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Climate change and the risk for  
“climatic statelessness”

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## **Abstract**

**The impact of climate change, such as rising sea level, floods, droughts and forest fires, have a devastating effect on human lives. Such adverse effects impair the enjoyment of human rights, including the rights to health, water and sanitation, food, adequate housing and the right to life. They also interact with a number of other factors to prompt people to migrate. Small Island Developing States (SIDS) are among the most vulnerable countries to the adverse impact of climate change. In fact, this phenomenon is endangering the lives of the islands' citizens, forcing cross-border migration and raising serious questions about the possibility that these individuals may become "stateless" because of the disappearance of their State's territory due to the total submersion. The present paper aims to contextualize the issue of "environmental migrations" in order to understand the relationship between climate change, disasters and human mobility. Secondly, it will analyse the concept of "statelessness" under international law and then the issue of statelessness in the context of climate change related displacement, taking into consideration the potential responses to the so called "climatic statelessness".**

## **Keywords**

Climate change, environmental migration, statelessness, climatic statelessness

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## Climate change and the risk for “climatic statelessness”

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### 1 Introduction

The link between climate change and natural disasters has long been well established, as highlighted in recent scientific reports and studies on the subject. According to the *Sixth Assessment Report (AR6)* of the Intergovernmental Panel on Climate Change (IPCC)<sup>1</sup> most of the disasters occurred in the last ten years (about 83%), such as floods, storms, droughts, waves of heat and sea level rise, due to extreme weather and climatic events and it is increasingly evident how these events affect ecosystems and human communities<sup>2</sup>. The Emergency Events Database (EM-DAT), developed by the Center for Research on the Epidemiology of Disaster (CRED)<sup>3</sup>, estimates that in the period between 2000 and 2019 there were 7,348 climate-related disasters, compared to 4212 recorded between 1980 and 1999, most of them in Asia, followed by the Americas and Africa, affecting a total of 97.6 million people<sup>4</sup>.

Among the States most exposed to the adverse effects of climate change are the Small Island Developing States (SIDS)<sup>5</sup>. Small Island States, such as Tuvalu, Kiribati or the Maldives, are particularly exposed to the risk of total submersion, being located only one meter above sea level<sup>6</sup>. The impact determined by this event increases the risks for the survival of human communities and feeds, directly and indirectly, the mass movement of the populations of these countries across

<sup>1</sup> The IPCC is the leading international body for the assessment of climate change. It was established in 1988 with the task of carrying out the appropriate scientific assessments “of the magnitude, timing and potential environmental and socio-economic impact of climate change”, in order to provide governments with information on climate change, its implications and potential future risks useful for the elaboration of the necessary climate policies, United Nations, *Protection of Global Climate for Present and Future Generations of Mankind*, UN General Assembly resolution, UN Doc. A/RES/43/53, 6 December 1988, par. 5. The “Sixth Assessment Report” addresses the physical understanding of the climate change, bringing together the latest advances in climate science, IPCC, *Climate Change 2021. The Physical Science Basis, Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2021*, online: [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM\\_final.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf).

<sup>2</sup> *Ibid.*, p. 1 ss.

<sup>3</sup> In 1988, the Disaster Epidemiology Research Center (CRED) established the Emergency Events Database (EM-DAT) with the support of the World Health Organization (WHO) and the Belgian government. The main objective of the database is to support humanitarian action at national and international level in the decision-making process for disaster preparedness, as well as to provide an objective basis for assessing vulnerability and defining priorities. The database is prepared using various sources from United Nations agencies, non-governmental organizations, insurance companies, research institutes. Further information on the work of the CRED and on the EM-DAT can be found at: <https://www.emdat.be/>.

<sup>4</sup> CRED, *Human Cost of disasters. An Overview of the Last 20 years 2000-2019*, Louvain, Belgio, 2020, p. 6-7.

<sup>5</sup> The SIDS group consists of 52 nations and territories, mainly islands, which present similar problems from a geographical, development and sustainability point of view.

<sup>6</sup> IPCC, *Climate Change 2014: Impacts, Adaptation and Vulnerability*, 2014, p. 1619 ss.

international borders, raising questions about the possibility that these individuals may become “stateless”<sup>7</sup>.

First of all, the present paper aims to examine the interrelation between climate change and human mobility. The second part will analyse the definition of “statelessness” under international law and the problem of “climatic statelessness” that could be determined by the disappearance of the State due to sea level rise. Finally, the third part will discuss the possible responses to this phenomenon.

## 2 The impact of climate change in Small Island States

Climate change constitutes the greatest threat that man will have to face in the near future, but human mobility in response to environmental and climatic changes is not a new phenomenon<sup>8</sup>. Since 1990, the IPCC has highlighted that “migration and resettlement may be the most threatening short-term effects of climate change on human settlements. People may decide to migrate in any of the following cases: loss of housing [...], loss of living resources [...], loss of social and cultural resources [...]”<sup>9</sup>. In its last report, it states that “climate change over the 21st century is projected to increase displacement of people [...]. Changes in migration patterns can be responses to both extreme weather events and longer-term climate variability and change, and migration can also be an effective adaptation strategy”<sup>10</sup>.

The impact of these events influences, directly or indirectly, the mass displacement of the most vulnerable populations, both within and across international borders, triggering the production of the so-called “environmental migrations”. Nevertheless, one of the main problems in this area is the lack of a generally accepted definition for referring to migration induced by climate change and its adverse effects. The complexity of the migratory phenomenon and the lack of a univocal approach that adequately represents the relationship between climate change and

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<sup>7</sup> A. J. Del Grande, *Statelessness in the Context of Climate Change: the Applicability of the Montevideo Criteria to “Sinking States”*, in *International Law and Politics*, Vol. 53, 2021, p. 153.

<sup>8</sup> R. Cohen, *Introduction to Theories of Migration*, Edward Elgar, Cheltenham (UK), 1996, p. 11; J. McAdam, *Climate Change, Forced Migration and International Law*, Oxford University Press, Oxford, 2012, p. 13 ss.; J. S. Kupferberg, *Migration and Dignity – Relocation and Adaptation in the Face of Climate Change Displacement in the Pacific – a Human Rights Perspective*, in *International Journal of Human Rights*, Vol. 25, No. 10, 2021, p. 1795.

<sup>9</sup> IPCC, *Climate Change: The IPCC Response Strategies*, 1990, p. 5-6.

<sup>10</sup> IPCC, *Climate Change 2021. The Physical Science Basis*, cit., p. 62.

migration makes it difficult to accurately estimate the number of people who will be forced to move due to environmental degradation<sup>11</sup>.

