



TEIMUN 2021

# LEGAL COMMITTEE

**TOPIC B:** THE SINKING ISLANDS - THE QUESTION OF STATEHOOD

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## **Welcome Letter**

Dear delegates of the UN General Assembly Sixth Committee (Legal),

We would like to welcome you to TEIMUN 2021 and thank you for choosing our committee! We are very excited you have decided to join this year's Legal UNGA committee, where we will be dealing with two important and pressing issues regarding international law. This study guide focuses on the first of our two topics which is The Question of Statehood: The Sinking Islands. Before diving deeper into our topic, we would like to introduce ourselves.

### **Youmna Osama**

Hello! Youmna here, a second-year International and European Law student at the University of Groningen. I am originally Egyptian but I have lived for most of my life in Saudi Arabia (I would still say I am 100% Egyptian though). I am really passionate about what I study (at least the international law part, ahem) and I am really excited to show you how interesting international law can be. Trust me, debating legal topics can be just as lively as debating political ones!

### **Maria Podzegunova**

Hello there! My name is Maria and I will be one of the chairs for the Legal Committee. Currently, I'm in my second year of the International and European Law LLB programme at the University of Groningen. One of my inspirations for choosing my degree programme was actually MUN, along with my passion for history and international politics. This will be my first TEIMUN conference, however, and I'm very much looking forward to it!

### **Natalie Viktoria Bichler**

Hi, my name is Natalie. I'm currently in my first year of the International and European Law degree at the University of Groningen. I am half Slovak and half German, but I grew up in Jamaica, Egypt and the UAE. I chose my degree because of my international background and interest in various legal areas such as human rights law, environmental law and more. I look forward to seeing how you will approach these issues and cannot wait to see the resolutions you will create together!

We are looking forward to meeting you all and truly believe our committee will be full of productive debates and fruitful discussions. This study guide is meant to prepare you, but we expect you to do your own research as well. If you have any

questions, feel free to contact us. Good luck with your preparation, and see you soon!

## 1 | Introduction

The UN is composed of 6 primary organs, the General Assembly (also known as the UNGA or GA). It is a forum comprising all 193 UN members. The GA is unlike any other UN organ as it ensures equal power and representation of each member state.<sup>1</sup> The first GA session was held on the 10th of January 1946.<sup>2</sup> The resolutions which the GA adopts are non-binding and serve as recommendations rather than commands. Chapter IV of the UN Charter sets out the composition, functions, powers, voting, and procedure of the General Assembly.<sup>3</sup>

The General Assembly is composed of 5 categories. One of these categories are the committees, of which there are 30. The six main committees are numbered from 1 to 6.<sup>4</sup> The Sixth Committee, or the Legal Committee, deals with legal matters. The Legal Committee is a key actor in the negotiations and the adoption of new international treaties. The Legal Committee assists the GA in "encouraging the progressive development of international law and its codification;" (Article 13(1)(a) of the UN Charter), which is part of an article relating to one of the functions and powers of the GA.

The Legal Committee is the primary forum for any legal questions, mainly concerning public international law. This committee generally discusses common topics regarding:

- The promotion of justice and international law
- Organizational, administrative and other matters
- Drug control
- Crime prevention

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<sup>1</sup> United Nations, 'Role of the General Assembly' (United Nations Peacekeeping, n.d.) <<https://peacekeeping.un.org/en/role-of-general-assembly>> accessed 27 February 2021.

<sup>2</sup> The Editors of Encyclopaedia Britannica, 'United Nations General Assembly' (Britannica, n.d.) <<https://www.britannica.com/topic/United-Nations-General-Assembly>> accessed 27 February 2021.

<sup>3</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

<sup>4</sup> The Editors of Encyclopaedia Britannica, 'United Nations General Assembly' (Britannica, n.d.) <<https://www.britannica.com/topic/United-Nations-General-Assembly>> accessed 27 February 2021.

