Disappearing island states and human rights

Preservation of statehood and human rights in times of climate change

Isabelle Berggren
# Table of Contents

Abbreviations .................................................................................................................. 4

1 Introduction .................................................................................................................. 5
   1.1 Background ............................................................................................................. 5
   1.2 Relevance .............................................................................................................. 6
      1.2.1 Climate change-related threats to the enjoyment of human rights .............. 6
      1.2.2 Climate change-related threats to the protector of human rights .......... 8
   1.3 Purpose and research questions ............................................................................ 9
   1.4 Limitations ........................................................................................................... 9
   1.5 Method and material ............................................................................................. 10

2 Impacts on effective statehood by climate change .................................................... 13
   2.1 Formulating the problem of potentially disappearing statehood ..................... 13
   2.2 Traditional objective criteria for statehood ......................................................... 14
      2.2.1 The classic formulation of statehood ............................................................. 14
      2.2.2 A permanent population ............................................................................... 15
      2.2.3 A defined territory ......................................................................................... 15
      2.2.4 Government ................................................................................................... 17
      2.2.5 Capacity to enter into relations with the other states – independence ....... 18
   2.3 Additional criterion of recognition ...................................................................... 20
      2.3.1 No automatic state extinction due to loss of objective criteria ............... 20
      2.3.2 Recognition as constitutive element for state continuation ..................... 20
      2.3.3 Two possibilities for state continuation ....................................................... 22

3 Preservation of traditional statehood ........................................................................ 23
   3.1 Identifying the problem – inhabitable territory ................................................. 23
   3.2 Creating new territory through artificial islands .............................................. 24
   3.3 Obtaining new autonomous territory within already existing territory .......... 26

4 Preserving statehood through continued recognition .............................................. 28
   4.1 The need for a new alternative definition ......................................................... 28
   4.2 Preserving an administrative government – government-in-exile ................. 28
   4.3 Departing from territory and redefining the basis for population .................. 30
   4.4 Reasons for continued recognition of the affected island states .................... 31
      4.4.1 Different kinds of reasons ............................................................................. 31
      4.4.2 A new notion of statehood within international law ................................ 31
4.4.3 Legal reasons – a legal duty of continued recognition? .................. 33
4.4.4 Moral reasons – political implications for recognition .................. 36

5 Continued statehood and the protection of human rights .................. 41
  5.1 Technical ability to protect human rights .................................. 41
  5.2 Effective governance and independence .................................. 41
  5.3 Diplomatic protection ......................................................... 44

6 Conclusion and a look into the crystal ball .................................. 46
  6.1 Conclusion ........................................................................... 46
  6.2 A look into the crystal ball .................................................... 47

Sources .......................................................................................... 49
  International and Regional Treaties ............................................. 49
  Resolutions by the United Nations General Assembly .................. 49
  Draft Articles and Records by the International Law Commission .... 50
  Other International Instruments .................................................. 50
  Cases and Awards ...................................................................... 50
  Public Materials from the United Nations .................................... 51
  Other Published Materials .......................................................... 51
  Literature .................................................................................. 52
  Other Sources ............................................................................. 58
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CPNI</td>
<td>Centre for the Protection of National Infrastructure</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EU</td>
<td>European Union</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>GOS</td>
<td>Government Office for Science</td>
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<td>HRC</td>
<td>United Nations Human Rights Council</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>LRI</td>
<td>Legal Response Initiative</td>
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<td>NRC</td>
<td>Norwegian Refugee Council</td>
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<td>OHCHR</td>
<td>Office of the United Nations Commissioner for Human Rights</td>
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<tr>
<td>OJEU</td>
<td>Official Journal of the European Union</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>SIDS</td>
<td>Small Island Developing States</td>
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<tr>
<td>TEU</td>
<td>Consolidated Version of the Treaty on European Union</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNEPA</td>
<td>United States Environmental Protection Agency</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<tr>
<td>UN-OHRLLS</td>
<td>United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States</td>
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1 Introduction

1.1 Background

In a world of constant development and internationalisation, states are constantly exposed to new threats, some of them of existential dimensions. Climate change is one of them and it is also a phenomenon which poses complex issues for international law to handle.\(^1\) Due to the rising sea level as reported by the Intergovernmental Panel on Climate Change (IPCC), it is predicted that a certain number of low-lying coral atoll island states with an elevation of only a few metres will sink underwater and disappear within the end of the 21\(^{st}\) century.\(^2\) Furthermore, recent studies show that these island states will become uninhabitable long before that due to an increase in frequency and severity of wave-driven flooding, causing increased salination of the soil, damaging the islands’ infrastructure, and leaving the islanders without usable groundwater and without a possibility to stay within their territorial states.\(^3\)

With territory as the fundamental constituent of statehood and state sovereignty, upon which international law is founded, this future scenario raises a number of issues from a legal perspective. As the modern world has never experienced the complete physical disappearance of a state’s entire territory, the novelty of the issue is striking.\(^4\) Is it possible for the island states to continue to legally exist albeit having lost their territory and, if so, in what shape and for what purpose? While these questions can be addressed from many perspectives, this thesis seeks to address them from the perspective of human rights. Particularly it is the territorial state, which risks disappearing, that bears the primary responsibility for protecting human rights. At the same time, climate change negatively affects the enjoyment of certain human rights.\(^5\) Therefore, it is for the future of these states and their populations important to find a solution in which not only statehood as a legal subject is ensured but one that provides that the subject also has the ability to protect human rights.

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\(^5\) See section 1.2.
1.2 Relevance

1.2.1 Climate change-related threats to the enjoyment of human rights

While there is no substantive legal support that a healthy environment is itself a basic human right, it is an indispensable requirement for the enjoyment of other human rights.6 The European Court of Human Rights (ECtHR) noted already in its case law during the 1980s and 1990s that climate change has an apparent impact on the direct enjoyment of the rights to life, property, home and private life.7 In the context of a rising sea level and increasing wave-driven flooding, the human right most often lifted as being at risk is the right to life, regulated in for example Article 6 of the International Covenant on Civil and Political Rights (ICCPR).8 The Office of the United Nations High Commissioner for Human Rights (OHCHR) notes that the right to life “encompasses existence in human dignity with the minimum necessities of life”, whereby the human right’s close connection to the components adequate food, clothing and housing is obvious.9 These components of life are clearly threatened by global warming, which is causing the destruction of people’s ability to undertake economic activities such as hunting, fishing and farming.10 In this regard, small coral atoll island states are especially vulnerable not only due to their geological location of being surrounded by large expanses of ocean, but also because of their socio-economic factors.11 Due to factors of size, limited natural resources, sensitive economies, poorly developed infrastructure, limited human resources and large populations, these states belong to a distinct group of developing states called Small Island Developing States (SIDS).12 Although stressed by the IPCC of having different risk profiles since not being

7 See for example the judgements of the ECtHR in Arrondelle v. the United Kingdom of 15 July 1980; Powell and Rayner v. the United Kingdom of 21 February 1990; López Ostra v. Spain of 9 December 1994, discussing the impacts on the right of private life in Article 8 of the ECHR due to noise nuisance in the first two cases and of offensive smell in the latter. See also García San José, 2005, p. 8; Loucaides, 2007, p. 171-176; McAdam, 2012, p. 59.
10 Grote Stoutenburg, 2015, p. 347; McAdam, 2012, p. 52 and 56; Willcox, 2015, p. 44.
11 Impacts of climate change does not act in isolation or with environmental factors only but also in relation to social and economic factors, see Maguire & McGee, 2017, p. 56; Nurse, et al. (eds.), 2014, p. 1619-1625; Grote Stoutenburg, 2015, p. 36; McAdam, 2012, p. 124-126; Willcox, 2015, p. 11-13.
homogenous, they share a number of characteristics making them what legal scholar Susannah Willcox calls “hot spots” of climate change-related harms, and collectively placing them in focus of the issue at hand.\(^{13}\)

Climate change may potentially also cause island states to lose their statehood, since territory is the constitutive criterion for statehood in international law. Since the international community has not yet handled the complete loss of a state’s physical territory, the consequences of what will happen to such statehood is uncertain.\(^{14}\) If statehood is lost, the collective human right of self-determination will be affected. This right is protected in for example the common Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ICCPR, which entails that all people may “freely determine their political status and freely pursue their economic, social and cultural development”.\(^{15}\) While this right holds an internal as well as an external aspect, the relevance of the latter is excluded due to the uncertainty of its applicability outside the decolonisation context and for the continuation of statehood rather than its establishment.\(^{16}\) The internal aspect is less controversial and refers to the political entitlements within the framework of an existing state.\(^{17}\) It is closely linked to freedom of expression, assembly and association and the right to take part in the conduct of public affairs and to vote.\(^{18}\) As this right is to be exercised within the nation state of the people and is dependent upon the stable institutions permitted within the territory, it is clearly threatened with island states becoming uninhabitable and territorially disappearing.\(^{19}\) Legal scholar Tracey Skillington argues that “there is a danger [island state populations] will not only lose jurisdictional control, but the moral and political authority to continue to establish justice among their members, as well as access to marine, land, and other resources necessary for the preservation of their community in proximity”.\(^{20}\)

\(^{13}\) Willcox, 2015, p. 11. See also Nurse, et al. (eds.), 2014, p. 1618.

\(^{14}\) Atapattu, 2014, p. 14; Crawford, 2007, p. 48; Dixon, 2013, p. 117 & 161; Shaw, 2017, p. 361. The risk and uncertainty of island states’ statehood being lost has been lifted by legal scholars, see Atapattu, 2014; Burkett, 2011; Gagain, 2012; Grote Stoutenburg, 2015; Kittel, 2014.

\(^{15}\) The right to life is an individual human right, see Shaw, 2017, p. 221. The right to self-determination is a collective human right, see Shaw, 2017, p. 221.


\(^{17}\) Saul, 2011, p. 614.

\(^{18}\) Shaw, 2017, p. 225.

