

Statelessness, Statehood and Climate Change in International Law:

The Case of the Low-lying Islands

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“But man is not made for defeat,” he said. “A man can be destroyed but not defeated.” I am sorry that I killed the fish though, he thought. Now the bad time is coming and I do not even have the harpoon. The dentuso is cruel and able and strong and intelligent. But I was more intelligent than he was. Perhaps not, he thought. Perhaps I was only better armed.’

The Old Man and the Sea, Ernest Hemingway (1899-1961)

Acknowledgment

'You are so young, so much before all beginning, and I would like to beg you (...) to have patience with everything unresolved in your heart and to try to love the questions themselves as if they were locked rooms or books written in a very foreign language. Don't search for the answers, which could not be given to you now, because you would not be able to live them. And the point is, to live everything. Live the questions now. Perhaps then, someday far in the future, you will gradually, without even noticing it, live your way into the answer.'

Letters to a Young Poet, Rainer Maria Rilke (1875-1926)

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I dedicate this work to my parents, Cristina and Bira, for their love, patience and friendship, and for supporting me in every single step of my life. You will be eternally my source of inspiration. This thesis is also dedicated to my brothers, William and Fábio, for representing the peace and the balance within my life, and for adding so much values to my memories. I love you all, family.

Tilburg, June 2013

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Abstract

The effects of climate change over and the prognoses on sea-level rise indicate that low-lying islands such as the ones located in the Pacific may be the most affected states because climate changes will likely render their territories either uninhabitable or completely submerged. Consequently, human sustainability will be altogether threatened, and the risk that the population become stateless will arise.

In this context, the present paper addresses the question on what would be the legal status of people displaced from 'disappearing states', should a low-lying state cease to exist due to climate change. In order to do so, it mainly exposes the impacts of climate change in relation to the small island states, and outlines the concept and criteria of statehood under international law. In sequence, the research then assesses the rules concerning the extinction of a state, along with an analysis of the legal status of the displaced population and the consequences arising from statelessness. At the end, measures for the prevention of statelessness and adaptability of the population are addressed, and recommendations towards the problem of loss of territory and forced displacement in the context of the sinking islands are suggested.

As it is drawn from the conclusion of the analysis, advancements of the existing legal frameworks and further improvement whenever gaps are at stake shall be given due attention by both international and national laws, without, nonetheless, losing sight of the population affected and their basic rights.

Keywords: Climate change. Statehood. Statelessness. Low-lying islands. International law

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I. Introduction

The effects of climate change over territories have been reported throughout the years as striking and dramatic. The prognoses on sea-level rise indicate that low-lying islands such as the ones located in the Pacific may be the most affected states because the severe events resulting from climate changes will likely render their territories either uninhabitable or completely submerged. As a consequence, human sustainability will be altogether threatened, and the risk that the population become stateless will arise.

Therefore, the extreme predicted scenario poses a broad range of questions at the international legal sphere, such as: what are the consequences to the very notion of statehood under international law, should a state lose its entire territory, and both the population and government be found in exile? What would be the legal status of the population in such case? The aim of the present research, therefore, is to address some of these questions in order to answer the main research question at hand, namely: what would be the legal status of people displaced from 'disappearing states', should a low-lying state cease to exist due to climate change?

Although the scope of the present research is on the impacts of climate change on statehood and statelessness, it will also touch upon issues such as state sovereignty and the protection of basic human rights.

In the first part (II.A), an overview of the impacts of climate change in relation to the small island states will be presented. At the second part (II.B), the criteria of statehood stated in the Montevideo Convention on the Rights and Duties of States will be outlined. From this point, at the third part (II.C), the focus of the research will then be on the rules concerning the

extinction of a state, especially on how international law deals with the issue. For such assessment, the law on state dissolution will be further analyzed.

The fourth part (III.A) will then be directed to the legal status of the displaced population. To this effect, it will expose the laws on nationality under international law in order to examine the problems that the lack of a nationality will cause to the displaced population. The effectiveness of the nationality laws as they currently stand, together with the legal framework on statelessness will also be under analysis in order to expose the existing legal gaps.

The evaluation will be relevant as a means to reflect on the possible actions for the prevention of the statelessness condition, which are stated in the fifth part (III.B) of the present research. In addition, some of the measures designed for the adaptability of the population in case they face a forced displacement will be presented.

At the sixth and final part (III.C) recommendations will be made in regard to the problem of loss of territory and forced displacement in the context of the sinking islands. These recommendations are aimed at bringing possible advancement of the existing legal frameworks and further improvement whenever gaps are noticeable. These developments will thus be able to provide guidance for future cases of disappearance of states' territories.

At the end, a reflection upon the issues will seek to contribute for a normative and practical understanding of the legal status of the displaced population in case a low-lying island state ceases to exist due to climate change. The analysis of the climate change impacts over low-lying island states, statehood and statelessness will help to assess the research goal, that is, to improve the ongoing discussions on the prevention of statelessness and the interpretation of the concept of 'statehood' under international law.

II. Statehood, extinction of states and climate change: addressing the basis

A. The current impact of climate change over low-lying islands

Small island states comprise small land masses surrounded by ocean, and are frequently located in regions prone to natural disasters, often of a hydrometeorological and/or geological nature.¹ These islands are placed as either developing or least developed, meaning that they share similar economic and sustainable development challenges including low availability of resources, susceptibility to natural disasters, and vulnerability to global developments.² According to a report issued by the United Nations in 2012, the least developed countries of the Asian and Pacific region include Kiribati, Solomon Islands, Tuvalu and Vanuatu.³

In addition, they generally have very high population densities. In the Maldives, for instance, the country's population amounts to 320,000, while the share of population living in low elevated coastal zones reaches 100 per cent.⁴ In Tuvalu, the enumerated population is of 11,206,⁵ while around 99, 5 per cent live in low elevated coastal areas.⁶

Moreover, the islands possess characteristics that make them highly susceptible to climate change effects. The rise of sea level is likely to exacerbate inundation, erosion and other coastal

¹ IPCC (Intergovernmental Panel on Climate Change), 2007. Fourth Assessment Report, International Working Group II: Impacts, adaptation and vulnerability, p.691.

² Stem,G., 2007. Vulnerability and Adaptation to Climate Change in Small Island Developing States: Background paper, UNFCCC Expert Meeting on Adaptation for Small Island Developing States (SIDS), p.4.

³ UNCTAD (United Nations Conference on Trade and Development), 2012. The Least Developed Countries Report, , New York and Geneva: United Nations Publication, 2012.

⁴ UN CDP (United Nations Committee for Development Policy), 2012. Maldives: Monitoring of Graduated Countries from the Category of Least Developed Countries, Expert Group Meeting, Review of the list of Least Developed Countries, CDP2012/PLEN/12, 16- 17 Jan. 2012, p.3.

⁵ Tuvalu Central Statistics Division, 2012. Population Census 2012. Available at: <<http://www.spc.int/prism/tuvalu/>> [Accessed 19 May 2013].

⁶ CIESIN (Center for International Earth Science Information Network). Proportion of Population in Coastal Zones (LECZ) in 2000, Low Elevation Coastal Zone (LECZ) Urban-Rural Estimates, Global Rural-Urban Mapping Project (GRUMP), Alpha Version. Palisades, NY: Socioeconomic Data and Applications Center (SEDAC), 2 Columbia University, 2009 and UNSD Environment Statistics Section.

hazards, threaten vital infrastructure, settlements and facilities, and thus compromise the socio-economic well-being of island communities and states.⁷ According to reports issued by the Intergovernmental Panel on Climate Change (IPCC), a scientific body under the auspices of the United Nations, and the International Scientific Congress on Climate Change, an event whose findings were supplementary to the work of the IPCC, the effects of rising sea levels on atoll states such as Kiribati, Tuvalu, Tokelau and the Marshall Islands may pose risks to their sovereignty or existence.⁸ Although predictions are not precise, it is acknowledgeable that out of the existing 40 small islands developing states, sea level rise could submerge entire parts of these sovereign nations.⁹

In fact two uninhabited islands belonging to Kiribati, Tebua Tarawa and Abanuea, have had their existence affected by sea-level rise, since they actually disappeared beneath the Pacific Ocean by 1999.¹⁰ The climate change effects have also reached the Carteret Islands in Papua New Guinea. The relocation of the population, who has been called the world's first 'climate change refugees', has been implemented several times because the islands have suffered inundations, and are expected to sink within five years.¹¹ The prognoses on the populational

⁷ IPCC (Intergovernmental Panel on Climate Change), 2007. Fourth Assessment Report, International Working Group II: Impacts, adaptation and vulnerability, p.689.

⁸ *Id.*, p.736; Climate Secretariat University of Copenhagen, 2009. *Rising sea levels set to have major impacts around the world*. [press release] 10 March 2009. Available at: <http://climatecongress.ku.dk/newsroom/rising_sealevels/> [Accessed 8 June 2013].

⁹ Warner, K. *et al.*, 2009. In Search of Shelter: Mapping the effects of climate change on human migration [pdf] Care, CIESIN, UNHCR, UNU-EHS, World Bank, p.18. Available at: <http://www.ciesin.columbia.edu/documents/clim-migr-report-june09_media.pdf> [Accessed 8 June 2013].

¹⁰ Lean, G., 1999. They're going under. *The Independent*, [online] Available at: <<http://www.independent.co.uk/life-style/theyre-going-under-1099931.html>> [Accessed 20 May 2013]; Cool, N., 2006. *Is it Hot in Here?: The simple truth about global warming*. Lincoln: iUniverse, p.28; Islands disappear under rising seas, *BBC News*, 1999 [online]. Available at: <<http://news.bbc.co.uk/2/hi/science/nature/368892.stm>> [Accessed 20 May 2013].