According to the World Bank there will be 250 million “environmental migrants” by 2050<sup>12</sup> and the IPCC predicts that by 2100, 216 million people will have to move due to the impact of climate change on the environment, highlighting that rising sea levels will endanger the survival of Small Islands States, such as Tuvalu, Kiribati, Vanuatu, Fiji, Micronesia and the Solomon Islands, forcing entire populations to migrate<sup>13</sup>.

In fact, being for the most part located only one meter above sea level, Small Island States are particularly exposed to the risk of total submersion. In addition, coastal erosion, the risk of flooding, the infiltration of salt water and the associated risk of a shortage of drinking water contribute to making these countries uninhabitable even before being completely submerged<sup>14</sup>.

Already in 2009, the Pacific island States declared before the United Nations General Assembly that “never before in all history has the disappearance of whole nations been such a real possibility”<sup>15</sup>. A year later, the Maldives government held an “underwater meeting” to highlight the threat of global warming to the country’s survival<sup>16</sup>. Following these concerns, expressions such as “vanishing islands”, “disappearing states” and “sinking islands” have been coined to refer to

<sup>11</sup> The first estimates relating to displacement induced by environmental causes can be traced back to 1988, when a report published by the Worldwatch Institute calculated the number of people displaced by environmental degradation at 10 million, J.L. Jacobson, *Environmental Refugees: a Yardstick of Habitability*, Worldwatch Institute, Working Paper No. 86, 1988, p. 24. Further studies estimated that “when global warming takes hold there could be as many as 200 million people overtaken by disruptions of monsoon systems and other rainfall regimes, by droughts of unprecedented severity and duration, and by sea-level rise and coastal flooding”, E. El-Hinnawi, *Environmental Refugees*, United Nations Environmental Program (UNEP), Nairobi, 1985; IFRC, *World Disasters Report: Focus on Recovery*, Geneva, 2001, p. 13-14; N. Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century*, in *The Royal Society*, Vol. 357, No. 1420, 2001, p. 611; S. Martin, *The State of the Evidence*, in *Forced Migration Review*, Issue 49, 2015, pp. 12-13. It is worth noting that although “environmental migration” is generally presented as “new” issue, it is actually a dating phenomenon, given that environmental factors have always played a significant role in migration theories. For example, in 1889, Ravenstein argued that “unattractive climate produced and is still producing currents of migration”, E.G. Ravenstein, *The Laws of Migration*, in *Journal of the Statistical Society of London*, Vol. 52, No. 2, 1885, p. 198. However, during the twentieth century, references to the environment as the cause of human mobility would disappear from the literature on migration, until the end of the 1980s because of the diffusion of the theory according to which “environmental migration” was a “primitive” form of migration destined to decline as a result of technological progress and of man’s greater control of the environment (W. Petersen, *A General Typology of Migration*, in *American Sociological Review*, Vol. 23, No. 3, pp. 256-266), the identification of socio-economic causes underlying migration (S. Castles, G. Kosack, *Immigrant Worker and Class Structure in Western Europe*, in *Labor, Capital and Society*, Vol. 19, No. 2, 1986, pp. 315-317), the exclusion from studies on forced migration of displacements induced by environmental degradation and the adoption of a purely political approach (E. Marx, *The Social World of Refugees: A Conceptual Framework*, in *Journal of Refugee Studies*, Vol. 3, No. 3, 1990, pp. 189-203).

<sup>12</sup> K. Rigaud, A. de Sherbinin et al., *Groundswell Report: Preparing for Internal Climate Migration*, World Bank Group, Washington D.C., 2020, p. 3.

<sup>13</sup> IPCC, *Climate Change 2021. The Physical Science Basis*, op. cit., p. 71.

<sup>14</sup> IPCC, *Climate Change 2021. The Physical Science Basis*, op. cit., pag. 72.

<sup>15</sup> United Nations, *Climate Change and its Possible Security Implications*, Resolution adopted by the General Assembly on 3 June 2009, UN Doc. A/RES/63/281, 11 June 2009.

<sup>16</sup> BBC News, *Maldives Cabinet Make a Splash*, 17 October 2009, available online: <http://news.bbc.co.uk/2/hi/8311838.stm>.

this phenomenon and to emphasize its gravity<sup>17</sup>. Thus, the problem of the “sinking islands States” has become emblematic of the most extreme impact of climate change on human society<sup>18</sup>. Therefore, the implications of this situation appear to be anything but negligible, as the gradual submergence of the physical territory of a State can lead not only to the erosion of available resources, but also to a real disappearance of the State itself<sup>19</sup>. This happened, for example, for five of the Solomon Islands, an island State in the South Pacific Ocean, and for other islands of Micronesia, confirming the dramatic effects of climate change in the region<sup>20</sup>.

This circumstance raises a number of important issues from the point of view of international law. The problem that arises is whether following the total submersion and, therefore, the disappearance of the territorial element, a State can be considered extinct<sup>21</sup> and whether as a result of this extinction and in the absence of adaptation strategies, the displacement of entire populations from Small island nations poses the risk of *de facto* statelessness, which could turn into *de jure* statelessness if the States concerned are deemed to have ceased to exist<sup>22</sup>.

### 3 The problem of “climatic statelessness”

The terminology employed to describe human mobility due to environmental and climatic changes in Small Island States is a significant issue in terms of how the phenomenon is dealt with from a legal perspective<sup>23</sup>.

In accordance with art. 1, par. 1 of the Convention relating to the *status* of stateless person of 1954, the expression “stateless person” indicates “a person who is not considered as a national by any State under the operation of its law”<sup>24</sup>. Therefore, an individual is considered stateless when the conditions indicated by this provision are satisfied; this means that the assessment of

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<sup>17</sup> L. Yamamoto, M. Esteban, *Vanishing Island States and Sovereignty*, in *Ocean and Coastal Management*, Vol. 53, No. 1, 2010, p. 1-9; C. Farbotko, *Wishful sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation*, in *Asia Pacific Viewpoint*, Vol. 51, No. 1, 2010, pag. 47-60; J. G. Stoutenburg, *Disappearing Island States in International Law*, Brill Nijhoff, Leiden, 2015; J. Barnett, *The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries*, in *Asia Pacific Viewpoint*, Vol. 58, No. 1, 2017, pag. 3-13; T. Bruner, *Sinking Islands and the UNSC: Five Modalities of Mobilising Science*, in *Geoforum*, Vol. 84, 2017, pag. 342-353.

<sup>18</sup> According to Jane McAdam, the phenomenon considered represents “the epitome of climate-related movement, connoting a straightforward cause (climate change) and effect (displacement)”, *op. cit.*, p. 122.