\(^{19}\) Doig, 2016, p. 73; Saul, 2011, p. 614; Skillington, 2016,

\(^{20}\) Skillington, 2016,
The loss of statehood would most likely also render their populations *de jure* stateless as they are not guaranteed citizenship in other states.\(^{21}\) This would in turn compromise their right to a nationality as proclaimed in Article 15(1) of the Universal Declaration on Human Rights (UDHR).\(^{22}\) Although having to resettle in other states due to the loss of their former habitats and thereby falling under the protection by the legal regime for the treatment of aliens of the host states, this relevant standard of treatment under international law is most often lower than the one offered by a state to its own nationals.\(^{23}\) This means that the island populations that have resettled will enjoy a lesser degree of protection both compared to the citizens of the host states and compared to what they previously enjoyed in their home states. As can be inferred from this, and as is held by legal scholar Malcom Shaw, “it is only through the medium of the state that the individual may obtain the full range of benefits available under international law, and nationality is the key”.\(^{24}\) In the context of this thesis, the loss of island statehood and consequently island nationality would render the islanders “objects of international law for whom no subject of international law is internationally responsible”.\(^{25}\)

### 1.2.2 Climate change-related threats to the protector of human rights

Not only the enjoyment of human rights but the protection of it would be affected if statehood is lost. Article 2(1) of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders) states that “[e]ach State has prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms”. Malcolm Shaw argues that “[m]ost international human rights conventions obligate states parties to take certain measures with regard to the provisions contained therein, whether by domestic legislation or otherwise”.\(^{26}\) In other words, effective domestic protection and the success of international standards ultimately depend on the power and capacity of states. The nation state is crucial both for actively protecting the

\(^{22}\) Grote Stoutenburg, 2015, p. 347. The determination of citizenship and nationality is left to the domestic jurisdiction of states, see Shaw, 2017, p. 494.
\(^{24}\) Shaw, 2017, p. 612. It is also held by Daes that nationality is “the only link between the individual and the rights, benefits and duties of international law”, 1992, p. 35.
\(^{25}\) Daes, 1992, p. 35.
\(^{26}\) Shaw, 2017, p. 252. Note that states have a certain measure of discretion, see Smith, 2016, p. 180-181. The UN Declaration on Human Rights Defenders is not legally binding but is nonetheless relevant as it is based upon internationally recognised human rights standards.
human rights of their population and for providing the legal arena for exercising certain collective human rights, such as internal self-determination.

Evidently, from the perspective of human rights the island states as legal subjects of international law must be preserved. To avoid rendering the island populations de facto stateless, these subjects preserved must also have the technical ability to protect human rights. This follows the interpretation on de facto statelessness made by the UNHCR as also including the technical inability of a state to provide protection of human rights, and not only the intentional deprivation of it. Thus, climate change is threatening both the existence of island statehood and the rights of the populations of these states to enjoy their human rights and have those rights protected.

1.3 Purpose and research questions

The overall purpose of this thesis is to analyse the impact of climate change on the statehood of low-lying island states, as well as to analyse and discuss possible legal avenues for ensuring that these states can continue to effectively protect human rights.

In order to fulfil this purpose, the following research questions are posed:

- How are the different effective criteria of statehood affected by the loss of inhabitable and physical territory?
- What are the possible solutions for preserving the statehood of these entities, in a traditional sense and in a new deterritorialised sense?
- Would a continuation of these states in a deterritorialised sense fulfil their responsibility to protect human rights of their populations?

A brief future looking assessment and discussion will also be offered, as well as some reflections on future research.

1.4 Limitations

While the issue of disappearing territory raises a lot of questions and issues of international law, this thesis cannot cover all. The aspects of migration law, the law of the sea, and security policy

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27 Massey, 2010, p. 64-65. It shall be noted that this interpretation of de facto statelessness has not always prevailed. Rather, the historical view has been that such statelessness occurs only when the state refuses to grant protection, see discussion in Grote Stoutenburg, 2015, p. 424-425.
will not be addressed. Without suggesting that further research on these areas is not necessary, some of them have been the main focus of legal research previously made. Furthermore, mitigation and how to slow down the process of global warming will not be discussed albeit being of great importance. Rather, this thesis is based upon the assumption that mitigation itself will not be able to prevent the loss of territory.

During the discussion of preserving traditional statehood, the possibilities of preserving already existing territory is excluded. This is motivated since these solutions are mainly concerned with scientific issues and considerations, rather than legal difficulties. During the discussion of preserving a new deterritorialised notion of statehood, where resettlement of the island populations cannot be avoided, the legal and practical possibility of such resettlement in other states is excluded. This is because the thesis focuses on the preservation of statehood as a protector of human rights, rather than on other practical difficulties for the populations. It shall also be noted that although a great part of a people’s human rights consists of their own choices of lifestyle, the preferred scenarios of the affected populations will not be discussed due to the difficulty in defining this within the timeframe given.

1.5 Method and material
The purpose of the thesis requires an extensive and sometimes innovative analysis of contemporary international law. The traditional international legal method used consists of interpretation and analysis of the international sources of law. The enumeration of sources in Article 38(1) of the Statute of the International Court of Justice (Statute of the ICJ), listed to be applied by the International Court of Justice (ICJ) in its judicial decisions, is internationally recognised as enumerating also the general sources of international law. While there exist no explicit hierarchy among these sources, international conventions and customary international law are of highest relevance. General principles of law are said to supplement the former ones, while judicial decisions from domestic courts and international literature shall be used in an interpretative manner.

There is no international regulation on how to handle the loss of physical and inhabitable territory. Instead, legal regimes covering certain aspects of state establishment, continuation  

and extinction is analysed. These include, *inter alia*, the Montevideo Convention on the Rights and Duties of States (Montevideo Convention) when discussing the traditional criteria for statehood, the United Nations Convention on the Law of the Sea (UNCLOS) when discussing the creation and legal status of artificial islands, the legal regime of cession of territory when discussing cession as a possible legal solution to continued statehood, and the UN Declaration on Human Rights Defenders when discussing the state as a legal protector of human rights. Furthermore, as a matter of customary international law, the additional criterion of recognition for the status of statehood is lifted. For the sake of finding reasons for continued recognition of the states without territory, the draft articles on state responsibility presented by the International Law Commission (ILC) is analysed albeit not being binding law.

Mostly crucial for analysing the issue of potentially disappearing statehood is the subsidiary source of international literature. The literature used is mainly concerning public international law, within which area the literature of James Crawford, Malcolm Shaw, and David Raic is especially used to discuss and analyse the effective characteristics of statehood and other aspects of general international law. Their interpretation of the different existing legal regimes within public international law is described and applied to the context of the thesis. Additionally, some literature by international legal experts on the issue of disappearing islands is used to create deeper understanding of the problematic aspects already acknowledged. This includes the work by Jenny Grote Stoutenburg, Lilian Yamamoto and Miguel Esteban, and Susannah Willcox. While not directly falling within the category of literature, some research and reports from international organisations is presenting the material needed for explaining the climate change from the view of island states. Some of these also consists of sources found on the internet.

While no international or national case law on disappearing island statehood yet exist, the state practice used illustrates general issues of public international law. It also provides examples of problematic situations and aspects concerning the subject of states previously handled. For instance, practice on governments-in-exile illustrates the continuation of statehood when having lost territory as a constituent criterion for effective governmental power and provides the basis when discussing the administrative possibility of low-lying island states to have a deterritorialised government. The practice on failed states illustrates the continuation of states having no functioning government. Both of these practices are further analysed to find legal
and moral reasons behind continued recognition of statehood, of which a part of this thesis is concerned.

Throughout the thesis, an integrated analysis is made as this is required for reaching answers to the research questions posed. The different legal regimes of certain important aspects of international law are analysed on the basis of literature and in the context of this thesis. The search for possibilities of preserving statehood in its function as a protector of human rights is based upon a similar analysis and discussion. Lastly, after a brief and overall analysis of the thesis, a look into the crystal ball defines the further issues with disappearing island statehood and presents some ideas for future research.
2 Impacts on effective statehood by climate change

2.1 Formulating the problem of potentially disappearing statehood

States are the most important and powerful of all subjects of international law and their existence is the basis for the rights and duties that the greater part of the international legal order is concerned.\textsuperscript{30} Statehood is important for the sake of internal security and defence, whereas states are the subject capable of invoking the legal theory of self-defence when being under armed attack.\textsuperscript{31} It is important for establishing and maintaining international relations with other states through treaties and by participating in international and regional organisations such as the UN and the European Union (EU).\textsuperscript{32} Furthermore, and for the purpose of this thesis, it is important for being the legal protector of human rights.\textsuperscript{33} The importance of identifying which entities constitutes states is therefore apparent and of equal importance is the determination of their continued existence in cases of external or internal threats to their constitutive elements. Nonetheless, this is one of the most controversial and complex issues of international law, and although previously held to be a “near practical impossibility”, the involuntary loss of statehood may become a fact when climate change is leaving low-lying coral atoll islands uninhabitable and eventually completely submerged underwater.\textsuperscript{34}

Since the establishment of the UN in 1945, there have only been a few cases of state extinction.\textsuperscript{35} Nonetheless, international law holds rules regarding the formal disappearance of states and is not alien to the situation as such. Instead, it is widely recognised that political entities are not static but subject to change and that new states may both emerge and disappear.\textsuperscript{36} The international law regime governing the extinction of states concerns different modes of state succession, such as dissolution, merger and absorption, and is defined in Article 2 of the

\textsuperscript{31} The right to self-defence is inherent for states, following Article 51 of the UN Charter. See also Sterio, 2011, p. 217-218.
\textsuperscript{32} A treaty is an international agreement concluded between states, following Article 2(1)(a) VCLT. States are the parties to the UN and the EU, following Article 3 of the UN Charter and Article 1 of the TEU respectively. See also Sterio, 2011, p. 218-219.
\textsuperscript{33} See section 1.2.2.
\textsuperscript{34} Dixon, 2013, p. 124. See also McAdam, 2010, p. 111, stating that there has been “virtually [no case] of involuntary extinction”.
Vienna Convention on Succession of States in Respect of Treaties (VCSSRT) as “the replacement of one State by another in the responsibility for the international relations of territory”.

In these situations, the predecessor state will cease to exist while a successor state will gain title over the territory in question, but it is apparent that this legal regime cannot be applied in the context of climate change where the territory will eventually be completely lost and no successor state will or can arise.

Therefore, the objective characteristics of effective statehood must be analysed to understand disappearance of territory from a legal point of view.

2.2 Traditional objective criteria for statehood

2.2.1 The classic formulation of statehood

Despite the importance of statehood within international law, there is no legal universal and authoritative definition of the concept but the Montevideo Convention holds a definition of statehood that is regarded as reflecting customary international law. According to Article 1 of the convention, an entity constitutes as state if possessing the four qualifications of “(a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with the other states”. This definition only concerns the establishment of statehood and does not explicitly suggest that the continued fulfilment of the criteria is necessary for the continuation of states having once fulfilled them. Rather, as shall be seen below, modern international law features an additional criterion relevant for both state establishment and state continuation when all objective characteristics are not, or no longer, fulfilled. But as this additional criterion becomes relevant in situations of a lack of objective characteristics, the classic formulation of statehood still remains the core of statehood and the basic starting point for any analysis of state continuation, of which this thesis is concerned.

