights,” warn UN experts on Earth Day, OHCHR, 22 April 2013, [www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13257&LangID=E](http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13257&LangID=E).

<sup>431</sup> Resolution 16/11 of the Human Rights Council of the United Nations (12 April 2011), UN Doc. A/HRC/RES/16/11 (2011); Report of the Human Rights Council of the United Nations on its nineteenth session, UN Doc. A/HRC/19/2 (2012).

<sup>432</sup> M. JANKI, *Indigenous Peoples Rights and the Environment: Issues and the Future*, draft paper for UNEP & OHCHR, 2009, [www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=gUAoSyFdNG8%3d&tabid=2046&language=en-US](http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=gUAoSyFdNG8%3d&tabid=2046&language=en-US).

<sup>433</sup> Resolution 7/23 of the Human Rights Council of the United Nations (28 March 2008), UN Doc. A/HRC/7/78 (2008); UN Doc. A/HRC/10/61

<sup>434</sup> Art. 1 and 3 UDHR; art. 5 and 6.1 ICCPR.

<sup>435</sup> Art. 11 ICESCR.

health<sup>436</sup> and the right to development,<sup>437</sup> have all been pinpointed as possibly affected by climate change.<sup>438</sup> Nonetheless developed countries remain hesitant to intervene or to provide financial assistance,<sup>439</sup> resources and technology for foreign peoples dealing with troubling human rights issues.<sup>440</sup>

147. Traditionalists will uphold that state sovereignty and international protection of human rights are incompatible. In this view international law is viewed as a tool to primarily govern relations between nations.<sup>441</sup> When the UDHR was adopted, its content was declared not legally binding, so preserving the idea that human rights policies should remain national.

In this day and age however, the international community has relinquished the idea that human rights are a purely domestic matter.<sup>442</sup> This belief is aided by the concepts of international customary law and international legal principles, which are universally valid. Nevertheless, the extraterritorial application of human rights to pressing issues such as climate change<sup>443</sup> and transboundary pollution remains problematic.<sup>444</sup>

148. Human rights are now generally accepted to surpass strictly defined topics and increasingly references are made to human rights in relation to other international issues. Articles 55 and 56 of the UN Charter order universal respect for human rights. The link between human rights and climate change has also been established before the UN Human Rights Council (UNHRC).<sup>445</sup> Special Rapporteur *Ksentini* was charged with investigating the link between human rights and the environment. Annexed to her final report were the Draft Principles on Human Rights and the Environment, which the Sub-Commission on Prevention of Discrimination and Protection of Minorities acknowledged, but sadly never endorsed.<sup>446</sup> From the Sub-Commission's actions it appears the Sub-Commission could not ignore the issue any longer, though in reality *Ksentini's* ample efforts only amounted to research for formality's sake.

149. More recently, human rights, in relation to the environment and specifically climate change, seem to be treated less in a summary manner. The former Deputy High Commissioner for Human Rights *Kyung-wha Kang* emphasized this when she stated: "Climate change is related not only to environmental factors

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<sup>436</sup> Art. 25 UDHR; art. 12 ICESCR.

<sup>437</sup> New South Wales Young Lawyers (ed.), *Human rights and climate change study, Submission to the OHCHR study: Human Rights and Climate Change Sydney: Environmental Law Committee and Human Rights Committee*, 2008, [www.ohchr.org/Documents/Issues/ClimateChange/Submissions/NSW\\_Young\\_Lawyers\\_HR\\_ClimateChange.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/NSW_Young_Lawyers_HR_ClimateChange.pdf), 11.

<sup>438</sup> M. REDER, "Climate change and human rights" in O. EDENHOFER, J. WALLACHER, H. LOTZE-CAMPEN, M. REDER, B. KNOPF and J. MÜLLER (eds.), *Climate Change, Justice and Sustainability: Linking Climate and Development Policy*, Dordrecht, Springer, 2012, 65 (hereafter: REDER, "Climate change").

<sup>439</sup> Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session, *UN Doc. E/CN.4/2005/52* (2005), §76.

<sup>440</sup> *UN Doc. A/HRC/10/61*, §86.

<sup>441</sup> L. E. RODRIGUEZ-RIVERA, "Is the Human Right to Environment Recognized Under International Law? It Depends on the Source", *Colo. J. Int'l Envtl. L. & Pol'y* 12 (2001), (1) 2.

<sup>442</sup> C. DOMMEN, "Claiming Environmental Rights: Some possibilities offered by the United Nations' Human Rights Mechanisms", *Geo. Int'l Envtl. L. Rev.* 11 (1998), (1) 2.

<sup>443</sup> M. LIMON, *Linking Human Rights and the Environment, background paper for key issues arising from Human Rights Council Resolution 10/4 and the June 2009 Council debate on the relationship between human rights and the climate change*, UNEP, [www.unep.org/environmentalgovernance/Portals/8/documents/Background%20Paper.pdf](http://www.unep.org/environmentalgovernance/Portals/8/documents/Background%20Paper.pdf), 3.

<sup>444</sup> A. BOYLE, "Human Rights and the Environment: a Reassessment", Working Paper for UNEP (2010), [www.law.ed.ac.uk/includes/remote\\_people\\_profile/remote\\_staff\\_profile?sq\\_content\\_src=%2BdXjsPWh0dHAIM0EIMkYIMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxyYWQIMkZwdWJsaWNhdGlvbnMIMkYwXzEyMjFfaHVtYW5yaWdodHNvcmludmlyb25tZW50YWxyaWdodHNhcmVhc3NlcyswZGYmYWxsPTE%3D](http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXjsPWh0dHAIM0EIMkYIMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxyYWQIMkZwdWJsaWNhdGlvbnMIMkYwXzEyMjFfaHVtYW5yaWdodHNvcmludmlyb25tZW50YWxyaWdodHNhcmVhc3NlcyswZGYmYWxsPTE%3D), 36.

<sup>445</sup> Resolution 7/23 of the Human Rights Council of the United Nations (28 March 2008), *UN Doc. A/HRC/7/78* (2008); *UN Doc. A/HRC/10/61*; POWERS, "Climate Change and Pollution", 25.

<sup>446</sup> Resolution 1994/27 in the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session (28 October 1994), *UN Doc. E/CN.4/Sub.2/1994/56* (1994).

but also to poverty, discrimination and inequalities – this is why climate change is a human rights issue.”<sup>447</sup> The UNHRC has adopted several resolutions on the topic and appointed John Knox as an independent expert to investigate the topic of human rights and the environment.<sup>448</sup> In March 2014, Knox underlined his intention to thoroughly examine the relationship between human rights and climate change.<sup>449</sup>

150. While climate change will certainly disturb the enjoyment of human rights,<sup>450</sup> it can be difficult to categorize this disturbance under a human rights violation in a legal sense<sup>451</sup> and to enforce rules regulating the issue.<sup>452</sup> The Inuit Circumpolar Council, representing the Inuit communities in Alaska, Canada, Greenland and Russia, petitioned to the Inter-American Commission on Human Rights stating that the US climate policy breached Inuit rights under the Inter-American Declaration on Human Rights. The Inuit claimed they suffered violations of, amongst others, the right to the preservation of health, the right to enjoy property and lands and the right to cultural benefits. The Commission dismissed the case based on the reasoning that there was insufficient information to conclude to a violation of rights protected by the Declaration.<sup>453</sup> The ICC petition is however quoted abundantly in doctrine as a key example of an appropriate human rights approach on climate change.<sup>454</sup>

151. For the island states it is not hard to imagine that when statehood has gone out the window, nationality will legally or at least factually fly out the window with it.<sup>455</sup> Furthermore, the equal enjoyment of human rights to property,<sup>456</sup> food, water, health, home, political participation and cultural rights are all at risk. All these rights are constituents of a substantive regionally,<sup>457</sup> as well as globally recognized,<sup>458</sup> right to health,<sup>459</sup> which is an essential part of the right to life. It cannot be denied the peremptory norm of the human right to life will be gravely affected by loss of land and statehood.

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<sup>447</sup> *Human rights key to climate change negotiations*, UNHCR, 17 June 2009,

[www.ohchr.org/EN/NewsEvents/Pages/Humanrightskeytoclimatechangenegotiations.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/Humanrightskeytoclimatechangenegotiations.aspx)

<sup>448</sup> *John Knox, Independent Expert on human rights and the environment*, OHCHR,

[www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/JohnKnox.aspx](http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/JohnKnox.aspx).

<sup>449</sup> J. Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the Human Rights Council, *UN Doc. A/HRC/25/53* (2014), 5.

<sup>450</sup> Resolution 10/4 of the Human Rights Council (25 March 2009), *UN Doc. A/HRC/RES/10/4* (2009); Resolution 18/22 of the Human Rights Council of the United Nations (17 October 2011), *UN Doc. A/HRC/RES/18/22* (2011); Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *UN Doc. A/62/214* (2007), §104.

<sup>451</sup> *UN Doc. A/HRC/10/61*, 70.

<sup>452</sup> S. HUMPHREYS, “Introduction: human rights and climate change” in S. HUMPHREYS (ed.), *Human Rights and Climate Change*, Cambridge, Cambridge University Press, 2010, 4.

<sup>453</sup> Inuit Circumpolar Conference, Center for International Environmental Law & Earthjustice, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Inuit Circumpolar, 7 December 2005, [www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf](http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf); S. MCINERNEY-LANKFORD, “Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance” in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 200.

<sup>454</sup> REDER, “Climate change”, 64; Z. GROSSMAN, “Part III: Current responses - indigenous responses to the international climate change framework” in A. PARKER and Z. GROSSMAN (eds.), *Asserting Native Resilience: Pacific rim indigenous nations face the climate crisis*, Corvallis, Oregon University Press, 2012, 120-121.

<sup>455</sup> STAHL, “Unprotected ground”, 34.

<sup>456</sup> Art. 17.2 UDHR.

<sup>457</sup> art. 11 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights of 17 November 1988, 28 ILM 156; Art. 24 African Charter on Human and Peoples’ Rights of 27 June 1981, 1520 UNTS 217 (1981).

<sup>458</sup> Art. 12 ICESCR

<sup>459</sup> General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2000/4* (2000), §4.

### *The act of breaching*

152. To trigger the duty of non-recognition, there must be a serious breach of a peremptory norm. ASR describes a breach as an internationally wrongful act committed by a state.<sup>460</sup> An internationally wrongful act occurs when the conduct of a state, in the form of an act or omission, is attributable to a State under international law and constitutes a failure to comply with an international obligation in force at the time of breach.<sup>461</sup>

#### *Attribution to a state*

153. In the climate change context there will most likely be a plurality of states as polluters. Taking into account the *Monetary Gold* and *East Timor* cases, where the ICJ twice denied judging a defendant where some of the other interested parties remained absent,<sup>462</sup> international courts and tribunals do not seem keen to utilize the domestic law concept of joint and several liability, where one can be held accountable for harm attributable to multiple parties.<sup>463</sup>

The ILC has likewise objected to the joint and several approach, indicating that the principle of independent responsibility takes first place in international law.<sup>464</sup> Thus in order to attribute a certain action to a certain state those actions should be quantifiable and clearly distinguishable from those of other states, for example, the amount of emitted greenhouse gases transgressing the allowed maximum under the Kyoto Protocol for a particular state.

#### *A serious breach*

154. The breach of a regulation will be considered serious when it encompasses a gross and systematic failure to adhere to that regulation.<sup>465</sup> It is up to states themselves to fill in the meaning of a gross and systematic failure,<sup>466</sup> though often guidance will be available from a UNGA or UNSC resolution on the topic.<sup>467</sup>

The ASR includes examples of what are considered to be serious breaches in international law. Relevant for the island states is the ILC's mention of a "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment".<sup>468</sup> With respect to climate change many international legal obligations come to mind, which, when breached, can simultaneously represent a breach of a peremptory norm.

155. By disregarding environmental obligations, states can indirectly attribute to climate change and

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<sup>460</sup> Art. 1 and 2 ASR.

<sup>461</sup> Art. 13 ASR.

<sup>462</sup> The *Nauru case* and its shared responsibility claim was indeed allowed to proceed to the merits, but only under strong dissent. In the end the case was resolved outside courtrooms. M. PAPANIKOLAOU, "Procedural Aspects of Shared Responsibility in the International Court of Justice", *Journal of International Dispute Settlement* 4(2) (2013), 295–318 and 305-306.

<sup>463</sup> J. D. WERKSMAN, "Could a Small Island Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice" in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 427 (hereafter: WERKSMAN, "Could a Small Island").

<sup>464</sup> J. CRAWFORD, *The International Law Commission's Articles on State Responsibility: Introduction, Text and commentaries*, Cambridge, Cambridge University Press, 2002, 145 (hereafter: CRAWFORD, *The ILC's Articles*).

<sup>465</sup> Art. 40.2 ASR.

<sup>466</sup> CRAWFORD, *The ILC's Articles*, 249-253.

<sup>467</sup> S. TALMON, "The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?" in C. TOMUSCHAT and J.-M. THOUVENIN (eds.), *The Fundamental Rules of the International of the International Legal Order: Jus Cogens and Obligations Erga Omnes Obligations*, Leiden, Martinus Nijhoff, (2006), 122.

<sup>468</sup> ASR, footnote 651; the same obligation is found in 235 LOSC.



rising sea-levels. Such indirect stipulations can amongst others be found in the LOSC,<sup>469</sup> the Convention on Biological Diversity,<sup>470</sup> Stockholm Declaration,<sup>471</sup> and numerous other conventions and agreements.<sup>472</sup>

An extensive enumeration of climate related breaches of law would however take this paper beyond its scope.<sup>473</sup> Therefore only the more obvious international climate change related obligations will be discussed. These are found in particular in the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol<sup>474</sup> and the no harm rule.

156. The main objective of the UNFCCC is “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.<sup>475</sup> In addition the UNFCCC supports precautionary measures<sup>476</sup> and special consideration for developing countries which are particularly vulnerable to the adverse effects of climate change and in need of aid in covering adaptation costs.<sup>477</sup>

The emission of greenhouse gases (GHGs) mostly occurs on a private level and is not attributable to the state. In addition, expulsion of GHGs remains a lawful act.<sup>478</sup> The focus of the UNFCCC goes to a state’s obligation to regulate a reduction of GHG emissions. Such an obligation is in place for the Annex I countries to UNFCCC which must take measures to reverse their long-term emission trend.<sup>479</sup>

157. The UNFCCC remains a quite vaguely and broadly formulated framework convention which necessitates implementing texts. One of those implementing agreements is the Kyoto Protocol which aims to achieve a decline of GHG emissions through various mechanisms. Still the Kyoto Protocol upholds the use of careful phrasing as well, as a reflection of scientific uncertainty as to the precise threshold for disallowed emissions and as a way to appease hesitant parties.<sup>480</sup>

Nonetheless, certain quantitative thresholds were set by the 1997 Kyoto protocol. Article 3 of the Kyoto Protocol asked Annex I parties to achieve a reduction of their overall emissions of the gases enlisted in the Annexes A and B, by at least 5 percent below 1990 levels<sup>481</sup> in the period of commitment which started in 2008 and ran until 2012.<sup>482</sup> This five year period, known as the first commitment period, is viewed as the obligatory period to demonstrate compliance, excluding actions running up to those five years. The second commitment period runs from 2013 to 2020, wherein parties to the 2012 Doha Amendment to the Kyoto Protocol, which differ from the parties during the first commitment period,<sup>483</sup> promise to reduce

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<sup>469</sup> The general provision to protect the area (Art. 145 LOSC), general provision to protect the marine environment (Art. 192, 194, 195 and 235 LOSC) and prevention of marine pollution (Art. 207-212 LOSC).

<sup>470</sup> Convention on Biological Diversity of 5 June 1992, 1760 UNTS 79.

<sup>471</sup> Principles 2 and 24 Stockholm Declaration; FREESTONE, “International law and Sea level Rise”, 121-125.

<sup>472</sup> FREESTONE, “International law and Sea level Rise”, 205.

<sup>473</sup> A more extensive report on the subject can be found in KOSOLAPOVA, *Interstate liability*.

<sup>474</sup> Kyoto Protocol to the UN Framework Convention on Climate Change of 10 December 1997, 37 ILM 32 (hereafter: Kyoto protocol).

<sup>475</sup> Art. 2 UNFCCC.

<sup>476</sup> Art. 3(3) UNFCCC.

<sup>477</sup> Art. 3(2) and 4(4) UNFCCC.

<sup>478</sup> A qualification which might change into an unlawful act in the future. STOUTENBERG, “Thresholds of effective statehood”, 81.

<sup>479</sup> STOUTENBERG, “Thresholds of effective statehood”, 80-81.

<sup>480</sup> G. ALFREDSSON, “Human Rights and the environment” in D. LEARY and B. PISUPATI (eds.), *The future of international environmental law*, Tokyo, United Nations University Press, 143.

<sup>481</sup> With the exception of Bulgaria, Hungary, Poland, Romania and Slovenia which have different base years.

<sup>482</sup> Art. 3 Kyoto Protocol.

<sup>483</sup> Russia, Canada, Japan and New Zealand have all decided against taking on commitments in the 2<sup>nd</sup> commitment period. Canada has even entirely withdrawn from the Kyoto protocol as a party, reportedly to escape penalties for not living up to its commitment in the first commitment period. This suggests that one can simply rid itself of its obligations; *Canada pulls out of Kyoto protocol*, The Guardian, 13 December 2012, [www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol](http://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol); the parties which still have made commitments under the

GHG emissions with 18 percent in total since the 1990 levels.<sup>484</sup> In addition the Kyoto protocol also requires its ratifying parties to aid in funding, transfer of technology and insurance.<sup>485</sup> However, to what extent that aid must be offered is not stipulated.

