Statelessness, statehood, and environmentally-displaced persons: the quest for a legal status

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MASTER´S THESIS IN INTERNATIONAL HUMAN RIGHTS LAW

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STATELESSNESS, STATEHOOD, AND ENVIRONMENTALLY-DISPLACED PERSONS: THE QUEST FOR A LEGAL STATUS

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Abstract:

Climate change has been at the forefront of discussions within the international community for a number of years. A key issue of talks in recent years has been the expected migration caused by changes in sea levels and extreme weather phenomena, the creation of possible "climate refugees".

While the term is incorrect, its inaccuracy is revealing in that it highlights a central aspect of climate-induced migration: environmentally-displaced persons (EDPs) are very likely to find themselves stranded in a legal vacuum once they relocate to a safe haven, notwithstanding preemptive solutions. To understand this problem, one should examine the 1951 Refugee Convention and its shortcomings. As persecution for a limited number of grounds is key to securing refugee status, EDPs would most likely not qualify as refugees since the effects of climate change could hardly be assimilated to persecution under the meaning of the convention.

Thus, they are likely not to qualify for the protection countries afford to those falling within the refugee definition, creating a protection gap. Migrants from Low-lying Island States (LLIS), which have to contemplate the eventual physical disappearance of their homeland will, as a result, find themselves in an especially precarious position, where migration is an unavoidable, but highly unattractive outcome.

As EDPs from low-lying island nations could best be described as *de facto* stateless upon relocation, this work argues that the 1954 Convention on the Status of Stateless Persons could bear a certain relevance to their situation by providing them with the *de jure* status of stateless persons. Admittedly a very poor "solution", such an approach could nevertheless provide a useful starting point to EDPs in a particularly vulnerable position, since *de facto* statelessness affords no legal status or protection whatsoever.

To underline the relevance of the law on statelessness for EDPs from low-lying island nations, the present work substantiates the claim that the physical disappearance of the components of a state could mean its demise as a fully-fledged state and thus result in its former nationals becoming legally stateless. To do so, this thesis first examines the statehood criteria generally understood to be part of customary international law, and assesses the possible implications of their non-fulfillment. As there is no state practice or directly relevant custom or treaty covering the physical disappearance of a state, a number of related precedents and norms are analyzed,

As a result of this analysis, it appears that although the law on statelessness had until now been considered as insufficient in the protection it affords and irrelevant time-wise for EDPs from LLIS, it could nevertheless become a relevant tool for protecting the rights of the affected populations.

Key words: climate change, statelessness, refugee law, climate refugees, environmentally-displaced persons, low-lying island states, rise in sea levels, statehood, presumption of continuity, human rights	
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Thank you to my wonderful girlfriend for her unwavering support, to my family for their help and encouragements, and to all those who have somehow contributed in their own way to the success of this endeavor.

A special thought to my uncle Jean-Paul, who has been an inspiration through this long journey.

Table of Contents

1. Introduction

Climate refugees and sinking islands have been used regularly in recent years to illustrate the effects of climate change. The Atlantis-style demise of a state and its territory, and the displacement of its population provide an excellent headline for newspaper attempting to attract their readers' attention. The temptation to use small nations vulnerable to a rise in sea levels as clickbait or to forward an agenda was perfectly illustrated by the hasty conclusion that the disappearance of five islands situated in the Solomon Islands was mostly a consequence of climate change[1]. A closer look at this particular case proved that a number of factors were at play, not all linked with the rise in sea levels originating from climate change.

Estimates of the number of "climate refugees" displaced by climate change have also proven controversial, due to the vagueness of the term and the highly hypothetical nature of the estimations[2]. Even the UN was heavily criticized in 2011 for comments made in 2005 that there would be 50 million "climate refugees" by 2010[3]. The willingness of news outlets to misquote reports on the situation or to exaggerate numbers has also exacerbated the misinformation plaguing the discussion on climate-induced displacement. As Professor McAdam explains:

> Misreporting, accompanied by a portrayal of the phenomenon which fails to appreciate its nuances and complexity, means that public debate is simplistic and often ill-informed.[4]

In parallel to the confusion surrounding "climate refugees" however, a growing body of scholarship has developed, attempting to conceptualize and address the challenges created by the effects of climate change on low-lying island nations. A first element that has attracted particular attention is the effects of a state's eventual physical demise on its claim to statehood. Another subject of debate and analysis has been the identifi-

[1] Mathiesen, Karl, "Headlines 'exaggerated' climate link to sinking of Pacific islands", for *The Guardian*, 10 May 2016, available at https://www.theguardian.com/environment/2016/may/10/headlines-exaggerated-climate-link-to-sinking-of-pacific-islands (Last visited 12 June 2017).
[2] McAdam, Jane, *Climate Change, Forced Migration, and International Law*, Oxford: Oxford University Press, 2012, pp. 24-25.
[3] Atkins, Gavin, "What Happened to the Climate Refugees", for *The Asian Correspondent*, 11 April 2011, available at https://asiancorrespondent.com/2011/04/what-happened-to-the-climate-refugees/#2UMX0axgkpuEJRV1.97 (Last visited 12 June 2017). cited in McAdam, 2012, *op. cit.*, p. 29.
[4] McAdam, 2012, *op. cit.*, p. 27.

cation of possible legal solutions, which could allow the rights of the displaced populations to be optimally protected despite the considerable trauma relocation is likely to involve. The present work, by analysing the relevance of the law on statelessness will touch upon both elements.

Initially outlining the aim and methodological framework of the present research, the structure of this work will then include an overview of the problems justifying the following analysis concerning the risk of statelessness as a result of state extinction and the relevance of the law on statelessness for environmentally-displaced persons from low-lying island nations.

2. Aim

One of the novelties introduced by international human rights law in international law was its vertical approach to obligations; until then, international obligations had been almost exclusively understood as binding states with regard to each other. Instead, human rights law brought international binding obligations within the until-then sacred relationship between a state and its citizens[5]. It is relevant to consider the context of the Second World War to understand the powerful trauma needed to prompt efforts to restrict what had thus far been considered an exclusive domestic prerogative[6]. Nevertheless, still to this day a degree of mistrust remains towards human rights instruments and organs when controversial issues, such as national security, are at stake.

To return to the vertical nature of the obligations created by human rights treaties, it is here that the present work finds its aim. An important proportion of the literature on the issue of environmentally-displaced persons from low-lying island nations has so far focused on primarily examining the grounds for the concerned states to retain their statehood. Despite the incontestable relevance of this approach, this state-centered angle has left gaps in the definition of the different avenues to protection and status potentially available to EDPs upon external migration.

Hence, what the present thesis strives to achieve is to explore and assess the relevance and added value of the international framework on statelessness for the purpose of

[5] Krause, Catarina & Scheinin, Martin (eds.), *International Protection of Human Rights: A textbook, Second Revised Edition*, Åbo: Institute for Human Rights, Åbo Akademi University, 2012, p. 19.
[6] *Ibid*, p. 14.

providing a status to environmentally displaced persons. This will be done by attempting to answer the following question:

Within a worst-case scenario situation and in the absence of the implementation of a comprehensive pre-emptive solution to relocation, to which extent and under what conditions would environmentally displaced persons (EDPs) from low-lying island states (LLIS) qualify for the status of stateless person within the meaning of the 1954 Convention on the Status of Stateless Persons, and what is the added value of this status within the aforementioned worst-case scenario context?

A number of concepts require definition here, the first of which being the use of "environmentally-displaced persons", or EDPs. Despite seeming harmless, the choice of a denomination for the displaced citizens of low-lying island states bears a heavy burden: it is the vehicle through which both informed readers and the general public are introduced to them and can thereby substantially influence the perception of the different problems with which they have to cope.

An inaccurate denomination, such as "climate refugee" or "environmental refugees" implies the inclusion of environmentally-displaced persons within the scope of the refugee definition, potentially inducing some to mistakenly think of them as refugees, who would as such become eligible for this legal status in most countries. As this is not the case, such a choice could steer the debate on the issue in the wrong direction. Furthermore, the use of "climate refugees" to designate citizens from Kiribati or the Maldives has been very negatively received, partly because of the perceived victimization it implies[7].

Nevertheless, there is no consensual term or legally-based term to designate the externally-displaced citizens of low-lying island states[8]. Hence, the present thesis adopts the use of the term "Environmentally-Displaced Persons" (EDPs), which was suggested in 2011 at the Nansen Conference on Climate Change and Displacement in the 21st Century as an alternative to other inaccurate denominations[9]. For the purpose of this work,

[7] Interview with President Anote Tong, President of Kiribati (Tarawa, Kiribati, 12 May 2009), cited in McAdam, 2012, *op. cit.*, p. 41.
[8] *Ibid*, p. 7.
[9] Wahlström, Margareta, *Chairperson's Summary*, in The Nansen Conference - Climate Change and Displacement in the 21st Century (Report), 2011, p. 19; Puthucherril, Tony George, "Climate Change, Sea level rise and protecting displaced coastal Communities: Possible solutions", in *Global Journal of Comparative Law*, Vol. 1, 2012, p. 235.

the term environmentally-displaced persons is understood as designating principally citizens from low-lying island states posteriorly to cross-border migration or relocation. This narrower use of the definition is not intended to exclude internal migration or disaster-induced migration from its scope, but is instead a practical choice, simply intended to designate the concerned individual actors which are at the center of the problematic exposed in this work. Moreover, the use of an accurately descriptive denomination attempts to minimize the stigma associated with other terms such as the abovementioned term, refugees.

In continuation with the understanding of the term "environmentally displaced persons" outlined above, it is necessary to circumscribe the cross-border displacement it underscores. The definition of cross-border displacement in the context of this work is intended to designate migrants who have crossed an international border, and thus fall beyond the jurisdictional scope of their home country. This is in opposition with internal displacement, which occurs within the borders of a state, thus leaving the displaced population within the jurisdiction of the same state.

The third and fourth concepts which requires elaboration in the research question are the contents of a "worst-case scenario", as well as pre-emptive solutions. The reason for regrouping the two terms is their belonging to the same spectrum of outcomes which are explored in Section 6 of the present work, which addresses a number of possible outcomes for the future of citizens from low-lying island states'. Without going into the discussion on the definition of the "worst-case scenario", which belongs in the limitations section, it is noteworthy that such a denomination would apply to a situation where no pre-emptive solution or *in situ* adaptation solution is effectively and widely implemented, leaving EDPs outside the scope of their country's jurisdiction at a time where the latter's existence is in tatters. Hence, a worst-case scenario could encompass a variety of situation where EDPs are left in an extremely vulnerable position with regard to the protection of their human rights, and more generally, to their legal status in the country they find themselves in.

Conversely, pre-emptive solutions are options which offer an avenue to preventing the citizens of low-lying island states from finding themselves in the undesirable position mentioned above. Varying widely in the scope and content of the protection they aim

to offer, the pre-emptive solutions are also defined further in the scenarization of the outcomes of climate change's effects on low-lying island nations and their citizens.

Perhaps as important as defining the aim of this research is the need to define what its aim is not. Rather than proposing a creative new approach to the protection of environmental migrants from low-lying island nations, this thesis simply aspires to provide a better understanding of the use of statelessness in this context, under its current form and interpretation. Instead of creative legal thinking or *de lege ferenda*, this thesis therefore mostly focuses on the analysis of *lex lata* and its application to the problematic[10]. Although this distinction blurs when touching upon the legal norms surrounding the extinction of statehood due to the lack of precedents and varying opinions on the topic, the present work remains within the realm of the legal framework as it currently exists.

Overall, by answering the research question this work seeks a better understanding of the legal context within which EDPs from LLIS will find themselves after their home country's claim to statehood weakens. More precisely, starting with an assessment of the protection gap, the present thesis hopes to explore the pathway towards using the 1954 Convention on the status of stateless persons as a means to providing a legal status for EDPs. In the process, the different elements which need to be fulfilled for this to happen will be defined, the context in which this avenue to status would be relevant will be delineated, and various advantages and shortcomings of such an approach will be discussed.

Down the line and in continuation with the venerable tradition of legal scholarship, one can hope the present endeavour might provide some guidance for decision makers, whether they be judges, policy makers, or political actors, and hopefully raise awareness of the challenges faced by low-lying island nations and their citizens.

3. Methodological framework

Answering a research question is a complicated task, for which choosing the appropriate tools is essential. The present section will look into the choice of methods that have been selected to address the problematic at the origin of this work, as well as some of

[10] For an example of the creative analysis of an existing legal definition, see Alexander, Heather & Simon, Jonathan, "Unable to Return" in the 1951 Refugee Convention: Stateless Refugees and Climate Change", in *Florida Journal of International Law*, Vol. 26, No. 3, 2015, p. n. a.

the underlying assumptions on which the arguments presented are based. In addition to the outline of the methodological setting of this thesis, a review of the different limitations to the scope of its analysis will follow.

Although legal scholarship has been widely perceived as being rigid and relatively self-oriented, the study of legal norms and concepts has evolved to become a substantially more diversified field than it might have been at its beginning. From the traditional "black letter" approach focusing on doctrinal analysis to multidisciplinary legal scholarship, the avenues to academic legal research are many. Regional paradigms have also been said to influence to a certain degree the general orientation of legal scholarship, as well as the perceived use and relevance of the different approaches[11].

Though the grounds for using another methodology to address the situation of EDPs from low-lying island nations might be many, the present work's angle of approach holds that the answers doctrinal research offers constitute the best tools in the attempt to answer the research question. As explained as part of the aim of this study, the present work is centered on the current framework of international law, and simply intends to provide a better understanding of the added value of statelessness to address issues related to determining the status of EDPs. As a result, doctrinal research, which is centered on the study of law itself rather than the interactions of law with its surrounding societal context as studied by socio-legal scholars, for instance, simply represents a logical choice to reach satisfying answers to the research question.

Implied in the choice of a legal methodology are a number of legal and philosophical assumption about legal norms and the international legal system of which one should be aware even if, as is the case of the this thesis, a work does not depart from the normal, "black letter" approach.

As legal research cannot be compared to empirical scientific research, it is essential to outline some of the invisible foundations upon which one's reasoning relies to form a coherent whole. In the present case, such an exercise starts with placing the present thesis within the positivist understanding of law. As such, it is implied that international

[11] van Gestel, Rob & Micklitz, Hans-Wolfgang, "Why Methods Matter in European Legal Scholarship", in *European Law Journal*, Vol. 20, No. 3, 2014, pp. 292-316.

legal norms are social constructions, their existence separated from their merit[12]. This project therefore does not intend to analyse *de lege lata* from a critical or socio-legal perspective, and thus will remain limited in its scope mostly to the "legal bubble", or the law as it exists and to other legal sources.

An exception should be made however for the section on recognition and continued statehood (5.3.6.1), since in this particular context the present work departs from the positivist constitutive theory of recognition, but focuses rather on the declaratory theory[13].

3.1. Method

As for the choice of a methodological approach, the elaboration of the exact method adopted to answer the research question is crucial. The present section will look into the latter, clarifying the choices made as well as the rationale at their source. The first part will sketch out the structure of the thesis and in doing so will elaborate on the place of each step within the greater context of the thesis. The subsequent part will examine the limitations in the scope of the present study and some of the reasons motivating such exclusions.

At the core of this thesis are two problematics. The first is climate change and its effects, amongst which the rise in sea-levels is of particular concern since it is likely to prompt wide-scale migration within the next century. The second problem is the legal vacuum and consequent legal status many of the individuals displaced due to climate change will find themselves deprived of. These problematics will be discussed in this section using factual, academic, and legal sources.

Once the factual and legal setting of this study have been defined, the next step will be to analyse statelessness as an option to provide a legal status to environmentally displaced persons from low-lying island nations. This will be done by first assessing the definition of stateless persons according to the 1954 Convention on the Status of Stateless Persons, as well as understanding the history and context behind this instrument, and the distinction between *de jure* and *de facto* statelessness. The following part will

[12] Green, Leslie, "Legal Positivism", *Stanford Encyclopedia of Philosophy*, 3 January 2003, available at https://plato.stanford.edu/entries/legal-positivism/ (Last visited 13 June 2017).
[13] The constitutive theory, summarized succinctly in the words of Crawford: "does not correspond with State practice; nor is it adopted by most modern writers." See Crawford, James, *The Creation of States in International Law*, 2nd edition, Oxford: Oxford University Press, 2006, p. ix.

then attempt to dissect the different elements of statehood, relevant state practice, and related principles of international law to estimate the likelihood of low-lying island nations losing fully-fledged statehood, taking into account the timescale set by climate change. The shortcomings of the 1954 Convention on Statelessness will subsequently be assessed.

The next section will attempt to map the possible legal outcomes of migration for low-lying island nations. Using a scenario-based approach, this section will define a spectrum of potential outcomes, ranging from pre-emptive solutions to gloomier scenarios where the response of the international community would prove to be largely worthless. Also included will be options such as *in situ* adaptation or the inception of a new legal instrument. The elaboration of the scenarios will be based on a hybrid approach; using the existing literature on the topic to isolate a number of outcomes, but also relying on the general expected context of migration to define a number of pessimistic scenarios which have been left relatively undefined until now. Beyond sketching the different scenarios, this section will also provide a limited assessment of the relevance of a number of them.

The last section of this thesis will attempt to offer clearer answers to the research question, in light of the results of the analysis included in the previous sections. In addition to defining statelessness's scope of application and assessing its relevance, this section will also look into a number of issues central to the application of statelessness to environmentally-displaced citizens from low-lying island nations.

In order to reach sound conclusions and adhere to the methodological framework of doctrinal research, the arguments developed through the course of this thesis will make use of the sources listed in Article 38.1 of the United Nations' Charter proportionally to their legal weight[14]. Notably, subsidiary sources of international law such as the teachings of the most qualified scholars will play an important role in interpreting other sources whose the exact impact and significance in this context remain uncertain due to the relative novelty of the legal challenges at issue.

[14] Charter of United Nations, entered into force 24 October 1945, 1 UNTS XVI, Chapter XIV: International Court of Justice Statute, Article 38.1.

3.2. Limitations

As the issues at stake in the present work are wide-ranging and diverse, it was necessary to establish several limitations in order to narrow the scope of this thesis down to the research question in its present form.

The first one of these is on the work's subject, namely, environmentally-displaced persons. More specifically, due to the worst-case nature of this analysis, the attention given to the agency of the persons at risk of being displaced is limited. This does not mean, however, that their agency is not essential to the elaboration of any attempt to safeguard their rights. Rather, low-lying island states have been actively involved in the efforts to safeguard the rights and safety of their nationals and a number of them have been actively searching for solutions that allow them to minimize the negative impacts of climate change[15]. The resilience and determination of the islanders should also not be undermined by a victimizing discourse, which is at odds with the considerable ingenuity they have shown in their efforts to cope with the effects of climate change.

Instead, the resolutely pessimistic angle adopted by this study limits the possibility of effectively integrating the agency of both LLIS and EDPs. Pre-emptive solutions that are able to adequately integrate the agency of the populations concerned are undoubtedly preferable. The present research addresses the possibility of identifying a baseline for protection in the event that all other options have failed or left gaps that leave some persons in need of a legal status.

The second limitation to the scope of this study is the choice of focusing on legal status rather than substantive protection. There are two dimensions to this choice: the first is the role of legal status as enabler for other rights, the other is simply the difference in scope. Prior to developing the reasons behind this choice however, it is important to attempt to define both concepts, even though such an exercise might prove unsatisfactory. To begin with, there is no agreed understanding of "protection" in international law; the concept has thus been described as a term of art[16]. Under the broad notion of protection, two different elements can be identified, namely the threshold qualification

[15] McAdam, 2012, *op. cit.*, pp. 31-32.
[16] Goodwin-Gill, Guy S., "The language of Protection", in *International Journal of Refugee Law*, Vol. 1, No. 1, 1989, p. 6.

and the rights that are attached[17]. The terminology used in the present work departs slightly from that defined by McAdam[18], since for the purpose of this work "protection" will designate the substantive protection which should be provided by the host country to an individual having cleared the threshold qualification through a determination process to obtain a certain legal status, be it refugee status or stateless status.

The importance of status for the enjoyment of one's human rights is not to be underestimated. Usually materialised through the legal link of citizenship, legal status can help secure protection for aliens such as refugees for instance. As explained by Goodwin-Gill and McAdam:

> While human rights law requires States to respect the rights it sets out in relation to *all* persons within its jurisdiction or territory, the quality of each right may vary depending on the individual's legal position vis-à-vis the State. Thus, while the *standard* of compliance with human rights law is international, the State retains discretion in its choice of *implementation* - whether and how to incorporate treaty provisions into domestic law.[19] (Emphasis not added)

One's legal status thus has the potential to substantially influence the enjoyment of one's rights. This situation is also exemplified by the practices of some countries in relation to refugees and asylum seekers, which aim to restrict the accessibility of protection through the denial of access to the determination procedure[20]. Such practices contradict the universality inherent to human rights law: humanity rather than nationality is at the core of the enjoyment of human rights. However, if such were indeed the case and human rights law were applied across the board, there would be limited need for instruments of *lex specialis* such as the 1951 Convention on the Status of Refugees or the 1954 Convention on the Status of Stateless Persons[21].

The second reason for preferring legal status to protection lies in their respective scope. Legal status is a result of a determination process, which intends to assess the application of a legal definition (i.e. the refugee definition set out in Article 1 of the 1951

[17] McAdam, Jane, *Complementary Protection in International Refugee Law*, Oxford: Oxford University Press, 2007, p. 20.
[18] *Ibid*.
[19] Goodwin-Gill, Guy S. & McAdam, Jane, *The Refugee in International Law; 3rd Edition*, Oxford: Oxford University Press, 2007, p. 334.
[20] *Ibid*, p. 370.
[21] van Waas, Laura, *Nationality Matters – Statelessness under international law*, Antwerp: Intersentia, 2008, p. 222.

Convention Relating to the Status of Refugees) to a particular individual. If the assessment is positive and attributes the legal status of refugee to the individual, this person is then entitled to the protection provided by the country in which they applied. However, protection is a multi-layered concept, since one's protection can originate from more than one source. In the case of refugee law, this means that a number of protection elements can be found directly within the text of the Convention such as the protection from discrimination or freedom of religion[22]. Ultimately however, the bulk of the protection afforded to refugees is determined by the domestic framework of protection set up by the country, which in return also co-exists with the general human rights obligations of the said country. As such, an analysis of the protection available to environmentally-displaced persons from low-lying island nations would be incomplete without including a review of the relevance of human rights law, or the content of the protection provided by an instrument such as the statelessness convention. Instead, an analysis centered on legal status shifts the focus to what is upstream from the legal status threshold, examining the obstacles and conditions appertaining to claiming the said legal status. Conversely, a protection-centered analysis also implies a downstream dimension to the legal status definition and determination process, assessing the value of the protection provided through the latter. Notably, this choice is not based on sheer relevance, but rather on first setting the base for a protection-based analysis by exploring the way that leads to it and analysing the scope of statelessness as a legal status in the context of this study.

Another necessary limitation to the scope of the present thesis is its focus on cross-border displacement. Although climate change will likely displace more people internally, a substantially different approach with regard to the law that applies, or should apply, must be taken here. In the case of internal displacement human rights law, humanitarian law in cases of conflicts, and to a certain extent the non-binding guiding principles on internal displacement[23] represent the clearest sources of legal obligations and guidance for countries facing internal migration. The choice of cross-border migra-

[22] 1951 Convention Relating to the Status of Refugees, concluded 28 July 1951, entered into force 22 April 1954, United Nations, *Treaty Series*, vol. 189, p. 137, Articles 3 and 4.
[23] *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)*, 3 April 1999, Supplement No. 10, UN Doc A/54/10.

tion also makes sense in the context of an analysis of the 1954 Statelessness Convention, whose scope neither includes nor excludes internally displaced persons but rather implies the cessation of their legal link with the country they had previously been citizens of. Since the prospect of such a situation occurring is relatively unlikely and would in any case require a separate analysis, the decision to exclude the internal migration of environmentally-displaced persons is only natural, even while recognizing the importance of internal displacement in the overall context of climate-induced migration[24].