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38 Predecessor state is defined as “the State which has been replaced by another State” while successor state is defined as “the State which has replaced another State” in Article 2(c) and (d) of the VCSSRT. See also Atapattu, 2014, p. 18; Burkett, 2011, p. 354; McAdam, 2010, p. 109-110; Mullerson, 1993, p. 475; Park, 2011, p. 6; UNHCR Submission, 2009, p. 1. There are also modes of state succession in which the predecessor state continues, such as cession and separation, see Shaw, 2017, p. 737–740.
41 Grote Stoutenburg, 2015 p. 250-251, stating that the classic formulation remains the basic starting point for an analysis of state extinction. See also section 2.3.
2.2.2 A permanent population

The first criterion of a *permanent population* is essential as states are held to be “aggregates of individuals” and “organization[s] of individual human beings and groups”.\(^{42}\) Albeit being of great importance, there is no minimum amount of population required and some of the small island states at risk of disappearing due to climate change, such as Tuvalu and Nauru, have among the smallest populations in the world.\(^{43}\) As the criterion is requiring the population to be *permanent* and thereby distinguishes between established and nomadic populations, it appears that the element of an organised community is understood solely through their existence on a certain *territory*, rather than depending upon nationality or cultural or linguistic ties.\(^{44}\) The population within this territory must exercise a form of communal life enabled through a basic social infrastructure while having “the will to form a social and political community and to unfold their lives on the given territory, not just be present there for some ephemeral cause”.\(^{45}\) Evidently, there is an implied nexus between a state’s population and its territory and this is clearly supported by legal scholars. James Crawford argues that the criterion of a permanent population “is intended to be used in association with that of territory” and Jenny Grote Stoutenburg holds that “[b]y leaving their territory, the people making up that territory’s population would lose the only criterion that identifies them as such”.\(^{46}\)

2.2.3 A defined territory

*Territory* seems to be the element of statehood most evidently problematic. Territory is generally identified as the fundamental prerequisite for the existence of states and its importance is illustrated in various statements of legal scholars, such as “(e)vidently, States are territorial entities” (James Crawford), “statehood without a reasonably defined geographical base is inconceivable” (Malcolm Shaw) and “[a] State without a territory is not possible” (Lassa Oppenheim).\(^{47}\) There is no minimum amount of territory required and the island states of Tuvalu and Nauru have among the smallest territories.\(^{48}\) There is no requirement of defined and settled boundaries and an often-cited exemplification of this is the ruling by the German-Polish

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\(^{43}\) Stahl & Appleyard, 2007, p. 7, Table 1.2, listing the population size of Pacific Island countries. See also Crawford, 2007, p. 52; Dixon, 2013, p. 119; Grote Stoutenburg, 2015, p. 266; McAdam, 2010, p. 112; Raic, 2002, p. 58; Shaw, 2017, p. 158.


\(^{45}\) Grote Stoutenburg, 2015, p. 272.

\(^{46}\) Crawford, 2012, p. 128; Grote Stoutenburg, 2015, p. 268.


\(^{48}\) Stahl & Appleyard, 2007, p. 6, Table 1.1, listing the demographic size of Pacific Island countries. See also Dixon, 2013, p. 119; Grote Stoutenburg, 2015, p. 252; Raic, 2002, p. 60; Shaw, 2017, p. 158.
Mixed Arbitral Tribunal in *Deutsche Kontinental Gesellschaft v. Polish State*, which states that for statehood to exist “it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited”. The criterion does not seem to be of a particularly strict character, but I argue that once a state’s territory has *completely* submerged underwater it will no longer have the sufficient consistency required and the territory criterion will no longer be met.

Besides existing, the territory must be *inhabitable* for the territory criterion to be met. This is because the criterion of a permanent population within a certain defined territory requires the territory to hold a population on a permanent basis. Since territory “is the physical basis that ensures that people can live together as organized communities”, it is evident that “in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a state”. The notion of being inhabitable also includes the possibility of holding a basic social infrastructure, as this is required for the sole understanding of the element of a permanent population. This means that although the complete submersion of a state’s territory will cause the loss of the two initial constitutive criteria for statehood, so will also the foregoing loss of a state’s entire inhabitable territory.

The facts that migration is usually a gradual process and that the islanders will resettle within other territories gradually raise the question of at what exact point the element of a permanent population on a defined territory ceases to be met. There does not appear to be a requirement of the *entire* population to live on the territory of the state. Rather, the criterion has been fulfilled even in cases where a large, or even the greatest, proportion of the populations has lived outside the state’s territory. This suggests that once no longer a small amount of inhabitable territory possible for not even a very small portion of people to form a community exists, the two initial criteria of statehood is lost.

53 McAdam, 2012, p. 16. The main reason for climate change-related migration to be gradual is that climate changes themselves are gradual, see GOS Final Project Report, 2011; Laczko & Aghazarm (eds.), 2009.
55 Grote Stoutenburg, 2015, p. 269-271, discusses a number of 50 persons as a possible quantitative guideline.
2.2.4 Government

The characteristics for statehood have their basis in the principle of effectiveness and were stipulated with the aim of defining entities as states only if they had the capability of effectively functioning on the international arena.\(^ {56}\) As it is the *government* that handles the international relations and can distinctly be described as “an institutionalized political, administrative and executive organizational machinery” with the purpose of governing the community of a state, this principle implies the condition of *effectiveness* for the fulfilment and existence of the government criterion.\(^ {57}\) Legal scholar James Crawford even argues that an effective government “might be regarded as central to its claim to statehood”.\(^ {58}\)

The effectiveness required has an internal and an external component. Although no exact form of government is prescribed in international law, the *internal component* refers to the government’s ability to “prescribe, implement and enforce governmental authority vis-à-vis the state’s subjects”, thereby requiring a legislative, judicial and executive branch that are “capable of establishing and maintaining a legal order”.\(^ {59}\) The *external component* refers to the ability of the government to execute their obligations under international law, which is further defined by legal scholar Jenny Grote Stoutenburg as the ability “to provide legal security to other states that agreements will be honored”.\(^ {60}\) Although the importance of effectiveness has been contested and a lesser degree of actual ability to exercise authority could be accepted were the state possess a legitimate right to governmental power, a more fundamental issue presents itself for island states.\(^ {61}\) International legal scholars agree that this authority must have a *territorial and personal scope* in order to be effective. James Crawford clarifies this by stating that governmental power is to be “exercised, or capable of being exercised, with respect to some territory and population”.\(^ {62}\) This supports the view that the criteria of territory and population criteria are not distinct on their own but instead held to be “constituent[s] of government and independence”.\(^ {63}\) The existence of a population and a territory is not only required for the fulfilment of those initial criteria but also for the existence of a government fulfilling the

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\(^ {56}\) Crawford, 2007, p. 46 & 97; Grote Stoutenburg, 2015, p. 275. See also section 2.3.2, discussing the declaratory theory at basis of the principle of effectiveness.

\(^ {57}\) Raic, 2002, p. 62. See also Crawford, 2007, p. 55; Dixon, 2013, p. 120.

\(^ {58}\) Crawford, 2007, p. 56.


\(^ {60}\) Grote Stoutenburg, 2015, p. 275.

\(^ {61}\) Grote Stoutenburg, 2015, p. 275-278. See however Crawford, 2007, p. 56, stating that the application of the requirement of efficiency depends upon whether or not there are opposing claims to statehood.


\(^ {63}\) Crawford, 2007, p. 52.
condition of effectiveness. Territory is also required for presenting the government with a physical location.

Legal authors have argued that the loss of either territory or population is the first indicium of loss of statehood, which implies that there will be a pre-face until the complete disappearance of statehood. But the close link between all criteria and the general quest of the populations to remain on the islands for as long as possible more likely supports the claim that all hitherto discussed criteria will be lost at the same time, namely when the territory becomes uninhabitable.64 There would then be no territory capable of holding a permanent population and no government capable of effectively exercising its governmental authority.

2.2.5 Capacity to enter into relations with the other states – independence

The last criterion mentioned in the Montevideo Convention is the capacity to enter into international relations. This capacity is not exclusive to states but can also belong to international organisations, autonomous national authorities, non-independent states and other bodies, which are all capable of maintaining relations with states. Thus, it does not prescribe a distinguishing feature of statehood.65 In order to differentiate the legal status of different international legal subjects as regards capacity, James Crawford argues that the capacity for states to enter into international relations depends on two conditions. First, there must be a government capable of exercising authority over a defined territory and a population therein and capable of entering into legal obligations with other states. Second, this government must be independent of other state legal orders and cannot be subject to any other sovereignty.66 This independence is concerned with the functions of a state, which Judge Huber of the Permanent Court of Arbitration (PCA) illustrated in the Island of Palmas (or Miangas) (United States v. the Netherlands) arbitration in 1928 through the words of; “Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State”.67 Based on this, the capacity for states to enter into international relations is regarded

67 The arbitral award by Max Huber in Island of Palmas of 4 April 1928, p. 838. See also Crawford, 2012, p. 120, stating that independence is “the decisive criterion of statehood” and Grote Stoutenburg, 2015, p. 292, holding that independence is “proof of its statehood”.

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as “a conflation of the requirements of government and independence”. As the requirement of government is separately stipulated in the Montevideo Convention and has been discussed above, the element of independence remains and shall be discussed. Before doing so, some general remarks shall be done. Due to the element of independence being dependent upon the existence of an effective government, it is more often comprehended as a consequence of international legal personality rather than a constitutive criterion for its existence. Still, as this thesis later turns to discuss the preservation for statehood in its function of protecting human rights, the element of independence and state function must be generally addressed.

Legal scholar David Raic argues that independence requires “that a separate territorial and political entity possesses the legal capacity to act as it wishes, within the limits given by international law”. The criterion is divided into formal and actual independence both of which a state must possess in order to qualify as independent. Formally, independence refers to the authority and sovereignty of the state’s government having been granted to its separate authorities, which requires that there are no valid claims by another state to govern the territory of the state at hand. The requirement of actual independence refers to “the minimum degree of real governmental power at the disposal of the authorities of the putative State that is necessary for it to qualify as ‘independent’” (emphasis added). This is generally based upon two prerequisites, although being relative and depending on the context in which the claim to or loss of independence is made. The first prerequisite concerns the physical ability of governmental power, while the latter refers to the freedom of foreign domination and control on a permanent long-term basis. Considering the lack of a territorial and personal scope for governmental powers to be exercised within, it becomes clear that independence in its traditional sense will be lost due to the loss of the three initial criteria for statehood. Solutions for ensuring the continuation of statehood must take this into account.

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70 Raic, 2002, p. 75.
73 Crawford, 2007, p. 72.
74 Crawford, 2007, p. 63 & 72, stating that independence is relevant and that the level of independence required depends on the context in which it is claimed or lost.
75 Grote Stouwenburg, 2015, p. 292.
2.3 Additional criterion of recognition

2.3.1 No automatic state extinction due to loss of objective criteria
As has been stated, the forthcoming loss of traditional objective criteria for statehood due to climate change will not necessarily and automatically lead to the loss of statehood.\(^76\) Instead, these criteria have in certain instances been supplemented and complemented by the additional criterion of recognition, capable of allowing states to both become established and continue albeit lacking constitutive criteria.\(^77\) James Crawford argues that “[w]here there are substantial changes in the entity concerned, continuity might depend upon recognition” (emphasis added), and both other legal scholars and state practice support this view.\(^78\) Through the element of recognition, modern international law features a strong presumption in favour of the continued existence of effectively established states. Even drastically changes in and losses of constitutive elements, such as population, territory and government, do not necessarily entail state extinction.\(^79\) This assumption of continuity might arguably be the principal explanation for the very low number of states having become extinct since the establishment of the UN. Legal scholar Milena Sterio describes this legal order as: “[S]tatehood functions as a shield, assuring those entities that qualify as a state a certain protection from attacks on their sovereignty. Minor cuts and bruises on the statehood shield do not affect the protected state; it is only in rare cases when the entire structure crumbles that a state may crumble and decompose into smaller units or become absorbed by larger ones”.\(^80\)

2.3.2 Recognition as constitutive element for state continuation
At the time of the Montevideo Convention’s establishment, the declaratory theory of statehood prevailed. According to this, the existence of a state as an international legal person is a matter of fact based on criteria of effectiveness and is independent from the political recognition of


\(^79\) Ibid.

