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ADDRESSING THE CHALLENGES TO STATEHOOD ARISING FROM CLIMATE CHANGE: FUTURE BASES FOR ACTION TO PROTECT LOW-LYING ATOLL NATIONS

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9.1 Introduction

The fate of states that, in the coming decades, will become partially or totally uninhabitable as a result of climate change constitutes one of the most important questions confronting international law today. At the very least, the erosion of fertile lands, the salinization of water sources and the impact of extreme weather events on infrastructure will make living conditions difficult. More drastically, in some cases, populations could be forced to relocate within borders or, in extreme situations, migrate towards other states. The question becomes whether a state would simply cease to exist or would it be able to survive without its territory being habitable and with its population located elsewhere, or ex situ? This question has real implications for low-lying atoll nations; it is not posed for mere theoretical or philosophical debate.

Climate change touches upon various areas of international law. From migration and the inadequate framework of refugee law to disaster management and insurance law, from the preservation of the right of a people to determine its legal and political system (right to self-determination) to the need to ensure compliance with environmental treaties, the international legal order needs to evolve if it is to tackle efficiently the greatest challenge of the 21st century. In other works, I have addressed some of the issues arising in the context of the Pacific region.[1] In this chapter, the idea is to focus more precisely on the most extreme of scenarios that could one day affect the very essence of low-lying atoll nations in the Pacific: the subject of statehood, and how it can be

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1 See for example Alberto Costi and Yves-Louis Sage (eds) *Droit de l'Environnement dans le Pacifique: Problématiques et Perspectives Croisées/Environmental Law in the Pacific: International and Comparative Perspectives* (New Zealand Association for Comparative Law/Association de Législation Comparée des Pays du Pacifique, Wellington, 2005); Alberto Costi "De la Définition et du Statut des 'Réfugiés Climatiques': Une Première Réflexion" (2010) 16 Yearbook of the New Zealand Association for Comparative Law 489; and Alberto Costi and Nathan Ross "The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future" in Caroline Morris and Petra Butler (eds) *Small States in a Legal World* (Springer, Heidelberg, 2017) 101.

Costi & Renwick (eds) *In the Eye of the Storm–Reflections from the Second Pacific Climate Change Conference* (SPREP, Te Herenga Waka—Victoria University of Wellington and NZACL, 2020)

maintained, either in situ (on-site) or ex situ, when some of the traditional indicia, or criteria, of statehood are at risk: territory; permanent population; and government's control of its territory.

The risk of so-called "disappearance" of a state,[2] or to be accurate, the disappearance of habitable territory, is a fairly recent phenomenon, one that is real (Klein, 2017), yet contentious as some studies show evidence that islands are geologically dynamic and in some cases growing in size.[3] Whether that is correct or not, as low-lying countries, many Pacific Island nations will continue, until we reverse trends, to be extremely vulnerable to sea level rise and the increased frequency of extreme weather events such as storm surges and flooding, as well as soil erosion and water salinization. As a result, by the end of the 21st century, many Pacific Island nations are likely to be irreversibly affected, with some of them becoming wholly or partially uninhabitable.[4] Despite this looming crisis and efforts by inter-governmental and non-governmental organisations to tackle issues arising from anthropogenic climate change, international law lacks a proper framework to address the legal status of low-lying states under threat and to protect sufficiently those who are displaced by climate change.

This gap in international law should be of particular concern to the Pacific region. Low-lying Pacific Island nations are likely to produce high levels of out-migration while countries in the region with larger and higher-lying land mass could face increasing migration pressure from the most affected of their neighbouring states. This creates a considerable incentive for countries like New Zealand to begin examining possible responses both at the international and national levels (a subject for another paper). Despite best efforts towards resilience building undertaken through international fora and domestic initiatives, in the absence of clear norms on the subject, the topic forces us to test the limits of international law and find solutions that can preserve and, in fact, reinforce the position of Pacific Islands as full members of the international community.

The scope of this chapter is thus two-fold. First, it examines the current state of the law. It explores whether, in the absence of a permanent population and a defined territory as commonly understood, and possibly, therefore, without fulfilling two of the criteria considered necessary to *establish*

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2 The use of the term "disappearance" implies a certain legal outcome, one which might not materialise, not least since recent studies show that the likelihood of low-lying atoll nations disappearing completely is not likely to occur. Although sometimes employed in political discourse by low-lying states' leaders who say that their whole territory, or their sovereignty, is at risk, this language also implies a legal outcome, but, as we shall see, there are no rules or precedents that might suggest this result is even possible, let alone likely. Where possible, the use of the word "disappearing state" in this chapter will be avoided and replaced by "low-lying state" as it is based on an objective fact of the topography that links these states to a common issue without implying any weakness, or any loss of sovereignty or legal personality: Costi and Ross, above n 1, at 103.

3 Megan E Tuck, Paul S Kench, Murray R Ford and Gerd Masselink "Physical modelling of the response of reef islands to sea-level rise" (2019) 47(9) Geology 803 at 805-806.

4 Intergovernmental Panel on Climate Change "Choices made now are critical for the future of our ocean and cryosphere" (press release 2019/31/PR, 25 September 2019) <https://www.ipcc.ch/site>. See also Leonard A Nurse et al "Small islands" in VR Barros et al (eds) *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge and New York, 2014) 1613 at 1618 and 1640. See Chapter 4 in this book.

statehood,[5] states can *continue* as legal persons in international law. This involves examining case studies of ex situ continuity of the state either in its entirety or in some reduced form, particularly important for the peoples of the Pacific, for which governments play a central role in protecting culture, custom, language and other critical characteristics of their communities. It also requires us to develop an understanding of what ex situ continuity entails in terms of rights and duties in international law for the low-lying atoll nations at risk.

Secondly, the chapter proposes some forward-looking thinking by considering alternative, and sometimes contentious, bases for action to protect those states. This will be done by borrowing legal and philosophical concepts discussed by international law experts. There may be obligations on the international community in general: for instance, the principle of respect for the right of a people to self-determination; the concept of an emerging international or regional "duty of assistance", an idea I have developed elsewhere (Costi and Sage, 2005); or even "a responsibility to protect" nations and their populations at risk. The chapter sketches the nature of such a "duty" and "responsibility": what these terms entail, and whether they translate into legal or political obligations to ensure low-lying nations can put in motion adaptation strategies that protect the state's survival.

