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Statehood, Statelessness, and Continuity in a Climate-Changed World

A worst-case scenario analysis

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ISBN 978-952-12-4327-1 (printed)

ISBN 978-952-12-4328-8 (digital)

Painosalama, Turku, Finland 2023

Acknowledgements

I want to start this section by acknowledging the tremendous injustice that is at the root of this thesis. Climate change and the current sea level rise are the result of centuries of injustices and oppression, and it is especially unjust that Small Island States should pay the price for it and fear for their ancestral land.

I would like first to thank my esteemed opponent, Professor Jane McAdam. This thesis would not have been possible without her groundbreaking work, and so it is a great honor to have had the opportunity to have her read and comment on my work. I would also like to extend my thanks to Associate Professor Miriam Cullen for her valuable comments as part of the review process. I also acknowledge with gratitude the support of Professor Markku Suksi, and of all the members of the School of Law at Åbo Akademi.

I also want to thank my supervisors, Professor Elina Pirjatanniemi and Professor Magdalena Kmak, for their warm and steadfast support throughout this doctoral journey. In addition to their supervision, I also take advantage of this opportunity to thank Elina and Magda for creating a dynamic and supportive research environment, one from which this thesis cannot be dissociated. Additionally, and while his name may not be formally acknowledged as a supervisor, I am indebted to Docent Viljam Engström for his always relevant comments and the always interesting discussions we have had throughout the last few years.

Completing a doctoral journey can be lonely, but I count myself lucky to have shared this journey with my colleagues at the Institute for Human Rights. Being a part of this exceptional team is a privilege, and words fall short of conveying my gratitude to you all. I want to specifically thank my fellow doctoral researchers (and friends), Stephen Phillips, Dionysia Kang, Meiraf Tesfaye, Maija Mustaniemi-Laakso, Lisa Grans, Isabell Junkkari, Albert Vlodder, Yulia Dergacheva, Emilia Plichta, Thomas Heikell, and Eleonora del Gaudio. My colleagues, Catarina Krause, Mikaela Heikkilä, and all the others involved also deserve a special mention for contributing to the high standard of education and supervision I benefitted from as both a student and a teacher. Additionally, while they often don't get the attention their excellent work deserves, I take advantage of this opportunity to thank Katarina Frostell, Raija Hanski, Kristiina Vainio, Yasmin Salametdin, for their invaluable help, and always welcome presence in the corridor.

Special thanks go to my friends Anik Dutta, Aparajita Chowdhury, Victor Popescu, Viktoriia Hladii, Polytimi Dimitriou, Alexandros Papageorgiou, George Rolis, Kilian Seiler, Riccardo Camilloni, Anna Afanasieva, Matti Karinen, Danijela Majdenic, Levin Schmid, Catherine Pageau, Alexandre Morisset, Yoojin Kim, Geraldine Chell (and Niamh), Heikki Kinnari, Hanna Laalo, Kevin Minet, Marina Karloff, to name only a few, as well as all my friends in Cyprus. I am incredibly grateful for your friendship and for your support throughout this doctoral journey.

As I write these acknowledgements, I also want to mention my families. My Cypriot family deserves special credit for their generous hospitality and unwavering support, and I want to thank Vasos, Christina, Lambros, Antigoni, Vassilis, Andrea, and last but not least, my dear sister-in-law, Orthodoxia (+Babe), for their contribution to this thesis. Growing up with seven siblings isn't always easy, but looking back I can only feel grateful and privileged to have you as my siblings, Geneviève, Martina (not forgetting Sadiel and Manuel), Christophe, Étienne, Thérèse, Anne, and Emma. I also take advantage of this opportunity to thank my father, Robin, for his constant and lasting support for my academic ambitions, as well as for his skilled proofreading of all my publications. My stepmother, Gabriella Gobbi, also deserves special thanks for her help and advice in navigating the complex world of academia. The last member of my family I want to thank is my mother, Suzanne, for her selfless dedication and willingness to take the less-travelled path.

Lastly, I want to thank the person without whom this thesis would not have been written, my dear wife, Kalypso Filippou. Her qualities, both as a scholar and as a kind and thoughtful human, have been a constant inspiration throughout this process. This thesis is dedicated to her.

Turku/Åbo, 3rd of November 2023

P.S. I initially wrote a much longer version of these acknowledgements, and while I ultimately decided to keep this section relatively short, I nevertheless decided to upload the full-length version here: https://zenodo.org/records/10068784

Abstract

The impact of anthropogenic greenhouse gas emissions is seriously threatening the stability of the earth's climate. The changes are felt acutely in the oceans of the planet, and one of the key consequences is sea-level rise, the process by which the average sea levels are slowly increasing. Due to their low elevation above sea levels, Low-lying Island States (LLISs), sea level rise presents an existential threat to their very existence, despite LLISs being among the lowest emitters of greenhouse gases. The predicament of LLISs presents a novel question to international law: no state has ever risked the permanent, physical loss of its territory. The absence of clear state practice or authoritative guidance on whether a state can continue existing beyond the loss of its territory and the loss of its population has resulted in significant uncertainty.

This thesis aims to address certain elements of this uncertainty and provide context-relevant legal analyses of possible avenues for palliative solutions, in the event better solutions could not have been implemented. The thesis' main arguments have been published in three peer-reviewed publications. The first article that constitutes this thesis examines the relevance of the principle known as the presumption of continuity. The article outlines two distinct doctrines of continuity, one of which assumes statehood to be mostly irreversible (a "ratchet"), while the other instead approaches continuity as an assessment of "sameness" of identity. The article argues that under the "sameness" doctrine, the presumption of continuity would only play a limited role in preserving the statehood of a threatened LLIS if the latter were to lose its territory. The second article investigates the possible relevance of the Sovereign Military Order of Malta (SMOM) as an alternative form of international legal personality for a deterritorialised LLIS, a means through which the latter could maintain its existence independently from statehood. The third article examines the limited and context-based relevance of the 1954 Convention relating to the Status of Stateless Persons for the displaced nationals of LLISs.

The summary provides crucial context to the analysis contained in the three articles by framing the latter's analyses through a scenario-based approach. Two sets of scenarios are outlined, respectively addressing a number of possible outcomes to the question of the future statehood of a deterritorialised LLIS and the avenues available for the protection of the externally displaced nationals of the LLIS in question. This framing is key, as it allows this thesis to investigate a hypothetical worst-case scenario context and context-relevant avenues for solutions while emphasizing that such an outcome should be avoided, whether through pre-emptive legal developments, or adaptation and mitigation efforts.

Abstrakt

Jordens klimatstabilitet hotas allvarligt av växthusgasutsläpp förorsakade av mänsklig aktivitet. Förändringarna märks tydligt i världens oceaner, där en av de viktigaste konsekvenserna är havsnivåhöjningen, dvs. processen där de genomsnittliga havsnivåerna långsamt stiger. Stigande havsnivåer utgör ett existentiellt hot mot små östater på grund av deras låga höjd över havsnivån, trots att små östater har bland de minsta utsläppen av växthusgaser. De små östaternas prekära situation ger upphov till en ny frågeställning inom internationell rätt: ingen stat har någonsin riskerat den permanenta, fysiska förlusten av sitt territorium. Avsaknaden av statspraxis eller vägledning om huruvida en stat kan fortsätta existera efter att ha förlorat sitt territorium och sin befolkning har lett till stor osäkerhet.

Denna avhandling syftar till att ta upp vissa delar av denna osäkerhet och att tillhandahålla i sammanhanget relevanta juridiska analyser av möjliga lindrande lösningar, i händelse av att bättre lösningar inte kunde ha genomförts. Avhandlingens huvudargument har publicerats i tre referentgranskade artiklar. Den första artikeln i avhandlingen undersöker relevansen av principen som kallas ”presumtionen om kontinuitet”. Artikeln beskriver två olika doktriner om kontinuitet, varav den ena antar att status som stat är mestadels irreversibel, medan den andra istället närmar sig kontinuitet som en bedömning av huruvida identiteten är och förblir oförändrad. Artikeln argumenterar för att enligt "identitetsdoktrinen” skulle presumtionen om kontinuitet bara spela en begränsad roll i bevarandet av en hotad östats status som stat ifall den skulle förlora sitt territorium. Den andra artikeln undersöker Malteserorden och dess möjliga relevans som ett exempel på en alternativ form av internationell rättslig status för en östat utan territorium, som på detta sätt kunde fortsätta att existera utan en koppling till status som stat. Den tredje artikeln undersöker den begränsade och kontextbaserade relevansen av 1954 års konvention angående statslösa personers rättsliga ställning för de fördrivna medborgarna i små östater.