The element of recognition was not stipulated as a condition for statehood but held to be irrelevant. This theory is obviously disadvantageous for the affected island states since it, as held by Jenny Grote Stoutenburg, “negates the possibility that entities which do not fulfill [sic] the effective criteria of statehood might be qualified as states”. But the theory is not corresponding to the crucial importance granted to the element of recognition for the continued existence of statehood in state practice. Rather, the opposing constitutive theory of statehood, entailing that statehood is in fact derived from recognition by other states, is supported. Therefore, the element of recognition as a substitute for lacking criteria of statehood will hereafter be defined as constitutive.

In the context of this thesis, the issue is whether the previously gained recognition of island states will be withdrawn. Whereas the withdrawal of recognition from a state generally takes place implicitly through the recognition of a successor state, the absence of a successor state would necessitate an express declaration of withdrawal. It is generally asserted by legal scholars that states cannot withdraw de jure recognition accorded to another state, or that this is only possible in exceptional circumstances. Of another view is a previous judge of the ICJ, Hersch Lauterpacht. He holds that recognition is not a “contract or a grant” and “[i]n principle there would seem to be no reason why recognition should not be liable to withdrawal so long as that act, like that of granting recognition, is conceived not as an arbitrary act of policy but as one of application of international law, namely as a declaration that the objective requirements of recognition have ceased to exist”. In other words, withdrawal of recognition is not allowed only for as long as the objective characteristics of statehood are still present, but becomes permissible once they are no longer met. Accordingly, the recognition of low-lying island states can soon be withdrawn and due to recognition in this sense being constitutive, this would also withdraw their statehood.

82 Article 3 of the Montevideo Convention states that “[t]he political existence of the state is independent of recognition by the other states”.
86 Definition of de jure and de facto recognition respectively in Shaw, 2017, p. 341. De facto recognition is initial and imply that there is some doubt as to the long-term viability of the government in question. De jure recognition is subsequent and follows when the recognising state accepts that the effective control displayed by the government is permanent and firmly rooted and there are no legal reasons detracting from this. See also Grote Stoutenburg, 2015, p. 299; Shaw, 2017, p. 345-347.
87 Lauterpacht, 1945, p. 179-180.
88 This illustrates the continued importance of the traditional criteria of statehood as stipulated in the Montevideo Convention.
Since all independent states of the international community have the sovereignty and competence to regulate their own international relations, the withdrawal of recognition by an individual state is only bilateral and only has bilateral factual and legal consequences. It does not impact the relations between the questioned state and other actors. Thus, it cannot lead to state extinction.\textsuperscript{89} Statehood will be lost only due to the withdrawal of recognition by several, potentially influential, states and thereby, the decision of state continuation and state extinction lies in the hands of the \textit{“international community”} as a whole.\textsuperscript{90} Legal scholar Jenny Grote Stoutenburg argues that this conclusion is supported by the withdrawal of recognition in cases of violation of \textit{jus cogens} norms and the dissolution of the Socialist Federal Republic of Yugoslavia despite a claim to continuity by the Federal Republic of Yugoslavia. In these cases, the extinctions of states were caused by a decision by the majority of states, rather than the isolated acts undertaken by individual states.\textsuperscript{91} Another adjacent issue is the possible exclusion from membership in the UN and thereby exclusion from practical capacity to act on the international arena for the island states, but this will not be further analysed here as it is based on a separate legal framework.\textsuperscript{92}

\textbf{2.3.3 Two possibilities for state continuation}

It becomes clear that there are two distinct possibilities for ensuring the continued existence of these states. The first possibility derives from the classic formulation of statehood and entails the preservation or obtainment of the traditional objective criteria of statehood. The second possibility derives from the additional criterion of recognition in a constitutive sense and depends upon the continued recognition by the international community as a whole, albeit not having any territory for the population to live upon and for the government to exercise power within. The latter possibility would entail the recognition of a new notion of statehood departing from the importance of territory but still meeting the basic elements necessary for the state to function. These two separate solutions will be analysed in chapters 3 and 4 respectively.

\textsuperscript{89} Grote Stoutenburg, 2015, p. 301. See also argument held by Lauterpacht, 1945, p. 179, although being somewhat outdated. He points towards the implications that would have “to the independence and the dignity of the State and [be] inimical to the stability of international relations”.

\textsuperscript{90} Stoutenburg, 2015, p. 314. The term “international community” shall not be further defined but generally refers to the large group of states, whereas the political influence of the states is also relevant.

\textsuperscript{91} Grote Stoutenburg, 2015, p. 301-302.

\textsuperscript{92} See discussion regarding this in Grote Stoutenburg, 2015, p. 304-313.
3 Preservation of traditional statehood

3.1 Identifying the problem – inhabitable territory

The underlying problem with the continued existence of traditional statehood for island states is that their territories are becoming uninhabitable and that this will render all constitutive criteria for statehood lost. Therefore, the main task for preserving traditional statehood is to either preserve existing inhabitable territory or to obtain new inhabitable territory. If the affected state can claim sovereignty over a defined territory, the legal protector of human rights will be preserved and the right of the populations to exercise collective human rights will be ensured.

The first possibility of preserving territory entails that the island state undertakes measures to maintain at least some part of its territory inhabitable, and moreover ensures that the territory actually stays inhabited.93 Suggestions in this area have been made as regards the construction of protective structures such as sea walls or by artificially elevating their territory.94 But as these solutions are mainly concerned with scientific issues and considerations and does not invoke many legal difficulties for the issue of statehood, they will not be further discussed in this thesis.95 It shall only be noted that they, although seemingly offering the most straightforward and least legally complicated ones, entail many practical difficulties and that they are therefore not presenting viable alternatives.96

The second possibility of preserving traditional statehood entails obtaining new inhabitable territory. This also includes a number of practical difficulties, but of greater interest are the legal complications it involves. As there is no undiscovered territory to be claimed, the options would be to either create entirely new territory not connected to already existing territory, or to obtain territory already belonging to a state. This will be further discussed below.

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93 This is what is required for the fulfilment of the traditional requirements of statehood, see section 2.3.
95 It is still an interesting topic for the law of maritime boundaries, discussed in Grote Stoutenburg, 2015, p. 162-169; Kittel, 2014, p. 1231-1233; Yamamoto & Esteban, 2014, p. 87-96 & 159-166.
3.2 Creating new territory through artificial islands

The creation of new territory is not a new idea within international law and has been exercised by states through the creation of artificial islands within their Exclusive Economic Zones (EEZ) or on their continental shelves for a wide range of purposes. Some examples of this include the Flevopolder in the Netherlands and the island of Hulhumalé belonging to the Maldives. The practical significance of artificial islands was recognised by the ILC already in the 1950s. In a debate on the law of the sea in 1954, ILC member Faris Bey el-Khoury of Syria argued that “artificial islands would no doubt be useful for various purposes and Governments should not be discouraged from undertaking their construction”. In recent times, islands have been artificially constructed for supporting urban expansion and tourism by providing sites for infrastructure and airports. In the context of a rising sea level, the significance of these islands may be even greater as they could present inhabitable territory for the affected populations to settle upon. But for the purpose of overcoming the loss of statehood, such artificial islands would have to fall within the criterion of territory.

It is a non-contested fact that islands can solely fulfil the requirement of a defined territory as stipulated in the Montevideo Convention, since a large number of states solely consists of one or more islands. However, as Article 121(1) of the UNCLOS defines an island as “a naturally formed area of land, surrounded by water, which is above water at high tide” (emphasis added), the question arises as to whether also artificially constructed islands fulfil this requirement. Although there is no explicit definition of artificial islands in UNCLOS, the definition of islands above effectively excludes those artificially formed from having the legal status of an island within the law of the sea, and this is also expressed in Article 60(8) of the UNCLOS stating that “artificial islands do not possess the status of islands”. While the law of the sea helps framing the issue by illustrating that the legal regimes of islands differ, the answer to the legal implications of this distinction cannot be found in UNCLOS but must be based upon subsidiary

97 Artificial islands may be constructed by a state within its EEZ and continental shelf, following Article 60 and Article 80 of the UNCLOS respectively.
99 ILC Summary Record, 1954, para 49.
100 Conway, 2009, p. 31; Gagain, 2012, p. 107. Examples of this include the artificial island hosting the Hong Kong International Airport.
101 Note however that most legal discussions around artificial islands in this context concerns the issue of maritime boundaries. For a discussion of this, see Gagain, 2012; Grote Stoutenburg, 2015; Yamamoto & Esteban, 2014.
sources of international law. As an existing customary international law on the issue cannot be argued for, judicial decisions and teachings from the states of the international community might serve as subsidiary means for determining the outcome, as stipulated in Article 38 of the Statute of the ICJ.

The opinions of legal scholars are divided. Some argue that artificial islands fulfil the criterion of territory as stipulated in the Montevideo Convention. Lawrence A. Horn, for instance, concludes that an artificial island “may indeed qualify as territory for the purposes of the legal requirements of statehood”, since the special legal regime of artificial islands in the UNCLOS only refers to attempts by existing states to expand their territorial seas. Nikos Papadakis argues that “artificial islands may be used in the future either for the creation of wholly new independent ‘States’ or for the expansion of territory and sovereignty by existing States in the open seas”, and the same standpoint is taken by Jenny Grote Stoutenburg when discussing artificial islands in the context of low-lying island states becoming submerged underwater.