Complementary to the choice of cross-border migration is the decision to focus on low-lying island nations. Although low-lying island nations find themselves in an especially precarious position, this is also true of countries such as Bangladesh. Noteworthy however is the difference in the challenges faced by both; low-lying island nations will experience widespread external migration, while the response to the effects of climate change in Bangladesh will most likely lead to large-scale internal migration, as exemplified by the migratory patterns observed in response to previous natural disasters[25]. The legal challenges related to both types of displaced populations vary widely in substance, and this variety also imposes certain limits to the scope of the present study. Since statelessness, the analysis of which is central to this work, implies an existential threat to the continued statehood of the concerned states, the choice of low-lying islands is a logical one. This is not to say that the results bear no relevance to the situation of countries such as Bangladesh, but rather signifies that low-lying islands present a better-suited object of study for identifying the role and potential of statelessness. More precisely, the choice of Tuvalu, Kiribati, and the Maldives as examples is based on their vulnerability and the frequency with which they are referred to in the literature as examples of low-lying island nations[26].

Another limitation is its exclusive use of the refugee definition in order to define the protection gap that leaves environmentally-displaced persons out of the scope of the

[24] Puthucherril, *op. cit.*, p. 233, see also Scott, Matthew, "Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights", in *International Journal of Refugee Law*, Vol. 26, No. 3, 2014, p. 409.
[25] McAdam, 2012, *op. cit.*, p. 166.
[26] Such is the case of McAdam, 2012, *op. cit.*, or Doig, Eleanor, "What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?", in *Tilburg Law Review*, Vol. 21, pp. 72-97, 2016, for instance.

1951 Refugee Convention. Including complementary protection, although relevant, would deserve more in-depth treatment than the present analysis can afford.

Notably, the 1951 Convention's scope does not encompass all displaced persons; this was never its goal, and as result an important proportion of the world's displaced populations finds itself unprotected by the Convention. Although not clearing the threshold established by the refugee definition, those displaced persons cannot, or are advised not to return to their country of origin, and thus find themselves in need of protection. Complementary protection is a broad term describing the protection which might be available to displaced persons outside of the 1951 Refugee Convention, originating from, *inter alia*, human rights law, humanitarian law, or domestic law[27]. Due to the multiple origins of complementary protection and its lack of harmonisation, a survey of its relevance for EDPs would require more than a few pages. Additionally, in spite of the protection international human rights law might offer, securing the rights it provides could prove challenging in practice[28], further highlighting the need for a legal status.

Also relevant however, is the fact that complementary protection is, to a certain degree, affected by the same issues found in the Refugee Convention. Namely, the inclusion of persons displaced by sudden and slow-onset disasters in the different frameworks of protection remains doubtful; Sweden (and Finland until May 2016[29]) is the only country that explicitly recognizes persons unable to return to their country of origin due to an environmental disaster as being worthy of protection under its domestic legal framework ("humanitarian protection")[30]. Other countries, like Canada for example, have explicitly excluded victims of natural disasters from their framework of subsidiary protection[31]. This, however, does not mean that complementary protection is irrelevant since there are substantial grounds for believing that the harm caused by the effects of

[27] McAdam, 2007, *op. cit.*, p. 20-23.
[28] Park, Susin, "Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States", for *UNHCR, Division of International Protection*, May 2011, p. 13-14.
[29] See Vuorio, Jaana, "Humanitarian protection no longer granted; new guidelines issued for Afghanistan, Iraq and Somalia", *Press Release*, Migri, 17 May 2016, available at http://www.migri.fi/for_the_media/bulletins/press_releases/1/0/humanitarian_protection_no_longer_granted_new_guidelines_issued_for_afghanistan_iraq_and_somalia_67594 (last visited 23 May 2017).
[30] Sweden, Aliens Act (2005:716), Ch. 4, s2(3).
[31] Immigration and Refugee Board of Canada (IRB), "Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection - Risk to Life or Risk of Cruel and Unusual Treatment or Punishment", s. 3.1.6, 15 May 2002. Cited in McAdam, 2012, *op. cit.*, p. 62.

climate change will eventually trigger non-refoulement obligations, and possibly a related obligation to provide protection[32]. Additionally, the obligations entailed by a number of human rights, such as the right to life enshrined in Article 6 of the ICCPR[33] or the prohibition of cruel, inhuman or degrading treatment found in the ICCPR[34] or the European Convention on Human Rights[35] could provide relevant avenues to complementary protection.

Overall, rather than a lack of pertinence it is the necessity of setting a workable scope for the context of this paper that excludes complementary protection. As outlining the reach of the refugee definition presents a sizeable challenge in itself, due to the fact that its implementation lies in the hands of domestic legislations, investigating complementary protection, defined as "fluid" in nature by McAdam[36], simply presents a challenge that requires a project of its own.

As part of the analysis on the relevance of statelessness, it should be specified that the efforts regarding assessment of the low-lying island nations' continued claim to statehood. Even though the analysis revolves mostly around the definition and constitutive elements of statehood, it should be clarified that the present work will remain focused on the classical definition of statehood. Thus, albeit relevant, the discussion on the philosophical foundations of the state will be left aside[37].

4. The Problem

4.1. Climate Change

At the heart of the problems raised in the present work lies an unprecedented threat to humanity as we know it: climate change. Despite the numerous controversies related to its existence, the possible strategies to fight it, and the apparent duality between economic growth and environmental sustainability, the scientific consensus on the issue is

[32] Such an obligation is argued by McAdam as part of a two-fold obligation under the principle of non-refoulement, for more, see McAdam, 2007, *op. cit.*
[33] International Covenant on Civil and Political Rights (ICCPR), concluded 16 December 1966, entered into force 23 March 1976, United Nations, *Treaty Series*, vol. 999, p. 171.
[34] ICCPR, Art. 7.
[35] ECHR, Art. 3.
[36] McAdam, 2007, *op. cit.*, p. 23.
[37] For more on this subject, see Knob, Karen, "Statehood: territory, people, government", in Crawford, James & Koskenniemi, Martti (eds.), *The Cambridge Companion to International Law*, Cambridge: Cambridge University Press, 2012. Or Crawford, James, 2006, *op. cit.*

overwhelming: climate change is real, and it results from human activity[38]. As such, we and our forbearers all have a hand in the effects resulting from this global phenomenon.

Summarily, climate change, or global warming as it is also described, is defined by the United Nations Framework Convention on Climate Change (UNFCCC) as:

> […] a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[39]

Since this work is concerned with how persons are affected by climate change, the causes of climate change itself are only marginally relevant to the analysis of their status in international law. Even though former or present greenhouse gas emissions could theoretically be linked with responsibility for a rise in sea levels, and thus in turn with the forced cross-border migration of EDPs from low-lying island nations, such analysis is beyond the scope of this paper.

Relevant to providing a legal status to EDPs however, are the effects of climate change and in turn, how the latter will affect the population of low-lying island nations. It is here that a first distinction is necessary, between slow-onset and fast-onset disasters since both will likely affect substantially the fate of LLIS. Sudden-onset disasters happen within a relatively short time-scale, and can cause important but mostly temporary damage. Slow-onset disasters, on the other hand, take place over a longer time period but can have devastating permanent consequences, such as those expected with the rise of sea levels on low-lying island states[40]. In relation to climate change, sudden-onset disasters can hardly be individually linked with climate change, although an increase in frequencies could be correlated with it[41]. The influence of sudden-onset catastrophes such as floods, hurricanes or wild fires on vulnerable populations could be considered

[38] For more on this, see NASA: Climate change: How do we know?, 10 April 2017, available at https://climate.nasa.gov/evidence/ (last visited 13 April 2017), or Intergovernmental Panel on Climate Change (IPCC), "Working Group I Contribution to the IPCC Fifth Assessment Report, Climate Change 2013: The Physical Science Basis" (2013), available at http://www.ipcc.ch/report/ar5/wg1/ (Last visited 13 April 2017).

[39] UN General Assembly, *United Nations Framework Convention on Climate Change (UNFCCC): resolution adopted by the General Assembly*, 20 January 1994, A/RES/48/189, Article 1.

[40] For a more detailed classification, see Appendix 1.

[41] Scott, *op. cit.*

as aggravating factors in the assessment of the impact of slow-onset disasters, such as a rise in sea levels[42].

From the perspective of Low-Lying Island States, both types of disasters represent a major threat to their existence. However, only slow-onset disasters and especially the rise in sea levels can really be anticipated and understood in a manner that allows sufficiently accurate predictions. The rise in sea levels is generally recognised as representing the most urgent threat to the physical existence of Low-lying Island nations, a problematic underlined, amongst others, by the Intergovernmental Panel on Climate Change (IPCC).

According to the data provided by the IPCC in its Fourth Assessment Report, sea levels could rise by 18 to 59cm between the levels observed in 1980-1999 to those expected in 2090-2099[43]. And while these estimates might seem pessimistic, the Fifth Assessment Report from the same organisation mentions the expected rise in sea levels through the next century as "threats to territorial integrity" or to the "viability of states", as well as to the "physical integrity" of low-lying island states[44]. The same report also increased the estimates for the rise in sea levels to up to 98cm in the same time span[45]. Considering the already overpopulated territories of Tuvalu and Kiribati, as well as their highest elevation point (five meters for Tuvalu), it is easy to understand the terminology used by the IPCC[46]. There is thus little doubt that climate change poses an existential threat to several low-lying island states, a reality that makes the forced external displacement of their inhabitants a highly probable outcome[47].

4.2. International refugee law: the protection gap

4.2.1. The refugee definition

The international framework on the protection of refugees is both an essential piece of the puzzle human rights protection represents, and a complex instrument in itself. As

[42] Puthucherril, Tony George, "Climate Change, Sea level rise and protecting displaced coastal Communities: Possible solutions", in *Global Journal of Comparative Law*, Vol. 1, 2012, p. 234.
[43] Core Writing Team, Pachauri, Rajendra K. & Reisinger, Andy (eds), "Climate Change 2007: Synthesis Report", for *Intergovernmental Panel on Climate Change (IPCC)*, Geneva, 2008, p. 45.
[44] IPCC Fifth Assessment Report: Working Group II, Chapter 12, "Human Security", 31 March 2014, pp. 3, 13-14, 20.
[45] Vidas, Davor, "Sea-Level Rise and International Law: At the Convergence of Two Epochs", in *Climate law*, Vol. 4, 2014, p. 72.
[46] McAdam, 2012, *op. cit.*, pp. 124-125.
[47] Park, *op. cit.*, p. 23.

for the general movement in favor of human rights that followed World War II and lead to the adoption of the 1948 Universal Declaration for Human Rights (UDHR)[48] and eventually to the entry in force of the international bill of rights, the 1951 Convention relating to the status of refugees was intended to palliate important lacunae in the protection of displaced persons[49]. Initially temporary, the reach of the Convention was extended in 1967 via an additional protocol which removed the geographical and time-bound restrictions to the Convention's scope[50], making it the principal international legal instrument for the protection of displaced persons.

Refugees benefitting from international protection currently number 21.3 million, a fact that highlights the crucial role played by the 1951 Convention into helping displaced persons find protection in countries other than those they have left[51]. However, despite the numbers covered by the Convention, the refugees who fall under the mandate of the UNHCR represent approximately a mere quarter of the global number of forcibly displaced persons worldwide, only. This discrepancy underscores the imperfections in the refugee definition, although it should be noted that from the outset it was never understood that the Convention would cover every refugee[52].

By nature, the refugee definition set up in Article 1A(2) of the 1951 Refugee Convention seeks to identify those in need of international protection:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> […]
>
> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In doing so, and through the evolution of jurisprudence, boundaries have been set which ultimately exclude a number of categories of displaced persons. Such is the case for

[48] Universal Declaration of Human Rights (UDHR), Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.
[49] Goodwin-Gill & McAdam, *op. cit.*, p. 18-20.
[50] McAdam, 2007, *op. cit.*, p. 28-29.
[51] UNHCR, "Figures ad a glance", 2015, available at http://www.unhcr.org/figures-at-a-glance.html (Last visited 13 June 2017).
[52] Goodwin-Gill & McAdam, *op. cit.*, p. 36.

internally displaced persons, for instance. In the case of environmentally-displaced persons from low-lying island nations, due to the novelty of their situation, a number of questions arises when attempting to assess their inclusion within the scope of the refugee definition. Essentially, the central question asked through this section is: will environmentally-displaced persons from low-lying island nations be eligible for international protection upon cross-border migration?

In attempting to respond, the present section will first review the elements of the refugee definition that are relevant to the analysis of the EDPs' eligibility to international protection under the 1951 Convention. The second step of this analysis will see the concepts previously defined applied to the EDPs' anticipated situation, thus charting the protection gap within which EDPs are likely to find themselves. This approach roughly follows the structure and the elements of response proposed by Jane McAdam in her opus *Climate Change, Forced Migration, and International Law*[53]. As is the case for a number of questions asked through this work, since the problems posed have yet to materialize, scholarly work on the subject will constitute one of the central avenues to finding answers, in conjunction with related decisions, legal instruments, or state practices. Additionally, since national determination processes, although implementing the 1951 Convention, are developed as part of domestic law, some elements of the refugee definition do not enjoy a universally-agreed upon definition and scholarly sources thus provide the best source of interpretation for understanding the Convention's wording.

4.2.1.1. Persecution

Persecution is one of the central elements of the defining limits of the refugee definition. Although there is no agreed upon legal definition of what persecution entails for the purpose of the 1951 Convention, it is generally understood as implying a serious violation of human rights, by its nature or repetition. Attempts to define persecution face a number of hurdles, especially in relation to the case-specific nature of the concept. For instance, there is limited use in enumerating all known measures of persecution identified to this day since any assessment of persecution should be individualised, and so what amounts to persecution is very much a facts-based exercise[54]. If a few human

[53] McAdam, 2012, *op. cit.*, pp. 42-48.
[54] Goodwin-Gill & McAdam, *op. cit.*, p. 93-94.

rights violations such as threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group are understood as always constituting persecution based on article 33 of the Convention, other cases are not so clearly defined[55]. The fact that implementation is ultimately in the hands of the determination processes set up by individual states also complexifies such an endeavour. As a result, the present attempt to outline the core aspects of persecution makes use of the scholarly work on the topic to isolate the essential elements, especially in view of their relevance to the protection of EDPs from low-lying island states. Regional instruments or domestic decisions will also provide guidance to achieve a better understanding of the refugee definition.

Starting with the latter, the definition given by the European regional system, albeit not directly legally relevant for countries outside of its original geographical scope, can provide some guidance on the constitutive elements of persecution, also reinforcing the arguments made by scholars such as Hathaway in relation to the gradation of the human rights violations:

> 1. Acts of persecution within the meaning of article 1 A of the Geneva Convention *must*:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).[56] (emphasis added)

Hence, persecution implies a serious harm to the applicant, through a severe violation of his or her human rights. As to which human rights are concerned and to which degree, the work of Professor James Hathaway on the subject can shed some light on what type of violation constitutes persecution. He uses the following definition to outline the meaning of persecution: "the *sustained* or *systematic* violation of basic human rights

[55] UNHCR, *Handbook and Guidelines on procedures and criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva: UNHCR, 2011, par. 51.

[56] European Union, "Qualification Directive", *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Article 9.

demonstrative of a failure of state protection"(emphasis added). Moreover, in elaborating on the concept of basic human rights, Hathaway separates rights into different categories, of which a violation goes from always constituting persecution to only in certain circumstances[57]. More precisely, the first degree of rights includes the absolute rights guaranteed in the 1948 UDHR and the International Covenant on Civil and Political Rights (ICCPR), of which a violation always constitutes persecution. A second degree encompasses rights to which a derogation is possible in certain exceptional cases, such as *habeas corpus* for instance. A violation of second degree rights might not always amount to persecution if the apparent violation is done in accordance with the conditions set in the legal instrument protecting the rights. The third degree mentioned by Hathaway concerns the rights not falling within the previous categories, such as economic, social, and cultural rights for example. In their case, the threshold for non-realisation or violation needs to be higher in order to constitute persecution. This is defined by Foster as necessitating a discriminatory element[58], such as preventing the enjoyment of certain rights by a minority group.

The gradation set by Hathaway highlights one of the essential aspects of persecution, which ultimately lies in the degree and proportion of the human rights violations concerned, as well as the individualised danger for the person fleeing his or her country:

> Whether something amounts to "persecution" is assessed according to the nature of the right at risk, the nature and severity of its restriction or impairment, and the likelihood of the restriction or impairment eventuating in the individual case.[59]

Alone however, a serious human rights violation is not sufficient to invoke international protection under the scope of the 1951 Convention, as other elements are also needed to clear the required threshold such as differential effects of the persecutory acts. This element of "motivation" implies "that people are persecuted because of something perceived about them or attributed to them"[60], this "something" being a ground found in the exhaustive list provided by refugee definition of the 1951 Convention. Thus, not all human rights violations constitute persecution, and ultimately the decision is in the

[57] Hathaway, James C., *The Law of Refugee Status*, Toronto: Butterworths, 1991.
[58] Foster, Michelle, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Cambridge: Cambridge University Press, 2007, p. 88, cited in McAdam, 2012, *op. cit.*, p. 43.
[59] Goodwin-Gill & McAdam, *op. cit.*, p. 92, cited in McAdam, 2012, *op. cit.*, p. 43.
[60] Goodwin-Gill & McAdam, *op. cit.*, p. 91.

hands of the countries implementing the Convention. Notably, the domestic implementation of the definition, applied in a case-specific manner, is known to result in varying interpretations depending on the jurisdiction[61].

4.2.1.2. Convention grounds

More precisely, the said persecutory acts need to be "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Hence, the applicant must be a victim of a serious human rights violation, directly or indirectly on the basis of at least one of the grounds enumerated in the refugee definition. This differential impact is essential to claim refugee protection; indiscriminate events or disasters are likely not to fall within the scope of the five grounds set by the 1951 Convention.

Additionally, although all grounds have been the subject of extensive discussion and case-law, of particular interest to the present work is the concept of "membership of a particular social group". To qualify, the members of a social group should share an innate characteristic or common background that cannot be changed, or benefit from a distinct identity in the relevant country as it is perceived as being different from the rest of the society[62]. Notably, those two elements are cumulative for the purpose of the European Qualification directive, but have not been defined as such under the 1951 Convention. However, it is generally understood that the persecutory acts in themselves cannot create a social group; the risk of being persecuted as a common characteristic is insufficient to qualify as a social group. Even though a group might not be considered as such prior to the persecutory acts, it is essential the persecution be based on a common characteristic:

> the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their perse-

[61] *Ibid.*

[62] European Union, "Qualification Directive", *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, Article 10 (1)(d).

> cution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.[63]

This interpretation of the convention has also been confirmed by an unchallenged body of case-law from various jurisdictions[64].

4.2.1.3. Role of the home state as a protection agent

The role of an applicant's home country is essential in defining the scope of the international protection provided by the 1951 Convention. The protection (or lack thereof) it may provide with regard to safeguarding its citizens' human rights is crucial for an applicant to secure refugee status. The state's protection is particularly related to the "well-founded fear" of persecution at the source of a refugee's flight to a safe haven.

Namely, Hathaway defines well-founded fear of persecution as a reasonable anticipation that staying within the country might result in persecution, from which one's government is unable or unwilling to protect[65]. Goodwin-Gill and McAdam adopt a sensibly similar definition, similarly highlighting the role of the home country as the original guarantor of protection:

> […] fear based on a real chance of persecution, which is not remote, insubstantial or far-fetched; and be unable or unwilling, because of such fear, to avail him- or herself of the protection of their country of nationality, or if stateless, to return to their country of former habitual residence.[66]

A failure of the home country in safeguarding human rights does not always justify cross-border flight and accession to refugee status, however[67]. It can provide a basis for fear of persecution for the purpose of the Convention but as explained by Goodwin-Gill & McAdam:

> The correlation is coincidental, however, not normative. The central issue remains that of *risk of harm amounting to persecution*; the principles and practice of State respon-

[63] Australia, *A and Another v Minister for Immigration and Ethnic Affairs and Another*, [1997], Australia: High Court, 24 February 1997 190 CLR 264 (McHugh J). cited in McAdam, 2012, *op. cit.*, p. 46.
[64] See for example Canada *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, 729; Canada *Chan* [1993] 3 FC 675 (Federal Court of Appeal); United Kingdom *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* [1999] House of Lords, 2 AC 629, per Lord Steyn at 634; Lord Hope at 656, cited in Goodwin-Gill & McAdam, *op. cit.*, p. 80.
[65] Hathaway, James, "Fear of Persecution and the Law of Human Rights", in *Bulletin of Human Rights*, 91/1, United Nations, (New York, 1992), p.99.
[66] Goodwin-Gill & McAdam, *op. cit.*, p. 92.
[67] *Ibid*, p. 133.

> sibility can contribute to that assessment, for example, by confirming the level of protection and judicial or other guarantees that may be due under universal and regional human rights instruments.[68]

Conversely, specific intent from the persecutor is not a required element of persecution, although if present, such an intent can be sufficient to support a claim to refugee status[69].

The state's role as an agent of protection or persecution can translate into providing (or failing to do so) effective and accessible protection from serious harm, although states do not have an obligation to eliminate all risk of harm[70]. To assess a state's fulfillment of its obligation to provide protection, the implementation of reasonable steps by the country's government to prevent persecution and their accessibility by the applicant have been put forward within the European regional system[71], while others have argued in favor of a due-diligence approach[72].

4.2.2. Application of the 1951 Convention's refugee definition to EDPs from low-lying island nations

Will EDPs from low-lying island nations fall within the scope of the definition of refugee set by the 1951 Refugee Convention or are they likely to fall into a protection gap? Using the definition of the concepts outlined above, this section will attempt to assess the likelihood that EDPs' claims to refugee status upon cross-border migration will be successful[73]. Central to this exercise will be the concept of persecution and the convention grounds listed in the refugee convention, with regard to the expected situation of EDPs.

As a starting point, there is nothing that explicitly excludes environmentally-displaced persons from the scope of the refugee convention, nor is there any mention of their inclusion; thus the need for this section. There have already been a few cases brought

[68] *Ibid*, p. 100.
[69] *Ibid*, p. 100.
[70] Hathaway, *op. cit.*, p. 105.
[71] Qualification Directive, Article 7(2): "Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection."
[72] Nykänen, Eeva, *Fragmented State Power and Forced Migration. Study on Non-State Actors in Refugee Law*, Turku: University of Turku, 2011, p.107-108.
[73] From a general perspective. Since, as mentioned earlier, the implementation of the determination process rests in the hands of the State parties and thus, lacks uniformity.

before national courts regarding the expected harm caused by climate change in the context of vulnerable low-lying island nations[74], but since courts have so far consistently rejected the arguments brought before them, it is essential to identify the problems faced (now and especially in the future) by environmentally-displaced persons when applying for refugee status on the basis of the effects of climate change.

The first element of this analysis is the relevance of the concept of persecution to the harm caused by the effects of climate change. There is no doubt that as time passes, the human rights of the citizens from low-lying island nations will go unfulfilled, and eventually even basic rights such as the right to life might be threatened by the conditions that prevail in those countries, thus likely crossing the serious harm threshold understood as constituting persecution. Before reaching such a degree of severity however, other rights such as economic, social and cultural rights will be progressively affected by the effects of climate change, such as the right to health or to an adequate standard of living protected under the International Covenant on Economic, Social, and Cultural Rights[75]. Hence, as time passes the severity of the harm inflicted directly and indirectly by the effects of climate change will increase. The severity of the harm, however, does not in itself suffice in characterizing a human rights violation as persecution that would substantiate a refugee claim.