Avhandlingens sammanfattning ger ett väsentligt sammanhang för analysen i de tre artiklarna och inramar analyserna genom att använda ett scenario-baserat tillvägagångssätt. Två olika scenarier presenteras. Den ena behandlar ett antal möjliga utfall till frågan om den framtida statusen som stat för en östat utan territorium. Den andra granskar de vägar som finns tillgängliga för att skydda de externt fördrivna medborgarna i östaten i fråga. Denna inramning är av central betydelse, eftersom den möjliggör att i avhandlingen undersöka ett hypotetiskt värsta-fall-scenario och kontextrelevanta lösningar, samtidigt som den betonar att ett dylikt utfall bör undvikas, antingen genom förebyggande rättslig utveckling eller anpassnings- och lindringsåtgärder.

Sommaire

L'impact des émissions anthropiques de gaz à effet de serre menace sérieusement la stabilité du climat de notre planète. Ces changements se ressentent profondément dans les océans de la planète, entraînant, parmi d'autres conséquences, une élévation progressive du niveau de la mer. En raison de leur faible élévation, plusieurs Petits États Insulaires en Développement (PEID) voient leur existence même menacée par l'élévation du niveau de la mer, bien qu'ils comptent parmi les plus faibles émetteurs de gaz à effet de serre. La situation difficile des PEID pose une question inédite en droit international: aucun État n'a jamais risqué la perte complète et permanente de son territoire. En l'absence de pratique étatique claire ou de doctrine faisant autorité, se pose la question de savoir si un État peut maintenir son statut au-delà de la perte de son territoire et de sa population, créant ainsi une incertitude.

Cette thèse se propose d'éclaircir certains aspects de cette incertitude en offrant des analyses juridiques ajustées à leur contexte. Des alternatives y sont explorées pour des situations où des solutions optimales se révèlent inapplicables. Les principaux arguments de cette thèse ont été traités dans trois publications évaluées par des pairs. Le premier article examine la pertinence du principe connu sous le nom de présomption de continuité. L'article distingue deux doctrines de continuité: la première considère l'existence des États comme étant principalement irréversible (un « cliquet »), tandis que la seconde envisage la continuité comme une évaluation de la similitude de l'identité de l'État en question, plutôt que son existence. L'article soutient que selon la doctrine de similitude, la présomption de continuité jouerait un rôle comparativement restreint dans la préservation de l'existence d'un PEID si celui-ci venait à perdre son territoire. Le deuxième article étudie la possible valeur de l'Ordre de Malte comme précédent possible pour une forme alternative de personnalité juridique internationale pour un PEID hors de son territoire, un moyen par lequel ce dernier pourrait maintenir son existence indépendamment de son statut d'État. Le troisième article examine la pertinence, limitée et contextuelle, de la Convention de 1954 relative au statut des apatrides pour les ressortissants déplacés des PEID.

Le résumé fournit un contexte crucial à l'analyse contenue dans les trois articles en les situant dans une approche se basant sur plusieurs scénarios futurs. Deux séries de scénarios sont établis, décrivant respectivement un certain nombre de possibilités concernant la question du futur statut d'État d'un PEID sans territoire, et d'autre part, des moyens légaux disponibles pour la protection des ressortissants du PEID en question déplacés à l'extérieur de leur pays. Ce cadrage est essentiel, car il permet à cette thèse d'étudier un contexte hypothétique de scénario catastrophe ainsi que des pistes de solutions adaptées, tout en soulignant qu'un tel avenir devrait être évité, que ce soit par des développements juridiques préventifs ou par des efforts d'adaptation et d'atténuation des changements climatiques.

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List of Original Publications

This thesis consists of the following three peer-reviewed publications (also referred to as Article 1, Article 2, and Article 3):

1. Rouleau-Dick, Michel, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?' (2021) 22 *Melbourne Journal of International Law* 357-382.

2. Rouleau-Dick, Michel, 'A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta' (2020) 63 *German Yearbook of International Law* 621-646.

3. Rouleau-Dick, Michel, 'Sea Level Rise and Climate Statelessness' (2021) 3 *Statelessness and Citizenship Review* 287-308.

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List of Abbreviations

AOSIS	Alliance of Small Island States
EDP	Environmentally Displaced Person
EEZ	Exclusive Economic Zone
GHG	Greenhouse Gases
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILP	International Legal Personality
IPCC	International Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
LLIS	Low-Lying Island State
NSSEIL	Non-State Sovereign Entity of International Law
OAU	Organisation of African Unity
RCP	Representative Concentration Pathway
SIDS	Small Island Developing State
SLR	Sea level Rise
SMOM	Sovereign Military Order of Malta
SSP	Shared Socioeconomic Pathway
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

There is a certain irony to approaching climate change from the perspective of legal research. Legal norms have played a key enabling role in allowing the overexploitation of and disregard for our environment. In fact, one may very well question the relevance of even considering international law when little exists in terms of binding rules, and even less in terms of compliance and enforcement mechanisms to fight back against climate change.[1] The predicament of Low-lying Island States (LLISs), facing the loss of their entire territory and possibly that of their statehood, is particularly telling. Threatened by the consequences of decades of anthropogenic greenhouse gas (GHG) emissions they did not significantly contribute to or benefit from, LLISs find themselves an unwilling poster case in the fight against climate change.

Facing the eventual displacement of their entire population and the flooding of their ancestral territory, LLISs provide a popular headline to discuss wider issues such as climate-induced migration, the impacts of sea levels rise and the urgency of action. In reality, the populations of LLISs present a minor proportion of the expected numbers displaced by the consequences of climate change. Low-lying coastal areas constitute some of the most heavily populated areas on the planet, and countries such as Bangladesh are likely to present challenges of a completely different scale from those that pertain to the future of LLISs.[2] Yet, the novelty of a state having to contemplate the complete loss of its territory and the displacement of its entire population presents a set of new and unprecedented challenges for international law. The challenges faced by LLISs, while of a smaller scale overall, are therefore particularly relevant to the future of the international legal system.

Presently, however, one of the most immediate problems created by what are still hypothetical considerations is the uncertainty that ripples out from the

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[1] Even the efficiency of strategic litigation, perhaps the most visible contribution of law to the fight against climate change, has been questioned and has generated in the process a number of interesting discussions on the role of law in this context. See Benoît Mayer, 'Why I Can't Sign the World Lawyers' Pledge on Climate Action' (*EJIL: Talk!*, 15 September 2021) <https://www.ejiltalk.org/why-i-cant-sign-the-world-lawyers-pledge-on-climate-action/> accessed 13 October 2021; Srinivas Burra, 'A Reductionist View on the Role of Lawyers' (*Opinio Juris*, 1 October 2021) <http://opiniojuris.org/2021/10/01/a-reductionist-view-on-the-role-of-lawyers/> accessed 13 October 2021; Benoît Mayer, 'Climate Change and the Role of Lawyers: A Reply to Burra' (*Opinio Juris*, 8 October 2021) <http://opiniojuris.org/2021/10/08/climate-change-and-the-role-of-lawyers-a-reply-to-burra/> accessed 13 October 2021; Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33 European Journal of International Law 1; Alexander Zahar, 'The Limits of Human Rights Law: A Reply to Corina Heri' (2022) 33 European Journal of International Law 1; Corina Heri, 'Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar' (*EJIL: Talk!*, 6 October 2022) <https://www.ejiltalk.org/legal-imagination-and-the-turn-to-rights-in-climate-litigation-a-rejoinder-to-zahar/> accessed 2 November 2022.

[2] See for instance, Tony George Puthucherril, 'Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions' (2012) 1 Global Journal of Comparative Law 225; Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 161–185.

challenges faced by LLISs. Narratives of “sinking States” and the general impression of impending doom one gets from descriptions in the media risks unnecessarily undermining efforts to build local resilience and provide much needed time to plan ahead for the governments of the threatened States.[3] As a result, mitigating uncertainty is one of the key areas where legal scholars may have a contribution to make, particularly regarding the uncertainty about the future statehood of a submerged LLIS.

Indeed, the heavy reliance of the concept of statehood on territoriality makes the notion of a deterritorialised State something of an oxymoron. Bridging this chasm is thus necessary if the loss of territory is to remain a mostly symbolic milestone rather than a significant setback for LLISs. This question has attracted the attention of legal scholars and generated a lively scholarly discussion on the arguments put forward, lately resulting in the International Law Commission (ILC) being mandated to discuss some of the key contentious points.[4]

This scholarly discussion may seem ripe for authoritative clarification,[5] and one would be right to question the relevance of looking deeper into questions that have already been discussed in a number of excellent publications and theses.[6] The burden is thus on this summary to clearly substantiate its *raison d’être*. Indeed, while this will be addressed at length in the following pages, the simple reason for this thesis’ existence lies in the impression of certainty one gets from reading most of the literature on the matter: most scholarship makes a clear

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[3] Jonathon Barnett, ‘The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries’ (2017) 58 Asia Pacific Viewpoint 3.

[4] At the time of writing, there is an ongoing effort by the ILC to discuss some of the questions examined in here. See International Law Commission, ‘Report of the International Law Commission - Seventy-Third Session (18 April-3 June and 4 July-5 August 2022)’ (United Nations General Assembly 2022) A/77/10.