The chapter is structured as follows. After this introduction, I expose the scenario under consideration and some of the key issues at stake. I then discuss the maintenance of legal personality in international law by examining the concept of statehood and assessing its applicability to the contemplated scenario, also pointing out its possible limitations and the importance for low-lying atoll nations of ensuring recognition of their borders and maritime zones by other states. I then consider future bases for action to protect low-lying states by reviewing other useful legal principles and concepts, namely continuity of statehood and the right to self-determination; a possible duty of assistance; the idea of the state as fiduciary of humankind; and finally the notion of responsibility to protect. I conclude by noting that there is no legal reason for low-lying states to lose statehood and that there may be sufficient existing and emerging legal principles and concepts on which the international legal community can base its actions for the protection of low-lying states; I also enumerate some resulting questions for future discussion.

9.2 Climate change scenario and issues at stake

The ability of peoples of low-lying atoll nations to remain and thrive in their homelands is undermined by climate change and its effects. According to the Intergovernmental Panel on Climate Change (IPCC), the sea level is rising at an increasing rate due to the thermal expansion of oceans and the thawing of snow and ice, and that rate is four times greater in the Pacific than the global average (Chambwera et al, 2014). If the most visible effect is that of "sinking" or "submerged" islands, climate change causes other problems compounding the situation, like cyclones, erosion of coastlines,

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5 Montevideo Convention on the Rights and Duties of States 165 LNTS 19 (opened for signature 26 December 1933, entered into force 26 December 1934) [Montevideo Convention], article 1:

> 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.

damage to ecosystems and habitats of marine species, spread of infectious diseases, injuries from extreme weather events (Farbotko, 2010). As internal and external displacement ensues, there are also other significant effects of climate change. These include, for example, the fracture of homogenous ethnic groups and destruction of culturally significant sites (for instance, sepulchres) as well as the emergence of security issues due to an increase in population density and loss of livelihood, thus multiplying threats, as indicated by the Security Council of the United Nations (UN).[6]

The problem is multifaceted. First, low-lying atoll nations are unable to protect themselves from a situation created by activities outside their region. The cost of current adaptation strategies, even with external assistance, is simply prohibitive in the long term (Chambwera et al, 2014), even for developed states (Holden, 2019). The risk to their territorial integrity is forcing low-lying states to consider ex situ solutions. For some, this is simply a question of time (Church et al, 2013). Secondly, the current climate change regime does not yet consider the continuity of states, instead addressing climate change challenges without looking beyond in situ solutions. The UN Framework Convention on Climate Change[7] and the Kyoto Protocol[8] are mostly aimed at mitigating greenhouse gas emissions. The concept of adaptation is only indirectly inferred from article 1 of the Framework Convention, under which the possible "disappearance" of a state could be considered an adverse effect of climate change. Although the Conference of the Parties (COP) has adopted mechanisms such as the Warsaw International Mechanism on Loss and Damage, established at COP19 in 2013 to address costly damages from climate change, and discussion of disaster management at COP16, this process has been timid.[9] For instance, an earlier draft of the Paris Agreement contained an idea of a climate change displacement coordination facility, but that was shut down by several states, including Australia (Costi and Ross, 2017). Article 7 of the Paris Agreement[10] is more aspirational than some of the COP decisions regarding adaptation. According to article 7(1), parties recognise that the current need for adaptation is significant and that greater needs are accompanied by greater costs. Moreover,

6 "Climate change recognized as 'threat multiplier', UN Security Council debates its impact on peace" (25 January 2015) UN News <https://news.un.org>.

7 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994) [UNFCCC].

8 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005).

9 Conference of the Parties, UNFCCC *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013 — Addendum — Part Two: Action taken by the Conference of the Parties at its nineteenth session* FCCC/CP/2013/10/Add.1 (2014), Decision 2/CP.19 "Warsaw international mechanism for loss and damage associated with climate change impacts".

10 Paris Agreement 55 International Legal Materials 743 (adopted 12 December 2015, entered into force 4 November 2016).

parties recognise that the needs of the particularly vulnerable states must be given support, and this requires international cooperation.[11]

Although the partial or total disappearance of a state would represent an extreme failure of the international legal system, no international agreement to date either mentions or impedes the loss of statehood – that is, the status conferring legal personality in international law with its particular privileges and obligations (Costi and Ross, 2020). Yet, the issue of statehood draws its importance from the fact that the principal function of a state is to ensure its persistence in order to protect its citizens, and hence, any international support and cooperation should aim at the persistence of statehood. In tune with this view is the work of the UN High Commissioner for Refugees (UNHCR) on planned relocation.[12] Its guidance states that relocation of at-risk populations to protect them from disasters and the impacts of environmental change, such as the effects of climate change, carries serious risks for those it is intended to benefit, including the disruption of livelihoods and loss of cultural practices. The UNHCR, therefore, sets out general principles to assist states and other actors faced with the need to undertake a "planned relocation". The UNHCR aspires for these general principles to helpfully serve as a process for states and supporting actors should they wish to formulate laws, policies, plans and programmes to that effect.[13]

Similarly, the Office of the UN High Commissioner for Human Rights (OHCHR) had earlier reiterated the well-known fact that the effects of climate change were already being felt by individuals and communities around the world, and that the most vulnerable were those living on the "front line" of climate change:[14]

> … in places where even small climatic changes can have catastrophic consequences for lives and livelihoods. Vulnerability due to geography is often compounded by a low capacity to adapt, rendering many of the poorest countries and communities particularly vulnerable to the effects of climate change.

The OHCHR report refers to the possible scenario of forcible displacement across national borders and points to some of the human rights issues such a situation would raise, for example, the rights of affected populations vis-à-vis receiving states and possible entitlement to live in community. The report goes on to state:[15]

> Human rights law does not provide clear answers as to the status of populations who have been displaced from sinking island States. Arguably, dealing with such possible disasters and protecting the human rights

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11 Id, article 7(6). I mention here the idea of cooperation and the concept of support for vulnerable states as they will form the basis of some of the points discussed later in the chapter.

12 *Guidance on Protecting People from Disasters and Environmental Change through Planned Relocation* (UNHCR, Brookings and Georgetown University, October 2015).

13 Id, at 5.

14 *Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights* A/HRC/10/61 (2009) at [93].

15 Id, at [60].

> of the people affected will first and foremost require adequate long-term political solutions, rather than new legal instruments.

These bold statements from the UNHCR and the OHCHR are important. They stress the fact that while terms like displacement and migration may have a particular connotation, "planned relocation" seems to be a novel concept that could be used to include solutions for entire states. The foremost priority for low-lying states is, in any event, the maintenance of their legal personality (Burson, 2018).

9.3 Maintaining legal personality in international law[16]

Why is it important to maintain the legal personality of affected states? Since 1648, the concept of state ("Westphalian" state) has been based to a large extent on the principle of territory, which is directly threatened by climate change. States are the only full subjects of international law, that is, only states have full legal capacity and are juridically equal insofar as they enjoy an equal right to establish law and administer justice.[17] They "make" international law; other (non-state) subjects derive their own legal personality from the will of states – the concept of derived legal personality (Costi and Ross, 2020). Moreover, states owe protection to all those on their territory and can also engage in diplomatic protection of their nationals abroad. These attributes are significant, not least for low-lying states with large numbers of relocated citizens.