- Combating international terrorism<sup>5</sup>

The first issue that will be dealt with in this committee is that of the sinking islands caused by global warming. Due to climate change, the sea levels have risen which has negatively impacted many island states, causing some of them to disappear entirely. If this continues, many more states are in danger of being submerged within the next few decades or even years. These states will be forced into relocating their populations, which will give rise to the number of climate refugees. With this issue, so many new questions arise. Will the affected states cease to be states? What will happen to their populations? Will these climate refugees be stateless? These questions need to be answered as this is a pressing issue that will only worsen with time.

## 2 | Problem Specification

It is no longer a question of if but rather when. The commonly used criteria of statehood is having a territory, permanent population, effective control and recognition by other states. While there is a principle of “once a state, always a state,”<sup>6</sup> this is commonly not accepted when it comes to the full disappearance of territory. With the increasing rise in sea levels due to climate change, the disappearance of the low-lying Pacific Islands such as the Maldives and Fiji is almost certain. Even now before the islands have sunk, the sea levels are causing destruction of crops and contamination of wells by saltwater, this will render the island inhabitable before it is underwater.<sup>7</sup>

The idea of a physical disappearance of a sovereign state has never occurred and as such there are no international legal mechanisms that specifically address such an issue. There is uncertainty as to the status of its population, would it become stateless? Would they have the right to asylum pursuant to the 1951 Refugee Convention? Would the state cease to exist? Many remedial measures are being considered but none are widely accepted due to either impracticality or lack of willingness amongst states. Some of these measures are tackling climate change,

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<sup>5</sup> United Nations, ‘Sixth Committee (Legal)’ (General Assembly of the United Nations, n.d.) <<https://www.un.org/en/ga/sixth/>> accessed 27 February 2021.

<sup>6</sup>This refers to the idea that if a state at some point has fulfilled the criteria of statehood, then it continues to be viewed as a state even if it subsequently fails to fulfil one of the criteria. This is commonly accepted for the criteria of effective control however it is debated whether this also applies to the criteria of territory as it is viewed as the most essential feature of a state.

<sup>7</sup>Jacquelyn Kittel, ‘The Global “Disappearing Act”’: How Island States Can Maintain Statehood in the Face of Disappearing Territory’ [2014] Michigan State Law Review 1207.

the construction of artificial islands, formal cession by another state, creating governments in exile and merging with states that are less threatened by the rise of sea levels.<sup>8</sup>

Another question is the extent to which the responsibility of states can be invoked since emitting third states are responsible for the loss of territory. Under Article 30 of the Article on State Responsibility (ARSIWA) states that have committed internationally wrongful conduct are responsible, the consequences of such responsibility entails ceasing the wrongful conduct and repairing for the injury caused due to the conduct. In the case at hand, this raises multiple questions. Does failing to regulate control over emission activities to meet international obligations constitute grounds for invoking responsibility? If that is the case, then to what extent do states need to cease the wrongful conduct? Do they have an obligation to bring down greenhouse gas emissions? Would states be obliged to provide a portion of their territory as reparation for committing an internationally wrongful act?

The loss of statehood is an important issue to consider as losing statehood means losing a number of rights and privileges under international law. For instance, only states have the right to invoke the jurisdiction of the International Court of Justice as well as have the ability to create primary sources of international law and legitimately invoke the use of force.<sup>9</sup> In addition only state actors can enjoy sovereign immunity.<sup>10</sup> Lastly, the livelihood of the entire population is at stake.<sup>11</sup>

## 3 | Background

### 3.1 | What is Statehood?

Statehood can be described as the status of being a recognized independent state.<sup>12</sup> As international legal actors, states have the power to create international law. However, what exactly does that entail? How does a state become a state? What defines a state? To answer these questions, we must look at the Montevideo Convention on the Rights and Duties of States from 1933. This convention stipulates

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<sup>8</sup>ibid.

<sup>9</sup>Primary sources of international law are treaties, customary law and general principles recognized by "civilized" nations.

<sup>10</sup>Kittel (n 7).

<sup>11</sup> Ibid.