158. The rules on state responsibility are not to be applied retroactively. A state is only bound by the legal obligations incumbent on it at the time of breach.<sup>486</sup> If we take a look at the UNFCCC obligation to reduce emission trends, that obligation was effective earliest on from 1994.<sup>487</sup> For the Kyoto Protocol, the rule of non-retroactivity entails state parties can only be held responsible for GHG emissions in breach of the permissible amount of emissions allowed during the commitment periods.<sup>488</sup> Given this narrow time frame, breaches will hardly be called lengthy or serious.

159. Besides turning to treaty law, customary international law offers relevant rules as well. It is uncontested that a state must prevent harm emanating from activities under its jurisdiction which may cause significant transboundary damage to the environment of another state, known as the no harm rule.<sup>489</sup>

The rule frequently arises in case law<sup>490</sup> and features in the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.<sup>491</sup> The no harm rule is closely intertwined with the customary international principle of prevention,<sup>492</sup> which often asks for the use of an environmental impact assessment on state level when significant transboundary harm could arise from national or international projects.<sup>493</sup>

160. To respect the no harm rule, states must act in a duly diligent manner to prevent foreseeable harm. Due diligence can prove problematic to define,<sup>494</sup> thus creating a hurdle for the application of the no harm rule.<sup>495</sup> A general definition of due diligence roughly translates into an obligation to use the opportunity to act and take proportional measures to halt or alleviate foreseeable harm.<sup>496</sup>

In the case at hand, most doctrine agrees that 1990, the year of the first IPCC report and the base year for emissions used by the UNFCCC, can be regarded as the date from which the detrimental consequences of

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Kyoto Protocol for the second period emit a sometimes called *negligible* 15 % of the world's global emissions. C. A. HART, *Climate Change and the Private Sector: Scaling up private sector response to climate change*, New York, Routledge, 2013, 125.

<sup>484</sup> *Kyoto Protocol*, UNFCCC, [https://unfccc.int/kyoto\\_protocol/items/2830.php](https://unfccc.int/kyoto_protocol/items/2830.php)

<sup>485</sup> Art. 3(14) Kyoto Protocol.

<sup>486</sup> Art. 13 ASR.

<sup>487</sup> The convention entered into force 21 March 1994; of course the parties to the convention could have ratified it later, meaning the convention and its obligations entered into force later for those parties.

<sup>488</sup> STOUTENBERG, "Thresholds of effective statehood", 83 and art. 13 ASR.

<sup>489</sup> Principle 2 Rio Declaration on Environment and Development (13 June 1992), *UN Doc. A/CONF.151/26* (vol. I) (1992); Principle 21 Stockholm Declaration.

<sup>490</sup> ICJ, Pulp Mills on the river Uruguay (*Argentina v Uruguay*), 2010 *ICJ Reports* 14, §101 (hereafter: Pulp Mills); ICJ, Legality or Threat of Use of Nuclear Weapons, advisory opinion, 1996 *ICJ Reports* 227, §29; ICJ, Gabčíkovo-Nagymaros (*Hungary v Slovakia*), 1997 *ICJ Reports* 7, §53 (hereafter: Gabčíkovo-Nagymaros); ICJ, Construction of a road in Costa Rica along the San Juan River (*Nicaragua v Costa Rica*), Provisional measures, 13 December 2013, *ICJ Reports*, §19; ICJ, The Corfu Channel Case (*U.K. v. Alb.*), 1949 *ICJ Reports* 4 (April 9); Trail Smelter Arbitration (*United States v Canada*), III RIAA 1905 (1941) (hereafter: Trail Smelter), 1965-1966.

<sup>491</sup> Art. 3 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in report of the International Law Commission on the Work of Its Fifty-Third Session, Supp. No. 10, *UN Doc. A/56/10* (2001).

<sup>492</sup> Pulp Mills, §101; Gabčíkovo-Nagymaros, §140.

<sup>493</sup> WERKSMAN, "Could a Small Island?", 423.

<sup>494</sup> M. FITZMAURICE, "International Responsibility and Liability" in D. BODANSKY, J. BRUNNEE and E. HEY (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, Oxford Handbooks, 2012, 1014 (hereafter: FITZMAURICE, "International Responsibility"); P. BIRNIE, A. BOYLE & C. REDGWELL, *International Law & the Environment*, Oxford, Oxford University Press, 2009, 222 (hereafter: BIRNIE et al., *International Law & the Environment*).

<sup>495</sup> WERKSMAN, "Could a Small Island?", 417.

<sup>496</sup> R. VERHEYEN, *Climate Change Damage And International Law: Prevention Duties And State*, Leiden, Martinus Nijhoff Publishers, 2005, 183.

climate change were foreseeable for states.<sup>497</sup> This is a very forgiving take on states' conduct as scientific journals already affirmed human-induced climate change in the fifties<sup>498</sup> and US and UK policy-makers discussed climate change consequences comprehensively in the seventies.<sup>499</sup>

To discover if any diligent measures were taken, one could take a closer look at historical emissions to see if changes in an upward trend have occurred due to emission reduction measures.<sup>500</sup> The measures would only have to be proportionate to the knowledge available at that time. The fact remains that it is highly complex to make a sort of grading system with objective indicators suitable for all states, to see if they have done their homework properly. Though, this does not mean it is impossible and certainly several of those objective indicators have already been documented<sup>501</sup> and translated into concrete percentages suggesting a state's capability and duty to finance adaptation measures.<sup>502</sup>

161. It has been argued that the commitments under the Kyoto Protocol would act as a *lex specialis* so that when in fulfillment of the Kyoto Protocol, a state could no longer be held responsible of being in breach of the no harm rule. This would also entail that developing states could never be deemed responsible for breaching the no harm rule in relation to GHG emissions, since they are explicitly excluded from making such commitments under the UNFCCC and the Kyoto Protocol.<sup>503</sup> The latter remark grows more and more out of touch with reality as developing countries now rank amongst the most polluting countries in the world.<sup>504</sup>

Anticipatory of this turn of events, Fiji, Nauru, Kiribati and Papua New Guinea added a declaration to the UNFCCC stating that they in no way renounce "any rights under international law concerning state responsibility for the adverse effects of climate change".<sup>505</sup> In addition, the climate treaties or the negotiation history thereof have never alluded to the intention to preclude a state's obligations under other rules of international law, such as the no harm rule.<sup>506</sup>

### *Shortcomings of the Articles on Responsibility of States' duty of non-recognition*

162. The aim of the duty of non-recognition as framed in the ASR is to repair the harm caused by an illegitimate act and its consequences by not recognizing it as legal. This type of reparation is meant to allow for recourse to the legitimate *status quo ante*. In the case of the island states, there is no identical *status quo ante* available after harm will have occurred since the land territory will be lost or lands will be rendered uninhabitable beyond repair. In addition, the ASR rely on peremptory norms. These norms are and remain unclear which could present troubles on application since the breached norm must be of this peremptory nature.

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<sup>497</sup> STOUTENBERG, "Thresholds of effective statehood", 82.

<sup>498</sup> "Every time you start a car, light a fire, or turn on a furnace you are joining the greatest weather 'experiment' men have ever launched. You are adding your bit to the tons of carbon dioxide sent constantly into the air as coal, oil, and wood are burned at unprecedented rates. Collecting in the atmosphere, warming the Earth, and influencing massive currents deep within the sea, this gas could in time substantially change the Earth's climate." R. C. COWEN, "Are Men Changing the Earth's Weather?", *The Christian Science Monitor*, 4 December 1957, 13.

<sup>499</sup> *Long-term climate changes and their effects*, Cabinet Office file ref CAB 163/272 #122885, UK National Archives, 1970, [www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATLN=6&CATID=7689300&ij=1](http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATLN=6&CATID=7689300&ij=1)

<sup>500</sup> VERHEYEN et al., *Beyond Adaptation*, 20.

<sup>501</sup> *WRI's Climate Data Explorer*, World Resources Institute, <http://cat2.wri.org/wri/>; VERHEYEN et al., *Beyond Adaptation*, 20.

<sup>502</sup> Oxfam International, *Adapting to Climate Change. What is needed in poor countries and who should pay*, Oxfam Briefing Paper, May 2007, 27-28.

<sup>503</sup> STOUTENBERG, "Thresholds of effective statehood", 83.

<sup>504</sup> WERKSMAN, "Could a Small Island", 421.

<sup>505</sup> *Declarations by Parties - United Nations Framework Convention on Climate Change*, UNFCCC, [https://unfccc.int/essential\\_background/convention/items/5410.php](https://unfccc.int/essential_background/convention/items/5410.php).

<sup>506</sup> VERHEYEN et al., *Beyond Adaptation*, 17.

163. It has been suggested that if the duty of non-recognition based on ASR fails, island states will have to count on a presumed moral imperative of other states based on equity, in order for them not to recognize the altered situation of a sunken island state.<sup>507</sup> It is indeed true international law is not apathetic to equitable measures when a particular circumstance asks for them.

Reference can be made to cases of maritime delimitation wherefore an equitable solution is provided by the LOSC when special circumstances are present upon division of a maritime zone claimed by multiple parties. In such a case aberration is allowed from the normally automatic application of the rule of equidistance, which would just divide the maritime zone between two parties in half, starting from the respective baselines.<sup>508</sup>

164. The difference with the equitable solution of the LOSC, is that the morality to take into account special circumstances is proscribed, and does not originate from states on an ad hoc basis. The duty of recognition knows no such proscribed morally infused stipulation.

## ***II. 4. 2. Defining continued statehood through recognition***

165. Besides exceptions to the effectiveness principle and the dominant Montevideo criteria, there may exist other and better building blocks for statehood with the potential of replacing the effectiveness principle, especially when it comes to state continuation and not state creation.

166. The description of a state by *Marek* aptly recognizes the character of a state by comparing it to Heraclitus' river, as naturally being in a constant state of flux.<sup>509</sup> In the same line of thought, *Grant* proffers that the definition of a state must be open to revision and reassessment.<sup>510</sup> Taking into account the evolution of international law and practice, a modern day world order can be found to require modern day conditions as a foundation for statehood.<sup>511</sup>

167. In an attempt to identify regulations properly fitted to state continuation, this paper puts forth that such a modern day condition can be retrieved in a broad notion of non-recognition, as an evolution of the concept of continued statehood, based on *ex injuria jus non oritur*.

### ***II. 4. 2. 1. Ex injuria jus non oritur***

168. The duty of non-recognition comes in various shapes. One such a variation originates from the ASR and was described above. Another variation of the duty has been ascribed to the principle of *ex injuria jus non oritur*, or the theory that law may not be founded on injustice, which is a key principle of international law.

169. The duty of non-recognition based on *ex injuria jus non oritur* is a specific peaceful and political technique, which does not constitute a sanction or enforcement action for dealing with unlawful regimes. It simply lets legality prevail over illegality. This widespread principle has infiltrated into the topic of statehood through the Stimson Doctrine. This is a US policy which first surfaced in 1932 when the United

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<sup>507</sup> STOUTENBERG, "Thresholds of effective statehood", 96.

<sup>508</sup> ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), 1984 *ICJ Reports* 246; ICJ, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993 *ICJ Reports* 38; ICJ, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea Intervening), 2002 *ICJ Reports* 303.

<sup>509</sup> MAREK, *Identity*, 4.

<sup>510</sup> GRANT, "Defining Montevideo", 457.

<sup>511</sup> Raič, 91.

States of America refused to recognize the territorial and political changes Japan tried to enforce by establishing the putative state Manchukuo on Chinese territory. Japan did this in an illegally forcible manner and so, *ex injuria*.<sup>512</sup> The ICJ has expressed its support for this particular variant of the duty of non-recognition in its 1971 *Namibia Advisory Opinion*<sup>513</sup> and reaffirmed it in its 2004 *Wall Advisory Opinion*.<sup>514</sup>

170. The duty of non-recognition which arises from *ex injuria* has a much broader range than the similar duty arising from the ASR, which confines itself to the breach of peremptory norms. An act or situation will still have to be declared illegal for the *ex injuria* theory, but this can happen regardless the character of the grounds of illegality.<sup>515</sup>

171. It is correct that many of the events for which non-recognition was applied, took place in different circumstances than the one of the sinking island states at hand. The threat of involuntary state extinction is usually induced by intrusion of a foreign state using force in an illegal manner and breaching peremptory norms.<sup>516</sup>

172. However, if states would only have a duty of non-recognition when a peremptory norm is breached, this would mean secessionist parts of a state could rightfully and easily secede to become a separate state. There would be no duty of non-recognition of the secession if no violence is used, the right to self-determination is not breached and human rights are left unscathed. In such a case no peremptory norms would be violated since the principle of territorial integrity is not an undisputed concept, let alone a peremptory right.

It is clear though from state practice of seceding entities such as Kosovo, Abkhazia and Transnistria that swift and universal recognition is not easily given to a seceding entity.<sup>517</sup> Hence, state practice already utilizes a broad notion of the duty of non-recognition as based on *ex injuria*.

#### II. 4. 2. 2. An analogy of the constitutive theory of recognition for state continuation

173. Today, the constitutive theory of recognition is not accepted as a basis for the *creation* or *emergence* of statehood.<sup>518</sup> It can however aid in particular cases where doubt is present as to the *continued* existence of a state.<sup>519</sup> Such a case presented itself when Congo was lacking effective control or European micro-states were found to depend greatly on other states. Still they were all recognized and thought of as states.<sup>520</sup> This is exactly why the concept of recognition should not be thoughtlessly shoved aside. There is indeed a basis for a duty of recognition within state continuity, as a direct effect of non-recognition of

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<sup>512</sup> H. MEIERTÖNS, *The Doctrines of US Security Policy: An Evaluation under International Law*, Cambridge, Cambridge University Press, 2010, 85.

<sup>513</sup> ICJ, Legal Consequences for States of the continued presence of South Africa in Namibia (Sout West Africa) notwithstanding the Security Council Resolution 276, Advisory Opinion, 1971 *ICJ Reports* 16, 54.

<sup>514</sup> ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 *ICJ Reports* 136, 196 and 199.

<sup>515</sup> ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 *ICJ Reports* 136, Separate Opinion of Judge Higgins, at 216.

<sup>516</sup> CRAWFORD, *The Creation of States*, 690-691; STOUTENBERG, "Thresholds of effective statehood", 74.

<sup>517</sup> C. KING, "Minority, violence and statehood on the European periphery", in J. MCGARRY and M. KEATIN (eds.), *European Integration and the Nationalities Question*, Oxon, Routledge, 2006, 128.

<sup>518</sup> CRAWFORD, *The Creation of States*, 22.

<sup>519</sup> MEGIDDO et al., "Palestinian independence", 188-189; CRAWFORD, *The Creation of States*, 198.

<sup>520</sup> CRAWFORD, *The Creation of States*, 93.

changes which would cause discontinuity, based on *ex injuria jus non oritur*.

174. Today's state practice represents a clear statement from the international community as a whole that the Montevideo conditions are too stringent and do not suit the classification needs of a modern world order. For that reason state practice strays from the criteria when it comes to state continuation.<sup>521</sup> The Montevideo criteria should still be used, but only as touchstones to guide the recognizing states in their decision to recognize or not, and to avoid removing all bars for purely political considerations.

175. The effect of an act of recognition is not without legal value. The recognition of a state as a whole, and not just its government,<sup>522</sup> gives rise to a new legal and opposable relationship between the recognizing and recognized state.<sup>523</sup> This new relationship is the direct consequence of the effect of recognition<sup>524</sup> and represents a crucial aspect of a state's international capabilities rather than a mere peripheral side-effect.<sup>525</sup> To further strengthen the legal effects of recognition, states should be recognized collectively by other states, since a single state's recognition will present only limited reliability of continued state relations and statehood as such.<sup>526</sup>

176. Recognition should be viewed as a duty and an opportunity for existing states to react appropriately to changes in the state community<sup>527</sup> or to influence that community.<sup>528</sup> There have been entities such as Taiwan, Kosovo, the South African Bantustans<sup>529</sup> or Abkhazia,<sup>530</sup> which fulfilled all the criteria of statehood, but still missed out on being fully recognized as a state, and so never became one.<sup>531</sup>

Collective opposition of recognition certainly played its part in judging the Federal Republic of Yugoslavia's (FRY) claim of continuing the Socialist Federal Republic of Yugoslavia (SFRY). The international community opposed the claim that the FRY would just continue the SFRY. As a result, the FRY was barred from continuing the state identity of the SFRY.<sup>532</sup> This again demonstrates the power coming from recognition and its presence in the topic of state continuity. States have been applying non-recognition for decades so as to let another entity into the statehood club or not.

States have the ability to recognize another state explicitly or implicitly.<sup>533</sup> In sight of the option of implicit recognition an island state could fall back on its uninterrupted international relations to be further recognized as a state since recognizing states are reluctant to withdraw their previous recognition.<sup>534</sup> The Institut de Droit International even deems past recognition to be irrevocable.<sup>535</sup> Furthermore, on the topic, the ICJ has referred to the "fundamental right of every state to survival" in its *Advisory Opinion on the Threat*

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<sup>521</sup> A. H. BERLIN, "Recognition as sanction: using international recognition of new states to deter, punish, and contain bad actors", *J. Int'l L.* 31(2) (2009), (531) 555 (hereafter: BERLIN, "Recognition"); ZIEMELE, "States, Extinction", §19.

<sup>522</sup> CRAWFORD, *The Creation of States*, 22.