¹¹ Shears, R., 2007. The world's first climate change refugees to leave island due to rising sea levels, *Mail Online*, [online]. Available at: <<http://www.dailymail.co.uk/news/article-503228/The-worlds-climate-change-refugees-leave-island-rising-sea-levels.html>> [Accessed 20 May 2013]; Paradise lost: rising seas threaten Pacific's Carteret Islands, *CARITAS*, [press release]. Available at: <http://www.caritas.org/activities/climate_change/ParadiseLost.html> [Accessed 22 November 2013]; I need a new home, my island has sunk, UNESCO Rio+20, [online]. Available at: <http://www.unesco.org/new/en/rio-20/single-view/news/i_need_a_new_home_my_island_has_sunk/> [Accessed 6 June 2012].

migration due to climate changes by 2050 lies between 50 and 350 million,¹² while wider projections of displacement go as far as 1 billion people by 2050.¹³

The estimates on sea level and temperature for the next 50 to 100 years also spotlight a great risk to coastal areas in respect to natural resilience, and a threat to sustainability of island agriculture and food security.¹⁴ Accordingly, projections on global sea level estimate a rise between 0.10m and 0.15m by 2030, 0.18m and 0.30m by 2050, and 0.41m and 0.88m by 2100.¹⁵

Ultimately, atoll environments may be unable to sustain human habitation, and such finding is likely even with a moderate amount of climate change over the next century.¹⁶ Due to the fact that the islands are mostly developing or least developed countries, their lack of financial and recourse capacity make it more difficult for them to mitigate or to adapt to climate change.¹⁷

In addition, these climate change-related impacts affect many international human rights,¹⁸ undermining then the existence of the very framework of protection of rights, that is, the state.¹⁹ One of the most important rights affected is the right to self-determination.²⁰ Accordingly, because it underpins territorial and political sovereignty, access to means of subsistence, and the capacity for economic, social and cultural developments, the no granting of such right by its main

¹² UN Secretary-General Report, 2009. Climate change and its possible security implications, UN doc A/64/350 , 11 September 2009, para.54.

¹³ Bird, R. *et al.*, 2007. Human Tide: The real migration crisis [pdf], Christian Aid Report, p.5.6. Available at: <http://www.christianaid.org.uk/images/cc_impacts_adaptation_final.pdf> [Accessed 8 June 2013].

¹⁴ IPCC (Intergovernmental Panel on Climate Change), 2007. Fourth Assessment Report, International Working Group II: Impacts, adaptation and vulnerability, p.690.

¹⁵ Hemming, D. *et al.*, 2007. Impacts of Mean Sea Level Rise Based on Current State-of-the Art Modeling, Hadley Centre for Climate Prediction and Research, Exeter, UK.

¹⁶ Barnett, J. & Adger, N., 2003. Climate dangers and atoll countries, *Climatic Change*, vol. 61, Number 3, p.326.

¹⁷ (OHCHR) Office of the UN High Commissioner for Human Rights, 2009. Report of the OHCHR on the Relationship Between Climate Change and Human Rights, UN Doc.A/HRC/10/61, para.10.

¹⁸ *Id.*, paras.21-37.

¹⁹ Willcox, S., 2012. A Rising Tide: The implications of climate change inundation for human rights and State sovereignty. *Essex Human Rights Review*, 9(1), p.7.

²⁰ In general, *see*: Willcox, S., 2012. A Rising Tide: The implications of climate change inundation for human rights and State sovereignty. *Essex Human Rights Review*, 9(1); UNGA (United Nations General Assembly) Resolution 637A (VII), 20 December 1952. The Right of Peoples and Nations to Self-Determination; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276, International Court of Justice (ICJ) Advisory Opinion (ICJ Reports 1971), 313-312 at paras.52-53; Western Sahara, ICJ Advisory Opinion (ICJ Reports 1975), 31-33 at paras.54-59.

guarantor within the international legal framework (the state)²¹ will make it more difficult for such guarantor to ensure the enjoyment of citizens' basic human rights.²² Therefore, people whose rights and territory are threatened by the effects of climate change face great obstacles.²³

In this respect, the concern that a threshold of dangerous climate change²⁴ may be breached by rates of international migration, resource scarcity on the islands, self-perpetuating socially and culturally erosive fragmentation, or by decreased resilience to adverse effects from drought or storm surges, is a matter at stake in the context of small island states.²⁵ Coupled with that, the possibility that the islands become uninhabitable and/or extinct will affect the current notions of statehood under international law. Among the emerging problems in such scenario, in the core of the migration of the population, the risk of statelessness may also arise.

B. The criteria of statehood under international law

The small islands under analysis are structured states, recognized in international law as such, and in accordance to the criteria set therefrom.²⁶ But what would be of these island states if one or more criteria would be lacking as a result of the above stated climate change effects over their territory? How would it affect the notion of statehood? In order to delve into these issues, an exposition of the general concept of statehood under international law will be presented.

²¹ Annan, K., 2005. In Larger Freedom: Towards development, security and human rights for all, UN Doc.A/59/2005, 21 March, para.19.

²² Willcox, S., 2012. A Rising Tide: The implications of climate change inundation for human rights and State sovereignty. *Essex Human Rights Review*, 9(1), p.6.

²³ *Id.*, p.12.

²⁴ Accordingly, such threshold is manifest in behavior and risk, as well as in physical parameters: Barnett, J. & Adger, N., 2003. Climate dangers and atoll countries, *Climatic Change*, vol. 61, Number 3, p. 328.

²⁵ *Id.*

²⁶ The membership within the United Nations system is a relevant source which lists sovereign states around the world.. Accordingly, the Maldives, Samoa, Kiribati, Papua New Guinea, Tuvalu and Marshall Islands, are sovereign states: United Nations, 2006. Member States of the United Nations, UN ORG/1469 [press release] 3 July 2006. Available at: <<http://www.un.org/en/members/>> [Accessed 21 May 2013].

The well-known criteria of statehood are provided by the Montevideo Convention on the Rights and Duties of States,²⁷ a legal instrument which is regarded as part of customary international law. Accordingly, a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other states qualify as elements of a *said* state.²⁸

A 'defined territory' is meant as at least a portion of the earth's surface, inhabited by a population, and governed effectively by an authority,²⁹ independently of imprecise boundary or territorial dispute.³⁰ The criterion is seen as a constituent of government and independence rather than as a separate requirement³¹ Accordingly, at the same time a territory is a factor determining statehood, it is also a criteria through which sovereignty is recognized, since a government's authority is predicated over such portion of earth.³² Thus, at the sinking islands context, as it will be further on exposed, it is relevant to point out that the disappearance of the actual islands' territories will call for discussions on several concepts entangled with statehood, including governmental authority and independence.

In addition, the loss of territory has effect on the enjoyment of human rights such as the right to self-determination. Self-determination is a collective right that encompasses peoples' free

²⁷ Montevideo Convention on the Rights and Duties of States 1933, entered into force 26 December 1934, 165 LNTS 19.

²⁸ *Id.*, Art.1.

²⁹ Crawford, J., 1976-7. The criteria for statehood in international law. *Brit Yrbk. Int. Law*, 48 (1976-7), p.114; UNSC (United Nations Security Council), 1948. Official Records, 383rd Meeting, 2 December, p. 41 (Jessup's argumentation for Israel's admission to the United Nations in respect of its territory).

³⁰ *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929), Annual Digest, (1929-30), NO.5, pp. 14-15; *North Sea Continental Shelf (Germany v. Denmark and The Netherlands)*, I.C.J. Reports, 1969, p. 3, at para.32; *Germany v. Reparations Commission*, Reports of International Arbitral Awards, (1924), vol. I, p. 524, at p. 525 (13th Question).

³¹ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p. 31, 37-45.

³² Under general international law, sovereignty is premised on the idea that the fundamental rule on consent of states in respect to intrusions into their territory is inviolable, and that territorial sovereignty means the right to exercise, without any other state's intrusion, the functions of a state: Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625(XXV), GAOR 28, UN Doc. A/8082 (1970), p. 121; United Nations Charter, 1945, Art.2(4); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res. 2131, GAOR 14, UN Doc.A/6220 (1965), p. 12; Jennings, R. & Watts, A. (eds.), 1992. *Oppenheim's International Law*. London: Longman, vol. 1, p.334; *Island of Palmas Case (United States v. The Netherlands)*, PCIJ (1928), ICJ Reports of Arbitral Awards, vol. 2, p. 829.

determination of political status and the pursuance of economic, social, and cultural development.³³ Notwithstanding, without a territory the population cannot enjoy the right. Therefore, given that self-determination is linked to territorial sovereignty, it (...) is unlikely that it [would be] recognized within the international community without a corresponding capacity for territorial autonomy.”³⁴ In this view, the criteria of territory is seen as significant for the fruition of a variety of rights.

In correlation to a territory, the criterion of a ‘permanent population’ is found, standing as the peoples forming a stable community within a territory they inhabit.³⁵ It does not require a specific minimum number of people living on the territory itself, however transitoriness is discarded of the idea of ‘permanent’.³⁶ In many Pacific countries a large part of the population lives outside their territory, yet it does not affect their ability to continue to function as states.³⁷ For the present research, it is questionable whether an exodus of the population as a consequence of an imminent or eventual loss of territory will purport that the state no longer meets the criteria of statehood. By the same token, it is questionable whether the island states, should their population flee from the natural disasters occurring or expected to occur within years in their territories, would still retain power enough to govern on a territory, and, likewise, have its population to abide to such power. As it is perceived, the situation does not still stand clear as for the conditions of the population living outside the state.

