Articles

Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?

Changement climatique et personnalité juridique internationale: les "nations déterritorialisées par le climat" comme sujets émergents du droit international?

DAVORIN LAPAŠ

Abstract

This article deals with the sea level rise phenomenon caused by the climate change process and its impact on the statehood of so-called disappearing island states as well as on the consequent factual and legal status of their populations. In classical international law doctrine, the loss of a state's territory will lead to the extinction of statehood and, consequently, the loss of that state's international legal personality, and possibly also to the statelessness of its nationals. This article proposes an alternative solution based on the transformation of disappearing island states into new non-territorial subjects of international law —

Résumé

Cet article traite du phénomène d'élévation du niveau de la mer causé par le processus de changement climatique, et de son impact sur le statut factuel et juridique d'États insulaires dits en voie de disparition ainsi que de leurs populations. Dans la doctrine classique du droit international, la perte du territoire d'un État conduira à l'extinction de son statut d'État et, par conséquent, à la perte de sa personnalité juridique internationale, ainsi qu'à l'apatridie éventuelle de ses ressortissants. Cet article propose une solution alternative basée sur la transformation d'États insulaires en voie de disparition en de nouveaux sujets du droit international

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"climate deterritorialized nations" — as successors to disappeared inundated states.

Keywords: climate change; "climate deterritorialized nations"; disappearing island states; international legal personality; sea level rise; subjects of international law.

non territoriaux — des "nations déterritorialisées par le climat" — en tant que successeurs d'États inondés disparus.

Mots-clés: changement climatique; élévation du niveau de la mer; États insulaires en voie de disparition; "nations déterritorialisées par le climat"; personnalité juridique internationale; sujets du droit international.

> We theorists have … to take heed to build our doctrines on tendencies rather than on 'facts'; otherwise when we have finished constructing our systems, it may happen that the facts are no longer what they were when we began building, and the system is out of date before it is established.[1]

Introduction

Only a few decades ago, students of public international law thought of the extinction of a state almost exclusively in the circumstance of the disappearance of its government as one of the constitutive elements of statehood,[2] which historically has proved to be the most fragile element. Permanent population and state territory have usually been considered too stable to disappear. Thus, until recently, authors only discussed hypothetical examples of the extinction of statehood due to the disappearance of a state's territory — for example, the extinction of an island state as a result of a tectonic catastrophe, as in the case of the mythical Atlantis. And the disappearance of the entire population was imaginable only in the scenario of a nuclear war.[3]

Unfortunately, the phenomenon of climate change-induced sea level rise has turned the unimaginable into reality, facing international law with the possibility of the appearance of some new mythical legal creatures: oxymoronic "deterritorialized states" or, as proposed in this article, "climate deterritorialized nations" (CDNs) as potential *sui generis* subjects of international

[1] Sir John Fischer Williams, "The Legal Character of the Bank for International Settlements" (1930) 24:4 Am J Intl L 665 at 665.

[2] See e.g. James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford: Clarendon Press, 2006) at 45–61; Sir Robert Jennings & Sir Arthur Watts, *Oppenheims's International Law*, vol 1, *Introduction and Part 1*, 9th ed (London: Harlow, Longman, 1992) at 120–23.

[3] VĐ Degan, *Međunarodno pravo* (Rijeka: Pravni fakultet Sveučilišta u Rijeci, 2000) at 231.

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law — the "orphans" of their inundated small island states. Thus, unfairly, the smallest contributors to the climate change phenomenon could become the most affected by its negative consequences.[4] The International Organization for Migration (IOM) forecasts that there will be between twenty-five million and one billion climate change migrants by 2050.[5]

International law is by definition a horizontal, non-hierarchical normative system regulating relations among its sovereign subjects, primarily states. As such, it can hardly reverse the consequences of their often egoistic behaviour, but what it can do is at least try to protect the rights of the most imperilled — in this case, the peoples of the sinking "disappearing island states," which, affected by the sea level rise phenomenon (*de jure* and/or *de facto*) are vanishing before our eyes. Besides the general protection of human rights already included in international law, these peoples will need specific protections concerning the preservation of their rights to self-determination and to their culture and identity, particularly in the case of their relocation.[6] It may be that the international legal system, which unfortunately often lacks teeth, can hardly change the destiny of these peoples. However, it should be the task of international legal doctrine to offer a viable and acceptable solution to protect some of the most threatened members of the international community — the populations of the sinking disappearing states.

This article argues that one such solution could be to transform such populations, which constitute just one element of statehood in classical international law doctrine, into non-territorial, semi-sovereign subjects of international law — CDNs.[7] By not only acquiring legal capacity, but also some other elements of international legal personality, CDNs as non-state

[4] Thus, as Tiffany TV Duong states, "[f]inally, climate change has a built-in disparate impact: those countries producing the most harmful GHGs are usually the least affected by climate change disasters, while those producing the least seem to bear the greater brunt of global warming harms. Moreover, the victims of climate change, often small islands or poor nations, are frequently in the worst position to adapt and mitigate the damages." Tiffany TV Duong, "When Islands Drown: The Plight of 'Climate Change Refugees' and Recourse to International Human Rights Law" (2010) 31:4 U Penn J Intl L 1239 at 1243.

[5] Migration and Climate Change, *International Organization for Migration* (2008), online: <www.iom.cz/files/Migration_and_Climate_Change_-_IOM_Migration_Research_Series_No_31.pdf>.

[6] See e.g. J McAdam, "Self-determination and Self-governance for Communities Relocated across International Borders: The Quest for Banaban Independence" (2017) 24 Intl J Minority & Group Rights 428 at 433. See also United Nations (UN), Office of the High Commissioner for Human Rights, *Human Rights, Climate Change and Migration* (last visited 7 March 2022), online: <ohchr.org/en/climate-change/human-rights-climate-change-and-migration>.

[7] In this context, it is also worth noting some other terms denoting the status of governments and peoples that have lost their territory — for example, "nations *ex situ*" (Maxine Burkett), "ecological refugee state" (Jörgen Ödalen), "state substitute" (Julien Jeanneney), or "pseudo-states" (Sabine Lavorel). See Maxine Burkett, "The Nation Ex-Situ: On Climate

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entities could act — probably for the first time in the history of international law — as successors to their predecessor states. In this regard, the recognition of international legal personality for CDNs as new non-territorial subjects of international law could not only provide them with international legal capacity (*capacitas iuridica*), including the capacity to produce legal consequences in international legal relations like the treaty-making capacity, or the right to legation, but it could also preserve their right to self-determination, including their rights over the natural resources of their disappeared states.

The aim of this article is therefore to try to identify a feasible and durable solution for these nations within the framework of the existing system of international law and its concept of legal personality. Thus, the first part of the article will present an overview of the development of the concept of legal personality and of its elements in international legal scholarship. In the following part, the article will analyze the concept of statehood in contemporary international law based on territory as one of its constitutive elements but, at the same time, relativized by the climate change process and, consequently, by the sea-level-rise phenomenon. Finally, the article will focus on the international legal status of the populations of disappearing island states after the loss of their territory and the possibility of their transformation into new, non-territorial subjects of international law — CDNs.

The Concept of International Legal Personality: A Concise Overview

The concept of legal personality is one of the most important issues in every legal order because it differentiates subjects of law from other participants in social relations. However, there is probably no area of law that has retained the topicality of this concept in such a measure as international law. Reasons for this can be found in legal philosophy and sociology as well as in history, but the best explanation is almost certainly found in the very nature of international law. The horizontal structure of the international legal order, characterized by the lack of a centralized legislative power as it exists in municipal legal orders, explains the peculiar nature of the international law-making process where the connection between theory and practice seems to be much more intensive and direct than in any other branch of law.

Change, Deterritorialized Nationhood, and the Post-Climate Era" (2011) 2 Climate L 345 at 345–74; Jörgen Ödalen, "Underwater Self-determination: Sea-level Rise and Deterritorialized Small Island States" (2014) 17:2 Ethics, Policy & Environment 225 at 230; Julien Jeanneney, "L'Atlantide. Remarques sur la submersion de l'intégralité du territoire d'un État" (2014) 118:1 RGDIP 95 at 128ff; Sabine Lavorel, "Les enjeux juridiques de la disparition du territoire de petits États insulaires" in P Bacot & A Geslin, eds, *Insularité et sécurité. L'île entre sécurité et conflictualité* (Brussels: Bruylant, 2014) 19 at 44ff.

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International law creates its subjects, whilst, at the same time, it has been created by them.

On the other hand, as Hermann Mosler would say, every legal order defines a system of its subjects according to its aims and needs, granting legal personality, in the first place, to those entities in relation to which it desires to realize its aims.[8] Therefore, the diversity of legal subjects among different legal orders seems unavoidable. International law cannot be the exception here.[9] On the contrary, it can serve as a perfect example for analysis of this process. However, in spite of some proposals for codification in the field of international legal personality,[10] contemporary international law does not contain any legal norm enumerating its subjects or even regulating conditions for acquiring international legal personality. The dynamics of international relations most probably aggravate the international law-making process in this sense since the appearance or disappearance of various categories of subjects of international law follows the changing needs of the international community.[11] Therefore, international law can only accept that "subjects of law in any legal system are not necessarily identical."[12] Thus, every attempt at codification and the defining of international legal personality, its elements, or even its minimum standards remains necessarily on the doctrinal level.

The historical development of international legal personality can be understood as an evolving relationship between states, as sovereign and

[8] Hermann Mosler, "Réflexions sur la personnalité juridique en droit international public" in J Baugniet, ed, *Mélanges offerts à Henri Rolin* (Paris: Éditions A Pedone, 1964) 228 at 239.