As developed earlier, a discriminatory impact on one of the grounds enumerated in the Convention is also required to move persecution from a "mere" human rights infringement to one justifying international protection. A number of obstacles arise when one attempts to frame the effects of climate change as grounds for claiming refugee status.

4.2.2.1. The indiscriminate nature of climate change

The first hindrance lies in the nature of climate change and its consequences: a rise in sea levels or an increase in the frequency of fast-onset natural disasters are both indiscriminate phenomena. The victims of such events will not be discriminated against, especially in the case of low-lying island nations where the entirety of the state's pop-

[74] See for instance Refugee Review Tribunal of Australia (RRTA), 10 December 2009, Case No. *0907346* [2009] RRTA 1168; New Zealand, *Refugee Appeal No 72189/2000*, Refugee Status Appeals Authority (RSAA), 17 August 2000; or *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment*, [2015] NZSC 107, New Zealand: Supreme Court, 20 July 2015.
[75] Articles 11, 12, International Covenant on Economic, Social, and Cultural Rights.

ulation is threatened simply by their location within their country's territory. This situation has already been highlighted by the New Zealand Refugee Status Appeals Authority (RSAA), as early as the year 2000:

> This is not a case where the appellants can be said to be differentially at risk of harm amounting to persecution due to any of these five grounds. All Tuvalu citizens face the same environmental problems and economic difficulties living in Tuvalu. Rather, the appellants are unfortunate victims, like all other Tuvaluans citizens, of the forces of nature leading to the erosion of the coastland and the family property being partially submerged at high tide. As for the shortage of drinkable water and lack of hygienic sewerage systems, medicines and appropriate access to medical facilities, these are also deficiencies in the social services of Tuvalu that apply indiscriminately to all citizens of Tuvalu and cannot be said to be forms of harm directed at the appellants for reasons of their civil or political status.[76]

Hence, substantiating a claim on the basis of a differential impact of climate change might prove a near impossible endeavor if there is no meaningful change in the situation prevailing in most vulnerable low-lying island nations. Context in which a claim could be founded might include cases where a government would discriminate against a particular social group in its efforts to mitigate the effects of climate change or the consequences of a natural disaster[77]. If this were the case and if the harm were sufficiently serious to amount to persecution and relate to at least one of the Convention grounds, a refugee claim would have chances of being successful. However, such a claim would still focus on the harm caused by the state's actions (or lack thereof) rather than the harm attributed to climate change itself.

4.2.2.2. State Responsibility

The second obstacle to environmentally-displaced persons falling within the scope of the refugee definition is centered on the role of their home country. As mentioned earlier, within the context of international refugee law a state can be an agent of persecution by directly causing persecution, or indirectly by failing to safeguard its citizens' human rights. To assess the latter, a due diligence approach can be adopted, or, alternatively, the steps taken by the country to ensure effective protection to its citizens can be considered.

[76] New Zealand, *Refugee Appeal No 72189/2000*, Refugee Status Appeals Authority (RSAA), 17 August 2000, cited in McAdam, 2012, *op. cit.*, p. 44-45.
[77] McAdam, 2012, *op. cit.*, p. 47-48.

In the case of low-lying island nations, both approaches are likely to find very limited ground for EDPs to argue in favour of a failure of their government to implement steps to mitigate the effects of climate change. At present, low-lying island nations have been actively fighting against the rise in sea levels, and all evidence shows that they intend to try to protect their citizens' human rights[78]. Hence, framing low-lying island states as agents of persecution might prove challenging, inaccurate, and unjust.

Other options aiming at centering efforts on the role of the international community as persecutor are also unlikely to succeed. Establishing the nexus between historical greenhouse gas (GHG) emissions and specific human rights violations would pose a sizeable challenge[79], and even if overcome, the element of discrimination would still be lacking. Indeed, a potential claimant would also have to argue that the harm caused by the international community through climate change affected him or her on the basis of at least one of the Convention grounds, a claim facing the same obstacle found in the indiscriminate nature of the effects of climate change. Moreover, this argument has been rejected by the Australian Refugee Review Tribunal (RRT) in a 2009 decision:

> In this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required…. There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide or other greenhouse gases, have any element of motivation to have any impact on residents of low lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion.[80]

Hence, the prospect of success of such an approach to claiming refugee status appear limited.

4.2.2.3. A Social Group?

Another approach to claiming refugee status through characterising EDPs as a particular social group also seem unlikely to succeed. As developed in the previous section, membership to a particular social group has to be centered on a specific characteristic,

[78] *Ibid*, p. 45.
[79] See Scott, Matthew, "Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights", in *International Journal of Refugee Law*, Vol. 26, No. 3, 2014, p. 409-411.
[80] Australia, Refugee Review Tribunal (RRTA), 10 December 2009, Case No. *0907346* [2009] RRTA 1168, par. 51. Cited in McAdam, 2012, *op. cit.*, p. 46.

to the exception of persecution itself[81]. Therefore, arguing that environmentally-displaced persons form a social group on a basis other than the threat posed by the effects of climate change is likely to prove impossible, since the common characteristic should be fundamental, or immutable. As McAdam explains:

> Although climate change affects some countries more adversely than others by virtue of their geography and resources, the reason it does so is not premised on the nationality or race of their inhabitants.[82]

The last problem facing claims for refugee status by environmentally displaced persons is the general understanding that the refugee definition simply does not include those displaced by natural disasters. The 1951 Refugee Convention was drafted decades before climate change-induced migration became a legitimate issue, and as a result it is not so surprising that environmentally displaced persons do not fall within its scope[83]. This interpretation is also supported by the interpretation of the Convention found in the UNHCR Handbook on determining refugee status[84].

Overall, if the 1951 Refugee Convention remains unchanged there are substantial arguments to support the claim that environmentally-displaced persons from low-lying island fall outside of the scope of the refugee definition, thus removing the possibility to of availing themselves of the international protection provided by that instrument. The difficulties in characterising the harm caused by climate change as persecution for a Convention ground and the role of the EDPs' home country are essential factors in creating the protection gap within which EDPs will most likely find themselves upon relocation outside of their home country.

4.3. The Principle of Non-refoulement

Even though an in-depth analysis of the non-refoulement principle lies beyond the scope of this paper, outlining its role in protecting environmentally-displaced persons is nevertheless necessary to identify the role of the international framework on the protection of stateless persons.

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[81] Goodwin-Gill & McAdam, *op. cit.*, p. 80.
[82] McAdam, 2012, *op. cit.*, p. 46.
[83] Glahn, Benjamin, " 'Climate Refugees'? Addressing the International Legal Gaps", in *International Bar News*, Vol. 63, No. 3, 2009, p. 18.
[84] UNHCR Handbook, par. 39.

Shortly summarised, the principle of non-refoulement protects individuals from being returned to persecution, torture or other relevant harm[85]. It is enshrined in a number of international human rights instruments, *inter alia* Article 33 of the 1951 Refugee Convention, Article 3 of the Convention Against Torture (CAT)[86], and Article 22(8) of the American Convention on Human Rights (ACHR)[87]. Other articles such as Article 3 of the European Convention on Human Rights (ECHR) have been interpreted as giving rise to obligations under the non-refoulement principle for state parties[88], as is also the case for Article 7 of the International Covenant on Civil and Political Rights (ICCPR)[89].

Although the scope and nature of the prohibition of *refoulement* may vary from one instrument to the other, the principle of non-refoulement is generally understood as being part of international customary law[90] . Some authors go as far as to consider it as a peremptory norm[91], an opinion supported by the UNHCR[92] which underscores its position is at the core of international human rights law, and international law itself[93]. Overall, there is substantial evidence to support the position that most, if not all, countries are bound by the principle of non-refoulement. Its content in international customary law has been outlined as such:

> No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.[94]

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[85] McAdam, *op. cit.*, 2007, p. 1.

[86] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), concluded 10 December 1984, entered into force 26 June 1987, United Nations, *Treaty Series*, vol. 1465, p. 85.

[87] American Convention on Human Rights, "Pact of San Jose", concluded 22 November 1969, entered into force 18 July 1978.

[88] *Soering v. United Kingdom*, ECtHR, App. no. 14038/88, Judgement of 7 July 1989.

[89] International Covenant on Civil and Political Rights (ICCPR), concluded 16 December 1966, entered into force 23 March 1976, United Nations, *Treaty Series*, vol. 999, p. 171.

[90] See, for instance Westra, Laura, *Environmental Justice and the Rights of Ecological Refugees*, London: Earthscan, 2009, p.97.

[91] Peremptory norms, or *Jus cogens* are of the highest binding statute in international law, applying to all members of the international community, regardless of their treaty obligations.

[92] UNHCR, "Conclusions adopted by the executive committee on the international protection of refugees 1975 - 2009 (Conclusion No. 1 – 109)", *Division of International Protection Services*, December 2009, Executive Committee Conclusion No. 25 (1982) and No. 79 (1996).

[93] This has however been disputed by scholars such as Hathaway, in Hathaway, James C., *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, 2005, p. 365.

[94] Lauterpacht, Sir Elihu & Betlehem, Daniel, "the Scope and Content of the Principle of Non-Refoulement: Opinion" in Feller, Erika, Türk, Volker & Nicholson, Frances (eds.), *Refugee Protection in*

However, since there is only limited case-law linked with Article 7 of the ICCPR, it is necessary to look to a regional instrument, the ECHR, for answers on the interpretation of the *non-refoulement* principle in relation to the risk of cruel, inhuman or degrading treatment[95].

Through a number of cases, the monitoring organ of the ECHR, the European Court on Human Rights (ECtHR) has expanded the scope of certain rights to imply extraterritorial obligations for the state parties to the Convention, mainly through Article 3. Article 3 provides that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" and is absolute in nature, allowing for no exceptions or restrictions[96].

Thus, the Court has interpreted Article 3 as prohibiting state parties from extraditing individuals who would be at real and imminent risk of being exposed to torture, inhuman or degrading treatment under Article 3 of the Convention upon their return to the country of destination. This interpretation of Article 3, effectively a wide and absolute implementation of the non-refoulement principle, was first confirmed by the Court in the case *Soering v. United Kingdom* and has since been reaffirmed in a number of cases[97].

In order for Article 3 to be triggered, the Court has defined a minimum threshold of severity, which needs to be met for the potential harm to qualify as "torture" or "inhuman or degrading treatment". It deserves to be mentioned that the obligations for state

International Law, UNHCR's Global Consultations on International Protection, p. 163. Cited in Granlund, Sara, "Environmentally Displaced Persons - a Study of their Current Position in International law", Master's thesis, *University of Turku*, 2012, p. 59.

[95] As explained by McAdam, elaborating on the prominent place of the ECHR in the analysis on *non-refoulement* obligations stemming from its Article 3: "Article 7 [of the ICCPR] contains a *non-refoulement* obligation, although a violation of this provision from a proposed removal has been substantiated on the facts only once. By contrast, Article 3 of the ECHR – which protects against torture and inhuman or degrading treatment or punishment – is a frequently utilized provision which has significantly developed the human rights-based *non-refoulement* jurisprudence in the European Court of Human Rights. It is for this reason that decisions from that jurisdiction form the bulk of the discussion." McAdam, 2012, *op. cit.*, p. 63-64.

[96] Rainy, Wicks and Ovey, *The European Convention on Human Rights, 6th Edition* Oxford: Oxford University Press, 2014, pp. 176-177.

[97] See for instance *Soering v. United Kingdom*, ECtHR, App. no. 14038/88, Judgement of 7 July 1989 or *Chahal v. United Kingdom*, ECtHR, App. no. 22414/93, Judgement of 15 November 1996.

parties are the same, regardless of the type of treatment; the distinction being one of severity and intent[98].

As for the severity threshold, it is not a static concept but rather a context-sensitive analysis, which takes into account the plaintiff's situation, age, as well as the duration and effects of the past or expected treatment[99]. The extraterritorial application of Article 3 has been found to apply in a number of situations, including healthcare[100] and distress from not knowing the whereabouts of a child or a parent[101]. Article 2 (right to life) has also been found to give rise to *non-refoulement* obligations under the ECHR framework but to a lesser extent than Article 3[102].

4.3.1. Non-Refoulement and climate-induced migration

The relevance of the non-refoulement principle for environmentally-displaced persons from LLIS resides mainly in its reactiveness and extended scope of immediate protection, despite the absence of a related legal status or substantive protection. As the living conditions on low-lying island states will deteriorate, eventually forcing the migration of their population, the principle of non-refoulement might become the last barrier available to prevent the extradition of EDPs to their former home country.

As an important proportion of the populations of both Kiribati and Tuvalu already resides abroad[103], the principle of non-refoulement could become crucial to avoiding the infliction of inhumane or degrading treatment upon citizens from those countries, following their possible deportation. A central questions thus revolves around the minimum threshold of severity required to trigger the principle of *non-refoulement* under Article 3.

[98] Rainy, Wicks and Ovey, *op. cit.*, p. 175.
[99] *Ibid*, p. 173.
[100] *D. v. United Kingdom*, ECtHR, 146/1996/767/964, Judgment of 2 May 1997.
[101] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. no. 13178/03, Judgement of 12 October 2006.
[102] Article 2 was found to give rise to *non-refoulement* obligations in a 2005 case in conjunction with Article 3 (*Bader and Kanbor v. Sweden*, ECtHR, App. no. 13284/04, Judgement of 8 November 2005. A reason for this is the fact that if a violation of Art. 3 is also found in relation with possible deportation, the analysis of Art. 2 "typically falls away". McAdam, 2012, *op. cit.*, p. 58.
[103] Approximately one third of Tuvalu's population resides abroad (when including those born outside of the country), Government of Tuvalu, "Tuvalu National Labour Migration Policy", 2014, pp. 3-4.

One the most relevant cases in this context would likely be *MSS v. Belgium and Greece*[104], in which the Court found a violation of Article 3 based on the extradition of the plaintiff to Greece, where his living conditions were found to constitute treatment prohibited under Article 3 of the Convention[105]. Additionally, as the Court has already found that feelings of fear and anguish could amount to inhuman or degrading treatment in *Jalloh v. Germany*[106], it is probable that EDPs would fall within the scope of Article 3 and its correlated *non-refoulement* obligation for state parties.

Thus, in a situation where fresh water resources were scarce or almost inexistent, and in a country ravaged by the increasingly devastating effects of the rise in sea levels, it is likely that the Court would adopt a progressively intolerant attitude towards extradition of plaintiffs to so-called "sinking islands". Furthermore, based on its context-sensitive approach and "living instrument" doctrine, the Court would also likely lower the minimum threshold of severity for vulnerable individuals such as children or elderly people, possibly building a line of case-law which might eventually apply to all EDPs present within the jurisdiction of state parties to the ECHR.

Generally, as part of the effort to outline the protection gap within which environmentally-displaced persons are likely to fall, the lack of legal status related to *non-refoulement* obligations proves particularly noteworthy, however. Despite its relevance to prevent potential human rights violations caused by deportations, the principle of *non-refoulement* is a negative duty: it does not entail the attribution of a legal status or related protection[107].

5. Statelessness and Statehood

5.1. History and terminology

At the core of statelessness is the link between a country and its citizens; nationality. The importance of this link is easily forgotten for the vast majority of individuals, as occurrences where it comes into play remain limited. Moreover, nationality is for most

[104] *M.S.S. v. Belgium and Greece*, ECtHR, App. no. 30696/09, Judgement of 21 January 2011.
[105] *Ibid*, para. 263.
[106] *Jalloh v. Germany*, ECtHR, App. No. 58410/00, GC, Judgement of 11 July 2006, para. 68.
[107] Even though a few countries have added a positive dimension to *non-refoulement* obligation by providing access to temporary residence permits in this case. See Decree No 616/2010 Official Bulletin No 31.898 (6 May 2010) (regulating immigration law 25.871) Art. 24(h), cited in McAdam, 2012, *op. cit.*, p. 105.

an immutable aspect of what they are as persons; one's nationality is not usually thought of as something subject to change.

This being said, the implications of nationality are wide-ranging: nationality allows one, amongst other things, to live and work within a country's territory, travel in and out of it on the basis of agreements concluded by one's country, and benefit from diplomatic protection when in need. Overall, numerous rights and privileges we take for granted are based on the premise of a nationality, defined by Blackman as:

> [The] legal manifestation of a bond between a state and an individual, whether acquired by birth, adoption, marriage, or affirmative choice.[108]

A perhaps more complete definition can be found in the *Nottebohm* decision, which also encompasses the "ethnological" dimension of nationality, emphasizing its importance as more than a simple legal status or relationship:

> [N]ationality is a 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.[109]

Defining what nationality is also implies outlining the scope of the problems caused by its absence for people falling in the legal limbo statelessness represents. Statelessness, simply defined is the absence of a nationality, the lack of a legal bond between an individual and any state. More precisely, the 1954 Convention relating to the Status of Stateless Persons gives the following definition of a stateless person:

> [A] person who is not considered as a national by any State under the operation of its law[110].

[108] Blackman, Jeffrey L., "State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", in *Michigan Journal of International Law*, Vol. 19, 1998, p. 1147(n21).
[109] *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955, I.C.J. Reports 1955, p. 4; General List, No. 18.*
[110] 1954 Convention, Article 1.

Noteworthy for understanding the position of statelessness in international law is its evolution through history. Considered a legal anomaly similar to having multiple nationalities[111], statelessness was considered in 1930 as presenting a threat to "good international order"[112]. The understanding this concept meant at the time that every person should belong to a state, and one state only[113]. And even though such a statement seems outdated, belonging to the pre-war era of the League of Nations, a number of countries worldwide still implement laws restricting multiple citizenships. Germany only eased its legal restrictions on dual citizenship in 2014[114], and the issue remains contentious. Other countries still implement bans varying in scope on dual citizenship, as in the case of Estonia, Spain, or Ukraine[115]. Political incentives have also played a part in the restriction or manipulation of nationality issues, highlighting the wide-ranging implications of nationality[116]. The example of multiple or dual citizenship illustrate an aspect of nationality that also affects statelessness directly: the inclusion of nationality matters in the *domaine reservé* of states, i.e. its sovereignty[117]. As such, the international efforts to address statelessness have had to be developed in parallel with the reluctance of States to be bound on a sensitive aspect of their jurisdiction.

5.1.1. The Right to a Nationality

The obstacles faced by efforts to develop protection for stateless persons are well-demonstrated by the development of the right to a nationality. Considered by some as

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[111] Loisel, Maurice, "Les anomalies des lois sur la nationalité : doubles nationaux et apatrides", in *Population*, Vol. 6, No. 2, p. 260.
[112] Rauchberg, Heinrich, "Die erste Konferenz zur Kodifikation des Völkerrechts", in *Zeitschrift für Öffentliches Recht*, Vol. 10, No. 4, 1930, p. 500, cited in Stiller, Martin, "Statelessness in International Law: A Historic Overview", in *Deutsch-Amerikanische Juristen-Vereinigung Newsletter*, Vol. 3, 2012, p. 94-95.
[113] Preamble of the Convention on certain Questions relating to the Conflict of Nationality Laws, concluded 12 April 1930, entered into force 1st July 1937, League of Nations, *Treaty Series*, vol. 179, p. 89, No. 4137.
[114] Conrad, Naomi, "Dual citizenship law takes effect in Germany", for *Deutsche Welle*, 19 December 2014, available at http://www.dw.com/en/dual-citizenship-law-takes-effect-in-germany/a-18143002 (Last visited 24 May 2017).
[115] Kaschel, Helena, "Dual citizenship in Europe: Which rules apply where?", for *Deutsche Welle*, 28 March 2017, available at http://www.dw.com/en/dual-citizenship-in-europe-which-rules-apply-where/a-38174853 (Last visited 24 May 2017).
[116] Citizenship has been used to forward certain political agendas by excluding unfavourable voters for instance. Pouilly, Cécile, "Africa's Hidden Problem", in *Refugee Magazine*, Vol. 147, No. 3, 2007, pp. 29-30, cited in van Waas, *op. cit.*, p. 19.
[117] "It is for each State to determine under its own law who are its nationals", Article 1, Convention on certain Questions relating to the Conflict of Nationality Laws, 1930. Although this inclusion in a State's domaine reservé is not absolute and is *de facto* limited by the concept of effective nationality when exercising diplomatic protection, defined in *Nottebohm* by the International Court of Justice.

amounting to customary international law[118], the UDHR is one of the first instruments to present an attempt to solve or prevent statelessness through a human rights approach. Namely, Article 15 of the Universal Declaration provides that:

> (1) Everyone has the right to a nationality.
>
> (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Although highly influential and undoubtedly a milestone in the protection of human rights, the UDHR failed to gain a binding status. This could have been done through a uniform, wilful and consistent application by the international community of its provisions (thus possibly becoming part of international customary law), or its transition into a binding treaty. As neither of these options materialized, the real impact of its provisions has been limited. Eventually developed in two treaties, many of the rights found in the UDHR eventually gained a stronger, legally-binding status through the ICCPR or the ICESCR. Article 15 of the UDHR was left out, however, the exclusion likely originating from the complexity of the issues at stake[119].

Apart from its exclusion from the main human rights treaties, the right to a nationality has also been found as lacking the means to be of real use to fight statelessness. More precisely, as Blackman explains:

> Article 15 does not carry a specific corresponding obligation on states to confer nationality. In other words the article fails to indicate precisely to which nationality one has the right and under what circumstances that right arises.[120]

Overall, it can be said that the efforts oriented towards enabling a minimum standard of treatment for stateless persons and subsequently in creating a framework for the prevention of statelessness have been more successful, resulting in the inception of two international treaties in 1954 and 1961 respectively.

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[118] Humphrey, John P., "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character", in Ramcharan, B. G. (ed.), *Human Rights. Thirty Years after the Universal Declaration*, The Hague: Martinus Nijhoff Publishers bv, 1979, p. 21-37, cited in von Bernstorff, Jochen, "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law", *European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 903-924.

[119] Chan, Johannes M. M., " The Right to a Nationality as a Human Right", in *Human Rights Law Journal*, Vol. 12, No. 1, 1991, p. 4-5, cited in Blackman, *op. cit.*, p. 1172.

[120] Blackman, *op. cit.*, p. 1172.

5.1.2. The Institutional Response

Initially intended to be covered in the 1951 Convention relating to the status of refugees through an additional protocol, the issue of statelessness was subsequently deemed worthy of an instrument of its own, due to the difference of the challenges faced by each category[121]. The protection of "unprotected people", whose ties with their country of origin were in tatters was one of the main concerns in the wake of the Second World War, and ultimately resulted in the development of both statelessness conventions and the refugee convention. As a result of this closely linked evolution, the text and provisions of both conventions bear strong similarities, although defining and addressing different issues.

At the center of both conventions is the definition of the individuals deemed worthy of the protection and legal status provided. The importance of definition cannot be underestimated as it sets the legal boundaries to inclusion or exclusion from the scope of the instruments, as illustrated in the present work by the attention given to the refugee definition. In the case of the Refugee Convention, the protection of individuals falling outside of the refugee definition has prompted the elaboration of subsidiary protection mechanisms, resulting in wider protection. Within the framework of protection of stateless persons, the legal definition of stateless persons found in Article 1 of the Convention has resulted in a schism between what is generally described as *de jure* statelessness and *de facto* statelessness, the stateless persons definition acting as the defining element of both categories.