[5] A number of states, including LLISs, currently seek an advisory opinion from the ICJ and the International Tribunal for the Law of the Sea (ITLOS) on the matter of loss and damage and the position of small island states in relation to climate change and international law. See Pita Ligaiula, ‘Vanuatu Elevates Draft Resolution to UNGA Requesting an Advisory Opinion from ICJ on Climate Change’ (*Pasifika Environews*, 1 November 2022) <https://pasifika.news/2022/11/vanuatu-elevates-draft-resolution-to-unga-requesting-an-advisory-opinion-from-icj-on-climate-change/>; Michael Kronenberger, ‘Dealing with Loss and Damage’ (*Völkerrechtsblog*, 18 November 2022) <https://intr2dok.vifa-recht.de/receive/mir_mods_00014556> accessed 21 November 2022; International Tribunal for the Law of the Sea, ‘Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law’ (2023).

[6] For instance, and to name only a few, see Nathan Jon Ross, ‘Low-Lying States, Climate-Change-Induced Relocation, and the Collective Right to Self-Determination’ (Doctoral thesis, Victoria University of Wellington 2019); Susannah Willcox, ‘Climate Change Inundation and Atoll Island States: Implications for Human Rights, Self-Determination and Statehood’ (Doctoral thesis, London School of Economics and Political Science 2015); Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 Climate Law 345; Derek Wong, ‘Sovereignty Sunk? The Position of “Sinking States” at International Law’ (2013) 14 Melbourne Journal of International Law 346; Susannah Willcox, ‘Climate Change and Atoll Island States: Pursuing a “Family Resemblance” Account of Statehood’ (2016) 30 Leiden Journal of International Law 117; Ori Sharon, ‘To Be or Not to Be: State Extinction through Climate Change’ (2021) 51 Environmental Law.

case that deterritorialised statehood is not only possible but is also supported by key precedents and State practice. While this may seem to be good news for LLISs, it also betrays a certain lack of nuance that could prove to be actually worse for LLISs than the uncertainty it seeks to dispel. Scholarly legal arguments can evolve and create narratives in relative abstraction of the reality to which they might need to apply. Shielded from scrutiny by the strong moral claim they bolster, it is easy to lose sight of the realities of international geopolitics, and of the regrettable (if not inevitable) porousness of international law to extraneous variables. Addressing the discrepancy between this outward impression of certainty over against the persistent uncertainty that permeates many of the norms at stake lies at the heart of this thesis.[7]

More specifically, the contribution this thesis adds can be found in its adoption of a different approach from that adopted by most scholarship on the statehood and future of LLISs. In addition to investigating possible ways forward for LLISs in the context of a specific legal and factual outcome - a “worst-case scenario” - I also necessarily set out to demonstrate that such an outcome is sufficiently plausible to be worth investigating at length. This does not mean that plausible should be equated with desirable, or even likely. Rather, I aim to help cover sensitive ground before these issues become too contentious or crystallised for scholarship to have any meaningful influence on possible outcomes.

This summary is structured in four key parts. In the first part, comprising of sections 2 and 3, I set the scene for the analysis by introducing the problems addressed by the thesis, the research questions, as well as some key elements of context and terminology. In the second part, section 4, I discuss the approaches used to answer the research questions at length. Namely, I introduce the combination of dogmatic research with a scenario-based approach, and outline both the strengths and limitations of each approach. In the third part, section 5, I apply a scenario-based approach to the legal uncertainty relating to the future of LLISs, and that of their nationals. I then combine the resulting two sets of scenarios to map the specific context in which the articles’ respective contributions are set. In the fourth part, section 6, I present the thesis’ key findings, including the articles’ but also the combination of their analysis with the scenario I spell out in section four. While the articles’ contributions remain the centerpiece of this summary, in the latter’s overall analysis I bring together the various pieces of this thesis into a coherent whole in section 6.

[7] It should be noted that the context of this thesis’ contribution has noticeably evolved since the beginning of writing, and that scholarship and the active efforts of LLISs to push for resolved outcomes to the thorny legal questions at stake has affected the “certainty” referred to here.

2. Setting the scene: Climate Change and Low-lying Island States

The science on climate change is clear and unequivocal: climate change is the result of centuries of emissions of greenhouse gases by industrialised countries. While there has been evidence and awareness that the earth's climate was changing due to human activity as early as the 1960s,[8] it is only recently that collective discussions have shifted from its existence to the need for remedies and solutions. Even if the need for adaptation is now emerging as a particularly pressing issue, we are still a long way from developing adequate adaptation and mitigation strategies of the scale needed. In fact, even if the pressure on decision-makers is increasing, the window of opportunity for effective action is also quickly narrowing.[9] The international community has nevertheless displayed a remarkable lack of commitment to the type of engagement that is needed to adequately address the need for mitigation and adaptation.

Even if humanity were able to immediately phase out fossil fuels and completely cut its greenhouse gas emissions, some of the effects of climate change would still not be substantially affected.[10] This is particularly true of sea level rise.[11] The higher temperatures resulting from climate change are acutely felt on the poles' ice sheets, which disintegrate further every summer and then fail to sustainably reconstitute themselves as they had done for millennia. This then releases tremendous quantities of water back into the planet's oceans, while simultaneously reducing the capacity of the earth to reflect back sunrays, due to the lower refraction capacity of water compared to the ice sheet. Among the

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[8] For instance, US President Lyndon B. Johnson stated the following to congress on the 8th of February 1965: "Air pollution is no longer confined to isolated places. This generation has altered the composition of the atmosphere on a global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels." Lyndon B Johnson, 'Special Message to the Congress on Conservation and Restoration of Natural Beauty.' <https://www.presidency.ucsb.edu/documents/special-message-the-congress-conservation-and-restoration-natural-beauty> accessed 23 January 2023.

[9] IPCC, 'Synthesis Report 2 of the IPCC Sixth Assessment Report (AR6)' (International Panel for Climate Change (IPCC) 2023); António Guterres, 'Secretary-General's Video Message for Press Conference to Launch the Synthesis Report of the Intergovernmental Panel on Climate Change' (*United Nations*, 20 March 2023) <https://www.un.org/sg/en/content/sg/statement/2023-03-20/secretary-generals-video-message-for-press-conference-launch-the-synthesis-report-of-the-intergovernmental-panel-climate-change> accessed 22 March 2023.

[10] See UN Environment Programme (UNEP), 'Emissions Gap Report 2022: The Closing Window' (UNEP 2022) XX–XXI; Damian Carrington, 'Climate Crisis: UN Finds "No Credible Pathway to 1.5C in Place"' *The Guardian* (27 October 2022) <https://www.theguardian.com/environment/2022/oct/27/climate-crisis-un-pathway-1-5-c>.

[11] See for instance Jason E Box and others, 'Greenland Ice Sheet Climate Disequilibrium and Committed Sea-Level Rise' (2022) 12 Nature Climate Change 808.

numerous wide-ranging consequences of this phenomenon, sea level rise (SLR) is perhaps best known.[12]

SLR can be categorised as a slow-onset event, as opposed to sudden-onset disasters or extreme weather events such as hurricanes or earthquakes.[13] In practice, this means that the Intergovernmental Panel on Climate Change (IPCC) has been able to gather reliable data on its progression and expected rates over the next decades. SLR varies substantially from one region to another and expected rates of SLR are also dynamic, affected by anticipated emissions and rise in global temperatures.[14]

For LLISs, SLR presents an existential threat since it is likely to result in the eventual disappearance of their entire territory and the displacement of their nationals. While *in situ* adaptation could prove effective in some cases, the costs relative to the concerned States' GDP are prohibitive.[15] Climate change also threatens multiple dimensions of the life of the populations of LLISs. Coral reefs face a particularly dire predicament and are generally considered the most vulnerable marine ecosystems to climate-related ocean change.[16] Salinization and the impact of extreme weather events are also likely to affect the availability of fresh water, adding to the existing environmental pressure on LLISs.[17]

However, while the analysis contained in this thesis necessarily rests upon the premise that in the short to mid term LLISs would lose the entirety of their territory, this is in no way an ineluctable outcome within this timeframe. *In situ* adaptation is costly, but by no means impossible if sufficient support is provided to vulnerable States and greenhouse gas emissions are kept to a minimum. As a result, the threat to LLISs' statehood (i.e., resulting from the possible loss of a LLIS's entire territory), is itself rooted in the possibility of a failure by the international community to step in, resulting in higher emissions and insufficient

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[12] The complex combination of phenomena linked to and responsible for SLR is discussed at length in the IPCC's 2019 thematic report on oceans and the cryosphere, particularly in chapters 3 and 4. Michael Oppenheimer and others, 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities' in Hans-Otto Pörtner and others (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC 2019) chs 3, 4.

[13] See for instance, Platform on Disaster Displacement, 'Key Definitions' <https://disasterdisplacement.org/the-platform/key-definitions> accessed 23 January 2023; Matthew Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 International Journal of Refugee law 404, 408; United Nations Climate Change, 'Slow Onset Events' (*UNFCCC*, 2020) <https://unfccc.int/wim-excom/areas-of-work/slow-onset-events> accessed 19 October 2023.