[9] Thus, Rolando Quadri states: "C'est la science du droit international et seulement elle qui pour des raisons systématiques manifestes a besoin d'utiliser l'idée abstraite de sujet de droit. Et cette idée doit être tirée de l'ordre juridique international dans son ensemble, de sa structure et de son esprit." Rolando Quadri, "Cours général de droit international public" (1964) 113:3 Rec des Cours 237 at 375. Similarly, Cezary Berezowski states: "Les catégories des sujets du droit international et leur nombre varient selon les relations internationales existantes et les règles juridiques de ces relations." Cezary Berezowski, "Les problèmes de la subjectivité international" in Vladimir Ibler, ed, *Mélanges offerts à Juraj Andrassy* (The Hague: Martinus Nijhoff, 1968) 31 at 32. For a similar attitude, see David I Feldman, "International Personality" (1985) 191:2 Rec des Cours 343 ("[H]istoric-comparative analysis has proved that international legal relations of each stage of historical development had their … particular international personality" at 357).

[10] See Feldman, *supra* note 9 at 406.

[11] "L'existence de normes indiquant que certaines entités possèdent la personnalité internationale (…) n'a pas été établie dans le droit international positif. La pratique internationale ne permet pas de constater l'existence de telles normes." Julio A Barberis, "Nouvelles questions concernant la personnalité juridique internationale" (1983) 179:1 Rec des Cours 145 at 168.

[12] The International Court of Justice (ICJ) explicitly confirmed this attitude in the so-called *Reparation* case. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 at 178 [*Reparation*].

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probably the most influential subjects of international law, and a spectrum of other participants in international relations as members of the international community. However, this relationship has not always been equally understood by international legal doctrine, particularly if the notion of sovereignty is taken as a starting point. Thus, Cezary Berezowski points out that, if we take the notion of sovereignty as the basic element of international legal personality, all international relations would seem to be simply inter-state relations (*relations interétatiques*) and, consequently, states would be the only subjects of international law. On the contrary, if we do not insist on the element of sovereignty, we approach a much broader concept of international legal personality.[13]

From the very beginning of the development of so-called classical international law, in the second half of the sixteenth century, up to the threshold of the twentieth century, only states were recognized as subjects of international law in the international legal order.[14] Such a restrictive approach can also be found in the second half of the twentieth century in the works of some East European, particularly Soviet, authors.[15] However, it is impossible to disregard the presence of some entities, atypical to the traditional "state-centric" approach, such as the Holy See, the Sovereign Order of Malta, or the growing number of intergovernmental and even non-governmental organizations (NGOs) (like the International Committee of the Red Cross). Conversely, French legal thought at the beginning of the twentieth century attempted to turn the concept of international legal personality completely upside-down. For example, according to one of the leading French legal theoreticians of that time, Georges Scelle, all international relations should be understood only as relations between individuals belonging to different states. Consequently, the individual was recognized not only as a subject of international law but also, moreover, as the only subject.[16]

While the reality of international relations did not confirm this approach, it should nevertheless be acknowledged that, from that time, the door of international legal personality has been opened to many other state-unlike

[13] See Berezowski, *supra* note 9 at 31.

[14] Thus, for example, in his *Manual of International Law* in 1902, Franz von Liszt began the chapter on subjects of international law with the following words: "Only States are subjects of international law — holders of international rights and duties" (in German: "Nur die Staaten sind Subjekte des Völkerrechts: Träger von völkerrechtlichen Rechten und Pflichten"). Franz von Liszt, *Das Völkerrecht — systematisch dargestellt* (Berlin: Verlag von O Haering, 1902) at 34. For a similar approach, see the judgment of the Permanent Court of International Justice in the *Lotus* case in 1927: "International law governs relations between independent States." *The Case of S.S. "Lotus"* (1927), PCIJ (Ser A) No 10 at 18.

[15] See Feldman, *supra* note 9 at 359. See also GI Tunkin, ed, *International Law* (Moscow: Progress Publishers, 1986) at 101–04, 120–22.

[16] See Georges Scelle, *Cours de droit international public* (Paris: Éditions Domat-Montchrestien, 1948) at 512.

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entities that have effectively taken part in the international community and its law. Numerous authors within international legal scholarship have offered their own definitions of the notion of international legal personality. Thus, for example, Bin Cheng and Julio Barberis consider a subject of international law to be every person capable of being an addressee of an international legal norm that directly imposes certain rights or duties.[17] Similarly, it seems that Francesco Capotorti makes no distinction between international legal personality and legal capacity in the international legal order.[18] It is probably an oversimplification or overly theoretical to limit the understanding of international legal personality to legal capacity, but, on the other hand, it seems equally unconvincing to strictly detach legal capacity from the other elements of legal personality. After all, the capacity of participants in international relations to produce legal consequences (*capacitas agendi*), such as the treaty-making capacity (*ius contrahendi*) or the right of legation (*ius legationis*), is itself the emanation of rights given to such participants by the norms of international law. Thus, as Malcolm Shaw points out,

> [p]ersonality is a relative phenomenon varying with the circumstances. One of the distinguishing characteristics of contemporary international law has been the wide range of participants. These include states, international organizations, regional organizations, non-governmental organizations, public companies, private companies and individuals.[19]

Thus, some authors, in addition to international legal capacity (*capacitas iuridica*), require that an international legal person should be capable of acting according to the requirements of the international legal order and, consequently, of producing legal consequences of such acts (*capacitas agendi*).[20] Some of these authors do not even differentiate between whether such a capacity is realized directly at the international level or by means of a

[17] Thus, Cheng states: "[A]voir la personnalité juridique internationale signifie être le destinataire direct des règles du droit international." Bin Cheng, "Introduction" in M Bedjaoui,ed, *Droit international, bilan et perspectives*, vol 1 (Paris: Pedone, 1991) at 25. See also Barberis, *supra* note 11 at 169.

[18] Thus, Capotorti states: "[D]ire qu'une entité possède la personnalité pour l'ordre juridique international dénote exactement la capacité du sujet à devenir titulaire des droits et des obligations prévus par cet ordre." Francesco Capotorti, "Cours général de droit international public" (1994) 248:4 Rec des Cours 9 at 42.

[19] MN Shaw, *International Law*, 9th ed (Cambridge: Cambridge University Press, 2021) at 180.

[20] See e.g. W Levi, *Contemporary International Law: A Concise Introduction* (Boulder, CO: Westview Press, 1979) at 63; B Vukas, "States, Peoples and Minorities" (1991) 231:6 Rec des Cours 267 at 486. Cf Feldman, *supra* note 9 at 359.

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state and its organs.[21] On the other hand, there are authors who emphasize the element of international responsibility as necessary to acquire international legal personality. Thus, for example, Constantin Eustathiades seems to consider that a subject of international law should be capable of breaking international legal norms.[22] Similarly, Nkambo Mugerwa considers that international legal personality encompasses "responsibility for any behaviour at variance with that prescribed by the system," "the capacity to enter into contractual or other legal relations with other legal persons," and "the capacity of claiming the benefit of rights."[23] In all the above-mentioned conceptions, there is one requirement that appears to be undisputable: legal capacity — that is, the capacity of an entity to be an addressee of legal rights and/or duties established directly by international legal norms.[24]

However, in international law, the classification of international persons according to the content of their legal personality usually does not seem very convenient. In fact, the content of the international legal capacity of an international legal person depends primarily on its role in the international community.[25] Therefore, it seems correct to conclude that international legal personality does not depend on the quantity of rights and duties conferred.[26] On the contrary, it is sufficient for an entity to acquire any

[21] See e.g. Jennings & Watts, *supra* note 2 at 119–20.

[22] See Constantin Th Eustathiades, "Les sujets du droit international et la responsabilité internationale. Nouvelles tendances" (1953) 84:3 Rec des Cours 397 at 414–15. See also P Reuter, *Droit international public* (Paris: Presses universitaires de France, 1983) at 175; Barberis, *supra* note 11 at 165.

[23] Nkambo Mugerwa, "Subjects of International Law" in M Sørensen, ed, *Manual of Public International Law* (London and New York: MacMillan and St Martin's Press, 1968) 247 at 249.

[24] Cf Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945) at 93. Thus, Hermann Mosler defines legal personality as follows: "It means that a person possesses the capacity to be the subject of legally relevant situations…. Legal capacity is a status in law which is, in a legal system, the reference point of conferring rights, obligations and competences." Hermann Mosler, "Subjects of International Law" in R Bernhardt, ed, *Encyclopedia of Public International Law*, vol 7 (Amsterdam: North-Holland, 1984) at 443. See also Christian Walter, "Subjects of International Law" in Rüdiger Wolfrum, ed, *The Max Planck Encyclopedia of Public International Law*, vol 9 (Oxford: Oxford University Press, 2012) 634 at 639.

[25] Thus, the ICJ in its earlier-mentioned advisory opinion in the so-called *Reparation* case, *supra* note 12 at 178, stated: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." See also the *Case Concerning the Factory at Chorzów*, Réponse du Gouvernement allemand à l'exception préliminaire du Gouvernement polonais (Response of the German Government to the Preliminary Objection of the Polish Government) (1927), PCIJ (Ser C) No 13-I at 173. See also L Caflisch et al, eds, *Les sujets du droit international*, vol 3 (Geneva: Librairie E Droz, 1973) at 33.

[26] See Barberis, *supra* note 11 at 168; Mosler, *supra* note 8 at 250.

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specific right or duty directly under an international legal norm to become a subject of international law. After all, even the subjects of municipal legal orders do not necessarily have all municipal legal capacities. For instance, children do not usually possess *capacitas agendi* at all, and, even for adults, it can be limited and, in some cases (for example, mental disorders), removed. They do not thereby cease to be subjects of the law, enjoying legal capacity (for example, fundamental human rights) and, consequently, legal personality in these legal orders. Seen in this light, even so-called non-state actors in international law cannot be an exception. Some of them, such as the International Committee of the Red Cross,[27] the International Federation of Red Cross and Red Crescent Societies,[28] the Inter-Parliamentary Union, the International Olympic Committee, and a number of other, so-called "advanced NGOs,"[29] have already opened the door of international legal personality, proving that any attempt to freeze the content of the "international community" would necessarily halt its development as well as the development of its law.