<sup>19</sup> L. Yamamoto, M. Esteban, *Atoll Island States and International Law. Climate Change Displacement and Sovereignty*, Springer, Berlin, 2014, p. 219.

<sup>20</sup> S. Albert, J. X. Leon, A. R. Grinham, J. A. Church, B. R. Gibbes, C. D. Woodroffe, *Interactions between sea-level rise and wave exposure on reef island dynamics in the Solomon Islands*, in *Environmental Research Letters*, Vol. 11, 2016, p. 1-10; P. D. Nunn, A. Kohler, R. Kumar, *Identifying and assessing evidence for recent shoreline change attributable to uncommonly rapid sea-level rise in Pohnpei, Federated States of Micronesia, Northwest Pacific Ocean*, in *Journal of Coastal Conservation*, Vol. 21, No. 6, 2017, p. 719-730.

<sup>21</sup> C. P. Carlarne, K. R. Grey, R. Tarasofsky, *The Oxford Handbook of International Climate Change Law*, Oxford University Press, Oxford, 2016, p. 526.

<sup>22</sup> A. J. Del Grande, *op. cit.*, p. 154.

<sup>23</sup> J. Campbell, O. Warrick, *Climate Change and Migration Issues in the Pacific*, United Nations Economic and Social Commission for Asia and the Pacific, Fiji, 2014, p. 2, online: <https://www.ilo.org/dyn/migpractice/docs/261/Pacific.pdf>.

<sup>24</sup> United Nations General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.



the existence of the indicated requirements is of a declarative, rather than constitutive, nature<sup>25</sup>. That being said, those who satisfy the requirements contained in the provision in question are considered *de jure* stateless, even if this term is not used in the Convention<sup>26</sup>. At the same time, although the expression *de facto* statelessness is not contained in any international instrument, except for the *Final Act* of the Convention on the Reduction of Statelessness of 1961<sup>27</sup>, this expression can be attributed the meaning of “persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country”<sup>28</sup>, i.e. those who, although not formally deprived of their citizenship, cannot or do not want to enjoy the protection of their State<sup>29</sup>. Therefore, those who are unable to return to their country “will also always be *de facto* stateless even if they are otherwise able in part or in full to avail themselves of protection of their country of nationality while in the host country (i.e. , diplomatic protection and assistance)”<sup>30</sup>.

It is therefore evident that the fundamental aspect of the definition is represented by the element of “citizenship”<sup>31</sup>. Citizenship is generally considered as an essential link between individuals and international law<sup>32</sup> that has “origins in the notion of allegiance”<sup>33</sup>, “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and duties”<sup>34</sup>. It constitutes a fundamental human right that found formal consecration in the Universal Declaration of Human Rights<sup>35</sup>, which states that “everyone has the right to a nationality. No one shall be arbitrarily deprived of his

<sup>25</sup> UNHCR, *Handbook on Protection of Stateless Persons. Under the 1954 Convention Relating to the Status of Stateless Persons*, Geneva, 2014, p. 10.

<sup>26</sup> UNHCR, *Guidelines on Statelessness No. 1: The Definition of “Stateless Person” in Article 1 (1) of the 1954 Convention Relating to the Status of Stateless Persons*, 20 February 2012, par. 8, online: <https://www.refworld.org/pdfid/4f4371b82.pdf>.

<sup>27</sup> United Nations, *Convention on the Reduction of Statelessness*, New York, 30 August 1961, United Nations, Treaty Series, Vol. 989, p. 175.

<sup>28</sup> UNHCR, *The concept of Stateless Persons Under International Law Summary Conclusions*, Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, 27-28 May 2010, p. 6.

<sup>29</sup> A. Annoni, *The Changing Role of Nationality in International Law*, Routledge, London, 2013, p. 38.

<sup>30</sup> UNHCR, *The Concept of Stateless Persons Under International Law Summary Conclusions*, cit., par. 9.

<sup>31</sup> A. Edwards, L. van Waas, *Nationality and Statelessness Under International Law*, Cambridge University Press, Cambridge, 2014, p. 72; M. Foster, H. Lambert, *International Refugee Law and the Protection of Stateless Persons*, Oxford University Press, Oxford, 2019, p. 54 ss.

<sup>32</sup> M. Foster, H. Lambert, *op. cit.*, p. 47.

<sup>33</sup> E. Fripp, *Nationality and Statelessness in the International Law of Refugee Status*, Bloomsbury, London, 2016, p. 34.

<sup>34</sup> International Court of Justice, *Nottebohm (Liechtenstein v. Guatemala)*, Second phase, 6 April 1955, ICJ Reports 1955, p. 4; K. Bianchini, *Protecting Stateless Persons. The Implementation of the Convention Relating to the Status of Stateless Persons Across EU States*, Brill Nijhoff, Leiden, 2018, p. 17.

<sup>35</sup> A. Annoni, *op. cit.*, p. 18.

nationality, nor denied the right to change his nationality” (art. 15), and was subsequently incorporated into other international instruments, both universal and regional<sup>36</sup>.

The concept of “citizenship” is clearly connected to that of “State” since the existence of citizenship presupposes the existence of the State<sup>37</sup>. According to art. 1 of the Convention on the rights and duties of States, adopted in Montevideo on 26th December 1933 by the VII International Conference of American States<sup>38</sup>, “the State as a person in international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states”<sup>39</sup>. The concept of “State” contained in the Montevideo Convention is based on the principle of “effectiveness”<sup>40</sup>, by virtue of which the formation of the State takes place where the indicated requirements exist<sup>41</sup>.

The concept of “permanent population” refers to a set of individuals who reside permanently on the national territory, constituting a community<sup>42</sup>; in fact, a State is first of all a “collectivité humaine” and, therefore, cannot exist without population<sup>43</sup>. This element therefore coincides with the concept of “people”, defined as “an aggregate of individuals who live together as a community though they may belong to different races or creeds or cultures or be of different colours”<sup>44</sup>. Furthermore, it should be noted that the small number of individuals who are part of it does not constitute an impediment to satisfying the requirement of the “population”, as demonstrated by the existence of numerous States whose population consists of less than one hundred

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<sup>36</sup> For example, the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (art.24, par.3), the Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (art.7), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, UN Doc. A/RES/45/158 (art.6), the Covenant on the Rights of the Child in Islam, June 2005, OIC /9-IGGE/HRI/2004/Rep.Final (art.7), the African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (art.6, par. 3), the Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, UN Doc. A/RES/61/106 (art. 18), the American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969 (art. 20), the Commonwealth Convention on Human Rights and fundamental freedoms, 26 May 1995 (art. 24, par. 1) and the Arab Charter on Human Rights, 15 September 1994, (art.29, par. 1).

<sup>37</sup> E. Fripp, *op. cit.*, p. 22.