The most critical priority for low-lying states is thus to maintain their legal personality. This is dependent on maintaining statehood, analysed typically against the orthodox criteria for statehood, and the related concept of state recognition.

9.3.1 Statehood

Turning first to statehood, article 1 of the Montevideo Convention on the Rights and Duties of States relates to the criteria for establishing statehood. Although the continuity of already established states is a separate legal question examined later, discussing these "orthodox" criteria is important for assessing any possible risks for low-lying states.

9.3.1.1 Defined territory

In the extreme event of relocation of the entire population of a state due to the effects of climate change ("climate change scenario"), can the requirement of a territory as per the Montevideo Convention's criteria of statehood be maintained?

There is no minimum size for a state's territory. The world's smallest states are Monaco (2.1 km^2), Nauru (21 km^2) and Tuvalu (26 km^2). The size of the territory of a state does not affect the level of statehood; all three mentioned states receive equal voting rights in the UN General Assembly

16 This section is based in part on Costi and Ross, above n 1; and Alberto Costi and Nathan Jon Ross "International Legal Personality" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 75.

17 Montevideo Convention, above n 5, article 4.

alongside larger states.[18] Even though the UN Convention on the Law of the Sea (UNCLOS) refers to "a naturally formed area of land, surrounded by water, which is above water at high tide",[19] this definition is for the purpose of allocating maritime resources and defining boundaries. It is not for establishing or maintaining statehood.

Also, a reading of the *Island of Palmas* arbitration may help to understand the meaning of territory for islands.[20] First, delimited borders are not essential. What matters is that there be a physical and identifiable territory. The territory is not always perfectly defined – maritime and territorial disputes testify to that reality (Costi and Ross, 2020). It is unlikely that the territory of low-lying states will disappear completely. It might, however, become partially or totally uninhabitable. Hence the importance of delimited maritime boundaries deposited with the UN or through bilateral agreement or domestic legislation to provide a record that may be opposed to other states, a point that has escaped the attention of regional leaders:[21]

> We confirm that the baselines that determine our territorial boundaries, once established, under the UN Convention on the Law of the Sea, shall remain unchanged despite the effects of sea level rise. Our sovereignty will not be compromised by climate change.

The second point from the *Island of Palmas* arbitration pertains to sovereignty as a key element for determining whether the territory criterion of the Montevideo Convention continues to be satisfied. Sovereignty is not a criterion for establishing statehood, but rather a right that arises as a consequence of the legal personality of the state being established (Costi and Ross, 2020). The *Island of Palmas* arbitration (insofar as the sovereignty element of the territory criterion is concerned) determined that the right of sovereignty over territory could only be upheld if it was effectively exercised (*animus occupandi*). Whether sovereignty, as envisaged by the arbitral tribunal (without having in mind low-lying states when deciding the case) persists with respect to the novel climate change scenario for low-lying states is, of course, untested.

The more specific question here is whether the loss of habitable territory in itself results in the discontinuity of the sovereign state as entity. Rosemary Rayfuse seems to presume that disappearance of territory means extinguishment of statehood.[22] Cedric Ryngaert and Sven Sobrie believe that

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18 Charter of the United Nations 1 UNTS XVI (opened for signature 26 June 1945, entered into force 24 October 1945) [UN Charter], article 18(1).

19 United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994), article 121(1).

20 *Island of Palmas (Netherlands v United States of America)* (*Award*) (1928) II RIAA 829 at 838 and 855.

21 Polynesian Leaders Group "Amatuku Declaration on Climate Change and Oceans" (8th Polynesian Leaders Meeting, Tuvalu, 29 June 2018) at [12] <https://www.sprep.org/sites/default/files/documents/executive_board/2018/Information%20Paper%202(b)%20-%20Amatuku%20Declaration%20on%20Climate%20Chance%20and%20Oceans_FINALsigned.pdf>.

22 Rosemary Rayfuse "International law and disappearing states: maritime zones and the criteria for statehood" (2011) 41 Environmental Policy and Law 281 at 284.

central to the Montevideo Convention is the principle of effectiveness. They wonder how a state can be effective without physical territory resulting from displacement of the population.[23]

There is no legal authority for reaching a conclusion with such drastic consequences. After all, a state can claim title over an uninhabited territory or *terra nullius* (Costi and Ross, 2020). As the *Eastern Greenland* case stated, sovereignty requires an intention to act as sovereign and some actual exercise or display of authority.[24] This can be performed through other arrangements. For instance, nothing in law prevents the ex situ continuity of sovereignty (Burkett, 2011). For example, governments in exile during World War II operated from outside their borders because of special circumstances – the difference here is that the threat might be long-term and lead to permanent loss of habitable territory due to climate change.

Moreover, as James Crawford explains, there is presumption of continuity of states: "There is a substantial body of practice protecting the legal personality of the state against extinction, despite prolonged lack of effectiveness."[25]

What lies underneath the defence of statehood is the protection of human rights and the collective right of a people to exercise its right to self-determination, best protected by the state. History shows the devastating effects for peoples when deprived of their national identity, culture, customs and language. There is a range of possible futures for a low-lying state ex situ that could address border delimitation and sovereignty.

9.3.1.2 Permanent population

Although permanent population is often considered as the least important indicia or criterion of statehood, there is no doubt this will be undermined in the climate change scenario. The matter of climate change effects threatening the population led former Kiribati President Anote Tong to announce plans for "migration with dignity", even going so far as to purchase an island off Fiji belonging to the Church of England (Caramel, 2014); and Tuvalu's current Prime Minister Enele Sopoaga considered approaching Australia and New Zealand to buy a parcel of land back in 2015.[26]

Regarding population too, size is irrelevant. What really matters is the permanence of a form of community life in the sense of sharing a common identity.[27] For Ian Brownlie, population is

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23 Cedric Ryngaert and Sven Sobrie "Recognition of States: International Law or Realpolitik?" (2011) 24 Leiden Journal of International Law 467 at 472.

24 *Legal Status of Eastern Greenland (Norway v Denmark)* (*Judgment*) (1933) PCIJ (Series A/B) at 46.

25 James Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 132.

26 "Tuvalu looking at buying NZ and Aust land for displaced" (24 August 2015) Radio New Zealand <https://www.rnz.co.nz>.