³³ International Covenant on Civil and Political Rights, 1966, UNGA, UN Treaty Series, vol. 999, p. 171, Art.1; International Covenant on Economic, Social and Cultural Rights, 1966, UNGA, UN Treaty Series, vol. 993, p. 3, Art.1.

³⁴ Willcox, S., 2012. A Rising Tide: The implications of climate change inundation for human rights and State sovereignty. *Essex Human Rights Review*, 9(1), p.7, 12.

³⁵ Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p. 70-1.

³⁶ Franck, T. & Hoffman, P., 1976. The Right of Self-Determination in Very Small Places, 8 *New York University Journal of International Law and Politics*, p.331, 183; Crawford, J., 1976-7. The criteria for statehood in international law, *Brit Yrbk. Int. Law*, 48, p.114 (“A permanent population is thus necessary for statehood (...) though (...) no minimum limit is apparently prescribed.”).

³⁷ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.8; STAHL, C. & Appleyard, R., 2007. Migration and Development in the Pacific Islands: Lessons from the New Zealand experience, Canberra: AusAID International Development, p.7.

As for an 'effective government', it has been regarded as one of the most important criterion of statehood since all the other criteria depend upon it.³⁸ Nonetheless, it has undergone some modifications where effective control over the territory and population is less critical than it used to be.³⁹ In order to assess the effectiveness of a government, a test has been set: "(...)the government must be in a position to enact and enforce legal rules inside the State; secondly, it must possess sufficient power to accomplish its duties under international law."⁴⁰ Thus, the effective government substantiates powers of authority over a State and links elements of statehood, such as territory and population, to it.

There is precedent for the endurance of the state in an abstract form as a 'government in exile'.⁴¹ Accordingly, it respects a "(...) government that lacks its territorial base", acting then, from abroad, in a friendly country.⁴² It thus reflects the domicile of a government,⁴³ being most common in the case of belligerent occupation or illegal annexation.⁴⁴ For an authority to qualify as the legitimate government of a State, even in exile, it must have certain independence,⁴⁵ that is, freedom from (direct or indirect) control by the host government on important policies.⁴⁶ In the disappearing state scenario, the governments of the islands will be encountered in exile as a result

³⁸ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.56.

³⁹ Shaw, M., 2008. *International Law*, 6th ed., Cambridge: CUP, p.200-201; Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.57.

⁴⁰ Doehring, K., 1987. 'State' in *Encyclopaedia of Public International Law*, R. Bernhardt (ed.), vol. 10, p.426.

⁴¹ Rayfuse, R. & Crawford, E., 2011. Climate Change, Sovereignty and Statehood. In: R. Rayfuse & S. Scott, eds.. *International Law in the Era of Climate Change*, R. Rayfuse, S. Scott, (eds.), Sydney Law School Research Paper No. 11/59, p.8.

⁴² Boczek, B., 2005. 'Government in exile' in. *International Law: A dictionary*. Lanham, MD: Scarecrow Press, p.65.

⁴³ Talmon, S., 1998. *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford: OUP, p.16.

⁴⁴ Marek, K., 1968. *Identity and Continuity of States in Public International Law*, 2nd. ed., Geneva: Droz. ("Clearly, it is always the legal order of the state which constitutes the legal basis for the existence of its government, whether such government continues to function in its own country or goes into exile"), *id.*, p.91, and ("There is nothing the occupant [power] can legally do to break the continuity of the occupied state"), *id.* p.80.

⁴⁵ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (1966), [1967] 1 AC 853 (U.K.H.L.); *Gur Corporation v. Trust Bank of Africa Ltd.* (1986), [1987] 1 QB 599 (CAN).

⁴⁶ Talmon, S., 1998. *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford: OUP, p.516; Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p.86-91.

of the inhabitability of the territory.⁴⁷ Therefore, under such condition, the pressing issue will be whether the government authority will remain the same since it will be more circumscribed while operating in exile.

The 'capacity to enter into relations' is an element that integrates the requirements of government and independence⁴⁸ together,⁴⁹ since it expresses the internal and external powers of a state as a subject in the international community's realm. In this sense, 'capacity' is dependent partly on the power of the internal government of a territory, without which international obligations may not be carried into effect, and on the entity concerned being separate, for the purpose of entering into international relations.⁵⁰ Therefore, the capacity to enter into relation with other states is seen as a consequence of statehood.⁵¹

In the small island states background, this criterion is interlinked to the previous one: the capacity of the state will be a result of its internal effectiveness and its external independence. As long as the islands' governments will be able to attain their authority when operating in exile, and have independence from their host countries, their capacity will not, in theory, be challenged. The issue at stake, however, is whether such *status quo* will be maintained when the islands be considered uninhabitable and the states find themselves in a permanent exile because of that - will independence and effectiveness still be asserted? These points are debatable and unclear.

⁴⁷ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.11.

⁴⁸ In fact, 'independence' has been emphasized by some authors as the decisive criteria for statehood because it expresses the exercise of functions of a state: Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.66; Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p.71; Marek, K., 1968. *Identity and Continuity of States in Public International Law*, 2nd. ed., Geneva: Droz, p.161-90; Island of Palmas Case (United States v. The Netherlands), PCIJ (1928), ICJ Reports of Arbitral Awards, vol. 2, p.829, 838; Oppenheim, L. & Lauterpacht, H., 1948. *International Law*, 7th ed., London, New York, Toronto: Longmans, Green and Co., vol. 1, p.114.

⁴⁹ Delupis, I., 1994. *The International Legal Order*, Aldershot/Brookfield: Ashgate Publishing Company, p.43.

⁵⁰ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.119.

⁵¹ Delupis, I., 1994. *The International Legal Order*, Aldershot/Brookfield: Ashgate Publishing Company, p.43.

Much as states can be created under international law, so too they can cease to exist.⁵² In the context of the possible extinction of a state due to climate change, the law on state dissolution may thus provide some further guidance about statehood.

C. The extinction/disappearance of states

Climate change threatens to deprive states of some of the Montevideo criteria,⁵³ and one of the main legal debates surrounding statehood and low-lying island states is whether they would continue to exist if their entire territory were submerged and/or if the entire population and the government were in exile.⁵⁴ In such a context, an analysis of the law on the dissolution and succession of states is relevant in order to further address the ongoing debates on sinking islands.

The law on dissolution of states provides that states may be dissolved as a consequence of merger with another state,⁵⁵ absorption into an existing state,⁵⁶ annexation,⁵⁷ or dismemberment of an existing state.⁵⁸ However, since the establishment of the United Nations, there have been few cases of voluntary, and no account of involuntary extinction of states.⁵⁹ Because States have outlived different situations but still resisted to cease in their entirety, there is a strong

⁵² Rayfuse, R. & Crawford, E., 2011. Climate Change, Sovereignty and Statehood. In: R. Rayfuse & S. Scott, eds.. *International Law in the Era of Climate Change*, R. Rayfuse, S. Scott, (eds.), Sydney Law School Research Paper No. 11/59, p.5.

⁵³ *Id.*

⁵⁴ Park, S., 2011. Climate Change and the Risk of Statelessness: The Situation of Low-lying Islands, *UNHCR Legal and Protection Research Series*, p.4.

⁵⁵ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.716.

⁵⁶ *Id.*, p.705.

⁵⁷ *Id.*, p.702-3.

⁵⁸ Marek, K., 1968. *Identity and Continuity of States in Public International Law*, 2nd. ed., Geneva: Droz, p.211-3.

⁵⁹ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.715.

presumption under international law of continuity of existing states,⁶⁰ and it is embodied by the law on state succession.⁶¹

State succession arises when one or more international person (states, whether fully or partially sovereign) takes the place of another international person, in consequence of certain changes in the latter's conditions.⁶² Continuity has been accepted even when very extensive loss of actual authority has taken place, and, in this perspective, it would not matter whether such loss occurred due to natural disasters.⁶³

Statehood may withstand the lack of a central government and even lawful occupation or administration of territory by foreign powers.⁶⁴ As long as the exile of the government stands as a temporary situation, there is precedent for continuity of the state. In this sense, if the loss of territory or the exile of the population and government were to become permanent, the situation would be different.⁶⁵ The state would find itself in a novel perspective because its sovereign authority over its main elements - territory and population - would be challenged by the lack of the former and the likely distribution of the latter into different territories. Such challenge would be marked by the fact that the government's exile would not stand as temporary anymore.

⁶⁰ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.701, 715; Schachter, O., 1993. State Succession: The once and future law, *33 Va. J. Int'l L.*, p.253, 258-60. ("As a matter of policy, the case for presuming continuity makes sense today when the state system is increasingly fluid. Nation-states no longer appear immortal. Many seem likely to split or to be absorbed by others. Autonomous regions are likely to increase, central governments may even disappear for a time (as in Somalia or Cambodia), and mergers and integration will probably occur."). *Id.*

⁶¹ O'Connell, D., 1967. *State Succession in Municipal and International Law*, vol.1, Cambridge: CUP, chap. 8 and 14; Marek, K., 1968. *Identity and Continuity of States in Public International Law*, 2nd. ed., Geneva: Droz, p.09-10. (The notions of identity and continuity and state succession "(...) are mutually exclusive (...) whereas the problem of state identity and continuity bears on the identity of the subject (...), the problem of succession relates to the identity of certain rights and obligations between different subject(...)"). *Id.*

⁶² Oppenheim, L., 1955. *International Law: A treatise*, 8th ed., H. Lauterpacht (ed.), London: Longman, p.157; Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978 (1946 U.N.T.S. 3), Art.2; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UNGA, 8 April 1983.