<sup>38</sup> *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, Montevideo, 26 December 1933, League of Nations Treaty Series, Vol. CLXV, No. 3802, p. 19.

<sup>39</sup> The Montevideo Convention incorporates and extends the theory of the three elements of the State developed by the German jurist Georg Jellinek at the beginning of the twentieth century (*Allgemeine Staatslehre*, Verlag von Julius Springer, Berlin, 1929) according to which three material elements are necessary for the existence of the State: a territory, a people and a government. For a detailed analysis of the theory G. Morelli, *Nozioni di diritto internazionale*, CEDAM, Milano, 1967, p. 127 ss.; G. Arangio-Ruiz, *L'état dans le sens du droit de gens et la notion du droit international*, CLUEB, Bologna, 1976, p. 3 ss., 55 ss. e 265 ss.; A. Cassese, *Diritto internazionale*, III ed., Il Mulino, Bologna, 2017, p. 66 ss.; F. Salerno, *Diritto internazionale. Principi e norme*, CEDAM, Milano, 2019, p. 34 ss.

<sup>40</sup> D. Raić, *Statehood and the Law of Self-determination*, Brill Nijhoff, Leiden, 2002, p. 58 ss.; F. Couveinhes-Matsumoto, *L'effectivité du droit international*, Bruylant, Bruxelles, 2014, p. 249 ss.; J. Crawford, M. Koskeniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2015, p. 46 ss.

<sup>41</sup> J. L. Briery, *The Law of Nations*, Oxford University Press, Oxford, 1967, p. 34 ss.; G. Morelli, *op. cit.*, p. 127 ss.; V. D. Degan, *Création et disparition de l'État (à la lumière du démembrement de trois fédérations multiethniques en Europe)*, in *Collected Courses of the Hague Academy of International Law*, Vol. 279, 1999, p. 227 ss.; A. Gioia, *Diritto internazionale*, Giuffrè, Torino, 2019, p. 133.

<sup>42</sup> M. Mancini, *Statualità e non riconoscimento nel diritto internazionale*, Giappichelli, Torino, 2020, p. 12.

<sup>43</sup> P. Daillier, A. Pellet, D. Müller, *Droit international public*, L.G.D.J., Paris, 2009, p. 451.

<sup>44</sup> R. Jennings, A. Watts, *Oppenheim's International Law*, IX ed., Oxford University Press, Oxford, 2008, p. 121.

thousand units<sup>45</sup>: it is the case, for example, of some small Pacific island States, such as Nauru, Tuvalu, Palau, Marshall Islands, Tuvalu and Kiribati.

Secondly, a territory is needed, as “a State without territory is not possible”<sup>46</sup>. The “territory” is a portion of the earth’s surface, on which the population is settled, governed effectively and independently by a government authority and includes the mainland (including rivers, lakes and canals), inland waters, the territorial sea and the airspace above it<sup>47</sup>. Also in this case, both the size of the territory – as demonstrated by the existence of numerous States whose dimensions are particularly small<sup>48</sup> – and the geographical contiguity between the areas that compose it are irrelevant<sup>49</sup>. That said, territory and population constitute “necessary preconditions and immanent conditions” of the existence of a State<sup>50</sup>.

In addition to these two elements, there is also the “government organization” which is the element that most identifies the State as an independent subject of international law<sup>51</sup>. It is an authority that exercises a stable, exclusive and effective control over the territory and the population allocated therein and understood as including the executive, legislative and judicial powers<sup>52</sup>.

Finally, the last requirement of statehood contemplated by the Montevideo Convention is represented by the “ability to enter into relations with other States”, which means that the governmental organization must be able to exercise a stable and exclusive control over the territory and the population allocated there and, on the international level, must be able to establish relations with other States<sup>53</sup>.

So, if the material element of the population or that of the territory of a State is lacking as a result of the erosion of the available resources or of the total submersion due to the sea-level

<sup>45</sup> P. K. Menon, *Some Aspects of the Law of Recognition. Part II: Recognition of States*, in *Revue de droit international de sciences diplomatiques et politiques*, Vol. 68, 1990, p. 1-29; J. C. Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood*, Cambridge University Press, Cambridge, 1996, p. 117 ss.; C. Focarelli, *International Law as Social Construct: the Struggle for Social Justice*, Oxford University Press, Oxford, 2012, p. 158; R. Lapidoth, *When is an Entity Entitled to Statehood?*, in *Israel Journal of Foreign Affairs*, Vol. 2, No. 3, 2012, p. 77-78; S. Marchisio, *Corso di diritto internazionale*, Giappichelli, Torino, 2017, p. 187.

<sup>46</sup> R. Jennings, A. Watts, *op. cit.*, p. 451.

<sup>47</sup> P. Dailler, A. Pellet, D. Müller, *op. cit.*, p. 457; P. K. Menon, *op. cit.*, p. 5.

<sup>48</sup> This is the case of States such as Nauru, Tuvalu, Kiribati, the Marshall Islands. See J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: les relations publiques internationales*, CNRS, Paris, 1993, p. 54; M. N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2017, p. 61; P. K. Menon, *op. cit.*, p. 5 ss.

<sup>49</sup> H. Kelsen, *General Theory of Law and State*, Cambridge University Press, Cambridge, 1949, p. 207 ss.; M. N. Shaw, *op. cit.*, p. 67; P. Malinczuk, *Modern Introduction to International Law*, VII ed., Routledge, New York, 1997, p. 76 ss.

<sup>50</sup> B. Conforti, *Diritto internazionale*, Editoriale Scientifica, Napoli, 2020, p. 28.

<sup>51</sup> S. Marchisio, *op. cit.*, p. 187.

<sup>52</sup> M. Mancini, *op. cit.*, p. 19; P. Dailler, A. Pellet, D. Müller, *op. cit.*, p. 458.

<sup>53</sup> J. Vidmar, *Democratic Statehood in International Law. The Emergence of New States in Post-Cold War Practice*, Hart Publishing, Oxford, 2013, p. 41.

rise, the question that arises is whether that State can be considered “extinct”<sup>54</sup>. The situation of the low-lying island States appears unique, but the problem has been examined only marginally, as the extinction of a State as a result of climate change has always appeared, until now, rather remote<sup>55</sup>.

In particular, the extinction of a State due to the loss of its population as consequence of the progressive movement to other States, although theoretically possible, does not find any practical confirmation. In fact, a large part of the population of many Pacific countries is now located outside their territory, without affecting the ability of these countries to continue to function as States<sup>56</sup>.