5.1.3. De facto and de jure statelessness

Simply defined, *de jure* stateless persons are persons who lack the *legal* bond between a state and an individual nationality constitutes. Conversely, *de facto* stateless persons retain the legal link of nationality, although *in fact* they are unable to benefit from the protection of the country of their nationality[122]. This distinction between the two types of statelessness was not unknown to the drafters of the 1954 Convention, as shown by a report produced for the UN in 1949[123], but the facts-based definition adopted by the

[121] van Waas, *op. cit.*, p. 226-227.
[122] Van Waas, *op. cit.*, p. 20.
[123] United Nations, *A Study of Statelessness*, E/1112, New York, August 1949, cited in van Waas, *op. cit.*, p. 21 (n 63).

refugee convention was understood as filling the gaps left by the legally-based definition found in the statelessness convention. The facts-based definition of the 1951 Convention was also intended to provide a safeguard to exclude persons "who simply renounced their nationality for personal convenience"[124].

In reality, however, since a "well-founded fear of persecution" on the basis of a "Convention ground"[125] constitutes the threshold required for acceding to refugee status rather than a simple lack of protection, *de facto* statelessness remains an important issue, and persons finding themselves in such a delicate position against their will are still largely left unprotected by international instruments. The exclusion of *de facto* stateless persons from the definition of the 1954 Convention has also been deemed as "implicitly detrimental to *de facto* stateless persons"[126] since although they differ in legal status, *de jure* and *de facto* stateless persons may live side-by-side and ultimately share the same needs[127].

From a terminology standpoint, *de facto* statelessness has entered "common use and has acquired a meaning"[128] but as mentioned above, does not bear any legal weight. *De facto* statelessness cases are divided by van Waas into three main categories:

> Where a persons is deprived of the enjoyment of those rights that are generally attached to nationality [ineffective nationality];
>
> Where a person's nationality is contested or disputed by one or more states; and
>
> Where a person is unable to establish or prove his nationality.[129]

Hence, a lack, or the unavailability of protection by one's country of origin or residence can help define *de facto* stateless persons. Historically, the situation of *heimatlos*[130] or that of Italian citizens opposing the fascist regime of Mussolini provide relevant examples of *de facto* statelessness:

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[124] McAdam, 2012, *op. cit.*, p. 140.
[125] See the previous section on International protection.
[126] Stiller, *op. cit.*, p. 94.
[127] van Waas, *op. cit.*, p. 22-23.
[128] Statement by Paul Weis to the United Nations Conference on the Elimination or Reduction of Future Statelessness, 25 August 1961, cited in Batchelor, Carol, "Stateless Persons: Some Gaps in International Protection", in *International Journal of Refugee Law*, Vol. 7, 1995, p. 252.
[129] van Waas, *op. cit.*, p. 24.
[130] German citizens fleeing the Nazi regime during the Second World War.

> [a]lthough Italian emigrants were not denaturalized, they were nevertheless refused any assistance by the state: the authorities abroad ignored them deliberately, did not provide them with identity cards and refused the state's protection.[131]

However, attempts to define or address *de facto* statelessness and the exact boundaries of its scope have been challenged as counter-productive, diverting attention away from *de jure* stateless persons whose situation is more precarious. For instance, the definition elaborated by Hugh Massey in a 2010 working paper for the UNHCR[132] has been criticized as attempting to give a legal definition of an empirically-defined concept and lacking internal consistency[133]. Authors such as Tucker have also argued that including ineffective citizenship in the statelessness debate might undermine the latter by including individuals not necessarily in need of international protection, or at least not accurately described by the stateless label[134].

Notwithstanding the critics on its scope and definition, the existence of the *de facto* statelessness phenomenon itself is generally accepted as the unprotected pendant of *de jure* statelessness, as shown by the inclusion of *de facto* statelessness in the UNHCR's broad mandate on statelessness, conferred in 1996 by the United Nations' General Assembly[135]. Conversely, *de jure* stateless persons are simply those falling within the scope of the definition of stateless persons set by the 1951 Convention, a definition "purely dependent on a point of law"[136] which has been described as "arguably unremarkable"[137].

For the purpose of the present work, the term "stateless" or "statelessness", used alone without the adjective *de jure* or *de facto*, will be understood as describing *de jure* statelessness or stateless person(s).

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[131] Colanéri, André, *De la condition des « sans-patrie » : Étude Critique de l'Heimlatosat*, Paris : Librairie générale de droit et de jurisprudence (L.G.D.J.), 1932, p. 32. Cited and translated in Stiller, *op. cit.*, p. 94 (n 7).
[132] Massey, Hugh, "UNHCR and De Facto Statelessness" for *Division of international protection*, UNHCR, 2010, p. 61.
[133] Harvey, Alison, "Statelessness: the "de facto" statelessness debate", in *Journal of Immigration Asylum and Nationality Law*, Vol. 24, No. 3, 2010, p. 260-261.
[134] Tucker, Jason, "Questioning de facto Statelessness, by Looking at de facto Citizenship", in *Tilburg law review*, Vol. 19, pp. 276-284, 2014. See also Harvey, *op. cit.*
[135] UN General Assembly, Resolution 50/152, 9 February 1996, par. 14-15; Seet, Matthew, "The Origins of UNHCR's Global Mandate on Statelessness", in International Journal of Refugee Law, Vol. 28, No. 1, 2016, p. 8.
[136] van Waas, *op. cit.*, p. 20.
[137] *Ibid.*

5.2. Statelessness and low-lying island nations

The present section will outline two essential premises which are essential to answering the research question. The first is simply the causational relationship between the physical disappearance of a state and the statelessness of its nationals. The second is the risk and nature of possible *de facto* statelessness for environmentally-displaced persons upon relocation. This analysis will set up the discussion on the possible demise of LLIS and what it could imply.

5.2.1. Statelessness by physical disappearance: legal dimension and factual risk

The causes of statelessness are many, ranging from discrepancies between the domestic laws on nationality to a corollary of the process of state succession. At the heart of the present work however, is a completely novel potential source of statelessness, namely, the physical disappearance of a state, its territory, and thus possibly the link with its inhabitants that nationality represents. Such an event is unprecedented in legal history, and as such poses challenges of equal novelty to legal scholars. The question of maritime rights in relation with shifting shorelines has for instance sparked scholarly discussions on the possible avenues regarding the legal response to the inevitable gap growing between factual and legal realities[138]. The need for an in-depth re-thinking of international law, as we shift into a post-climate change era or as named by Vidas, the "Anthropocene"[139], might signify a considerable paradigm shift in international law[140].

Statelessness as a result of a state's disappearance is a fairly well-established consequential relation, although usually part of the process of state succession: a country

[138] Vidas, Davor, "Sea-Level Rise and International Law: At the Convergence of Two Epochs", in *Climate law*, Vol. 4, pp. 70-84, 2014. See also Soon, Alfred HA, "The effects of a Rising Sea Level on Maritime Limits and Boundaries", *Netherlands International Law Review*, Vol. 37, 1990. Freestone, David & Pethick, John, "Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses", in Blake, Geral H., *Maritime Boundaries*, New-York: Routledge, 1994.

[139] Vidas, *op. cit*., p. 80, citing Zalasiewicz, Jan, Williams, Mark, Smith, Alan, et al., "Are We Now Living in the Anthropocene?", *GSA Today*, Vol. 18, 2008, pp. 4-8.

[140] Hence, choosing a black letter, legally self-centered analysis to answer the questions asked in the present work may seem out of touch, but it is required to understand what are the possible implications of physical state disappearance in the *current* framework of international law, as well as what the options are to provide a legal status to the displaced citizens of low-lying island nations, notwithstanding proposed pre-emptive solutions to relocation.

disappears, and so does its nationality[141]. There are a number of examples of such extinctions of states, such as the collapse of Yugoslavia or the Soviet Union, which resulted in the cessation of their respective nationalities.

In the case of low-lying island states:

> the permanent disappearance of habitable physical territory, in all likelihood preceded by the loss of population and government, may mean the "State" no longer exists for the purpose of [Art. 1 of the 1954 Convention on Statelessness].[142]

This conclusion, namely the extinction of the statehood of low-lying island states that consequentially render their former nationals stateless, has been confirmed by a number of authors in recent years[143]. For instance, Susin Park in her report on climate change and the risk of statelessness for low-lying island states for the UNHCR, emphasizes the necessity of preserving nationality during a potential project of relocation, as statelessness could arise if the acquisition of a new nationality does not occur before the extinction of that of the former low-lying island state[144]. Crawford's words support this claim by concisely summarizing the relationship between nationality and statehood as follows: "Nationality is dependent upon statehood, not vice-versa."[145]

5.2.2. Risk of de facto statelessness

If the risk of *de jure* statelessness finds its source in the legal existence of environmentally-displaced persons' home country, the risk of *de facto* statelessness is solely a question of fact. At the core of the risk of *de facto* statelessness for EDPs is the capacity of the country of their nationality to ensure that their nationality remains effective in practice, which might prove to be a legal and logistical challenge once the situation on the islands' territory starts hampering the countries' capacity to protect their citizens.

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[141] Weis, Paul, *Nationality and Statelessness in International Law*, 2nd revised edition, Alphen aan den Rijn: Sijthoff and Noordhoff International Publishers B.V.,1979, p. 136, cited in McAdam, Jane, " 'Disappearing States', Statelessness and the boundaries of International Law", in *University of New South Wales Faculty of Law Legal Studies Research Paper Series*, No. 2010-2, 2010, p. 22.

[142] Summary Conclusions of UNHCR's Expert Meeting on "The Concept of Stateless Persons under International Law", Prato, 27-28 May 2010, par. I.C. 27. Cited in McAdam, 2012, *op. cit*., p. 139.

[143] See for instance McAdam, 2012, *op. cit.*, Alexander & Simon, *op. cit.*, Doig, *op. cit.*, or Puthucherril, *op. cit.*

[144] Park, *op. cit.*, p. 17-20.

[145] Crawford, *op. cit.*, p. 52.

As *de facto* statelessness is almost entirely a factual label, the risk of EDPs from low-lying islands falling within its scope is generally accepted as almost inevitable, since even if their home country retains its statehood:

> their populations would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased. The population could thus be considered de facto stateless.[146]

Hence, there is a substantial risk that if EDPs do not acquire a nationality effective in practice prior to leaving their home country, they will fall within the scope of *de facto* statelessness, regardless of their home country's possible continued statehood.

From there, in order to assess the value of *de jure* statelessness in relation to providing a legal status to climate-change induced migrants from low-lying island nations upon relocation, the next logical step consists of evaluating the likelihood of low-lying islands retaining or losing their statehood due to the progressive deterioration of their constitutive elements. The aim of this analysis is to evaluate whether EDPs from low-lying island nations could fall within the scope of the definition set by the 1954 Convention, or if their status would qualify only as *de facto* stateless, notwithstanding the implementation of pre-emptive solutions.

5.3. Continued Statehood and impending physical disappearance: what future for low-lying island nations?

As shown in the previous section, even though EDPs from low-lying island nations will likely not qualify as refugees under the meaning of the definition set by the 1951 Convention on the Status of Refugees, the continued statehood of their home country will most probably play a crucial role in their legal status upon relocation to another country. Continued statehood would mean qualifying only as *de facto* stateless persons, a purely descriptive denomination. In the event that their home country loses fully-fledged statehood, EDPs would then qualify as stateless persons under the 1954 Convention Relating to the Status of Stateless Persons.

[146] UNHCR, supported by the International Organization for Migration and the Norwegian Refugee Council, "Climate Change and Statelessness: An Overview" (Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC), 1-12 June 2009), 2, available at http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf (Last visited 29 May 2017), cited in McAdam, 2012, *op. cit.*, p. 141.

Although heavily simplified, this portrait of the situation highlights the necessity to analyse the definition of statehood and the continued claim to statehood of low-lying island nations from the perspective of public international law, as the strength of environmentally-displaced persons' homeland's claim to statehood will influence substantially the legal status they could qualify for. Simply put, it is essential to answer the question "will small low-lying island nations such as Tuvalu or Kiribati still exist as states once they physically disappear, and if not, at which point is their extinction likely to happen?" in order to better identify the legal status EDPs might qualify for.

Although beyond the scope of the present analysis, it is worth noting that continued statehood for low-lying island nations also matters for other reasons. Wong identifies three principal ones: 1) standing before the ICJ and membership to the United Nations are limited to states, 2) inhabitants of LLIS have a strong link with their land, culture, and state, and 3), there is a substantial amount of uncertainty related to extinction[147].

Empirically, the demise of small nations such as Tuvalu as fully-fledged states as we understand them seems inevitable. The evidence and scientific consensus are clear: the entire territory of those low-lying island nations is bound to disappear if nothing is done. Eventually, posteriorly to external migration, as children of EDPs will acquire the nationality of the host state they live in, the effective nationality of the "sunk islands" will ultimately deplete and die off, thus sealing the fate of the said countries and meaning their effective, final disappearance[148]. This is due to the concept of "effective nationality" defined by the International Court of Justice in the *Nottebohm* case to identify the "real" nationality of a dual citizen and which essentially means that the presumption of diplomatic protection goes to the country to which the national has the strongest ties [149].

[147] Wong, *op. cit.*, p. 349-350.
[148] McAdam, 2012, *op. cit.*, p. 137.
[149] *Nottebohm* case, ICJ; The contemporary approach to evaluate an individual's real and effective nationality is to search for "stronger factual ties between the person concerned and one of the States whose nationality is involved", involving consideration of "all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment". McAdam, 2012, *op. cit.*, p. 137(n 122), citing *Islamic Republic of Iran v United States of America*, *Case No A-18* (1984) 5 Iran USCTR 251, 265.

However, it is likely that the physical and legal disappearance of low-lying island nations will happen before the completion of the scenario mentioned above, since it represents a relatively distant conclusion timewise. As the elements of statehood fail to be fulfilled by the concerned state, its claim will weaken, signifying its eventual demise as a state. This does not mean that the former state will not continue to exist as a *sui generis* entity of international law (this is actually a rather plausible option), but since the aim of this chapter is limited to the states' claim to full statehood, this option will not be analysed here.

Instead, the present section will focus on providing a general understanding of the "classical" definition of statehood, which can be found in Article 1 of the 1933 Montevideo Convention ("the Montevideo definition")[150], and its application to physical state disappearance. This definition finds it relevance in the fact that it is generally understood as reflecting international customary law[151], and thereby provides a minimum account of what is needed for an entity to be considered a state[152]:

> [t]he State ... should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.[153]

Hence, all four criteria should be present for a new state to come into existence[154].

In the context of physical state disappearance however, its exact meaning and expression have not been the subject of sufficient state practice, and debates on low-lying island states' continued claim to statehood therefore remain almost entirely hypothetical. As a result, the legal norms and state practice associated with the creation of states represent essential tools in evaluating the implications of a state's progressive physical disappearance on its claim to statehood. After all, it is not so far-fetched, in the absence of direct precedents, to infer that the legal norms surrounding a new state's birth can

[150] 1933 Montevideo Convention on the Rights and Duties of States, concluded 26 December 1933, entered into force 26 December 1934, 165 LNTS 19.
[151] McAdam, Jane, " 'Disappearing States', Statelessness and the boundaries of International Law", in *University of New South Wales Faculty of Law Legal Studies Research Paper Series*, No. 2010-2, 2010, pp. 5-6.
[152] Wong, *op. cit.*, p. 353. Willcox, Susannah, "Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood", *Leiden Journal of International Law*, Vol. 30, No. 1, 2016, p. 118.
[153] Article 1, 1933 Montevideo Convention on the Rights and Duties of States, concluded 26 December 1933, entered into force 26 December 1934, 165 LNTS 19.
[154] McAdam, 2012, *op. cit.*, p. 128.

also apply to another state's possible extinction. Ultimately, both are similarly related to the essence of statehood in contexts where its exact boundaries are blurry and where the need for a definition is present.

As for the structure of the present section, it will first address the emphasis put on the Montevideo definition and its relevance. Secondly, the constitutive elements of the state set up by the definition will be outlined individually in the order they appear in the definition, as well as their application to the context of low-lying island nations through a review of relevant cases, state practice, and scholarly work. Specific attention will also be given to the value of governments in exile, quasi-states, and failed states as precedents supporting a continued claim to statehood for LLIS. Although other criteria for statehood have been considered throughout literature such as permanence, willingness and ability to observe international law, or a "certain degree of civilization", they will not be discussed here[155].

5.3.1. Statehood definition and the minimum threshold

As mentioned above, the definition of state enshrined in the 1933 Montevideo Convention is generally recognised as reflecting international customary law. The choice of this "classical" definition is thus a logical one, due to its status in international law and it popularity as a basis for further investigation[156]. Although it has been criticised as being "unclear, imprecise or incomplete"[157], Wong underlines that the criticism does not concern the existence of the criteria found in the definition, but rather "their incompleteness or the difficulties (and inconsistencies) encountered when applying them"[158].

Seemingly simple, its content and implementation have been the center of extensive discussions since its inception. Authors such as Professor James Crawford have analysed in depth the different elements it sets at the core of statehood, providing valuable insight into the significance of state practice, international treaties, and custom with regard to the birth and death of states[159]. However, despite the voluminous amount of writing dedicated to the question and a number of unsuccessful attempts to provide a

[155] For a complete analysis on the topic, see Crawford, 2006, *op. cit.*, p. 89-95.
[156] See for instance, Willcox, *op. cit.*, or Crawford, James, *Brownlie's Principle of Public International Law*, 8th Ed., Oxford: Oxford University Press, 2012, p. 423.
[157] Wong, *op. cit.*, p. 354.
[158] *Ibid.*
[159] Crawford, 2006, *op. cit.*

better definition[160], a degree of uncertainty remains about what exactly a state is. As for statehood itself, Crawford defines it as:

> rather a form of standing than a set of rights. States exist "at the international" level or "on the international plane", but this is a concept rather than a place, since in fact there is only one world. To be a State is to have a range of powers and responsibilities at that level.[161]

Given the central role of states in international law, it is perhaps surprising how blurry the criteria for being accepted as a state can be. This might be seen as a result of the existing states' willingness to maintain a certain margin of appreciation when it comes to determining the validity of an entity's claim to statehood. Objective criteria thus play a role in minimizing this "built-in" uncertainty, and improve the prospects of applying a definition of state to a particular situation[162]. Of the four elements identified in the minimum threshold account of statehood, three can be regarded as mostly empirically-based, namely, the requirement of a territory, permanent population, and government. However, in practice, the apparently objective criteria set by the Montevideo Convention are not devoid of subjectivity, as their practical implementation remains open to interpretation in "limit" cases.

History and state practice show that the objective dimension of statehood usually does not prove controversial. Since the requirements for population, territory, and government are not defined quantitatively, a certain doubt can subsist about the exact size of a state's territory for example, without hampering its claim to statehood. Ultimately, scholars such as Craven or Crawford agree that international recognition or independence, subjective and externally-defined dimensions of statehood, are important elements for a new state to be born[163]. This is further illustrated by the current and past existence of a number of "would be" states such as North Cyprus, Transnistria, or Abkhazia which can be argued to successfully meet the objective requirements of statehood but have failed to secure international recognition.

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[160] Such attempts were initiated by the International Law Commission following the Second World War, as well as for the purpose of the drafting of the 1969 Vienna Convention on the Law of Treaties. Both attempts failed, even after being heavily diluted through successive modifications. See Crawford, 2006, *op. cit.*, pp. 38-40.
[161] Crawford, 2006, *op. cit.*, p. 44.
[162] *Ibid*, p. 45.
[163] Craven, Matthew, "Statehood, Self-determination, and recognition" in Evans, Malcolm D. (ed.), *International Law*, 3rd ed., Oxford: oxford University Press, 2010, p. 242-243; Crawford, 2006, *op. cit.*, p. 62.

On one hand, the permanent disappearance of low-lying island nations is likely to play against their claim to statehood. Until now, most threats to a state's continued statehood have been the result of temporary hardships such as war, which force a government to exercise its functions in exile, or relatively long periods of political turmoil that extinguish a country's international relations for a certain time[164]. Despite the extended length of some of those situations, the notion that a state can simply disappear permanently without leaving any trace of its existence is still to be integrated into international law.

On the other hand, it has been argued that statehood cessation would not necessarily happen immediately after one or even more empirical aspects of statehood go unfulfilled, since, because of the presumption of continuity, the threshold of implementation for the Montevideo definition is different between a state's inception and a state's physical disappearance[165]. This would mean that states such as Tuvalu or Kiribati might continue to exist as such, as long as the international community recognizes them.

The following pages will attempt to assess the weight of each element of the criteria for statehood, and conversely, the weight of their possible non-fulfillment for the purpose of island states' continued claim to statehood.

5.3.2. Territory[166]

Essential to the definition of a state is its territory, a distinct colour on the world map:

> [T]erritory, people and government coincide in the state to produce international law's map of the word as a jigsaw puzzle of solid colour pieces fitting neatly together.[167]

Even though this description appears, rightfully, slightly sarcastic since reality is more complicated and nuanced, it nevertheless illustrates the importance of territory for a state. States are territorial entities and remain grounded in the control of an area of earth's landmass.

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[164] McAdam, 2012, *op. cit.*, pp. 134-135.
[165] *Ibid*, p. 128.
[166] Territory is here understood as land territory, as Park explains: "Despite the fact that the air space and the territorial sea would physically remain, these are generally considered appurtenances to the land territory and, thus, would presumably pass together with the land territory". Park, *op. cit.*, p. 14, citing, Brownlie, Ian, *Principles of Public International Law*, 6th Edition, Oxford: Oxford University Press, 2003, 105, 117-118.
[167] Knob, Karen, "Statehood: territory, people, government", in Crawford, James & Koskenniemi, Martti (eds.), *The Cambridge Companion to International Law*, Cambridge: Cambridge University Press, 2012, p. 95.

There are few requirements on the territory itself: fragmentation, contested borders, or even size do not hamper a state's existence and recognition. Examples of states with fragmented territory are many, such as the case of the United States for instance, where Alaska is completely isolated from the other forty-eight mainland states. Enclaves such as Kaliningrad or the little bits of territory scattered between Belgium and Netherlands do not affect the statehood of their respective countries[168].

Another aspect of territory is that apart from its existence, its exact borders need not to be uncontested or precisely defined. Such was the case of Israel in 1948. It is unclear if its whole territory was contested or that it was rather a case of undefined frontier, but regardless of the debate over its territory, Israel was accepted as a UN member in 1949[169]. Defined borders have also been deemed unnecessary in a number of rulings, first by a German-Polish Mixed Arbitral Tribunal:

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not legally effected the State in question cannot be considered as having any territory whatever… In order to say that a State exists…it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.[170]

It is worth noting here that the absence of a territory seems to implicitly signify the invalidity of a country's claim to statehood, as opposed to undefined borders. Subsequently, the International Court of Justice (ICJ) re-affirmed the incidental nature of precisely delimited boundaries:

> The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.[171]

As there do not appear to be exceptions to this rule, unclear borders and a fragmented, non-contiguous territory do not present significant obstacles to statehood. Similarly,

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[168] *Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Rep 1959, p. 209, 212-213, 229, cited in Crawford, 2006, *op. cit.*, p. 47.
[169] General Assembly Resolution 273 (III) (37-12:9), 11 May 1949; Security Council Resolution 70, 4 March 1949 (9-1) (Egypt): 1 (UK). Cited in Crawford, 2006, *op. cit.*, p. 48.
[170] *Deutsche Continental Gas-Gesellschaft v. Polish State*, 5 ANN. DIG. I.L.C. 11, Germano-Polish Mixed Arbitration Tribunal, 1929, cited in Crawford, 2006, *op. cit.*, p. 49-50.
[171] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, p. 32. Cited in Crawford, 2006, *op. cit.*, p. 50.

size does not matter for claims to statehood. Vatican City, with its less than 0.5 square kilometers or Monaco with 1.95km² embody perfectly the absence of a minimal requirement for the area covered by a country's territory[172].