Other legal scholars argue that artificial islands cannot constitute territory for the notion of statehood, thereby supporting the judicial decision in In Re Duchy of Sealand, given by the German Administrative Court of Cologne in 1978. One of the questions at hand in the case was whether an island artificially created by individuals could constitute a state in the meaning of international law. Without discussing the specific circumstances of the case, the court held that to be a defined territory, the area must be “situated on any fixed point on the surface of the earth” and that “only those parts on the surface of the earth which have come into existence in a natural way can be recognized as constituting State territory” (emphasis added), whereby no new state was held to have been established. Considering the divided opinions on the legal status of artificial islands for the criteria of statehood, the legal availability of this option appears uncertain. If taking on a quantitative assessment of the legal scholars having discussed this issue to date, the general acceptance of artificial islands to solely constitute the territorial frame for

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103 Grote Stoutenburg, 2015, p. 170.
104 Horn, 1973, p. 541.
105 Papadakis, 1977, p. 37. See also Stoutenburg, 2015, p. 170-173. However, Grote Stoutenburg makes a distinction between artificial islands and artificial installations and artificial structures, only arguing for the first to fulfil the criterion of territory, 2015, p. 173-175.
106 Decision by the Administrative Court of Cologne in In Re Duchy of Sealand of 3 May 1978, referred to by Gagain, 2012, p. 116; Grote Stoutenburg, 2015, p. 174-175; Kittel, 2014, p. 1235. See also Crawford, 1989, p. 279, stating that “artificial islands cannot form the basis for territorial States any more than can ships”; Green, 1973, p. 189, stating that “an artificial structure, whether fixed or floating in the seas, will give no right to a surrounding territorial sea or to super-adjacent air space”.
107 Quoted by Gagain, 2012, p. 116. See also ibid.
the continuation of statehood when natural island territory is lost, appears unlikely and remote. This is without suggesting that it may not change in the future and maybe especially so in the novel context at issue of this thesis.\footnote{Not many legal scholars have yet discussed this in the context at hand but the standpoint taken by Grote Stoutenburg implies such a change, 2015, p 169-176.} Still, if the case at the moment is that artificial islands do not fulfil the criterion of a defined territory, constructing them would not pose a possible solution for preserving statehood in the traditional sense.

3.3 Obtaining new autonomous territory within already existing territory

As the construction of new territory does not seem to be a viable option for continued traditional statehood, the question arises as to whether it is possible to obtain already existing territory for this purpose. Since all territory is currently under the jurisdiction of states, this can only lawfully be achieved through the cession of territory.\footnote{Doig, 2016, p. 86; Rayfuse, 2011, p. 284; Soons, 1990, p. 230. Two other solutions are merger and federation, wherein the international legal personality will be preserved but the statehood of the island states will nevertheless be lost, either directly for merger or when inhabitable territory lost for federation. For discussion regarding these options, see Grote Stoutenburg, 2015, p. 182-184; Rayfuse, 2011, p. 285; Soons, 1990, p. 230; Yamamoto & Esteban, 2014, p. 199-202.} Cession of state territory is where a part of an existing state’s territory is transferred to another existing state. This form of state succession only affects the territorial boundaries of the states and not their legal status as states, as neither state’s continuity is affected.\footnote{Doig, 2016, p. 86; Grote Stoutenburg, 2015, p. 177; Park, 2011, p. 18; Shaw, 2017, p. 728; Yamamoto & Esteban, 2014, p. 187.} Exchange of territory has occurred frequently in the course of history but as it, in legal scholar Robert Yewdall Jennings words, represents a “bilateral mode of acquisition which requires the co-operation of the two States concerned”, the continuity of the affected island states would then depend upon the will of other states to cede territory.\footnote{Quoted by Yamamoto & Esteban, 2014, p. 187. See also Grote Stoutenburg, 2015, p. 177.} It requires some states to give up jurisdiction and sovereignty over territory previously and currently belonging to them. Furthermore, as the ceded territory will eventually be the only territory possessed by the receiving state, it needs to be able to hold a permanent population to fulfil the traditional requirements of statehood.

While the difficulties with persuading states to cede uninhabitable territory may be able to overcome, the possibility of persuading states to cede inhabitable territory seems remote. Due to the strength of the principle of territorial integrity and sovereignty of states, several legal authors have held that this option is very unlikely.\footnote{Doig, 2016, p. 86; McAdam, 2010, p. 123; Yamamoto & Esteban, 2014, p. 188.} For instance, Rosemary Rayfuse argues
that “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”.\textsuperscript{113} Considering the discussions above, neither the creation of artificial islands nor the cession of territory appear to be viable options in this context. This means that in order to ensure the continuation of statehood of the island states, a new notion of statehood must be defined and recognised.

4 Preserving statehood through continued recognition

4.1 The need for a new alternative definition

The thesis now turns to discussing the continued existence of island states through the recognition of a new notion of statehood, to be applied specifically and addressing the specific challenges these states face in the context of climate change. Considering the analysis of the criteria for statehood above, these elements are in different needs to be challenged and modified.\textsuperscript{114} As climate change will cause the island states to have no physical inhabitable territory, the notion of statehood needs to depart from the importance of territory. As the criterion of a permanent population is traditionally understood on the basis of its link to territory, this needs to be redefined on the basis of new links between the populations. Due to the fact that the requirements of territory and population are so closely interlinked and are so fundamental for the traditional notion of statehood, they will be handled together.\textsuperscript{115} The government criterion also needs to be modified. It cannot host the governmental institutions required due to territory becoming uninhabitable, and it will have no scope of jurisdiction for its exercise due to territory and population in the traditional sense being lost.\textsuperscript{116} How this shall be achieved is the focus of this chapter. The last traditional criterion is that of independence. While not being an independent criterion of statehood, it will be addressed when discussing the functions of states generally and as protectors of human rights.

4.2 Preserving an administrative government – government-in-exile

Governments-in-exile have previously been used for the continued existence of states when having lost territory as a constituent of government, thereby presenting a new notion of statehood recognised by the international community.\textsuperscript{117} In this section, the administrative aspect of the government shall be discussed while its jurisdiction is discussed below concerning the criteria of territory and population.\textsuperscript{118} In other words, are governments-in-exile a possible solution for preserving an administrative government for the affected island states?

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\textsuperscript{114} See chapter 2.
\textsuperscript{115} Crawford, 2012, p. 128; Grote Stoutenburg, 2015, p. 268.
\textsuperscript{116} This is understood in terms of a territorial and personal scope, see section 2.2.4.
\textsuperscript{118} See however Grote Stoutenburg, 2015, p. 287, not making such a distinction between administration and jurisdiction. Other scholars who has discussed the use of governments-in-exile for island states include Kittel, 2014, p. 1235-1236; McAdam, 2010, p. 116-118.
Legal scholar Siegfried Magiera defines a government-in-exile as “a government which has been forced to leave the territory of its State due to enemy occupation or civil war and which claims governmental powers with the consent of the State of residence and possibly other States as long as there exists a genuine chance to return”. Accordingly, this institution has often been established as a consequence from invasion, belligerent occupation or annexation, causing the loss of governmental capacity and ability to operate and perform its functions from within the state’s territory. State practice of these cases is quite extensive as they increased after the German invasion in Europe in connection with World War II. Many of the governments became situated in London, England and two examples of this include the Belgian government-in-exile known as the Government of Pierlot and the Dutch government-in-exile known as the London Cabinet. In these situations, the institution of a government-in-exile allows the governments to function extraterritorially form the territory of another state, and could therefore potentially be established by island states losing territory.

Although having somewhat different characteristics depending on the context, governments-in-exile have the common aspects of being temporary and exceptional. They are based upon the premise that “there exists a genuine chance to return”, meaning that they will exist only until the government can regain control in its home territory. Although research has been made on whether the territory of the affected island states will eventually re-emerge as climate change-related harms of greenhouse gas emissions will hopefully be reduced, this will most likely not happen in a near future. This means that the government-in-exile will have no genuine chance of returning to its previous location. Instead, there has to be an acceptance of its indefinite existence. Currently, international law fails to determine how long a government can operate outside its territory and does not address permanent governments-in-exile situations. But considering only the administrative possibility of a government-in-exile, there

123 Kittel, 2014, p. 1237; Yamamoto & Esteban, 2010, p. 7. See section 4.4.3 on the emission of greenhouse gases being the main cause of the rising sea levels.
124 Kittel, 2014, p. 1236.
is nothing hindering the recognition of low-lying island states having lost the territorial basis for its government through the institution of a government-in-exile, even indefinitely.\textsuperscript{126}

Another dilemma with applying this institution in the context at hand, is the requirement of \textit{consent}. Due to the principle of territorial sovereignty, the state in which the government-in-exile is located, often called the host state, must accept the government to operate from within its territory indefinitely.\textsuperscript{127} While such consent might be difficult to obtain, there is nothing legally hindering this solution of relocating the governments of island states to other states.

\subsection*{4.3 Departing from territory and redefining the basis for population}
In order for the affected states to continue exercising governmental power through their administrative institution of a government-in-exile, the requirements of territory and population needs to be modified as these set the jurisdictional territorial and personal scope of the power.\textsuperscript{128} Departing from the traditional notion of statehood, legal scholars have stated that governments-in-exile are “premised on the continued existence of a permanent population on the State’s territory”, and this presumption needs to be altered in the context of island states.\textsuperscript{129} While population has traditionally been determined on basis of the population’s existence on a defined territory, it must now be determined on the basis of another characteristic, such as by participation through voting, citizenship, or possession of a passport of the state.\textsuperscript{130} The effective exercise of governmental power could thereby be understood in terms of its capability to govern its population, albeit being scattered around the globe. Thus, the reasons for requiring territory as a precondition for statehood might cease to apply. While there are no historic examples of recognised statehood without territory and as embodied in its population, it appears clear that the continued recognition of this notion will not be given without profound reasons and strong incentives by the international community, and it is to these reasons the thesis will now turn.

\begin{flushleft}
\textsuperscript{126} See however Grote Stoutenburg, 2015, p. 285-287, not separating the government’s administration from its legal scope of jurisdiction. She holds that governments-in-exile might be a plausible solution only for as long as there is still territory for the population to live on but not enough resources for the government at hand to exercise authority upon.\\
\textsuperscript{127} McAdam, 2010, p. 116-118; Shaw, 2017, p. 363-364.\\
\textsuperscript{128} See section 2.2.4.\\
\textsuperscript{129} McAdam, 2010, p. 112. See also UNHCR Submission, 2009, p. 1-2.\\
\textsuperscript{130} Doig, 2016, p. 75; Grote Stoutenburg, 2015, p. 259-260.\
\end{flushleft}
4.4 Reasons for continued recognition of the affected island states

4.4.1 Different kinds of reasons

Although the presumption of state continuity is held to be strong, and legal scholar Gerard Kreijen even argues that “States may have a complicated birth, but they do not die easily”, the dependency on continued recognition of states presents an uncertain framework for deciding the future fate for island states. The reasons for continued recognition has been divided into legal and moral ones to clarify the discussion. It shall first be considered whether there is any legal duty for states to continue their recognition. Then, the political implications for it will be discussed. To define these reasons, state practice of continued recognition of states having lost characteristics of statehood is analysed. Due to the possible reluctance of states in accepting a new notion of the traditionally important concept of statehood without any legal basis to do so, the room given for a new notion of statehood in international law shall initially be discussed.

4.4.2 A new notion of statehood within international law

Whether a new notion of statehood could be argued for on the basis of existing international law depends on the importance given to the criteria stipulated in the Montevideo Convention. The decreased relevance of them could be inferred from the increased importance given to the additional element of recognition, as previously discussed. This change in the elements crucial is also supported by practice on so called “de facto” states. These states fulfil the criteria for statehood but do not hold the legal status of states due to not being recognised as such by the international community. In these cases, recognition appears to be a constitutive element and supports the view of a modified notion of statehood.