On the other hand, the loss of the territorial element raises a much more complex problem. As has been highlighted, the “territory” constitutes one of the fundamental requirements of a State, represents the physical foundation of power and jurisdiction, as well as citizenship<sup>57</sup>. International law contemplates the possibility that a State can cease to exist, in particular as a result of the “succession”, which presupposes that a successor State replaces the previous one. In fact, the succession represents “the replacement of one State by another in the responsibility for the international relations of territory”<sup>58</sup>. On the contrary, the potential extinction of a State due to climate change and, in particular, to sea level rise, gives rise to a distinctly different situation, with respect to which the conventional rules of international law are inapplicable<sup>59</sup>.

Furthermore, in principle, there is a strong presumption in favour of the continuity of the State despite the disappearance of the territorial element, which finds its rationale in the objective of international law to guarantee the stability and maintenance of the *status quo*<sup>60</sup>. This presumption explains why it is considered that the loss of the territorial element does not affect the legal personality of a State, so as to preserve the rights and obligations attributed to it despite the changes that have taken place in the territory<sup>61</sup>. On the other hand, this theory has been criticized and considered as a fiction from which derives the recognition of immortality to the States that

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<sup>54</sup> J. Scheffran, M. Brzoska, H. G. Brauch, P. M. Link, J. Schilling, *Climate Change, Human Security and Violent Conflict. Challenges for Societal Stability*, Springer, New York, 2016, p. 9; B. Mayer, F. Crepeau, *Research Handbook on Climate Change, Migration and the Law*, Edward Elgar, Cheltenham (UK), 2017, p. 195 ss.; F. Thornton, *People on the Move: International Law and Justice*, Oxford University Press, Oxford, 2018, p. 35 ss.

<sup>55</sup> D. Wang, *Sovereignty Sunk? The Position of “Sinking States” at International Law*, in *Melbourne Journal of International Law*, Vol. 14, No. 2, 2013, p. 348; F. Thornton, *op. cit.*, p. 36.

<sup>56</sup> J. McAdam, *op. cit.*, p. 132; M. B. Gerrard, G. E. Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Cambridge University Press, Cambridge, 2013, p. 369.

<sup>57</sup> V. Lowe, *International Law: A Very Short Introduction*, Oxford University Press, Oxford, 2015, p. 138.

<sup>58</sup> United Nations, *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, Vienna, 8 April 1978, art. 2, par. 1, lett. b).

<sup>59</sup> J. McAdam, *op. cit.*, p. 127.

<sup>60</sup> K. G. Bülher, *State Succession and Membership in International Organization. Legal Theories versus Political Pragmatism*, Martinus Nijhoff, The Hague, 2001, pag. 18; V. Lowe, *op. cit.*, p. 139; D. Wong, *Sovereignty Sunk? The Position of Sinking States at International Law*, in *Melbourne Journal of International Law*, Vol. 14, No. 2, 2014, p. 17.

<sup>61</sup> M. B. Gerrard, G. E. Wannier, *op. cit.*, p. 74.

is legally incorrect and historically false<sup>62</sup>. States are mainly territorial entities; therefore, the possession of a territory is “fundamental” for statehood<sup>63</sup>.

That’s why, according to some States, extinction represents in all respects a possible consequence of sea level rise, as submersion would expose States to the risk of losing their populations and their land<sup>64</sup>. In fact, even if the government of a State whose territory has been submerged continues to exist, its capacity to effectively exercise power would still be limited, due to the lack of a territory on which to exercise it<sup>65</sup>. The government would need, in fact, a host State willing to receive it and to allow it to exercise sovereignty over its citizens in the form of diplomatic and consular protection; a prospect that appears somewhat unlikely<sup>66</sup>.

In conclusion, if we consider that in these circumstances a State must be considered extinct and does not exist under international law, people would be considered *ipso facto* stateless unless they have another citizenship<sup>67</sup>. In fact, the threat posed by sea level rise to the territorial integrity of Small Island States raises doubts about the condition in which the population that left that countries would find themselves<sup>68</sup>. Indeed, believing that extinction resulting from the impacts of climate change produces the loss of citizenship, individuals moving to other States would run the risk of becoming “stateless”<sup>69</sup>, since that essential attachment between the individual and the state which forms the basis of “citizenship” would be lost<sup>70</sup>. However, the question still remains open and not easy to resolve. It remains to be seen, therefore, how international law will address this challenge in the near future and what solutions States will adopt for the protection of displaced populations<sup>71</sup>.

## 4 Possible solutions to avoid “climate statelessness”

Despite these uncertainties, it is evident that the territory of Small Island States can become completely uninhabitable even before the complete submersion, forcing the population and the

<sup>62</sup> According to this theory, in fact, States could not “disappear juridically - even if for all intents and purposes they have already fallen or been pulled down in fact”, D. Wong, *op. cit.*, p. 18; J. G. Stoutenburg, *op. cit.*, p. 380.

<sup>63</sup> J. Crawford, *op. cit.*, p. 128; V. Lowe, *op. cit.*, p. 138.

<sup>64</sup> In this regard, see the declarations of the Maldives (Human Rights Council Resolution 7/23, *Human Rights and Climate Change*, Submission of the Maldives to the Office of the UN High Commissioner for Human Rights, 25 September 2008), by Nuaru (United Nations General Assembly, *Follow-Up to the Outcome of the Millennium Summit*, UN Doc. A/63/PV.85, 3 June 2009), of France, Portugal, Lebanon, India and Australia (United Nations General Assembly, *Follow-up to and implementation of the Mauritius Strategy for the Further Implementation of the Program of Action for the Sustainable Development of Small Island Developing States*, UN Doc. A/62/27, 28 August 2007).

<sup>65</sup> J. Crawford, I. Brownlie, *Brownlie’s Principles of International Law*, Oxford University Press, Oxford, 2019, p. 76.

<sup>66</sup> S. Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, in UNHCR, *Legal and Protection Policy Research Series*, 2011, p. 7.

<sup>67</sup> UNHCR, *The concept of Stateless Persons Under International Law Summary Conclusions*, *cit.*, par. 7.

<sup>68</sup> C. P. Carlarne, K. R. Grey, R. Tarasofsky, *op. cit.*, p. 526.

<sup>69</sup> J. McAdam, *op. cit.*, p. 139.

<sup>70</sup> H. Alexander, J. Simon, *Sinking into Statelessness*, in *Tilburg Law Review*, Vol. 20, No. 21, 2014, p. 21.

<sup>71</sup> M. Dobrić, *Rising Statelessness Due to Disappearing Island States: Does the Current Status of International Law Offer Sufficient Protection?*, in *Statelessness and Citizenship Review*, Vol. 1, No. 1, 2019, p. 67.

government to move earlier. With respect to the risk that the adverse effects of climate change could act as a cause of extinction of the State and, therefore, of “climate statelessness”, various solutions have been proposed until now.