<sup>523</sup> BROWNLIE, *Principles*, 89-90; CRAWFORD, *The Creation of States*, 27.

<sup>524</sup> Art. 6 Montevideo Convention; HORBACH et al., *Handboek*, 176-180.

<sup>525</sup> CRAWFORD, *The Creation of States*, 23.

<sup>526</sup> *Ibid.*, 540.

<sup>527</sup> BROWNLIE, *Principles*, 89-90.

<sup>528</sup> T. D. GRANT, *The recognition of states: law and practice in debate and evolution*, Westport, Praeger, 1999, xix.

<sup>529</sup> O.C. OKAFOR, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, The Hague, Martinus Nijhoff, 2000, 68-69.

<sup>530</sup> CARIUS, et al., *Migration*, 7.

<sup>531</sup> HORBACH et al., *Handboek*, 165-167.

<sup>532</sup> CRAWFORD, *The Creation of States*, 669.

<sup>533</sup> Art. 7 Montevideo Convention; TALMON, *Recognition of governments*, 21-23.

<sup>534</sup> H. LAUTERPACHT, *Recognition in international law*, Cambridge, Cambridge University Press, 1947, 349-352.

<sup>535</sup> Art. 5 Institut de Droit International, "Resolutions Concerning the Recognition of New States and New Governments", *The American Journal of International Law* 30(4) (1936), 185.

or Use of Nuclear Weapons.<sup>536</sup>

Similarly, the flexibility of the Montevideo criteria point towards a noticeable tendency of the international community to let statehood and, importantly, state identity endure.<sup>537</sup> How else could the Federal Republic of Germany, with only a slightly altered constitution, have stepped up as the continuing, and not the successor state of the extinct German Democratic Republic which was simply added to a new Germany.<sup>538</sup> State practice reveals a preference for the preservation of formal and cultural state identity,<sup>539</sup> despite major changes in territory and control.<sup>540</sup> The same flexibility applies to large changes in population and international status.<sup>541</sup>

177. In conclusion, firstly, it is clear the basis to judge continuation of statehood has in practice strayed from the principle of effectiveness.

Secondly, states use the concept of recognition as a sort of stick and carrot approach, by choosing (not) to recognize an entity as a state, regardless fulfillment of the Montevideo criteria.<sup>542</sup> It is for the same reason *Bull* and *Watson* conclude their work on the international community by stating “much of the world is under the sway of states that are not states in the strict sense, but only *by courtesy*”.<sup>543</sup>

Thirdly, even if recognition as a tool would be viewed as an exception reserved for exceptional situations, the unprecedented situation of sinking island states has exceptional written all over it.

178. Perhaps it is time to abandon the practice and mindset of dividing the world up into entities worthy of statehood and those who are not. Perhaps it is time for quarter-states, half-states, full-states and deterritorialized states in a new world order.<sup>544</sup> Whether the international community sticks to existent divisions or draws new boundaries, the constitutive power of recognition to confirm the continuity of state, even in the form of a deterritorialized state, can be of great use. It can be employed to permanently establish a new kind of statehood or to apply a transitional label maintaining statehood whilst the state is looking for new territory to settle on.<sup>545</sup>

### II. 4. 2. 3. To be or not to be a state

179. It is worth indicating Judge *Cançado Trindade's* remark that international legal doctrine has become obsessed with the ideas of state sovereignty and territorial integrity, to the exclusion of other factors and so rendered oblivious of the most precious constitutive element of statehood which are the people.<sup>546</sup>

This statement was again reflected in Judge *Dillard's* separate opinion to the *Western Sahara case* wherein he stated “it is for the people to determine the destiny of the territory and not the territory the destiny of the

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<sup>536</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 *ICJ Reports* 226, 263.

<sup>537</sup> CRAWFORD, *The Creation of States*, 715.

<sup>538</sup> The same can be said of Russia which continued the membership of the politically defunct USSR in the United Nations. CRAWFORD, *The Creation of States*, 674 and 677.

<sup>539</sup> CRAWFORD, *The Creation of States*, 715.

<sup>540</sup> *Ibid.*, 667.

<sup>541</sup> CRAWFORD, *The Creation of States*, 678-679 and 685; J. MCADAM, “Disappearing States, Statelessness and the Boundaries of International Law”, in J. MCADAM, *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, Hart, 2010, 114 (hereafter: MCADAM, “Disappearing States, Statelessness”).

<sup>542</sup> BERLIN, “Recognition”, 534-535.

<sup>543</sup> H. BULL and A. WATSON, *Expansion of international society*, Oxford, Clarendon Press, 1984, 430.

<sup>544</sup> I. ÖSTERDAHL, “Relatively Failed: Troubled Statehood and International Law”, in J. KLABBERS (ed.), *Finnish Yearbook of International Law vol. 14*, Leiden, Martinus Nijhoff, 2003, 49.

<sup>545</sup> WONG, “Sovereignty sunk”, 33-34.

<sup>546</sup> ICJ, *Regarding the Independence of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade, 2010 *ICJ Reports* 204, §77.

people”.<sup>547</sup> States can use the non-recognition of island state extinction and so the implied recognition of continuance to acknowledge the island state, or the people, as a deterritorialized entity.<sup>548</sup>

This entity, as a unit of people, could firstly fit within a cosmopolitan world order and permanently or temporarily continue to be a state, with altered characteristics.<sup>549</sup> The framework of a cosmopolitan world order can accommodate the sunken island state’s people scattered throughout the world with due appreciation of their cultural diversity.<sup>550</sup>

Secondly, the entity could be recognized to fall within the existent category of international legal personalities with powers more limited than those of a state.<sup>551</sup>

180. The first option allows for the recognition of the entities as full-blown states. The island state would be categorized as a new type of state, a deterritorialized state. In this scenario the deterritorialized state could hold on to its sovereign state powers in the amount that they are still relevant.

181. For the second scenario, it must be remembered that statehood is no longer the only way to enter the international playing field.<sup>552</sup> The UN has been accorded possession of objective international personality, which the ICJ has stated to righteously entitle the UN to be respected by all, even by non-UN-member states.<sup>553</sup>

International legal personality embodies the competence to assume rights and duties under international law.<sup>554</sup> There exist several *sui generis* international legal personalities without a territory.<sup>555</sup> One of those *sui generis* entities is the Holy See which resides in Vatican City. Importantly, this entity has legal personality distinct from that of the state of Vatican City. The Holy See lacked territory from 1870 for 59 years, though its diplomatic relations always endured.<sup>556</sup> It is commonly accepted that the Holy See retained its international legal personality during that period.<sup>557</sup>

Another example of *sui generis* legal personality has materialized through the Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta. Today the Sovereign Military Order of Malta resides and owns the Magistral Palace and Magistral Villa on the Aventine Hill in Rome. The palace and villa have been awarded extra-territorial status by Italy in 1834.<sup>558</sup> Before settling in Rome, there were however times when the Order did not own any territory, but still the Order was and is recognized to have *sui generis* international legal personality by over 80 countries and the Italian Court of Cassation.<sup>559</sup> The Order of Malta produces passports<sup>560</sup> and has representatives in 104 countries.<sup>561</sup>

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<sup>547</sup> ICJ, Western Sahara Case, Advisory Opinion, Separate Opinion of Judge Dillard, 1975 *ICJ Reports* 12, 122.

<sup>548</sup> RAYFUSE, *International law and disappearing states*, 9; BURKETT, “The Nation Ex-Situ”, 95.

<sup>549</sup> BURKETT, “The Nation Ex-Situ”, 99-101.

<sup>550</sup> CAMPBELL, “Climate-Induced Community”, 69; RAYFUSE, *International law and disappearing states*, 11.

<sup>551</sup> WEI et al., *Receding maritime zones*, 5.

<sup>552</sup> PAHUJA, “Postcoloniality”, 464; CRAWFORD, *The Creation of States*, 29.

<sup>553</sup> Reparations, 185; CRAWFORD, *The Creation of States*, 30.

<sup>554</sup> SHAW, *International law*, 175-201.

<sup>555</sup> RAYFUSE, *International law and disappearing states*, 10.

<sup>556</sup> RAYFUSE, *W(h)ither Tuvalu?*, 10.

<sup>557</sup> A. KACZOROWSKA, *Public international law*, Abingdon, Oxon, 2010, 197-198.

<sup>558</sup> *960 years of history*, Order of Malta, [www.orderofmalta.int/history/639/history-order-of-malta/?lang=en](http://www.orderofmalta.int/history/639/history-order-of-malta/?lang=en).

<sup>559</sup> The Order was even completely without territory for 200 years. N. COX, “The Acquisition of Sovereignty by Quasi-States: The case of the Order of Malta”, *Monnibatten Journal of Legal Studies* 6 (2002), (26) 40.

<sup>560</sup> CARIUS, et al., *Migration*, 9.

<sup>561</sup> *Ibid.*, 7.



The UN<sup>562</sup> and the European Union (EU)<sup>563</sup> are examples of international non-state legal persons who take part in international relations.<sup>564</sup> For a while now, the EU has been part of the United Nations as an observing member and in 2011 it received additional participatory rights. Even if island states were to lose their statehood, they could still have the right to partake in some of the inner workings of the UN if they are able to hold on to legal personality.<sup>565</sup>

In addition, the islanders' group identity<sup>566</sup> would be preserved, as it is represented by the *sui generis* legal personality.<sup>567</sup> The biggest downfall of this option is the fact that legal persons cannot possess maritime zones. Again, an agreement added to the LOSC on this topic could bring relief.<sup>568</sup>

However, the actions of these *sui generis* entities will only have an effect on those recognizing their legal personality.<sup>569</sup> Therefore, it is vital for such entities that they are and stay recognized by others possessing international legal personality.<sup>570</sup> Taking into account the current recognition of the island states, continued recognition is not an irrational demand to be able to exist as a *sui generis* legal person with reduced rights and duties in comparison to a state.

### **II. 4. 3. Agreements**

182. It must be recalled that states are free to make treaties, as long as these agreements only contain provisions concerning rights of the treaty parties. This follows from the fact that the principle of consensus stands next to peremptory norms, as long as the agreement made does not infringe upon peremptory norms.<sup>571</sup> This way, states could agree to the continuity of a particular island state. Still, once again article 34 VCLT must be taken into account, which entails that the agreements will only function between the treaty parties.

### **II. 4. 4. Non liquet**

183. A *Non liquet* describes a situation for which there are no rules permitting, prohibiting or regulating the targeted situation in any way. This term stands in opposition of the Lotus principle, which allows for a situation if there are no rules prohibiting it, or the reversed Lotus principle, which prohibits all which is not specifically allowed.<sup>572</sup>

Whereas *non liquet* keeps a situation in limbo and waits for new regulations to deal with the specific situation, the Lotus principle eliminates any chance of a gap in law. Both terms are criticized as last resort options.<sup>573</sup> This paper<sup>574</sup> contends neither of those terms are applicable.

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<sup>562</sup> CRAWFORD, *The Creation of States*, 30.

<sup>563</sup> RAYFUSE, *International law and disappearing states*, 13.

<sup>564</sup> *Ibid.*, 10.

<sup>565</sup> L. FRIEDMAN, *If a country sinks beneath the sea, is it still a country?*, Scientific American, 23 August 2010, [www.scientificamerican.com/article.cfm?id=if-a-country-sinks-beneath-the-sea-is-it-still-a-country&offset=2](http://www.scientificamerican.com/article.cfm?id=if-a-country-sinks-beneath-the-sea-is-it-still-a-country&offset=2).

<sup>566</sup> MCADAM, "Disappearing States, Statelessness", 113.

<sup>567</sup> FREESTONE, "International law and Sea level Rise", 115-116; STAHL, "Unprotected ground", 18-19.

<sup>568</sup> RAYFUSE, *W(h)ither Tuvalu?*, 6.

<sup>569</sup> BROWNLIE, *Principles*, 64-65.

<sup>570</sup> HORBACH et al., *Handboek*, 180-185; PARK, *Climate change and the risk of statelessness*, 14.

<sup>571</sup> CRAWFORD, *The Creation of States*, 100 and 102.

<sup>572</sup> Lotus, 19.

<sup>573</sup> B. DANIEL, "Non Liquet and the Incompleteness of International Law", in L. B. DE CHAZOURNES and P. SANDS (eds.), *International law, the international court of justice and nuclear weapons*, Cambridge, Cambridge University Press, 1999, 159; SHAW, *International law*, 656.

Proust claimed “The real voyage of discovery consists not in seeking new lands, but seeing with new eyes.”. Similarly there is no need for entirely new legal theories or the acknowledgement of a gap in law to deal with statehood continuation as the prerequisite of legality and the theory of continuing recognition exist and can be applied.

## II. 5. CHANGE ON THE HORIZON

184. Doctrine still mostly puts the dominant Montevideo conditions on a pedestal.<sup>575</sup> Yet, all in all it remains unclear whether the Montevideo conditions, based on the principle of effectiveness, ever aimed to impose a strict normative legal standard or if they should just be regarded as the recordings of the most common factual constituents of statehood<sup>576</sup> amongst various territories,<sup>577</sup> at a certain point in time. State practice and this paper lean towards the latter interpretation and hold that the Montevideo criteria never claimed to be the one and only truth valid during the entire lifetime of a state.

185. State practice proves that the deficiency of any one of the conservative Montevideo statehood elements does not necessarily disrupt state continuity.<sup>578</sup> As exceptions are tolerated for each criterion, there seems to be no hierarchy amongst the criteria. Taking into account this flexibility of the criteria, there needs to be a grave enough shock to even shake state continuity.

186. The uncertainty shrouding the statehood of island states, could be the trigger international law needs to rethink the present stance on continuation of statehood and to stop enlarging the category of exceptions to the Montevideo criteria. International law suffers when subject matter is approached not only in a formal, but also in an overly and overtly formalistic manner.<sup>579</sup>

187. *Crawford* and *Grant* criticize the Montevideo definition of a state as well as being no more than a basis for further investigation,<sup>580</sup> as it includes unnecessary components and excludes components now known as indispensable.<sup>581</sup> Land territory no longer needs to be the necessary playpen of a state. States can easily exercise power extraterritorially over its nationals in pursuit of the passive personality principle. This evolution in law is already reflected in treaty law such as the LOSC by allowing jurisdiction over flag state vessels, regardless their whereabouts.

188. This paper does not have the purpose to oppose the current categorization of states, but it should be clear that the reversal of the formalization of the term state can lead to positive change, offering assistance in a world with climate change on the horizon.

A new world order would be better adapted to present-day legal obstacles and human needs. Instead of looking at the Montevideo criteria on creation of states, the act of recognition must be viewed as the main principle in state continuation. It must be once more underlined that this is no novelty and it has already left a mark on historical state practice.

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<sup>574</sup> Unlike what is put forth in the following paper which supports labeling the sinking islands' situation with a non liquet. A. G. JAIN, “The 21<sup>st</sup> century Atlantis: the international law of statehood and climate change-induced loss of territory”, *Stan. J. Int'l L.* 50(1) (2014), 49.

<sup>575</sup> VIDMAR, “Unilateral declarations”, 62.

<sup>576</sup> D. FRENCH, “Introduction” in D. FRENCH (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press 2013, 2 (hereafter: FRENCH, “Introduction”).

<sup>577</sup> CRAWFORD, *The Creation of States*, 46 and 97.

<sup>578</sup> CRAWFORD, *The Creation of States*, 718; G. KREIJEN, *State Failure, Sovereignty and Effectiveness*, Leiden, Martinus Nijhoff, 2004, 34.

<sup>579</sup> FRENCH, “Introduction”, 3.

<sup>580</sup> CRAWFORD, *Brownlie's principles*, 128

<sup>581</sup> GRANT, “Defining Montevideo”, 453-454.

189. Admittedly, a deterritorialized state, though possible, would be very fragile, for a people scattered throughout the world could easily integrate with the host state's population and become subject to the host state's laws. In such a scenario the original island state's government *ex situ* would primarily provide diplomatic protection, as current states provide for nationals abroad.<sup>582</sup>

The bottom line remains that regardless the outward appearance of a state, the prerequisite of effectiveness and the stabilizing objective of the Westphalian world do still have their relevance, but not as the dominating criteria.<sup>583</sup> These notions play their part in the sense that they can be a first barrier to eliminate theories keeping island states around in law, when they are inept in fact. The existence of such a state must at all times be avoided since it would be unsatisfactory for its subjects, as well as lack any international legitimacy.<sup>584</sup>

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<sup>582</sup> MCADAM, *'Disappearing states'*, 12.

<sup>583</sup> R. H. JACKSON, *Quasi-States: Sovereignty, International Relations, and the Third World*, Cambridge, Cambridge University Press, 1990, 23.

<sup>584</sup> PERRITT, "Structures", 425 and BURKETT, "The Nation Ex-Situ", 113.

## PART III – AID FOR FUTURE ACTION

190. When reasoning with the yardsticks of the reigning Montevideo Convention, it cannot be denied that a state and its statehood will most likely disappear when its entire land territory disappears and its population scatters.<sup>585</sup> Since these are today's circumstances, island states must face the quest to find resources which can help secure full or partial survival of statehood and its privileges, which is exactly what part III of this paper means to achieve.

191. At the present time, adaptation possibilities are often considered from a top-down approach. As a result abstract scientific research results remain out of touch with local knowledge and feasible adaptation measures.<sup>586</sup> It remains a fact that small islands states, even when clustered, hardly ever have the loudest voice on international level. Their limited financial means, small size, remoteness, susceptibility to natural disasters, isolated markets, limited human resources and economic dependence on other states which have often contributed to climate change do not help either.<sup>587</sup> Nonetheless, every adaptation option should consider the relevant context, meaning cultural and local conditions must be respected, also when administering more general adaptation methods.