On the other hand, in international legal doctrine, there is no consensus concerning the content of another element of international legal personality — the capacity to act directly according to international law — that is, to produce legal consequences of such acts (*capacitas agendi*). In this context, some authors put an emphasis on international law-making capacity — in particular, on treaty-making capacity[30] — while others highlight the element of international responsibility[31] or even the requirement for *ius standi* before international fora.[32] This being so, Shaw considers the rising number of participants on the international plane as one of the most significant characteristics of contemporary international law. For him, "international personality is participation plus some form of community acceptance."[33] What is more, as Myres McDougal states, "[c]ontemporary theory about international law, obsessed by a technical conception of the 'subjects of international law', continues, however, greatly to over-estimate the role of the 'nation-state' and to underestimate the role of all these other new

[27] See e.g. Shaw, *supra* note 19 at 238.

[28] Christian Tomuschat, "General Course of Public International Law" (1999) 281 Rec des Cours 23 at 159.

[29] See Davorin Lapaš, "Diplomatic Privileges and Immunities for IGO-Like Entities: A Step towards a New Diplomatic Law?" (2019) 16:2 Intl Organizations L Rev 378 at 397–98.

[30] Cf Mosler, *supra* note 24 at 443; Feldman, *supra* note 9 at 359; Jennings & Watts, *supra* note 2 at 119–20.

[31] Eustathiades, *supra* note 22 at 414–15; Mugerwa, *supra* note 23 at 249.

[32] Mugerwa, *supra* note 23 at 249.

[33] Shaw, *supra* note 19 at 180.

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participants."[34] Similarly, following McDougal, and keeping with the language of his school of international legal process,[35] Rosalyn Higgins goes even further here. Instead of "subjects," she talks about "participants" in international (legal) relations.[36]

Therefore, and as concluded by Philip Allott, international law does not have *a priori* subjects. States and international organizations are just two among the countless participants in international legal relations that are as numerous and various as the needs of international society demand and their actual legal relations, regulated by contemporary international law, recognize.[37] Although, in international law, there is no legal norm defining the notion of international legal personality or its elements,[38] the search for possible international legal personality in any (new) participant in international relations should be concentrated on the above-mentioned elements: the capacity of the entity to be an addressee of legal rights and duties established by international legal norms and its capacity to act directly on the international scene producing consequences relevant to the international legal order.

Understood this way, international legal personality is a legal concept that is neither simply a set of elements (like legal capacity, treaty-making capacity, right to legation, international responsibility, and so on) nor necessarily their entirety. These elements are just proof of the presence of a new participant in international relations that has become so intensive that it can no longer be ignored by the international community. Moreover, the presence of a new participant confronts the international community with the necessity of regulating its existence in international relations by its normative system — that is, international law, providing it with rights and duties according to its nature and role in the international community. Therefore, international legal personality is nothing more than a

[34] MS McDougal, "International Law, Power, and Policy: A Contemporary Conception" (1953) 82:1 Rec des Cours 137 at 161. On the other hand, "for many scholars, the *modern* subject is no longer acceptable as the basis for bringing us truth; new — *post-modern* — methods to gather knowledge, to find the available fragments of truth and to account for the phenomenon of man are needed." JE Nijman, *The Concept of International Legal Personality — An Inquiry into the History and Theory of International Law* (The Hague: TMC Asser Press, 2004) at 370–71.

[35] Nijman, *supra* note 34 at 403.

[36] See R Higgins, "Conceptual Thinking about the Individual in International Law" in R Falk, F Kratochwil & SH Mendlowitz, eds, *International Law: A Contemporary Perspective* (Boulder: Westview Press, 1985) 476 at 480.

[37] Cf Philip J Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 372–73.

[38] Cf Berezowski, *supra* note 9 at 33. See also K Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017) at 71–89; R Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010) at 29–42.

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consequence of the actual acquisition of rights and duties already given by international law to participants in international relations.

Climate Change and Disappearing Island States

Although a paramount phenomenon of international relations and the principal subjects of contemporary international law, states have not yet received a universally accepted definition under international law.[39] Probably, as James Crawford states,[40] the best known formulation of the basic criteria for statehood is that laid down in Article 1 of the 1933 *Convention on the Rights and Duties of States* (*Montevideo Convention*): "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."[41] What is more, according to some authors, the above-mentioned Article 1 is commonly regarded as reflecting customary international law.[42] In this sense, it is worth noting Opinion no. 1 of the Conference on Yugoslavia Arbitration Commission. Paragraph 1(a) of this opinion clearly states: "[T]he existence or disappearance of the State is a question of fact."[43] As Budislav Vukas has pointed out, the reasoning of the Arbitration Commission concerning the existence and dissolution of the Socialist Federal Republic of Yugoslavia was based on the same traditional factual criteria for the existence of a state under international law.[44]

However, anthropogenic climate change has confronted international law with the need to reconsider the very notion of the state. In recent times, international law has been challenged with some alternative points of view concerning the preservation of the *de facto*, or at least *de jure*, statehood of disappearing island states, although such points of view have primarily been aimed at finding a solution for the populations of such states. Some authors have urged reconsideration of the necessity of the simultaneous existence of all four elements of statehood as provided by the *Montevideo Convention*, pointing out examples of recent civil wars when the central government ceased to function and yet the state retained its statehood and even its

[39] Vukas, *supra* note 20 at 280.

[40] Crawford, *supra* note 2 at 45–46.

[41] *Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 1.

[42] See e.g. J McAdam, "'Disappearing States', Statelessness and the Boundaries of International Law" in J McAdam, ed, *Climate Change and Displacement. Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 105 at 110–11; Ödalen, *supra* note 7 at 227.

[43] See Conference on Yugoslavia, Arbitration Committee, *Opinion No 1*, 29 November 1991, reprinted in (1992) 31 ILM 1494 at 1495.

[44] Vukas, *supra* note 20 at 296.

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membership in the United Nations (UN).[45] Similarly, examples of the belligerent occupation of the entire territory of another state have been advanced where the continuity of statehood was accepted by the international community by recognizing the legitimacy of the government in exile — such as, for example, in the case of the Iraqi belligerent occupation and declaration of annexation of Kuwait in 1990.[46] In addition, one should not overlook the fact that belligerent occupation, or a government operating "in exile," are legally *per definitionem* just temporary situations, no matter how long they might last.

Further, with regard to the element of territory, Derek Wong observes that states such as Albania, Burundi, Estonia, Israel, Kuwait, Latvia, Rwanda, and Zaire, which at the time of their recognition or even admission to international organizations (for example, the League of Nations or the UN) had "ill-defined borders," but that this was not considered an obstacle to the fulfilment of the requirement for territory as a component of statehood.[47] Thus, according to the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases, "[t]here is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations."[48] Law, of course, sometimes uses legal fictions (for example, *nasciturus* in Roman law),[49] but they have always been just pragmatic solutions used to overcome a temporary status that could otherwise result in irreversible and unjust consequences. On the contrary, legal fictions can never be an appropriate normative option to regulate irreversible situations such as the permanent loss of an island state's territory due to sea level rise.

Similarly, proposals based on analogies between disappearing island states and the Sovereign Order of Malta or the Holy See (1871–1929) are equally misleading.[50] Both of the latter non-territorial subjects of international law

[45] Thus, James Crawford points out that "statehood has been preserved amidst the chaos of the Democratic Republic of Congo and the lack of any overall governmental authority in Somalia." Crawford, *supra* note 2 at 91–92.

[46] See *ibid* at 161–62.

[47] See D Wong, "Sovereignty Sunk? The Position of 'Sinking States' at International Law" (2013) 14 Melbourne J Intl L 346 at 355.

[48] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands),* Judgment, [1969] ICJ Rep 3 at 32.

[49] This fiction has a long legal tradition dating back to Roman law. "*Nasciturus pro iam nato habetur, quotiens de commodis ipsius partus quaeritur,*" which means that "[t]he unborn is deemed to have been born to the extent that his own benefits are concerned." Paulus, *Digestae* (Zagreb: Latina et Graeca, 1989) at 1, 5, 7. See also *Sententiae ad filium Iulii Pauli, Liber tertius* (Zagreb: Latina et Graeca, 1989) at 126.

[50] Thus, for instance, such an analogy is mentioned by Rosemary Rayfuse, Jörgen Ödalen, and Eduardo Jiménez Pineda. See Rosemary Rayfuse, "International Law and Disappearing

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differ significantly from disappearing island states since they lack not only territory but also population. For that reason, they do not face the legal problems connected with the status and rights of populations, either in public international or private law. As Jenny Grote Stoutenburg correctly remarked,

> [i]t is the maintenance of all the legal attributes of statehood, and the continued enjoyment of sovereign equality, that would distinguish "deterritorialized" island states from other non-territorial so-called special sovereign entities, such as the Sovereign Order of Malta, which have been reduced, after the loss of their territory, to international legal subjects with only functionally circumscribed competences that enable the fulfilment of their (limited) tasks.[51]

Therefore, such analogies seem oversimplified, overlooking the relationship between territoriality, sovereignty, and statehood as legal concepts. Sovereignty in the case of the Sovereign Order of Malta or the Holy See does not include territoriality and statehood. Conversely, the territoriality of a subject of international law does not necessarily include sovereignty or statehood (as in the case of the Free Territory of Trieste (1947–54) or the former trust territories). Therefore, sovereignty and territoriality can exist separately depending on the category of an international legal person. Conversely, statehood necessarily comprises both of them. It includes by definition at least a limited sovereignty (in the case of protected states, for example)[52] and territory, though Crawford clearly points out that, "although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory."[53]

Thus, faced with sea level rise, Grote Stoutenburg mentions three scenarios: "In the first scenario, the island state ceases to exist not only physically but also legally, because the majority of other states, or the 'international

States: Maritime Zones and Criteria for Statehood" (2011) 41:6 Envtl Pol'y & L 281 at 285; Ödalen, *supra* note 7 at 356–58; Eduardo Jiménez Pineda, "The Disappearing Island State Phenomenon: A Challenge to the Universality of the International Law of the Sea" (Conference Paper No 11/2018, European Society of International Law Conference Paper Series, 13–15 September 2018) at 13.

[51] Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Leiden: Brill/ Nijhoff, 2015) at 379.

[52] Thus, Crawford states: "[T]he necessary prerequisites for independence under a regime of protection are the retention of substantial authority in international affairs (including implementation of international obligations), some degree of control over the exercise of foreign affairs powers, and that metropolitan competences be based on delegation by treaty or other instrument." Crawford, *supra* note 2 at 294.