First of all, measures to “slow down” sea level rise could help to mitigate its consequences. For example, the construction of protective walls realized in the capital by the Maldives, as well as the creation of settlements and the creation of crops below sea level implemented by the Netherlands could constitute suitable solutions to stem the effects of the phenomenon<sup>72</sup>. However, these measures are too expensive for most island States, in addition to the fact that they cannot be implemented everywhere, given the particular shape of the territory of some islands. Therefore, the use of these containment tools will largely depend on the availability of the necessary resources to finance their construction<sup>73</sup>.

An alternative solution, proposed in 1996 by Brian Fisher, the then Executive Director of the Australian Bureau of Agricultural and Resource Economics, is that of the “en masse relocation” of the population of one State in another country, based on the idea that the mass transfer of a population had a lower economic “cost” than measures to mitigate the effects of climate change<sup>74</sup>. Actually, although repeatedly proposed by the island States themselves – for example, by Kiribati and Tuvalu who have often suggested relocating their inhabitants to Australia or New Zealand<sup>75</sup> – this option has always been welcomed by the Pacific populations with a strong “discontent” because of the strong bond that exists between the Pacific island communities and their land<sup>76</sup>. Indeed, the implementation of a relocation is complex, as it is a long-term process that requires considerable effort, due to the difficulty of identifying suitable sites and of negotiation and consultation both with the communities that move and with those of the destination areas<sup>77</sup>.

Nonetheless, the government of Kiribati, led by President Anote Tong, between 2003 and 2015 began the implementation of a series of adaptation measures, including the actual purchase of a large “freehold property”, an estate in Vanua Levu (Fiji)<sup>78</sup>, which was allegedly used for

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<sup>72</sup> J. Hinkel, *The Ability of Societies to Adapt to Twenty-First-Century Sea-Level Rise*, in *Nature Climate Change*, Vol. 8, No. 7, 2018, p. 570-578.

<sup>73</sup> E. Piguet, *op. cit.*, p. 873; A. E. Collins, *Applications of the Disaster Risk Reduction Approach to Migration Influenced by Environmental Change*, in *Environmental Science and Policy*, Vol. 27, No. 1, 2013, p. 112-115.

<sup>74</sup> A. Gillespie, W. C. G. Burns, *Climate Change in the South Pacific: Impacts and Responses in Australia, New Zealand and Small Island States*, Springer, London, 2006, p. 267.

<sup>75</sup> In this sense, see Foreign Affairs, Defence and Trade References Committee, *A Pacific Engaged Australian Relations with Papua New Guinea and the Island States of the Southwest Pacific*, August 2003, par. 6; D. Helvarg, *Interview with a Drowning President, Anote Tong*, 1 October 2010, online: <https://www.thenation.com/article/archive/interview-drowning-president-kiribatis-anote-tong/>; E. Hermann, W. Kempf, *Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji*, in *The Contemporary Pacific*, Vol. 29, No. 2, 2017, p. 232.

<sup>76</sup> J. Campbell, M. Goldsmith, K. Koshy, *Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)*, Asia-Pacific Network for Global Change Research, 2005, p. 21.

<sup>77</sup> *Ibid.*, p. 6.

<sup>78</sup> In 2011, Kiribati High Commissioner Reteta Rimon learned from a property developer that a rural property of more than 5,000 acres on Vanua Levu, Fiji's second largest island, had been put up for sale by the Anglican Church. This property was considered ideal for agriculture, forestry and for the extraction of rock, useful for fortifying the most exposed sections of the coast of Kiribati.



economic development purposes and to ensure food security in Kiribati<sup>79</sup>. However, as has been noted in the doctrine, the constant analogy between territorial sovereignty and real estate property is misleading, as the private purchase of a territory is different from the acquisition of “sovereignty”<sup>80</sup>. In fact, while the purchase gives the purchasing state private property rights, that is the right to occupy and extract natural resources or erect buildings, it does not confer “sovereignty” rights, as the latter is maintained by the “selling” State<sup>81</sup>.

According to the government’s program, this measure was linked to its climate change policy and not its migration policy. Nonetheless, migration has become, over time, one of the possible options for the inhabitants of the island. In fact, the policy of “migration with dignity” was developed as part of the “Kiribati Adaptation Program (KAP)”<sup>82</sup>, a broader mass relocation strategy developed over three phases between 2006 and 2016<sup>83</sup>. Specifically, with the intent of preserving the national identity and sense of community of the inhabitants of the island forced to leave their lands, this policy was intended to plan migration in a more methodical way<sup>84</sup>, investing in training and enhancement of citizens’ skills, in particular of the younger generations<sup>85</sup>. This “dignified migration” policy was intended to provide them with the professional qualifications needed to migrate to other countries, such as Australia and New Zealand, and find employment there, preventing Kiribatians from becoming “refugees” or “stateless”<sup>86</sup>.

The theme of “dignified migration” continued to be part of the government’s agenda even afterwards. In October 2015, the “National Labour Migration Policy (NLMP)” was approved, managed by the Ministry of Labour and Human Resources Development, which defined the activities aimed at facilitating labour migration abroad<sup>87</sup>. Furthermore, at a meeting of the “Coalition of Atoll Nations Against Climate Change”, held in October 2015, the governments of Kiribati, Tuvalu and Tokelau adopted a document stating that “climate change related impacts are increasing the demand for migration and will continue to do so”, underlining that “labour mobility provides immediate climate change adaptation benefits” and inviting all the actors involved to undertake “urgent affirmative action for labour mobility and explore innovative new approaches”<sup>88</sup>.

<sup>79</sup> Former President Anote Tong has made climate change the central goal of his mandate. Speaking in many international fora, he has frequently underlined the existential threat that the island States would face due to climatic phenomena, asking for greater commitment in the implementation of measures to mitigate greenhouse gas emissions.

<sup>80</sup> J. R. Crawford, *op. cit.*, p. 717.

<sup>81</sup> E. Allen, *Climate Change and Disappearing Island States*, in Brill Open Law, 2018, p. 11.

<sup>82</sup> For further information on the “Kiribati Adaptation Program”, see the official website: <https://www.climate.gov.ki/kiribati-adaptation-program/>.

<sup>83</sup> K. E. McNamara, *Cross-border Migration with Dignity in Kiribati*, in *Forced Migration Review*, Vol. 49, May 2015, p. 62.

<sup>84</sup> E. Remling, *Migration as Climate Adaptation? Exploring Discourses Amongst Development Actors in the Pacific Island Region*, in *Regional Environmental Change*, Vol. 20, No. 3, 2020, pp. 3 ss.