<sup>12</sup> Recognition is not a requirement for statehood as all states have the rights to not recognize an entity as a state, meaning that absolute recognition is not possible. Another important thing to keep in mind is that not recognizing a government is different than not recognizing a state.



the four requirements for statehood called the "Montevideo criteria", which are laid down in article 1.<sup>13</sup> The criteria are:<sup>14</sup>

*(a) A Permanent Population;*

This requirement states that the necessity of a people occupying the territory, but the population's size does not matter. Whether it is a few thousand or a few million, the entity with any permanent population already fulfils the first requirement.<sup>15</sup> The issue with sinking islands is that as the land becomes more and more uninhabitable, more people will be forced to leave to different states. Meaning that these people will no longer be part of the permanent population as they can no longer live on these islands. The permanent population will continue to decrease until there is no permanent population at all.

*(b) A Defined Territory;*

Like the first requirement, this requirement does not have a minimum size for an entity to be considered a state, which can be seen with the Vatican, an independent and sovereign state, an enclave within another state, even though it is only 44 hectares. The territory must be clearly defined, though its boundaries do not have to be fixed or permanent. The biggest issue that the sinking islands have with this requirement is that once their territory has been submerged into the water, there will be no more territory for the permanent population to occupy and for the government to exercise its authority over.<sup>16</sup>

*(c) A Government; and*

The entity must have someone who can control a population and the territory they occupy. It does not matter what type of government is running the entity's affairs, as long as it has authority. The government does not always have to be effective, as this requirement is only necessary for establishing the state, not after. Sinking islands face complications with this condition, as the government's authority may not be recognized in other states where their population is residing, leading to a lack of control.<sup>17</sup> If their population is scattered in more states, this will be even harder to

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<sup>13</sup> These criteria have since become accepted as customary international law. Once a state has already been established, the absence of one or more of the requirements does not mean a state will cease to exist.

<sup>14</sup> Montevideo Convention on the Rights and Duties of States (enacted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 1.

<sup>15</sup> Groups of individuals such as nomadic tribes, possess their own legal personality but it is unclear whether they suffice as a permanent population.

<sup>16</sup> Kittel (n 7) 1221.

<sup>17</sup> *ibid*, 1224.

achieve as it is unclear whether their population is still part of the permanent population.

#### *(d) Capacity to Enter into Relations with Other States*

The last requirement sets out the need to be legal independence rather than political or economic.<sup>18</sup> This requirement is not as essential as the other three, but its independence is necessary. The capacity to enter into relations with other states does not pose a big issue to the sinking states as they already have relations with other states. As long as their government can run their affairs, this capacity will stay intact.<sup>19</sup>

The biggest problems that sinking islands face now with statehood concerns the 'Montevideo criteria' first three criteria. Because of these three criteria, sinking islands face the threat of state extinction or dissolution and statelessness. However, the recent questions are whether these requirements are still necessary for establishing a state and the presumption of continued existence even with the loss of one or more of the Montevideo criteria. This is known as the Presumption of Continuity.<sup>20</sup>

### **3.2 | What is Statelessness?**

The Max Planck Encyclopaedia of International Law defines statelessness as 'the situation of being without citizenship...or of any State'.<sup>21</sup> In comparison, the 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as one who is 'not considered a national by any State under the operation of its law'.<sup>22</sup> The consequences of statelessness are far-reaching and can indeed have a lot of social as well as legal impact, as will be discussed in the following section. While few international instruments have been developed pertaining to this concept, it is undeniable that this notion as it exists for the sinking islands is an uncharted territory for international law. In fact, in its 2005 Working Paper, the UNCnHR states that '[w]hilst members of the United Nations...are used to addressing issues of State

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<sup>18</sup> Anders Henriksen, *International Law* (2nd edn, Oxford University Press 2019) 64.

<sup>19</sup> Kittel (n 7) 1225.

<sup>20</sup> Derek Wong, 'Sovereignty sunk? The Position of 'Sinking States' at International Law' [2013] *Melbourne Journal of International Law* 362.

<sup>21</sup> Katja Göcke, 'Stateless Persons', *Max Planck Encyclopedia of International Law* (2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e878>> accessed 10 March 2021.