[53] *Ibid* at 46.

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community', refuses to grant it continued recognition after the loss of the effective insignia of statehood."[54] The second scenario would be the legal fiction of "deterritorialized" island states that enjoy recognition of continuity of their statehood.[55] The third scenario would be that the island state survives but as a *sui generis* legal entity, like the Sovereign Order of Malta.[56]

On the other hand, the UN High Commissioner for Refugees (UNHCR) has stated that, "in situations where a State does not exist under international law, the persons are *ipso facto* considered to be stateless unless they possess another nationality."[57] Moreover, prior to the physical disappearance of the last part of the land territory of a state, most of its population would have left since it would already be uninhabitable due to the scarcity of fresh water or extreme climate conditions.[58] In this context, it is worth noting that a "caretaker population" or "land-keeping population" without a basic social infrastructure that enables some sort of communal living would not constitute a permanent population within the traditional meaning of statehood.[59]

In the scenario of the legal fiction of the "deterritorialized" island state, it would retain a symbolic relationship with its former territory, and its government would continue to operate in exile, subject to recognition on the part of other states. Thus, its nationals would, although *de facto* stateless persons, retain *de jure* nationality of their disappeared state since in that case no successor state would exist.[60] In our view, such a fiction is not only in contradiction to the concept of statehood in international law, but it also does not seem to offer a very useful solution to disappearing island state populations: "As a result, the affected islanders would not be protected by the international statelessness regime."[61] In classical international legal theory, if a state loses its territory or its permanent population when the territory becomes uninhabitable, its statehood ceases to exist, and it disappears as a state. Thus, as Vukas points out, "[t]he existence of all the three elements of statehood is indispensable not only at the moment of the creation of a State, but also for its continuing existence. The disappearance

[54] Grote Stoutenburg, *supra* note 51 at 404.

[55] *Ibid* at 423.

[56] *Ibid* at 430–31.

[57] UN High Commissioner for Refugees (UNHCR), "The Concept of Stateless Persons under International Law" (Summary Conclusions, Expert Meeting, Prato, Italy, 27–28 May 2010) at 2, online: <www.unhcr.org/4cb2fe326.html>.

[58] Cf Jiménez Pineda, *supra* note 50 at 11.

[59] Cf Grote Stoutenburg, *supra* note 51 at 272.

[60] *Ibid* at 423.

[61] *Ibid* at 405.

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of any of them means the extinction of the legal personality of a State."[62] Of a similar opinion are Shaw — "Extinction of statehood may also take place as a consequence of the geographical disappearance of the territory of the state: see e.g. with regard to the precarious situation of Tuvalu"[63] — and Sir Robert Jennings and Sir Arthur Watts — "A state without a territory is not possible, although the necessary territory may be very small."[64] Therefore, a concept of statehood that would abandon "defined territory" (*un territoire déterminé*)[65] as a widely accepted requirement for statehood in international law as well as the creation of newly coined notions such as "deterritorialized states" may not only seem to be oxymoronic but, at the same time, lead to undermining the fundamental difference between territorial and non-territorial subjects of international law. As Crawford clearly states, "[e]vidently, States are territorial entities."[66]

Although there is "no rule that the land frontiers of a State must be fully delimited and defined," a state as a territorial entity (unlike, for example, the Sovereign Order of Malta) cannot "move" from one territory to another.[67] Therefore, the relocation of a "state" after the permanent loss of its entire territory would be legally impossible since it would already, *ipso facto*, have lost its statehood and consequently ceased to exist as a state. Therefore, it should come as no surprise that island states, faced with climate change and sea level rise, have felt compelled to institutionalize their cooperative efforts to combat their common peril.

SOME ATTEMPTS AT *DE FACTO* PRESERVATION OF STATEHOOD

By the early 1970s, the disappearing island states had formed a group of developing island countries (1972–82) and, later, island developing countries (1983–92) and, since the beginning of the 1990s, the Alliance of Small Island States (AOSIS)[68] and small island developing

[62] Vukas, *supra* note 20 at 282–83.

[63] Shaw, *supra* note 19 at 190.

[64] Jennings & Watts, *supra* note 2 at 563.

[65] See also Institut de Droit international, *La reconnaissance des nouveaux États et des nouveaux gouvernements, Session de Bruxelles, 23 avril 1936* (Basel: Éditions juridiques et sociologiques, 1957) at 11.

[66] Crawford, *supra* note 2 at 46. Of a similar opinion is Jiménez Pineda: "[L]and (the territory) is logically one of the statehood's constitutive elements." Jiménez Pineda, *supra* note 50 at 8.

[67] Jennings & Watts, *supra* note 2 at 121.

[68] The Alliance of Small Island States (AOSIS) is a coalition of forty-four small island and low-lying coastal developing states from the Pacific, Caribbean, and Atlantic, Indian Ocean, Mediterranean, and South China Sea region. It was established in 1990, dealing primarily with the problems of climate change, sustainable development, and ocean conservation.

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states (SIDS).[69] However, sea level rise caused by climate change can potentially result in significant damage not only for low-lying atoll island states but also for high islands since their infrastructure is mostly located in coastal areas.[70] Even some non-island states, like Bangladesh,[71] could be faced with the negative effects of climate change other than sea level rise (for example, ocean warming and acidification, the increase in greenhouse gases, deoxygenation or coral bleaching, the problem of compromised freshwater, and consequent huge negative impacts on the economy, particularly relating to tourism, fisheries, and agriculture).[72] In this context, one should bear in mind that the maritime zones of SIDS are usually much larger than their land mass,[73] which any change of their boundaries determined by the "land dominates the sea principle" due to sea level rise makes more complex.[74]

The importance of preserving the statehood of SIDS and their maritime boundaries and entitlements, as well as protecting the *de facto* and *de jure* status of their populations, has inspired a series of initiatives concerned with these phenomena. For instance, "the former maritime zones of the disappearing island states would become high seas or would be under the jurisdiction of a neighbour state entitled to claim them."[75] Alternatively, as Eduardo Jiménez Pineda has remarked, "could a

Today, AOSIS represents 5 percent of the world's population. For more details see "AOSIS," online: <aosis.org/about/>.

69 Small island developing states (SIDS) are a distinct group of developing countries facing specific social, economic, and environmental vulnerabilities. SIDS were recognized as a special case both for their environment and development at the United Nations (UN) Conference on Environment and Development, which is also known as the Earth Summit, held in Rio de Janeiro in 1992. Presently, SIDS represent thirty-nine UN member states and nine associate members non-self-governing territories. UNESCO, *UNESCO and Small Island Developing States (SIDS)*, online: <en.unesco.org/sids/about#list>. For more details on SIDS and their activities, see Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Small Island Developing States: Small Islands Big(ger) Stakes* (New York, 2011). On the development of AOSIS and SIDS, see also Grote Stoutenburg, *supra* note 51 at 19–29. See also Jiménez Pineda, *supra* note 50 at 3–4.

70 Jiménez Pineda, *supra* note 50 at 4.

71 Cf Reed Koenig, "Climate Change's First Casualties: Migration and Disappearing States" (2015) 29:3 Georgetown Immigration LJ 501 at 517–18.

72 See Jiménez Pineda, *supra* note 50 at 4.

73 Thus, for instance, Tuvalu has a land mass of twenty-six square kilometres and an exclusive economic zone of 757,000 square kilometres. See *ibid* at 5–6.

74 See D Vidas, D Freestone & J McAdam, eds, *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Leiden: Brill, 2018) at 20–27.

75 Jiménez Pineda, *supra* note 50 at 8.

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neutral regime over those waters, like common heritage of humankind, be established?"[76] In principle, few would disagree with Tullio Treves that the *United Nations Convention on the Law of the Sea* (*UNCLOS*) ought to be considered not only as a "*point d'arrivée*" but also as a "*point de départ*" for its further development, application, and adaptation.[77]

The *de facto* preservation of the statehood of the states most affected by sea level rise by constructing "sea-walls,"[78] or by artificial accretion,[79] would probably be legally the most acceptable solution, although not necessarily the most feasible one, particularly for small island states.[80] It would depend not only on technical and physical feasibilities but also on states' political will and the readiness of international financial institutions to support such initiatives. For instance, in the South China Sea, Vietnam, China, Malaysia, and the Philippines have built relatively small features such as sand cays and modest rocks into military facilities with runways, barracks, and helipads to substantiate exclusive economic zone (EEZ) claims, while Japan's efforts to preserve Okinotorishima Island consisted of forming two groups of very small rocks on top of a broad coral reef platform, less than one metre above sea level.[81] In this regard, Tuvalu's foreign minister Simon Kofe in his speech to the twenty-sixth Conference of the Parties warned: "Tuvalu is made up of nine atolls and has a population of around 11,000 people. Its highest point is just 4.5 metres above sea level, making it particularly vulnerable to climate change. Since 1993, sea levels have risen about 0.5 centimetres per year, according to a 2011 Australian government report. … The one thing is clear — that the people have a very close tie to their land."[82] And, as Susannah Willcox explains, "[l]ike Tuvalu, the Kiribati government insists that it will 'do all that [it] can to preserve Kiribati as a sovereign and habitable entity.'"[83] Thus, the International

[76] *Ibid* at 10.

[77] Tullio Treves, "L'État du droit de la mer à l'approche du XXI siècle" (2000) 5 Ann dr mer 123 at 123–24. Cf R Casado Raigón, *Derecho Internacional* (Madrid: Editorial Tecnos, 2017) at 321. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*].

[78] See e.g. Wong, *supra* note 47 at 383.

[79] *Ibid* at 384. Cf also Jennings & Watts, *supra* note 2 at 696–97.

[80] Jiménez Pineda, *supra* note 50 at 9.

[81] *Ibid.*

[82] "Tuvalu's Foreign Minister Simon Kofe Gives COP26 Speech Knee-Deep in the Sea to Show Nation on Frontline of Climate Crisis," online: <www.abc.net.au/news/2021-11-10/tuvalu-minister-makes-cop26-speech-from-sea/100608344>.