[14] Oppenheimer and others (n 12) ch 4.

[15] Ranging from 7.6% for the Marshall Islands to 4.1% for Kiribati in 2050 following RCP8.5 emission patterns, see ibid 377. It should also be noted that solutions that involve artificial structures may not be a panacea to the problems faced by LLISs, see Veronika Bílková, 'A State Without Territory?' (2016) 2016 Netherlands Yearbook of International Law 19, 36. Powers instead cites costs amounting to 30 times the Maldives' GDP to protect all of its 200 inhabited islands, although this figure dates back to 1998. See Ann Powers, 'Sea-Level Rise and Its Impact on Vulnerable States: Four Examples' (2012) 73 Louisiana Law Review 151, 170.

[16] Oppenheimer and others (n 12) 379.

[17] ibid 378.

support.[18] Unfortunately, anthropogenic climate change has already resulted in the triggering of long term changes and uncertainty remains as to exactly how the future may unfold, even under the most optimistic emissions scenarios.[19]

While climate science has provided a spectrum of possible futures for LLISs, the issues examined here therefore rest upon the assumption that LLISs face an existential threat to their very existence if the international community's response remains inadequate.[20] While the analysis does not identify a specific State, the Marshall Islands, Maldives, Kiribati and Tuvalu are often cited as key examples of LLISs due to their low average and maximum elevations, and vulnerability to SLR.[21]

3. Research questions and key concepts

In this thesis and the articles that are at its core, I seek to answer a number of questions, centred on the primary research question that can be formulated as such:

> *Within the context of a worst-case scenario, what avenues exist for the protection of the legal personality of threatened LLISs and that of their displaced nationals?*

To answer this question and in light of the premises discussed in this summary, the articles that form the building blocks of this thesis proceed as follow: first, examine whether statehood can be retained beyond the loss of physical indicia; second, investigate the possibility of retaining a non-statehood international legal personality; and third, determine the extent to which the law on statelessness can provide protection to the displaced population in the event of the loss of statehood. This is reflected in the respective research questions of the three articles:

- **Article 1 (Competing continuities, MJIL, 2021)**: *To which extent could the presumption of continuity of existing states influence the claim to continued statehood of low-lying island states?*

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[18] This does not mean that an adequate response by international actors would necessarily ensure the survival of LLISs in the long term, but simply that the nature and timeline of the challenges posed by climate change could be altered significantly.

[19] The relevance of more optimistic emission scenarios has been consistently undermined by the lack of commitment to mitigation efforts. For instance, the gap between the current policies and commitments adopted worldwide, and the temperature goals of the Paris Agreement were deemed "woefully insufficient" in a 2022 report by the UN Environment Programme. UN Environment Programme (UNEP) (n 10) 26.

[20] This possibility has been emphasised by some of the concerned States themselves to demonstrate the need for action. See for instance, Reuters, 'Tuvalu Seeks to Retain Statehood If It Sinks Completely as Sea Levels Rise' (*The Guardian*, 11 November 2021) <https://www.theguardian.com/world/2021/nov/11/tuvalu-seeks-to-retain-statehood-if-it-sinks-completely-as-sea-levels-rise?CMP=Share_iOSApp_Other> accessed 11 November 2021.

[21] Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (UNHCR, Division of International Protection 2011) 1.

- **Article 2 (A Blueprint for survival, GYIL, 2020)**: *Can Non-State Sovereign Entities of International Law (NSSEILs) such as the Sovereign Military Order of Malta present a viable precedent for a deterritorialised Low-lying Island State for the purpose of a preserving a non-statehood level of international legal personality?*
- **Article 3 (SLR and Climate Statelessness, SCR, 2021)**: *To which extent and under what conditions would environmentally displaced persons (EDPs) from low-lying island states qualify for the status of stateless person within the meaning of the 1954 Convention on the Status of Stateless Persons, and what is the added value of this status within the aforementioned worst-case scenario context?*

More substantively, the articles proceed first by investigating the role of the presumption of continuity in the discussion on the statehood of LLISs. While the question of continued statehood is not in itself a matter of protection, its outcome is closely intertwined with the available avenues for protection. Consequently, the first article demonstrates that there is still significant uncertainty as to the future of statehood for a deterritorialised LLIS, and therefore, that an analysis of alternatives available in the context of a worst-case scenario is needed in order to establish a type of "default" baseline for further planning. From there, the second article explores the potential added value presented by the peculiar precedent of the Sovereign Military Order of Malta (SMOM) as a possible blueprint for international legal personality (ILP) independent of territorial sovereignty. Lastly, the third article investigates the context in which the law on statelessness, specifically the 1954 Convention Relating to the Status of Stateless Persons ("1954 Convention"),[22] could provide an avenue for the protection of some of the displaced nationals of former LLISs.

The contribution of this work is to provide an answer to the primary research question; an overall narrative that goes beyond the contribution of any individual article. Additionally, this summary presents an opportunity to discuss further elements that have been left out of articles for length or coherence purposes. Before this can be addressed, however, key conceptual issues need to be settled. In the next section, I will therefore aim to remedy this by defining some of the key concepts discussed here, as well as the fundamental issues that underpin the need for this work.

3.1. Worst-case scenario

Opting to discuss the worst outcome of a specific set of legal challenges is not a self-evident choice. In fact, the majority of legal scholarship on the questions at hand has hitherto considered the type of outcomes discussed here but mostly as a transitional step in the process of substantiating why such an outcome is

[22] Convention Relating to the Status of Stateless Persons, concluded 28 September 1954, entered into force 6 June 1960, United Nations, *Treaty Series*, vol. 360, p. 117.

unlikely under the current relevant normative framework.[23] So why choose to discuss such a scenario at length, and perhaps more importantly, what is a scenario to begin with?

In the simplest term, a scenario is a specific future outcome or set of mostly similar outcomes to a question or set of questions that is considered in the present. While past and present form a linear chain of events, projecting ourselves in the future implies shifting to an infinite number of possible "futures". This can be compared to a tree, where the original, single trunk represents the linear past. The first emergence of a branch constitutes the present, a fork in the road. And the infinity of branches that stem from there onwards help us visualise the myriad of possible outcomes to a specific question, context or situation. The shape and complexity of the tree can shift based on the specific question we examine and the timeline we set, but a constant remains the quasi-infinite number of possible futures. In contrast, a scenario is a simplification of the original tree's complexity, a rough sketch that draws attention to key junctions in the way the branches develop. While scenarios necessarily require losing some of the nuances inherent to very specific futures, they are a crucial tool to provide digestible bites that can then be analysed. To summarise, the term "scenario" is used here to designate specific outcomes or set of outcomes which are built around defined premises that can then be explained or justified.

If we go back the initial question, the primary element to consider in relation to the need to investigate a worst-case scenario is the uncertainty that pervades the future of LLISs. While it is always possible to prioritise more desirable outcomes, there is still sufficient uncertainty to warrant the investigation of solutions applicable to a worst-case scenario. Certain possible outcomes have been left relatively neglected or under-studied and it is the aim of this thesis to help investigate solutions or identify relevant norms in such a context. The motivation for choosing the dark end of the spectrum of possible scenarios consequently lies primarily in the heretofore lack of engagement with them, even though they remain sufficiently plausible to deserve further investigation.

In the context of this thesis, a worst case scenario consists of a combination of severe climate change that would result first in the external displacement of most of its population, and subsequently in the loss of the state's entire territory. This series of negative outcomes would be compounded by a relatively hostile, or at least divided international support for the continuation of the state's international legal personality,[24] and the lack of implementation of other possible solutions, as explored further in Section 5. It is worth noting that such an outcome is both a *legal* and factual worst-case scenario, but in no small part

[23] See for instance, Michel Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (2021) 3 Statelessness and Citizenship Review 287, 290–293.

[24] Taking inspiration from Neil et al.'s Shared Socio-economic pathways (SSPs), one could situate such outcome within the "Regional rivalry" quadrant, for instance. See Brian C O'Neill and others, 'A New Scenario Framework for Climate Change Research: The Concept of Shared Socioeconomic Pathways' (2014) 122 Climatic Change 387.

due to the significant overlap between the two, primarily through the proxy of recognition.[25] This also implies that while a hypothetical LLIS in such context could retain a level of control over certain variables, a number of external elements would remain beyond the scope of what it can implement unilaterally.