Besides recognition, the importance of self-determination for the existence of states also supports the decreased importance of the traditional criteria of statehood. Legal scholar Grote Stoutenburg argues that “[n]owadays, the right to self-determination can on the one hand have the effect of modifying the traditional criteria of statehood, lowering for instance the degree of effectiveness expected from governments in decolonisation situations. On the other hand, it can also act as an additional, ‘modern’ criterion whose application can lead to the denial of statehood to effective international legal entities that have been created in contravention to its

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132 See section 2.3.
Thus, the legal regime governing statehood appears to be changeable rather than static and it could be argued that statehood is no longer solely determined by the four traditional elements outlined in the Montevideo Convention. Instead, international law is potentially giving room for a new notion of statehood. Due to the strong presumption of state continuity mentioned above, the possibility of applying a new notion of statehood is especially strong regarding already existing states. This is shown through the institution of a government-in-exile and will be illustrated also through the continued existence of “failed states”.

Turning more specifically to the departure from territory, the practice on governments-in-exile shows that international law accepts governments that are detached from the requirement of territory. There are also examples of other sovereign entities with international legal personality detached from territory, such as the Sovereign Order of the Military Hospitaller Order of St. John of Jerusalem, of Rhodes and of Malta and the Holy See. Although not being states, these entities show that sovereignty does not have to be understood in terms of territory, as previously thought. Instead, it might be given directly to a people. Legal scholar William Edward Hall regarded the characterisation of states as territorial entities to be a historically contingent dogma rather than a logical necessity of statehood. He argued that “[a]bstractedly there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities, and though there might be difficulty in subjecting such societies to restraint, or in some cases in being sure of their identity, there would be nothing in such difficulties to exclude the possibility of regarding them as subjects of law, and there would be nothing therefore to render the possession of a fixed seat an absolute condition of admission to its benefits.”

While the populations of island states cannot be compared to nomadic tribes after having scattered across the globe, the important core of defining “settled communities” on a different basis than a defined territory can be interpreted, and possibly so also the granting of sovereignty to populations without a permanent and defined territorial basis. Thus, a new notion of statehood not dependent upon the existence of territory but instead embodied in its population

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134 Grote Stoutenburg, 2015, p. 245.
135 This standpoint is taken by Kittel, 2014, p. 1227-1228; Willcox, 2015, p. 179.
137 Grote Stoutenburg, 2015, p. 282.
139 Hall, 1924, p. 18-19.
140 See however Grote Stoutenburg, 2015, p. 260-262, discussing historical cases of non-granting of sovereignty to people.
could arguably find room in international law. This would mean that not only governments and other sovereign entities can be accepted as detaching from territory, but also states.\[141\]

### 4.4.3 Legal reasons – a legal duty of continued recognition?

According to Articles 40(1) and 41(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DASR), states are prohibited to recognise as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of international law. A peremptory norm of international law is a norm of *jus cogens*, defined in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”, and is binding *erga omnes*.\[142\] Thus, if a state establishment or extinction would be the result of a violation of *jus cogens*, the situation created is prohibited. Consequently, there would be a general duty for the international community of either non-recognition or continued recognition regardless of having contributed to the violation or not.\[143\]

It shall be noted that this regime appears to apply on breaches of all *jus cogens* norms, as no difference in terminology is made in the DASR and all such norms are held to be of equal character. Thereby, breaches of all *jus cogens* norms could potentially invoke the general duty of continued recognition.\[144\]

To argue for a legal duty of continued recognition, a number of prerequisites needs to be fulfilled. First, it follows by Article 2 of the DASR that there shall be an action or omission *attributable* to a state. In the context of island states, the conduct possibly creating a legal responsibility for states on the international arena is the greenhouse gas emissions. The IPCC holds that it is extremely likely that the dominant cause of the global warming is anthropogenic greenhouse gas emissions and that it has very likely made a substantial contribution to the sea

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\[142\] *Erga omnes* translates to “against all”, see Weatherall, 2015, p. 8. This characterisation refers to the obligation being owned by each state in the international community, whereby there is a corresponding obligation for all states to respect them, see Grote Stoutenburg, 2015, p. 319 & 364; Weatherall, 2015, p. 8-11. See also Grote Stoutenburg, 2015, p. 364; Kadelbach, 2006, p. 25; Saul, 2011, p. 633; Weatherall, 2015, p. 9-11 & 253.

\[143\] The duty of non-recognition emerged already through the so called Stimson Doctrine as a response to the Japanese military occupation of Manchuria situated on Chinese territory in late 1931, see Turns, 2003, p. 105-113. On the contemporary principle, see Grote Stoutenburg, 2015, p. 283 & 329; Talmon, 2006, p. 100-102.

\[144\] Grote Stoutenburg, 2015, p. 329-330. The examples given by the ILC in its Commentary to DASR, 2001, p. 114, para 6, concerns situations created through the use of force. This is obvious considering that these are the only examples existing and shall therefore not be interpreted as excluding breaches of other *jus cogens* norms. The ILC has since extended the obligation of non-recognition “to all situations created by a serious breach of a *jus cogens* obligation”, see Talmon, 2006, p. 103.
level rise. But as these emissions are not caused by state organs but by individuals and privately-owned industries, they are not attributable to the state. The ILC has held that the state shall not be held responsible for “the conduct of all human beings, corporations or collectives linked to the State by nationality, habitual residence or incorporation”. Instead, the omission by the organs of government and agents of the state to regulate these emissions can be attributed to the state, as illustrated in Articles 4-10 of the DASR. Under the no harm rule, recognised to be a norm of customary international law, states are under a general obligation to not cause harm to the environment and more specifically to prevent, reduce and control the risk of environmental harm to other states. The same applies under the precautionary principle in international law, according to which states must take precautionary measures in order to protect the environment. Furthermore, the obligations of addressing the climate issue in the United Nations Framework Convention on Climate Change (UNFCCC) are imposed on the states rather than the specific contributors to it. While states can be held responsible for this omission, it is irrelevant to point out the specific states guilty of it, since the duty of continued recognition is applicable erga omnes in cases of serious breaches of jus cogens rules.

Second, there shall be a serious breach of an obligation. Following Article 12 and 40(2) of the DASR and in the context of island states, this is requiring the omission to regulate greenhouse gas emissions to not be “in conformity with what is required of [the State]” and involving “a gross or systematic failure by the responsible State to fulfil [that] obligation”. As the legal duty of continued recognition further requires the obligation breached to arise under a jus cogens norm, there must be an obligation for states to regulate greenhouse gas emissions to a certain level following such a norm. While a jus cogens norm directly linked to environmental law cannot be claimed to exist, the questions arise as to whether the right to life and its under components depending on a safe and healthy environment constitutes a jus cogens norm and whether this norm poses obligations on states to protect the environment.

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145 Anthropogenic is defined as “(r)esulting from or produced by human activities” in Planton (ed.), 2013, p. 1448. See also IPCC Synthesis Report, 2014, p. 4-5.  
146 ILC Commentary to DASR, p. 38, para 2.  
147 ILC Commentary to DASR, p. 38, para 2; Shaw, 2017, p. 595.  
149 The principle is codified in the Rio Declaration on Environment and Development, Principle 15. See also Kittel, 2014; p. 1239.
While the fundamental importance of the right to life is beyond question, the opinion differs among legal scholars regarding whether or not it is a *jus cogens* rule. The affirmation of this has been given by legal scholars Karin Parker and Lyn Beth Neylon, as well as by the OHCHR in a report on the situation of human rights in Chile.\textsuperscript{150} In his comments on the Draft Articles on the Law of Treaties (DALT), Ulrich Scheuner has more specifically defined those human rights belonging to *jus cogens* as “those rules which protect human dignity, personal and racial equality, life and personal freedom”.\textsuperscript{151} Following this, the acceptance of the right to life as a *jus cogens* norm could possibly also include the components of adequate food, clothing and housing, obviously affected by climate change.\textsuperscript{152} This conclusion is supported by Jenny Grote Stoutenburg, as these components “protect the minimum material and social preconditions for human existence”.\textsuperscript{153} On the other hand, legal scholar Thomas Weatherall notes that the right to life is subject to derogations and argues that it is therefore “not a suitable candidate as a peremptory norm”.\textsuperscript{154}

Assuming that the right to life is a *jus cogens* norm and that a healthy and safe environment falls within this norm, the existence of a legal duty of continued recognition still hinges upon this norm posing obligations on states to regulate greenhouse gas emissions. Since the omission to regulate this is undertaken *within* the territory of states but is producing effects *outside* their territories, such obligations must be extraterritorial.\textsuperscript{155} According to Article 2(1) of the ICCPR, which convention regulates the right to life, the obligation of states to respect and ensure the rights recognised in the convention is geographically limited to rights belonging “to all individuals within its territory and subject to its jurisdiction”, thereby implying a denial of the extraterritorial scope of these human rights.\textsuperscript{156} Even if posing extraterritorial obligations, it would be difficult to argue for there being any causality between the conduct of the states and the disappearance of inhabitable territory of the island states.\textsuperscript{157} Two issues with causality was discussed by the OHCHR in a report on the relationship between climate change and human


\textsuperscript{151} Scheuner, 1967, p. 526-527.

\textsuperscript{152} See section 1.2.1.

\textsuperscript{153} Grote Stoutenburg, 2015, p. 349. See also Orakhelashvili, 2008, p. 56.

\textsuperscript{154} Weatherall, 2015, p. 264. Norms of *jus cogens* are defined on the basis of being non-derogable.

\textsuperscript{155} This does not suggest that the emissions are also having effects within their own territories. See discussion on extraterritorial human rights in Joseph, 2011, chapter 8.

\textsuperscript{156} This is supported by Grote Stoutenburg, 2015, p. 351. See however Joseph, 2011, p. 248, interpreting this a bit different; Willcox, 2015, p. 95, stating that external self-determination places extraterritorial obligations on states. The right to life follows by Article 6 of the ICCPR.

\textsuperscript{157} It could however violate other international obligations not having peremptory force, such as environmental obligations, see discussion in Grote Stoutenburg, 2015, p. 362-373.
rights. First, it was noted that it is “virtually impossible” to link the emissions of a particular country with a specific climate change-related effect. Second, albeit anthropogenic climate change is held to be one of the main causes to the rising sea level, it is only “one of several contributing factors” and therefore impossible to establish a concrete causal relationship.\textsuperscript{158} While the first is not directly relevant in this context, as the duty of continued recognition will arise regardless of the specific actor causing the island states to disappear, the latter cannot be disregarded.\textsuperscript{159} 

Arguably, the possibility of posing a legal duty of continued recognition on the international community is absent. Thus, this situation differs from that of governments-in-exile, as they have continued to be recognised on the main basis of this regime and legal duty. While the reason behind governments-in-exile often pertain to illegal occupation or annexation of the territory, the \textit{jus cogens} norm breached is the use of force prohibited by Article 2(4) of the Charter of the United Nations (UN Charter). In these situations, it is not allowed for states of the international community to \textit{recognise} the unlawfully established new regime, and correspondingly a duty for the international community to \textit{continue recognise} the international legal personality of the occupied or annexed state albeit not necessarily having the required efficiency or authority over their territory.\textsuperscript{160} However, no such duty appears to exist in the context of island states.