[83] Susannah Willcox, "Climate Change Inundation, Self-Determination, and Atoll Island States" (2016) 38 Hum Rts Q 1022 at 1033.

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Law Association's (ILA) Committee on International Law and Sea Level Rise in its report of 2018 pointed out

> … the duty of States affected by sea level rise to turn to the international community for support, as well as a general obligation of other States to provide needed support either bilaterally or collectively through the UN humanitarian and development agencies, the funding mechanisms for humanitarian action, development banks, and the "Green Climate Fund" supporting States to adapt to the effects of climate change.[84]

Similarly, the report of the co-chairs of the Study Group of the International Law Commission (ILC) on sea level rise in relation to international law stated: "There is general agreement that the use of artificial means to maintain base points, coastal areas and island features is acceptable under international law as evidenced by wide State practice. However, the practicality in terms of scope and expense raises questions as to the feasibility of this option for all States."[85]

OTHER LEGAL OPTIONS FOR THE PRESERVATION OF STATEHOOD

Alternatively, some options could offer solutions that would be more realistic and in accordance with the above-mentioned concept of statehood in contemporary international law, if applied while the state affected by sea level rise still exists. Thus, if a disappearing island state acquired additional territory, this would preserve its statehood *de jure* even after its original territory later disappears since, as long as states exist, they can acquire or lose parts of their territory — that is, change their boundaries. This can happen, for example, in the case of accretion or creation of a new volcano island (for example, in Tonga in 2009 with the island of Hunga Tonga-Hunga Ha'apai and in Iceland in 1963 with the island of Surtsey).

Instances of cession/purchase will have the same effect—for example, the purchase of Alaska by the United States in 1867 from Russia or the sale by Denmark of territories in the West Indies in 1916 to the United States.[86] An example worth noting here is the 2014 purchase by Kiribati of about eight

[84] Vidas, Freestone & McAdam, *supra* note 74 at 54–55.

[85] International Law Commission (ILC), "Sea-level Rise in Relation to International Law: First Issues Paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law," 72nd Sess, Geneva, 27 April–5 June and 6 July–7 August 2020, UN Doc A/CN.4/740 (13 May 2020) at 80, para 218(e). See also ILC, "Sea-level Rise in Relation to International Law: Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law," 73rd Sess, Geneva, 18 April–3 June and 4 July–5 August 2022, UN Doc A/CN.4/752 (19 April 2022).

[86] See e.g. Shaw, *supra* note 19 at 424.

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square miles on the Fijian island of Vanua Levu for a little less than US $9 million, potentially to relocate its population there one day.[87] However, the Kiribati government purchased the property from the Church of England, and there was no formal acknowledgement of the transfer of sovereignty from the government of Fiji.[88] On the other hand, former Maldivian president Mohamed Nasheed announced plans to purchase a new "homeland" to which to relocate the Maldivian population *en masse*, although admitting that collective relocation would only be viable as a last resort.[89] However, as Rosemary Rayfuse has remarked, "from a practical perspective it is difficult to envisage any State now agreeing, no matter what the price, to cede a portion of its territory to another State unless that territory is uninhabited, uninhabitable, not subject to any property, personal, cultural or other claims, and devoid of all resources and any value whatsoever to the ceding State."[90]

A land lease would also not be a legally appropriate solution for preserving the statehood of a disappearing state since a lessee would only acquire temporary sovereignty over that land, dependent on the legal conditions stipulated with the lessor. Therefore, the "criterion of independence" could not be met.[91] Thus, with regard to leases of land, Shaw concludes that this has usually "disguised the reality that ultimate sovereignty lay with the lessor."[92] In addition, land lease could here only be an option *ad interim*, determined by the duration of the lessee's statehood. In this context, it is worth mentioning that the Indonesian maritime minister announced in 2009 that Indonesia was considering renting out some of its more than seventeen thousand islands to "climate change refugees."[93] In addition, other often-mentioned solutions would also not be able to preserve the statehood of disappearing island states. On the contrary, some of them would be the causes for the extinction of states in international law—for example, the creation of a federation with a host state[94] or a merger.[95]

[87] Jiménez Pineda, *supra* note 50 at 11.

[88] See Koenig, *supra* note 71 at 519.

[89] See Willcox, *supra* note 83 at 1032.

[90] Rayfuse, *supra* note 50 at 284–85.

[91] Crawford, *supra* note 2 at 55.

[92] Shaw, *supra* note 19 at 460.

[93] See J McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards* (Geneva: UNHCR, 2011) at 58.

[94] Cf e.g. Rayfuse, *supra* note 50 at 285.

[95] Thus, Shaw states: "Extinction of statehood may take place as a consequence of merger, absorption or, historically, annexation." Shaw, *supra* note 19 at 190. See also Jennings & Watts, *supra* note 2 at 206. Therefore, a merger would not only be a legally inappropriate solution for the preservation of statehood of disappearing island states but also not a very feasible one. Rayfuse provides a very good illustration of how states have already shown their unwillingness to engage in such "wholesale population absorption": "When, in 2001,

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Although there are federations where, according to the distribution of power between the central and local organs, their members can sometimes retain some elements of international personality, in international law they are not considered as sovereign states.[96] Similarly, Crawford mentions the case of the merger of North and South Yemen as an example of the extinction of states.[97]

A confederation could legally preserve the statehood of its component units, but it would also be only a temporary solution since it would cease to exist with the extinction of the statehood of the disappearing member state. For the same reason, the option of a condominium over the sea areas of the disappearing island state and the host state would also not be a more lasting solution.[98] Therefore, in the following section, the article will focus on the international legal status of the populations of disappearing island states as potential new, non-territorial subjects of international law.

CDNs as New Subjects of International Law?

The loss of territory will lead to the extinction of statehood and, consequently, of the legal personality of that state. While some of the abovementioned solutions focus on the preservation of the status quo statehood of disappearing island states (*de facto* or at least fictitious — *de jure* — statehood), international legal scholarship has also turned to the question of the legal status of their populations. In general, these proposals could be summarized as "planned relocation"; the recognition of the status of "climate change" or "environmental refugees";[99] the recognition of the status of "climate," "ecological," or "environmental migrants";[100] the recognition of

Tuvalu approached Australia and New Zealand about the possibility of taking its population in the case of total loss of its territory, Australia flatly refused, while New Zealand agreed only to a 30 year immigration programme to accept up to 75 Tuvaluans per year who must be of good character and health, have basic English skills, have a job offer in New Zealand, and be under 45 years of age." Rayfuse, *supra* note 50 at 285.

[96] Thus, as Crawford pointed out, "[f]ederation represents a major form of State organization. Internationally it is usual for the central government to have full authority over foreign affairs, although the local States may retain some external competences, usually minor ones. As a result, it is said that: '[t]he federal state … constitute[s] a sole person in the eyes of international law.'" Crawford, *supra* note 2 at 483–84.

[97] "The result has been described as a double succession, with neither North nor South Yemen absorbing or annexing the other, but rather becoming extinct and their union generating one new State instead." *Ibid* at 706.

[98] Cf Shaw, *supra* note 19 at 207–08.

[99] See Grote Stoutenburg, *supra* note 51 at 402; Duong, *supra* note 4 at 1248.

[100] See Koenig, *supra* note 71 at 506.

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the status of "environmentally displaced people";[101] or the "international protection of minority rights of the displaced disappearing island state's population."[102]

THE "PLANNED RELOCATION" SCENARIO

According to the ILA's Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise,

> "planned relocation" means a planned process in which persons voluntarily move or are forced to move away from their homes or places of temporary residence, are settled in a new location within their own or another state, and are provided with the conditions for rebuilding their lives. Planned relocation is carried out under the authority of the state, and is undertaken to protect persons from risks and impacts related to disaster and environmental change in the context of sea level rise.[103]

As a preventive measure, "planned relocation" is provided for as a temporary solution to help disappearing island state populations to "move away from dangerous areas in advance of anticipated disasters or long-term environmental degradation."[104]

However, planned relocation only offers a temporary *de facto* solution for the future status of the populations of the disappearing island states since, unlike other natural disasters like tsunamis, fire, earthquakes, and so on, sea level rise unfortunately seems to be a continuous and irreversible process.[105] Grote Stoutenburg mentions some recent examples of planned relocations of populations, such as the Marshall Islands and the Chagos Archipelago. The Chagossian population, removed to the Seychelles and Mauritius, quickly descended into deep poverty.[106] Rayfuse gives examples of intrastate relocations: in 2006, the residents of Lohachara Island in the Bay of Bengal moved to a nearby island to escape their rapidly disappearing island,

[101] See Grote Stoutenburg, *supra* note 51 at 396.

[102] *Ibid* at 420–23.

[103] For the text of the Sydney Declaration and the Commentary, see Vidas, Freestone & McAdam, *supra* note 74 at 44–66.

[104] *Ibid* at 59.

[105] For that reason, unlike some other subjects of international law that, by definition, have been characterized by temporality (for example, liberation movements or insurgents), the appearance of CDNs could face the international community with permanent non-territorial subjects requiring the regulation of their status in international law.

[106] See Grote Stoutenburg, *supra* note 51 at 390–91.

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and, in 2007, the residents of Papua New Guinea's Cateret Islands were evacuated to nearby Bougainville.[107] Willcox notes that Tuvaluans have invoked their right to self-determination within their own country, claiming that relocation would lead to the loss of their sovereign rights and their identity.[108] Similarly, Jane McAdam concludes that if *en masse* relocation to another country is to be considered as a permanent solution, then issues other than land alone need to be considered in order to provide security for the future, such as the maintenance of identity, culture, and social practices, balancing the needs of existing communities with relocating communities, self-determination, sovereignty, and so on.[109]

However, during the 1980s and 1990s, due to new approaches to international law (NAIL), "human rights constituted the rising star of international law and carried an uncontested air of moral superiority."[110] Thus, as Gregory Shaffer has remarked, "[a]ctors increasingly conceive of social problems that transcend the nation-state in ways in which international law and international legal institutions play an important role. Scholars now apply empirical methods to understand how international law operates in these situations."[111] In this context, the president of Kiribati, Anote Tong, in his address to the UN General Assembly in 2008, noted that "such large scale evacuations require long-term planning, so that when people migrate they can do so 'with dignity.'"[112] On the other hand, it is worth noting here the words of the prime minister of Fiji in 2014, providing reassurance to the Banaban community (present-day Kiribati) that, if sea levels continue to rise, some or all of the people of Kiribati may have to come and live in Fiji: "You will be able to migrate with dignity. The spirit of the people of Kiribati will not be extinguished. It will live on somewhere else because a nation isn't only a physical place. A nation — and the sense of belonging that comes with it — exists in the hearts and minds of its citizens wherever they may be."[113]

Thus, it seems that the peoples of disappearing island states consider relocation as more of a process of the disappearance of their national

[107] Rayfuse, *supra* note 50 at 284. See also Jiménez Pineda, *supra* note 50 at 12.