Ultimately, although the aspects of territory discussed above are relevant for the application of the statehood definition to practical cases, they simply establish the absence of requirement on the type, size, and borders of such territory. What appears to be the defining element of territory for the purpose of statehood is territorial sovereignty, which "involves the exclusive right to display the activities of a State."[173] Interpreting this principle, Crawford identifies the core of the territorial requirement as follows: "the right to be a state is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory"[174] or in other words "the state must consist of a certain coherent territory effectively governed"[175]. In either case, the importance of an uncontested governing authority is underlined, hinting at the government criterion found in the 1933 statehood definition and its independence. The necessity of a territory alone is summarized by Craven as appearing "simultaneously indispensable" and impossible to define[176]. Similarly, Shaw notes the absence of requirement for a territory defined with absolute certainty but underlines the necessity of a territorial base from which to operate[177].

In the context of low-lying island nations, the importance of territory takes a completely different meaning than in the case of a newly-created or aspiring candidate to statehood. The anticipated disappearance of their territory is, after all, the trigger for the present discussion on their claim to statehood, directly or indirectly. Thus, the question is simple: can a state retain statehood without a territory?

5.3.2.1. De-territorialized statehood?

As mentioned above, there is no minimum area required for a state to exist. Hence, even a very small landmass could possibly be sufficient to ensure continued statehood, from

[172] Craven, *op. cit.*, p. 223.
[173] *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber) 4 ILR 3, 103, 108, 110, 111, 113, 114, 418, 479, 482, 487, 492. Cited in Crawford, 2006, *op. cit.*, p. 46.
[174] Crawford, 2006, *op. cit.*, p. 46.
[175] Crawford, 2006, *op. cit.*, p. 52.
[176] Craven, *op. cit.*, p. 224, cited in Willcox, *op. cit.*, p. 124.
[177] Shaw, Malcolm N., *International Law*, 6th ed., Cambridge: Cambridge University Press, 2008, p. 199.

a purely technical standpoint[178]. Such an option would have to exclude artificial structures, however, since the latter cannot be considered as part of a state's territory under the current framework of international law:

> Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.[179]

Moreover, there will likely be a point at which the unsubmerged part of the LLIS's territory will fail to meet the required threshold to qualify as an island under the United Nations Convention on the Law of the Sea[180]:

> 1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> […]
>
> 3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[181]

As a result, the question asked above would become crucial for the legal status of the low-lying island nations. If lacking a territory, the concerned LLIS' claim to statehood would be harder to substantiate, due in part to the fact that states are still essentially territorial entities. As Philip Jessup noted in 1948: "[O]ne cannot contemplate a State as a kind of disembodied spirit"[182].

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[178] This option has been envisaged by the President of Kiribati, suggesting that the country's government could relocate on the islands' highest landmass in order to maintain a population on their territory as long as possible. Interview with Anote Tong, in McAdam, 2012, *op. cit.*, p. 137.

[179] Article 60(8), United Nations Convention on the Law of the Sea ("Montego Bay Convention), concluded 10 December 1982, entered into force on 16 November 1994. The assertion that a wholly artificial structure cannot be considered as a State's sovereign territory is also supported by the case *In re Duchy of Sealand*, Administrative Court of Cologne, 3 May 1978 (1989), 80 International Law Reports, pp. 683, 685-686. cited in McAdam, 2012, *op. cit.*, p. 130.

[180] Noteworthy to possible attempts to extend LLIS' territorial sovereignty is the fact that embassy of the said country cannot count as part of the State is represents' sovereign territory. Albeit benefitting from a special immunity, they remain the sovereign territory of the receiving State, as shown by the possibility for the latter to declare any member of the diplomatic mission *persona non grata* and thus force repatriation of the said member. This is provided by Articles 9 and 21 of the United Nations' Vienna Convention on Consular Relations, concluded 24 April 1963, entered into force 19 March 1967, which enjoys wide ratification (179 as of 2016).

[181] UNCLOS, Article 121(1)(3).

[182] United Nations Security Council Official Records (UN SCOR), 3rd session, 383rd meeting, UN Doc S/PV.383 (2 December 1948), 11. Cited in Wong, *op. cit.*, p. 352.

5.3.2.2. The Holy See, the Order of Malta: precedents of "de-territorialized States"?

Although the potential evolution of LLIS as "de-territorialized" states has been analysed, based *inter alia* on the decreasing link between citizenship and residence[183], there is still evidence a state needs a territorial base to retain statehood. Except for the case of governments in exile which will be discussed separately, two examples are sometimes used as basis to claim a state can exist apart from the existence of a sovereign territory: the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta[184], and the situation of the Holy See[185] from 1870 to 1929, even though their relevance to support this claim can be disputed in both cases.

In the case of the Order of Malta, it was established in the Middle Ages as a territorial entity exercising its sovereignty on the island of Malta, *inter alia,* until dispossessed in 1798 through a treaty imposed by Napoleon, losing any territorial basis in the process. Now operating from Palazzo Malta in Rome, which has extraterritorial status but is not considered a sovereign territory[186], the Order of Malta maintains active diplomatic relations with 106 countries[187] and has enjoyed the status of permanent observer to the United Nations General Assembly since 1994[188]. However, despite retaining an international personality[189], having the power to conclude treaties[190] and its head benefiting from sovereign immunity, the Order of Malta is generally not considered a state[191], but

[183] Burkett, Maxine, "The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era", in *Climate Law*, Vol. 2, 2011, p. 360.
[184] Doig, *op. cit.*, p. 81-82.
[185] A distinction should be made between the Vatican City State and the Holy See. The Vatican City is usually understood as the territory over which the Holy See exercises its sovereignty as a government, as underlined by the United States' Department of State. See U.S. Department of State, "U.S. Relations with the Holy See", 17 October 2016, available at https://www.state.gov/r/pa/ei/bgn/3819.htm (Last visited 1 June 2017).
[186] Cox, Noel, "The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem of Rhodes and of Malta", in *Australian International Law Journal*, Vol. 13, 2006, p. 217. cited in Wong, *op. cit.*, p. 356.
[187] Sovereign Order of Malta, "Bilateral Relations", available at https://www.orderofmalta.int/diplomatic-activities/bilateral-relations/ (Last visited 31 May 2017).
[188] General Assembly of the United Nations, "Observers", 12 January 2017, available at http://www.un.org/en/ga/about/observers.shtml (Last visited 31 May 2017).
[189] *Nanni v Pace and the Sovereign Order of Malta* (1935) 8 ILR 2, 4 (Italian Court of Cassation), cited in Wong, *op. cit.*, p. 357.
[190] Hungary and the Order exchanged ratification instruments for a bilateral international cooperation agreement in 2011. Cox, *op. cit.*, p. 223-224, cited in Wong, *op. cit*, p. 357(n 85).
[191] See the discussions related to the admission of the Order to the United Nations General Assembly as a Permanent observer. General Assembly, Official Records, Forty-eighth Session, 103rd Meeting, 24 August 1994, UN Doc. A/48/PV/103. Cited in Park, *op. cit.*, p. 8. See also for a concurring opinion Crawford, 2006, *op. cit.*, p. 30.

rather "an international body that has some legal personality"[192]. As a result, the relevance of the Order of Malta's situation as a precedent for "de-territorialised" nationhood remains limited, even though it could possibly provide a model for the transition of LLIS' governments to an alternative status in international law.

The historical example of the Holy See's situation prior to the *Lateran Pacts* also offers little value for arguing in favor of statehood removed from a territorial reality. Effectively lacking a territory from 1870 to 1929 despite occupying the Vatican Palace, it did not exercise sovereign authority during that period[193]. Officially recognised by Italy through the *Lateran Pacts* in 1929, an Italian court held in 1937 that the Holy See could only have been considered a state posteriorly to the entry into force of the *Pacts*, since the Holy See's sovereignty could not be exercised in the absence of a territory[194]. As such, the statehood of the Holy See during that period, in the absence of sovereign control over Vatican City, has been described as "controversial at best"[195]. Hence, there are little to no grounds to support the claim that either the Order of Malta, or the Holy See from 1870 to 1929 can provide examples of states existing in the complete absence of a territory[196].

Rather, the Holy See's example could be used to support the claim that once left without a territory, a low-lying island nation's statehood could disappear. If this is the case of an international legal entity whose loss of territory could have been argued as temporary (in theory, if not in fact), *a fortiori* there would be limited grounds to argue that a country being deprived permanently of its territory could retain its full statehood. Furthermore, the permanent abandonment of a state's territory resulting in loss of statehood could be supported by the example of the Order of Malta. As the order now maintains diplomatic relations with the independent Republic of Malta and recognizes its sovereignty on the island of Malta[197], this permanent severance of a territorial link weighs adversely against any claim to statehood. Though weak, this example illustrates once

[192] Wong, *op. cit.*, p. 357.
[193] Wong, *op. cit.*, p. 357. See also Crawford, 2006, *op. cit.*, p. 702 (n 14).
[194] Since in conflict with the application of Italian law in the Vatican Palaces. *Guadalupe v Associazone Italiana di S Cecilia* (1937) 8 ILR 151, 151-2, (Court of Rome) cited in Wong, *op. cit.*, p. 357.
[195] Wong, *op. cit.*, p. 357.
[196] Wong, *op. cit.*, p. 357-358.
[197] Sovereign Order of Malta, "Bilateral Relations", available at https://www.orderofmalta.int/diplomatic-activities/bilateral-relations/ (Last visited 31 May 2017).

more that more than a simple hiatus in territorial sovereignty, a permanent loss of territory could result in extinction[198]. This echoes Derek Wong's summary of Thomas Grant's understanding of the territory requirement to statehood[199]: "territory is a leg upon which the state must be created; the leg may be bent, but it must exist."[200]

What the present section highlights is a very simple reality about statehood under its current form, one that cannot be sidelined in the debate on the continued statehood of low-lying island nations and which can be summarized by Crawford as follows: "Evidently, States are territorial entities"[201]. Thus, once the territory of an LLIS becomes unsuitable for habitation, *a fortiori* is completely submerged, and as a result cannot be considered a sovereign territory over which the state's government exercises its authority, the State's claim to statehood would become hard to maintain. Before the territorial requirement for statehood goes unfulfilled, however, the current understanding of how cross-border migration will unfold shows that the population criterion is likely to be the first one affected in its substance by the rise in sea levels[202].

5.3.3. Permanent population

Another minimum requirement for statehood in the Montevideo definition is the need for a permanent population. At present, the country of Tuvalu, a low-lying island nation, is the third smallest sovereign country in the world[203]. This illustrates well an essential aspect of the permanent population criterion, similar to the territorial element of statehood, which is that there appears to be no lower quantitative limit. Through time, the sovereignty of "micro states" such as Liechtenstein have been contested, but never on the basis of population: Liechtenstein was denied membership to the League of Nations in 1922 due to a perceived lack of independence from Austria and not to its small population[204]. As no exception to this trend has been found in state practice, the existence

[198] Park, *op. cit.*, p. 7.
[199] Grant, *op. cit.*
[200] Wong, *op. cit.*, p. 354.
[201] Crawford, 2006, *op. cit.*, p. 46.
[202] McAdam, 2012, *op. cit.*, p. 131.
[203] Central Intelligence Agency (CIA), "Tuvalu", *The World Factbook*, available at https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html (Last visited 07 June 2017).
[204] Craven, *op. cit.*, p. 222.

of a theoretical quantitative threshold does not seem to exist in the context of state inception. The number of very small states such as the Holy See (approximately 1000 inhabitants) or Nauru (9591 inhabitants)[205] tends to support this conclusion.

The other aspect of population which is included in the 1933 definition is that the said population should be permanent. Essentially, this concept has been argued as possibly excluding a transitory or nomadic population from being considered in the context of territorial sovereignty[206]. As no challenge to statehood has been issued on this basis until now, the exact extent of the permanency of a population is still to be defined. Additionally, the fact that the majority or an important proportion of a state's population lives abroad has not been found to be a problem for continued statehood. The example of Samoa or Tonga illustrates this situation well, since 56.9% of Samoa's population and 46% of Tonga's do not live within their country's territory, a situation which has not resulted in a challenge to their statehood[207]. It is thus unclear how the mass migration of a country's population would affect its existence as a state, or at which point a state's population would be considered insufficient to fulfill the criterion of permanent population. However, there seems to be a certain margin for low-lying island states between the moment their population starts depleting and the possible loss of their statehood.

This being said, a variable which might play against their continued claim to statehood is the permanent dimension of the migration. Based on the current scientific consensus, even if all greenhouse gas emissions stopped overnight, glaciers and ice caps will continue melting for some time before the trend changes, thus maintaining the current rise in sea levels and the threat to low-lying island states[208]. As a result, the eventual quasi-extinction of Tuvalu or Kiribati's population would take on a completely different meaning than if their population had been temporarily relocated due to a sudden onset

[205] Central Intelligence Agency (CIA), "World", *The World Factbook*, available at https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (Last visited 4 November 2016).
[206] Shaw, *op. cit.*, p. 199.
[207] McAdam, 2012, *op. cit.*, p. 132.
[208] IPCC Fifth Assessment Report: Working Group II, Chapter 12, "Human Security", 31 March 2014.

disaster such as a volcano eruption[209], or a longer term problem such as environmental degradation.

The second example above is based on the situation of the Republic of Nauru, whose population, due to the consequences of phosphate mining on the island, was almost resettled in Australia in the early 1960s[210]. Although the planned relocation did not happen, since Australia's proposal implied a loss of sovereignty for the Nauruan people[211], it is highly possible that the displacement of the Nauruan population outside of its territory of origin would have seriously hampered Nauru's future claim to statehood. Overall, the application of Nauru's case to the current situation of Tuvalu or Kiribati remains limited, however. Nauru was not a member of the United Nations at the moment of the planned relocation; it would become one only in 1999 and since the relocation never happened, it would be hazardous to draw any conclusions about the demographic dimension of statehood on the basis of this example.

Another aspect of the permanent population criterion which might play against low-lying island nations is that even if the virtual totality of their population has already migrated and only a remote outpost remains on their almost submerged territory, the "permanent" requirement of the criterion could prove hard to meet. The work of prominent researchers such as Jane McAdam has underlined that the general environmental deterioration of the low-lying island states, coupled with existing overpopulation and the already problematic salinization of fresh water sources and reserves will be tipping points in prompting the migration of the countries' population[212]. The eventual demise of coral reefs due to the ocean's acidification and the subsequent collapse in the local economy will also accelerate the phenomenon. Eventually, only a few inhabitants will remain within the original territory of the country, and the option of building a symbolic

[209] Montserrat, a Non-Self-Governing Territory under the Charter of the United Nations administered by the United Kingdom, was affected by a volcanic eruption in 1997 which forced the external displacement of most of the territory's population, resulting in a two years hiatus in partial self-governance. Although of limited reach in the context of statehood, this example provides an example of such an evacuation. Blitz, Brad K., "Statelessness and Environmental-Induced Displacement: Future Scenarios of Deterritorialisation, Rescue and Recovery Examined", in *Mobilities*, Vol. 6, No. 3, 2011, p. 433.
[210] McAdam, 2012, *op. cit.*, p. 150-153.
[211] The opposition to this loss ultimately doomed the putative agreement. See *Case Concerning Phosphate Lands in Nauru (Nauru v Australia)*, "Preliminary Objections of the Government of Australia" [1990], ICJ Vol. 1, cited in McAdam, 2010, *op. cit.*, p. 19.
[212] *Idem*, p. 131.

outpost could provide at least a theoretical "population" for the state to retain its statehood[213]. One could, however, argue against the validity of such a "population", since the permanent aspect of the population criterion implicitly forbids a temporary or transitory population. Furthermore, the decision *In re Duchy of Sealand* highlighted the requirement that

> the group of persons in question must form a cohesive vibrant community. An association whose common purpose covered merely commercial and tax affairs [is] insufficient[214],

hinting that there might be a qualitative threshold to respect in order to qualify as "permanent population" for the purpose of statehood. In the end, the viability of such an option would ultimately depend upon the will of the international community to maintain recognition, and the fulfillment of the other criteria. The permanent aspect of the state's failure to meet a statehood criterion in addition to its inevitable eventual demise are also likely to weigh negatively in the scale of statehood.

In conclusion, based on the sole disappearance of a low-lying island state's population, such as will probably happen in the case of Tuvalu and Kiribati, it is hard to conclude in favor or against the state's continued statehood. The combined uncertainty related to the expression of the Montevideo definition in the context of physical disappearance, and the exact meaning and implications of the permanent population criterion have as a consequence to relegate any conclusion to a hypothetical status. However, it is safe to say that when the states' population dwindles to a number close to zero, an era of contested statehood for low-lying island nations will have begun. Alone, the mass migration of a state's population is unlikely to definitely end the debate on continued statehood but it will weaken the affected state's claim.

5.3.4. Effective Government

[213] Interview with Kiribati's president Anote Tong, cited in McAdam, 2012, *op. cit.*, p. 137.
[214] *In re Duchy of Sealand*, Administrative Court of Cologne, 3 May 1978 (1989), 80 International Law Reports, p. 685.

As opposed to the elements of statehood mentioned above, of which the fulfillment can be *prima facie* empirically assessed, the requirements for an effective government are multi-layered. More than being "the exercise of authority with respect to the persons and property within the territory of the State"[215], the criterion of an effective government also implies the external requirement of independence[216], "the exercise, or the right to exercise, such authority with respect to other States"[217]. Independence is also outlined further as the right to exercise "in regard to a portion of the globe…to the exclusion of any other State, the functions of a State"[218]. The importance of government in relation to the other criterion for statehood should not be underestimated, identified by Crawford as a good candidate for the title of "most important single criterion for statehood, since all the others depend upon it"[219].

Perhaps paradoxically, however, the place of the government criterion with regard to the "extinction debate", on the prospects of continued statehood for low-lying island nations, is limited by the existence of precedents supporting the assertion that a low-lying island nation could retain statehood despite a failure to meet the criterion of an effective government. The first precedent, the Congo case, presents a situation where a state successfully attained statehood despite lacking any "effective government". The second situation, the case of "failed states", might apply more accurately to the challenges faced by LLISs, since as opposed to the Congo case, it does not concern the inception of a new state but rather the "continuity" of existing states in the face of complete internal meltdown, as shown by Somalia's situation in the 1990s.

5.3.4.1. The Congo case

Contrary to the population and territory requirement for statehood, the non-fulfillment of the government criterion for statehood has been proved at least once, in the context of state inception, as not curtailing the recognition of a new state. The case of Congo (later Zaire, and currently the Democratic Republic of Congo) upon its accession to the United Nations in 1960, following the withdrawal of Belgium, its colonizing power, provides an interesting precedent to a state successfully claiming statehood, although

[215] Crawford, 2006, *op. cit.*, p. 55(n 85).
[216] McAdam, 2012, *op. cit.*, p. 132.
[217] Crawford, 2006, *op. cit.*, p. 55(n 85).
[218] *Island of Palmas Case (United States of America v The Netherlands)*, p. 838.
[219] Crawford, 2006, *op. cit.*, p. 56.

lacking the attributes of an "effective government". Complete bankruptcy, the intervention of UN and Belgian forces to restore order and prevent civil war, the existence of two competing governments both claiming to be the legitimate governing authority, and the existence of various independence movements have resulted in Crawford describing Congo's post-independence situation as "[a]nything less like effective government it would be hard to imagine"[220]. Nevertheless, although effectively lacking any government, the newly born Congo enjoyed wide recognition and its accession to the United Nations was granted without dissent[221].

The interpretation of Congo's success in securing statehood despite lacking an effective government is generally that the government criterion for statehood is less strict than what has been thought, due to its dual nature as both "the actual exercise of authority, and the right or title to exercise that authority"[222]. The latter is especially relevant to the case of Congo, since its independence had been granted by Belgium, meaning that "by default", Congo had the right or title to exercise governmental authority within the territory formerly occupied by Belgium[223]. This specific situation is opposed by McAdam to the birth of a new state by secession, where the seceding entity has to establish its competing claim to statehood against another existing state, thus raising the threshold to fulfill the statehood criteria[224].

Yet one aspect appears to be neglected by both McAdam and Crawford in their analysis of the Congo case, namely, the reluctance of sovereign states to allow the creation of a physical and legal void in the map of international law and relations, what could be described as *terra nullius*[225]. Although quite possibly marginal, the assumption that the

[220] Crawford, 2006, *op. cit.*, p. 57.
[221] UN Security Council, Resolution 142, 7 July 1960. UN GA, Resolution 1480 (XV), 20 September 1960.
[222] Crawford, 2006, *op. cit.*, p. 57;
[223] McAdam, 2012, *op. cit.*, p. 132-133.
[224] McAdam, 2012, *op. cit.*, p. 133; The case of Finland from 1917 to 1918, then in the midst of a civil war with international ramifications, was the subject of a stricter test by the Commission of Jurists mandated by the League of Nations in the context of the Åland Islands dispute. The jurists were of the opinion that the Finnish Republic truly gained statehood only in May 1918 when the situation was stabilised, although formally the country had been granted independence already in December 1917 by a declaration of the Soviet Russian Government. See *League of Nations Official Journal*, Special Supplement No. 4, 1920, pp. 8-9. cited in Crawford, 2006, *op. cit.*, p. 58.
[225] A residual category of territory, normally designating an area of territory which is unclaimed and uninhabited. The term *terra nullius* has also been used to qualify the hypothetical situation of a territory simply outside of the jurisdiction of any sovereign state, such as Taiwan has sometimes been argued to

members of the General Assembly did not oppose Congo's membership partly because it would have created an unacceptable gap, thus creating numerous legal and technical issues[226], it could be added to the factors which played in favor of Congo's successful claim to statehood despite the lack of an effective government.

Combined with the absence of a competing claim and the relinquishment by the previous sovereign of any claim to the concerned territory, the avoidance of creating *terra nullius* could have contributed to the uncontested recognition of Congo in 1960 and the implicit presumption that Congo was a state, despite factual evidence supporting the opposite. Such a presumption against the creation of *terra nullius* could also be argued to apply in the case of failed states, the second type of precedents involving a state retaining statehood despite the non-fulfillment of the effective government criterion.

5.3.4.2. Failed States

So-called "failed states"[227] have been identified as illustrating the difference in threshold between independence in the context of a state's accession to statehood and the threshold required for continued existence[228]. As Crawford explains:

> it is important to distinguish independence as an initial qualification for statehood and as a condition for continued existence. A new State attempting to secede will have to demonstrate substantial independence, both formal and real, from the State of which it formed a part before it will be regarded as definitively created. On the other hand, the independence of an existing State is protected by international law rules against unlawful invasion and annexation, so that the State may, even for a considerable time, continue to exist as a legal entity despite a lack of effectiveness. The context in which the claim to independence or to loss of independence is made is thus highly significant.[229]

This statement, although targeting "unlawful invasion and annexation", seems to also apply more generally to states which display a general lack of effectiveness, sometimes

be posteriorly to the Japanese relinquishment of any right to the Taiwanese territory, although this view remains highly controversial and most likely unfounded. See Crawford, 2006, *op. cit.*, p. 209, 258.

[226] Identified by McAdam in the context of State succession and the premature recognition of a seceding State as possibly undermining international stability and rendering impossible the preservation of mutually beneficial relations. McAdam, 2012, *op. cit.*, p. 133.

[227] The use of the term "failed states" is criticised by Crawford as a "perilous" expression, the basis of which are not rooted in facts but rather in a sometimes patronizing or condescending understanding of statehood and independence. Crawford, 2006, *op. cit.*, p. 721-722, also citing Wedgewood, Ruth, "The Evolution of United Nations Peacekeeping", *Cornell International Law Journal*, Vol. 28, No. 3, 631, 636.

[228] McAdam, Jane, " 'Disappearing States', Statelessness and the boundaries of International Law", in *University of New South Wales Faculty of Law Legal Studies Research Paper Series*, No. 2010-2, 2010, p. 10.