192. Power is knowledge and further in depth and more local research remains important, especially when matching general adaptation models to a specific location. There are various research groups such as the Association of South Pacific Environmental Institutions Initiative (ASPEI), the Secretariat of the Pacific Regional Environment Programme (SPREP) and the SysTem for Analysis, Research and Training (START) which are all working towards this goal.<sup>588</sup>

However, often these initiatives remain stuck at the level of research, when they ought to branch out and commence processing and implementing the acquired research results into pragmatic responsive measures.<sup>589</sup> Such measures should, at least partially, swap the more commonly focused on post-damage ad hoc humanitarian aid<sup>590</sup> for more proactive external aid anticipatory to the onrushing waves.

193. The consequences of climate change are now increasingly referred to, not as abnormal, but rather the *new normal*.<sup>591</sup> This new term has been coined to explain the surge of storms and change in weather patterns due to climate change. The new normal however goes beyond meteorological observations. This paper has already put forth various mitigating and adaptive options<sup>592</sup> in order to continue satisfying the Montevideo criterion of territory.

Mitigation and adaptation however go beyond salvaging territory, and stretch out to every challenge climate change and sea level rise dumps on the island states. Since a state is associated with territory,

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<sup>585</sup> GAGAIN, "Climate change, sea level rise", 91.

<sup>586</sup> BARNETT and CAMPBELL, *Climate change and small island states*, 177.

<sup>587</sup> In 2012, 12.8 % of the Maldives GDP was procured through foreign direct investment, compared to a world average of 2.1 %. *Global Private Financial Flows*, World Development Indicators, <http://wdi.worldbank.org/table/6.9>; UNFCCC, *Climate Change: SIDS*, 14; A. POWERS, "Sea-level rise and its impact on vulnerable states: four examples", *La. L. Rev.* 73 (2012), (151) 170; S. TULLY, "The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific", *N.Z. J. Pub. & Int'l L.* 5 (2007), (169) 174 (hereafter: TULLY, "Contribution of Human Rights").

<sup>588</sup> BARNETT and CAMPBELL, *Climate change and small island states*, 70.

<sup>589</sup> *Ibid.*, 72-75.

<sup>590</sup> TULLY, "Contribution of Human Rights", 194.

<sup>591</sup> T. BURKE, *Events, dear boy, events have put climate change back on the agenda*, *The Guardian*, 26 March 2014, [www.theguardian.com/environment/blog/2014/mar/26/events-climate-change-extreme-weather](http://www.theguardian.com/environment/blog/2014/mar/26/events-climate-change-extreme-weather); *A sooner Spring and a later Autumn suggests the new normal*, News release University of Southampton, 28 March 2014, [www.southampton.ac.uk/mediacentre/news/2014/mar/14\\_49.shtml](http://www.southampton.ac.uk/mediacentre/news/2014/mar/14_49.shtml).

<sup>592</sup> UN Doc. A/64/350 (2009), 24.

population and exercise of power, state adaptation must focus on all of these parts of a state.

194. All those required measures will however not just fall into an island state's lap. The difficulty for many small island state governments to keep their feet out of the water is related to the lack of technology for and cost of adaptive measures.<sup>593</sup> These states are more often than not Small Island Developing States (SIDS), whereof 20 percent also qualifies as a Least Developed Country (LDC).<sup>594</sup>

### III. 1. WHICH HELP IS NEEDED

195. It is doubtful if the numerous small island or developing nations' organizations can offer adequate aid to sinking island states by themselves. These organizations, such as the Alliance of Small Island States (AOSIS), the Central American Integration System (SICA) and the Group of 77 (G77) serve more as a voice calling upon other states to cooperate and to provide assistance.<sup>595</sup>

196. Despite long-lived awareness of problems, still most island states have not come up with a game plan, let alone have they implemented such a plan.<sup>596</sup> The IPCC's AR5 even explicitly mentions "[p]lanning for sea level rise has evolved considerably over the past two decades and shows a diversity of approaches, although its implementation remains piecemeal".<sup>597</sup>

By 2005, merely 20 percent of the SIDS had established specific institutions to cover integrated coastal and marine management. A more inspiring 63 percent had already made national sea rise adaptation plans, but only 22 percent actually established institutions to further elaborate on and execute the planned adaptation measures.<sup>598</sup>

197. Whereas developing countries seek to implement action-oriented plans, developed countries tend to seek further enhancement of knowledge to eventually come to a process-driven solution. This differing approach highlights another difficulty of the UNFCCC's Conference of Parties' (COP) negotiation process and explains the lack of fine-tuned cooperation.<sup>599</sup>

198. In short, strengthened cooperation, more data on climate change and appropriate adaptation measures are required as well as supportive assistance in kind or through monetary aid.

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<sup>593</sup> A. VOCCIA, "Climate Change: what future for small, vulnerable states", *International Journal of Sustainable Development & World Ecology* 19(2) (2011), (101) 108 (hereafter: VOCCIA, "Climate Change"); SCHOFIELD, "Shifting limits", 411.

<sup>594</sup> POWERS, "Climate Change and Pollution", 20; VOCCIA, "Climate Change", 101.

<sup>595</sup> *Ibid.*, 24.

<sup>596</sup> UNFCCC, *Climate Change: SIDS*, 26.

<sup>597</sup> IPCC, 2014: *Summary for Policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability*, 9.

<sup>598</sup> Global Conference on Oceans, *Global oceans conference 2010*, 18

<sup>599</sup> I. MILLAR, C. GASCOIGNE and E. CALDWELL, "Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process" in M. B. GERRARD and G. E. WANNIER (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 454 (hereafter: MILLAR et al., "Making Good the Loss").

### III. 2. FUNDS

199. Next to help in kind, which can be orchestrated through aid coming from associated or merged with states, and more liberal migration policies protecting environmental refugees, monetary funds will be required.<sup>600</sup>

200. On a national level New Zealand has made a voluntary commitment to allocate 5 million NZD per year to assist climate change projects in developing countries. Much of these funds are aimed at the Pacific, including through the New Zealand Aid Programme's Pacific Regional Environmental Programme.<sup>601</sup> Not only New Zealand,<sup>602</sup> but also Australia<sup>603</sup> has a national action plan to assist the nearby Pacific islands in their climate change struggle.

201. International organizations such as the World Bank and the Global Environment Facility (GEF) are essential in providing monetary support for research projects and implementation of adaptation measures.<sup>604</sup> On the planning level, GEF has instigated the Strategic Pilot on Adaptation (SPA).<sup>605</sup> Moneywise, GEF manages the Strategic Priority on Adaptation pilot (SPA), the Special Climate Change Fund (SCCF) and the Least Developed Countries Fund (LDCF) created by the UNFCCC and assists in the management of the Adaptations Fund under the Kyoto Protocol to support costly adaptation measures. The Adaptation Fund (AF) is one of the few funds linked to mandatory monetary contributions. These contributions to the AF however still do not truly guarantee funds as they are mostly linked to the volatile system of revenues gained from the Clean Development Mechanism (CDM) of the Kyoto Protocol.<sup>606</sup>

The Copenhagen Green Climate Fund (GCF), formally established in the UNFCCC's 2010 Cancun session, contains a commitment of developed countries to provide 100 billion USD per year by 2020, but currently it is still unclear where those funds will come from.<sup>607</sup>

202. Funds targeting mainly other issues besides climate change such as global food security, could theoretically also be tapped into, given the extent of the detrimental influence of climate change. But still a shortage of funds to support climate change mitigation and adaptation measures is predicted.<sup>608</sup> Additionally, the funds are often meant for not only adaptation but also mitigation measures, despite a strong demand for an adaptation specific fund.<sup>609</sup> Together with the fact that the funds as they exist today contain insufficient monetary means, the island states also have to deal with difficult application

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<sup>600</sup> An oversight of climate change funds can be found on the Climate Funds Update website. *About Climate Funds*, Climate Funds Update, [www.climatefundsupdate.org/listing](http://www.climatefundsupdate.org/listing).

<sup>601</sup> *New Zealand's immigration relationship with Tuvalu*, New Zealand Ministry for the Environment, 19 December 2013, [www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php](http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php).

<sup>602</sup> *Financial resources and technology transfer*, NZ Ministry for the Environment, [www.mfe.govt.nz/publications/climate/nz-fifth-national-communication/page8.html](http://www.mfe.govt.nz/publications/climate/nz-fifth-national-communication/page8.html)

<sup>603</sup> *Climate Change*, Australian Government: Department of Foreign Affairs and Trade, <http://aid.dfat.gov.au/aidissues/climatechange/Pages/home.aspx>

<sup>604</sup> VOCCIA, "Climate Change", 110.

<sup>605</sup> B. BIAGINI, S. DOBARDZIC, L. CHRISTIANSEN, R. MOORE, C. ORTIZ-MONTEMAYOR and D. SCHINN *Financing Adaptation Action: Least Developed Countries Fund*, GEF, 2012, [www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf](http://www.thegef.org/gef/sites/thegef.org/files/publication/AdaptationBooklet.pdf), 4.

<sup>606</sup> UNFCCC Conference of the Parties, Decision 10/CP.7, *UN Doc. FCCC/CP/2001/13/Add.1* (2002), 52.

<sup>607</sup> *Climate Action*, European Commission, [http://ec.europa.eu/clima/policies/international/negotiations/progress/index\\_en.htm](http://ec.europa.eu/clima/policies/international/negotiations/progress/index_en.htm); MILLAR et al., "Making Good the Loss", 467.

<sup>608</sup> SCHUBERT et al., *Climate Change as a Security Risk*, 208 and 211; VERHEYEN et al., *Beyond Adaptation*, 12.

<sup>609</sup> N. BIRD, J. BROWN and L. SCHALATEK, *Climate Finance Policy Brief No.4: Design Challenges for the Green Climate Fund*, Overseas Development Institute, 2011 [www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6457.pdf](http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6457.pdf), 4.

requirements to receive help and a lack of willingness to transfer technology.<sup>610</sup>

203. This remains so despite the fact that the concept of a Loss and Damage Mechanism was already put on the UNFCCC negotiation table by AOSIS in 1991.<sup>611</sup> The concept has however remained on the negotiation table so far. The united small island states are rightly prudent to ask for assistance, as they will need it, both monetary and in kind.

### III. 3. INSURANCE MECHANISMS

204. Agreements can be made between two or more states in order to provide aid or procure continued recognition for the island states. As the targeted polluters will likely not be so eager to cooperate freely, the claimant states could instead try to invoke the polluters' responsibility and/or liability. Before resorting to dispute settlement however,<sup>612</sup> another mechanism can be considered with regard to environmental risks and harm.

Insurance agreements are not unknown to the environmental disasters scene, and their use is being examined for climate change scenarios.<sup>613</sup> The United Nations Environment Programme (UNEP), the Inter-American Development Bank, the World Bank and the United Nations Development Programme (UNDP) have all stressed their support for insurance-related risk reduction and transfer agreements.<sup>614</sup>

205. Several types of insurance schemes relating to both public and private funds have been suggested such as the sovereign insurance scheme, micro-insurance, and index-based macro insurance.<sup>615</sup>

Sovereign insurance draws on private insurers and was for example established by sixteen governments to provide financial liquidity after the 2004 hurricane season struck the Caribbean Islands.

Micro-insurance offers protection on the level of singular households. In this regard the Participatory Livestock Compensation Fund, set up by the NGO Proshika in Bangladesh, aids farmers to overcome their losses induced by floods.

Ever since 2008, about two-dozen weather index-based insurance schemes were successfully implemented in several developing countries, including Peru, Malawi, Mexico, Mongolia and Caribbean countries. Weather-indexed based insurances schemes are triggered when a set standard of a meteorological element, such as precipitation, is exceeded. This way, the insurance system is linked to objective data and remains unencumbered with a heavy burden of proof for those insured.<sup>616</sup>

206. The drawbacks of every single one of these insurance types lies with the substantial conditions of

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<sup>610</sup> POWERS, "Climate Change and Pollution", 33.

<sup>611</sup> Intergovernmental Negotiating Committee, UNFCCC, Fourth session, A/AC.237/Misc.17/Add.9., (1991); UNFCCC Decision 1/CP.16, Cancún Agreements: Outcome of work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, (2010), §26.

<sup>612</sup> FREESTONE, "International law and Sea level Rise", 82.

<sup>613</sup> Alliance of small island states, *Proposal to the AWG-LCA: Multi-Window Mechanism to Address Loss and Damage from Climate Change Impact*, UNFCCC, 2008, [http://unfccc.int/files/kyoto\\_protocol/application/pdf/aosisinsurance061208.pdf](http://unfccc.int/files/kyoto_protocol/application/pdf/aosisinsurance061208.pdf); Munich Climate Insurance Initiative, *Adaptation to Climate Change: Linking Disaster Risk Reduction and Insurance*, UNFCCC Climate Talks (June 6, 2009), 2009, <http://unfccc.int/resource/docs/2009/smsn/ngo/163.pdf>.

<sup>614</sup> MILLAR et al., "Making Good the Loss", 457.

<sup>615</sup> *Ibid.*, 458.

<sup>616</sup> *Risk Management Approaches to Address Adverse Effects of Climate Change – Insurance*, UNFCCC, [http://unfccc.int/cooperation\\_support/response\\_measures/items/4971.php](http://unfccc.int/cooperation_support/response_measures/items/4971.php).

the policies, limited coverage and expensive premiums.<sup>617</sup> These insurance policies may have offered relief for more confined weather-related risks, but seem inappropriate for the particular risk of sea level rise for highly threatened island states. The very essence of an insurance policy is that it constitutes an agreement based on chance. Maybe damage will materialize with heavy losses or perhaps with minor losses, widespread or very local, and maybe no damage will arise at all.

The island states' situation seems uninsurable since it does not fit in this sphere of contracts based on chance, as damage is highly likely to occur, on a large scale and at a great cost. The only scenario in which the insurance plan might be installed and the premiums might be payable, is one where an island state has already put funds towards severe mitigating and adaptation measures lessening the risk of damage.

### III. 4. THE COURTROOM

“If wars have been waged to protect the rights of people to live in freedom, and to safeguard their security, why will they not be waged to protect our right to survive from the onslaught of climate change?”<sup>618</sup>

207. Slowly but certainly acceptance of barring the infliction of environmental harm on another state has grown. Amongst others, this idea has materialized through the principle of avoiding transboundary harm. There has been a surge of the number of environmentally orientated cases, both on national and international level, but that does not mean those cases are easily won.<sup>619</sup> Besides overcoming procedural difficulties, nations will need to have a strong case before more than mere recognition of harm and a breach of rights are awarded.

208. When Nauru looked to redress the environmental harm dealt to its lands by 90 years of Australian phosphate mining,<sup>620</sup> Nauru held Australia had infringed upon the trusteeship obligations it had accepted under Article 76 of the UN Charter and under the Trusteeship Agreement for Nauru of 1 November 1947. Nauru was left with 80 percent of its lands heavily damaged and unusable. The case ended with a bilateral agreement between Nauru and Australia wherein Australia promised to rehabilitate the mined areas of Nauru.<sup>621</sup>

209. Nauru was able to base its claim on clear legal grounds and to point out the wrongdoer. Climate litigation has none of those certainties. There are numerous parties contributing to climate change and as climate change takes place all over the globe, it will not be easy to pinpoint who exactly is at the other end of the mess. Unlike a polluting oil spill which is often easily and directly linked to a single pollutant, such a direct evident link will not be apparent in climate change litigation.<sup>622</sup>

210. Furthermore, it will have to be determined what exactly makes the relevant state's actions

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<sup>617</sup> MILLAR et al., “Making Good the Loss”, 460.

<sup>618</sup> *Small island nations' survival threatened by climate change*, UN News Centre, 25 September 2008, [www.un.org/apps/news/story.asp?NewsID=28265](http://www.un.org/apps/news/story.asp?NewsID=28265).

<sup>619</sup> D. B. HUNTER, *The Implications of Climate Change Litigation for International Environmental Law-Making*, American University Washington College of Law, Working Paper No. 2008-14, [http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1005&context=fac\\_works\\_papers](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1005&context=fac_works_papers), 18-19.

<sup>620</sup> J. CONNELL, “Losing ground? Tuvalu, the greenhouse effect and the garbage can”, *Asia Pacific Viewpoint* 44(2) (2003), (98) 98 (hereafter: CONNELL, “Losing ground?”).

<sup>621</sup> ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 1992 *ICJ Reports* 240, Discontinuance, No. 93/29.

<sup>622</sup> WERKSMAN, “Could a Small Island?”, 412.



unlawful and whether there was fault or at least foreseeability of harm.<sup>623</sup> However, even when the no transboundary harm rule could be used as a legal ground, other thorny issues remain. It seems highly unlikely a state can prove an exact causal link<sup>624</sup> between the targeted unlawful state actions and the climate change harm which has occurred and for which damages are claimed.<sup>625</sup> Nonetheless a trend of instigating climate change litigation with defendants in the form of governments,<sup>626</sup> industries and related commercial entities and insurers has emerged and seems to have come to stay.<sup>627</sup>

### ***III. 4. 1. International litigation***

211. The island states could turn to international courts to invoke the polluting states' responsibility and/or liability.

212. At times, doctrine unjustly interchanges the terms state liability and responsibility, or confounds their meaning as similar to their meaning in national laws.<sup>628</sup> For this reason a short clarification seems in order.