⁶³ Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p.71.

⁶⁴ Malanczuk, P., 1998. *Akehurst's Modern Introduction to International Law*, 7th ed., London/New York: Routledge, p.78; That was the case of Iran under Allied occupation (Soviet and British forces) from 1941 to 1946. The parties made clear that they did not wish to avail themselves of Iranian sovereignty or territorial integrity, and that the occupation was a temporary situation: see more on Foreign Relations of the United States, 1941-III, p.443; Tripartite Treaty of Alliance of 29 January 1942: British and Foreign State Papers, vol.144, p.1017, Arts. 1, 4 and 6.

⁶⁵ Park, S., 2011. Climate Change and the Risk of Statelessness: The situation of low-lying islands, *UNHCR Legal and Protection Research Series*, p.7-8.

Should a state be willing to receive a government of an affected small island nation, the latter's effectiveness would be questionable since it would be dependent on the host country's granting of powers and on the willingness of other states to accord or recognize the jurisdiction of the government.⁶⁶ The enforcement of laws by the government in exile - such as diplomatic protection to its nationals - could also be affected, since the government's very existence would be challenged by its international competence, its sovereignty, and its statehood after the loss of its territory and/or its population.⁶⁷ Diplomatic protection, therefore, could lay unavailable to (former) nationals that would likely be in face of statelessness.

The law on state dissolution and succession is thus designed to deal with a state changing borders, government or the extent of its territorial control under a voluntary decision, and these changes are within the territory in which the predecessor state originally existed. The situation of low-lying island states, thus, stands as “ (...)unique since there would, in principle, be no successor state in such cases”, except where an union would be achieved with another state prior to the extinction itself.⁶⁸ Additionally, small island nations may face the necessity to abandon their entire territory. By the same token, then, they will lose fundamental Montevideo criteria.⁶⁹

III. Statehood, statelessness and the legal status of displaced people from disappearing states: facing the gaps

⁶⁶ Peterson, M., 1997. *Recognition of Governments*, New York: St. Martin's Press, Inc.; London: Macmillan Press; Talmon, S., 1998. *Recognition of Governments in International Law: With particular reference to governments in exile*, Oxford: OUP, p.231; Shaw, M., 2008. *International Law*, 6th ed., Cambridge: CUP, p.305.

⁶⁷ According to Brownlie, "[i]n the absence of any internal law provisions or evidence of facts giving nationality by birth and other titles under internal provisions, a state may still claim to protect its population by virtue of its international competence, its sovereignty, and its very statehood (...)": Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p.403.

⁶⁸ Park, S., 2011. Climate Change and the Risk of Statelessness: The situation of low-lying islands, *UNHCR Legal and Protection Research Series*, p.6.

⁶⁹ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p. 479-500; Rayfuse, R. & Crawford, E., 2011. Climate Change, Sovereignty and Statehood. In: R. Rayfuse & S. Scott, (eds.). *International Law in the Era of Climate Change*, Sydney Law School Research Paper No. 11/59, p.6-7.

A. Statehood, maintenance of nationality and statelessness

In the 'disappearing states' framework, the connection between the maintenance of nationality and the actual existence of the state altogether needs to be scrutinized in order to establish the legal status of the displaced population.⁷⁰

The maintenance of nationality is dependent upon the existence of statehood.⁷¹ In fact, the latter cannot subsist without the former. It follows that a state, through the issuing of specific provisions, sets out the criteria determining who shall be its nationals.⁷² Nonetheless, if the state itself does not have authority over its own population and physically disappears (as for the sinking islands situation), and if the remaining population is not welcomed by another state under its nationality laws, the risk of those people to become stateless may arise.

Therefore, it is important to emphasize that the right *to confer* a nationality is not imposed upon the state, despite several documents under international law predicating for a right *to a nationality*. Although slight, the difference in the right's approach provides for a rather significant interpretation into distinct directions. For that reason, such right will be addressed in order to demonstrate that existing legal gaps in this matter may affect the status of the displaced population from disappearing states and lead them into a stateless condition.

The Universal Declaration of Human Rights is a key international instrument that stipulates 'nationality' to be a right from which no one shall be arbitrarily deprived, and whose

⁷⁰ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.2.

⁷¹ Crawford, J., 1978. The Criteria for Statehood in International Law, 48 *BRIT. Y.B. INT'L L.*, p. 93, 114.

⁷² Encyclopædia Britannica, 2013. 'Nationality'. Encyclopædia Britannica Online Academic Edition. [online] London: Encyclopædia Britannica (UK). Available at: <<http://www.britannica.com/EBchecked/topic/405793/nationality>> [Accessed 27 May 2013].

changing no one shall be denied of.⁷³ Nationality has also been expressed by the International Court of Justice in the *Nottebohm Case* as the "(...) legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."⁷⁴ Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination,⁷⁵ the International Covenant on Civil and Political Rights,⁷⁶ the Convention on the Elimination of All Forms of Discrimination against Women,⁷⁷ and the Convention on the Rights of the Child⁷⁸ are some of the instruments that contain reference to the right to a nationality.⁷⁹

As it has been already referred to, nationality and statehood are intertwined. The concept of nationality relates to the idea of population as "an aggregate of [the state's] subjects",⁸⁰ and to the extent that the state is the one bound to set its own laws on nationality, it is said that the

⁷³ Universal Declaration of Human Rights, 1948, UNGA Res.217A (III), Art.15.

⁷⁴ *Nottebohm Case (Liechtenstein v. Guatemala)*, Second phase, I.C.J. Reports, 1955, p.23.

⁷⁵ The Convention provides for the right of all persons without distinction as to race, colour, or national or ethnic origin, to equality before the law in the right to a nationality and in the right to marriage and choice of spouse: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Art.5.

⁷⁶ The Convention provides that every child be registered immediately at birth and has the right to acquire a nationality: International Covenant on Civil and Political Rights, adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 24.

⁷⁷ The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180, 34 UN GAOR Supp. (No 46) 193, UN Doc A/34/46, Art.9.

⁷⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art.7.

⁷⁹ Reference to the right is also encountered in: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res 45/158 of 18 December 1990, Arts. 4, 18, 25, 28, 20, 43 and 54; Convention on the Nationality of Married Women, UNGA Res 1040 (XI) of 29 January 1957, entered into force 11 August 1958, see, v.g., Preamble; Convention on the Rights of Persons with Disabilities, (adopted 13 December 2006) UNGA Res.61/106, Art.18. At the regional level, in: the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (adopted 11 July 1990, entered into force 29 November 1999); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003; the Organization of the Islamic Conference, Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep.Final; the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, 1948; the Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Art.20; the Arab Charter on Human Rights, 22 May 2004, entered into force 15 March 2008; and in The Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, 26 May 1995, entered into force 11 August 1998.

⁸⁰ Juss, S., 1994. Nationality Law, Sovereignty and the Doctrine of Exclusive Domestic Jurisdiction, *9 Fla. J. Int'l L.* 219, p.222.

determination of nationality by a State “is a concomitant of State sovereignty”,⁸¹ meaning that it is regulated without others’ intromission.

It has been recognized that “the power of a state to confer its nationality is not unlimited”,⁸² however no in-depth development on the general limits on state competence to confer nationality⁸³ has been legally addressed under international law. This specific problem on the discretion of states in the doctrine of nationality, as it will be further analyzed, is linked to the cases of statelessness.

Moreover, because the conferment of nationality is found under each state’s own authority, the right of a person to a nationality is sometimes left aside. As a consequence, since nation-states are important subjects worldwide, “(...) if the individual human being does not have some state as a protector, the larger community aspiration for human rights is meaningless.”⁸⁴ Therefore, the right to a nationality is posited within the human rights realm,⁸⁵ however no such assumption is taken as part of customary international law.⁸⁶

What is thus perceived is a gap in the international protection of those who cannot enjoy the benefits steaming from nationality laws because no consensus exists in relation to the granting of nationality. As it will be exposed, in the context of the sinking islands, if the states

⁸¹ Weis, P., 1979. *Nationality and Statelessness in International Law*, 2nd rev. ed., Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers, p.65; The Permanent Court of International Justice (PCIJ) also stated that nationality is a matter of a state’s internal law: Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7); see also Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J.(ser. B) No. 7, at 16 (Sept. 15).

⁸² Research in International Law, Harvard Law School, 1929. The Law of Nationality, 23 *AM. J. INT’L L.*.(Spec. Supp.), p.11, 13.

⁸³ Sloane, R., 2009. Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality, *Harvard International Law Journal*, vol. 50, n.1, Winter ed., p.3.

⁸⁴ McDougal, M. *et al.*, 1947. *Nationality and Human Rights: The protection of the individual and external arenas*, Faculty Scholarship Series Paper 2654, p.902.

⁸⁵ For instance, the Inter-American Court of Human Rights stated in an Advisory Opinion that, the powers of states to regulate matters relating to nationality are determined by their obligations to ensure the full protection of human rights: Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4.