[229] Crawford, 2006, *op. cit.*, p. 63.

called "failed states". Although a number of states through time have been described as falling within the scope of the term, the case of Somalia in the early 1990s probably represents the best example of such a "failed state". From the collapse of its central government in 1991 to the establishment of a transitional government in 2004, the external relations of Somalia were inexistent due to internal turmoil and the lack of a centralised, internationally recognised government[230]. Nevertheless, despite a clear failure to meet the "effective government" criterion, Somalia's statehood remained uncontested[231].

As a result, the continued recognition of Somalia and other so-called "failed states" has been cited as a ground to believe that the lack of an effective government, possibly due to mass-migration or the loss of a territory in the case of low-lying island nation, would have limited impact on the country's statehood[232]:

> Even when States have collapsed, their borders and legal personality have not been called in question. Such 'fictitious' States have not lost their membership of international organizations and, on the whole, their diplomatic relations have remained intact. Though they are unable to enter into new treaty obligations, the international law treaties they have concluded remain in force.[233]

The case of "failed states" bears special weight when compared to the expected situation of low-lying island nations. As mentioned by Crawford, the contextually-modulated threshold of effectiveness is relevant to the fulfillment of the government criterion, as an existing state may retain statehood despite a lack of government effectiveness.

There are, however, a number of inconsistencies in the comparison between "failed states" and low-lying islands. The first is related to the dynamic interaction between the different criteria for statehood; "failed states" can be understood as owing their continued statehood not only to the lower threshold mentioned above, but also to the undeniable existence of their population and territory:

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[230] U.S. Department of State, "U.S. Relations with Somalia", 12 April 2017, available at https://www.state.gov/r/pa/ei/bgn/2863.htm (Last visited 2 June 2017); Malanczuk, Peter, *Akehurst's Modern Introduction to International Law - Seventh revised Edition*, Bungay: Routledge, 1998, p. 402-403. Wong underlines the inability of Somalia to take its seat at the UN General Assembly during this period, as well as the shutting down of all its foreign embassies. Wong, *op. cit.*, p. 363.

[231] Crawford, 2006, *op. cit.*, pp. 91-92.

[232] See for instance, Rayfuse, Rosemary & Crawford, Emily, "Climate Change, Sovereignty and Statehood", *Sydney Law School Legal Studies Research Paper*, No, 11/59, 2011, p. 9. McAdam, 2010, *op. cit.*, pp. 9-10., Burkett, *op. cit.*, p. 357.

[233] Thürer, Daniel, "The "failed State" and international law", *International Review of the Red Cross*, Vol. 81, No. 836, 1999, p. 752.

> In effect whereas in some States (e.g. Somalia) the existence of territory and people have compensated for the virtual absence of a central government, in the case of the Vatican City the strength and influence of the government – the Holy See – have compensated for a tiny territory and the lack of a permanent population.[234]

Thus, Crawford, in addition to the elasticity of the concept of government which is also illustrated by the Congo case, also acknowledges the importance of a population and a territory to "compensate" for the lack of an effective government.

A second caveat is raised by Crawford, in the context of an analysis of the "failed state" phenomenon. More precisely, rather than presenting an example of the non-fulfillment of the government criterion and thus a question of possible extinction, "failed states" such a Somalia are cases of "crises of government"[235], which are widely accepted as not affecting a state's international obligations[236], *a fortiori* its statehood.

Whether the situation of low-lying islands nations will be considered sufficiently comparable to the examples mentioned in the present section is entirely hypothetical. As McAdam summarizes:

> The question is whether, in the absence of a permanent population within a diminishing territory, other States would be prepared to continue to recognise Tuvalu and Kiribati as on-going States or not[237].

Overall, the criterion of an effective government can be said to be relatively flexible, depending on the context of its application. As shown in this section, a lack of effectiveness has been found not to impact a state's claim to statehood, although the reasons for this might not apply to the case of low-lying island nations. On the other hand, the case of governments in exile might present a more compelling example of the fulfillment of the effective government criterion in the face of considerable internal disruption. This issue will be discussed further in a section of its own, since it also touches upon the other criteria of statehood.

Factually, the effects of a rise in sea-levels on a low-lying island nation's capacity to exercise its authority within its territory might affect its effectiveness. As reported by an IPCC report in 2001: "land loss from sea-level rise, especially on atolls (e.g. those

[234] Crawford, 2006, *op. cit.*, p. 223. Crawford is addressing Vatican City's situation posteriorly to the *Lateran Pacts*.
[235] Crawford, 2006, *op. cit.*, p. 721-722.
[236] *The Sapphire v Napoleon III*, 78 US 164, 168 (1871), cited in Crawford, 2006, *op. cit.*, p. 679.
[237] McAdam, 2010, *op. cit.*, p. 22 (n 148).

in the Pacific and Indian Oceans) and low limestone islands (e.g. those in the Caribbean), is likely to be of a magnitude that would disrupt virtually all economic and social sectors in these countries"[238]. Furthermore, as the state's population migrates, there will be a point at which its jurisdiction almost exclusively comprises nationals residing abroad, limiting the authority of the state with regard to its population[239]. Thus, the exercise of authority within its sovereign territory would prove challenging. A perhaps more important question would then be whether other states would still be willing to recognize the exiled government of a low-lying island state as a proper state, despite its lack of effectiveness. As this has been likened to the position of governments in exile during the Second World War, the possible answers to this question will be discussed along with the relevance of governments in exile in a dedicated section.

5.3.5. Capacity to enter into relations with other States

The fourth criterion set up by the 1933 Montevideo Convention, that is, the capacity to enter into relation with other states, has developed substantially since its original drafting. It is now clear that other types of international entities (e.g. international organisations, or as discussed earlier, the Order of Malta) have the capacity to initiate and maintain international relations with states and other entities. As such, it presents a poor criterion to outline the boundaries of statehood and as a result, has little value in the situation of low-lying island nations. Crawford sees the only useful value of the criterion as limited by the fact that: "capacity to enter into relations with other states, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence"[240]. The criterion is thus consequential to statehood, not constitutive. As the said elements are addressed in their own respective parts, there is little value to discuss the present criterion. Rather, the importance of recognition for continued statehood, a closely-related aspect of statehood, will be discussed.

5.3.6. Other Relevant Concepts and Precedents

5.3.6.1. Recognition

[238] IPCC, *Climate change 2001*, Third Assessment Report: Impacts, adaptation and vulnerability, contribution of Working Group II, Chapter 17, Section 17.2.2. cited in Park, *op. cit.*, p. 9.
[239] McAdam, 2012, *op. cit.*, p. 136.
[240] Crawford, 2006, *op. cit.*, p. 62.

In spite of its importance for newly created states, recognition is generally not considered a criterion for statehood, due to recognition being a result rather than a condition for statehood: "An entity is not a State because it is recognized; it is recognized because it is a State"[241]. For low-lying island nations, however, recognition might become crucial in continuing to claim statehood; despite failing to meet some of the components of statehood, as discussed above, continued recognition could still ensure that the government of a low-lying island nation can carry on acting and being recognized as a state.

The question of the nature of recognition is still controversial, however, opposing constitutive and declaratory theories. The former considers recognition a legal act, necessary for a new state to be born, and placing existing states in the position of ultimate arbitrators of statehood. The latter qualifies recognition as a political act instead, "independent of the existence of the new state as a subject of international law"[242]. As the latter appears to be more consistent with state practice and there are a number of inconsistencies with the constitutive theory[243], the declarative understanding of recognition is to be preferred.

The importance of recognition in the context of state inception can thus be likened to the consecration of a state's claim to statehood, a confirmation of its validity and an acceptance as a member of the international community. Accordingly, recognition can be understood as confirming the existence of the constitutive elements of statehood (territory, permanent population, independent and effective government), meaning that a state can, to a certain extent, exist independently from recognition[244].

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[241] *Ibid*, p. 93.
[242] *Ibid*, p. 22.
[243] The constitutive theory is not reconcilable with the idea of an "illegal" recognition, although this has happened in the past, such as the case of the recognition of the Franco regime by Italy and Germany, which was "illegal *ab initio*". Crawford, 2006, *op. cit.*, p. 21. Moreover, Crawford elaborates on the untenable conclusions the constitutive theory would entail in cases of non-recognition: "The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State – to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answer, is unacceptable." Crawford, 2006, *op. cit.*, p. 27.
[244] Crawford, 2006, *op. cit.*, p. 28. Craven instead emphasizes that there is little value in the concept of "unrecognized states", since "it is meaningless to assert that Abkhazia, North Ossetia, or Taiwan *are* States if no one is prepared to accept them as such." He nevertheless highlights the ambiguous nature of non-recognition through the case of the Arab States in relation to Israel before 1993, where the former were in a position of simultaneous inclusion and exclusion of Israel as a State. Craven, *op. cit.*, p. 242, 244.

The application of recognition to the context of continuity or extinction is nonetheless more complex. Effectively, two questions are relevant to the situation of low-lying island in relation to international recognition. First, can continued recognition palliate the non-fulfillment of some of the constitutive elements of statehood? And secondly, if the government of a low-lying island nation relocates to the territory of another state and starts operating from there, is the parallel with previous examples of governments in exile sufficiently strong to ensure, at least to a certain degree, that other members of the international community will maintain their recognition?

The answer to the first question is divided; on one hand, it is thought that maintained recognition can allow entities otherwise not necessarily qualifying as states to nevertheless be accepted as such. Recognition can thus act as a consolidation of an entity's status when the latter is in doubt[245]. This interpretation also takes into account the flexibility of the concept of statehood, which can "accommodate entities that might otherwise be regarded as *sui generis*"[246].

According to this understanding of the role of recognition, applied to the case of low-lying island nations, it could mean that despite the lack of a territory, population, and possibly independent government, their claim to statehood would remain relatively unquestioned, provided they enjoy wide recognition. Concretely, this could mean that:

> at least for an interim period, they [the States] would continue to recognize a State as such, even when the full indicia of statehood are lacking. Whether, and for how long, countries like Kiribati and Tuvalu could continue to remain members of the UN in such circumstances would therefore depend on the views of other States.[247]

The importance of recognition in relation to the non-fulfillment of statehood criteria is also echoed by Crawford: "where a state undergoes multiple changes, the problem is more difficult and the role of recognition still more important"[248].

The second possible answer is grounded in the fact that recognition alone, as highlighted earlier, is not a constitutive element of statehood. If an entity reuniting all the elements of statehood, including a sufficiently independent government, can qualify as a state despite limited recognition, then it is not so far-fetched to argue that an entity

[245] Crawford, 2006, *op. cit.*, p. 93.
[246] *Ibid*¸ p. 88.
[247] McAdam, 2012, *op. cit.*, p. 138.
[248] Crawford, 2006, *op. cit.*, p. 692.

lacking the attributes of a state but enjoying important recognition, is not a state. This interpretation of the role of recognition is best explained by Alexander and Simon:

> If recognition were constitutively sufficient for statehood, then if the community of nations, for whatever reason, decided to recognise a boiled egg as a state, then that boiled egg would be a state. But this is absurd. It follows that no amount of recognition extended to some entity could guarantee that that entity were in fact a state.[249]

Others have argued that a submerged island state could maintain a status as a *sui generis* entity of international law if other states maintained their recognition, such as assumed by the Sovereign Order of Malta, which maintains embassies and diplomatic relations with a number of states[250].

Ultimately, the role played by recognition in identifying the extinction of an island state could be crucial:

> Since there is no self-executing mechanism for determining when a State no longer exists, the point at which a State such a Tuvalu or Kiribati could be said to have finally ceased to exist would depend not just on isolated acts of non-recognition by individual States, but their cumulative effect.[251]

The question would then be if recognition alone could suffice to prevent EDPs from falling within the scope of statelessness, which would likely involve an assessment of their home country's statehood. The outcome of such an analysis would then depend on the court's interpretation of legal norms and precedents such as the often cited case of governments in exile.

5.3.6.2. A necessary precision: United Nations membership and Statehood

The present exercise of evaluating the prospects for the continued statehood of island states requires a clarification of the role of a state's membership in the United Nations. Since membership is formally limited to states, the extent to which the United Nations' organs have conformed to the statehood criteria through the admission of new members remains unclear[252]. The process of admission is a politically tainted one, where ques-

[249] Alexander, Heather & Simon, Jonathan, "Sinking into Statelessness", in *Tilburg Law Review*, Vol. 19, 2014, p. 24.
[250] Gagain, Michael, "Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the "Constitution of the Oceans", *Colorado Journal of International Law & Policy*, Vol. 23, No 1, 2012, p. 93.
[251] McAdam, 2012, *op. cit.*, pp. 137-138, citing Crawford, 2006, *op. cit.*, pp. 704-705.
[252] Crawford, 2006, *op. cit.*, p. 179.

tions related to statehood have sometimes been downgraded due to the Cold War context or the international support in favor of decolonization[253] [254]. As a result, although United Nations membership can be used as a *prima facie* evidence of statehood, it does not represent a requirement for it, even less a constitutive element[255].

In the context of the extinction of a state, a few precedents exist of "former" states being expelled from the United Nations General Assembly. Particularly noteworthy are the cases of Taiwan and the former Socialist Federal Republic of Yugoslavia (SFRY). Taiwan (The Republic of China) was expelled in 1971 and its seat on the UN Security Council was given to the People's Republic of China by General Assembly Resolution 2758(XXVI)[256]. Yugoslavia was expelled in 1992[257], as a result of its internal collapse. The Federal Republic of Yugoslavia, in spite of its claim to the succession of the SFRY, had to apply separately for a new membership to the General Assembly[258]. Nonetheless, it should be noted that these cases both occurred in a context in which another entity claimed the succession of the expelled one.

5.3.6.3. Governments in exile

The term "Government in exile" is not a legal one; rather, it is used to designate a government operating outside of its territory[259]. Most cases of governments in exile have historically happened in the context of the belligerent occupation or annexation of their territory; other types of governments in exile have also included exiled cultural or national groups seeking independent political status, such as the Tibetan government in

[253] Crawford, 2006, *op. cit.*, p. 182.
[254] Craven, addressing the difficulties related to recognition, highlights the difficulty of separating political statements and recognition: "it is frequently impossible to entirely dissociate the fact of recognition from the idea of political approval". Craven, *op. cit.*, p. 243.
[255] Grant, Thomas D., "Defining Statehood: The *Montevideo Convention* and Its Discontents", *Columbia Journal of Transnational Law*, Vol. 37, 1999, p. 450. Wong, *op. cit.*, pp. 364-365.
[256] UN GA Resolution 2758 (XXVI), 25 October 1971.
[257] UN GA Resolution 47/1, 22 September 1992.
[258] GA Res 47/1, 1992, cited in Crawford, 2006, *op. cit.*, p. 188.
[259] Talmon, Stefan, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford: Oxford University Press, 1998, p. 16, cited in McAdam, 2012, *op. cit.*, p. 135.

exile[260]. The exercise of governmental capacity from abroad was most famously displayed during the Second World War, when a number of occupied countries' governments were effectively operating from London[261].

For a low-lying island state to retain its statehood despite failing to meet the generally recognized minimum threshold, a number of concessions would need to be made. In line with the first interpretation of the importance of recognition, in order to secure continued recognition from most of the international community, a low-lying island state would rely on the understanding that it is still a state despite operating from the territory of another sovereign state. The success of establishing continued statehood would then hinge partly on the strength of the parallel established with governments in exile, the closest example to such a situation. This parallel can be established in relation to different aspects of statehood: the first concerns the preservation of independence necessary to an effective government, and the second relates to the absence of a territory and population in the context of continuity.

On the first aspect, applying the example of governments in exile to the case of low-lying island states does not pose major problems, since the link lies mainly in the exercise of governmental authority rather than the general context of the "exile". The question to be answered is then if a government operating from within the territory of another sovereign state can still satisfy the criterion of an effective government and the independence the latter requires. As a government in exile's jurisdiction is considerably limited by its situation, and ultimately reliant on the will of its "host" state, this would depend on the degree of liberty it is awarded to perform its tasks[262]. The fact that almost if not all of the putative state's population would be located in foreign territory would severely curtail its ability to implement its laws, a situation that would limit its jurisdiction principally to diplomatic and consular protection[263]. However, since the functional situation of a low-lying island state would most likely not differ in substance from the

[260] Shain, Yossi, *Governments in Exile in Contemporary World Politics*, New York: Routledge, 1991, cited in McAdam, 2012, *op. cit.*, p. 135.
[261] Australian Government, Department of Veteran's Affairs, "Allied Governments-in-Exile during the 1939-45 War", available at http://clik.dva.gov.au/history-library/part-1-military-history/ch-2-world-war-ii/s-2-commonwealth-allied-and-neutral-countries/allied-governments-exile-during-1939-45-war (Last visited 4 June 2017).
[262] Park, *op. cit.*, p. 7.
[263] Talmon, *op. cit.*, p. 202-206, cited in Park, *op. cit.*, p. 7.

precedent instances of a government in exile, it can be assumed that, as was the case then, the limited independence and effectiveness of a state in this position[264] would not hamper its claim to statehood, that is, provided the host state does not interfere with the delocalised state's governmental functions[265].

The other dimension of the relevance of governments in exile to the case of LLIS is more doubtful. The necessity of a territory and a permanent population is firmly established as an essential part of statehood, at least in the context of accession to Statehood. The impact of the non-fulfillment of those criteria is unclear, however, especially in the context of physical extinction. This is where the precedent provided by governments in exile is cited as substantiating the view that a delocalized government, lacking a territory and a population to exercise its jurisdiction, would nevertheless retain its international personality[266].

However, there are grounds to believe the relevance of the government in exile example is limited for LLIS in this particular context. The first shortcoming of this approach is that most governments in exile which enjoyed wide recognition, especially the historical examples which took place during WWII, were the result of belligerent occupation. In this context, although the governments in exile were not in control of their territory and population, the nature of the occupation meant that statehood was not under question:

> because belligerent occupation in no way grants legal title to the Occupying Power and cannot affect the legal status of the territory under general international law.[267]

Hence, the existence of a territory and an uninterrupted link with the exile government was still present, while that would not be the case for LLISs.

The illegal nature of the foreign occupation, violating customary international law through an illegal use of force[268], could also be argued as having implied a corollary

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[264] As Park explains: "The government's effectiveness would be questionable, and the criterion of "independence" would not appear to be met." Park, *op. cit.*, p. 7.
[265] McAdam, 2102, *op. cit.*, pp. 133-134.
[266] See for instance Rayfuse & Crawford, *op. cit.*, p. 8, Willcox, *op. cit.*, p. 14, McAdam, 2012, *op. cit.*, p. 135-138.
[267] Turns, David, "The Law of Armed Conflicts", in Evans, Malcolm D. (ed.), *International Law*, 3rd ed., Oxford: Oxford University Press, 2010, p. 838.
[268] As recognized by the decision *Military and Paramilitary Activities in and against Nicaragua (Nicaragua United States of America)*, ICJ, 27 June 1986, p. 147 (par. 5).This prohibition is also found in Article 2(4) of the Charter of the United Nations.

obligation to recognize the displaced government of the occupied countries, or at least not to support the occupier's competing claim. As Park underlines, due to the origin of their situation and their contribution to the war effort the situation of Norway, France or Greece could be considered "exceptional situations"[269]. Furthermore, as governments in exile are temporary in nature, the parallel with low-lying island states might prove arduous to establish. As for the case of "failed states", the interruption in effectiveness is premised as temporary due to the existence of a material, concrete association between a certain territory and population. In the absence of one or both, and in the context of looming permanent physical extinction, one can question whether such a flexible interpretation of statehood could be adopted by the international community rather than a simple change in status towards a *sui generis* entity such as the Order of Malta, for instance.

As a result, although presenting a number of similarities with the foreseeable future of island states, parallels with the case of governments in exile are also limited by the fundamental differences which can be observed between their respective situations. Apart from these arguments, a principle of international law is often considered central to the question of continued statehood for low-lying island states, the presumption of continuity.

5.3.6.4. The presumption of continuity

If the constitutive elements of statehood, the historical examples backing continued recognition and the parallels with past governments in exile are the pieces of a puzzle constituting the support for the continued statehood of island states upon relocation, one could see the presumption of continuity as the cement solidifying the puzzle as a whole. The presumption of continuity is what effectively strengthens the overall case for statehood, providing a legal counter-balance to the empirical demise of "disappearing states".

The presumption of continuity of state existence is an overarching legal norm which has applied consistently to cases of continuity such as substantial changes in government (e.g. revolutions, coups), territory and population. In this context, it provides that,

[269] Park, *op. cit.*, p. 7.

despite important internal changes, a state retains its international status and the obligations attached to it, as was the case, for instance, of Russia assuming the USSR's identity after its collapse[270]. Crawford identifies the necessity of such a principle as a logical corollary of the distinction between the state and its government[271]. He further defines the role of continuity in international law as follows:

> Like the communities they encapsulate, States are not static. Yet, we assume continuity of our States even as their governments, constitutions, territories and populations change. International law is based on this assumption.[272]

Continuity is thus an important factor of stability[273], ensuring international obligations are respected (*pacta sunt servanda*) in spite of internal changes or disturbances[274].

The presumption of continued state existence thus comes into play when determining whether a putative state is a "new" state, or rather continuous with a former state[275]. It can thus be described as a limiting principle ensuring, for instance, that a new government could not argue that it represents a new entity of international law, free of previous international obligations[276]. Conversely, the presumption of continuity implies a constraint for other states to recognize a new state as being continuous with a former one, inheriting its rights and duties[277]. The principle's scope thereby essentially addresses the "sameness" of states.

Arguments relating to the application of the presumption of continuity as a ground for the continued statehood of LLISs adopt a wider interpretation of the principle. Since the presumption of continuity implies that a state can continue to exist as such without an effective government, it is seen as providing a ground supporting the willingness of

[270] Shaw, Malcolm N., "State Succession Revisited", *Finnish Yearbook of International Law*, Vol. 5, 1994, pp. 49-50, cited in Crawford, 2006, *op. cit.*, pp. 677-678.
[271] Crawford, 2006, *op. cit.*, p. 668.
[272] Crawford, 2006, *op. cit.*, p. 667.
[273] Wong, *op. cit.*, p. 362.
[274] Marek, Krystyna, *Identity and Continuity of States in Public International Law*, Geneva: Librairie Droz S.A., 1955, pp. 68-76, cited in Crawford, 2006, *op. cit.*, p. 669.
[275] Simon & Alexander, 2014, *op. cit.*, p. 24.
[276] Simon & Alexander, 2014, *op. cit.*, p. 23-24.
[277] Marek, Krystyna, *Identity and Continuity of States in Public International Law*, 2nd Edition, Geneva: Librairie Droz S.A., 1968, pp. 141-143, cited in Alexander & Simon, 2014, *op. cit.*, p. 24.

states to recognize statehood in spite of the defect of one or more of the statehood criteria[278], or at least a delay in acknowledging that a state has ceased to exist[279]. The presumption of continuity has also been framed as a "ratchet effect", a presumption against extinction which might explain the very low number of state extinctions in the last century[280].

The nature of the presumption of continuity, which as mentioned above principally concerns questions of continuity or succession, could be seen as precluding the broader application it is given by proponents of its interpretation as a factor that prevents extinction. The principle under its current form addresses questions of continuity, which is distinct from statehood[281]. Its role lies in the assessment of sameness of a state, not the existence of the new state and its claim to statehood.

Continuity in the context of the non-fulfillment of a constitutive element of statehood also has limited value. Although the presumption of continuity allows an entity without an effective government (the "failed state" example) or a territory (government in exile case) to retain its statehood, it does so based on the assumption that the defect is temporary[282]. The permanent physical extinction of a state's territory goes beyond a temporary "defect" in an element of statehood, and thus could result in the loss of statehood[283]. This conclusion is also supported by the fact that the presumption of continuity is generally limited to the government criterion: even though the fulfillment of the other criteria might be tenuous, as in the case of governments in exile[284], there is no doubt that the physical elements of statehood are still present[285].