27 Administrative Court of Cologne (1978) *In re Duchy of Sealand* 80 ILR 683 at 687.

interlinked with territory. It is a stable community in control of a specific area.[28] On first impression, permanent population as the second criterion for establishing statehood will not be met in the event all the inhabitants of a state leave or if the territory becomes uninhabitable. It can be argued, however, that if the entire population or a large majority of it relocates to a new land, there nevertheless remains a population with a form of community life, reasonably homogenous, linked by ethnicity, culture, history and language. In fact, the main threat of relocation is the risk of fragmentation across borders. Hence the importance of a "planned relocation" suggested by the UNHCR and the OHCHR for avoiding fragmentation and assimilation on the one hand, while, on the other, keeping alive the right to self-determination, exercised collectively by the people, wherever located.

It is also worth noting that although a territory may become uninhabitable, nothing in international law requires it to be habitable, except for specific purposes such as maritime delimitation (Mossop, 2017). It is theoretically possible, then, for a state to persist in a form of government in exile. Thus, the territory made uninhabitable by the adverse effects of climate change remains the territory of the state *in absentia*. The inclusion of uninhabited land within a state's territorial claims certainly has precedent. New Zealand, for example, has numerous islands that form part of its territory, including some which have never been inhabited, such as the Solander Islands (except when five sealers were stranded there for five years).[29]

In summary, in the scenario of total loss of habitable territory, the permanent population criterion will not be met in situ. The issue, however, must be measured against the legal requirements for continuity of statehood discussed later. As will be seen, in principle, low-lying states may persist ex situ, where the entirety or most of the population relocates.

9.3.1.3 Government

The third criterion for statehood is a government. Often thought to be the most important requirement, it reflects the need for a state to have, on the one hand, international representation and, on the other, the actual capacity to exercise power over a territory and a population (Costi and Ross, 2020). Does this criterion require simply a government in power, or an effective government? Crawford applies criteria for effective government more strictly to situations of establishing states rather than those of continuity of states.[30] Effective government refers to the ability of the government to control the territory and people, and to exercise such authority exclusively.

A concern then, is the ability of governments of low-lying states to continue to fulfil their essential functions, such as guaranteeing basic rights and services to their citizens. One issue, here, is whether increasing funding from other states may lead to a degree of dependency. Another one relates, for instance, to displacement of large numbers of people, leading to internal instability and threatening domestic order and social cohesion. As a result of the impacts of climate change, the legitimacy of

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28 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 70-71.

29 Costi and Ross, above n 1, at 115.

30 Crawford, above n 25, at 59.

the government could be questioned, especially should a government be forced to relocate in another territory. One could argue that a government is not effective if unable to carry out its functions within its territory or rule over the displaced population, especially if the latter is fragmented and located in different countries.

However, there are many examples of states that have been, for long periods of time, unable to provide public services required of government over the whole territory (for instance, Somalia in recent times). Yet, states, wrongly adorned in legal terms with the epithet "failed", did maintain their statehood. Bosnia and Herzegovina and Croatia were admitted to the UN in spite of the fact that non-governmental forces controlled large tracts of their respective territories.[31] Article 4 of the Montevideo Convention provides that the rights of each state "do not depend upon the power which it possesses" to exercise them. Thus, the mere prospect of a limited capacity of a Pacific Island government to exercise its powers should not by itself threaten statehood. Neither should the form of government be an issue. As commented by the International Court of Justice (ICJ) in the *Western Sahara* advisory opinion, the form of government is irrelevant.[32] Add to this Crawford's conclusion that international law does not lay down "specific requirements as to the nature and extent of this [governmental] control [of territory], except that it includes some degree of maintenance of law and order and the establishment of basic institutions."[33] He further remarks that there is "a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other. In the former situation, the criterion for effective government may be applied more strictly".[34]

It is, therefore, possible to argue that a low-lying state could continue to have a government – even an ex situ government – that is exercising any form or degree of control over its territory, including uninhabited islands and territorial sea; that would be sufficient to satisfy the government criterion of the Montevideo Convention. Although there might be problems in practice, the fact is that continuity of state may well persist and follow the government and the people of the low-lying state rather than being extinguished by the loss of existing territory and permanent in situ population.

9.3.1.4 Capacity to enter into international relations

This last indicia of statehood relates to the competence of the state to conduct international relations with other states. Whereas satisfaction of the other criteria of the Montevideo Convention is "basically factual, fulfilment of this criterion depends on competence – the state ought to have the ability to conduct international relations – and on other states' willingness to reciprocate."[35] But as

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31 *Admission of the Republic of Bosnia and Herzegovina to membership in the United Nations* GA Res 46/237, A/Res/46/237 (1992); and *Admission of the Republic of Croatia to membership in the United Nations* GA Res 46/238, A/Res/46/238 (1992).

32 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at 43-44.

33 Crawford, above n 25, at 59.

34 Ibid.

35 Costi and Ross, above n 16, at 89.

Crawford suggests, capacity is not "a criterion, but rather a consequence of statehood, and one which is not constant but depends on the status and situation of particular States."[36] Now, low-lying states have already shown capacity to enter into treaties, to lay claims to their maritime zones, and to participate in international negotiations, for instance climate change, individually and through the Alliance of Small Island States (AOSIS).[37]

Two points should be made at this stage: agreements entered into by low-lying states before a potential relocation are presumed to continue; and capacity to enter into new agreements after relocation, however, will depend on the willingness of other states. Although not a formal requirement, continued state recognition will have practical effects, especially as regards capacity, as noted by Malcolm Shaw:[38]

> … the more overwhelming the scale of recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria. Conversely, the more spare international recognition is, the more attention will be focused upon proof of actual adherence to the criteria concerned.

It is, therefore, important for low-lying states, for instance, to make submissions to the UN Commission on the Limits of the Continental Shelf, and to enter into treaties (on fisheries, for instance) that record clearly the precise delimitation of their maritime borders. In doing so, they ensure that other states recognise their current status for the future.

9.3.2 Importance of state recognition and presumption of continuity

Both customary international law and the Montevideo Convention only determine requirements for a new state to be *established* and gain statehood. Neither specifies the requirements for the *continued* existence of states. Moreover, customary international law includes a principle of state continuity, which is based on a strong presumption against the extinguishment of states once they have been firmly established, as is the case for low-lying states. The principle was affirmed in the *Tinoco* arbitration.[39]

No involuntary extinction of states has occurred in fact since 1945; any extinction of state has been by purposeful dissolution (Burkett, 2011). There is nothing to suggest that the principle of continuity will become moot if a low-lying state no longer satisfies a statehood criterion. Ivan Shearer, for instance, makes the argument that once a state is already established, the requirement of territory is not necessary.[40] Thomas Grant makes a similar point, in that once an entity "has established itself

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36 James Crawford *The Creation of States in International Law* (Clarendon Press, Oxford, 1979) at 47.

37 On the latter point, see Chapter 7 in this book. The argument can also be made that a low-lying state could delegate the conduct of its international relations to another state without this affecting statehood, as exemplified by Liechtenstein requesting Switzerland to represent it via its embassies and consulates (Duursma, 2006).