213. State liability, for lawful but abnormally risky acts, must be explicitly expressed. An example hereof can be encountered in the Convention on International Liability for Damage Caused by Space Objects.<sup>629</sup> Other international liability regimes, such as those of the Hazardous and Noxious Substances Convention<sup>630</sup> or the Vienna Convention on Civil Liability for Nuclear Damage,<sup>631</sup> tend to focus on the operator, instead of the state as the liable one.<sup>632</sup> Without such an explicit legal base, liability will not easily be accepted as applicable.<sup>633</sup>

214. State responsibility on the other hand, is linked to an unlawful act committed by a state. The ASR are regarded as authoritative on the topic by the international community.<sup>634</sup> In the case at hand, state responsibility is in order. As discussed above, a state's responsibility can be invoked when it has committed an internationally wrongful act by omitting or committing an act, which is attributable to the state, and which results in breaching an international obligation. The character of the obligation,<sup>635</sup> which

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<sup>623</sup> R. LORD, S. GOLDBERG, L. RAJAMANI, J. BRUNNÉE, *Climate change liability*, Cambridge, Cambridge University Press, 2012, 34 (hereafter: LORD et al., *Climate change liability*).

<sup>624</sup> Art. 31 ASR.

<sup>625</sup> BIRNIE et al., *International Law & the Environment*, 224.

<sup>626</sup> LORD et al., *Climate change liability*, 28-34.

<sup>627</sup> KOLMANSKOG et al., "Development", 172.

<sup>628</sup> KOSOLAPOVA, *Interstate liability*, 3.

<sup>629</sup> Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, 961 UNTS 187

<sup>630</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances of 3 May 1996, 35 ILM 1415 (not in force).

<sup>631</sup> OECD Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982.

<sup>632</sup> FITZMAURICE, "International Responsibility", 1022-1023.

<sup>633</sup> Pulp Mills, §272; A. BOYLE, "Liability for Injurious Consequences of Acts Not Prohibited by International Law" in J. CRAWFORD, A. PELLET and S. OLLESON (eds.), *Oxford commentaries on international law: The law of international responsibility*, Oxford, Oxford University Press, 2010, 104; BIRNIE et al., *International Law & the Environment*, 518; P. GUTTINGER, "Allocation of responsibility for harmful consequences of acts not prohibited by international law" in J. CRAWFORD, A. PELLET and S. OLLESON (eds.), *Oxford commentaries on international law: The law of international responsibility*, Oxford, Oxford University Press, 2010, 516.

<sup>634</sup> ICJ, Application of the Conventions of the Prevention and punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) 2007 *ICJ Reports* 43, §460; ICJ, Armed Activities on the territory of the Congo (Democratic Republic of Congo v Uganda) 2005 *ICJ Reports* 168, §293.

<sup>635</sup> Art. 12 ASR; B. STERN, "The Elements of an Internationally Wrongful Act" in J. CRAWFORD, A. PELLET and S. OLLESON (eds.), *Oxford commentaries on international law: The law of international responsibility*, Oxford, Oxford University Press, 2010, 193.

was incumbent on the state at the time of the breach, does not matter.<sup>636</sup>

When it comes to GHG emissions, associated policy and industry standards, these are all set by government bodies and so the governmental regulations on emission standards will be considered attributable to a state without much hassle.<sup>637</sup> Likewise, legal standing should not pose much of an issue here, as the term injured state of article 42 ASR will be an easy fit for the island states.

The tougher bit of the definition lies with the links between the state act or omission, the breach of an international obligation and the harm present.<sup>638</sup> In addition, finding the appropriate international forum which has jurisdiction over both parties, can be quite difficult as well. For example, only 70 states have deposited a declaration recognizing the ICJ's jurisdiction as compulsory.<sup>639</sup>

215. Breaches of law have already been proposed in this paper so as to kick start the duty of non-recognition of the consequences of an act deemed in breach of a peremptory norm. Those grounds remain valid to base a claim of restitution on. When the polluting state is found responsible, it will have to make reparations by halting the unlawful act, and possibly compensating the damages suffered.<sup>640</sup> For the latter, again causality will be the issue as state practice is known to deny compensation for damages too indirect, remote and uncertain.<sup>641</sup>

216. This topic does however deserve an added remark. Infringed upon rules will not just turn to gold. This is especially true for poorly delineated stipulations such as the no harm rule. The precise consequences ensuing from a breach of the no harm rule are unclear. What is agreed upon, is its power to reverse the burden of proof. This entails a defendant state will have to prove that there is no causal link between its action and the damage present, rather than the claimant having to prove that the other's actions have resulted in particular harm.<sup>642</sup>

This may seem a feeble result, but it is anything but. The reversal of the burden of proof is exactly what is needed to resolve the difficult issue of proving the causal connection between acts and damages in climate change litigation.

217. Despite the many obstacles for international litigation, Tuvalu already considered venturing down this path during international negotiations in 2002 when the prime minister suggested to take the issue of exhausted greenhouse gases and the consequences thereof for Tuvalu to court.<sup>643</sup> Up until today Tuvalu hasn't actually taken the step towards the ICJ. The envisioned counterparties were Australia and the USA.<sup>644</sup> Most definitely Tuvalu's hesitant behavior has to do with the fact that the claim's chances of succeeding are next to nothing. Neither Australia nor the USA recognizes the legal outcome of ICJ cases.<sup>645</sup>

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<sup>636</sup> Art. 1 and 2 ASR.

<sup>637</sup> Art. 8 ASR and TOI et al. "State responsibility", 1111.

<sup>638</sup> LORD et al., *Climate change liability*, 28-49.

<sup>639</sup> *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ, [www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3](http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3).

<sup>640</sup> Art. 30 and 31 ASR; PCIJ, *The Factory at Chorzow (Germ. v. Pol.)*, 1928 *PCIJ Series A No. 17*, §125.

<sup>641</sup> *Trail Smelter*, 1931.

<sup>642</sup> ITLOS, *The Mox Plant Case (Ireland v United Kingdom)*, ITLOS Case No 10 (2001), Separate opinion of Judge Wolfrum, 3.

<sup>643</sup> PHILANDER, *Encyclopedia*, 988-989.

<sup>644</sup> CONNELL, "Losing ground?", 103.

<sup>645</sup> C. P. CARLARNE, *Climate change law and policy*, Wiltshire, Oxford university press, 2010, 128.

### ***III. 4. 2. National litigation***

218. First it must be remarked that the term liability under this subtitle will be used as an all-encompassing term, since its meaning will differ from one national legal order to another. In order to find the one liable for damage caused by climate change one can turn to two different national liability systems in national courts. The first is supported by public law, the other by private law.

219. The public law path aims to tackle governments and their decisions granting permits to public and private, highly polluting entities in disregard of constitutional or administrative regulations. In this case both the abovementioned international state responsibility as well as nationally regulated state liability can be applicable.<sup>646</sup>

When a government or one of its agencies fulfills the role of the adversary, the claimant will have to sue in the adversary's national courts, if it does not wish to infringe upon state immunity.<sup>647</sup> State immunity makes sure a state is principally immune to prosecution in another state.<sup>648</sup> The USA, for example, does accept a state's waiver of state immunity in certain cases, so that a US court can judge the foreign state in the end.<sup>649</sup> The claimant can be anyone from a domestic or foreign individual, to an NGO or a state's government.<sup>650</sup>

220. The second type of liability directly focuses on the private polluting entity.<sup>651</sup> In civil law countries, one could turn towards liability as such, whereas common law countries can rely on the public nuisance<sup>652</sup> or negligence tort<sup>653</sup> to procure reparation in cash or in kind. When multiple forums are open to receive a claim, there is room for forum shopping, meaning that a claimant can freely choose one of the available forums. Most likely the choice will consist of the courts where the defendant resides, where the harmful activity took place or where the damage has occurred. Apart from some exceptional cases, it has thus far proven to be quite the ordeal to get a satisfactory verdict.<sup>654</sup>

221. These options do not ascertain jurisdiction of courts, and courts may have to dismiss the case.<sup>655</sup> At the beginning of the litigation history of *Ecuador v Texaco/Chevron* which now already spans two decades, class actions were filed in the name of Ecuadorian and Peruvian nationals in New York in 1993. Claimants asked for damages for the pollution of Peru and Ecuador's rainforest and rivers, allegedly caused by Texaco's operations between 1964 and 1992.<sup>656</sup> After appeals, the US courts eventually dismissed both cases in 2002 based on *forum non conveniens*, meaning that the US courts deemed Ecuadorian courts better suited to judge this matter.<sup>657</sup>

The pitfalls and benefits that come with a multitude of forums are distinctly portrayed in this case. In

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<sup>646</sup> A. NOLLKAEMPER, "Internationally Wrongful Acts in Domestic Courts", *The American Journal of International Law* 101(4) (2007), (760), 760.

<sup>647</sup> ICJ, Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), 2012 *ICJ Reports* 99

<sup>648</sup> C. A. WHYTOCK, "Foreign state immunity and the right to court access", *Boston University Law Review* 93 (2013), (2033), 2034 (hereafter: WHYTOCK, "Foreign state immunity").

<sup>649</sup> S. C. TOSINI, "Foreign Sovereign Standing to Sue the United States in Its Own Courts under the Administrative Procedure Act", *J. Int'l L.* 28 (2014), (91) 92; WHYTOCK, "Foreign state immunity", 2064.

<sup>650</sup> Court of International Trade, *Tembec Inc. v United States* (2006), 441 F. Supp. 2d 130, 1321-1323

<sup>651</sup> FREESTONE, "International law and Sea level Rise", 82.

<sup>652</sup> M. HIGGINS, "Legal and policy impacts of sea level rise to beaches and coastal property", *Sea Grant Law and Policy Journal* 1(1) (2008), (43) 61.

<sup>653</sup> LORD et al., *Climate change liability*, 32.

<sup>654</sup> CONNELL, "Losing ground?", 98.

<sup>655</sup> BIRNIE et al., *International Law & the Environment*, 222 and FITZMAURICE, "International Responsibility", 312.

<sup>656</sup> US District Court NY, *Aguinda v. Texaco, Inc.* (1993), Dkt. No. 93 Civ. 7527; US District Court NY, *Jota v. Texaco, Inc.* (1994), Dkt. No. 94 Civ. 9266.

<sup>657</sup> US Second Circuit Court, *Aguinda v. Texaco, Inc* (2002), 303 F.3d 470.

March 2014, the District Court of New York judged that it recognized the pollution claim, though barred the Ecuadorian judgment awarding 9.5 billion USD from enforcement in the USA due to fraud and corruption of Steven Donziger and associates, whom were representing the claimants.<sup>658</sup> The victory of 2011 in the Ecuadorian court started to turn sour.

Claimants can however still continue to challenge Chevron, which incorporated Texaco, in Brazil, Argentina and Canada where Chevron also has assets. Yet, also those efforts have recently been dealt a blow when in May 2014, the Washington law firm Patton Bogs which worked alongside Donziger and represented claimants in each of those countries, decided to drop out of the case and agreed to pay Chevron 15 million USD in settlements.<sup>659</sup> This multinational litigation saga on environmental pollution has not even come to end, but already demonstrates judicial action can get tangled up in ancillary issues and might not be the swiftest way to monetary compensation for climate change harm.

### III. 5. OUTSIDE THE COURTROOM

“Global warming threatens the physical and cultural survival of several South Pacific societies. They are innocent victims of the northern hemisphere’s 300-year ory of fossil fuel burning in the name of industrialization.”<sup>660</sup>

222. When the British climatologist *Mike Hulme* put it this way, he was underlining the basis for the polluter pays principle,<sup>661</sup> which points the finger to most industrialized countries.<sup>662</sup>

223. Trying to make the polluter pay does not necessarily have to take place within the usual courtrooms and article 33 of the UN Charter reveals a number of other types of dispute resolution. In particular the Charter encourages states to seek a solution through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of own choice.<sup>663</sup>

224. Furthermore, the UNFCCC can offer limited aid via a conciliation commission established by article 14.6 UNFCCC which can decide on the appropriate application and interpretation of several UNFCCC articles. The decision will however only have to be considered by the parties in good faith.<sup>664</sup>

225. Besides dispute resolution, island states could turn to courts for advisory opinions and UN institutions for resolutions as well. After unsuccessfully asking the UNSC for a resolution on protection of island states against climate change induced sea level rise,<sup>665</sup> more recently Palau has asked the UNGA to seek an advisory opinion of the ICJ to put a spotlight on the security implications<sup>666</sup> of climate change.<sup>667</sup>

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<sup>658</sup> Originally the award amounted up to 19 billion USD, but it was scaled back to 9.5 billion USD by the Ecuadorean National Court of Justice. US District Court NY, *Chevron corporation v. Steven Donziger* (2014), 11 Civ. 0691 (LAK).

<sup>659</sup> C. KRAUSS, *Patton Bogg settles dispute with Chevron over pollution case*, New York Times, 7 May 2014, [www.nytimes.com/2014/05/08/business/energy-environment/patton-boggs-settles-dispute-with-chevron-over-pollution-case.html?hpw&rrref=business&r=1](http://www.nytimes.com/2014/05/08/business/energy-environment/patton-boggs-settles-dispute-with-chevron-over-pollution-case.html?hpw&rrref=business&r=1)

<sup>660</sup> P. HULM, *A Climate of Crisis: Global Warming and the Island South Pacific*, Port Moresby, Association of South Pacific Environmental Institutions, 1989, 1.

<sup>661</sup> *Environmental change and forced migration*, 18.

<sup>662</sup> BARNETT and CAMPBELL, *Climate change and small island states*, 183.

<sup>663</sup> Art. 33.1 UN Charter.

<sup>664</sup> Art. 14 UNFCCC.

<sup>665</sup> UN News, *Reeling from impacts*

<sup>666</sup> VOCCIA, “Climate Change”, 107.

This advisory opinion would not be binding, but would provide a well-respected view on the issue.<sup>668</sup>

226. An innovative, diplomatic approach was used by the Federated States of Micronesia (FSM) in the 2010 *FSM v. Prunéřov* dispute in which the FSM wrote the Czech ministry and demanded an environmental impact assessment (EIA) be made for a Czech Republic power plant running on coal, since FSM feared transboundary harm in the form of climate change.<sup>669</sup> The EIA was made and it concluded no significant transboundary harm would emanate from the project. This dispute did not do much for climate change prevention itself, however the complaint did achieve worldwide attention for just how global the issue of climate change is. The FSM and the Czech Republic lie about 12.800 km apart.

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<sup>667</sup> *Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*, UN, 3 February 2012, [www.un.org/News/briefings/docs/2012/120203\\_ICJ.doc.htm](http://www.un.org/News/briefings/docs/2012/120203_ICJ.doc.htm)

<sup>668</sup> Art. 65 ICJ Statute.

<sup>669</sup> European Network of Environmental Law Organizations, *Implementation of the Environmental Impact Assessment Directive in the EU: Member States Case law examples from the practice of the European environmental impact assessment litigation*, Justice and Environment, 2013, [www.justiceandenvironment.org/files/file/2013/EIA%20Implementation%20Legal%20Analysis%202013.pdf](http://www.justiceandenvironment.org/files/file/2013/EIA%20Implementation%20Legal%20Analysis%202013.pdf), 13.

## PART IV – CONCLUSION

227. Surely the island states look to their future with a sinking feeling, but the rest of the world seems to need a sunken island before taking veritable action. The international community should not turn away from preventive mitigating measures, yet urgently needs to redistribute efforts in order to have an adaptive strategy accommodating a realistic worst case scenario as well.

Most of all, island states need insight into their legal future. Current legal theory must be permitted to evolve along with a more modern perception of statehood continuation and allocation of maritime zones.

228. Island states are very concerned with keeping their culture and identity. In 2011, the Republic of Micronesia's ambassador to the UN emphasized "land is our identity, not an interchangeable commodity".<sup>670</sup>

However, cultural identity does not have to stick to land or have a connection to a state. Just as numerous federal states, also Belgium contains distinct units of people which each have their own separate identity. Those units can be divided geographically, though this is not even necessary. New Zealand, as a whole, is home to the Māori people as well as the descendants of British conquerors. These two units of people are culturally distinguishable and uphold that distinction in everyday life, yet manage to live in a respectful harmony in New Zealand.

229. Concerning the question of statehood, there must be given a clear answer to the question if sinking or sunken islands should still possess statehood at all when they can no longer satisfactorily fulfill the criteria of land territory and permanent population.

A division must be made between islands which are able to maintain their lands partly or find new natural or artificial land territory, and those who become bereft of all land territory. The first category could be able to keep its state identity, whereas the second should transit into a new internationally recognized legal entity. When matters come to

230. Retention of statehood for the first category can materialize through UN resolutions, made to call upon all states not to recognize a state's unjust climate change induced demise by not fulfilling the Montevideo criteria. What concerns the Montevideo criteria, these are not fit to be applied strictly, nor are they applied as such in state practice today. They should be viewed as a mere tool when it comes to state continuation.

The non-recognition of a state's demise, and thus the recognition of statehood should furthermore not be hinged on discovery of a breach of uncertain peremptory norms. When it comes to continuance of states the practice of recognition must follow from the *ex injuria jus non oritur* theory and state practice as it stands today.

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<sup>670</sup> For *Island Nations Threatened by Climate Change, Conference Outlines Their Legal Remedies*, Columbia Law School, 23 May 2011, [www.law.columbia.edu/media\\_inquiries/news\\_events/2011/may2011/risingseas-gerrard](http://www.law.columbia.edu/media_inquiries/news_events/2011/may2011/risingseas-gerrard).

231. For the second category of states, the existence of powerful entities with legal personality, such as the European Union, cannot be overlooked. The international community is on a course to operate in a more unified manner. This does not mean island states should be allowed to disappear overnight without a fight, but that a solution may lie in a transitory policy wherein statehood is slowly relinquished and populations are joined.