The choice of such a pessimistic outlook requires some clarification: I obviously do not promote or endorse such scenarios but instead contend that the best way to avoid worst case outcomes is to consider them as lucidly and as objectively as possible. This approach is expressed particularly eloquently by Stoutenburg when outlining the contribution of her study of the legal future of LLISs:

> An exercise in legal extrapolation, it is not intended to reinforce the 'doomsday scenario' that has sometimes been painted by the media, which strips the island populations of agency and nurtures a culture of vulnerability and resignation in which necessary adaptation measures are neglected in view of a seemingly inevitable fate. Nor does it intend to legitimize instances of 'wishful sinking' by some climate activists, who seem to anticipate or even desire the demise of low-lying island states so as to prove to the rest of the world the reality of climate change. On the contrary, the study seeks to enhance agency, as it is believed that effective policy choices require a sound understanding of the international legal environment in which they are made.[26]

The focus of this thesis is narrower in comparison with Stoutenburg's opus, but it nonetheless closely follows the latter's perspective on legal scholarship in this context. A key assumption that motivates the present research is that engaging with less-than-optimal scenarios and inconvenient arguments,[27] far from accelerating their realisation, can instead help shape a course of action that steers away from the pitfalls that would otherwise remain hidden if not properly mapped out. It is hoped that both practitioners and decision-makers can benefit from this exploration of the "darker side" of the spectrum of normative scenarios, and that this knowledge can be reflected in their choices.

Here, it is necessary to introduce the pre-emptive/palliative dichotomy which underpins key aspects of this thesis. For present purposes, *pre-emptive* solutions or remedies consist of those that can be implemented proactively and exist outside of the scope of the legal obligations of states in the context of current public international law. For instance, this includes solutions such as the cession of a piece of sovereign territory to a LLIS, or the conclusion of a free association agreement such as that between New Zealand and the Cook Islands.[28] Pre-emptive solutions are primarily defined by their reliance on proactive and unprompted action by at least one other state. In contrast, *palliative* solutions

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[25] See Section 5.2.1. and figure 1.

[26] Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill 2015) 6–7.(footnotes omitted)

[27] On the latter, see section 6.1. and Benoît Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021) 6.

[28] On the latter, see Zbigniew Dumienski, 'Shared Citizenship and Sovereignty - The Case of the Cook Islands' and Niue's Relationship with New Zealand' in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Palgrave Macmillan 2019).

rely predominantly on existing legal frameworks and are intended to apply in contexts where an LLIS would have run out of pre-emptive actions or in which they could not be implemented. Thus, in the hypothetical timeline of the future of a LLIS, the window for the implementation of pre-emptive solutions generally precedes that of palliative solutions.

However, the distinction between pre-emptive and palliative is not watertight, and this terminology is mostly helpful for clarifying the various solutions proposed for LLISs based on what they require of other members of the international community. My choice of a worst-case scenario thus means that it is firmly palliative in outlook and nature.

3.1.1. Loss of territory

Academic research tends to gravitate towards the idea of filling gaps or pushing the boundaries of our current collective knowledge. A peculiarity of here is that rather than aiming to fill a gap identified in previous literature as being ripe for "solving", it first aims to explore the possibility of an "alternative narrative", and, then to investigate the implications of the latter in terms of available remedies. However, this necessarily implies explaining the need for such an investigation on a subject that, according to most authors, is everything but settled. The onus is therefore on this thesis to demonstrate the need for its analysis.

I choose to work *in parallel* with other scholarship rather than *against* it, using a scenario-based approach.[29] Legal scholarship commonly boils down to promoting a specific interpretation of a set of norms as the putative "right" one, i.e., the route that the author(s) believe a judge should take if tasked with ruling on the legal question(s) at stake and assuming *ceteris paribus*; a similar set of facts. In contrast with such an approach, I emphasise preparedness over the prescriptive support of a single interpretation. Preparedness is implemented here through an increased focus on context, and the setting in which specific legal arguments may become relevant or have added value for LLISs. In turn, this rests upon the assumption that a multiplicity of "correct" interpretations may coexist, due to the uncertainty inherent to unsettled legal questions and future factual settings, as well as the influence of external variables.[30] This plays a central role in the choice to explore the applicable norms in a specific scenario, rather than seek a hypothetical *overall* "best" outcome. Indeed, the future of LLISs is shaped by challenges that require particular attention to context and increased focus on the interrelatedness of factual and legal factors.

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[29] The content and implementation of this approach are discussed at length in section 5 below.

[30] To a large extent, all analysis of statehood and LLISs make assumptions about the context in which they would or could be relevant, although such assumptions are often left unaddressed or unspecified. The role played by recognition, and the outcome of other states' respective positions on the statehood of a deterritorialised LLIS is a salient example of such variable. See Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?' (2021) 22 Melbourne Journal of International Law 357, 372–373.

The need for this thesis can ultimately be traced back to the possibility that several existing insular states might lose the entirety of their territory to sea level rise caused by climate change. This is an oversimplification of a process that is likely to be substantially less straightforward to assess, although it remains a process whose the legal implications require exploration. In practice, while LLISs may eventually lose the entirety of their emerged territory, setting a threshold for making such a claim would be fraught with ambiguity, and some uncertainty remains as to the exact dynamics involved, particularly with regards to the specific timeline of such events.[31] The geomorphological reality that underpins the existence of LLISs is further nuanced by the sizeable adaptation efforts deployed by LLISs and the possibilities for the threatened states to implement certain measures to minimize the impact of the loss of territory or even ensure its symbolic fulfillment.[32]

Moreover, scientific assessments of the future of LLISs remain conflicted. Some studies have shown that atoll islands, the type of islands most common in LLISs, could show sufficient resilience to at least partially overcome the effects of SLR on their boundaries due to an increase in sediment accumulation.[33] Nonetheless, other research shows that the capacity of atoll islands to adapt may not be sufficient to keep up with the unprecedented levels of anthropogenic SLR, resulting in declining stability as the effects of climate change worsen.[34] Even intermediate predictions of SLR in the Republic of the Marshall Islands were found to be superior to historical levels and thus firmly in uncharted territory by the end of the century.[35] If no action is taken, permanent island loss is likely to be inevitable.[36] In fact, even certain mitigation efforts could potentially result in accelerated erosion,[37] emphasising the need for immediate and adequate action, but also active contingency planning.

The key takeaway from this section is that the islands that currently constitute the territory of LLISs are likely to disappear. The uncertainty predominantly lies in the exact timeline of events that would lead to such complete loss of territory, and it is crucial to note that there are still significant opportunities for both mitigation and adaptation efforts. Timely intervention and support to LLISs can have tremendous impacts, and the fatalist narratives

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[31] See for instance, Haunani H Kane and Charles H Fletcher, 'Rethinking Reef Island Stability in Relation to Anthropogenic Sea Level Rise' (2020) 8 Earth's Future 1.

[32] Although this option is unlikely to be decisive. Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law - Climate Change Displacement and Sovereignty* (Springer-Verlag Berlin Heidelberg 2014) 155.

[33] See Virginie KE Duvat, 'A Global Assessment of Atoll Island Planform Changes over the Past Decades' (2019) 10 WIREs Climate Change 1; Arthur P Webb and Paul S Kench, 'The Dynamic Response of Reef Islands to Sea-Level Rise: Evidence from Multi-Decadal Analysis of Island Change in the Central Pacific' (2010) 72 Global and Planetary Change 234.

[34] Kane and Fletcher (n 31).

[35] ibid 7.

[36] ibid 9. Other effects of climate change such as ocean acidification could also impact the resilience of atoll islands.

[37] David Freestone and Çiçek Duygu, 'Legal Dimensions of Sea Level Rise: Pacific Perspectives' (World Bank 2021) 5.

that have become part of the public perception of LLISs is problematic on multiple levels. Indeed, as the window of opportunity for effective action is still firmly open, it is particularly dangerous to present the support of LLISs as a lost cause, making it that much harder to muster meaningful support.[38] LLISs are not passive victims and should not be depicted as such.[39] If anything, the incredible injustice of their predicament should trigger an exemplary response from the international community. Nevertheless, the likelihood of LLISs' disappearance means that there is a simultaneous need to discuss the legal implication of the loss of territory before the latter actually occurs. Thus, the fact that LLISs will eventually lose their territory is accepted as a premise of this thesis and of the articles that is encompasses.[40] This premise also aligns with the worst-case scenario approach of this thesis.

3.1.2. Deterritorialised statehood

The loss of territory, while relevant for the statehood of the concerned LLIS, does not have to be significant in relation to its legal status. Indeed, deterritorialised statehood has been discussed for some time now, and there are grounds to believe such a continued existence would be possible for an LLIS deprived of its territory. Such a development would ensure that a deterritorialised LLIS maintains its legal personality and statehood, an outcome that is generally assessed as positive and that is actively sought by LLISs.[41]

Nevertheless, there is still uncertainty as to the solidity of this legal path. The uncertainty that permeates the possibility of deterritorialised statehood is sufficient to warrant caution. In line with the worst-case scenario approach, key sources of uncertainty, both within and outside "the law" will be identified and subsequently inform the legal analysis of what alternatives exist to deterritorialised statehood within such a scenario.

It should be clarified that the concept of deterritorialised statehood itself is not problematic. In fact, it may represent a crucial lifeline for LLISs. Instead, what can be problematized is the certainty with which it is presented as a foregone conclusion. While this deserves a discussion of its own, the specific elements of

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[38] Barnett (n 3).