5.3.7. Overall Assessment

What this section highlights, through the analysis of the different elements of statehood, is that there is a real probability that as the constitutive criteria of statehood erode, so

[278] This was also the conclusion of a UNHCR expert meeting on the issue in 2011. UNHCR "Summary of Deliberations: Climate Change and Displacement, Identifying Gaps and Responses, Expert Roundtable" (Bellagio 2011), para. 30.
[279] McAdam, 2012, *op. cit.*, p. 135.
[280] Willcox, *op. cit.*, pp. 6-7. citing Crawford, 2006, *op. cit.*, p. 715 on the number of extinctions.
[281] Alexander & Simon, 2014, *op. cit.*, p. 24.
[282] Wong, *op. cit.*, p. 366.
[283] Wong, *op. cit.*, p. 367.
[284] Albeit operating from abroad, governments in exile derive part of their legitimacy from their claim to an existing population and territory.
[285] Wong, *op. cit.*, p. 367.

will the strength of low-lying island states' claim to statehood. Despite a number of examples being cited as grounds for believing LLISs would retain their legal status, it has been shown that most of the parallels drawn to support this claim are afflicted by shortcomings affecting their relevance to the case of island states. As the discussion on statehood remains highly hypothetical, only the future will confirm or disconfirm the different and sometimes conflicting interpretations of state practice, customary principles, treaty provisions and existing cases. Nevertheless, the impact and novelty of a state permanently losing its population and territory, based on the cumulative impact of a failure to meet the statehood criteria, should not be underestimated. In the assessment of LLISs' future prospects for statehood, these elements create uncertainty. After all, there is no known precedent of a state physically disappearing.

Ultimately, however, the key discussion lies in the determination of the point in time at which an island state's statehood would cease to exist, thus rendering its former nationals stateless under the definition of the 1954 Convention. Unsatisfactorily, the only conclusion the present section can produce is that there is no precise moment in time when an island state's statehood would cease to exist, based on the current understanding of international law. Rather, a number of points bear the potential of triggering extinction.

The earliest would be the moment when the remaining population inhabiting the state's territory cannot qualify as a "cohesive vibrant community", as defined in *In re Duchy of Sealand*[286]. As it is likely that at such point the government of the country would have relocated to another state's territory, there would be grounds to argue that the respective criteria of population and effective government were not met in substance, as explained when assessing the permanent population criterion and the example of governments in exile.

A second important milestone would be the moment when the remaining unsubmerged territory can be considered uninhabitable and incapable of sustaining human life. Under the current UNCLOS' regime, the island nation would then face considerable challenges to claim its exclusive economic zone, or even qualify its territory as an "island"

[286] *In re Duchy of Sealand*, Administrative Court of Cologne, 3 May 1978 (1989), 80 International Law Reports, p. 685. Although this concerned the creation of a new State, which could be argued as entailing a higher threshold.

for the meaning of the Convention[287]. The complete submersion of the territory could be interpreted as presenting even stronger evidence of extinction.

The last moment that could prove decisive to assess the extinction of a low-lying island state could be the withdrawal of recognition by a majority of the community of nations, as identified by McAdam[288]. Such a recognition of its extinction could take the form of a successful vote to expel the former state from the United Nations General Assembly, or change its status to permanent observer.

Overall, what this section demonstrates is that already from the moment the indicia of a permanent population appears to be lacking, a case could be made that the concerned state has legally disappeared as such (and as result, so has its nationality), thus allowing an environmentally-displaced person from the said country to qualify as stateless under the 1954 Convention on the Status of Stateless Persons. If successful, this would mean EDPs from this nation could qualify for a legal status, and the protection it entails.

5.4. Shortcomings

Despite its relevance for climate-induced migration, the 1954 Convention on the Status of Stateless persons has a number of caveats, starting with the absence of an enforcement mechanism. The only legal supervision for the Convention is the referral of questions of interpretation to the International Court of Justice, a recourse which has never been used to this day[289]. Furthermore, as opposed to the 1951 Refugee Convention, the 1954 Statelessness Convention was not under the direct mandate of the UNHCR until 1996, when this mandate was expanded by the United Nations' General Assembly[290].

In addition to a lack of an enforcement mechanism, the 1954 Convention's effectiveness is curtailed by its relatively low number of ratifications, 83 in 2014[291]. Although

[287] UNCLOS, Article 121(1)(3).
[288] McAdam, 2012, *op. cit.*, pp. 137-138.
[289] Van Waas, 2008, *op. cit.*, p. 232.
[290] UN GA, Resolution 50/152, 9 February 1996, par. 14-15. cited in Park, *op. cit.*, p. 17.
[291] UNHCR, "UN Conventions on Statelessness", *UNHCR* Website, available at http://www.unhcr.org/un-conventions-on-statelessness.html (Last visited 8 June 2017).

this number is higher than that of the 1961 Convention on the Reduction of Statelessness, the strength of the 1954 Convention is also hampered by the fact that almost half of its state parties have submitted reservations or declarations upon its ratification[292].

Additionally, only a few of the state parties have established a determination procedure to ensure the identification of stateless persons[293]. This situation can be partly blamed on the absence of any provision on the subject in the Convention, as well as on the almost inexistent international attention to the phenomenon of statelessness until recently[294]. It is worth mentioning that the 1954 Convention is a reactive instrument, which does not oblige a country to pre-emptively rescue EDPs from their home country.

6. Mapping the possible outcomes: a scenario-based approach

The task of identifying the added value of the protection of stateless persons with regard to the situation of EDPs is a complex one. Judged as incomplete or widely inadequate, the statelessness-related framework for protection is easy to dismiss as being unworthy of further attention. Hence, identifying a number of outcomes for the future of low-lying island nations constitutes a necessary step towards outlining the potential of statelessness as a basis for the acquisition of a legal status for EDPs upon relocation.

In an effort to situate the possible role and added value of the framework for the protection of stateless persons within the wider context of international law, namely the still widely undefined prospects for the future of vulnerable low-lying island nations from a legal and factual perspective, a number of scenarios were sketched out in the present section, and then presented subsequently under the form of a table. Initially a result of a thought experiment, the scenarios are based for some on solutions or legal avenues developed through the literature on the topic. Other scenarios instead cover gloomier outcomes where the response of the international community could not allow for the proper safeguard of the displaced persons' human rights.

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[292] van Waas, 2008, *op. cit.*, p. 232. Only articles protecting absolute rights (namely, non-discrimination and access to courts), Article 1 on the definition of stateless persons, Article 4 on freedom of religion, and the final clauses (Articles 33 to 42) cannot be subject to reservations.

[293] Gyulai, Gábor, "Statelessness in the EU Framework for International Protection", in *European Journal of Migration and Law*, Vol. 14, pp. 279–295, 2012.

[294] van Waas, 2008, *op. cit.*, p. 232. The issue was largely ignored through the Cold War era and it is only recently that the UNHCR's mandate on the subject has been strengthened. For more, see Seet, Matthew, "The Origins of UNHCR's Global Mandate on Statelessness", in *International Journal of Refugee Law*, Vol. 28, No. 1, pp. 7-24, 2016.

It is important to note that the scenarios are not intended as a comprehensive review of the possible outcomes of the problem, nor as an empirically-based research of its own. Rather, as a whole, it constitutes a review of the spectrum of potential futures and as such, a tool to clarify the added value of stateless and the conditions upon which its relevance is reliant. This implies that a scenario is also a spectrum of its own, with numerous possible variants and expressions.

6.1. The scenarios

6.1.1. Scenario A: Sovereign relocation.

Scenario A is mainly based on the cession of land by another sovereign state to the government of the low-lying island state. This option protects the rights of Environmentally Displaced Persons ideally, notwithstanding pre-existing problems within the LLIS, and would in all likelihood ensure continued fully-fledged statehood for the LLIS. Even though doubts remain about the exact *modus operandi* needed to preserve independence and thus statehood, an early transition while the LLIS's statehood is still firmly established could ease concerns on that regard. As defined by Max Huber in the 1928 *Island of Palmas Case*:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[295]

Hence the requirement of a full renouncement by the "giving" country of any claims of sovereignty over the ceded land. Prior examples, such as the transaction transferring Alaska to the United States of America could provide a relevant example of such mutually agreed cession of sovereignty. It is worth noting that such a transaction does not fall within the scope of a simple private exchange, but needs to encompass the right to govern in the concerned area[296].

This option would likely provide excellent protection for the collective and cultural rights of the displaced population, since communities could be preserved within the

[295] *Island of Palmas Case* (1928) 1 RIAA 829, 839 (Arbitrator Huber) 4 ILR 3, 829, 838.
[296] Soon, Alfred HA, "The effects of a Rising Sea Level on Maritime Limits and Boundaries", *Netherlands International Law Review*, Vol. 37, 1990, p. 207, cited in McAdam, 2012, *op. cit.*, p. 122.

new territory for instance. However, as mentioned above, it is necessary to separate scenario A from a simple private transaction to purchase land within another country. The latter has been mentioned by a few LLISs as an avenue for the future[297], but in order to fall within the scope of the scenario, there would need to be a full cession of sovereignty agreed with the state of which the territory is currently a part.

A simple purchase might not preserve the sovereignty of the newly relocated LLIS[298]. Hence, since the price to pay for the donating state would be substantial and there would be limited incentives related; it might be difficult to find a state willing to part with a parcel of its territory and all rights attached thereto[299]. This, coupled with the absence of an obligation to do so in international law means that the political likelihood of such an agreement is low[300]. It should also be noted that the constitution of several states prohibit such an agreement[301].

Overall, Scenario A constitutes what could be described as the best and most effective option for the relocation of environmentally displaced persons from low-lying island nations[302]. Such a plan, provided it is implemented correctly could ensure minimal vulnerability for the displaced persons. The downsides of such an outcome reside mainly in the obstacles which stand in the way of achieving it. Finding a "giving" country willing to ratify such an agreement, as well as gathering sufficient funds to achieve this endeavours, could prove very challenging and casts a shadow on the feasibility of such a solution[303].

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[297] Tharoor, Ishaan, "The Maldives Struggle to Stay Afloat", for *Time*, 18 May 2009, available at http://content.time.com/time/magazine/article/0,9171,1896628,00.html (Last visited 14 June 2017).

[298] Simple ownership would likely not ensure sufficient independence to secure continued existence of the LLIS as a fully-fledged state. The nature of the relationship between the state and the territory might have a substantial impact on the status of the LLIS. See Wong, Derek, "Sovereignty Sunk? The Position of 'Sinking States' at International Law", in *Melbourne Journal of International Law*, Vol. 14, 2013, pp. 369-370. Crawford also highlights the clear difference between the private law notion of ownership and the exercise of territorial sovereignty. Crawford, 2006, *op. cit.*, p. 48.

[299] Oliver, Selma, "A New Challenge to International Law: The Disappearance of the Entire Territory of a State", in *International Journal on Minority and Group Rights*, Vol. 16, 2009, p. 242.

[300] McAdam, Jane, *Climate Change, Forced Migration, and International Law*, Oxford: Oxford University Press, 2012, p. 147.

[301] Such is the case for Norway for instance, which Constitution states in its first section that: "The Kingdom of Norway is a free, independent, indivisible and inalienable Realm." Thus making any cession of territory a Constitutional matter.

[302] Wong, Derek, "Sovereignty Sunk? The Position of 'Sinking States' at International Law", in *Melbourne Journal of International Law*, Vol. 14, 2013, pp. 383-384.

[303] Doig, Eleanor, "What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?", in *Tilburg Law Review*, Vol. 21, 2016, p. 87; Oliver, *op. cit.*, p.242.

6.1.2. Scenario B: In situ adaptation

Scenario B is centered on local adaption and mitigation of the effects of the rise in sea levels rather than relocation. Such an approach is already implemented by a number of LLISs to varying degrees; sea walls and makeshift structures have been built in an attempt to fight back against the advancing ocean. At state-level, plans have been made to cope with the effects of climate change, including, for instance, the installation of rainwater tanks as part of Kiribati's *National Adaptation Program of Action* (NAPA)[304]. *In situ* adaptation encompasses a much wider scope of solutions however, including, for example, the creation of artificial structures.

The relevance of scenario B also varies widely in relation to the aim behind such adaptation. Simple coping mechanisms could slow down environmental degradation and thus allow the LLIS and its citizens to remain within their territory by implementing a physical adaption to the rise in sea-levels. This option might not be sustainable in the long-term, as the funds required and the scale needed would present an increasingly complex challenge, but could, for instance, be combined with another approach to relocation and afford more time to an LLIS's government in its attempts to reach a better outcome. As underlined, since the timing and results of negotiations by LLISs will be crucial[305], *in situ* adaptation could become a valuable tool for LLISs, if not an outcome on its own in the form of ambitious technological solutions (e.g. "floating islands"[306]).

The arguments in favour of *in situ* adaptation are therefore simple; relocation could be delayed and potentially avoided, complex discussions relating to the loss of statehood and the lack of protection of EDPs might not be completely avoided but would at least be substantially different. The feasibility and legal implications of artificial islands or other technological solutions (pre-emptive *in situ* adaptation) are still very much up for debate but surely present an intriguing if not probable avenue for the future[307].

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[304] Republic of Kiribati, *National Adaptation Program of Action (NAPA)*, January 2007, p. 32.
[305] Puthucherril, Tony George, "Climate Change, Sea level rise and protecting displaced coastal Communities: Possible solutions", in *Global Journal of Comparative Law*, Vol. 1, 2012, p. 258-259.
[306] Ives, Mike, "As Climate Change Accelerates, Floating Cities Look Like Less of a Pipe Dream", for *New York Times*, 27 January 2017, available at https://www.nytimes.com/2017/01/27/world/australia/climate-change-floating-islands.html (Last visited 14 June 2017).
[307] See Section 5.3.2. The inclusion of such artificial structures in the sovereign territory of the State would however prove doubtful, as the UNCLOS regime explicitly mentions that artificial structures do not create an exclusive economic zone for instance.

Two major problems undermine the likelihood of scenario B becoming a permanent outcome, namely, the sheer amount of funding needed to sustain it, as well as the high level of uncertainty related to the future evolution of the effects of climate change[308]. As the existence of low-lying island nations already relies on a very fragile equilibrium, maintaining such a balance is likely to be challenging in the face of a phenomenon which we do not yet fully understand. To hope to efficiently implement an adaptation-oriented solution, low-lying island states need the international community to demonstrate a very strong and sustained effort to address the causes of climate change, which has so far proved elusive, as shown by the negotiations in Paris failing to reach the desired target of a binding +1.5°C maximum rise in temperatures[309]. Additionally, the current financial dependency of many low-lying island nations on foreign aid[310] does not constitute a very positive omen for the prospects of funding a wide-scale, unprecedented effort to fight back against the rise in sea-levels.

Last but not least, as mentioned by Puthucherril centering the efforts on mitigation has the potential to divert attention from a necessary discussion on the humanitarian aspect of climate change, which is likely to matter, since the amount of damage done to the earth's climate would be hard to completely revert at this point in time[311]. Conversely, a too fatalistic outlook might hamper the efforts to secure foreign aid[312]. It is also worth noting that a technological solution would most likely not solve the already existing socio-economic pressure on low-lying island nations, such as low employment or over-population[313].

6.1.3 Scenario C: Strong Bilateral agreement - Incorporation & State succession

Scenario C would consist of a "receiving state" agreeing to welcome the entirety of the population of an LLIS and grant the latter's nationals full citizenship, or at least facilitate and accelerate their accession to it. The agreement should also include provisions

[308] Puthucherril, *op. cit.*, p. 254.
[309] Briggs, Helen, "What is in the Paris Climate Agreement?", for *BBC News*, 31 May 2017, available at http://www.bbc.com/news/science-environment-35073297 (Last visited 14 June 2017).
[310] For example, in 2013, it was estimated that foreign aid contributed to over 43% of the government's finances. Central Intelligence Agency (CIA), "Kiribati", *The World Factbook*, available at https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html (Last visited 07 June 2017).
[311] Puthucherril, *op. cit.*, p. 254.
[312] McAdam, 2012, *op. cit.*, p. 34.
[313] *Ibid*, p. 31. (On the existing socio-economic pressure on low-lying island nations).

intended to protect the collective and cultural rights of the displaced population, ensuring a certain level of self-determination while remaining fully within the jurisdiction of the receiving state. Eventually, EDPs could become part of the receiving state and constitute a protected minority, for instance. The former government of the LLIS could play an important transitional role in the process and possibly retain its representative role even if statehood would most likely be lost at some point in the process.

Possible avenues to incorporate the LLIS government in the long term could include the creation of a semi-autonomous region or entity within the receiving state. Another avenue could be the transition of the LLIS into a form of self-governance in free association with another State, as mentioned by McAdam[314]. As this option is well-established in the Pacific region, including the examples of Niue and the Cook Islands vis-à-vis New Zealand[315], it could present a possibility for the LLIS to retain a certain level of self-governance as long as the islands were populated. Under an agreement of this type, the citizens of the LLIS would also likely acquire the partner State's citizenship, thereby preventing statelessness.

This scenario is the only one which would relatively clearly fall within the scope of the traditional understanding of state succession and the related legal norms applying to such situations[316]. Along with a potentially smoother transition, due to the existence of a number of legal precedents, Scenario C would provide some basic guarantees to the LLIS's citizens in order to avoid "frictional" statelessness due to the succession process. This scenario would also fall within the scope of the 1961 Convention on the prevention of Statelessness. Such an option has been envisaged under a relatively similar form by Park[317] or Wong[318]. Others, such as Burkett, have defined and argued in favor of more creative variations of this option, such as the creation of a political trusteeship under the United Nations framework[319].

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[314] *Ibid*, pp. 19-20.
[315] McAdam, 2010, *op. cit.*, p. 20..
[316] Customary international law is understood as providing a binding obligation for the successor State to provide its citizenship to all individuals who at the moment of the succession had the nationality of the predecessor State. See Article 21 of the *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)*, 3 April 1999, Supplement No. 10, UN Doc A/54/10. Cited in Park, *op. cit.*, p. 18.
[317] Park, *op. cit.*, p. 18.
[318] Wong, *op. cit.*, p. 385.
[319] Burkett, *op. cit.*

6.1.4. Scenario D1: Multilateral strong agreement

Under this type of scenario, a number of "receiving states" would agree to allow EDPs to relocate within their territory. However, the agreement would not provide special safeguards to protect the cultural and collective rights of EDPs upon relocation, only that they be eligible for the citizenship of the country they relocate to immediately or shortly after their arrival. Since the relocation process would take place in collaboration with a number of countries, the role of the LLIS's government would be mainly centered on coordination and in ensuring that all its nationals find a safe haven. In this scenario, once the population had been evacuated, the role of the LLIS's government would necessarily be very limited and mostly symbolic, since its citizens would then primarily rely on their new citizenship and host state for diplomatic protection[320]. The obligation to safeguard EDPs' rights would shift, upon relocation, towards the receiving states. As the indicia of statehood would progressively disappear, the former government's status would likely shift from sovereign state to a type of *sui generis* subject of international law.

The central difference between this scenario and scenario C lies mostly in the agency of the LLIS's government in the mid to long-term perspective. For the displaced population, the absence of specific protection for their cultural and community rights would pose a problem, although, since they would gain citizenship in the receiving nation, it might be possible to implement some type of cultural citizenship[321].

6.1.5. Scenario D2: Multilateral weak agreement

Similarly to scenario D, the present scenario is based on the success of the LLIS's government to negotiate an agreement with one or more countries, allowing its population to relocate within the receiving states' territory. The agreement would not include specific provisions for the protection of collective or cultural rights, nor would it ensure that communities be resettled together. Upon arrival, the EDPs could not be eligible for the receiving state's citizenship but would instead qualify for permanent residency or

[320] McAdam, 2012, *op. cit.*, p. 136.
[321] For instance, the "millet" system implemented by the Ottoman Empire could provide a starting point for elaborating such as system. Doig, *op. cit.*, p. 75.

an equivalent status. With time, they would eventually be able to gain access to citizenship, although in the same way as other aliens present on the receiving state's territory.

In a similar fashion to the LLIS's government situation found in scenario C, the LLIS's government would eventually face a challenge to its statehood which could, if successful, force the transition of the former state to a *sui generis* entity.

In parallel to the agreement, the host state is understood as having a determination framework based on its ratification of the 1954 Convention on the Status of Stateless Persons, which allows the state to determine the merits of applications on grounds of statelessness. This would become relevant for EDPs to gain a legal status once within the territory of the host state. Although the accessibility of a residency status would mitigate the need for a legal status, the existence of a statelessness determination framework could ensure that, in the event that an environmentally-displaced person does not qualify for the residency status or its renewal, they could at least apply for the stateless status and the protection it affords.

6.1.6. Scenario E1 and E2: Last minute agreement (bilateral or multilateral)

Once again based on the assumption that a relocation agreement has been negotiated before the living conditions within the territory of the LLIS deteriorate enough to prompt a massive exodus, the scenarios E1 and E2 present a weaker "solution" than scenario D. The last-minute nature of the agreement would substantially affect the strength of the protection afforded to the EDPs upon their arrival in the receiving country. Namely, in scenarios E1 and E2, EDPs would be allowed to legally enter the territory of the receiving state only as a temporary measure. The agreement would not provide a path for citizenship and only confer upon EDPs a special, transitional status that provides very limited safeguards to protect their rights.

Essentially, scenarios E1 and E2 are based on temporary agreements, which could only ensure that the LLIS's population is not left adrift. This may be intended to extend the LLIS's government's margin to negotiate a better agreement for its citizens, but might also result in leaving EDPs in a legal limbo if the efforts of their government fail. Over time, the stranded EDPs' transitional status could evolve into a more permanent situation, potentially perpetuating the deficient protection of their rights. As deportation

would be impossible in this context, EDPs would find themselves in a highly vulnerable position.

Where scenarios E1 and E2 differ is on the fate of the LLIS's government post-relocation. In scenario E1, a challenge to the LLIS's continued statehood is issued by another member of the international community, eventually resulting in the formal loss of the LLIS's full statehood, and potentially its seat in the UN. Despite retaining a representative role in relation to the relocated EDPs, the former state would most likely become a *sui generis* entity of international law. For EDPs, this loss of statehood would result in difficulties related to the acquisition of travel documents and diplomatic protection, even though this would depend on the exact nature of the former LLIS's government following its change of status. The formal loss of statehood would also result in EDPs falling within the definition of *de jure* statelessness provided by the 1954 Convention on the status of stateless persons.

In scenario E2, no challenge to statehood would be issued within a short to mid-term time frame. Hence, the LLIS's government could formally retain its authority as a member of the international community of states. From the perspective of the stranded EDPs however, continued statehood for their former government would have limited impact on the concrete protection of their rights, as there would be no territory where they could enjoy the full scope of the rights their citizenship would entitle them to. Additionally, as the persecution element would most likely still be lacking and their government would retain statehood, the best way to define their status would be *de facto* stateless.

In scenarios E1 and E2 EDPs find themselves especially vulnerable compared to the scenarios discussed previously. In both cases the receiving country does not have an established determination framework for the purpose of examining application for stateless status. As the need might rise, such a framework could be established and prove valuable for EDPs, with the prospect of acquiring citizenship in the receiving country. Even in a situation where accession to citizenship remains unattainable through the statelessness status, the protection attached to the status could prove valuable since, amongst other guarantees, it ensures access to courts and thus potential justiciability for other rights. Additionally, even if the statehood of their former state was not officially contested (E2), a court reviewing an application for stateless status would most likely

have to assess the LLIS's claim to statehood, and as shown earlier, there would be grounds to decide that despite continued recognition, the state cannot be considered to have retained statehood. As a result, the court could attribute stateless status to the applicant, although a number of factors, such as the implementation of the determination framework and the stance of the host country, would likely influence the decision.