[108] Willcox, *supra* note 83 at 1033.

[109] McAdam, *supra* note 93 at 59–60.

[110] N Tzouvala, "New Approaches to International Law: The History of a Project" (2016) 27:1 Eur J Intl L 215 at 221.

[111] G Shaffer, "International Legal Theory, International Law and Its Methodology: The New Legal Realist Approach to International Law" (2015) 28:2 Leiden J Intl L 189 at 210.

[112] See Statement by His Excellency Anote Tong, President of the Republic of Kiribati, *General Debate of the 63rd Session of the UN General Assembly* (25 September 2008), online: <www.un.org/ga/63/general_debate/pdf/kiribati_en.pdf>. See also Ödalen, *supra* note 7 at 234.

[113] Quoted in McAdam, *supra* note 6 at 433.

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identity than as an appropriate, lasting and just solution that the international community can offer to alleviate their troubles. Therefore, it has come as no surprise that the concept of Third World approaches to international law (TWAIL) appeared in contemporary international law highlighting the need to translate the principle of permanent sovereignty over "natural resources" into a set of legal concepts that embed the interests of Third World peoples as opposed to their ruling elites. As Bhupinder Chimni, dealing with the problem of conceptualizing permanent sovereignty as the right of peoples and not states, has said, "[f]rom this perspective, there is a need to address the difficult question of how to give legal content to peoples' sovereign rights? There is often in this respect the absence of appropriate legal categories and [*sic*] are difficult to implement in practice."[114]

THE "ENVIRONMENTAL REFUGEES/MIGRANTS" OPTIONS

On the other hand, the options that treat disappearing island state populations as "environmental refugees/migrants" or "displaced persons" are not only questionable in regard to the feasibility of relocating the entire population of disappearing island states but also open to some legal and ethical dilemmas. First, Article 1 of the 1951 *Convention Relating to the Status of Refugees* (*Refugee Convention*)[115] provides only five circumstances for acquiring refugee status, and neither sea level rise nor other natural catastrophes are among them. Article 1(2) of the 1974 *Convention Governing the Specific Aspects of Refugee Problems in Africa* provides for extensive interpretation of the definition of refugees, which includes "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[116] Perhaps such an extensive definition could be applied *de lege ferenda*, by analogy, or even in the form of customary international law to "environmental refugees."[117]

[114] BS Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8:1 Intl Community L Rev 3 at 24. For more details on the development of the Third World approaches to international law (TWAIL) concept, see e.g. AR Hipollyte, "Correcting TWAIL's Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance" (2016) 18:1 Intl Community L Rev 34 at 38–43.

[115] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) [*Refugee Convention*].

[116] *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

[117] In this context, it is worth mentioning the non-governmental organization (NGO) Living Space for Environmental Refugees (LiSER), which was created in order to promote the

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However, it seems that the fundamental problem with such broadening of the definition of refugees lies in its contradiction of the grammatical interpretation of Article 1 of the *Refugee Convention* as well as the 1967 *Protocol Relating to the Status of Refugees*.[118] According to Article 1(A)(2) of the *Refugee Convention*, refugee status is a consequence of the "well-founded fear of *being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion" (emphasis added). For that reason, the *Refugee Convention* in Article 1(C)(1) provides that its provisions "shall cease to apply to any person … if he has voluntarily re-availed himself of the protection of the country of his nationality." The situation here is very different. Persons who leave their country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order," similar to "environmental refugees" as victims of ecological catastrophes such as sea level rise, are not persecuted by their state; just the opposite, they share *de facto* and *de jure* its destiny. Therefore, even if these persons were considered to be refugees, their voluntary re-availing themselves of the protection of their country as a reason for the cessation of their refugee status would be absurd. By the same logic, following the *Refugee Convention*'s definition, refugee status implies a mutual relation between the persecuted person and his or her state of origin, which would necessarily cease by the fact of the extinction of the "persecuting" state.

On the other hand, international law, inasmuch as it regulates the status of migrants at the present stage of its development, protects only migrant workers and members of their families, defining the term "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[119] Migrants and "environmental refugees" can undoubtedly share economic reasons for leaving their countries, but, in the case of the latter, it will be a necessity rather than simply a search for a better life. Thus, as Reed Koenig has remarked, "[c]urrently, there is no framework for dealing with the

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official recognition of environmental refugees. See CA Vlassopoulos, "When Climate-induced Migration Meets Loss and Damage: A Weakening Agenda Setting Process?" in B Mayer & F Crépeau, eds, *Research Handbook on Climate Change, Migration and the Law* (Cheltenham, UK: Edward Elgar, 2017) 376 at 379. LiSER was the very first NGO dedicated to this issue. It was created in 2002 and discontinued in 2011. F Gemenne & K Rosenow-Williams, "Conclusion: The Actors Involved in the Environmental Migration Complex" in K Rosenow-Williams & F Gemenne, eds, *Organizational Perspectives on Environmental Migration* (London: Routledge, 2016) 255 at 237.

[118] *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267 (entered into force 4 October 1967).

[119] See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), arts 2(1), 4 [*ICRMW*].

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citizens of uninhabitable countries. At the international level, there is much caution, as major countries and international organizations are unable or unwilling to address the situation."[120] On the other hand, according to the same author, amending the *Refugee Convention* lacks international consensus, and, even if consensus existed, opening the convention for amendments would allow the possibility of proposals that could weaken the convention.[121] Moreover, there have been calls for a new stand-alone treaty or the amendment of the *United Nations Framework Convention on Climate Change* (*UNFCCC*) to provide "climate refugees" with international protection.[122] However, as McAdam has pointed out, the disadvantages would probably be a lack of political will, problems of definition and conceptualization, and, consequently, ineffectiveness in practice.[123]

An illustrative example of the above-mentioned difficulties is the case of *Ioane Teitiota v New Zealand* before the UN Human Rights Committee in 2019.[124] The author of the communication claimed that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in the Republic of Kiribati to New Zealand since the situation in Tarawa had become increasingly unstable and precarious. Fresh water had become scarce because of saltwater contamination and overcrowding on Tarawa, inhabitable land had eroded, and the island had become an untenable and violent environment. Therefore, the author sought asylum in New Zealand, but the New Zealand Immigration and Protection Tribunal issued a negative decision concerning his claim. Also, New Zealand's Court of Appeal and Supreme Court each denied the author's subsequent appeals concerning the same matter and deported him to Kiribati. Ioane Teitiota filed a communication with the UN Human Rights Committee on the basis of the *International Covenant on Civil and Political Rights* (*ICCPR*) and its *Optional Protocol*,[125] claiming that his right to life (Article 6(1) of the *ICCPR*) had been violated. However, the Human Rights Committee decided that the facts before it did not permit it to conclude that the author's removal to the

[120] Koenig, *supra* note 71 at 503.

[121] *Ibid* at 505–06.

[122] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, art 3 (entered into force 21 March 1994).

[123] McAdam, *supra* note 93 at 59–60.

[124] *Ioane Teitiota v New Zealand*, International Covenant on Civil and Political Rights, Human Rights Committee, Views adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2728/2016, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020) at 2 and 12 [*Teitiotai*].

[125] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

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Republic of Kiribati violated his right to life under Article 6(1) of the *ICCPR*.[126]

On the other hand, besides the under-developed framework for dealing with the populations of uninhabitable countries in international refugee and migration law, it is also hard to ignore the question of ethical justification for the applicability of these concepts to the populations of disappearing island states. International law, in spite of the valuable endeavours of the UNHCR and IOM, sometimes leaves the fate of island state populations in the hands of states that caused their calamities. Furthermore, in spite of numerous violations of the *Refugee Convention* and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (*ICRMW*), and the fact that the provisions of Article 38 of the *Refugee Convention* and Article 92(1) of the *ICRMW* provide for jurisdiction of the ICJ for any dispute between the parties to these conventions,[127] no such dispute has ever been submitted to the court. It seems that this fact could also point to the indifference of states towards the fate of the populations of disappearing island states that, due to sea level rise, would arrive at their doors as refugees or migrants.

Unfortunately, neither the ILC's *Draft Articles on the Protection of Persons in the Event of Disasters*,[128] nor several UN General Assembly resolutions,[129] although they are soft law documents, offer more feasible solutions, except the principles on humanitarian assistance with regard to all persons affected by a disaster. Equally, internal relocation in the form of assistance with regard to internally displaced persons does not appear to be a more durable solution, bearing in mind the progressive and irreversible process of sea level rise,[130] while, at the same time, the UNHCR points out the necessity of the

[126] See *Teitiotai*, *supra* note 124 at 2, 12. However, it is worth mentioning the Dissenting Opinion of Committee Member Vasilka Sancin. *Ibid,* Annex 1 at 13–14, paras 5–6.

[127] See *Refugee Convention*, *supra* note 115, art 38; *ICRMW*, *supra* note 119, art 92(1).

[128] See ILC, *Draft Articles on the Protection of Persons in the Event of Disasters*, UNGAOR, Supp No 10, 68th Sess, UN Doc A/71/10 (2 May–10 June and 4 July–12 August 2016), art 10. However, at its seventieth session in 2018, the commission decided to include the topic "Sea-level rise in relation to international law" in its long-term program of work. *Official Records of the UN General Assembly*, UNGAOR, 73rd Sess, Supp No 10, UN Doc A/73/10 (30 April–1 June and 2 July–10 August 2018) at 340–41, para 369. See also ILC, *Report on Seventy-first Session (29 April–7 June and 8 July–9 August 2019),* Supp No 10, UN Doc A/74/10 (20 August 2019) at 340–41, paras 263–73.