232. The transitory nature of possible continued recognition of a fully sunken island state as a state without any sort of territory is apparent and necessary. Promoting the opposite, would be promoting fiction. Yet, that is not to say the international legal order should remain as it is.

Denial is not a strategy. The international community should make place for a new type of entity based on an independent governing body *ex situ* and governing cosmopolitan people. Naturally, such an entity should only wield powers useful to it, such as, for example, diplomatic protection.

233. Now concerning the island state's maritime zones, as much as this paper supports the eventual relinquishment of statehood for states lacking all land territory, it backs the retention of fixed maritime zones for all the island states in trouble. This measure is essential to continue to finance the needs of the islands' population which will become a cosmopolitan people.

Furthermore, maritime territory is just as much territory as land territory, and it is a conservative notion to legally favor one above the other due to prior practical considerations of exclusive habitability. The notion of habitability is likely to alter, especially given due consideration of artificial installations sitting atop this maritime territory.

For this reason, the existence of maritime territory should no longer be linked to the existence of land territory. In such a frame of mind, an island state and its statehood might once again re-emerge through artificial constructions located in or on maritime territory, when law and technology allow for this.

234. In order to turn current and future measures into reality, a state will need a greater effort of the international community, both in mitigating policies as adaptation funds. Courtrooms however, whether they are national, regional or international, do not seem to offer anything but more hurdles to overcome. Court cases, private liability and state responsibility will mostly find their use in creating more awareness and so hopefully appealing to true global political interest in regulating polluting industries and climate change in general.

235. When it comes to awareness, knowledge is power, but there must first be knowledge. It will remain crucial to continue developing awareness and promoting research on climate change and in particular sea level rise, to further gain the willingness of the international community to aid the island states in need of help and frankly, justice.

236. In the end, each case will need its own fitted solution, depending on success in maintaining its maritime zones to use as leverage for external aid and the habitability of its land or maritime territory.

Looking towards the near future, island states should consider merits-based migration and training their population to become an asset to a host state. The island states should take their precautions preferably sooner than later by engaging in international or bilateral agreements concerning their future public status, the fixation of maritime zones and the options of migration for their population.

237. Finally, let us not forget the essential basics of this issue and get back to what this paper started off with. Climate change and sea level rise are a *common* concern of mankind, in need of *common* action paired with a *common* vision in order to guide all, including island states, out of dangerous waters.



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## **Bibliography**

### **CONVENTIONS AND TREATIES**

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights of 17 November 1988, 28 ILM 156

African Charter on Human and Peoples' Rights of 27 June 1981, 1520 UNTS 217

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85

Convention on Biological Diversity of 5 June 1992, 1760 UNTS 79

Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958, 559 UNTS 285

Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, 961 UNTS 187

Convention on the Continental Shelf of 29 April 1958, 499 UNTS 311.

Convention on the High Seas of 29 April 1958, 450 UNTS 11

Convention on the Reduction of Statelessness of 30 August 1961, 989 UNTS 175

Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958, 516 UNTS 216

Convention relating to the Status of Refugees of 18 July 1951, 189 UNTS 150

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances of 3 May 1996, 35 ILM 1415 (not in force)

International Covenant on Civil and Political Rights of 16 December 1966, 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights of 15 December 1966, 993 UNTS 3

Kyoto Protocol to the UN Framework Convention on Climate Change of 10 December 1997, 37 ILM 32

Montevideo Convention on the Rights and Duties of States of 26 December 1933, 165 LNTS 19

OECD Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960

United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3

United Nations Framework Convention on Climate Change of 09 May 1992, 1771 UNTS 107

United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 7 April 1983, 22 ILM (1983) 306.

Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978, 1946 UNTS 3

Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331

## NATIONAL LEGISLATION

Australian Senate Hansard 15 (10 October 2005) (Au.)

Migration (Climate Refugees) Amendment Bill 2007, C2007B00149 (Au.)

Seas and Submerged Lands Act 1973 (Act No. 161/1973) (Au.)

---

Niue Constitution Act 1974 (29 August 1974), 1974 No 42 (NZ.)

---

Compact of free association amendments act of 2003 (17 December 2003), 117 stat. 2720 (USA)

## INTERNATIONAL CASE LAW

Armed Activities on the Territory of Congo case (Democratic Republic of the Congo v Uganda), 2005 *ICJ Reports* 168

Badinter commission, Opinion 1 of the Arbitration Commission of the Peace Conference on Yugoslavia (29 November 1991), 92 *ILR* 165

Badinter commission, Opinion 2 on Questions Arising From the Dissolution of Yugoslavia (4 July 1992), 31 *ILM* 1488

Germano-Polish Mixed Arb. Trib., Deutsche Continental Gas Gesellschaft v. Polish State, *Ann. Dig.* (5) 1929/30, 11

ICJ, Application of the Conventions of the Prevention and punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) 2007 *ICJ Reports* 43

ICJ, Armed Activities on the territory of the Congo (Democratic Republic of Congo v Uganda) 2005 *ICJ Reports* 168

ICJ, Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v Spain), 1970 *ICJ Reports* 3

ICJ, Case concerning East Timor (Portugal v. Australia), 1995 *ICJ Reports* 102

ICJ, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986 *ICJ Reports* 14

ICJ, Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 *ICJ Reports* 24

ICJ, Construction of a road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), Provisional measures, 13 December 2013, *ICJ Reports*

ICJ, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 *ICJ Reports* 18

ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), 1984 *ICJ Reports* 246

ICJ, Fisheries Case (United Kingdom v. Norway), 1951 *ICJ Reports* 116

ICJ, Gabčíkovo-Nagymaros (Hungary v Slovakia), 1997 *ICJ Reports* 7

ICJ, Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), 2012 *ICJ Reports* 99

ICJ, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea Intervening), 2002 *ICJ Reports* 303

ICJ, Legal Consequences for States of the continued presence of South Africa in Namibia (Sout West Africa) notwithstanding the Security Council Resolution 276, Advisory Opinion, 1971 *ICJ Reports* 16

ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 *ICJ Reports* 136

ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 *ICJ Reports* 226

ICJ, Legality or Threat of Use of Nuclear Weapons, advisory opinion, 1996 *ICJ Reports* 227

ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), 2001 *ICJ Reports* 40

ICJ, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993 *ICJ Reports* 38

ICJ, North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1969 *ICJ Reports* 3.

ICJ, Pulp Mills on the river Uruguay (Argentina v Uruguay), 2010 *ICJ Reports* 14

ICJ, Regarding the Independence of Kosovo, Advisory Opinion, 2010 *ICJ Reports* 204

ICJ, Reparations for Injuries Suffered in the Service of the United Nations, 1949 *ICJ Reports* 174

ICJ, the Case Concerning the Continental Shelf (Libya v. Malta), 1985 *ICJ Reports* 13

ICJ, The Corfu Channel Case (U.K. v. Alb.), 1949 *ICJ Reports* 4 (April 9)

ICJ, Western Sahara Case, Advisory Opinion, 1975 *ICJ Reports* 12

ITLOS, The “Volga” Case (Russian Federation v. Australia), case no. 11 (2002)

ITLOS, The Mox Plant Case (Ireland v United Kingdom), ITLOS Case No 10 (2001), Separate opinion of Judge Wolfrum

PCIJ, Legal Status of Eastern Greenland (Denmark v Norway), 1933 *PCIJ Series A/B* No. 53

PCIJ, SS Lotus (France v Turkey) 1927 *PCIJ Series A* No. 10

PCIJ, The Factory at Chorzow (Germ. v. Pol.), 1928 *PCIJ Series A* No. 17

Permanent Court of Arbitration, Island of Palmas Arbitration (Netherlands v United States of America) (4 April 1928), 2 RIAA 829

Trail Smelter Arbitration (United States v Canada), III RIAA 1905 (1941)

## NATIONAL CASE LAW

Supreme Court, Secession of Quebec, (1998), 2 SCR 217 (Ca.)

----

Administrative Court of Cologne, Re Duchy of Sealand (1978), 80 ILR 683 (Ger.)

----

Ioane Teitiota v Chief Executive of Ministry of Business and Innovation and Employment (8 May 2014), NZCA 173 / 2014 (NZ.)

----

Court of International Trade, Tembec Inc. v United States (2006), 441 F. Supp. 2d 130 (USA)

Second Circuit Court, Aguinda v. Texaco, Inc (2002), 303 F.3d 470. (USA)

US District Court NY, Aguinda v. Texaco, Inc. (1993), Dkt. No. 93 Civ. 7527 (USA)

US District Court NY, Chevron corporation v. Steven Donziger (2014), 11 Civ. 0691 (LAK). (USA)

US District Court NY, Jota v. Texaco, Inc. (1994), Dkt. No. 94 Civ. 9266. (USA)

US Supreme Court, United States v. Alaska (1997), 521 U.S. 1 (USA)

## REPORTS, RESOLUTIONS AND GENERAL DOCUMENTATION OF THE UNITED NATIONS

383<sup>rd</sup> meeting of the Security Council of the United Nations (2 December 1948), *UN Doc. S/PV.383* (1948)

Alliance of small island states, *Proposal to the AWG-LCA: Multi-Window Mechanism to Address Loss and Damage from Climate Change Impact*, UNFCCC, 2008, 8, <http://unfccc.int>

Asian Disaster Preparedness Center, *Regional Training Manual on Disaster Risk Reduction for Coastal Zone Managers*, UNEP, 2009, 59, [www.unep.org](http://www.unep.org)

Climate Change Secretariat, *Climate change: impacts, vulnerabilities and adaptation in developing countries*, UNFCCC, 2007, 64, <http://unfccc.int>

*Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-first Meeting* (29 November 1951), UNHCR (1951)

CRISTECU, A., *The right to self-determination*, UN Doc. E/CN.4/Sub.2/404/Rev.1, (1981)

CUBASCH, U., WUEBBLES, D., CHEN, D., FACCHINI, M. C., FRAME, D., MAHOWALD, N. and WINTHER, J.-G., 2013: Introduction. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [STOCKER, T.F., QIN, D., PLATNER G.-K., TIGNOR, M., ALLEN, S.K., BOSCHUNG, J., NAUELS, A., XIA, Y., BEX, V., and MIDGLEY, P.M. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, in press

Declaration of the United Nations Conference on the Human Environment (16 June 1972), *UN Doc. A/Conf.48/14/Rev. 1* (1973)

ESPIELL, H. G., Special Rapporteur for the Thirty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (20 June 1978), *UN Doc. E/CN.4/Sub.2/405/Rev.1* (1978)

ESPIELL, H. G., *The Right to Self Determination: Implementation of United Nations Resolutions*, Study for the Thirty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (20 June 1978), *UN Doc. E/CN.4/Sub.2/405/Rev.1* (1980)

Follow-up to the outcome of the Millennium Summit of the General Assembly of the United States (11 September 2009), *UN Doc. A/64/350* (2009)

General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2000/4* (2000)

Intergovernmental Negotiating Committee, UNFCCC, Fourth session, A/AC.237/Misc.17/Add.9., (1991)

IPCC, 2007: *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, [PARRY, M.L., CANZIANI, O.F., PALUTIKOF, J.P., VAN DER LINDEN, P.J. AND HANSON, C.E. (eds.)], Cambridge University Press, Cambridge, UK, 976

IPCC, 2007: *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, PACHAURI, R.K and REISINGER, A. (eds.)]. IPCC, Geneva, Switzerland, 104

IPCC, 2010: *Workshop Report of the Intergovernmental Panel on Climate Change Workshop on Sea Level Rise and Ice Sheet Instabilities* [STOCKER, T.F., DAHE, Q., PLATTNER, G.-K., TIGNOR, M., ALLEN, S., MIDGLEY, P. (eds.)]. IPCC Working Group I Technical Support Unit, University of Bern, Bern, Switzerland, 227

IPCC, 2013: *Summary for Policymakers. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Change* [STOCKER, T.F., QIN, D., PLATTNER, G.-K., TIGNOR, M., ALLEN, S.K., BOSCHUNG, J., NAUELS, A., XIA, Y., BEX, V. and MIDGLEY, P.M. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535

IPCC, 2014: *Summary for Policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [FIELD, C.B., BARROS, V.R., DOKKEN, D.J., MACH, K.J., MASTRANDREA, M.D., BILIR, T.E., CHATTERJEE, M., EBI, K.L., ESTRADA, Y.O., GENOVA, R.C., GIRMA, B., KISSEL, E.S., LEVY, A.N., MACCRACKEN, S., MASTRANDREA, P.R., and WHITE, L.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 32

JANKI, M., *Indigenous Peoples Rights and the Environment: Issues and the Future*, draft paper for UNEP & OHCHR, 2009, [www.unep.org](http://www.unep.org)

Knox, J., Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the Human Rights Council, *UN Doc. A/HRC/25/53* (2014)

LIMON, M., *Linking Human Rights and the Environment, background paper for key issues arising from Human Rights Council Resolution 10/4 and the June 2009 Council debate on the relationship between human rights and the climate change*, UNEP, [www.unep.org](http://www.unep.org)

Ministry of Home Affairs, Housing & Environment, Republic of Maldives, *First National Communication of the Republic of Maldives to the United Nations Framework Convention on Climate Change 2* (2001), <http://unfccc.int>

Munich Climate Insurance Initiative, *Adaptation to Climate Change: Linking Disaster Risk Reduction and Insurance*, UNFCCC Climate Talks (June 6, 2009), 2009, 21, <http://unfccc.int>

New South Wales Young Lawyers (ed.), *Human rights and climate change study, Submission to the OHCHR study: Human Rights and Climate Change Sydney: Environmental Law Committee and Human Rights Committee*, 2008, 34, [www.ohchr.org](http://www.ohchr.org)

PARK, S., *Climate change and the risk of statelessness: the situation of low-lying islands*, in Legal and protection policy research series, UNHCR Doc. PPLA/2011/04 (May 2011)

Report of the Human Rights Council of the United Nations on its nineteenth session, *UN Doc. A/HRC/19/2* (2012)

Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, *UN Doc. A/HRC/10/61* (2009)

Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session, *UN Doc. E/CN.4/2005/52* (2005)

Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *UN Doc. A/62/214* (2007)

Report on the Relationship Between Climate Change and Human Rights for the Human Rights Council, *UN Doc. A/HRC/10/61*, (2009)

Resolution 10/4 of the Human Rights Council (25 March 2009), *UN Doc. A/HRC/RES/10/4* (2009)

Resolution 1541 (XV) of the General Assembly of the United Nations (15 December 1960), *UN Doc. A/4651* (1960).

Resolution 16/11 of the Human Rights Council of the United Nations (12 April 2011), *UN Doc. A/HRC/RES/16/11* (2011)

Resolution 18/22 of the Human Rights Council of the United Nations (17 October 2011), *UN Doc. A/HRC/RES/18/22* (2011)

Resolution 1803 (XVII) of the General Assembly of the United Nations (14 December 1962), *UN Doc. A/5217* (1962)

Resolution 1994/27 in the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session (28 October 1994), *UN Doc. E/CN.4/Sub.2/1994/56* (1994)

Resolution 2625 (XXV) of the General Assembly of the United Nations (24 October 1970), *UN Doc. A/RES/25/2625* (1970)

Resolution 2869 (XXVI) of the General Assembly of the United Nations (20 December 1971), *UN Doc. A/RES/2869* (1971)

Resolution 43/53 of the General Assembly of the United Nations (6 December 1988), *UN Doc. A/RES/43/53* (1988)

Resolution 44/225 of the General Assembly of the United States (22 December 1989), *UN Doc. A/Res/44/225* (1989)

Resolution 45/197 of the General Assembly of the United States (21 December 1990), *UN Doc. A/Res/45/197* (1990)

Resolution 46/215 of the General Assembly of the United States (20 December 1991), *UN Doc. A/Res/46/215* (1991)

Resolution 541 of the Security Council of the United Nations (18 November 1983), *UN Doc. S/RES/541* (1983)

Resolution 63/281 of the General Assembly of the United Nations (11 June 2009), *UN Doc. A/RES/63/281* (2009)

Resolution 7/23 of the Human Rights Council of the United Nations (28 March 2008), *UN Doc. A/HRC/7/78* (2008)

RIERA, J., *Challenges relating to climate change induced displacement*, remarks for the International Conference "Millions of People without protection: Climate Change Induced Displacement in Developing Countries", 2013, 7, [www.unhcr.org](http://www.unhcr.org)

Rio Declaration on Environment and Development (13 June 1992), *UN Doc. A/CONF.151/26* (vol. I) (1992)

Seventh session of the Human Rights Council of the United Nations, *UN Doc. A/HRC/7/L.21/Rev.1* (2008)

Statute of the International Court of Justice of 26 June 1945, 1 UNTS 933.