<sup>22</sup> Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 U.N.T.S. 117 (1954 Convention), art. 1.1.



succession ,it would appear that the extinction of a State, without there being a successor, is unprecedented'.<sup>23</sup>

### 3.3 | Consequences of Statelessness

In today's society, it is difficult to find any activity that does not require citizenship. Stateless people have less protection, rights, freedoms and opportunities. The status of stateless does not only affect individuals; it also affects the state and the international community.<sup>24</sup>

Individuals, stateless ones, face many challenges in their daily lives, which interferes with or even violates many of their fundamental rights. Stateless people also face mental health issues due to feeling disconnected from society. Voiceless and powerless, they lack rights others take for granted. They lack legal protection and often have no access to education, healthcare, employment, among many more. As they are not registered, they have no birth certificate, no passport, no identification documents and once they die, no death certification.<sup>25</sup> They are thus unable to marry, sign a contract, own property, vote, and travel. Consequently, they have lower living standards and often live in poverty. Stateless individuals often face discrimination, violence, exploitation, amongst others.<sup>26</sup>

Instability is a considerable threat to states with high amounts of stateless people. The discrimination, violence, and exploitation that stateless people face can lead to civil unrest and uprisings.<sup>27</sup> This can lead to negative impacts on the political, social and economic aspects of the state. Statelessness can also affect the international community by resulting in displacement, instability and armed conflicts.<sup>28</sup>

## 4| Questions A Resolution Must Answer (QARMAs)

### 4.1 | What Remedial Measures are Possible?

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<sup>23</sup> UNCnHR, 'The Human Rights Situation of Indigenous Peoples in States and Territories Threatened with Extinction for Environmental Reasons' (2005) as cited in Gleider Hernández, 'International Human Rights and Refugee Law' in International Law (OUP 2019).

<sup>24</sup> 'Self-Study Module on: Statelessness' [2012] UNHCR 30

<sup>25</sup> Jeri L. Dible, 'The Social and Political Consequences of Another Stateless Generation in the Middle East' [2016] United States Army Command and General Staff College 9

<sup>26</sup> *ibid.*

<sup>27</sup> UNHCR (n 22) 35.

<sup>28</sup> *ibid.*, 37.

## *International Approaches Proposed*

This section aims to provide a brief overview of some of the solutions proposed to address the issue of the sinking islands. This list is non-exhaustive and independent research is recommended in order to find a larger variety of proposed solutions. None of the current proposed solutions are perfect as they currently stand, and international law does not have a clear solution to this issue as the law as it stands did not anticipate such drastic effects of climate change. We recommend that you think outside of the box to find ways to make proposed solutions work as well as possibly develop further solutions to the issue at hand.

### *4.1.1 | Early Action*

#### *Addressing the Cause: Tackling Climate Change*

Since climate change is the reason for the rising sea levels, an ideal solution would be to tackle the root cause. While this is seemingly the perfect solution, this should only be one aspect of a resolution as it is highly unlikely that any large changes will occur in the near future that will be of such drastic nature that they prevent the rise of sea levels and completely counter the current disappearing island issue.<sup>29</sup> This is still important however since without adjustment to the behaviour towards environmental protection by states, sea levels rising could potentially endanger a larger list of islands. An interesting international agreement to look into is the Kyoto Protocol which was created to reduce the greenhouse gas emissions from the world's largest emitters.<sup>30</sup> However, so far this Protocol has been widely unsuccessful. A point to possibly consider is creating an effective protocol or figuring out ways to make the Kyoto Protocol and the more recent Paris Accords more effective.

#### *Governments-in-Exile*

It has been suggested by some scholars the disappearing islands could possibly maintain statehood through governments in exile.<sup>31</sup> This would allow

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<sup>29</sup> UN News, 'Samoa: Stopping Climate Change Is 'About People, About Survival,' Says UN Envoy' (UN News Centre, 2 September 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48614#.VCssYkvVRK4>> ("World leaders have not sufficiently addressed climate issues").