[129] See e.g. *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 45/100 (14 December 1990) at preambular para 3; *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nation*, GA Res 46/182 (19 December 1991), Annex, Principle 4.

[130] Thus, Koenig mentions the internal relocation of over five hundred thousand residents of Bhola Island in Bangladesh, which, although not an example of a disappearing island state, as a low-lying country is especially susceptible to rising sea levels. According to Koenig,

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progressive development of international law in unprecedented situations.[131]

In addition, as Willcox has remarked, disappearing island states' populations, for example, "the population of Tuvalu, Kiribati, and Maldives count as self-determining peoples whose members share not just a common cultural life, language, and attachment to land and colonial history, but also a history of participation in the common political institutions of their state."[132] In seeking new territory on which the peoples of disappearing island states could re-establish themselves as self-determining communities, they will inevitably encounter other peoples exercising their own rights to self-determination and territorial integrity.[133] Thus, such a position of the disappearing island state population could raise the question of their minority status in the host country, including the international protection of their minority rights. This situation becomes even more complex in practice when one bears in mind that the extinction of an island state in classical international law results in the *de jure* statelessness of its population. Although the right to self-determination is a right of peoples and not of states — that is, not of disappearing island states — their peoples however "will need to be incorporated within the boundaries of any future host state, which situation will require further negotiation about the extent to which they can continue to exercise their collective autonomy."[134] McAdam mentions in this context various solutions, including complete independence as a sovereign state, trusteeship, status as a protected state, associated status, as well as the scenario of withdrawal from the international community of the population, "effectively becoming a non-entity" and consequently "dropping out of the world community."[135]

THE INTERNATIONAL LEGAL PERSONALITY OF NATIONS?

The extinction of the legal personality of a state does not impede the "transformation" of that state into another, non-territorial subject of international law. Here, it is worth noting that even in the nineteenth century, some authors went as far as considering nations, and not states, as the basic

"Bangladeshi scientists believe that as many as 20 million of the 150 million residents will become climate change refugees by 2030, forced to move because they are no longer able to live on their land." Koenig, *supra* note 71 at 517–18.

[131] See UNHCR, *supra* note 57 at 5.

[132] Willcox, *supra* note 83 at 1026.

[133] *Ibid* at 1034.

[134] *Ibid* at 1036.

[135] For more details, see McAdam, *supra* note 6 at 447–50.

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subjects of international law.[136] Moreover, peoples on other continents were living in different communities where the European concept of statehood, and, consequently, the concept of international legal personality, was very different, erasing the clear distinction between peoples and states. As McAdam correctly points out, "[t]he positivist international law approach enabled imperial States to 'overcome the historical fact that non-European states had previously been regarded as sovereign' by dismissing forms of tribal organization and imposing wholly foreign conceptual constructs on them."[137] Thus, the ambassador of Cameroon Paul Bamela Engo stated before the ICJ that the African concept of "kingdoms" has been defined in terms of an emphasis on peoples and their cultures, irrespective of where they choose to migrate or live.[138]

Although this argument was not accepted as relevant by the ICJ, it can hardly be denied that, in contemporary international law, peoples enjoy certain rights and, consequently, a limited legal capacity in international law (for example, the rights of Indigenous peoples or the principle of "self-determination of peoples").[139] An UN Educational, Scientific and Cultural Organization (UNESCO) Meeting of Experts in 1989 defined a people as "a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life."[140] On the other hand, as Vukas states, the word "nation" is very often used as a synonym of "state."[141] Moreover, some important international instruments, in which states are referred to in a more solemn manner — having their population in view — use "nations" rather than "states."[142] Even the name of the present world organization — the United Nations — seems to confirm an equivalence between "nations" and "states" as only "States may

[136] See e.g. PS Mancini, "Della Nazionalità comme fondamento del Diritto delle Genti" in PS Mancini, *Diritto internazionale: Prelezione* (Naples: Giuseppe Marghieri Editore, 1873) at 42. Cf also R Redslob, *Les principes du droit des gens moderne* (Paris: Librairie Arthur Rousseau, 1937) at 216.

[137] McAdam, *supra* note 6 at 441.

[138] See *Land and Maritime Boundary (Cameroon v Nigeria)*, Provisional Measures, ICJ Doc CR.96/2 (15 March 1996) at 33. See also Vukas, *supra* note 20 at 283.

[139] In this context, see also K Ipsen, *Völkerrecht*, 7th ed (Munich: CH Beck, 2018) at 373–403.

[140] UN Educational, Scientific and Cultural Organization, *Final Report and Recommendations of the International Meeting of Experts of Further Study of the Concept of the Rights of Peoples, Paris, 27-30 November 1989* (1990) at 7–8.

[141] Vukas, *supra* note 20 at 312.

[142] E.g. *Atlantic Charter*, 14 August 1941, online: <avalon.law.yale.edu/wwii/atlantic.asp>; *Declaration by the United Nations*, 1 January 1942, online: <avalon.law.yale.edu/20th_century/decade03.asp>.

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become Members of the Organization."[143] Even the very first sentence of the *Charter of the United Nations* (*UN Charter*) could be considered confusing: "We the Peoples of the United Nations." And it is worth mentioning that not only independent states, but also "dominions" and "colonies," could become members of the League of Nations, the predecessor of the UN. They had to "give effective guarantees" of their sincere intention to observe their international obligations, and their military forces had to remain under the control of the League.[144]

However, in 1851, Pasquale Mancini had already integrated his vision of the nation creating "a natural society of men who — by the unity of territory, origin, customs and language — are led to a community of life and a social consciousness."[145] More than a hundred years later, Yoram Dinstein wrote that "a nation is easy to define inasmuch as it consists of the entire citizen body of a State. All the nationals of the State form the nation."[146] For this reason, the (re)appearance of "peoples" or "nations" (here, referred to as CDNs), provided with international legal capacity, could enable the population of states affected by sea level rise to retain (or succeed to) the international legal personality (but not the statehood) of their disappeared state, retaining at the same time some of its rights and entitlements. If international law recognized these entitlements/rights of the populations of disappearing island states as belonging to a new category of entity (CDNs) — that is, as new subjects of international law and, consequently, the successors of their inundated states — it could be a much more feasible and durable solution for regulating the status of those populations. After all, there is little doubt that solutions like land leases, cession/purchase of a part of a host state's territory, or even the option of jointly retained entitlements/rights by a host state and CDNs would be more feasible for disappearing island state populations, as "collective" subjects of international law, than for individuals as "environmental refugees" or "migrants."[147]

[143] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945), art 4 [*UN Charter*].

[144] *Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session*, 28 April 1919, (1919) 13 Am J Intl L Supp 128 (entered into force 10 January 1920), Art 1, para 2 states: "Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments."

[145] Mancini, *supra* note 136 at 37.

[146] Yoram Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 ICLQ 102 at 103–04.

[147] Thus, as Koenig rationally remarked, "The EEZ rights are a potential source of funding for countries that will not have the means to find it elsewhere. These countries will be dealing with loss and relocation on a massive scale: communities must move, jobs will be displaced,

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Although the legal status of CDNs in host states could be regulated within the concept of the protection of minorities in international law, bearing in mind that CDNs and minorities enjoy not only fundamental human rights but also the "right of self-determination," as recognized by Article 1(1) of the *ICCPR*, this could be more complex in terms of the legal nature of the beneficiaries than the content of these rights. Minority rights in practice belong to individuals who, according to UNESCO's definition quoted above, enjoy common ethnic, cultural, historical, or other features that are different from those of the majority population of the state where they live. In contrast, a CDN is not simply a group of individuals sharing common features but also a collective, *sui generis* entity composed of the entirety of a population who would probably maintain at least some of the legal institutions of their disappearing island state after its disappearance as elements of its extinct statehood.[148] Therefore, CDNs should not be considered as peoples in the narrow meaning of "*ethnos*" — as primarily individuals belonging to one particular ethnic group — but, rather, as "*demos*" — as the entire population of a state — that is, all the citizens of a disappeared state.[149]

Consequently, what would differentiate CDNs from states is primarily the lack of territory due to the effects of sea level rise. For that reason, collective human rights like minority rights should be differentiated from the rights of CDNs as collective entities, inasmuch as "collective rights" should be differentiated from the rights of a "collectivity."[150] Therefore, CDNs could appear as non-territorial, *sui generis* subjects of international law provided with legal capacity (*capacitas iuridica*) and capacity to produce legal consequences in international law (*capacitas agendi*). Although some authors doubt the (pragmatic) value of international legal personality as a theoretical concept

and unfortunately, lives will be lost. Allowing disappearing states to sell or lease the rights of their former EEZ would provide these poor countries with financial support." Koenig, *supra* note 71 at 522.

148 This logic can be found in the Roman law doctrine differentiating individuals (*personae phisicae*) from collective legal entities (*personae iuridicae*). Thus, Ulpianus said: "Si quid universitati debetur, singulis non debetur; nec quod debet universitas singuli debent." See e.g. R Sohm, *The Institutes of Roman Law* (Oxford: Clarendon Press, 1892) at 107.

149 Cf Vukas, *supra* note 20 at 322.

150 Such differentiation can be understood by analogy with the detached legal personality of state and individuals as its population. Although the fundamental rights of states have an influence on individuals, they belong to the state as a collectivity. On the contrary, minority rights as collective rights belong to individuals who, as the members of a minority group, enjoy the right to practice their own religion and culture or, to use their own language, individually as well as in community with other members of their group. Cf *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135 (18 December 1992), art 3, para 1.