\textbf{4.4.4 Moral reasons – political implications for recognition} 

A new alternative notion of statehood might still be recognised by the international community based on moral reasons. Legal scholar Krystyna Marek argues that the underlying reason for the presumption of continuity is the “practical concern for the maintenance of international rights and obligations, - in other words, for the security and stability of international legal relations”.\textsuperscript{161} This refers to the possibility for the state to uphold international relations and it has previously been suggested as the basis for continued recognition in cases of states losing initially fulfilled criteria for effective statehood, including the situation of governments-in-exile discussed above and the situation of so called “failed states” to be discussed below.

\textsuperscript{158} OHCHR Report, 2009, para 70. 
\textsuperscript{159} See discussion on the duty arising \textit{erga omnes} above. This determination is however of relevance if discussing a legal responsibility to decrease the state’s emissions or similar. 
\textsuperscript{160} Grote Stoutenburg, 2015, p. 329; Talmon, 2006, p. 100-102. 
\textsuperscript{161} Quoted by Kreijen, 2004, p. 37.
The term “failed states” has been used to described states that, although initially meeting all requirements of statehood, have lost the central criterion of an effective government. The two emblematic cases of this situation are those of Somalia and Afghanistan. Although the concept of a failed state is somewhat controversial and is changing over time, it is generally defined as a state that is unable to control its territory and has lost the monopoly on the use of force, often due to rebellion, civil war, coups, anarchy or riots. As regards Somalia, the governmental crisis occurred as a consequence to civil war and riots in the late 1980s and since, the state has not had a stable government and the society and economic life appear entirely disintegrated. As regards Afghanistan, the occurrence of the Al-Qaida attacks on New York in 2001 was the incident reinforcing the hard security focus on “failed states”. But its government lost capacity on the international arena already in the ending and aftermath of the Cold War as a consequence to the civil war occurring after the Soviet withdrawal from the state in 1989. Notwithstanding these collapsed governments, Somalia and Afghanistan have not lost their statuses of states. On the contrary, their existence as legal entities do not appear to have been genuinely challenged but they have continued to be recognised. They still retain membership of international organisations and their diplomatic relations with other states have, at large, not been affected. While the island states at hand does not face governmental failure as such, this practice illustrates some moral reasons behind the continued recognition of states albeit having lost, what James Crawford holds to be, the central criterion of statehood.

In short, the main reason for the continued recognition of failed states could be the preference of the international community to keep their relations with the entity affected. Since there is no external power claiming governmental control in these situations, the withdrawal of recognition would result in the loss of statehood and thereby the loss of international relations. Legal scholar David Raic illustrates this when discussing the case of Somalia, as he explains the patience of the international community “in terms of a refusal to jeopardize legal relations with an entity where there is clearly no successor State” (emphasis added). Based on this, the international community appears reluctant in contributing to the entire loss of statehood and this is of

168 Crawford, 2007, p. 56.
relevance also in the context of island states where no successor state is even able to exist.\textsuperscript{170} But although stability is normally upheld with the continued existence of states and continuation is generally more advantageous, stability would be obstructed if all entities at all times would continue even when clearly not having the capacity or ability to function as states on the international arena.\textsuperscript{171} Thus, the affected island states must still be able to generally function after having lost its entire territory.

The function to exercise international relations with other states is by James Crawford defined as the plenary competence of states to “perform acts, make treaties, and so on, in the international sphere”.\textsuperscript{172} Turning to the practice of governments-in-exile, they continue to conclude treaties, maintain diplomatic relations, conferring immunities, privileges and jurisdiction over nationals. Legal scholar Jane McAdam also argues that “provided that the government in exile’s functions are not interfered with, or controlled by, the host State (or any other), its independence is preserved”.\textsuperscript{173} Thus, this function would arguably be upheld also for the governments of island states operating in exile, although having their population scattered across the globe instead of within a defined territory. Still, as the exercise of governmental power from the territory of another state requires the consent of the latter state, the governmental power is necessarily more circumscribed than when operating within the state’s own territory.\textsuperscript{174} It was for example stated by the British House of Lords in the \textit{Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government} case that the jurisdiction of the Dutch government-in-exile referred to above “is only possible so far as it is authorised by the British legislature and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute”.\textsuperscript{175}

The restrictions on state functions have previously been accepted by the international community on the basis of them being only temporary. The temporary characteristic is noted above considering governments-in-exile and applies also on failed states.\textsuperscript{176} Regarding failed states, David Raic argues that “the continuation of personality is presumed on the basis of the

\textsuperscript{170} McAdam, 2010, p. 114.
\textsuperscript{171} Grote Stoutenburg, 2015, p. 303-304.
\textsuperscript{172} Crawford, 2007, p. 40. See also Crawford, 2007, p. 40-42.
\textsuperscript{173} McAdam, 2010, p. 115. See also Willcox, 2015, p. 188.
\textsuperscript{175} Lord Wright in the decision by the House of Lords in \textit{Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government} of 1943, quoted by Talmon, 2001, p. 217, note 58.
\textsuperscript{176} Raic, 2002, p. 71-72.
underlying assumption of the lack of finality of the existing situation”, implying that statehood will only continue if the loss is temporary.\textsuperscript{177} Although Raic has also held that the case of Somalia “seems to suggest that in the case of an established State, the presumption is in favour of the continuity of statehood not only when there is a prolonged period of ineffective government but even if there is a prolonged period of absence of government”, the acceptance of continuation is still based upon a belief of the situation as not being definite.\textsuperscript{178} The UN Security Council has stressed the importance of re-establishing Somalia’s governance and thereby implied that it in fact \textit{can} be resituated, which could arguably be a reason for the international community to not withdraw recognition.\textsuperscript{179} Thus, although a state can only inadequately perform their obligations towards other states due to not fulfilling all elements of statehood, its continuation may be preferred since the termination of its existing rights and obligations would be more damaging for the international community.\textsuperscript{180}

In the context of island states, the acceptance cannot be based upon the notion of the deterritorialised statehood being only temporary.\textsuperscript{181} Potentially, it could be based upon the knowledge of the international community to not only contribute to global warming but even being the main cause of it due to not regulating their emissions of greenhouse gases and ensuring a stable and functioning environment of the globe. Although there is no doubt that the effects of these climate impacts are indiscriminate and strike to every state in the global community, they are unevenly distributed and, turning to the issue of a rising sea level, cause the greatest challenges for low-lying atoll islands.\textsuperscript{182} Ironically, this means that with the developed states being the highest emitters of greenhouse gases it is not them but the small island countries, emitting around 1-1.5 per cent of all global greenhouse gases, that have to face the challenges deriving from it.\textsuperscript{183} While this cannot be used to substantiate any legal duty of continued recognition, it might present a moral reason for it.

Another solution and reason for continued recognition could be to regard the governments-in-exile as temporary after all. When discussing her suggestion of creating a nation \textit{ex situ}, Maxine

\begin{thebibliography}{9}
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\bibitem{177} Raic, 2002, p. 69. \\
\bibitem{178} Raic, 2002, p. 71. See also Raic, 2002, p. 67. \\
\bibitem{179} UN Security Council Statement of 11 January 2001. \\
\bibitem{180} Kreijen, 2004, p. 38. \\
\bibitem{181} See section 4.2. \\
\bibitem{182} Atapattu, 2014, p. 2; Mcadam, 2012, p. 4 & 19; Nurse et al. (eds.), 2014, p. 1616-1618; Willcox, 2015, p. 11. \\
\end{thebibliography}
Burkett holds that it “would be designed to exist in perpetuity”, while Rosemary Rayfuse proposes her similar solution to be transitory.\(^{184}\) Rayfuse holds that “it may not be realistic to envisage the continuing existence of deterritorialised States \textit{ad infinitum}” and instead proposes it to last for either “one generation (30 years) or one human lifetime (100 years)”.\(^{185}\) While it may not be possible to set up an exact timeframe for the continued recognition of the affected island states, the knowledge of their statehood being only temporary could possibly still convince states to uphold their recognition for a certain period of time.\(^{186}\) Perhaps, the recognition could continue for as long as island statehood is required. When the states’ populations have not only acquired nationality and integrated in other states, but also lost their sense of community, the state could possibly have outplayed its role and importance.

Due to the fact that the continued existence of the affected island states is dependent on the reaction of the international community, a definitive answer to their fate cannot be given. While some moral implications for the continued recognition of this new notion of statehood appears to exist, the basis for its existence is problematic. The status of states will become fragmented once (if) states begin to withdraw their recognition, whenever that might be. To avoid this, a treaty solution is probably required.\(^{187}\)

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\(^{184}\) Burkett, 2011, p. 366. See also Rayfuse, 2011, p. 286.

\(^{185}\) Rayfuse, 2011, p. 286.

\(^{186}\) It shall be remembered that states do not know the exact timeframe for governments-in-exile or failed states either, but still continue to recognise them.

\(^{187}\) Grote Stoutenburg, 2015, p. 375.
5 Continued statehood and the protection of human rights

5.1 Technical ability to protect human rights

To function as a legal protector of human rights, the state preserved must have an effective governance and independence. Turning to the specific problematic with island states and their populations being scattered across the globe after resettlement, they are also required to have the technical ability to provide for diplomatic protection. This is required to avoid de facto statelessness.188

Considering the preservation of statehood in a traditional sense, it is assumed that the protection of human rights is fulfilled. No legal difference in this regard should be the result of the construction of artificial islands or cession of territory. Instead, the ability to protect human rights is far more uncertain considering the preservation of statehood in the new deterritorialised notion discussed and shall be analysed in this chapter.