[39] In fact, LLISs have been particularly active in trying to gather support and emphasise the need for action at the international and regional level. See for instance, Maryan Omidi, 'Maldives Sends Climate SOS with Undersea Cabinet' (17 October 2009) <https://www.reuters.com/article/us-maldives-environment-idUSTRE59G0P120091017> accessed 31 January 2023; Lucy Handley, 'Pacific Island Minister Films Climate Speech Knee-Deep in the Ocean' (8 November 2021) <https://www.cnbc.com/2021/11/08/tuvalu-minister-gives-cop26-speech-knee-deep-in-the-ocean-to-highlight-rising-sea-levels.html> accessed 31 January 2023.

[40] This possibility is sufficiently serious to have generated considerable literature on the matter, in addition to a substantiated effort to address the uncertainty it generates through various institutional channels. See for instance, Davor Vidas, David Freestone and Jane McAdam, 'International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise' (International Law Association 2018); Bogdan Aurescu and others, 'Sea-Level Rise in Relation to International Law' (United Nations General Assembly 2018) A/73/10.

[41] However, this assumption has been problematized, see for instance, Sharon (n 6) 1063.

which are discussed at length in the first article,[42] challenging the certainty that has been ascribed to this outcome is the first step in investigating what options are available if deterritorialised statehood cannot be sustained. Consequently, while the merits and likeliness of deterritorialised statehood can be argued, there is still sufficient uncertainty to warrant an investigation of what legal remedies and options are available in a scenario where deterritorialised statehood would not be available for LLISs. This reflects a redundant feature of the challenges faced by LLISs: the inadequacy of existing legal frameworks. With regards to the law on statehood, uncertainty is a built-in feature.

The outer boundaries of statehood are notoriously blurry, and this is not by accident. States jealously guard their prerogative to determine who gets to become a member of the select club of states, and while legal matters do play a role, they are not necessarily decisive.[43] While tempting, it would be misguided to assume that the position of other states on the future of LLISs would be exclusively shaped by legal principles and considerations, as opposed to international politics and other calculations.[44] In fact, even if this was a purely legal matter, I will demonstrate here that the relevant legal framework is far from unequivocal on the question of deterritorialised statehood. Therefore, leaving the notion of deterritorialised statehood uncontested could be likened to putting all of one's egg in the same basket; the basket may seem solid but it would be prudent to consider looking for other baskets.

3.1.3. Protection Gap

The question of statehood is only one element of a multifaceted cluster of problems for LLISs and their populations. While statehood may be key to maintaining the international legal personality of the threatened States, the challenges faced by those in danger of being displaced are compounded by the existence of a clear gap in the normative framework that protects (imperfectly) people on the move: international refugee law. Nationals of LLISs displaced across international borders due to the effects of climate change would likely not fall within the scope of current refugee law.

It is, by now, a rather common trope in the media to publish spectacular estimates of how many "climate refugees" may be displaced by climate change.[45]

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[42] Rouleau-Dick, 'Competing Continuities' (n 30).

[43] Jan Klabbers, *International Law* (Cambridge University Press 2013) 73.

[44] The challenges faced by Kosovo in its claim to statehood are indicative of the impact international politics can have on accession to statehood in a contested environment. See Tatjana Papić, 'De-Recognition of States: The Case of Kosovo' (2021) 53 Cornell International Law Journal 683.

[45] For instance, the UN Secretary General recently mentioned the danger of a "mass exodus on a biblical scale" caused by climate change. See Damian Carrington, 'Rising Seas Threaten "Mass Exodus on a Biblical Scale", UN Chief Warns' (*The Guardian*, 14 February 2023) <https://www.theguardian.com/environment/2023/feb/14/rising-seas-threaten-mass-exodus-on-a-biblical-scale-un-chief-warns> accessed 16 February 2023. See also, McAdam (n 2).

Beyond being problematic in itself,[46] this use of the term is misleading as it erroneously implies that those displaced due to climate change are necessarily "refugees" in the legal sense of the term. Indeed, the term refugee is regulated and defined by Article 1.A of the 1951 Convention on the Status of Refugees ("1951 Refugee Convention"), which states that a refugee is someone who:

> [..] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country [...][47]

This definition is generally ill-suited to protect populations displaced by climate change due to the indiscriminate nature of climate change, in contrast with the "persecution" criterion which implies a level of intent, the existence of an agent of persecution, and a discriminatory component. This problem is magnified in the case of the populations of LLISs, because their entire population is threatened and might eventually be displaced, and since conflict or discriminatory effects of climate change are unlikely present to the extent needed to trigger international protection. A relative consensus thus exists that most of those displaced by the effects of climate change will not be refugees in the legal sense of the term.[48] This is not to say that refugee law has no role to play in the protection of those displaced by climate change, but simply that other conditions need to be fulfilled for it apply. This might be satisfied in cases where the migratory movements are multi-causal and are exacerbated by existing patterns of inequalities or marginalisation,[49] but this is unlikely to be true in the case at hand.

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[46] This narrative has the potential to stoke unfounded fears and be instrumentalized against those most in need of assistance. See this interview with François Gemenne by Étienne Leblanc, 'Quand Le Climat Contraint de Tout Quitter' (*Radio-Canada*, 25 October 2021) <https://ici.radio-canada.ca/recit-numerique/3137/cop26-climat-migration?fbclid=IwAR0Bkz8XMTqyNvX3i_Qd9_0mlEKDHTaulcqD4E0k_VxJzM2emxTe4OS8tf w> accessed 11 March 2021; Giovanni Bettini, 'Climate Migration as an Adaption Strategy: De-Securitizing Climate-Induced Migration or Making the Unruly Governable?' (2014) 2 Critical Studies on Security 180.

[47] *Convention Relating to the Status of Refugees*, opened for signature 28 July 2951, 189 UNTS 37 (entered into force 22 April 1954) art 1(A).

[48] For an excellent discussion on the matter, see McAdam (n 2) 42–48. See also António Guterres, 'Migration, Displacement and Planned Relocation' (*UNHCR*, 31 December 2012) <https://www.unhcr.org/news/migration-displacement-and-planned-relocation> accessed 19 October 2023. Scott, outlining the dominant view described in this section, describes the current dominant paradigm in relation to the refugee definition and climate change displacement as such: "With the combined legal authority of senior courts, the UNHCR, and authoritative scholars of international scholars of international law, it is easy to see how the dominant view strongly supports the conclusion that the Refugee Convention has only peripheral relevance to the legal predicament of people displaced across borders in the context of 'natural' disasters and climate change." Matthew Scott, *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press 2020) 5–6.

[49] Matthew Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change' (2016) 35 Refugee Survey Quarterly 26, 27; Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (2020) 114 American Journal of International Law 708, 712.

Ultimately, while the United Nations High Commissioner for Refugees (UNHCR) has a monitoring role and has been actively involved in the protection of displaced populations, the implementation of the 1951 Refugee Convention is largely in the hands of national authorities. However, here also the restrictive wording of the refugee definition has proven, at least so far, an insurmountable obstacle for putative "climate refugees", as best illustrated by the *Teitiota* case.[50] In this case, Ioane Teitiota, an i-Kiribati man, attempted to claim refugee status in New Zealand on the basis of the forecasted impacts of climate change on his home country of Kiribati. This line of argument was not accepted by the New Zealand court, and it seems unlikely that other domestic courts would come to a different conclusion on this question, notwithstanding a change in the 1951 Convention's refugee definition.

Teitiota was subsequently deported to Kiribati, prompting a complaint to the Human Rights Committee (HRC) on the basis that the plaintiff's removal amounted to a violation of his right to life, enshrined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR), of which the HRC is the monitoring organ.[51] While this argument was not retained by the HRC in its decision, the Committee nevertheless found that the principle of *non-refoulement* might apply to such case in the future if a sufficient threshold of harm was reached.[52]

While a positive development, the applicability of *non-refoulement* is far from a panacea and it needs to be assessed accordingly. At the core of the principle is the idea that sending someone to another country where they are at sufficient risk of serious violations of their human rights triggers an obligation not to enact such removal. The prohibition of *refoulement* is a key component of international refugee law and is enshrined in Article 33(1) of the 1951 Refugee Convention and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[53] although its customary status is debated.[54] In practice, the HRC's decision in *Ioane Teitiota v New Zealand* simply means that were the conditions in Kiribati to deteriorate sufficiently, the *non-refoulement* principle would be triggered and thereby ensure that Kiribati

[50] *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* (New Zealand Court of Appeal).

[51] *Ioane Teitiota v New Zealand (advance unedited version)* [2020] Human Rights Committee (HRC) CCPR/C/127/D/2728/2016.

[52] The growing body of litigation on international protection and climate displacement may also undermine existing standards, such as an implicit requirement of "imminence". See Adrienne Anderson and others, 'Imminence in Refugee and Human Rights Law: A Misplaced Notion for International Protection' (2019) 68 International & Comparative Law Quarterly 111.

[53] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted 10 December 1984, entered into force 26 June 1987. 1465 UNTS 85. Art. 3. See also UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' (UNHCR 1997).