⁸⁶ Hailbronner, K., 2006. Nationality in Public International Law and European Law. In: R. Bauböck *et al.* (eds.), *Acquisition and Loss of Nationality: Comparative Analyses, Policies and Trends in 15 European Countries*, vol.1, Amsterdam: Amsterdam University Press, p.38.

find themselves unable to secure the right to a nationality, and the acquisition of a new nationality is not granted by other states, the population will face a “heightened risk of statelessness”.⁸⁷

According to international law, a stateless person is the one considered not to be a national by any state under the operation of its law.⁸⁸ This definition focuses on the existence (or absence) of a formal bond of nationality, however it does not consider the quality or effectiveness of citizenship. As a reflection, persons qualifying under the definition are referred to as '*de jure* stateless', in opposition to the '*de facto* stateless', people who, despite retaining a formal bond of nationality, are unable to benefit from the protection of their country of nationality.⁸⁹

Due to the fact that stateless people do not possess an effective nationality, they are “(...)unable to have a legal residence, travel, work in the formal economy, attend school, access basic health services, purchase or own property, vote, hold elected office, and enjoy the protection and security of a country.” In addition to that, “[b]irths, marriages, and deaths are often not certified, and stateless persons often find themselves unable to seek redress through the courts.”⁹⁰ As it is perceived, basic human rights are thus threatened.

Although *de facto* statelessness has been recommended to be treated, whenever possible, as *de jure* statelessness in order to enable persons to acquire an effective nationality,⁹¹ the two international treaties on statelessness do not actually envisage the eventuality of physical statelessness.⁹² The extension of the provisions of the ‘1954 Convention relating to the Status of

⁸⁷ Park, S., 2011. Climate Change and the Risk of Statelessness: The situation of low-lying islands, *UNHCR Legal and Protection Research Series*, p.3.

⁸⁸ The 1954 Convention relating to the Status of Stateless Persons, 1960, Art.1.

⁸⁹ Wass, L., 2008. *Nationality Matters: Statelessness under international law*, Antwerp: Intersentia, p.20.

⁹⁰ Blitz, B. & Lynch, M., 2009. Statelessness: The global problem, relevant literature, and research rationale. In: B. Blitz & M. Lynch (eds.). *Statelessness and the Benefits of Citizenship: A comparative study*, Geneva: Oxford Brookes University, p.4-5.

⁹¹ Final Act of the Convention on the Reduction of Statelessness and the Draft Articles on Nationality of Natural Persons in relation to the Succession of States, 989 UNTS 175 1975; Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, E.T.S. No. 200, 2009, Art. 3; Massey, H., 2010. *UNHCR and de facto statelessness*, UNHCR Legal and Protection Policy Research Series, LPPR/2010/01, p. 61-65.

⁹² McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, ed. *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.14. The referred treaties are: Convention

Stateless Persons' to the *de facto* stateless was not established by the drafters of the Convention due to the difficulties borne in proving loss or lack of nationality.⁹³

In the context of succession of states, the '1961 Convention on Reduction of Statelessness' obliges states to ensure that any transfer of territory does not render people stateless.⁹⁴ In fact, “the question on the nationality of the inhabitants of the territory subject to the change of sovereignty becomes *ipso facto* the concern of at least two states.”⁹⁵ As a rule, states have conferred their nationality on the former nationals of the predecessor state;⁹⁶ nonetheless, it is still argued among scholars whether nationality automatically changes or whether it should be subject to the new state's arrangements in such matter.⁹⁷

In the case of the extinction of a state, it has been claimed that the population could be regarded as *de facto* stateless since they would "(...) likely find themselves largely in a situation that would be similar, if not the same, as if statehood had ceased."⁹⁸ After all, as confirmed by the International Law Commission, the disappearance of a state by dissolution entails the disappearance of its nationality.⁹⁹ In the sinking islands situation, the tight legal focus of the instruments respecting statelessness “(...)leaves little scope for arguing for a broader

relating to the Status of Stateless Persons, 1960, 360 UNTS 117, and Convention on Reduction of Statelessness, 1975, 989 UNTS 175.

⁹³ Robinson, N., 1997. Convention relating to the Status of Stateless Persons: Its History and Interpretation (Commentary by Nehemiah Robinson), Institute of Jewish Affairs, World Jewish Congress, 1955, reprinted by UNHCR, Art.1.

⁹⁴ Convention on Reduction of Statelessness, 1975, 989 UNTS 175, Art.10.

⁹⁵ Weis, P., 1979. *Nationality and Statelessness in International Law*, 2nd rev. ed., Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers, p.135.

⁹⁶ *Id.*, p.144.

⁹⁷ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.13; Brownlie, I., 1963. The Relations of Nationality in Public International Law, 38 *British Year Book of International Law*, p.284, 320; O'Connell, D., 1967. State Succession in Municipal and International Law, vol.1, Cambridge: CUP, p.497-528.

⁹⁸ UNHCR and International Organization for Migration and the Norwegian Refugee Council, 2009. Climate Change and Statelessness: An overview [pdf] (Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UNFCCC (UN Framework Convention on Climate Change), Bonn. Available at: <<http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>> [Accessed 9 June 2013], at 2.

⁹⁹ International Law Commission, 1999. *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)*, Supplement No. 10, UN Doc. A/54/10, 43, Commentary (1) to Art. 23.

interpretation that would encompass people whose state is at risk of disappearing”.¹⁰⁰ In this sense, *de facto* statelessness as a consequence of the inability of a state to grant due protection to its citizens because of either uninhabitability or loss of its own territory is not contemplated in the existing legal framework.

Additionally, should the government be in exile and the population be living in other states, they will be thus under different laws, since they will be “(...)subject to the laws and jurisdiction of those states.”¹⁰¹ In case the host state would be willing to permit the affected island state to exercise its personal sovereignty over its nationals in the form of diplomatic and consular protection, it is not presumable that such state would allow the island state to exercise jurisdiction to enforce its own laws.¹⁰² Under such background, the population would fall short of protection by the state.

It has been highly emphasized, however, that statelessness should be avoided by states. The Convention on the Avoidance of Statelessness in relation to State Succession, for instance, deals with the issue.¹⁰³ Likewise, other international instruments and soft laws had outlined the necessity of avoiding future cases of statelessness.¹⁰⁴

The legal provisions alluded provide, therefore, an overview of the significance of actions taken by states in determining how to exercise their sovereign right and responsibility in respect

¹⁰⁰ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, ed. *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.14.

¹⁰¹ Dixon, M., 2007. *Textbook on International Law*, 6th edition, Oxford: OUP, p.143. (“The jurisdiction of a state within its own territory is complete and absolute. The state has power and authority over all persons, property and events occurring within its territory.”); McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.12.

¹⁰² Talmon, S., 1998. *Recognition of Governments in International Law: With particular reference to governments in exile*, Oxford: OUP, p.216-18, 238-43.

¹⁰³ Convention on the Avoidance of Statelessness in relation to State Succession, Council of Europe, CETS No.200, 2006.

¹⁰⁴ European Convention on Nationality, Council of Europe, 1997, ETS 166, Art. 4; Asian-African Legal Consultative Organisation (AALCO), Resolution on the Half-Day Special Meeting on Legal Identity and Statelessness, Forty-Fifth Session of the General Assembly, Res/45/SP.1, 8 April 2006.

to issues of nationality and statelessness.¹⁰⁵ Notwithstanding, no legal instrument has yet been explicit in covering the possible novel cases of *de facto* statelessness resulting from the uninhabitability or extinction of a state territory.

As for the analysis above, it is possible to visualize that the conferment of nationality is predicated on a state while acting as a sovereign. Given that such conferment is under the discretion of the state, the link between the theoretical aspects of nationality and the rise of statelessness is evident. In the context of the disappearance of small island states, the risk is augmented by the fact that the islanders will face the inability of their own state to secure protection under national laws, and the possibility that, due to other states' discretion, they will not acquire a new nationality, and, therefore, fall short of proper human rights protection.

From the theoretical considerations made, the next part will introduce the concrete cases and address available actions and preventions of the problems.

B. The prevention of statelessness in disappearing islands

In the context of low-lying islands, at some point, as already mentioned, the territories will become uninhabitable. Bearing in mind that few states have ratified the 1954 Convention relating to the Status of Stateless Persons,¹⁰⁶ and that its related recommendations – for instance, the extension of treatment by states of *de jure* stateless to *de facto* ones – only binds such states and benefits the stateless within their territories, it is clear that the practical application of the

¹⁰⁵ Batchelor, C., 2006. Transforming International Legal Principles into National Law: The right to a nationality and the avoidance of statelessness, *UNHCR Refugee Survey Quarterly*, vol.25, Issue 3, p.13.

¹⁰⁶ As of presently (2013), the record is that 77 state parties have ratified the Convention: UN Treaty Collection, *Status of the 1954 Convention relating to the Status of Stateless Persons*. Available at: <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTSO&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en> [Accessed 29 April, 2013].

Convention is very delimited. The statelessness issue in the context of sinking islands, therefore, should be taken as a problem to be prevented by states.¹⁰⁷

The United Nation High Commissioner for Refugees, who has been entrusted with a global mandate on statelessness, including the goal of engaging in actions to prevent and reduce statelessness,¹⁰⁸ has outlined that, in order to prevent temporary statelessness, acquisition of an effective nationality should be foreseen prior to the dissolution of the affected state.¹⁰⁹ Another arrangement that could be set is the allowance of dual citizenship, even if only for a transitional period, in order to prevent a precarious status of ‘stateless’ of those involved.¹¹⁰ Under international law, the prevention of statelessness has also been addressed by the General Assembly in several resolutions.¹¹¹

In addition, some options have been pointed out as workable in a long-term plan. They include: the cession of a territory, relocation of the population and self-governance.¹¹²

a. Cession

The cession of a state territory means the renunciation made by one State in favor of another, of the rights and title which the former may have to the territory in question. Such

¹⁰⁷ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.15.