5.2 Effective governance and independence

The responsibility of states to protect the human rights of their populations is generally described in the UN Declaration on Human Rights Defenders. It follows by Article 2(2) that “[e]ach State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed”. Furthermore, Article 14(1) defines the responsibility of states “to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights”. Inferred from this, the protection of human rights is based in the different institutions of states, representing their legislative, executive and judicial jurisdiction.189 As establishing a constitutional model in which all human rights are effectively protected is a difficult task and one that has not yet reached an ultimate solution, this shall not be undertaken in detail and neither shall it set the framework for what is required by a state to protect and ensure human rights.190 The analysis of the deterritorialised statehood as a protector of human rights regards its governance and independence solely departs from the three different kinds of jurisdictional

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188 See section 1.2.2.
189 This is discussed under section 2.2.4 as the internal component of governmental effectiveness.
190 See Campbell et al. (eds.), 2003, discussing how to improve the protection of human rights through institutions.
and institutional branches of statehood. These branches are reflecting the basic principle of state sovereignty and are necessary not only for the protection of human rights but also for the rule of law.\textsuperscript{191}

The importance of institutions exercising legislative jurisdiction for the protection of human rights is obvious.\textsuperscript{192} It is stated in Article 3 of the UN Declaration on Human Rights Defenders that “[d]omestic law consistent with the Charter of the United Nations and other international obligations of the State in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed and within which all activities referred to in the present Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted”. Through legislation, human rights are given a legal basis and states are obliged to take certain measures with regard to the provisions contained therein.\textsuperscript{193} The importance of an institution exercising executive jurisdiction and enforcing these legislations within its territorial jurisdiction is equally obvious and needs no further explanation.\textsuperscript{194} Lastly, judicial institutions supervising the domestic systems and allowing the populations to benefit from an effective remedy and fair trial is important for the guaranteed respect for fundamental rights and legal integrity of the state populations.\textsuperscript{195} Legal scholar Richard S. Kay argues that the protection of human rights in the world today is more and more “a matter of declaring the rights in a written constitution and making that constitution enforceable against the state in some kind of law court”, thus covering all three types of jurisdiction and connecting them to the issue of human rights.\textsuperscript{196}

These jurisdictional competences can \textit{administratively} be ensured through the institution of a government-in-exile. Still, their \textit{effective exercise} and the true functioning of the state is dependent upon its actual independence. Actual independence has briefly been described above as consisting of two prerequisites; the first concerning the physical jurisdictional scope of territory and population, and the latter concerning the freedom of domination and control on a

\textsuperscript{191} Shaw, 2017, p. 483.
\textsuperscript{192} Legislative jurisdiction refers to the supremacy of the constitutionally recognised organs of the state to make binding laws, see Shaw, 2017, p. 486.
\textsuperscript{193} Shaw, 2017, p. 252. Note that states have a certain measure of discretion, see Smith, 2016, p. 180-181.
\textsuperscript{194} Executive jurisdiction refers to the power to take executive action in pursuance of or consequent on the making of decision or rules, see Crawford, 2012, p. 456. The wording of “within its jurisdiction” refers to this capacity normally only extending within the state’s territory and not extra-territorially.
\textsuperscript{195} Judicial jurisdiction refers to the power to try cases before national courts, see Shaw, 2017, p. 487. See also Yamamoto & Esteban, 2014, p. 268.
\textsuperscript{196} Kay, 2003, p. 117.
long-term basis. Since the jurisdictional scope has been re-defined in this thesis, the question is whether the new notion of statehood has the ability to exercise its functions without foreign domination and control. Legal scholar David Raic explains this aspect of actual independence in the words of; “[T]he decisions and actions of the putative State must be its own, that is to say, it must be the putative State as such, and not a third State, which can be held responsible under international law for the actions of the putative State”. Legal scholar James Crawford argues that it is problematic to “determine at what point foreign influence becomes ‘control’ or ‘domination’”, since this might differ with regard to the different functions of a state. Therefore, only the function of protecting human rights shall here be addressed.

Due to the government operating in exile and the populations being hosted by several host states, there will be some foreign influence. The institution of a government-in-exile has in state practice not led to a control or domination by the host state. Rather, the occupied or annexed state has been able to continue to conclude amnesty agreements, to participate in intergovernmental human rights organisations, as well as to provide passports to its citizens, owing to the consent given by the host state. In these traditional cases of governments-in-exile, the populations have continued to be settled within the territorial boundaries by the state and have not fallen under the jurisdiction of other states as such. In the context of island states, the situation is reversed. Their populations will fall under the jurisdiction of their host states and be subject to the laws and enforcement mechanisms of those states, after having resettled.

Because of the strong territorial integrity belonging to the host states, the island states of nationality cannot exercise their governmental control without the consent of the former. Consequently, the continued exercise of island states both conceptually and for their function to protect human rights is largely dependent upon the will of the international community. While states might continue to recognise the affected island states out of pure goodness or morality, the consent to let them exercise jurisdiction within the own territory of the host states is a much larger sacrifice and would impair the sovereignty of the latter states. Although the affected island states would retain their legal statuses of states, their capacity to regulate, protect

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197 See section 2.2.5.
199 Crawford, 2007, p. 76.
201 McAdam, 2010, p. 117.
and provide basic protection for their citizens will face considerable difficulties and constraints. Their role as protectors of the human rights belonging to their populations becomes the same as any state can exercise with respect to its nationals abroad, namely diplomatic protection.202

5.3 Diplomatic protection

Considering both the functional limits of governing their populations and the fact that the islanders are not necessarily granted citizenship in their new host states, the ability of island states to provide diplomatic protection becomes crucial. The importance of diplomatic protection is further illustrated by the lower degree of protection often offered by states to aliens.203 Diplomatic protection is regulated in customary international law, but the ILC has drafted upon state practice of diplomatic protection in Article 44 of the DASR as well as in the Draft Articles on Diplomatic Protection (DADP).204 Without generally describing and analysing this regime, it shall be held that Article 1 of the DADP is defining the meaning and scope of diplomatic protection as “the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.205 In other words, diplomatic protection concerns the possibilities for a state to bring claims on behalf of natural or legal persons located abroad and to invoke the responsibility of other states for injuries caused to its citizens.206

The material scope of the diplomatic protection was extended and pointed out by the ICJ in the Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) case in 2007, where the commission held that “[o]wing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatments of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights”.207 Thus, it is clear that diplomatic protection is of relevance when it comes to...

202 McAdam, 2010, p. 117.
203 See section 1.2.1.
204 DADP is given content to Article 44 of the DASR, stating that state responsibility may only be invoked by the state of nationality and if the local remedies has been exhausted. See ILC Commentary to DADP, 2006, p. 26, para 2. See also Crawford, 2013, p. 567-568.
205 For a discussion and analysis on the topic, see Crawford, 2013, chapter 18.
206 Crawford, 2013, p. 566. It shall be noted that there is no obligation for the states to provide diplomatic protection, see Crawford, 2013, p. 570.
human rights protection. This right of island states is not interfered with due to the governments being in exile and the populations being scattered across the globe.

Considering the right of island states to exercise diplomatic protection, a complicated issue arises if the host states actually do decide to grant citizenship to their new island population. If a state violates the rights of an alien with dual citizenship, the main rule is that both states of nationality may exercise diplomatic protection. However, an exception is applicable in situations where the individual injured holds the nationality of both the claimant and the respondent state. In that case, the claimant state may not invoke the responsibility of the host state. This means that the atoll island state loses its right to diplomatic protection if the host state is violating the islander’s right. This was held by the ICJ in the *Reparation for Injuries Suffered in the Service of the United Nations* case in 1949. It is also illustrated by Article 6(1) of the DADP, stating that “[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national”.

Following subsequent development on the issue, there is still a possibility for the island states to bring claims in such situations. This requires that the islander has a stronger or predominant bond, a so called “genuine link”, to the island state compared to the host state. While such a genuine link may exist for the first years of time, it will probably wane with time. Thus, the relevance of diplomatic protection and the function of the affected island states as protectors of human rights will simultaneously wane. Considering the discussion made, the conclusion can be drawn that the preservation of deterritorialised states as protectors of human rights is difficult and maybe even impossible without changing the legal regime of international law.

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6 Conclusion and a look into the crystal ball

6.1 Conclusion

In order to preserve the island states as legal protectors of human rights, the easiest solution from a legal point of view would be to retain the existing territory or obtain new territory. The population could stay within the territory and continue to be protected by their original states. But this is rarely a real option for island states, and a new notion of statehood may be needed. As a minimum, this new notion needs to ensure continued recognition by the international community and the technical ability to protect the human rights of citizens. Both requirements present some significant difficulties.

First, as there is arguably no legal duty of continued recognition, the continued existence of the state in a new understanding is dependent upon the moral will of the international community. Second, in order to protect the human rights of its scattered population, the states must be given the consent and right to exercise their jurisdiction within the states hosting them. As this is a much bigger sacrifice for states and inflicts upon the fundamental concept of territorial sovereignty, this will most likely not happen. Thus, the governments-in-exile will face considerable constraints on their capacity to regulate, protect and provide basic services for their citizens. The legal regime of human rights protection would therefore only consist of the diplomatic protection, where the question arises of whether this is enough in order for the population to not become \textit{de facto} stateless. It could be assumed that for as long as diplomatic protection can be carried out without interference from other states, they would not be identified as \textit{de facto} stateless. This would be until the former islanders is granted second citizenship and they lose the genuine link to the island states. Once the genuine link criterion to the original island states is no longer met, the states will fail to uphold this protection. Considering the protection of \textit{individual} human rights of the former islanders, these will be ensured by their new home states after having received their citizenship. Considering the protection of those \textit{collective} human rights the islanders were exercising in their original states, they are at risk of being lost.

As discussed in the beginning of this thesis, the continuation of island statehood is of relevance and importance also for presenting the legal arena for social, cultural and political ties. The preservation of the state would preserve some sense of communal identity of the island populations, although not being linked together on the basis of territory but after having
resettled in different states. The continued citizenship and the continued administrative
government would allow the former islanders to continue participate in political matters such
as voting and could help to maintain the social identity of them. It could also help to ease the
rootlessness that might occur due to the people of island states becoming scattered across the
world and thereby preserve their right to human dignity and life. But once the populations
start to integrate in their new host states and after a few generations have passed, this sense of
a communal identity will most likely start to become fragmented. While the integration in the
host states is necessary for the full enjoyment of human rights, the cultural and political ground
that has previously been the basis for the island societies will be lost.

It could thus be argued that the preservation of island states for protecting and human rights is
not necessary for the long-run. Neither is it very possible as it requires the continued recognition
of a subject with lesser value than other state subjects on the international arena. Still, the
importance of such statehood for the time period immediately after the forced resettlement of
the island populations shall not be neglected. The state could preserve some common ground
for the people who will have to start their new lives on new territory and without the social
community they once belonged to. In this sense and for this time period, the preservation of
statehood in a deterritorialised sense presented in this thesis could be useful. That is if only
some practical issues of recognition and consent by the international community would be
solved.

6.2 A look into the crystal ball
The issue of island states becoming uninhabitable and eventually physically disappearing
presents a lot of problems, of which only one has been addressed in this thesis. What can be
concluded from the discussion and analysis is that human rights are not the best instrument used
to solve the issue of islanders losing their protector of human rights. The very narrow extraterritorial scope of human rights makes it difficult to address it and to come up with a good
solution for the islanders, with or without preserving the state, and this regime would have to
be redefined in order to better suit for the contemporary problems in international law.

212 See Willcox, p. 38-39.
Apart from defining the continued statehood capable of protecting the human rights of its populations at least for some time, the aspect of human rights also contains the issue of deciding states responsible for hosting the future resettlement of island populations. As there is no legal duty of continued recognition on the basis of anthropogenic climate change, it will respectively be difficult to argue that the omission by states to regulate these emissions could be laid as a duty for them hosting resettlement. This is at least true while looking at the existing international law. It becomes more and more clear that this issue needs to be solved through a very flexible and yet wide international treaty, possibly addressing the issue of climate change in itself and determining the states responsible for hosting the island populations, as well as addressing the preservation of the island states for the sake of a cultural and common identity. Furthermore, the continued recognition and the consent to governments-in-exile should practically be solved through such an instrument. Conclusively, we need to seek beyond contemporary international law to find a solution.
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