UN Office of the high representative for the least developed countries, landlocked developing countries and small island developing states, *Small Islands Developing States (SIDS) Statistics*, UN-OHRLLS, 2013, 13, <http://unohrlls.org>

UN Office of the high representative for the least developed countries, landlocked developing countries and small island developing states, *Small Islands Developing States (SIDS) Statistics*, 2013, 26, <http://unohrlls.org>

UNFCCC Conference of the Parties, Decision 10/CP.7, *UN Doc. FCCC/CP/2001/13/Add.1* (2002)

UNFCCC Decision 1/CP.16, Cancún Agreements: Outcome of work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *FCCC/CP/2010/7/Add.1*. (2010)

UNHCR, *Climate Change and Statelessness: An Overview*, Submission to the AWG-LCA 6 under the UNFCCC, 1–12 June 2009, Bonn, 19 May 2009, UNFCCC, 4, <http://unfccc.int>

UNHCR, *Commemorating the Refugee and Statelessness Conventions: a compilation of Summary Conclusions from UNHCR's Expert meetings 2010-2011*, UNHCR, 2012, 124, [www.unhcr.org](http://www.unhcr.org)

United Nations Division for Sustainable Development, *Trends in sustainable development: Small Island Developing States* (2010), 39, [www.un.org](http://www.un.org)

United Nations Framework Convention on Climate Change, *Climate Change: Small Island Developing States* (2005), 28, <http://unfccc.int>

United Nations, Charter of the United Nations of 24 October 1945, 1 UNTS XVI (1945)

Universal Declaration of Human Rights of 10 December 1948, *UN Doc. A/RES/3/217 A* (1948)

## REPORTS OF THE INTERNATIONAL LAW COMMISSION

Articles on Nationality of Natural Persons in Relation to the Succession of States of the International Law Commission, in Report of the International Law Commission on the work of its Fifty-fourth Session, *UN Doc. A/54/10*, Chapter IV (1991)

Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in report of the International Law Commission on the Work of Its Fifty-Third Session, Supp. No. 10, *UN Doc. A/56/10* (2001)

Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the work of its Fifty-Third Session, Supplement No. 10, *UN Doc. A/56/10* (2001) and as adopted in the Resolution 56/83 of the General Assembly of the United Nations of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4

Report of the International Law Commission on the work of its Fifteenth session, (A/5509), *UN Doc. A/CN.4/163* (1999)

Report of the International Law Commission on the work of its First Session, 12 April - 9 June 1949, Supplement No. 10 (A/925), *UN Doc. A/CN.4/13* and Corr. 1-3 (1949)

## BOOKS

ANTON, D. K. and SHELTON, D., *Environmental protection and human rights*, Cambridge, Cambridge University Press, 2011, 986.

AUST, A., *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2013, 520

BARNETT, J. and CAMPBELL, J., *Climate change and small island states: Power, Knowledge and the South Pacific*, London, Earthscan, 2010, 218

BERGER, A., MESINGER, F. and SIJACKI, D. (eds.), *Climate change: Inferences from Paleoclimate and Regional Aspects*, Wien, Springer, 2012, 224.

BIRNIE P., BOYLE, A. & REDGWELL, C., *International Law & the Environment*, Oxford, Oxford University Press, 2009, 830

BODANSKY, D., BRUNNEE, J. and HEY, E. (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, Oxford Handbooks, 2012, 1112

BOUVIER, J. and RAWLE, F., *Bouvier's Law Dictionary and Concise Encyclopedia*, online edition, 1856.

BROOME, J., *Climate matters – ethics in a warming world*, New York, W.W. Norton & Company, 2012, 210

BROWNLIE, I., *Principles of public international law*, Oxford, Oxford University Press, 2008, 784

BULL, H. and WATSON, A., *Expansion of international society*, Oxford, Clarendon Press, 1984, 479

CARBONE, S. M. and SCHIANO DI PEPE, L., “States, Fundamental Rights and Duties”, in *The Max Planck Encyclopedia of Public International Law*, January 2009, online edition

CARLARNE, C. P., *Climate change law and policy*, Wiltshire, Oxford university press, 2010, 350

CHENG, B., *General principles of law as applied by international courts and tribunals*, Cambridge, Cambridge University Press, 2006, 544



- CHURCHILL, R. and FREESTONE, D. (eds.), *International law and global climate change*, Londen, Graham & Trotman, 1991, 447
- CRAWFORD, J. R., “State”, in *The Max Planck Encyclopedia of Public International Law*, January 2011, online edition
- CRAWFORD, J., *Brownlie’s Principles of Public International Law*, Oxford, Oxford University Press, 2012, 888
- CRAWFORD, J., PELLET, A and OLLESON, S. (eds.), *Oxford commentaries on international law: The law of international responsibility*, Oxford, Oxford University Press, 2010, 1296
- CRAWFORD, J., *The Creation of States in International Law*, Oxford, Clarendon Press, 2006, 498.
- CRAWFORD, J., *The International Law Commission’s Articles on State Responsibility: Introduction, Text and commentaries*, Cambridge, Cambridge University Press, 2002, 424
- DAES, E. and UNCHR, *Status of the Individual and Contemporary International Law*, New York, United Nations, 1992, 68
- DE CHAZOURNES, L. B. and SANDS, P. (eds.), *International law, the international court of justice and nuclear weapons*, Cambridge, Cambridge University Press, 1999, 592
- DOUGLAS, B.C., KEARNEY, M.S. and LEATHERMAN, S., *Sea level rise: history and consequences*, San Diego, Academic Press, 2001, 232
- DUURSMA, J., *Fragmentation and the International Relations of micro-States: Self-determination and Statehood*, Cambridge, Cambridge University Press, 1996, 461
- EDENHOFER, O., WALLACHER J., LOTZE-CAMPEN H., REDER M., KNOPF B. and MÜLLER J. (eds.), *Climate Change, Justice and Sustainability: Linking Climate and Development Policy*, Dordrecht, Springer, 2012, 380
- EVANS, M. (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe*, Aldershot, Dartmouth, 1997, 329
- FRENCH, D. (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, Cambridge, Cambridge University Press 2013, 534
- FROWEIN, J., SCHARIOTH, K., WINKELMANN, I. and WOLFRUM, R. (eds.) *Verhandeln für den Frieden, Negotiating for Peace*, Berlin, Springer, 2003, 868
- GARNER, B. A. and BLACK, H. C., *Black’s Law dictionary*, online edition, 2009.
- GERRARD, M. B. and WANNIER, G. E. (eds.), *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate*, Cambridge, Cambridge University Press, 2013, 639
- GRANT, T. D., *The recognition of states: law and practice in debate and evolution*, Westport, Praeger, 1999, 280
- HART, C. A., *Climate Change and the Private Sector: Scaling up private sector response to climate change*, New York, Routledge, 2013, 296
- HELD, D., *Cosmopolitanism: Ideals and Realities*, Cambridge, Polity Press, 2010, 144
- HORBACH, N., LEFEBER, R. and RIBBELINK, O., *Handboek internationaal recht*, Den Haag, T.M.C. Asser Press, 2007, 946.
- HULM, P., *A Climate of Crisis: Global Warming and the Island South Pacific*, Port Moresby, Association of South Pacific Environmental Institutions, 1989, 22

- HUMPHREYS, S. (ed.), *Human Rights and Climate Change*, Cambridge, Cambridge University Press, 2010, 348
- JACKSON, R. H., *Quasi-States: Sovereignty, International Relations, and the Third World*, Cambridge, Cambridge University Press, 1990, 225
- JACKSON, R., *Sovereignty: The Evolution of an Idea*, Cambridge, Polity Press, 2007, 200
- KACZOROWSKA, A., *Public international law*, Abingdon, Oxon, 2010, 877
- KAHLER, M. and WALTER, B. F. (eds.), *Territoriality and conflict in an era of globalization*, Cambridge, Cambridge University Press, 2006, 340.
- KLABBERS, J. (ed.), *Finnish Yearbook of International Law vol. 14*, Leiden, Martinus Nijhoff, 2003, 392
- KOGEN, M. G., "Territory, Abandonment", in *The Max Planck Encyclopedia of Public International Law*, November 2008, online edition
- KOOIJMANS, P. H. and BRUS, M., *Internationaal publiekrecht in vogelvlucht*, Deventer, Kluwer, 2008, 403
- KOSOLAPOVA, E., *Interstate liability for climate change-related damage*, Den Haag, Eleven Publishers, 2013, 228
- KREIJEN, G., *State Failure, Sovereignty and Effectiveness*, Leiden, Martinus Nijhoff, 2004, 386
- LAGONI, R. and VIGNES, D., *Maritime delimitation*, Leiden, Martinus Nijhoff, 2006, 241.
- LALONDE, S., *Determining boundaries in a conflicted world: the role of uti possidetis*, Montréal, McGill-Queen's University Press, 2002, 347
- LAUTERPACHT, H., *Recognition in international law*, Cambridge, Cambridge University Press, 1947, 442
- LEARY, D. and PISUPATI, B. (eds.), *The future of international environmental law*, Tokyo, United Nations University Press, 335
- LORD, R., GOLDBERG, S., RAJAMANI, L., BRUNNÉE, J., *Climate change liability*, Cambridge, Cambridge University Press, 2012, 685
- MALANCZUK, P., *Akehurst's modern introduction to international law*, New York, Routledge, 1997, 472
- MAREK, K., *Identity and continuity of states in public international law*, Geneve, Librairie Droz, 1968, 619
- MCADAM, J., *Climate Change and Displacement: Multidisciplinary Perspectives*, Oxford, Hart, 2010, 285
- MCGARRY, J. and KEATIN, M. (eds.), *European Integration and the Nationalities Question*, Oxon, Routledge, 2006, 417
- MEIERTÖNS, H., *The Doctrines of US Security Policy: An Evaluation under International Law*, Cambridge, Cambridge University Press, 2010, 330
- NANDAN, S. N. and ROSENNE, S., *United Nations Convention on the Law of the Sea 1982: A commentary – Volume II*, Dordrecht, Martinus Nijhoff, 1993, 1040
- NORDQUIST, M. H., MOORE, J. N., SOONS, A. H. A. and KIM, H. (eds.), *The Law of the Sea Convention : US accession and globalization*, Leiden, Martinus Nijhoff, 575
- NUNN, P. D., *Developments in Earth and Environmental Sciences: volume 6 - Climate, Environment, and Society in the Pacific during the Last Millennium*, Amsterdam, Elsevier, 2007, 316

- NUSSBAUM, A., *A concise history of the law of nations*, New York, Macmillan, 1954, 361
- OKAFOR, O.C., *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, The Hague, Martinus Nijhoff, 2000, 232
- ORAKHELASHVILI, A., *Peremptory norms in international law*, Oxford, Oxford University Press, 2006, 672
- ORWELL, G., *Animal Farm*, New York, Harcourt, 1954
- OUDE ELFERINK, A. G. (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, Leiden, Martinus Nijhoff, 2005, 250
- OUDE ELFERINK, A.G., “Artificial Islands, Installations and Structures” in *The Max Planck Encyclopedia of Public International Law*, July 2007, online edition
- PARKER, A. and GROSSMAN, Z. (eds.), *Asserting Native Resilience: Pacific rim indigenous nations face the climate crisis*, Corvallis, Oregon University Press, 2012, 240
- PHILANDER, S.G., *Encyclopedia of global warming and climate change*, California, Sage Publications, 2008, 1136
- POMERANCE, M., *Self-Determination in Law and Practice: the new doctrine in the United Nations*, The Hague, Martinus Nijhoff, 1982
- RAIČ, D. *Statehood and the Law of Self-Determination*, The Hague, Kluwer Law International, 2002, 495
- RAYFUSE, R. and SCOTT, S. V. (eds.), *International Law in the Era of Climate Change*, Cheltenham, Edward Elgar, 2012, 378
- RONEN Y., “Territory, Lease” in *The Max Planck Encyclopedia of Public International Law*, July 2008, online edition
- SCHOFIELD, C., LEE, S., and KWON, M.-S. (eds.), *The Limits of Maritime Jurisdiction*, Leiden, Martinus Nijhoff, 2013, 794
- SCHUBERT, R., SCHELLNHUBER, H.J., BUCHMANN, N., EPINEY, A., GRIEBHAMMER, R., KULESSA, M., MESSNER, D., RAHMSTORF, S. and SCHMID, J., *Climate Change as a Security Risk*, London, Earthscan, 2008, 248.
- SHAW, M. N., *International law*, Cambridge, Cambridge University Press, 2008, 1708
- SHAW, N. and MALCOLM, N., *International law*, Cambridge, Cambridge University Press, 2008, 1542
- SINCLAIR, I., *The Vienna Convention on the Law of Treaties*, Manchester, Manchester University Press, 1984, 150
- SYMMONS, C. R., *Historic Waters in the Law of the Sea: A Modern Re-Appraisal*, Leiden, Martinus Nijhoff, 2008, 320
- SYMMONS, C. R., *Some Problems Relating to the Definition of “Insular Formations” in International Law: Islands and Low-Tide Elevations*, Durham, IBRU Maritime Briefing, 1995, 32
- TALMON, S., *Recognition of governments in international law*, 1998, Oxford, Oxford University Press, 393
- TOMUSCHAT, C. and THOUVENIN, J.-M. (eds.), *The Fundamental Rules of the International of the International Legal Order: Jus Cogens and Obligations Erga Omnes Obligations*, Leiden, Martinus Nijhoff, (2006), 471

VERHEYEN, R., *Climate Change Damage And International Law: Prevention Duties And State*, Leiden, Martinus Nijhoff, 2005, 408

WARNER, R. and SCHOFIELD, C. (eds.), *Climate change and the oceans – Gauging the legal and policy currents in the Asia Pacific and beyond*, Cheltenham, Edward Elgar, 2012, 274.

ZIEMELE, I., “States, Extinction of” in *The Max Planck Encyclopedia of Public International Law*, May 2007, online edition

ZIMMERMAN, A., “Continuity of States” in *The Max Planck Encyclopedia of Public International Law*, August 2006, online edition.

## JOURNAL ARTICLES

BARNETT, J. and NEIL, A. W., “Climate Dangers and Atoll Countries”, *Climatic change* 61 (2003), 321-337.

BATES, D. C., “Environmental Refugees? Classifying Human Migration Caused by Climate Change”, *Population and Environment* 23(5), 465-477

BERLIN, A. H., “Recognition as sanction: using international recognition of new states to deter, punish, and contain bad actors”, *J. Int'l L.* 31(2) (2009), 531-591

BRUBAKER, R., “The ‘diaspora’ diaspora”, *Ethnic and Racial Studies* 28(1) (2005), 1-19

CARON, D. D., “When Law makes Climate Change Worse: Rethinking the Law of Baselines in Light of Rising Sea Level”, *Ecology L.Q.* 17 (1990), 621-653.

CONNELL, J., “Losing ground? Tuvalu, the greenhouse effect and the garbage can”, *Asia Pacific Viewpoint* 44(2) (2003), 98-107

COWEN, R. C., “Are Men Changing the Earth's Weather?”, *The Christian Science Monitor*, 4 December 1957, 1-13

COX, N., “The Acquisition of Sovereignty by Quasi-States: The case of the Order of Malta”, *Mountbatten Journal of Legal Studies* 6 (2002), 26-47

CRAWFORD, J., “The Creation of the State of Palestine: Too Much Too Soon?”, *EJIL* 1(1990), 307-313

DERUYTTER, T., “Klimaatvluchtelingen: doelloos op zoek naar erkenning. Onderzoek naar nieuw internationaal wetgevend initiatief”, *Tijdschrift voor Milieurecht*, 2010, 203-224.

DEWITTE, C., “At the water's edge: legal protections and funding for a new generation of climate change refugees”, *Ocean & Coastal L.J.* 16 (2010), 211-238

DOMMEN, C., “Claiming Environmental Rights: Some possibilities offered by the United Nations' Human Rights Mechanisms”, *Geo. Int'l Envtl. L. Rev.* 11 (1998), 1-48

GAGAIN, M., “Climate change, sea level rise and artificial islands: saving the Maldives' statehood and maritime claims through the ‘constitution of the oceans’”, *Colorado Journal of International Environmental Law and Policy*, vol. 23 (2012), 77-120

GORDON-CLARK, M., “Paradise lost? Pacific island archives threatened by climate change”, *Archival Science* 12 (1) (2012), 51-67

- GRANT, T. D., "Defining statehood: the Montevideo Convention and its discontents", 37 *Colum. J. Transnat'l L.* 1999, 403-457
- HIGGINS, M., "Legal and policy impacts of sea level rise to beaches and coastal property", *Sea Grant Law and Policy Journal* 1(1) (2008), 43-64
- Institut de Droit International, "Resolutions Concerning the Recognition of New States and New Governments", *The American Journal of International Law* 30(4) (1936), 185-187
- JAIN, A. G., "The 21<sup>st</sup> century Atlantis: the international law of statehood and climate change-induced loss of territory", *Stan. J. Int'l L.* 50(1) (2014), 1-52
- JOHNSON J., BELL, J. and DE YOUNG, C., "Priority adaptations to climate change for Pacific fisheries and aquaculture: Reducing risks and capitalizing on opportunities", *Food and Agriculture Organization of the United Nations: fisheries and aquaculture proceedings* 28 (2013), 109
- KELMAN, I., "Climate Change and Displacement: Island Evacuation", *Forced Migration Review* 31 (2008)
- KOLMANNSSKOG, V. and MYRSTAD, F., "Environmental Displacement in European Asylum Law", *EJML* 11 (2009) 313-326
- KOSKENNIEMI, M., "National Self-Determination Today: Problems of Legal Theory and Practice", *ICLQ* 43 (1994), 241-269
- KOSKENNIEMI, M., "The future of statehood", *Harvard International Law Journal* 32 (1991), 397-410
- LAVALLE, R., "Not Quite a Sure Thing: The Maritime Areas of Rocks and Low Tide Elevations under the UN Law of the Sea Convention", *Int'l J. Mar. & Coastal L.* 19 (2004), 43-69
- MAYER, B., "The international legal challenges of climate-induced migration: proposal for an international legal framework", *Colorado Journal of International Environmental Law* 22 (2011), 357-416
- MCDORMAN, T. L., "The continental shelf beyond 200 nm: law and politics in the arctic ocean", *J. of transnational law & policy* 18(2), 155-193
- MCKINLEY, M. A., "Conviviality, Cosmopolitan Citizenship, and Hospitality", *Unbound* 5 (2009), 55-87
- MILNE, G. A., GEHRELS, W. R., HUGHES, C. W. and TAMISIEA, M. E., "Identifying the Causes of Sea Level Change", *Nature Geoscience* 2 (2009), 471-478
- MIMURA, N. and NICHOLLS, R. J., "Regional issues raised by sea-level rise and their policy implications", *Climate Research* 11 (1998), 5-18
- MIMURA, N., "Vulnerability of island countries in the South Pacific to sea level rise and climate change", *Climate Research* 12 (1991), 137-143
- NALDI, G.J., "The case concerning the frontier dispute (Burkina Faso v Republic of Mali): Uti Possidetis in an African perspective", *International and Comparative Law Quarterly* 36(4) (1987), 893-904
- NOLLKAEMPER, A., "Internationally Wrongful Acts in Domestic Courts", *The American Journal of International Law* 101(4) (2007), 760-799
- NUNN, P. D., "Responding to the Challenges of Climate Change in the Pacific Islands: Management and Technological Imperatives", *Climate Research* 40 (2009), 211-231
- OLIVER, S., "A New Challenge to International Law: The Disappearance of the Entire Territory of a State", *Int'l J. on Minority & Group Rts.* 16 (2009), 209-243