6.1.7. Scenario F: status quo and indifference

Scenario F is the essentially the opposite of scenario A; it offers limited to no protection and leaves EDPs to fare for themselves in a context where no agreement has allowed them to legally relocate, even temporarily as in Scenarios E1 and E2. Potentially allowed to enter a country's territory on the basis of a travel visa or illegally, EDPs would have to rely on the potential help of their deterritorialized government, even though the latter could only offer limited help, since it would lack physical jurisdiction.

As EDPs would not fall within the statelessness framework, they would have to rely on family ties or working visas to reach a safe haven. Ultimately, this situation would likely leave a number of EDPs stranded in legal limbo with very few possibilities of escaping. A number of other factors could also contribute to worsening this scenario, especially the status of general human rights law in the country where the EDPs might find themselves. Relocating to a country which has not ratified the major human rights conventions would mean that EDPs would have to rely on the domestic legal system of the country to safeguard their rights, with no oversight by international organs, and limited commitment by the receiving state. If the necessary conditions were met, however, they could fall within the scope of the refugee definition after leaving their country of residence.

6.1.8. Scenario G: A New Convention

Scenario G involves the creation of a new Convention aimed at providing protection to EDPs. This could also take the form of a modification to the existing refugee law framework, especially the 1951 Convention.

As such, an instrument or modification is not on the international agenda at the moment, and has not yet been discussed. It is thus impossible to predict the content and protection this scenario might offer to EDPs. However, a number of concerns have arisen with

regard to the initiation of efforts in this direction, some experts believing it might crystallize the vulnerability and the lack of protection of those who do not fit the definition of EDP that would come out of such discussions. Such could be the case of internally-displaced persons, for instance, who do not currently fall within the scope of the refugee definition and might remain in the same situation if not included in the new instrument[322].

Others are wary of the consequences of opening discussions on refugee protection in a hostile socio-political environment; instead of progress, such negotiations could result in a serious pushback to the current framework of refugee protection, as some countries would likely want to reconsider past commitments. The political challenges that the negotiation of a new instrument implies would likely seriously hamper the chances of reaching a satisfactory agreement[323]. This is also due to the inherent opposition between the countries from which migration is originating and the countries of destination[324].

6.2. Scenario table

In addition to the scenarios themselves, a table was drafted using a number of questions, intended to outline the general scope of each scenario. Structured using a number of questions, the table attempts to synthetize the previous pages within an easily comparable framework. Consequently, the answers given outline the general content of the scenario examined, although some questions might not be directly relevant to a particular scenario.

A first block of questions (1, 2, 3, and 4) concerns the possible pre-emptive solutions which could be implemented prior to the migration of the populations. Questions 2 and 3 refer to more specific and far-reaching solutions, involving the cession of sovereign territory or a specific framework for environmentally-displaced persons. Generally, these questions aim at assessing the "institutionalization" of the migration process through legal agreements or instruments, and to a lesser extent, the reach and protection afforded by the latter.

[322] McAdam, 2012, *op. cit.*, p. 43.
[323] *Ibid*, p. 197.
[324] Kälin, Walter & Schrepfer, Nina, "Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches" (Study of the Swiss Ministry of Foreign Affairs), April 2011, p. 57. cited in McAdam, 2012, *op. cit.*, p. 197.

As for questions 5, 6, 7, and 8, they are directly related with the applicability of the framework for the protection of stateless persons within the context of the concerned scenarios. Question 5 refers to section 5.3.6.2, concerning the importance of recognition. Questions 6 and 8 aim at defining the applicability of the 1954 Statelessness Convention in the scenarios through determining if it bears some relevance in the context of a precise scenario. A negative answer to question 6 renders the Convention completely irrelevant to the concerned scenario. Question 7 is related to the possible protection afforded by the Convention, which is partially defined by the legal status of the stateless person in the host country.

Question 9 simply aims at outlining the possible relevance complementary protection based on international human rights law could have in the context of a precise scenario. Although complementary protection was left out of the present work, it could still be relevant for environmentally-displaced persons upon relocation.

6.2.1. Scenarios: Part 1

	Scenario A	**Scenario B**	**Scenario C**	**Scenario D1**
1. Has an agreement on relocation been concluded by the LLIS's government with another state?	Yes	-	Yes	Yes
2. Does the relocation agreement include specific protection for the cultural & collective rights of EDPs within the receiving state's legal framework?	Yes	-	Yes	No
3. Does the agreement include the full legal cession of a territory to host the relocated EDPs and the LLIS government, preserving their independence?	Yes	-	No	No
4. If an agreement exists, does it provide direct citizenship or a facilitated/accelerated path to full citizenship?	-	-	Yes	Only access to temp. residency
5. Has there been a campaign of de-recognition against the statehood of the LLIS?	No	No	-	Yes
6. Has the receiving country ratified the Statelessness Conventions?	-	-	-	Yes
7. Have EDPs been able to enter and stay legally within the territory of the receiving state?	-	-	Yes	Yes
8. Is there a national framework of determination/protection for *de facto/de jure* stateless persons.	-	-	-	Yes
9. Has the receiving country ratified the major human rights Conventions (International Bill of Rights)?	Yes	Yes	Yes	Yes

6.2.2. Scenarios: Part 2

	Scenario D2	**Scenario E1**	**Scenario E2**	**Scenario F**	**Scenario G**
1. Has an agreement on relocation been concluded by the LLIS's government?	Yes	Yes	Yes	No	-
2. Does the relocation agreement include specific protection for the cultural & collective rights of EDPs within the receiving state's legal framework?	No	No	No	No	-
3. Does the agreement include the full legal cession of a territory to host the relocated EDPs and the LLIS government?	No	No	No	No	-
4. If an agreement exists, does it provide direct citizenship or a facilitated/accelerated path to full citizenship?	Only access to temp. residency	No	No	No	Possibly
5. Has there been a campaign of de-recognition against the statehood of the LLIS?	Yes	Yes	No	No	-
6. Has the receiving country ratified the Statelessness Conventions?	Yes	Yes	Yes	No	-
7. Have EDPs been able to enter and stay legally within the territory of the receiving state?	Yes	Short-term stay only	Short-term stay only	Short-term stay, or no	Possibly
8. Is there a national framework of determination/protection for *de facto/de jure* stateless persons.	Yes	Yes	Yes	No	-
9. Has the receiving country ratified the major human rights Conventions (International Bill of Rights)?	Yes	Yes	Yes	Yes	-

6.3. Situating the scenarios

What the scenarios elaborated above demonstrate is the diversity of the possible outcomes of migration (or not, for *in situ* adaptation). Since there are at present approximately forty island nations considered vulnerable to the rise in sea levels[325], it is likely that each state will face different challenges in practice and that, accordingly, the answers to these challenges will vary widely from one country to another.

Hence, factors such as a state's population, cultural background, geographical location and international relations will most probably play an important role in the establishment of solutions to provide a safe haven for future EDPs. For instance, Tuvalu, with its very small population and close ties with New Zealand, or the Federated States of Micronesia, whose citizens enjoy the right to live and work in the United States of America, find themselves in a better position than Kiribati or the Maldives[326]. The latter is in an especially complex situation due to the relatively volatile geo-political context in the region. As there is already evidence such factors influence the position of those countries on the issue of relocation and the fight against climate change[327], it is highly probable that not all vulnerable low-lying island nations will be able to secure a satisfying solution prior to migration.

The number of threatened nations and the variety of possible outcomes thus underscores the need for a "worst-case scenario" approach, aimed at providing a limited but sorely needed starting point to secure a legal status for environmentally-displaced persons upon cross-border relocation.

7. Statelessness as a starting point

As established at the beginning of this work, the aim of the present research is to assess the relevance of the framework on the protection of stateless persons as a means to providing a legal status for environmentally-displaced persons from low-lying island nations upon cross-border relocation. To achieve this, this thesis is attempting to answer the following question:

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[325] UNHCR, *In search of shelter: Mapping the Effects of Climate Change on Human Migration and Displacement*, May 2009, available at http://www.refworld.org/docid/4ddb65eb2.html (Last visited 8 June 2017).
[326] McAdam, 2012, *op. cit.*, pp. 200-201.
[327] McAdam, 2012, *op. cit.*, p. 200.

Within a worst-case scenario situation and in the absence of the implementation of a comprehensive pre-emptive solution to relocation, to which extent and under what conditions would environmentally displaced persons (EDPs) from low-lying island states (LLIS) qualify for the status of stateless person within the meaning of the 1954 Convention on the Status of Stateless Persons, and what is the added value of this status within the aforementioned worst-case scenario context?

To provide satisfactory answer, a number of claims needed to be substantiated, the first of which was the idea that climate change and its effects pose an existential threat to low-lying island nations. Complementarily, it had to be demonstrated that the rise in sea levels would cause wide-scale cross-border migration. Once the existence of climate-induced migration had been established, an assessment of the protection (or lack thereof) available for the displaced populations under the Refugee Convention was needed. This supported the idea that EDPs would fail to qualify as refugees, due to the fact that migration does not qualify as persecution for a Convention ground, and that at best they might fall within the scope of the non-refoulement principle.

From there, the need to assess the risk of statelessness for EDPs resulted originally in an effort to contextualize and situate the 1954 Statelessness Convention, and a broader review of the statelessness phenomenon including the distinction between *de jure* and *de facto* statelessness. Since statelessness may result from the extinction of a country's statehood, considerable attention was given to the possibility of extinction of EDPs' home states. To do so, the constitutive criteria provided by the Montevideo Convention, which is generally considered reflective of customary international law, and the impact of their possible non-fulfillment, were analysed. The impact and importance of recognition, the example of governments in exile, and the weight of the presumption of continuity were also assessed. Overall, this section attempted to provide a relatively complete portrait of the weight of low-lying island nations' claims to statehood once the existence of their population and territory, as well as the effectiveness and independence of their government becomes uncertain. Even though inherently limited by the hypothetical nature of the debate on extinction, this section demonstrated the possibility that an island state's physical demise could result in its legal extinction.

Once the above points were examined, a number of scenarios were drawn up in order to identify the spectrum of possible outcomes of relocation. As these outcomes are all possible if not plausible, they will now allow the identification of the relevance and

added value of the 1954 Convention on the Status of Stateless Persons as a means to providing legal status for EDPs posteriorly to relocation.

Summing up, the previous sections of this thesis have illustrated the validity of three central claims:

- There is a high risk of cross-border migration from low-lying island nations due to climate change and its effects.
- The central instrument for the protection of refugees, the 1951 Convention in its current form, is likely not to cover the environmentally-displaced populations mentioned above, resulting in a protection gap.
- There is a real risk of *de jure* statelessness for the nationals of low-lying island states, starting from the point at which the permanent population element of statehood becomes doubtful. Conversely, regardless of their home country's legal status, environmentally displaced persons from vulnerable island states would find themselves *de facto* stateless.

7.1. Relevance and added value

The use of statelessness as an element of solution for providing a legal status for environmentally-displaced persons has so far been discarded as having "little practical benefit"[328], or not providing a ready solution[329]. The reasons raised to support these conclusions lie in two main shortcomings of the protection of stateless persons[330].

7.1.1. Too late?

The first of these shortcoming concerns the moment at which environmentally-displaced persons are expected to become stateless. As statelessness is understood to be a consequence of their home country's loss of statehood, the moment of extinction is central to determining the relevance of statelessness. In raising this argument, McAdam identifies this moment as being too late for the law on statelessness to have any relevance[331], based *inter alia* on the weight of the presumption of continuity and the existence of precedents such as the case of governments in exile or "failed states" supporting

[328] McAdam, 2012, *op. cit.*, p. 142. Generally see pp. 138-143 for an assessment of the relevance of statelessness.
[329] Alexander & Simon, 2014, *op. cit.*, p. 25.
[330] McAdam, in addition to the reasons developed in the following paragraphs also questions the clarity of the link between State extinction and statelessness, citing Weis, 1979, *op. cit.* For more on the issue, see section 5.2.1.
[331] McAdam, 2012, *op. cit.*, p. 142.

continued statehood, despite the non-fulfillment of different constitutive elements of statehood[332].

However, in light of the analysis on extinction carried out in the present work, there are grounds for believing that the weight given to the legal norms and precedents cited above is greater than their real value with regard to the expected situation of low-lying island nations. The cumulative impact and permanent dimension of the non-fulfillment of the different criteria for statehood is likely to precipitate the loss of statehood. Moreover, the scope and nature of the presumption of continuity seem to limit considerably the role it is given by McAdam or Willcox. It is therefore likely that the growing gap between factual and legal reality might result in extinction, possibly as early as the point at which the population remaining within its territory ceases to be considered "permanent".

In this context, depending on the manner in which the migration is taking place, a legal analysis of their home country's claim to statehood could find that environmentally-displaced persons are stateless under the meaning of the 1954 Convention. Although there would be a delay between the migration of most of the country's population and its qualification as stateless, the time-gap would be substantially shorter than assumed by McAdam. Hence, the remedial function of the law on statelessness could prove valuable for EDPs who would not yet have secured a legal status. In the meanwhile, the rise of an obligation of non-refoulement could prevent their deportation, due to the human rights violation a return would entail, especially under the prohibition of inhuman or degrading treatment.

The existence of a delay between migration and the qualification for the obtainment of the stateless status highlights an inherent shortcoming of statelessness in this context, namely, the fact that the law on statelessness could never be effective for EDPs instantly upon external migration. However, this drawback, although still present, seems less important than expressed by McAdam. As a result, while still reliant on the hypothetical nature of the analysis of extinction, it is possible to argue that the law on statelessness could play a role in providing environmentally-displaced persons with a legal status.

[332] See generally McAdam, 2012, *op. cit.*, pp. 119-160.

7.1.2. Too little?

The second flaw which has so far resulted in the neglect of the law on statelessness with regard to the situation of environmentally-displaced persons is simply its assumed inadequacy or weakness as a "solution"[333]. Plagued by limited ratifications, the 1954 Convention never achieved the perceived success of its fraternal twin, the 1951 Convention on the Status of Refugees and its 1967 Protocol, with only 83 State Parties against 146[334]. The framework for the protection of statelessness under the 1954 Convention also lacks a duty to intervene pre-emptively, since its provisions come into play only once the stateless persons enter the jurisdiction of a State party. Furthermore, the low number of States having successfully implemented a determination procedure undermines the practical value of the law on statelessness[335]. Two elements can nonetheless mitigate this sombre portrait.

Even if the 1954 Convention is not subject to enforcement by a judicial organ, statelessness has been included in the mandate of the UNHCR since 1996[336]. Although evidently not supporting, in itself, the use of the law on statelessness as a ready option for protection, the qualification of EDPs as *de jure* stateless would further strengthen the UNHCR's mandate to assist them, even though they would already qualify once their nationality can be considered ineffective, since *de facto* stateliness also falls within the UNHCR's mandate[337].

More generally, increasing attention has been given to the issue of statelessness in recent years. Statelessness had been largely sidelined during the Cold War, but the fear of wide-scale statelessness in Eastern Europe prompted an increase in awareness of the issue and efforts to fight it, including the aforementioned mandate given to the UNHCR[338]. An effect of this increased attention has been a number of countries making

[333] McAdam, 2012, *op. cit.*, p. 142.
[334] UNHCR, "UN Conventions on Statelessness", *UNHCR* Website, available at http://www.unhcr.org/un-conventions-on-statelessness.html (Last visited 8 June 2017); UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, April 2015, available at http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (Last visited 8 June 2017).
[335] Only a small minority (6) of the EU member States have identified statelessness as a protection ground, as of 2012. Gyulai, *op. cit.*, p. 287.
[336] Seet, *op. cit.*, p. 8.
[337] The issues related to the definition and identification of *de facto* stateless persons in section 5.2 are nevertheless likely to affect the materialisation of measures intended to protect them, thus limiting in practice the value of *de facto* statelessness for this purpose.
[338] Seet, *op. cit.*, p. 7.

pledges to implement domestic determination frameworks in order to provide concrete solutions to statelessness[339]. The revival of the fight against statelessness has also materialized in recent years through the #ibelong campaign initiated under the UNHCR's *aegis* in collaboration with UNICEF[340]. There is thus evidence that despite the relatively low number of ratifications and overall poor domestic implementation, the situation might change as awareness increases.

The second element supporting the relevance of the 1954 Convention as a means to providing a legal status to environmentally-displaced persons is inherent to the context in which it could be implemented. Since there is a possibility that nationals of low-lying island states would have to migrate without securing another nationality prior to leaving their home country, they would find themselves effectively in a legal vacuum, without a legal status to help secure international protection. In this context, the law on statelessness, despite its caveats and the limits in its scope, could prove valuable for environmentally-displaced persons to at least qualify for a legal category[341].

7.2. An alternative to legal limbo

The role of the scenarios in the context of this research is to help materialize the type of situation where the law on statelessness could prove relevant as a means to securing a legal status. Evidently, in the case of scenarios A, B, C, or even G, the 1954 Convention is rendered irrelevant by the implementation of a solution preventing statelessness. The implementation of pre-emptive solutions adequately protecting the right of the potential EDPs would undoubtedly constitute preferable outcomes to the relatively inadequate option the law on statelessness provides. Nevertheless, the number of LLISs and their widely varying characteristics means that although some might be able to implement such pre-emptive solutions, it is likely that at least one could find itself unable to provide an option that includes resettlement of its whole population and the acquisition of a new nationality.

As the environmental and socio-economic pressures mount, the vulnerable island states will likely seek bilateral or multilateral agreements to allow their nationals to find a safe

[339] Gyulai, *op. cit.*, p. 288.
[340] See iBelong, available at http://www.unhcr.org/ibelong/ (Last visited 8 June 2017).
[341] Although dismissing the law on statelessness as having little value in the context of climate-induced displacement, McAdam nevertheless mentions the improvement a transition from *de facto* statelessness to *de jure* statelessness could represent. McAdam, 2010, *op. cit.*, p. 22.

haven, as has already been attempted by Tuvalu, for instance[342]. The exact content or scope of the agreement is entirely hypothetical, whence the need for mapping the possible options. A weak multilateral agreement, as found in scenario D, could mean that the displaced populations are eligible only for a temporary status upon entering the territory of the host state.

Eventually, as time passes, the protection offered by the temporary framework of protection might erode if political pressure rises, and issues of national security are invoked to prevent the acceptance of more EDPs[343]. For instance, the current manner in which the European countries have dealt with the increase in the influx of refugees following the "Arab Spring" and the civil war in Syria[344] might also raise concerns about the willingness of the international community to implement pre-emptive solutions that involve the (potentially permanent) reception of thousands of environmentally-displaced persons form low-lying island states.

Within a worst-case scenario, where a particular population of environmentally-displaced persons could have secured temporary asylum upon migrating to a foreign country but no permanent protection, there would be very few options to secure a legal status and the protection it might entail. As long as their home country's claim to statehood is solidly established, their situation could only be described as *de facto* stateless, an unenviable situation approximating legal limbo. However, provided the country they reside in is a State Party to the 1954 Convention, as their home state progressively loses the indicia of statehood, they could hope to qualify for the status of stateless persons, bringing them within a legal status.

8. Conclusion

It is here that the answer to the research question lies. The threshold which needs to be cleared for the law on statelessness to bear relevance for the protection of EDPs is admittedly a low one, essentially defined by *de facto statelessness*. As there is evidence that post-migration, and regardless of their country's status, the nationality of environmentally-displaced persons could be regarded as ineffective, thus falling within the

[342] McAdam, 2012, *op. cit.*, pp. 31-32.
[343] Oliver, *op. cit.*, p. 237.
[344] Nallu, Preethi, "Fortress Europe: An Interactive Map Of The EU's Growing List Of Security Barriers", for *Huffington Post*, available at http://www.huffingtonpost.com/entry/refugees-deeply-fortress-europe_us_570baf69e4b0885fb50d7b25 (Last visited 9 June 2017).

scope of what is considered to be *de facto* statelessness; the possibility that the law on statelessness could apply to their case already represents an important improvement on the complete lack of legal status and protection implied by *de facto statelessness.*

As the current work is centered on *lex lata* and disregard the possibilities of pre-emptive solutions, given the protection gap which afflicts the environmentally-displaced persons, the 1954 Convention on Statelessness, despite the conditionality of its application, could nevertheless provide a starting point towards developing a legal status for EDPs. What this thesis demonstrates is that due to the complete lack of protection or legal status available otherwise to environmentally-displaced persons from low-lying island nations, the possibility of gaining a legal status, and belonging to a specific legal category, would already represent substantial progress in an effort to secure protection.

Thus, although statelessness should not be seen as an adequate solution to the problems EDPs are likely to face upon relocation, it does present the possibility of constituting a baseline, a legal status that allows them to perhaps stabilise their situation in the foreign country they find themselves in.

Still, assessing the relevance of the law on statelessness for providing EDPs with a legal status should be understood for what it is: a worst-case scenario option, an instrument providing limited protection in relation to the legal status it establishes, undermined by limited ratifications and poor domestic implementation, and reliant on a number of conditional factors whose fulfilment is unsure. However, compared to what the "alternative", *de facto* statelessness, represents, it is indeed possible to say that the 1954 Convention on the Status of Stateless Persons has a role to play in the general effort to safeguard the rights of environmentally-displaced persons from low-lying island nations, by securing their qualification for a legal status.

What this work has highlighted indirectly through the analysis of the relevance of the law on statelessness for EDPs is the inadequacy of the current protection for persons in this type of situation. The exact path to remedy this situation remains obscure, since no proposed solution is devoid of flaws. The possibility of creating a new international instrument, for instance, although tempting by its apparent simplicity and assumed adequacy, also presents a number of drawbacks. The geopolitical context within which

international law and human rights have to evolve complicates considerably the elaboration of a solution capable of encompassing all those in need of international protection.

The complexity of the challenges posed by the relocation of whole countries should not be downplayed, nor should the agency and collective rights of those affected. There is, as a result, an important need to fight the misinformation which has so far limited the necessary discussion on the appropriate answer to climate-induced displacement. As highlighted by this work, the law on statelessness, albeit providing merely a baseline protection, has a certain value mainly due to the general lack of other options for protection, not because it is an adequate answer to relocation.

This highlights the need for the elaboration of a better answer by the international community, starting with an increase in the funding available for adaptive measures. As the fight against climate change has so far proven incapable of reaching sufficiently ambitious goals to prevent the expected disappearance of a number of low-lying island nations, the need for a concerted answer by the countries responsible for climate change is rising and is highly unlikely to diminish.

The potential of climate change to act as a general factor of instability should also not be underestimated. As states will have to face increasing numbers of internally-displaced persons within their borders, it is unlikely that their attitude to migrants seeking safety will be welcoming. More likely is the possibility that due to internally-displaced migrants constituting the overwhelming majority of those displaced, the problems faced by externally-displaced nationals of low-lying island states could be downplayed or marginalised. Additionally, as Puthucherril highlights:

> It is also expected that climate change and SLR will lead to massive internal displacement of a country's own citizens. In such circumstances, it may be grossly unfair to expect such countries to accept additional immigrants. At the same time, there may be countries that are in a position to accommodate additional people, but there may be constraints on the numbers that they can feasibly accommodate.[345]

Ultimately, although the exact influence of climate change on migration is impossible to assess accurately, it could be considered a risk multiplier and thus add an important element of uncertainty to the elaboration of answers to climate-induced cross-border migration.

[345] Puthucherril, *op. cit.*, p. 256.

This factor highlights the need for the conclusion of solid agreements safeguarding the rights of possible EDPs before migration is needed. Elements of such agreement could include securing the acquisition of another nationality for environmentally-displaced persons prior to losing their former[346].

Words: 37 874

[346] Park, *op. cit.*¸ p. 15.

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