38 Malcolm N Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 164.

39 *Tinoco Claims Arbitration (United Kingdom v Costa Rica)* (*Award*) (1923) 1 RIAA 369.

40 Ivan Shearer (ed) *Starke's International Law* (11th ed, Butterworths, London, 1994) at 85.

in international society as a state, it does not lose statehood by losing its territory or effective control over that territory."[41] Even if these writings were in the context of World War II and the more recent conflict in Somalia, they nevertheless indicate the continuity of statehood once established.

Regarding low-lying states, two observations are necessary. First, their fate cannot be analysed in isolation. Many principles of international law apply to the situation of low-lying states: statehood; self-determination; and sovereign equality. Secondly, the concept of recognition takes on a new dimension in the context of climate change. Since the factual scenario is novel, the reaction of the international community will be crucial.

Politics is likely to play an important role and could interfere with legal norms. For low-lying states with valuable maritime resources, as mentioned earlier, laying out coordinates and nautical charts with the UN or in legal instruments is important. Low-lying states may also argue that withdrawing recognition could be seen as interference in their internal affairs. Assuming that low-lying states engage in efforts to maintain statehood ex situ, any removal of recognition could be seen as a breach of the principle of non-intervention. More importantly, withdrawal of recognition of a state actively engaged in securing its continued statehood could amount to a denial of a people's right to self-determination.

9.3.3 Concluding remarks

At first sight, low-lying states are not only vulnerable due to the physical impacts of climate change effects, but also because reliant on the goodwill of more powerful states whose interests might not necessarily take theirs into account. The challenges to a state, due to the uninhabitable character of the territory as a result of climate change, raise important legal concerns, but orthodox principles of international law can tackle effectively any legal concerns, even positing novel solutions, such as the prospect of a "deterritorialized nationhood" (Burkett, 2011). Presently, statehood appears to be defined only in relation to the establishment of states, not their disestablishment. State continuity is presumed in international law as a principle. State extinction so far appears to relate only to states dissolving into a number of smaller states, as with the former Yugoslavia, or those being absorbed into larger ones (for instance, England and Scotland into the United Kingdom).

Although the literature has analysed in detail other forms of legal personality, only continued statehood, wherever the government is located, can procure the best possible protection to its nationals. The least preferred option, lack of a legal status, will not be able to afford citizens any protection. The latter will be "at the mercy" of the hosting states where the people will have relocated, in accordance with domestic and international human rights instruments (Ross, 2014). Resolving the issue of the legal status of low-lying states is crucial before any other legal issues (for instance, fate of the population, maritime zones, access to resources, etc) can be addressed.

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41 Thomas D Grant "Defining Statehood: The Montevideo Convention and its Discontents" (1999) 37 Columbia Journal of Transnational Law 403 at 435.

9.4 Future bases for action to protect low-lying states

So far, this chapter has built on the current state of international law to argue for the most favourable status for low-lying states in the climate change scenario: continued statehood. International law has not developed with the physical destruction of a state's entire land territory in mind. The international legal order is also based on the premise that states act in good faith to fulfil their obligations to protect and restore the environment albeit, "[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities", as "developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".[42]

Unfortunately, the legal instruments, with the Paris Agreement in tow, impose few hard legal obligations on state parties. Equally, and without doubting the causal linkage between human activity and climate change, the latter poses significant challenges to international law and international courts: issues associated with climate change cut across national boundaries; the sources of the problem are varied and broad; and it is difficult to link the activity in one country directly to the damage caused to another.[43]

The absence of clear actionable legal obligations puts pressure on the need to develop initiatives and programmes that may only in the long term curb current patterns. In the meantime, it is necessary to consider novel, or adapt existing, legal norms directly addressing the scenario of states under threat due to climate change.[44] Hence, exploring future bases for action to protect those states is warranted.

From an international law viewpoint, there may be obligations on the international community in general: for instance, an obligation *erga omnes* (opposable to all without exception) to protect the right to self-determination; an emerging concept of an international or regional "duty of assistance"; or even "a responsibility to protect" states and their populations at risk. This part examines the protection afforded to continued statehood and to the right to self-determination before exploring the nature and scope of the "duty of assistance" and the "responsibility to protect". Could they translate into obligations to provide assistance so that states at risk from climate change can put in motion adaptation strategies that protect them adequately?

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42 See for example Rio Declaration on Environment and Development A/CONF.151/26 (Vol I) (1992) at 8 (adopted 14 June 1992) [Rio Declaration], principle 7.

43 See Philippe Sands "Climate Change and the Rule of Law: Adjudicating the Future in International Law" (2016) 28 Journal of Environmental Law 19 at 22-23. The same cannot be said about climate litigation at the domestic level, where courts, for instance, have used their powers under judicial review and statutory interpretation to curb governments' powers. See Chapter 8 in this book.

44 Costi and Ross, above n 1, at 115.

9.4.1 Continuity of statehood and relevance of the right to self-determination

Given the centrality of states in the international legal order, it is unsurprising that there is "a principle of the continuity of state."[45] This principle is discussed relative to the Montevideo Convention's criterion of government; that is, whilst governments change, the state is presumed to continue. For Crawford, for instance:[46]

> There is a strong presumption that the State continues to exist, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective government.

This reflects a practically necessary distinction between governments and states in numerous situations, for example, where there are governments in exile or lengthy civil wars. In relation to low-lying states, the question arises as to whether this presumption of continuity could also apply when indicia of statehood other than, or in addition to, government are severely affected. The challenge to these states is, of course, unprecedented: there are no instances where the status of an existing state has been questioned because of loss of permanent population or habitable territory. If states have become extinct in the past, it has been for reasons entirely different from the situation confronting low-lying states. Again, Crawford explains:[47]

> …there is a strong presumption against the extinction of States once firmly established. It is significant that almost all the cases of extinction … involved either entities that were ephemeral or whose independence was not clearly established or were instances of voluntary extinction, when a people (as in the case of the GDR [German Democratic Republic]) or their representatives (as in the case of Czechoslovakia) decided to put an end to their State and to opt for a different future.

The Montevideo Convention specifies that recognition by other states (a state of affairs currently enjoyed by all low-lying states) "is unconditional and irrevocable".[48] Overall, it is clear that international law takes an extremely conservative approach to the extinction of states.

There are many reasons why this conservatism and the presumption of continuity ought to apply to low-lying states. First, these states are, in Crawford's words, "firmly established"; there is no doubting the status of their current statehood. Accordingly, the possibility that they also enjoy the presumption of continuity ought to be considered.