<sup>30</sup>Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

<sup>31</sup>Kittel (n 7) 1207.

the governments of disappearing islands to operate from the territory of another state, therefore being able to maintain statehood even without the required territory element. Such governments are usually created in situations that are considered temporary, for instance in cases of occupation or annexation. As a result, their legitimacy is recognized under international law for temporary situations such as invasion and colonization where states can later regain their territory, however it is unclear whether they would also be a viable solution for climate change displacement because the loss of territory is not of temporary nature.<sup>32</sup> Questions remain regarding whether a government in exile can maintain indefinite control over disappearing territory and maritime zones.<sup>33</sup> International law as it currently stands does not determine the duration permitted for a government to stay in exile especially in the case of a territory that becomes submerged under water and can never be recovered.<sup>34</sup> Furthermore, in such a case, it is unlikely that the government and its people would be able to return and reclaim sovereignty.<sup>35</sup> Some argue for the possibility of government in exile for disappearing states. This possibility is based on the notion of equity, if greenhouse gas emissions are severely reduced and the islands re-emerge, the island should belong to descendants of the previous citizens, such a conclusion however is only possible if their governments continue to operate in exile.<sup>36</sup> It is important to take into account that even if this is possible, the process of re-emergence will take a long time and as such, short-term solutions are also needed to tackle the issue.

### *Construction of Artificial Islands*

Some disappearing islands such as the Maldives have considered creating artificial islands to which their citizens could relocate [196]. However, international law is unclear regarding whether such islands can be considered territory in the context of statehood. An interesting domestic case regarding artificial islands was given by the German Municipal court in the *In re Duchy*

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<sup>32</sup>Jane McAdam, 'Disappearing States,' *Statelessness and the Boundaries of International Law* [2010] UNSW 105.

<sup>33</sup>Jörgen Ödalen, *Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States* [2014] *Journal of Agricultural and Environmental Ethics* 225.

<sup>34</sup>Rosemary Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma* [2010] *Univ. of N.S.W. Faculty of Law Research Series, Paper No. 52* 11.

<sup>35</sup>Lilian Yamamoto & Miguel Esteban, 'Vanishing Island States and Sovereignty' [2010] *Ocean & Coastal MGMT* 1.

<sup>36</sup>Kittel (n 7) 1207.

of Sealand where it defined territory as territory for the purpose of statehood can only emerge on Earth's surface naturally, thereby excluding artificial islands. When looking at international law, the United Nations Convention on the Law of the Sea (UNCLOS) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>37</sup> However the Convention does not rule out the possibility of artificial islands and it is presumed that there is little guidance in international law regarding whether an artificial island can satisfy the territory requirement.<sup>38</sup> It is important to note that even if artificial islands prove to satisfy the territory requirement, the process of creating artificial islands is expensive and islands would still need aid from the international community [213].

#### *4.1.2 / Last Resort*

##### *Preventing Statelessness*

###### A. Cessation to Another State

An option to prevent citizens of sinking islands from becoming stateless and maintaining their nationality would be for other States to cede territory to the affected State for its continued existence.<sup>39</sup> In such a case, other states would have to agree that it is the sinking state that is establishing itself in the new territory.<sup>40</sup> It is unclear to what extent states would be willing to give up their territory for another state, the question of state responsibility discussed in the report comes to mind.

###### B. Creating a Union of States

A union of states would entail either the creation of a new state or the lead to subsumption of one state by another state.<sup>41</sup> This could be done using the guidance provided in the 1961 Convention and the Draft Articles on the Nationality of Natural Persons in Relation to Succession States which provides that in the absence of a treaty providing otherwise, citizens of the

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<sup>37</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, art 121(1).

<sup>38</sup> Kittel (n 7) 1207.

<sup>39</sup> Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States' [2011] UNHCR PPLA/2011/04.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

predecessor state should acquire the nationality of the successor state if they would become stateless otherwise.<sup>42</sup>The legal authority of the Draft Articles lies in its existence as a customary law rule.<sup>43</sup>

## 5 | How Might State Responsibility Be Relevant in this Case?

The concept of State responsibility becomes relevant when variations of redress are discussed as part of the notion of remedial territory. Remedial territory is territory which is transferred from the responsible to the injured States as a form of redress for the loss of territory as a consequence of climate change.<sup>44</sup> However, before elaborating upon this concept further, it is important to discuss the notion of State responsibility, as its own body of law, first.