¹⁰⁸ UNGA Res.50/152, 9 Feb. 1996, paras.14-15. The expansion of UNHCR’s mandate has followed the provision of Art. 11 of the 1961 Convention on the Reduction of Statelessness, cf. UNGA Res.3274 (XXIX), 10 Dec. 1974, and UNGA Res.31/36, 30 Nov. 1976. The mandate has been reiterated and further developed in a number of General Assembly resolutions, v.g. UNGA Res.59/34, 10 Dec. 2004, UNGA Res.61/137, 25 Jan. 2007, UNGA Res.62/124, 24 Jan. 2008 and UNGA Res.63/148, 27 Jan. 2009; it has also been developed through the UNHCR Executive Committee, cf. v.g. EXCOM Conclusion No.106 (LVII), 2006 on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons.

¹⁰⁹ UNHCR and International Organization for Migration and the Norwegian Refugee Council, 2009. Climate Change and Statelessness: An overview [pdf] (Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UNFCCC (UN Framework Convention on Climate Change), Bonn. Available at: <<http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>> [Accessed 9 June 2013], at 3.

¹¹⁰ Park, S., 2011. Climate Change and the Risk of Statelessness: The situation of low-lying islands, *UNHCR Legal and Protection Research Series*, p. 19.

¹¹¹ UNGA Res.61/137, 25 Jan. 2007; UNGA Res.62/124, 24 Jan. 2008; UNGA Res.63/148, 27 Jan. 2009; Park, S., 2011. Climate Change and the Risk of Statelessness: The situation of low-lying islands, *UNHCR Legal and Protection Research Series*, p.19.

¹¹² McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, ed. *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.19.

cession is concluded through international treaties or bilateral agreements in which the ceding state must intend to relinquish and pass sovereignty to the other state.¹¹³

The President of the Maldives has discussed the possibility of purchasing land in Sri Lanka, India or Australia as an insurance policy towards sea-level rise; questions on sovereignty, however, have not been reported.¹¹⁴

As for the nationality, the population of the acquiring state is not affected because the ceding state is "(...)obliged to recognize any law of the acquiring state by which its nationality is conferred on the inhabitants of the ceded territory", and the cession would then not render them stateless.¹¹⁵

b. Relocation

A related issue is the relocation of the population to another country. The Pacific is marked by centuries of transitions in response to changing environmental, political or social conditions.¹¹⁶ In the 1940s, for instance, due to the destruction of Kiribati's Banaba Island by phosphate mining, the vast majority of the population moved to the island of Rabi in Fiji.¹¹⁷ More recently, the threat of uninhabitability of the island has led Kiribati's President to address at the

¹¹³ Jennings, R., 1963. *The Acquisition of Territory in International Law*, New York: Oceana Publications, p.16. In the case of Nauru and its resettlement in Australia, however, sovereignty was a sticking point, and the government of Nauru ended up refusing the transfer of the population to Curtis Island (Australian Territory) because the resettlement terms did not grant the Nauruans sovereign independence, cf. Case concerning Phosphate Lands in Nauru (Nauru v Australia) (International Court of Justice), Memorial of the Republic of Nauru, vol. 1, April 1990, para.74; Written Statement of Nauru, 1990, para.22.

¹¹⁴ Ramesh, R., 2008. Paradise almost Lost: Maldives Seek to Buy New Homeland, *The Guardian*, [online] 10 Nov. Available at: <<http://guardian.co.uk/environment/2008/nov/10/maldives-climate-change>> [Accessed 28 April, 2013].

¹¹⁵ Weis, P., 1979. *Nationality and Statelessness in International Law*, 2nd rev. ed., Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers, p.152.

¹¹⁶ McAdam, J., 2013. Caught Between Homelands, *Inside Story* [online] 15 March. Available at: <<http://inside.org.au/caught-between-homelands/>> [Accessed 3rd June, 2013].

¹¹⁷ McAdam, J & Loughry, M., 2008. Climate-induced displacement and the challenges for protection: A case study from the Pacific, *Forced Migration Review* 31: 51-52, p.52.

United Nations General Assembly a plan of relocation.¹¹⁸ Alike the case of the Maldives, the vulnerability at hand has also been reasoned through talks with the government of Fiji, in order to buy some of that nation's land for Kiribati's population to move to.

Relocation means the physical process of moving people, and it can be featured as either temporary or permanent and either voluntary or forced. It contrasts with the concept of resettlement since the latter reflects the restoration of living standards and livelihoods.¹¹⁹ In this sense, relocation deems a more accurate approach to the population's allocation since those who move should be able to restore their living standards and livelihoods in a new environment, that is, to properly resettle.¹²⁰

The relocation process into another state also involves the integration of the population within a new society. In fact, concerns about the maintenance of identity, culture, social practices and land tenure may not be readily understood by outsiders, which can lead to misunderstandings and misguided policies in relation to the new-comers.¹²¹ Therefore, "(...)issues other than land alone must be considered in order to provide security for the future" of the relocated population.¹²²

¹¹⁸ Statement by His Excellency Anote Tong, President of the Republic of Kiribati, [pdf] General Debate of the 63rd Session of the UN General Assembly, September 25, 2008, p.3. Available at: <www.un.org/ga/63/generaldebate/pdf/kiribati_en.pdf> [Accessed 28 April, 2013].

¹¹⁹ UNHCR, 2012. *Protection and Planned Relocations in the Context of Climate Change*, PPLA/2012/04, p.11. Available at: <<http://www.refworld.org/docid/5023774e2.html>> [Accessed 9 June 2013].

¹²⁰ *Id.*; Campbell, J., 2010. Climate-Induced Community Relocation in the Pacific: The meaning and importance of land. In: J. McAdam (ed.). *Climate Change and Displacement: multidisciplinary perspectives*, Oxford: Hart Publishing..

¹²¹ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.17. The prospected resettlement of the population of Nauru in Australia (*vide note above*) is an example of such concerns on the maintenance of a distinctive identity: Trusteeship Council Official Records, 13th session (May/June 1963), UN Doc T/SR.1203-1224, 6, cited in Case concerning Phosphate Lands in Nauru (Nauru v Australia) (International Court of Justice), Memorial of the Republic of Nauru, vol.1, April 1990, para.171; Statement by Hammer Deroburt, OBE, GCMG, MP, Head Chief, Nauru Local Government Council', Appendix 1 to Nauru Memorial, para.21.

¹²² McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.17.

In addition to that, if land is acquired, the migration laws of the host country may have to be amended in order to allow for permanent relocation of the population.¹²³ The process may implicate additional modification of the nationality of the relocating population. Moreover, as already exposed, the sovereign authority and independence of the sinking island will be challenged by the willingness of the hosting state to accept these features within its own territory.

c. Self governance

Another option would be of setting a self-governance, based on the free association of territories, as is the case of Niue in regard to New Zealand,¹²⁴ where a variety of constitutional arrangements and formal links exist.¹²⁵ Accordingly, the model aims at respecting the individuality and the cultural characteristics of the associated territory and its population, together with granting the right to determine an internal constitution without interference.¹²⁶ It is seen to be significant for island communities' developments,¹²⁷ however the free-association relationship recalls a somewhat tie between the parties, as perceived in the case of Niue and New Zealand, where the retention of New Zealand citizenship was as important to the people of Niue as the guarantee of economic support in Niue itself.¹²⁸

¹²³ Maas, A. & Carius, A., 2011. *Creating Space for Action: options for small island states to cope with global environmental change*, Migration and Global Environmental Change Report, 2011, p.6

¹²⁴ UN General Assembly, Question of Niue, 13 December 1974, A/RES/3285. Available at: <<http://www.refworld.org/docid/3b00f1c044.html>> [Accessed 28 April 2013].

¹²⁵ Quentin-Baxter, A., 1999. Niue's Relationship of Free Association with New Zealand, *30 Victoria University of Wellington Law Review*, p.589.

¹²⁶ UNGA Res.1541 (XV), 15 December 1960, Principle VII.

¹²⁷ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.492.

¹²⁸ Quentin-Baxter, A., 1999. Niue's Relationship of Free Association with New Zealand, *30 Victoria University of Wellington Law Review*, p.591.

Although preserving a degree of autonomy and sense of ‘nation’, it is nonetheless arguable whether a move away from full statehood would appeal to recently independent states such as Kiribati and Tuvalu, and to potential partner states like Australia and New Zealand.¹²⁹

In addition to the described above possible solutions, early actions for the adaptability of the population should be taken. Without adaptation, it is likely that “(...)environmental conditions and human well-being will get worse in the future”, whereas “(...)if effective adaptation strategies are implemented, both the bio-geophysical conditions and socio-economic well-being of islanders should improve.”¹³⁰ Therefore, such measures should be taken as early as possible so that the outcome will be relevant.

It has also been discussed that either in biophysical and in human aspects the resilience of the small islands to the effects of climate changes has improved the development of the adaptive capacity of the islands.¹³¹ In this sense, it has contributed to reduce vulnerability through the creation of adaptive capacity at a national level.¹³²

The dislocation of a community significantly affects the maintenance and enjoyment of their cultural and social rights, and can last for generations.¹³³ Because of that, educational and awareness-like measures would contribute to adaptability and provision of knowledge to the population remaining on the islands.¹³⁴ Projects such as the ‘Kiribati Adaptation Programme’,

¹²⁹ McAdam, J., 2010. Disappearing States, Statelessness and the Boundaries of International Law. In: J. McAdam, (ed.). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford: Hart Publishing, p.22.