Secondly, as discussed earlier, there are no rules for terminating statehood except under circumstances unrelated to the climate scenario examined here: state succession in situations of decolonisation; dismemberment of an existing state; secession; merger and, historically, annexation (Shaw, 2017). By definition, succession requires that sovereignty is inherited by another, and so, in

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45 *Tinoco Claims Arbitration*, above n 39, at 377.

46 Crawford, above n 25, at 34.

47 Id, at 715.

48 Montevideo Convention, above n 5, article 6.

all such cases, "[t]here is never simply a void", as Jane McAdam explains.[49] In fact, events leading to state succession are entirely different from the climate change scenario. There is, therefore, as already mentioned, nothing in international law that suggests that the presumption will become moot if a low-lying state no longer satisfies a criterion for creating states.

Thirdly, the right to self-determination belongs to the people, not to the territory. That right is a non-derogable, peremptory norm that exists in perpetuity (Ross, 2019). Continued international legal personality (statehood or otherwise) is the only way to secure the external dimension of self-determination, which is currently enjoyed by the peoples of low-lying states both *de jure* (in law) and *de facto* (in fact). If statehood is terminated by some external body, through whatever juridical means, without voluntary forfeiture by the peoples of low-lying states, "the effects on their human rights, including their right to self-determination and to development, [would] be devastating".[50]

Fourthly, enjoying the collective right to self-determination is a prerequisite for the enjoyment of all individual human rights.[51] Therefore, depriving peoples of their state by any exogenous force – other states' greenhouse gas emissions, climate change, and (hypothetical) subsequent termination of their state – would certainly exacerbate the risks of impoverishment and human rights challenges inherent to the relocation enterprises of low-lying states. Relocation through ordinary immigration schemes would transform peoples "socially and politically from being members of an outright majority in their own States to being members of minorities in the destination State";[52] and fragmentation into dispersed communities would challenge their collective decision-making powers and "jeopardise their continued enjoyment of self-determination".[53]

Finally, in the absence of any rules for terminating statehood in the circumstances faced by low-lying states, international actors are in a position to decide on the development of international law: whether to deprive a people of their statehood and external self-determination or, instead, to enable the perpetual statehood otherwise presumed. Embracing the presumption of continuity as a starting point advances a resolution suitable for enabling collective and individual human rights.

9.4.2 Duty of assistance

The existence of a principle of cooperation has been recognised in international legal instruments for some time. It has also been raised in legal and non-legal texts, leading to the timid emergence of

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49 Jane McAdam "'Disappearing States', Statelessness and the Boundaries of International Law" in Jane McAdam (ed) *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, Oxford, 2010) 105 at 109.

50 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/HRC/31/52 (1 February 2016) at [29].

51 *The right of peoples and nations to self-determination* GA Res 637 A (VII) (1952), preamble.

52 Nathan Jon Ross *Low-Lying States, Climate Change-Induced Relocation, and the Collective Right to Self-Determination* (PhD Thesis, Te Herenga Waka—Victoria University of Wellington, New Zealand, 2019) at 38.

53 Id, at 39.

a plea for a duty of assistance when a state at risk makes a request, a notion I have discussed before, while acknowledging the difficulties in establishing a corresponding legal obligation at present (Costi and Sage, 2005).

It is found in the UN Charter,[54] as one of the UN's purposes. Although article 1(3) is not binding, it highlights the importance for the UN and its members to address and resolve "international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." In addition, articles 55 and 56 of the UN Charter ensure that members individually and jointly will take action to create conditions of stability and well-being for enabling the economic and social development of their peoples. Read together with the right to self-determination, it is possible to say that cooperation would include efforts to assist peoples of low-lying states to continue to exercise their right to self-determination.

The principle of cooperation is also traditionally prescribed in international environmental law instruments – too many to cite here – often linked with a call to provide assistance to developing states. According to the Rio Declaration, for instance, the notion of sustainable development is presented as requiring solidarity among states and different peoples, and states should "cooperate to strengthen endogenous capacity-building" by improving scientific understanding and "by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies".[55] Principe 7 of the Rio Declaration calls upon states to cooperate in a spirit of global partnership with a view to conserve, protect and restore the health and integrity of earth's ecosystem. This principle, already cemented in the Stockholm Declaration five decades ago,[56] is also found in AOSIS' programmes that call for cooperation of the international community with small developing states.[57] Cooperation may take various forms. At a more general level, it entails the need for parties to a treaty to work together to ensure compliance with its terms in good faith (Costi, Davidson and Yarwood, 2020). At a more practical level, cooperation may comprise financial and technical assistance and technology transfers.[58] The various forms of cooperation are found in many provisions of the UN Framework Convention on Climate Change and the Paris Agreement.[59]

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54 UN Charter, above n 18, article 1(3).

55 Rio Declaration, above n 42, principles 5 and 9.

56 Stockholm Declaration on the Human Environment in Report of the United Nations Conference on the Human Environment A/CONF.48/14 at 2 and Corr.1 (1972) (adopted 16 June 1972).

57 See for example Alliance of Small Island States and United Nations Development Programme *Rising Tides, Rising Capacity. Supporting a Sustainable Future for Small Island Developing States* (UNDP, June 2017). For a summary of the low-lying states' participation in international climate change discourse, see Lilian Yamamoto and Miguel Esteban *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer, Heidelberg, 2014) at 105-119. See also Chapter 7 in this book.

58 See for example Paris Agreement, above n 10, articles 7, 9, 10 and 13.

59 See for example UNFCCC, above n 7, article 9; and Paris Agreement, above n 10, articles 8 and 14.

The cooperation principle is also included in many human rights treaties and statements by human rights bodies. For example, the OHCHR noted: "international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights".[60]

The realisation of human rights demands not only respect by the international community of the right of a people to self-determination, as already mentioned, but also its prioritisation as it provides the best conditions for a people to ensure its development and for individuals to thrive in the knowledge that their rights are protected. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[61] refers to the obligation of each state party:

> … to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This provision has been interpreted by the UN Committee on Economic, Social and Cultural Rights as requiring the international community to assist a state that lacks financial resources or expertise (McAdam, 2012). Although the level of assistance is not set out clearly, this provision should be read in conjunction with article 23, which defines international action for the achievement of the rights in the ICESCR as:

> … including such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

There is a clear expectation that a state should be able to ask for assistance, which should be provided upon request. Many other instruments also speak to the need for international action.

Although the existence of some sort of duty to assist is largely undisputed, its precise meaning remains unclear and so does its legal nature.

The following legal arguments suggest a duty of assistance may slowly come to be recognised as an emerging principle of international law and may help clarify its possible substance.

First, it most likely entails an obligation to take the interests of other states into account; before a state undertakes an activity that may have transboundary effects, it is clearly established that it should consult and exchange information with interested states.[62] To satisfy such a requirement, there is a need for the rights of all parties to be recognised.[63] Concerning the climate change scenario

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60 *Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights*, above n 14, at [99].