The concept of State responsibility in public international law is predominantly governed by the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>45</sup> Although ARSIWA is codified customary international law and is not considered an international treaty as such, its rules are undoubtedly very authoritative in nature.<sup>46</sup> With that in mind, it is important to distinguish two types of rules overseeing State responsibility: primary and secondary rules. While primary rules are obligations, both substantively and procedurally, which are binding upon States, secondary rules are those which govern the consequence of non-performance or violations of primary rules.<sup>47</sup> It has been definitively accepted that international responsibility of States falls within the realm of secondary rules, as opposed to primary ones such as those found in the law of treaties. This has been conveyed in ICJ case law, including the Rainbow Warrior arbitration and the Gabčíkovo-Nagymaros case.<sup>48</sup>

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<sup>42</sup> Final Act of the Convention on the Reduction of Statelessness and the Draft Articles on Nationality of Natural Persons in relation to the Succession of States (adopted on 26 July 1951, entered into force 13 December 1975) 989 UNTS 175 art. 10.

<sup>43</sup> See commentary (6) to Art. 21 of the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States.

<sup>44</sup> Emma Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law 1, 12.

<sup>45</sup> Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.

<sup>46</sup> Hernández (n 21) 248.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

ARSIWA defines an 'internationally wrongful act' as conduct, consisting of an action or omission, that (a) can be attributed to a State, and (b) is a breach of an international obligation of that State. Following this logic, it may seem reasonable to establish that indeed the failure to comply with the obligation posed upon States to combat climate change may constitute an internationally wrongful act. However, there arise particular legal challenges in this classification:

1. An internationally wrongful act entails an assumption that a particular conduct has taken place, and consequently, the existence of an injury.<sup>49</sup> Due to the fact that, in case of the sinking islands, no de-territorialisation has occurred yet, it is impractical to assume that injury has already taken place. However, as Allen argues, it cannot be excluded as ARSIWA does not provide for injury to be a precondition for invoking State responsibility. On the other hand, nor is the concept of 'legal injury' (i.e. injury emanating from a mere fact of a breach of an international norm).<sup>50</sup>
2. The issue of establishing a causal link emerges. In itself, this problem is twofold: the first issue lies in establishing a general causal link between the act and the outcome, whereas the second one is establishing the particular act which caused that result. Addressing the first issue, it is difficult to demonstrate that a general causal link exists due to the lack of consensus amongst scientists.<sup>51</sup> Having regard to the second issue, various solutions have been proposed. While the 'but for' test remains too broad to establish a causal connection, there has been a proposal for the 'necessary element of a sufficient set' (NESS) test by Plakokefalos. This test entails the idea that individual emissions of a State may not be sufficient to establish contribution to climate change, whereas taken together, the emitting States form part of an overall set which may be held liable.<sup>52</sup>
3. There arises the question of whether reparation might entail territory. Article 34 ARSIWA provides for three forms of reparations which are not obliged to be made in full: compensation, restitution and satisfaction.<sup>53</sup>

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<sup>49</sup> Allen (n 42) 13.

<sup>50</sup> *ibid.*

<sup>51</sup> Allen (n 42) 14.

<sup>52</sup> Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination' (2015) 26(2) EJIL 471, 477.

<sup>53</sup> ARSIWA (n 43) art 34.



Article 36 ARSIWA defines compensation in terms of monetary payment, while ICJ case law illustrates an instance where monetary compensation has been provided for environmental damage caused.<sup>54</sup> There has also been evidence of compensation in non-monetary form, for instance, in the United Nations Declaration on the Rights of Indigenous Peoples, which provides for a replacement of territory as a result of unexchangeable confiscated land.<sup>55</sup>

Article 35 ARSIWA provides for restitutions as one of the possibilities of reparation. In principle, restitution is regarded as the restoration of the status quo ante, which is the reestablishment of the situation to how it was previous to the commission of the internationally wrongful act.<sup>56</sup> However, the problem with this solution lies in the fact that an island which has already sunk cannot be per se restored.<sup>57</sup>

Article 37 ARSIWA establishes a last-resort category of reparation, where satisfaction may be provided in cases where neither compensation nor restitution may be implemented.<sup>58</sup> In the case of the sinking islands, this form of reparation may become useful insofar as compensation or reparation cannot be provided.