[54] See for example, in favor of the inclusion of the principle as a customary norm Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 346; UNHCR (n 53). *Contra,* James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 363.

nationals could not be sent back to their home country.[55] However, this does not imply any substantive obligation on the state that the Kiribati national finds themselves in, and stops short of creating any obligation to provide protection on other states *vis-à-vis* nationals of LLISs. In fact, the relevance of the HRC's decision lies primarily in its authoritative nature, as the applicability of the *non-refoulement* principle had previously been known to be likely to apply to such cases.[56] An EDP that can secure protection against *refoulement* would fall within the scope of the human rights obligations of the country they find themselves in. However, in the absence of a legal status in their country of residence (such as, for instance, a work permit or a residence permit on humanitarian grounds), they are likely to find themselves facing a nearly insurmountable list of legal hurdles in their effort to secure any substantive protection.

What follows from this overview is that the 1951 Refugee Convention, the cornerstone instrument of international refugee law, is simply inadequate as a protection framework for displaced national of LLISs. While it may still apply in some specific cases,[57] provided other elements ensure the fulfilment of the needed criteria, its shortcomings create a clear gap in protection. In practice, this means that a displaced national of a LLIS might eventually find themselves protected from being returned to their country of origin due to the effects of climate change, in accordance with the prohibition of *refoulement*, but would lack a legal status and exist in what essentially amounts to legal limbo.

Conversely, if one looks to regional instruments, the *1969 Convention Governing the Specific Aspects of Refugee Problems in Africa* provides for some interesting possibilities in the way it includes in Art. 1A(2) that:

> The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[58]

This wording leaves room for including persons displaced purely due to the effects of climate change, provided the latter reach the necessary threshold to qualify the applicant for protection. While the inclusion of environmentally displaced persons has been met with opposition by some State parties to the Organisation of African Unity (OAU) Refugee Convention, there is no indication that State practice on the matter would be sufficiently consistent to override the text of the Convention.[59]

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[55] See generally, McAdam (n 49).

[56] ibid 709.

[57] Such specific scenarios are included in the scenarios discussed in section 5.2.3.

[58] *Emphasis added*. Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention) art 1A(2).

[59] For an excellent discussion of the OAU Refugee Convention's refugee definition, see Tamara Wood, 'Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31 International Journal of Refugee Law 290, and more specifically, p. 308. See also Isabel M Borges, *Environmental Change, Forced Displacement*

In fact, while the protection gap is primarily rooted in the inadequacies of international refugee law, it is likely that promising solutions to fill this gap lie in regional or domestic instruments. The failure of international refugee law to adequately protect EDPs from LLISs is but one of its many inadequacies. The specific protection gap identified here illustrates well the need to shift some of the basic premises that have defined the global north's response to migration, which is largely reflected in the current framework of refugee law. Migration is increasingly becoming a necessary path to adaptation, and the resulting need to rethink migration law may also be an opportunity to find constructive answers beyond the global north's outdated frame of reference.[60] While this discussion lies outside the scope of this thesis, it is safe to say that the future of climate-induced migration will be a "make or break" moment for how the current international legal system approaches migration as a whole.

Ultimately however, this thesis' discussion of international refugee law's failure to adequately protect EDPs is self-contained. Firstly, this is not a particularly contentious conclusion in light of the existing scholarship on the matter, further supported by the decision reached in *Teitiota v Chief Executive Ministry of Business, Innovation and Employment*.[61] Secondly, this specific discussion is addressed in the third published article, as well as in a working paper.[62]

Overall, this section identified three problems: first, the eventual complete loss of territory faced by several LLISs resulting from the forecasted effects of climate change and SLR, resulting in legal uncertainty relating to the concept of statehood; second, the relative certainty with which the idea that deterritorialised statehood is not only possible under the current norms on statehood, but would also be supported by the international community; thirdly, the protection gap resulting from the inadequate wording of the refugee definition. These key problems have been highlighted since they are at the very root of this thesis, as reflected in the respective scope of the articles. The next question will outline some of the key concepts and terms used in this analysis.

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and International Law (Routledge 2019) 81–84; Khaled Hassine, *Handling Climate Displacement* (Cambridge University Press 2019) 66–67.

[60] Papua New Guinea's Supreme Court of Justice's approach to international migration in the context of Australia's extraterritorial processing of migrants is a good example of how different premises can affect how migration is approached, in contrast with the approach adopted by the European Court of Human Rights, for instance. See Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar 2021). On Australia's approach to the processing of asylum seekers, see Stephen Phillips, 'Imitation as Flattery: The Spread of Australia's Asylum Seeker Rhetoric and Policy to Europe' (2019) 13 UNSW Law Society Court of Conscience 43.

[61] See McAdam (n 2) 42–48. This protection gap was also emphasised, already in 2011, by then High Commissioner for Refugees António Guterres, 'Nansen Conference on Climate Change and Displacement; Statement by António Guterres, United Nations High Commissioner for Refugees' (*UNHCR*, 6 June 2011) <https://www.unhcr.org/4def7ffb9.html> accessed 17 February 2021.

[62] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23); Michel Rouleau-Dick, 'Why Environmentally Displaced Persons from Low-Lying Island Nations Are Not Climate "Refugees": A Legal Analysis' (Åbo Akademi University 2018) Working paper.

3.2. Terminology and conceptual issues

3.2.1. Low-lying island states (LLISs)

Words matter, and this is particularly true when addressing the consequences of climate change. I choose here to use the term "Low-lying Island States", but other terms are also used throughout the literature. The first category encompasses terms that are commonly found in media reports and scholarly output which emphasise what is assumed to be the imminent demise of the states in question. This includes terms such as "disappearing States",[63] "sinking States",[64] or "21st Century Atlantis"[65]. While one could argue that such designations are perhaps factually accurate in light of the scientific forecasts, they nevertheless prominently portray disappearance as an ineluctable outcome, a choice which has wider implications for those States and their future.[66]

Moreover, several geopolitical groups or international organisations exist that include the states that are the focus of this thesis. These include, among others, *Small Island Developing States* (SIDS)[67] and the *Alliance of Small Island States* (AOSIS)[68] with most of the former being part of the latter. However, such designations remain too broad for the purpose of this thesis as they include states that, while facing significant challenges because of climate change, do not face an existential challenge to their statehood.[69] Therefore, the use of the terms SIDS or members of the AOSIS can be problematic when discussing statehood

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[63] See for instance, Marija Dobrić, 'Rising Statelessness Due to Disappearing Island States' (2019) 1 Statelessness and Citizenship Review 42; Stoutenburg, *Disappearing States* (n 26); Sumudu Anopama Atapattu, 'Climate Change: Disappearing States, Migration, and Challenges for International Law' (2014) 4 Washington Journal of Environmental Law & Policy 1.

[64] For instance, Wong (n 6); Heather Alexander and Jonathan Simon, 'Sinking into Statelessness' (2014) 19 Tilburg Law Review 20.

[65] Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 Stanford Journal of International Law 1. See also Julien Jeanneney, 'L'Atlantide: Remarques sur la submersion de l'intégralité du territoire d'un état' (2014) 118 Revue générale de droit international public 95. Jeanneney uses the term "small island states" (i.e., "petits états insulaires") throughout the article.

[66] For a discussion of such implications in the present see Barnett (n 3).

[67] UN-OHRLLS, 'List of SIDS' (*United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States*) <https://www.un.org/ohrlls/content/list-sids> accessed 9 November 2021.

[68] AOSIS, 'AOSIS Member States' (*Alliance of Small Island States*, 2021) <https://www.aosis.org/about/member-states/> accessed 9 November 2021.

[69] The term SIDS has nevertheless been used to describe LLISs, see for instance Ori Sharon, 'State Extinction Through Climate Change' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (1st edn, Cambridge University Press 2021); Mainé Astonitas, Jacqueline Fa'amatuainu and Ahmed Inaz, 'Climate Refugees? Alternative and Broadened Protection Avenues for Refugees from Small Island Developing States (SIDS)' (*Refugee Review: Re-Conceptualizing Refugees & Forced Migration in the 21st Century*, 21 November 2018) <https://refugeereview2.wordpress.com/opinion-pieces/climate-refugees-alternative-protection-avenues-for-refugees-from-small-island-developing-states-sids-by-maine-astonitas-jacqueline-faamatuainu-ahmed-inaz/> accessed 20 January 2020; Chiara Redaelli and Valentina Baiamonte, 'Small Island Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies' [2017] SSRN Electronic Journal; Sharon (n 6).

since it misleadingly includes states that are not exclusively low-lying and thus not facing the challenges addressed here.

This leaves factual designations that focus directly on the characteristics that render the concerned States particularly vulnerable to the effects of climate change. For instance, "Atoll Island States" are defined by Yamamoto and Esteban as:

> States composed solely or almost exclusively of atolls. Prominent in this group of countries are Kiribati, Tuvalu, Nauru, the Marshall Islands, and the Maldives. All of these could become submerged in the future by a combination of increased coral mortality, sea-level rise and coastal erosion resulting from higher levels of tropical cyclone activity.[70]

The term is also used by other scholars to discuss the impacts of climate change on the statehood of vulnerable states.[71] However, the present thesis chooses to use a variation on this term in the form of "Low-lying Island States", as it encapsulates the core element that makes the concerned States particularly sensitive to climate change and at risk of potentially losing their entire territory. This choice is in line with the use of the term by other scholars,[72] and reflects the terminology used by the IPCC.[73] Moreover, as it encapsulates the very characteristic that makes the concerned states vulnerable, this terminology remains sufficiently open to be able to adapt to new knowledge and research in what has become a dynamic research environment.