- ORAKHELASHVILI, A., “The Position of the Individual in International Law”, *Cal.W.Int'l L.J.* 31 (2001), 241-276
- PAHUJA, S., “The postcoloniality of international law”, *Harv. Int'l L.J.* 46(2) (2005), 459-469
- PAPARINSKIS, M., “Procedural Aspects of Shared Responsibility in the International Court of Justice”, *Journal of International Dispute Settlement* 4(2) (2013), 295-318
- PERRITT, H. H., “Structures and Standards for Political Trusteeship”, *UCLA Journal of International Law and Foreign Affairs* 8 (2009), 385-472
- PETERS, J., “United States v. Alaska: Section 10 Permits, the Territorial Sea, and Federalism”, *Ocean & Coastal L.J.* 1 (1994), 59-96
- PFEFFER, W. T., HARPER, J. T. and O'NEEL, S., “Kinematic Constraints on Glacier Contributions to 21st-Century Sea Level Rise”, *Science* 321 (2008), 1340-1343
- POWERS, A., “Sea-level rise and its impact on vulnerable states: four examples”, *La. L. Rev.* 73 (2012), 151-173
- PUTHUCHERRIL, T. G., “Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions”, *Global Journal of Comparative Law* 1 (2013), 1-39
- RIGNOT, E., VELICOGNA, I., VAN DEN BROEKE, M. R., MONAGHAN, A. and LENAERTS, J. T. M., “Acceleration of the Contribution of the Greenland and Antarctic Ice Sheets to Sea Level Rise”, *Geophysical Res. Letters* 38 (2011), 1-5.
- RODRIGUEZ-RIVERA, L. E., “Is the Human Right to Environment Recognized Under International Law? It Depends on the Source”, *Colo. J. Int'l Envtl. L. & Pol'y* 12 (2001), 1-45
- SCHOFIELD, C., “Shifting limits? Sea levels rise and options to secure maritime jurisdictional claims”, *CCLR* 3(4) (2009), 405-416
- SCHREUER, C., “The Waning of the Sovereign State: Towards a New Paradigm for International Law?”, *EJIL* 4 (1993)
- SMITH, R. W. and THOMAS, B. L., “Island Disputes and the Law of the Sea: An examination of Sovereignty and Delimitation Disputes”, *IBRU Maritime Briefing*, 2(4) (1998), 1-31
- SOONS, A. H., “Effects of Sea Level Rise on Maritime Limits and Boundaries”, *NILR* 37 (1990), 207-232.
- STAHL, S., “Unprotected ground: the plight of vanishing island nations”, *New York International Law Review* 23 (2010)
- STOUTENBURG, J., “Implementing a new regime of stable maritime zones to ensure the (economic) survival of small island states threatened by sea-level rise”, *IJMCL* 26(2) (2011), 263-311
- SYMMONS, C., “Ireland and the Rockall dispute: an analysis of recent developments”, *IBRU Boundary and Security Bulletin* 6(1) (1998), 78-93
- TOL, R. S. J. and VERHEYEN, R., “State responsibility and compensation for climate change damages—a legal and economic assessment”, *Energy Policy* 32 (2004), 1109-1130
- TOSINI, S. C., “Foreign Sovereign Standing to Sue the United States in Its Own Courts under the Administrative Procedure Act”, *J. Int'l L.* 28 (2014), 91-112

TULLY, S., "The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific", *N.Z. J. Pub. & Int'l L.* 5 (2007), 169-200

VAN DYKE, J. and BENNET, D., "Islands and the delimitation of Ocean Space in the South China Sea", *Ocean Yearbook* 10 (1999), 54-89

VERMEER, M. AND RAHMSTORF, S., "Global Sea Level Linked to Global Temperature", *Proceedings of the Nat'l Acad. Sci.* 106 (2009), 21527-21532

VOCCIA, A., "Climate Change: what future for small, vulnerable states", *International Journal of Sustainable Development & World Ecology* 19(2) (2011), 101-115

WHYTOCK, C. A., "Foreign state immunity and the right to court access", *Boston University Law Review* 93 (2013), 2033-2093

WONG, D., "Sovereignty sunk? The position of 'sinking states' at international law", *Melbourne Journal of International Law* 14 (2) (2013)

WOODROFFE, C. D., "Reef-Island Topography and the Vulnerability of Atolls to Sea Level Rise", *Global & Planetary Change* 62 (2008), 77-96

## **PAPERS, ESSAYS, THESES & GENERAL REPORTS**

BIAGINI, B., DOBARDZIC, S., CHRISTIANSEN, L., MOORE, R., ORTIZ-MONTEMAYOR, C. and SCHINN, D., *Financing Adaptation Action: Least Developed Countries Fund*, GEF, 2012, 35, [www.thegef.org](http://www.thegef.org)

BIRD, N., BROWN, J. and SCHALATEK, L., *Climate Finance Policy Brief No.4: Design Challenges for the Green Climate Fund*, Overseas Development Institute, 2011, 8, [www.odi.org.uk](http://www.odi.org.uk)

BOYLE, A., *Human Rights and the Environment: a Reassessment*, Working Paper for UNEP (2010), 39, [www.law.ed.ac.uk](http://www.law.ed.ac.uk)

CARIUS, A. and MAAS, A. *Migration and global environmental change, PD15: creating space for action: options for small island states to cope with global environmental change*, document in preparation of the UK Government's Foresight Project, Migration and Global Environmental Change, 2011

DE MOOR, N., *International environmental law and migration: fitting the bill?*, unpublished paper for the 10<sup>th</sup> Annual Colloquium of the IUCN Academy of Environmental law on "Global Environmental Law at a Crossroads", 38

European Network of Environmental Law Organizations, *Implementation of the Environmental Impact Assessment Directive in the EU: Member States Case law examples from the practice of the European environmental impact assessment litigation*, Justice and Environment, 2013, 50, [www.justiceandenvironment.org](http://www.justiceandenvironment.org)

FERRIS, E., CERNEA, M. M. and PETZ, D., *On the front line of climate change: learning from and with pacific countries*, Project on Internal Displacement, Washington D.C., The Brookings Institution – London School of Economics, 2011, 32

G. TSALTAS, T. BOURTZIS and G. RODOTHEATOS, *Artificial islands and structures as a means of safeguarding state sovereignty against sea level rise. A law of the sea perspective*, document in preparation of the 6th ABLOS Conference "Contentious Issues in LOSC - Surely Not?", 2010

Global Conference on Oceans, Coasts, and Islands, *Global oceans conference 2010: ensuring survival, preserving life, improving governance: summary report*, 2010, 52, <http://globaloceanforumdotcom.files.wordpress.com>

HALL, E., *Vanuatu Village Relocated due to Rising Sea Levels*, ABC News, 6 December 2005, [www.abc.net.au](http://www.abc.net.au)

HAYASHI, M., “Sea Level Rise and the Law of the Sea: Legal and Policy Options”, in TERASHIMA, H., (ed.), *Proceedings of the International Symposium on Islands and Oceans*, 2009, 160, [www.sof.or.jp](http://www.sof.or.jp)

HUNTER, D. B., *The Implications of Climate Change Litigation for International Environmental Law-Making*, American University Washington College of Law, Working Paper No. 2008–14, 19

KÄLIN, W., “Conceptualising Climate Induced Displacement – A challenge for International Law”, Distinguished Lecture series 3, Maharniban Calcutta Research Group, March 2011, 38

MCADAM, J., *‘Disappearing states’, statelessness and the boundaries of international law*, unpublished paper, University of New South Wales Faculty of Law Research Series, 2010, 23

MUTABDZIJA, D. and BORDERS, M., *Charting the course: toward a seasteading legal strategy*, unpublished paper for The Seasteading Institute, 2011, 34, [www.seasteading.org](http://www.seasteading.org)

Oxfam International, *Adapting to Climate Change, What is needed in poor countries and who should pay*, Oxfam Briefing Paper, May 2007, 47

RAYFUSE R., *W(h)ither Tuvalu? International law and disappearing states*, unpublished paper, University of New South Wales Faculty of Law Research Series, 2010, 13

RAYFUSE, R. and CRAWFORD, E., *Climate Change, Sovereignty and Statehood*, Legal Studies Research Paper No. 11/59, University of Sydney, September 2011, 13.

*Territorium*, Oxford Dictionaries, [www.oxforddictionaries.com](http://www.oxforddictionaries.com)

*Tuvalu*, IMF Country Report No. 12/259, International Monetary Fund, September 2012, 21, [www.imf.org](http://www.imf.org)

VERHEYEN R. and RODERICK, P., *Beyond adaptation: The legal duty to pay compensation for climate change damage*, WWF-UK Climate Change Programme Discussion Paper November 2008, 37, <http://assets.wwf.org.uk>

Wei, D., DAWES, R. and MAXWELL, I., *Receding maritime zones, uninhabitable states and climate exiles: how international law must adapt to climate change*, unpublished paper for FIELD, 2011, 9, [www.field.org.uk](http://www.field.org.uk)

## DIGITAL SOURCES

*‘If we fail our environment, we fail to protect our human rights,’ warn UN experts on Earth Day*, OHCHR, 22 April 2013, [www.ohchr.org](http://www.ohchr.org)

*960 years of history*, Order of Malta, [www.orderofmalta.int](http://www.orderofmalta.int)

*A sooner Spring and a later Autumn suggests the new normal*, News release University of Southampton, 28 March 2014, [www.southampton.ac.uk](http://www.southampton.ac.uk)

*About Climate Funds*, Climate Funds Update, [www.climatefundsupdate.org](http://www.climatefundsupdate.org)

BURKE, T., *Events, dear boy, events have put climate change back on the agenda*, The Guardian, 26 March 2014, [www.theguardian.com](http://www.theguardian.com)

C. KRAUSS, *Patton Bogg settles dispute with Chevron over pollution case*, New York Times, 7 May 2014, [www.nytimes.com](http://www.nytimes.com)

*Canada pulls out of Kyoto protocol*, The Guardian, 13 December 2012, [www.theguardian.com](http://www.theguardian.com)



*Climate Action*, European Commission, <http://ec.europa.eu>

*Climate Change*, Australian Government: Department of Foreign Affairs and Trade, <http://aid.dfat.gov.au>

*Declarations by Parties - United Nations Framework Convention on Climate Change*, UNFCCC, <https://unfccc.int>

*Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ, [www.icj-cij.org](http://www.icj-cij.org)

*Environmental change and forced migration scenarios: Tuvalu and New-Zealand*, EACH, 2007, 32, [www.ehs.unu.edu](http://www.ehs.unu.edu)

*Estimates of 2013: "Population (Total)"*, The World Bank, 2013, <http://data.worldbank.org>

*Fiji Supports Kiribati On Sea Level Rise*, Office of the President Republic of Kiribati – Climate Change, 11 February 2014, [www.climate.gov.ki](http://www.climate.gov.ki)

*Financial resources and technology transfer*, NZ Ministry for the Environment, [www.mfe.govt.nz](http://www.mfe.govt.nz)

*For Island Nations Threatened by Climate Change, Conference Outlines Their Legal Remedies*, Columbia Law School, 23 May 2011, [www.law.columbia.edu](http://www.law.columbia.edu)

*Frequently Asked Questions about Ocean Acidification*, Woodshole Oceanographic Institute (WHOI), [www.whoi.edu](http://www.whoi.edu)

FRIEDMAN, L., *If a country sinks beneath the sea, is it still a country?*, Scientific American, 23 August 2010, [www.scientificamerican.com](http://www.scientificamerican.com)

*Global Private Financial Flows*, World Development Indicators, <http://wdi.worldbank.org>

*Glossary of statistical terms: Environmental Refugee*, OECD, <http://stats.oecd.org>

*Government land purchase within grasp*, Office of the President Republic of Kiribati – Climate Change, 23 August 2013, [www.climate.gov.ki](http://www.climate.gov.ki)

*Growth in United Nations membership: 1945-present*, United Nations, [www.un.org](http://www.un.org)

HARRIS, G., *Borrowed Time on Disappearing Land: Facing Rising Seas, Bangladesh Confronts the Consequences of Climate Change*, The New York Times, 28 March 2014, [www.nytimes.com](http://www.nytimes.com)

HAUSFATHER, Z., *IPCC's New Estimates for Increased Sea-Level Rise*, *The Yale Forum on Climate Change & the Media*, Yale Climate Forum, 23 October 2013, [www.yaleclimatemediaforum.org](http://www.yaleclimatemediaforum.org)

*History of Sealand*, Sealand, [www.sealandgov.org](http://www.sealandgov.org)

*Human rights key to climate change negotiations*, UNHCR, 17 June 2009, [www.ohchr.org](http://www.ohchr.org)

*Indonesia's rent-an-island answer to climate change*, ABC News, 3 June 2009, [www.abc.net.au](http://www.abc.net.au)

*Inuit Circumpolar Conference*, Center for International Environmental Law & Earthjustice, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, Inuit Circumpolar, 7 December 2005, [www.inuitcircumpolar.com](http://www.inuitcircumpolar.com)

IPCC, *Media Centre*, IPCC, [www.ipcc.ch](http://www.ipcc.ch)

*John Knox, Independent Expert on human rights and the environment*, OHCHR, [www.ohchr.org](http://www.ohchr.org)

*Kyoto Protocol*, UNFCCC, <https://unfccc.int>

*Long-term climate changes and their effects*, Cabinet Office file ref CAB 163/272 #122885, UK National Archives, 1970, [www.nationalarchives.gov.uk](http://www.nationalarchives.gov.uk)

*Maritime Space: Maritime Zones and Maritime Delimitation*, UN, [www.un.org](http://www.un.org)

*Mission*, Order of Malta, [www.orderofmalta.int](http://www.orderofmalta.int)

MOCEICA, S., *Kiribati's hunt for land*, The Fiji Times, 3 maart 2012, [www.fijitimes.com](http://www.fijitimes.com)

*New Zealand's immigration relationship with Tuvalu*, New Zealand Ministry of Foreign Affairs and Trade, [www.mfat.govt.nz](http://www.mfat.govt.nz)

*New Zealand's immigration relationship with Tuvalu*, New Zealand Ministry for the Environment, 19 December 2013, [www.mfat.govt.nz](http://www.mfat.govt.nz)

*Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*, UN, 3 February 2012, [www.un.org](http://www.un.org)

*Reeling from Impacts of Global Warming, Small Island States Urge General Assembly to Take Comprehensive Action*, UN News, 25 September 2008, [www.un.org](http://www.un.org)

Republic of Maldives, *National Adaptation Plan of Action*, SIDS, 2006, 50, [www.sids2014.org](http://www.sids2014.org)

*Risk Management Approaches to Address Adverse Effects of Climate Change – Insurance*, UNFCCC, <http://unfccc.int>

SAEED, A., *From underwater, Maldives sends warning on climate change*, CNN, 17 October 2009, <http://edition.cnn.com>

Secretary-General Ban Ki-moon, *Latest Statements: Dhaka, Bangladesh, 14 November 2011 - Secretary-General's remarks at opening of Climate Vulnerable Forum*, United Nations, 14 November 2011, [www.un.org](http://www.un.org)

*Small island nations' survival threatened by climate change, UN bears*, UN News Centre, 25 September 2008, [www.un.org](http://www.un.org)

SPENCER, R., *The World is sinking: Dubai islands 'falling into the sea'*, The Telegraph, 20 January 2011, [www.telegraph.co.uk](http://www.telegraph.co.uk)

*Stateless People*, UNHCR, [www.unhcr.org](http://www.unhcr.org)

*The World Factbook*, Central Intelligence Agency, [www.cia.gov](http://www.cia.gov)

*The World Factbook: Tonga*, Central Intelligence Agency, [www.cia.gov](http://www.cia.gov)

*Tibet in Exile*, The Central Tibetan Administration: restoring freedom for Tibetans, <http://tibet.net>

*WRI's Climate Data Explorer*, World Resources Institute, <http://cait2.wri.org>

YARDLEY, J., *Tibetan Exiles Elect Scholar as New Prime Minister*, The New York Times, 27 April 2011, [www.nytimes.com](http://www.nytimes.com)

## PICTURES

Isaac Cordal, *Follow the leader*, Isaac Cordal, <http://cementeclipses.com/works>

*Universiteitsstraat*, World under Water, <http://worldunderwater.org/#>