Moreover, Article 39 ARSIWA envisages that a difference in reparation due may be determined if the claimant has contributed to the damage suffered.<sup>59</sup> As Allen points out, although it is true that the sinking islands have emitted greenhouse gases, their contribution has not been substantial enough for this requirement to be fulfilled.<sup>60</sup> Indeed, the fact that the claimants themselves may be perceived as having contributed to their own harm suffered, the theory of remedial territory may be put in question altogether.

## 6 | Who Are the Important Actors?

When considering the key actors in the case of the sinking islands, a few pertinent ones may be identified. As has already been discussed above, the sinking islands themselves, as well as the potentially responsible States are the pertinent actors in this case. Furthermore, emphasis may be put on the United Nations organisation,

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<sup>54</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Judgement) [2018] ICJ Rep 2018.

<sup>55</sup> ARSIWA (n 43) art 36; United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

<sup>56</sup> ARSIWA (n 43) 35; Allen (n 42) 15.

<sup>57</sup> *ibid.*

<sup>58</sup> ARSIWA (n 43) art 37.

<sup>59</sup> ARSIWA (n 43) 39.

<sup>60</sup> Allen (n 42) 19.

for they as the international community, are endowed with the obligation to take action in international crises. However, the very much overlooked actors which also play an important role are the people of the sinking islands. In that regard, a question inevitably arises: what rights will the population of the suffered States be left with, and what status will they have once the territory dissolves under their feet?

Firstly, one should consider the applicability of refugee law to the present situation. The Refugee Convention defines a refugee as a person who has, 'owing to well-founded fear of being persecuted...is outside the country of his nationality'.<sup>61</sup> Here, two challenges arise: the people should be located outside of their territory and fear of being persecuted. However, a lot of people affected by climate change will be within the same country, thus will be categorised as 'internally displaced people'.<sup>62</sup> Furthermore, there must be a fear of persecution for: race, religion, nationality, being part of a particular social group, or political opinion. Nonetheless, the rising sea level cannot be applied to any one of these circumstances, particularly because it is an indiscriminate occurrence.<sup>63</sup> Thus, refugee law does not seem likely to suffice under these circumstances. However, in recent years, the term 'climate refugees' has been used to describe this particular group of people.<sup>64</sup>

Another option would be to apply complementary protection, which can be defined as the 'protection granted by States on the basis of an international protection need outside the 1951 Refugee Convention framework'.<sup>65</sup> While at first it may look like a possible option for this scenario, .... provide reasons for the contrary.

One main problem is that international law does not account for statelessness de facto, as in the case of the sinking islands - only de jure statelessness has been recognised absolutely.<sup>66</sup> Moreover, the only recognised protection would be found mainly in soft (non-binding) law, such as Article 15 of the Universal Declaration of Human Rights, which encompasses the right to nationality.<sup>67</sup> Another example may be given of the Convention on the Reduction of Statelessness, which obliges parties

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<sup>61</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1.

<sup>62</sup> Valentina Baiamonte and Chiara Redaelli, 'Small Islands Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies' (2017) SSRN 6, 10 <<https://ssrn.com/abstract=3072872>> accessed 10 March 2021.

<sup>63</sup> *ibid*, 10-11.

<sup>64</sup> Kim Angell, 'New Territorial Rights for Sinking Island States' (2021) 20(1) EJPT 95, 95.

<sup>65</sup> Baiamonte and Redaelli (n 60) 11.

<sup>66</sup> *ibid*, 12.

<sup>67</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 15.

to grant nationality to persons born on their territory, who would have otherwise been stateless.<sup>68</sup> However, no binding solutions can be found in international law as of now for certain.