<sup>85</sup> C. Menjívar, M. Ruiz, I. Ness, *The Oxford Handbook of Migration Crisis*, Oxford University Press, Oxford, 2019, p. 305.

<sup>86</sup> *Ibid.*

<sup>87</sup> The “National Labour Migration Policy” is available at: [https://www.ilo.org/wcmsp5/groups/public/---asia/--ro-bangkok/--ilo-suva/documents/publication/wcms\\_431833.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/--ro-bangkok/--ilo-suva/documents/publication/wcms_431833.pdf).

<sup>88</sup> Government of Tokelau, *High-Level Dialogue on Climate Induced Migration Outcomes Document*, 10 October 2015, Ambo Tarawa, Kiribati, online: <https://www.tokelau.org.nz/Bulletin/October+2015/Climate+induced+migration+outcomes+document.html>.

According to part of the doctrine, one of the most effective solutions could be to negotiate the cession of a territory by another State where to relocate the population and transfer its “sovereignty”<sup>89</sup>. This solution could therefore guarantee the continuity of the existence of small island States<sup>90</sup>. For example, this option has been considered by the President of the Maldives who announced plans to purchase land in Sri Lanka or India<sup>91</sup>.

Furthermore, as the population would be relocated to the new land, no citizenship issues would arise, as the new territory would be under the sovereignty of the island State that acquired it<sup>92</sup>. However, a formal land cession is highly unlikely, as States are reluctant to cede their sovereignty over portions of their territory in light of the scarce benefits that would accrue<sup>93</sup>. Furthermore, even if the territory is ceded, the State would face problems due to the insufficient resources available<sup>94</sup>.

Alternatively, States facing sea level rise could join another State in the form of a “union” or “federation”. In this case, the new successor State should grant citizenship to the extinguished State’s population to avoid “statelessness”<sup>95</sup>. In fact, according to art. 10 of the Convention on the Reduction of Statelessness “Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer”.

A possible alternative could be represented by the appropriation of a “*terra nullius*”, a territory that is not under the jurisdiction of any State<sup>96</sup>. If an unclaimed territory can be identified, it would be possible to occupy it, demonstrating the intention and willingness to act as a “sovereign”, accompanied by the effective exercise of sovereignty<sup>97</sup>. However, the difficulty lies in identifying an area that is not currently under the jurisdiction of any State, since to date the only “unclaimed areas” are those considered as “*res communis*” of the international community<sup>98</sup>, intended to serve as a common resource shared by all humanity. And before any part of the *res*

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<sup>89</sup> M. B. Gerrard, G. E. Wannier, *op. cit.*, p. 167; R. Rayfuse, *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood*, in *Environmental Policy and Law*, Vol. 41, No. 6, 2011, p. 284; E. Piguet, *op. cit.*, p. 875-876; J. Kraska, H. N. Scheiber, M. Kwon, *Ocean Law and Policy: Twenty Years of Development Under the UNCLOS Regime*, Nijhoff, Leiden, 2016, p. 121 ss.; A. T. Camprubi, *Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States*, Nijhoff, Leiden, 2016, p. 15 ss.; C. Costello, M. Foster, J. McAdam, *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford, 2021, pp. 844 ss.

<sup>90</sup> R. Rayfuse, *op. cit.*, p. 285.

<sup>91</sup> R. Ramesh, *Paradise Almost Lost: Maldives Seek to Buy a New Homeland*, *The Guardian*, 10 November 2008, available online at: <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change>; S. Holland, *Indonesia’s Rent-an-Island Answer to Climate Change*, ABC News, 3 June 2009, available online at: <http://www.abc.net.au/news/stories/2009/06/03/2588165.htm>; S. Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, in UNHCR, *Legal and Protection Policy Research Series*, May 2011, p. 18.

<sup>92</sup> B. Mayer, F. Crépeau, *op. cit.*, p. 78.

<sup>93</sup> L. Yamamoto, M. Esteban, *op. cit.*, p. 187.

<sup>94</sup> R. Rayfuse, *op. cit.*, p. 288.

<sup>95</sup> A. J. Del Grande, *op. cit.*, p. 159.

<sup>96</sup> L. Yamamoto, M. Esteban, *op. cit.*, p. 189.

<sup>97</sup> A. G. Jain, *The 21<sup>st</sup> Century Atlantis: the International Law of Statehood and Climate Change-Induced Loss of Territory*, in *Stanford Journal of International Law*, Vol. 50, No. 1, 2014, pag. 47 ss.; R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, Manchester, 2017, pag. 78 ss.

<sup>98</sup> This includes outer space and celestial bodies, the high sea and Antarctica.



*communis* can be occupied, the consent of the entire international community or at least a part of it will be required<sup>99</sup>.

A further proposal is to build an artificial island where to transfer the population and the government and, therefore, the State itself<sup>100</sup>. The Maldives, for example, have already built the artificial island of Hulhumalé near its capital, Male. It is an artificial territory that includes over four hundred hectares of land that reach a height of three meters above the current sea level and which, since 2016, has housed a hospital, schools, government buildings, commercial and residential areas for a total population of over forty thousand inhabitants<sup>101</sup>. The problem is that this type of measure is extremely expensive and is not a permanent solution, as demonstrated by the experience of the “World Islands” of Dubai, a group of over three hundred artificial islands, which are gradually sinking into the sea<sup>102</sup>. Furthermore, the creation of artificial islands risks causing serious damage to the marine environment and ecosystems, as highlighted by the Permanent Court of Arbitration in the *Philippines v. China* case of 2016<sup>103</sup>, stating that “China’s artificial island building activities have caused devastating and long lasting damage to the marine environment in the South China Sea”<sup>104</sup>.

On the other hand, it is not clear whether the requirement of the “territory” can be considered satisfied once an artificial island has been built. According to art. 121 of the 1982 Montego Bay Convention an island is “a naturally formed area of land, surrounded by water, which is above water at high tide”, while “artificial islands, installations and structures do not possess the status of islands” (art. 60)<sup>105</sup>. In this sense, the assertion of the Cologne Administrative Court in the 1978 *In re Duchy of Sealand* case<sup>106</sup>, according to which a British platform attached to the seabed off the coast of the United Kingdom did not satisfy the requirement of the territory as the latter must “consist in a natural segment of the earth’s surface come into existence in a natural way”<sup>107</sup>: therefore, an artificial platform created by man, such as the so-called “Duchy of Sealand”, could not be defined either “a part of the earth’s surface” or “land territory” because it does not constitute a segment of the terrestrial sphere<sup>108</sup>. In fact, according to the Court, the fact that the platform was “firmly connected to the sea-bed by concrete pillars does not transform the platform into a part of the ‘surface of the earth’ or ‘land territory’”. On the contrary the terms ‘surface of the earth’ and ‘land territory’ demonstrate that only structures which make use of a specific piece of the earth’s surface can be recognized as State territory within the meaning of international law. Furthermore, both in international law and in colloquial speech the use of the term ‘territorium’ derived from the Latin word ‘terra’, which is synonymous with ‘earth’, clearly

<sup>99</sup> A. G. Jain, *op. cit.*, p. 48.