¹³⁰ Harvey, N. et al., 2004. *Global Change Coastal Zone Management Synthesis Report*. Asia-Pacific Network for Global Change Research, APN Secretariat, pp.37.

¹³¹ Mimura, N. et al., 2007. Small Islands. In: M. L. Parry et al (eds.). *Climate Change: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge: CUP, p.707.

¹³² Tompkins, E.L., 2005. Planning for Climate Change in Small Islands: insights from national hurricane preparedness in the Cayman Islands, *Global Environ. Chang.* p.15, 139-149.

¹³³ Campbell, J., 2010. Climate-Induced Community Relocation in the Pacific: The meaning and importance of land. In: J. McAdam (ed.). *Climate Change and Displacement: multidisciplinary perspectives*, Oxford: Hart Publishing.

¹³⁴ Barnett, J. & Adger, N. J., 2003. Climate Dangers and Atoll Countries, *Climatic Change*, vol. 61, Number 3, p.333.

implemented by the Island's government since 2003, are essential to reduce vulnerability to climate change and improve adaptability of the population.¹³⁵

Arrangements on the participatory involvement of affected populations as well as the governments of affected island states are also relevant,¹³⁶ and adaptation funds for planning and implementation of programmes are needed, as it was stressed by the United Nations Secretary-General in a visit to Kiribati in 2011.¹³⁷ However, it is important to stress that adaptation actions are not only dependable on the governments; individual stakeholders and urban and rural communities that inhabit island countries should also play a role in carrying out such actions.¹³⁸ Moreover, “international support to assist with the adaptation in vulnerable, developing countries” is highly needed.¹³⁹

After all, the combination of factors such as “the degree of exposure to climate change” and “the limited capacity to adapt to projected impacts”¹⁴⁰ will be more pressing issues in the reasoning that adaptation measures shall be put in practice in order to reduce the impacts that will affect small islands. Therefore, the measures described above aim at bringing a sort of solace to the islands' population, whose status of stateless may become a reality in case no attention be given to the prevention of the problem. Further support and adaptation is also desirable in order to accommodate such population into new environments and conditions.

¹³⁵ Kiribati Adaptation Program (2003-2016), Office of the President, Government of Kiribati. Available at: <<http://www.climate.gov.ki/category/action/adaptation/kiribati-adaptation-program/>> [Accessed 29 April, 2013].

¹³⁶ Committee on the Elimination of Discrimination against Women, 2009. *Concluding observations of the Committee on the Elimination of Discrimination against Women on Tuvalu*, UN Doc. CEDAM/C/TUV/CO/2, para.56.

¹³⁷ UN News Centre, 2011. Joint press statement of the President of the Republic of Kiribati and the Secretary-General of the United Nations, [Press release], Tarawa (Kiribati), 05 September 2011. Available at: <http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1281# UX5dLLXlp8F> [Accessed 29 April, 2013].

¹³⁸ IPCC (Intergovernmental Panel on Climate Change), 2001. Third Assessment Report, International Working Group II: Impacts, adaptation and vulnerability, p.867.

¹³⁹ Stern, N., 2007. *The Economics of Climate Change: The Stern Review*. Cambridge: CUP, p. 692.

¹⁴⁰ IPCC (Intergovernmental Panel on Climate Change), 2001. Third Assessment Report, International Working Group II: Impacts, adaptation and vulnerability, p.842-975.

C. Statehood and the risk of statelessness: recommendations

As it has been exposed throughout the present work, two main issues under international law – statehood and statelessness – are intertwined and encountered in a third problematic situation: climate change. In view of the complexity of these issues, the present section will address separately recommendations to each of them, in order to tackle their problems. In sequence, every recommendation will be converged into a final guidance for the interlinked matters.

In what concerns statehood, much has been argued about the criteria establishing the concept of ‘state’ under the Montevideo Convention, and at what extent should them be taken into account when it comes to “defining” a state. Thomas D. Grant (1998-9) makes valid points by drawing examples from state practice, as in the case of the retained recognition of the Polish, Yugoslav, Czechoslovak, and Baltic states by the Allied Powers in the Second World War, even though all territorial power by the respective governments had been lost. Adding to this, he states, statehood survives illegal occupation and annexation of territories, meaning that nor even effectiveness is critical to the definition.¹⁴¹ Following such remarks, he points out that the Montevideo Convention itself was not concerned with how an entity might cease to be a state, but rather with whether an entity became a state. Reflecting upon this, he concludes that “(...) once an entity has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory.” Therefore, situations where entities subsist as states while lacking one or another criterion of the Montevideo Convention are

¹⁴¹ As it was the case of Somalia, which did not lose its statehood at the outbreak of a civil war in 1991, even being in a complete lawless condition, *see*: Osinbajo, Y., 1996. Legality in a Collapsed State: The Somali experience, *45 INTL & COMP. L.Q.* 910, 910-11 n.4.

“illuminating”¹⁴² and may provide further prospects of developments of the existing rules for future cases.

Regarding statelessness, discussions retain the argument that many national laws still do not clearly encompass a legal framework, drawn from international principles, which address the protection of an individual from a condition of stateless.

In order to better understand the point, it is important to delve into interlinked basic concepts for nationality laws, such as ‘sovereignty’ and ‘reserved domain of states’. Ian Brownlie (2008) once expressed that “[i]n general, 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state”, adding that “(...) matters within the competence of states under general international law are said to be within the reserved domain (...) of states”, that is, “where the jurisdiction of the state is not bound by international law”. He opposed, however, that categories such as 'nationality' would fall into such reserved domain, since the “(...) conferment and withdrawal of nationality may lead to a collision of interest between states if two states are in dispute over the right of one of them to exercise diplomatic protection.”¹⁴³

The view is also favored by a statement of the Permanent Court of International Justice in 1923: “[t]he question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question: it depends on the development of international relations.”¹⁴⁴

As for Brownlie's reasoning on the placement of 'nationality' outside the so-called 'reserved domain of states', altogether he sheds light on the fact that, inasmuch as the sovereignty

¹⁴² Grant, T., 1998-9. Defining Statehood: The Montevideo Convention and its discontents, *37 Colum. J. Transnat'l L.* 403, p.435.

¹⁴³ Brownlie, I., 2008. *Principles of Public International Law*, 7th ed., Oxford: OUP, p.292-3.

¹⁴⁴ Advisory Opinion on the Tunis and Morocco Nationality Decrees, PCIJ (Permanent Court of International Justice), Ser.B.No.4, 1923, p.23.

concept may provide states with the power to set their own laws, it may also conflict with the protection of individuals under their jurisdictions, and whose interests may have been affected. It thus posits nationality laws as a problematic example. According to the Inter-American Court on Human Rights, "[d]espite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction."¹⁴⁵

The argument is relevant to the statelessness issue because, although human rights have attained substantial recognition, an individual can still be inadvertently or deliberately rendered stateless without a legal identity in any state by virtue of decisions taken without the person's knowledge or input.¹⁴⁶ Thus, the balance between a state's determination of the content of nationality laws, and the reflection of principles of international law therein are points at hand in regard to statelessness.¹⁴⁷

Taking into account the points outlined above, the solution of the problems surrounding the sinking islands context can be advanced through recommendations. As it has been warned by the United Nations Office of Disaster Risk Reduction, many islands are suffering from sea level rise, and because of that, "(...)more action needs to be taken at the international level to increase

¹⁴⁵ Inter-American Court of Human Rights, Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4.

¹⁴⁶ Batchelor, C., 2006. Transforming International Legal Principles into National Law: The right to a nationality and the avoidance of statelessness, *UNHCR Refugee Survey Quarterly*, vol.25, Issue 3, p.8.

¹⁴⁷ Batchelor, C., 1998. Statelessness and the Problem of Resolving Nationality Status, *International Journal of Refugee Law*, vol.10, p.157-8.

their capacities to deal with what is now seen as inevitable."¹⁴⁸ It is therefore relevant to thoroughly address the situation.

In what regards statehood, attention has to be drawn to the internal disturbances already caused and likely to affect the population due to climate change, and how such statehood shall be maintained and continued at the doorstep of the total loss of the states' territories. It would be reasonable, therefore, to use the processes of islands relocations as models for the future and sources of information that will contribute to the creation of more protective international laws for those subject to such transformations.

The point is accorded based on the relativity of the already exposed concept of reserved domain of states since the extent of such domain depends on international law and varies according to its development.¹⁴⁹ In this sense, the *internal* cases would make for more advanced *external* (international) laws.

As mentioned before, through the understanding that the Montevideo criteria were concerned with the birth of a state, and the consideration that new challenges currently touch the very structure of such framework, it will be possible to broad the criteria and avail a more up to date development of their content.

Concerning statelessness, the same proposition should be applied, but to the contrary: instead of making use of internal laws as a source for the advancement of international rulings, the already existing rules should be made clear, accessible, well understood, and translated from

¹⁴⁸ Statement by Jerry Velasquez from the UN Office of Disaster Risk Reduction,. In: LEONI, B. Tsunami Highlights Small Island Vulnerability, [Press release] United Nations Office for Disaster Risk Reduction - Regional Office for Asia and Pacific (UNISDR AP), Feb. 6, 2013. Available at: <<http://www.unisdr.org/archive/31133>> [Accessed 9 June 2013]..