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in contemporary international law,[151] Martti Koskenniemi's approach seems to reconcile these dilemmas:

> Engaging in practical reasoning, the lawyer shall have to recognize that solving normative problems in a justifiable way requires, besides impartiality and commitment, also wide knowledge of social causality and of political value and, above all, capacity to imagine alternative forms of social organization to cope with conflict. It shall lead him to overstep the boundaries between practice and doctrine, doctrine and theory.[152]

The capability of international law to imagine alternatives could offer a more just and feasible solution for CDNs in the form of international legal personality. Besides CDNs' right to self-determination in the form of election of their own authorities, and possibly some other rights that might be agreed upon with their host states, international law could recognize in them some of the sovereign rights/entitlements in the marine areas that had previously belonged to their disappeared states.[153] After all, it would not be the first time in the history of international law that a non-territorial entity exercised not only sovereign rights but also sovereignty over a territory (for example, the Sovereign Order of Malta). Thus, perhaps for the first time in history, a non-state entity would appear as a successor of its predecessor state. Understood in this way, CDNs would become non-territorial, semi-sovereign subjects of international law, with the extent of their disappeared states' sovereignty (for example, criminal or civil jurisdiction) likely limited in accordance with the legal regulation of their status in the host states.

However, it is worth noting here that the legal concept of sovereignty in international relations should not be understood as a uniformly shaped model but, rather, as a scale of rights and duties that can differ even from one state to another. Thus, in this context, some authors speak of the right of a population to extract the natural resources of their disappeared state,[154]

[151] See e.g. H Charlesworth, C Chinkin & S Wright, "Feminist Approaches to International Law" (1991) 85:4 Am J Intl L 613 at 621. See also TM Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999) at 30–31. However, some authors have foreseen our time as the age of non-state actors. Cf JT Mathews, "Power Shift" (1997) 76:1 Foreign Affairs 50 at 52.

[152] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd ed (Cambridge: Cambridge University Press, 2005) at 557.

[153] In this context, some authors point out the need for reconsideration of the "land dominates the sea principle." See e.g. DD Caron, "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict" in S-Y Hong & JM Van Dyke, eds, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Boston: Brill/Martinus Nijhoff, 2009) 1 at 1, 14.

[154] Ödalen, *supra* note 7 at 233–34.

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the right to their "underwater heritage,"[155] or even the right to financial resources to create a navy in order to effectively control the site of their abandoned territory.[156] The latter possibility would not be unprecedented for a non-territorial entity since Article 93 of *UNCLOS* provides for the right of the UN, its specialized agencies, and the International Atomic Energy Agency to employ ships flying the flag of these organizations.[157]

In addition, it should not be unimaginable for CDNs to gain some other international rights that have already been recognized for some non-state and even non-territorial entities. Thus, for example, the Holy See,[158] the International Olympic Committee (IOC),[159] the Sovereign Order of Malta,[160] and, formerly, the Palestine Liberation Organization[161] have been provided with observer status at the UN General Assembly. Some of these entities maintain diplomatic relations with numerous countries. Thus, for instance, the Sovereign Order of Malta has diplomatic relations with 112 countries.[162] Furthermore, it is worth noting in this context that, for example, the Final Act of *UNCLOS* was signed in 1982 by eight liberation movements and fifty-seven non-governmental organizations having consultative status to the UN Economic and Social Council.[163] By the same logic, there should be no obstacles for CDNs to continue participation (at least with limited decision-making powers as with the above-mentioned non-territorial entities) at international conferences on climate change and sea level rise issues (the Conferences of the Parties) as successors of their inundated states — namely, the victims of these phenomena.

Further, the earlier-mentioned IOC as a non-governmental organization realized some aspects of diplomatic privileges and immunities and treaty-making capacity, at least *in statu nascendi*. As Christain Tomuschat correctly remarked, "some NGOs have been given a status that is modelled on régimes

[155] Jiménez Pineda, *supra* note 50 at 10.

[156] Ödalen, *supra* note 7 at 233.

[157] *UNCLOS*, *supra* note 77.

[158] GA Res 58/314 (1 July 2004).

[159] GA Res 64/3 (19 October 2009).

[160] GA Res 48/265 (24 August 1994). UN, "List of non-member states, entities and organizations having received a standing invitation to participate as observers in the sessions and the work of the UN General Assembly," UN Doc A/INF/73/5/Rev.1 (18 January 2019).

[161] GA Res A/RES/3237 (XXIX) (22 November 1974).

[162] See Sovereign Order of Malta, "Bilateral Relations," online: <www.orderofmalta.int/diplomatic-activities/bilateral-relations/>.

[163] See *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/121 and Corr 1 to 8 (10 December 1982) at 187–89, online: <www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf>.

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normally granted only to States or international organizations."[164] Thus, on 1 November 2000, the IOC concluded an agreement with the Swiss Federal Council regarding the IOC's status in Switzerland, providing the IOC with some of the diplomatic privileges usually granted to states and intergovernmental organizations (IGOs) — that is, independence and freedom of action of the IOC on Swiss territory (Article 2) and exemption from direct federal taxes (Article 3).[165] In addition, Article 9 of the Agreement provides that "the Swiss authorities shall take all necessary measures to facilitate entry into Swiss territory, exit from this territory and stay of all members of the IOC as well as, as far as possible, all persons, whatever their nationality, who are called upon to work with the IOC in an official capacity."[166]

This being so, at least theoretically, the option of the conclusion of an agreement between a CDN and a host state on the cession/purchase of a part of the latter's territory could even lead to the creation by the CDN of a new state, provided that an effective government and territorial sovereignty could be established on such territory. As Shaw points out, "[t]he basis of cession lies in the intention of the relevant parties to transfer sovereignty over the territory in question."[167] Finally, subject to the consent of host states, the role of the UN, perhaps even in the form of temporary reactivation of the functions of the UN Trusteeship Council and the UN General Assembly in accordance with Chapter XIII of the *UN Charter*, could offer considerable help in the regulation of the status of CDNs and the preservation of their right to self-determination.[168]

Concluding Remarks: Fictitious Statehood versus CDN Reality?

There is no doubt that international legal personality is an extremely dynamic category in international law. International legal scholarship has made efforts to sort out the elements of international legal personality in order to create a clear definition of an "international legal person," but, in fact, the doctrine simply follows social processes in the international community and their legal regulation. In that sense, international law doctrine does not differ very much from the natural sciences, its task being to describe, systematize, and understand the world around it. Faced with the

[164] Tomuschat, *supra* note 28 at 159.

[165] *Accord entre le Conseil fédéral suisse et le Comité International Olympique relative au statut du Comité International Olympique en Suisse*, 1 November 2000, online: <archive.icann.org/en/psc/annex6.pdf> (entered into force 1 November 2000), arts 2–3.

[166] *Ibid*, art 9. For more details see also J-P Chappelet & B Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The Governance of World Sport* (London: Routledge, 2008) at 107.

[167] Shaw, *supra* note 19 at 424.

[168] Cf Burkett, *supra* note 7 at 363ff.

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phenomenon of disappearing island states in the context of climate change, three possible scenarios concerning the international legal status of the island state populations affected by sea level rise can be set out:

(1) The *de facto* and *de jure* preservation of the statehood of the disappearing states: constructing "sea-walls," or artificial accretion, with the support of the international community and, in particular, of international financial institutions (UN humanitarian and development agencies, the funding mechanisms for humanitarian action, development banks, the Green Climate Fund, and so on) could maintain the *status quo* and probably be the best solution. Moreover, it would be in accordance with the declared readiness of the parties to the *UNFCCC* and the Green Climate Fund, the Cancún Adaptation Framework,[169] or the Sendai Framework on Disaster Risk Reduction 2015–2030,[170] to help the victims of climate change.[171]

(2) The extinction of the statehood of inundated states: this will (even before the event) raise the question of the international legal status of their populations as soon as their last islands become uninhabitable. International law could respond with the recognition of CDNs as new entities — that is, new subjects of international law that could retain or succeed to the entitlements/rights of their disappeared states, thus preserving their right to self-determination and regulating their status with host states. In this context, the above-mentioned assistance from the UN and other international organizations would be extremely useful.

(3) Lastly, the extinction of the statehood of inundated states without recognition of successor collective legal entities as such: probably the most unfair and unfavourable scenario for both the populations of inundated states and their host states. This scenario would likely confront international law with a new category of stateless persons — that is, "climate refugees/migrants," which would face the international community and its law with the challenge of revising international refugee/ migration law.

Without doubt, international law has to follow the development and needs of the international community since it has never been an isolated normative artefact but, rather, a means of regulating the social relations therein. Consequently, it is worth noting here that, unlike a mere codification of

[169] *Cancún Adaptation Framework: Pre-event on Early Warning, Third Global Platform for Disaster Risk Reduction*, Geneva, 9 May 2011.

[170] *Sendai Framework for Disaster Risk Reduction 2015–2030*, Third United Nations World Conference on Disaster Risk Reduction, Sendai, Japan, 14–18 March 2015, 7 April 2015.

[171] Cf Vidas, Freestone & McAdam, *supra* note 74 at 55.

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international law, its "progressive development" is supposed to take into account the social and ethical determinants that the international community is facing in every epoch.[172] However, the "progressive development of international law" need not be understood as dissolution of existing theoretical concepts, including the Westphalian foundation of international law and its concept of statehood. Non-territorial subjects of international law existed long before 1648 — that is, before the "Westphalian system" of international law. The international community then, as now, was composed of states as well as other non-territorial, and sometimes quite peculiar, participants in international relations. Examples include not only the Sovereign Order of Malta and the Holy See but also similar non-territorial entities (for example, the Teutonic Order, Mercedarian Order, and Trinitarian Order) whose international legal personality ceased to exist over time. Subjects of international law appear, exist, and disappear continuously in the extremely dynamic evolutionary processes of the international community and international relations.

Therefore, it seems that nowadays the acceptance of new, non-territorial international legal persons such as CDNs (just like IGOs almost a hundred years ago) should be a much easier choice for international law than to accept the dilution of one of its classical concepts — statehood. The concept of international legal personality, as well as international law in general, is subject to the development of international relations since the law is never an aim in itself. To develop in such a way, however, does not mean to abandon the existing concepts of the system but, on the contrary, to fill them with new substance.

[172] Thus, the *UN Charter*, *supra* note 143, art 13(1)(a) states: "The General Assembly shall initiate studies and make recommendations for the purpose of … promoting international co-operation in the political field and encouraging the progressive development of international law and its codification."

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