<sup>100</sup> J. G. Stoutenburg, *op. cit.*, p. 169; A. G. Jain, *op. cit.*, p. 47.

<sup>101</sup> For detailed information on the characteristics of this “artificial island” project, see the website: <https://hdc.com.mv/hulhumale/>.

<sup>102</sup> A. Haro, *Dubai’s Man-Made Islands for the Super Rich are Reportedly Sinking Back into the Sea*, 22 May 2016, online: <https://www.theinertia.com/environment/dubais-man-made-islands-for-the-super-rich-are-reportedly-sinking-back-into-the-sea/>.

<sup>103</sup> Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Case No. 2013-19, 12 July 2016.

<sup>104</sup> *Ibid.*, par. 983.

<sup>105</sup> UN General Assembly, *Convention on the Law of the Sea*, Montego Bay, 10 December 1982.

<sup>106</sup> Federal Republic of Germany, Administrative Court of Cologne, *In re Duchy of Sealand*, 3 May 1978.

<sup>107</sup> *Ibid.*, p. 685.

<sup>108</sup> *Ibid.*, p. 686.

indicates that State territory within the meaning of international law must be either ‘mother earth’ or something standing directly thereon”<sup>109</sup>.

Inspired by the “government in exile” model, a different solution could be constituted by the so-called “deterritorialized State”, a State whose population would be spread over several host States and whose government, located anywhere in the world, within the territory of another State, would exercise its internal sovereignty at distance, continuing to maintain international relations as before<sup>110</sup>. Several tools have been proposed for the realization of this solution. For example, the conclusion of a “Global Disappearing Act”, an international treaty with which States would undertake the commitment to tackle the root causes of climate change, starting with a reduction in their greenhouse gas emissions<sup>111</sup>. At the same time, those primarily responsible for these emissions should agree to host the government-in-exile and the population of island States subject to total submersion<sup>112</sup>.

Or, according to some authors, a solution could be the creation of the so-called “*ex situ* nationhood”, “a virtual nation-state, held together by a social network”<sup>113</sup>, governed by an *interim* body composed of elected representatives of the nation<sup>114</sup>. This model is inspired by the trusteeship system created by the United Nations, albeit with the appropriate differences, as the “trustees” would be members of the nation *ex situ*<sup>115</sup>. The primary task of the government of the deterritorialized State would be that of “act as a trustee of the assets of the state for the benefit of its citizens wherever they might now be located”<sup>116</sup>.

However, some difficulties in the implementation of this system should be overcome. First of all, UN member States are excluded from the system of trust, consistent with the principle of sovereign equality<sup>117</sup>. Therefore, to ensure respect for the sovereign equality of the State concerned, the United Nations and other member States should only intervene to support the transition and the establishment of an *ex situ* nation<sup>118</sup>. The members of the *interim* body of these supported States would therefore act as political trustees, charged with facilitating an orderly transition of

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<sup>109</sup> *Ibid.*

<sup>110</sup> W. Werner, *Netherlands Yearbook of International Law: The Changing Nature of Territoriality in International Law*, Springer, The Hague, 2017, p. 36.

<sup>111</sup> J. Kittel, *The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory*, in *Michigan State Law Review*, Vol. 5, No. 12, 2015, pp. 1241.

<sup>112</sup> W. Werner, *op. cit.*, p. 37.

<sup>113</sup> M. Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood, and the Post-Climate Era*, in *Climate Law*, Vol. 2, 2011, p. 346.

<sup>114</sup> R. Lyster, R. R. M. Verchick, *Research Handbook on Climate Disaster Law*, Edward Elgar, Cheltenham (UK), 2016, pp. 98 ss.

<sup>115</sup> For further information on the United Nations trust system, see, in particular, S. Chersteman, *You, the People: The United Nations, Transitional Administration and State-Building*, Oxford University Press, Oxford, 2005; A. Ghani, C. Lockhart, *Fixing Failed States. A Framework for Rebuilding a Fractured World*, Oxford University Press, Oxford, 2008; R. Wilde, *International Territorial Administration*, Oxford University Press, Oxford, 2009; G. B. Murati, *UN Territorial Administration and Human Rights*, Routledge, Dordrecht, 2020.

<sup>116</sup> R. Rayfuse, *op. cit.*, p. 289; W. Werner, *op. cit.*, p. 37.

<sup>117</sup> Art. 78 of the United Nations Charter states that: “The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality”, United Nations, *Charter of the United Nations*, 24 October 1945, United Nations Treaty Series XVI.

<sup>118</sup> M. Burkett, *op. cit.*, p. 364.

the population and the functioning of the governance mechanisms of that State<sup>119</sup>. Once the territorial displacement of the affected population is completed, the *interim* body will join the displaced government to form a single body that will act as the new central government of the *ex situ* nation<sup>120</sup>. Of course, the legitimacy of the latter would be subject to the acquiescence of the international community; in particular, potential host States to which island populations would migrate. On the other hand, this legitimacy is necessary “so that a critical mass of the international community will recognize and protect the trustee and its successors. Without international legitimacy, the trustee will likely lack necessary resources, and may face state-sponsored resistance”<sup>121</sup>.

Through the creation of the *ex situ* nation, the maintenance of citizenship by the citizens of the State in danger of extinction would be guaranteed even if placed in a different host country, thus avoiding the creation of a condition of “statelessness”. Furthermore, the benefits of maintaining citizenship would be associated with those deriving from the preservation of the cultural identity of the population of the island State. Therefore, overall, this measure would be in line with the presumption in favour of the survival of the State and the prevention of statelessness for the individuals involved and, therefore, the *ex situ* nation could prove to be an effective response to the risk of extinction of the small island States<sup>122</sup>.

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<sup>119</sup> A. T. Camprubí, *Statehood Under Water: Challenges of Sea Level Rise to the Continuity of Pacific Island States*, Brill, Leiden, 2016, p. 8.

<sup>120</sup> M. Burkett, *op. cit.*, p. 369; W. Werner, *op. cit.*, p. 40.

<sup>121</sup> M. B. Gerrard, G. E. Wannier, *op. cit.*, p. 108.

<sup>122</sup> W. Werner, *op. cit.*, p. 42.