## 7 | Sources for Further Research

Jacquelynn Kittel, 'The Global "Disappearing Act": How Island States Can Maintain Statehood in the Face of Disappearing Territory' [2014] Michigan State Law Review 1207. (<https://core.ac.uk/download/pdf/228471646.pdf>)

Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States' [2011] UNHCR PPLA/2011/04 (<https://www.unhcr.org/4df9cb0c9.pdf>)

Emma Allen "Climate Change and Disappearing Island States: Pursuing Remedial Territory" [2018] (<https://doi.org/10.1163/23527072-00101008>)

Derek Wong, 'Sovereignty sunk? The Position of 'Sinking States' at International Law' [2013] Melbourne Journal of International Law (<http://classic.austlii.edu.au/au/journals/MelbJIL/2013/13.pdf>)

## 8 | Bibliography

### 8.1 | Primary Sources

#### *Treaties*

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

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

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<sup>68</sup> Hernández (n 21) 435; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Final Act of the Convention on the Reduction of Statelessness and the Draft Articles on Nationality of Natural Persons in relation to the Succession of States (adopted on 26 July 1951, entered into force 13 December 1975) 989 UNTS 175.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted on 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.

### *Case Law*

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Judgement) [2018] ICJ Rep 2018.

### *Other*

UNCnHR, 'The Human Rights Situation of Indigenous Peoples in States and Territories Threatened with Extinction for Environmental Reasons' (2005) as cited in Gleider Hernández, 'International Human Rights and Refugee Law' in International Law (OUP 2019).

## **8.2 | Secondary Sources**

### *Articles*

Allen E, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law 1.

Angell K, 'New Territorial Rights for Sinking Island States' (2021) 20(1) EJPT 95.

Baiamonte V and Redaelli C, 'Small Islands Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies' (2017) SSRN 6 <<https://ssrn.com/abstract=3072872>> accessed 10 March 2021.

- Blitz B.K, 'Statelessness, protection and equality' [2009] Refugee Studies Centre.
- Dible J.L, 'The Social and Political Consequences of Another Stateless Generation in the Middle East' [2016] United States Army Command and General Staff College 9-12.
- Kittel J, 'The Global "Disappearing Act": How Island States Can Maintain Statehood in the Face of Disappearing Territory' [2014] Michigan State Law Review 1207.
- McAdam J, 'Disappearing States,' Statelessness and the Boundaries of International Law' [2010] UNSW 105.
- Ödalen J, Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States [2014] Journal of Agricultural and Environmental Ethics 225.
- Park S, 'Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States' [2011] UNHCR PPLA/2011/04.
- Rayfuse R, International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma [2010] Univ. of N.S.W. Faculty of Law Research Series, Paper No. 52 11.
- Göcke K, 'Stateless Persons', Max Planck Encyclopedia of International Law (2013) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e878>> accessed 10 March 2021.
- Kolmannskog V, 'Climate Change, Environmental Displacement and International Law' [2012] Journal of International Development 1074.
- Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination' (2015) 26(2) EJIL 471.
- 'Self-Study Module on: Statelessness' [2012] UNHCR 30-37.
- Wong D, 'Sovereignty sunk? The Position of 'Sinking States' at International Law' [2013] Melbourne Journal of International Law.
- Yamamoto L and Esteba M m, 'Vanishing Island States and Sovereignty' [2010] Ocean & Coastal MGMT 1.

### *Book Chapters*

Anders Henriksen, 'The actors in the international legal system' in *International Law* (Oxford University Press 2019).

Hernández G, 'International Human Rights and Refugee Law' in *International Law* (OUP 2019).

William E Conklin, 'The Consequences of Statelessness' *Statelessness: The Enigma of the International Community* (Hart Publishing 2014).

### *Websites*

UN News, 'Samoa: Stopping Climate Change Is 'About People, About Survival,' Says UN Envoy' (UN News Centre, 2 September 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48614#.VCssYkvVRK4>> ("World leaders have not sufficiently addressed climate issues").

United Nations, 'Role of the General Assembly' (United Nations Peacekeeping, n.d.) <<https://peacekeeping.un.org/en/role-of-general-assembly>> accessed 27 February 2021.

The Editors of Encyclopaedia Britannica, 'United Nations General Assembly' (Britannica, n.d.) <<https://www.britannica.com/topic/United-Nations-General-Assembly>> accessed 27 February 2021.

United Nations, 'Sixth Committee (Legal)' (General Assembly of the United Nations, n.d.) <<https://www.un.org/en/ga/sixth/>> accessed 27 February 2021.