¹⁴⁹ Resolution of the Institute of International Law, 1954. *Annuaire de l'Institut* 45,ii. 292, 293; *Nationality Decrees in Tunis and Morocco*, PCIJ (Permanent Court of International Justice), [1923] Ser. B, no.4, p.24.

the abstract notion into a specific individual entitlement.¹⁵⁰ These arguments touch directly upon the weak guidance of international laws toward issues pertaining statelessness.¹⁵¹ Accordingly, at the national level, drafting a nationality law and interpreting it in implementation require guidance on how to prepare a law which is transparent, incorporates international standards, abides by internal rules and procedures, and ensures that statelessness is not created on a state's territory or in relation to persons under its jurisdiction abroad. It is important, therefore, that statelessness be given a thorough attention in order to prevent a substantial gap between the law as it reads and the result as implemented in practice.¹⁵²

It should be remarked, however, that prevention is the first tool to address any foreseeable situation. To the extent that climate change is in a stage where action is deemed necessary in order to face its already existing consequences, it is likely that prevention only will not reach the problems of statelessness in the context of sinking islands. Nonetheless, drawbacks from prevention of the stateless condition through the actual advancement of laws on nationality, together with careful plans on the relocation of the affected populations, will bridge some gaps of the problem. Despite being a sound development, however, it still does not touch altogether the question on the statehood criteria. It is therefore through the *opinio juris* and the practice of states towards the acceptance of new criteria that notions on the creation and extinction of states can be better addressed and developed under international law.

In 2008, in a submission to the Office of the UN High Commissioner for Human Rights, the Republic of Maldives stated that "land is (...) a fundamental pre-cursor to the enjoyment of all

¹⁵⁰ Batchelor, C., 2006. Transforming International Legal Principles into National Law: The right to a nationality and the avoidance of statelessness, *UNHCR Refugee Survey Quarterly*, vol.25, Issue 3, p.9.

¹⁵¹ Batchelor, C., 1998. Statelessness and the Problem of Resolving Nationality Status, *International Journal of Refugee Law*, vol.10, p.158-9.

¹⁵² Batchelor, C., 2006. Transforming International Legal Principles into National Law: The right to a nationality and the avoidance of statelessness, *UNHCR Refugee Survey Quarterly*, vol.25, Issue 3, p.9.

other [human] rights." ¹⁵³ In fact, as previously mentioned, the loss of territory will threaten the granting of many rights of the islands' population. Notwithstanding, it should be taken into account the fact that, once a state is created, the content of nationhood also materializes along the time through a community bound by common descent, language and history. ¹⁵⁴ In this sense, if a nation is established, its existence is held by the population through the maintenance of traditions and culture, even if the state's territory will be no longer available. ¹⁵⁵

In view of the fact that the climate change effects over the small islands touch directly upon the population's human rights, it is imperative to consider these rights. The extinction of the state as such is not a viable solution because the idea of nationhood is still alive within the population, and thus it should be respected. After all, as stated by James Crawford (2006), "(...) the substrate of the State is not property, it is the people of the State seen as a collective". ¹⁵⁶

Therefore, the appliance of planned and less harming actions, such as the ones exposed in the previous section, should be the best way of addressing the problems deriving from climate changes on small island states.

¹⁵³ See Government of the Republic of the Maldives, Submission to the OHCHR Under Human Rights Council Resolution 7/23 (2008), at 21.

¹⁵⁴ 'Nation', in Collins English Dictionary: Complete & unabridged, 11th, 2011. Available at: <<http://www.collinsdictionary.com/dictionary/english/nation>> [Accessed 7th June 2013].

¹⁵⁵ Although not being the focus of the present research, the idea of nationhood has already been recalled as relevant in the specific context of sinking islands. It has been proposed that, in order to find a suitable solution for the nation-states that will lack a territory, international law should accommodate the so-called 'Nations *Ex Situ*', that is, an "off-site conservation" of the population as a "(...)means of conserving the existing state and holding the resources and well-being of its citizens—in new and disparate locations—in the care of an entity acting in the best interest of its people": Burkett, M., 2011. The Nation *Ex-Situ*: On climate change, deterritorialized nationhood and the post-climate era, *Climate Law* 2, 345–374, p.346.

¹⁵⁶ Crawford, J., 2006. *The Creation of States in International Law*, 2nd ed., Oxford: OUP, p.717.

IV. Conclusion

The present work has brought into attention a set of issues that have inevitably become a pressing central point in international law discussions due to its already perceived consequences: the effects of climate change over states' territories and the population living in such areas. The small island states located in the Pacific are actual examples of subjects facing these consequences. Therefore, they were taken as a starting point for the analysis of the legal implications surrounding a possible disappearance or uninhabitability of the islands when it comes to the definition of 'statehood', and the status of the displaced population following such disappearance or uninhabitability of the state – and that is when the question on statelessness was brought about.

The prognoses on the sinking of many small island states due to sea-level rise are clear enough in expressing that sooner or later the world will confront more serious consequences deriving from climate changes. The record of the disappearance of islands is not new; nonetheless, it has never been related to inhabited islands. In the current situation, the threat to the natural resilience of the islands will affect human access to means of subsistence, and the capacity for economic, social and cultural developments. Progressively, it will represent the undermining of basic rights of the population and, in a broader sense, their very right to self-determining in a territory. In this scenario, the state, which should be the guarantor of rights, is challenged because the territory where it is expected to exercise authority becomes unavailable.

As it has been analyzed, theoretically the idea of statehood under international law includes 'territory' as an important element. In the context of sinking islands, however, this idea is challenged, and, as a result, so is the state's sovereignty and authority. The main debate in this

problem is whether the lack of one or more criteria defining statehood would affect the concept attributed to a 'state' as such under international law. And the answer to this debate is: yes, the notion of statehood as expressed in the Montevideo Convention is altered by the lack of one or more of its criteria (in the present case, 'territory'). It does so in the sense that the criteria laid down in the Convention seek to establish a framework for the birth of a state, and, throughout the years such instrument has evolved as a rule of customary international law.

Notwithstanding, it is important to make a distinction in the following point: it should not influence the idea of extinction of a state whenever such event is provoked by a natural (even though man-driven) cause – which, in the current situation, is represented by the climate change effects. The disappearance or uninhabitability of a territory, when resulting from a climate change effect, should not represent the extinction of the state as a whole, because: (i) it once was born with all the criteria; and, (ii) the remaining criteria may still survive if further arrangements and agreements be set.

In other words, the creation and extinction of a state need to be dealt with in a more cautious way, taking into account new issues that have arisen along the time since the existence of the Montevideo Convention. Climate change is one of these issues, and, as exposed in the present research, is impacting the legal concept of statehood under international law. Therefore, such issues should account for a development of the existing rules, not for the exclusion of this development.

In analyzing the consequences of climate change over small island states, another important issue that arises is the legal status of the displaced population and whether they could become stateless in case the sinking islands in fact become extinct.

As it has been approached in the research, both the forced displacement of the population and the barriers placed by different nationality laws may result in the *de facto* statelessness of the island states' population if no state accepts the displaced ones into their territory. Additionally, because the maintenance of nationality is dependent upon statehood, it becomes unclear how the population will be treated should one or more criteria of statehood be lacking in relation to their own island states. Up to now, no legal framework on statelessness has yet addressed the problem when it results from the inhabitability or extinction of a state's territory. Therefore, what is observed is the existence of a legal gap where the discretion of states towards nationality laws undermines the prevention of cases of statelessness.

In fact, as already mentioned, the avoidance of statelessness is a commitment expected from States. In the specific case of sinking islands, this can be translated into measures aiming at tackling the problem. They include the acquisition of an effective nationality prior to the dissolution of the affected state and the allowance of dual citizenship. In addition, long-term plans like the cession of a territory, the relocation of the population and self-governance based on the free association of territories can contribute to reduce the consequences arising from the loss of the population's original territory.

The central problem analyzed has thus comprised intertwined issues. In order to bring further development to the topic, the recommendations provided addressed these issues. As suggested, the nationality laws should follow a more standardized parameter, where the protection of human rights is placed on the spot, that is, as a main concern. The already existent legal instruments advocating for nationality to be a right are clear examples of the importance of the issue to statelessness prevention. In this sense, they should be taken into account whenever a draft of nationality laws is made. Therefore, it is important that due attention be given to the

content of treaties dealing with (more broadly) human rights law, and, more specifically, statelessness, in order to create measures of prevention that will serve as further patterns to be followed as a custom by other states. This will certainly contribute to the development of a customary international law on both avoiding statelessness and acknowledging the right to a nationality.

On the question of statehood under international law and the extinction of states, the conclusive recommendations point to the necessity that the current events of climate change faced by island states be given a more careful attention, just like in the case of statelessness. The suggestion, however, is that the Montevideo criteria should be reviewed in order to either adjust to these new events or be better interpreted in order to make a proper distinction between the birth and extinction of a state and the values attached to each of the existing criteria. The loss of territory due to natural causes should not be the cause of the extinction of a state; the other criteria deserve consideration. As it has been exposed, further arrangements may support the existence of a state, even if it has lost its original territory.

As it can be inferred from all the issues at hand, it is the population, human beings, who are mainly subject to the consequences caused by climate changes over the small island states. Because of that, a more human-centered approach should be conceived. After all, the protection of individuals as such should not be blocked by misguided rules and gaps. Rather, as advanced in the present research, plans and adaptation to the problems of sinking islands are steps that will positively contribute to the prevention of statelessness and the development of the idea of statehood under international law.

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