61 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976).

62 *Lake Lanoux Arbitration (France v Spain)* (*Award*) (1957) 24 ILR 101.

63 *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3 at 30-31.

contemplated here, this would not be objected to by developed states, many having shown solidarity with the plight of states at risk.

Secondly, the "duty of assistance" is likely to call for pro-active measures along the traditional lines of financial and technical assistance, and possibly even conclusion of assistance agreements. As long as there is no compelling states to subscribe to specific substantive obligations, it is unlikely to raise major objections. According to McAdam, "it would be difficult to find authority to support the proposition that the duty to cooperate impose a responsibility on States to facilitate adaptation through migration where *in situ* adaptation to climate change cannot remedy the pressures on the local population."[64] There is thus an expectation that states will work together to protect peoples from the effects of climate change without this commitment being a legally binding obligation upon any particular state to provide any particular form of assistance.

Thirdly, at a more practical level, and by analogy, one can find isolated examples of existing duties of assistance. For instance in regard to individuals, the International Law Commission in its work on disaster law has reflected on the broad entitlement to human rights protection held by those persons affected by disasters.[65] Its work also serves as a reminder of the duty of states to ensure compliance with all relevant human rights obligations applicable during both the disaster and the pre-disaster phase. Another example may be found in the law of the sea. A duty to assist persons in distress at sea is a long-established rule of customary international law dating back centuries (Papanicolopulu, 2016). This duty extends to both other vessels and coastal states in the vicinity; and all persons, including irregular maritime migrants, remain protected. This rule has been codified in UNCLOS, which prescribes relevant duties for flag and coastal states at article 98:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
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> 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Beyond the law of the sea, it is interesting to note that the Convention Governing the Specific Aspects of Refugee Problems in Africa, unlike many other instruments, explicitly recognises that

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64 Jane McAdam *Climate Change, Forced Migrations, and International Law* (Oxford University Press, Oxford, 2012) at 258.

65 International Law Commission *Report of the Work on its Sixty-Second Session (3 May-9 June and 5 July-6 August 2010)* A/65/10 (2010), draft article 5.

particular countries will have to call for help when they are over-burdened with refugees, and it imposes a duty on the other states to assist:[66]

> Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU [Organization of African Unity, replaced by the African Union], and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.

These examples show some acceptance on the part of states of certain obligations they owe to other states in circumstances where life may be under threat. One possibility would be to read the duty of assistance in line with the principle exposed in *Island of Palmas*, that:[67]

> territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory.

This means, at the very least, that states have an obligation not to interfere in the affairs of other states, a duty to prevent trans-boundary harm,[68] and possibly a duty of assistance upon request by another state.

Leaving the confines of the law, prominent non-legal thinkers too have espoused the emerging idea of a duty of assistance. For instance, political philosopher John Rawls made the duty of assistance one of the eight principles in his *Law of the People*, stating that peoples have "a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime".[69] For Rawls, peoples are domestic societies which are burdened in the sense that they face what he calls "unfavorable conditions", namely conditions that make it "difficult if not impossible" for the society in question to establish and stabilize the basic arrangements required for that society to be well-ordered. He notes that a society may face "historical, social, and economic circumstances" which result in a lack of the required "political and cultural traditions, the human capital and know-how" and "often, the material and technological resources" which make it possible to sustain a well-ordered regime.[70] He considers that although "internationally reasonable peoples" have interests which they pursue in their foreign policy, they are willing to "limit their basic interests as required by the reasonable … guided by and congruent with a fair equality and a due respect for all peoples".[71] Being "internationally reasonable", therefore, does not simply involve imposing moral

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66 Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 (adopted 10 September 1969, entered into force 20 June 1974), article 2(4).

67 *Island of Palmas*, above n 20, at 839.

68 *Trail Smelter Case (United States of America v Canada)* (*Award*) (1938 and 1941) 3 RIAA 1905.

69 John Rawls *The Law of Peoples* (Harvard University Press, Cambridge (MA), 1999) at 37.

70 Id, at 90 and 106.

71 Id, at 29 and 44-45.

constraints on an otherwise wholly self-interested foreign policy: it also involves a positive concern to secure justice for other societies, grounded in the natural duty of justice.[72] One could also view this moral motivation of peoples in terms of a criterion of reciprocity among peoples: for Rawls, "internationally reasonable peoples" are those willing to satisfy what he calls the "criterion of reciprocity" in their mutual relations as peoples. Among "internationally reasonable peoples" and conceiving peoples as free and equal, the principles by which each people proposes to govern the "mutual relations among peoples" are those they believe "it is reasonable for them to propose" and also that "it is reasonable for other peoples to accept".[73] His views have been defended as a viable approach to managing climate change (Kenehan, 2015).

In an attempt to find a rationale behind this idea of a duty to assist, one can also look back at the *dédoublement fonctionnel* or role-splitting theory elaborated by Georges Scelle in the first half of the 20th century (Scelle, 1932-1934). For Scelle, the realisation of law in any society must rest on legislative, judicial and enforcement functions although the means of performance of those functions may vary depending on the society. In the absence of a central organ at the international level capable of performing those three functions, it is left to states' organs to perform them in the international legal order. Hence, a dual role is performed by the state and its organs: as national organs, they protect state interests and those of their nationals; as international organs, they adopt international rules and standards (legislative role), may create dispute resolution and compliance mechanisms, and "any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they act as international enforcement agencies."[74]

This dual-splitting role of the state would ideally lead states to adopt a more altruistic approach to problems facing the international community. One would hope that states, including those most responsible for greenhouse gas emissions, would assume the role of advocate of the international community in the protection of the global environment, hopefully with international institutions filling progressively any gap in the international legal order (Scelle, 1948).

Other theories, often used in the field of environmental policy, draw on concepts of guardianship or stewardship. One such view is that of the state serving, under current international law, as a fiduciary of humanity (Criddle and Fox-Decent, 2016). In law, the fiduciary duty imposes a legal obligation on one party to act in the best interests of another. Evan Criddle and Evan Fox-Decent argue that, in general, states' authority to govern and represent their people is dependent on their fulfilment of numerous duties, the most general of which is to establish a regime of secure and equal freedom on behalf of the people subject to their power. They contend that international institutions also serve as fiduciaries of humanity and are similarly subject to fiduciary obligations. The fiduciary theory reconciles state sovereignty and responsibility by explaining how a state's obligations to its people are constitutive of its legal authority under international law. They in fact attempt to chart a

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72 Id, at 29.

73 Id, at 35, 57 and 121.

74 Antonio Cassese "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law" (1990) 1 European Journal of International Law 210 at 212-213.

path towards greater convergence between "the moral ideal" of sovereignty as a "sacred trust" and "the legal rules intended to give it effect" in order to lend greater coherence and integrity to the international legal system as a whole.[75]

This fiduciary theory explains the cosmopolitan obligations of states to peoples as correlates of the entitlement of every member of humanity to security and equal freedom. Under this theory, therefore, the provision of assistance to peoples under threat of climate change would be viewed, by other states, as the "juridical price" of statehood. And although the right to assistance is not absolute, in the event the state denies assistance, it should be prepared to submit such decisions to independent and international review. Under this theory's framework, the centrality of international institutions raises the question of their relationship to sovereign states and the people living in them. Criddle and Fox-Decent argue that the fiduciary theory of sovereignty best explains the duty of non-refoulement as a peremptory norm of international law.[76] A state's obligation to provide refuge to foreign nationals fleeing persecution abroad flows from the intersection of the state's two positions: on the one hand, its position as a joint trustee of the earth's surface on behalf of humanity; and, on the other hand, its position as a local fiduciary that international law entrusts with sovereignty over the people within a certain territory. As a fiduciary of humanity, the state acquires a cosmopolitan duty to grant refuge when an individual fleeing unsurmountable threats to their human rights appears at its border.

Although Criddle and Fox-Decent do not address climate change directly, their views about refugee law could be adapted to the situation of Pacific peoples under threat from sea level rise, the fiduciary theory of sovereignty meaning that a state has a cosmopolitan duty to welcome peoples fleeing climate change.

This leads us back to the 2009 OHCHR report mentioned earlier:[77]

> While there is no clear precedence to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take positive action, individually and jointly, to address and avert this threat. Equally, States have an obligation to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples.

The report raises several questions warranting further investigation. Is this report referring to a positive or a moral duty? Is the duty a procedural or a substantive one? By and against whom is the duty enforceable? What does that duty actually entail?

9.4.3 Responsibility to protect

Another helpful concept might be the "responsibility to protect" (R2P) and its possible applicability to those who are displaced by natural disasters, when their own governments are unable

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75 Evan J Criddle and Evan Fox-Decent *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press, New York, 2016) at chapter 1.

76 Id, at chapter 7.

77 *Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and human rights*, above n 14, at [41].

or unwilling to assist them. R2P has become a familiar concept in the past two decades. It was first drawn out by the International Commission on Intervention and State Sovereignty (ICISS) with two central elements. The first concerned a shift in the understanding of sovereignty from "sovereignty as control" to "sovereignty as responsibility". That is, sovereignty is no longer to be understood as a right to perform whatever internal actions the state desires. The reason for sovereignty, it is submitted, is essentially the protection of the people's most fundamental rights from the most egregious acts of violence; and hence, sovereigns have a responsibility to fulfil this protection.[78] The second element of R2P is that, while the state has primary responsibility for protecting its citizens, should the state be unwilling or unable to fulfil that mandate, then the responsibility shifts to the international community.[79]

On this basis, the international community is called upon to fill what Ramesh Thakur calls the "responsibility deficit" that arises when the state fails to fulfil its primary obligation.[80] R2P thus imposes a responsibility on states to not harm and to pro-actively protect their populations; and in the event the state cannot or will not live up to its responsibility, it imposes a responsibility on the wider community of states to engage in appropriately authorised and multilateral actions – including, if need be, using coercive force – to protect those populations (Bellamy and Luck, 2019).

The core concept of R2P was elaborated first by the ICISS and then in a somewhat diluted format accepted by UN member states.[81] Thus understood, R2P is strongly distinguished from a "right of unilateral intervention", but providing legitimacy to multilateral action aimed at protecting the local population, in the process favouring initially less coercive and intrusive measures (Bellamy and Luck, 2019). R2P has since been invoked by the UN Security Council in a few resolutions.[82] Later work has largely affirmed the significance of this distinction, though some have argued the point of difference can be overplayed. Some authors have criticised several of the major claims to intervene based on R2P that distinguish it from "humanitarian intervention", stressing the fact that the significance of prevention, as distinct from reaction, is substantially overplayed in the literature (Weiss, 2016) and subject to controversies regarding its scope of application (Costi and Donohue, 2020).

What is less known is that the ICISS' original conception called for R2P to apply not only to cases of war crimes, crimes against humanity, genocide and ethnic cleansing, but also extraordinary natural or ecological disasters, hinting at the possibility of an intervention by the international community in the event of an overwhelming natural or environmental disaster, "where the state concerned is either

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78 International Commission on Intervention and State Sovereignty (ICISS) *Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, 2001) at 13.

79 Id, at 17.

80 Ramesh Thakur "Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS" (2002) 33 Security Dialogue 323 at 324.

81 *2005 World Summit Outcome* GA Resolution 60/1, A/Res/60/1 (16 September 2005) at [138]-140].

82 Security Council Resolution 1706 S/RES/1706 (31 August 2006); and Security Council Resolution 1973 S/RES/1973 (17 March 2011).

unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened."[83] Omission of any reference to extraordinary natural or ecological disaster in the *World Summit Outcome* resolution adopted by the General Assembly,[84] the non-recourse to R2P after Cyclone Nargis in 2008 inflicted intense damage on Myanmar, and the narrow interpretation and inconsistent application of R2P in recent conflicts, suggest that any attempt to extend the concept to an existing or emerging responsibility towards those at risk of displacement by climate change, let alone its operability in such a scenario, would present some difficulties.

9.5 Conclusion and questions arising

The above analysis leads me to conclude that there is no legal reason for low-lying states to "disappear" and lose statehood. Moreover, there are enough existing legal principles and emerging concepts on which the international legal community could potentially base its actions for the protection of low-lying atoll nations in the future. It seems indeed possible to interpret existing norms in a way that would help protect states and the rights of their peoples. In fact, the issues confronting low-lying states threatened by climate change are not so much legal as they are political.

Some questions ensue. Is the presumed continuity of states in the envisaged scenario likely to be politically acceptable by the international community? Where will the boundaries of acceptability lie? To what extent will states be agreeable to a duty of assistance or a responsibility to protect the affected low-lying atoll nations? Where is resistance most likely to be expected?

The key question is whether there is sufficient political will in the international community to positively interpret the existing, and any emerging, legal principles and concepts to ensure continued statehood, or at least legal personality, and to incorporate them into workable legal norms and action plans. Interested regional powers may be well advised to leverage their position and already start establishing more precisely the contours of the legal norms likely to emerge eventually from applicable legal principles and concepts.

The survival of several small developing island nations in the Pacific region and beyond can only be safeguarded if there is concerted global effort. The future development of public international law may require a renewed creative commitment. Addressing the challenges to statehood arising from climate change provides a case in point.

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83 ICISS, above n 78, at 33.

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