3.2.2. Environmentally displaced persons (EDPs)

Beyond the existential threat that climate change poses to LLISs, climate change is also expected to result in the forced cross-border displacement of the populations living on the islands threatened by SLR. As discussed in section 3.1.3., the inadequacy of the current international legal framework on the protection of displaced persons, principally the 1951 Refugee Convention, means that the term "climate refugee" is misleading and problematic.[74] Using terms such as "climate refugees" or "environmental refugees" implies that those people who are displaced fall within the existing protection framework, which is mostly not the case. Furthermore, the use of "climate refugees" to designate citizens from vulnerable LLISs has been very negatively received by the latter, partly because of the perceived victimization it implies.[75]

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[70] Yamamoto and Esteban (n 32) 1. (citations omitted)

[71] See for instance, Willcox, 'Atoll Island States' (n 6); Willcox, 'Family Resemblance' (n 6); Lilian Yamamoto and Miguel Esteban, 'Migration as an Adaptation Strategy for Atoll Island States' (2017) 55 International Migration 144; Barnett (n 3); Park (n 21).

[72] See for instance, Park (n 21); Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer 2017); Ross (n 6).

[73] Oppenheimer and others (n 12).

[74] See for instance, Rouleau-Dick, 'Why Environmentally Displaced Persons from Low-Lying Island Nations Are Not Climate "Refugees": A Legal Analysis' (n 62); McAdam (n 2) 42–48.

[75] McAdam (n 2) 41. This type of categorisation in relation to climate migration and its relation to securitisation have also been found to be potentially problematic, see for instance Bettini (n 46).

As a result, this thesis uses the term "environmentally displaced persons" to refer to those who have or would be displaced across international borders by the effects of climate change. Purely for the purpose of clarity and in the self-contained context of this work, the term is intended here to refer exclusively to LLISs' nationals displaced across international borders. EDPs and EDPs from LLISs are thus used interchangeably throughout this summary. The nexus between the decision of migrating and the effects of climate change is a complex and multi-causal one, which lies beyond the scope of this thesis.[76] However, the particularity of the challenges faced by LLISs makes this link clearer to assume than in other contexts of displacement or migration, due to the existential nature of the threat posed to LLISs. This is not to say that migration from LLISs stems uniquely from SLR and climate change effects, but that in the specific context of the challenges addressed here, it is safe to say that environmental factors would have played a prominent role in the external migration of the inhabitants of LLISs. It should be further noted that this is a descriptive term and that it is used independently of any legal meaning.

Additionally, the use of the term "relocation" in this thesis aims to describe the process through which a LLIS would relocate its activities and its physical base of operation. Consequently, the term "post-relocation" characterises a situation where a LLIS would now be operating outside of its former territory, the latter being assumed to have disappeared at this stage.

4. Methodological framework

The importance of methodology cannot be understated, particularly in the context of a doctoral thesis. It shapes how one thinks about one's research. This crucial choice is also heavily shaped by one's academic path and which teaching or learning experiences have moulded the latter. Furthermore, the dynamic aspect of methodology is often left unexplored, as the culmination of what is a complex thought process is ultimately presented as a static picture, a conscious choice that needs to be defended and explained. The reality is inevitably less linear and does not easily fit in the neat paragraphs of a methodology section. In fact, while this fluidity cannot be directly integrated in how one approaches the end result of the research process (i.e., this summary and the articles that constitute its building blocks), it is nevertheless the background against which one should understand the methodological choices that are combined here.

Namely, as is the case for most legal scholars, I entered the journey of my doctoral studies with a resolutely doctrinal background and focus, and this perspective has heavily shaped my methodological outlook. However, as my understanding of the issues at stake deepened, a purely doctrinal perspective failed to account for all the elements that are relevant to this discussion. Thus, while this summary has doctrinal legal scholarship as its starting point, it strays

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[76] Ilan Kelman and others, 'Does Climate Change Influence People's Migration Decisions in Maldives?' (2019) 153 Climatic Change 285.

from a purely black-letter narrative, even if it is ultimately only to come back to a primarily doctrinal discussion as its destination.

This section will start by outlining a methodological roadmap, through which the key assumptions underpinning the analysis will be discussed and clarified. This will consist first of clarifying the reliance of this thesis on a predominantly black-letter law approach to legal research, as well as some of its shortcomings. In turn, this will allow for a discussion of the scenario-based approach and what its added value is in light of the doctrinal focus of this thesis.

4.1. Doctrinal Research

4.1.1. What, why, and how?

Doctrinal research, black-letter law, legal dogmatics, traditional approaches[77] are all terms used to describe the "default" way of looking at "the law" as it is purported to exist and function, according to the law's own internal logic. By formulating arguments in a certain way and relying on the law as it appears from a hypothetical independent standpoint, doctrinal research as a tool aims to provide answers as to what the law "is" or "says" on the matter at hand. This is how international law is approached by international tribunals, and consequently by most actors of the international system (at least *prima facie*); it is also the language in which proficiency is required of the international lawyer to articulate their arguments, since it replicates how arguments would be presented to a judge or to other peers.[78] In other words, legal reasoning in this form "[…] is conditioned by the fact that most people, after going through similar training, will agree in their judgements concerning most cases."[79]

For this to be a viable approach to the application and interpretation of international law, doctrinal research relies on a few foundational claims. International law can thus be summarily boiled down to "a system of objective principles and neutral rules that emanate from the will of states' will, either directly through treaties or indirectly through custom".[80] States are generally considered to be international law's primary subjects, and rules are identified according to a test of legal validity. Any concerns that are not strictly legal are "extra legal" and consequently external to a strict determination of "the law".[81]

[77] Andrea Bianchi, *International Law Theories* (Oxford University Press 2016) 21.

[78] Jörg Kammerhofer, 'International Legal Positivist Research Methods' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021) 99, 102.

[79] Lars Hertzberg, *The Limits of Experience* (Philosophical Society of Finland : Akateeminen kirjakauppa 1994) 209. This is also, broadly, part of Koskenniemi's description of international law and of the inherent contradiction at the heart of an international lawyers' profession. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005).

[80] Bianchi (n 77) 21.

[81] ibid.

Moreover, it is assumed that legal questions "are supposed to have one correct legal answer".[82]

This portrayal admittedly outlines doctrinal methodology in slightly exaggerated and rather broad terms, but it nonetheless emphasises some of its core tenets.[83] The law is a sealed and self-contained system, and within that closed system things are done in a certain accepted way, to which commitment is expected from the international legal scholar.[84] Examining the law through legal dogmatics comes with its own set of rules. Debates necessarily exist, but they do so within the frame of an epistemology that is usually accepted by all involved.[85]

If this appears a rather naïve way of approaching the intricate web of norms and State practice that is broadly assumed to be international law, it is because it is. In fact, one could argue that attempting to stay completely within legal dogmatics necessarily requires active ignorance or dismissal of the context and backdrop against which the conclusions reached are formulated, and by whom they are reached.[86] This can be explained partly by the observation that "for the most part, 'default positivism' is semi-conscious and half-reflected, more part of one's legal socialisation and culture than of a conscious choice and reflection."[87] In that form, the incoherencies of a legal positivistic approach are palliated by its "default" status, since scrutiny takes the form of deference to the authority of peers rather than scrutiny over the theoretical underpinnings of a piece of scholarship, which happens on an altogether different level and can thus easily be dismissed or not be considered at all.

This does not really address the shortcomings of a doctrinal approach to international legal research. Indeed, accepting the role of other variables on normativity or its implementation implies a departure from the core tenets identified above. In fact, Koskenniemi discusses the inevitable professional schizophrenia that results from the simultaneous commitment to the higher ideals of upholding the rule of law and the pragmatic knowledge of the actual processes involved as a never-ending tension "between commitment and

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[82] ibid. Kammerhofer uses this tendency of what he terms "default legal positivism" to contrast it to a proposed alternative "New Doctrinal Scholarship" inspired by Kelsen's pure theory of law and striving to be theoretically coherent. See Kammerhofer (n 78) 106–108.

[83] This may be because of the "default" status of legal positivism. It follows that legal positivist research is often "not consciously based on a *theory* of positivism." (emphasis original), Kammerhofer (n 78) 97.

[84] Reza Banakar, 'On Socio-Legal Design' [2019] SSRN Electronic Journal 2–3 <https://www.ssrn.com/abstract=3463028> accessed 14 March 2023.

[85] This is discussed by d'Aspremont under the umbrella of "routine". See Jean d'Aspremont, 'International Legal Methods: Working for a Tragic and Cynical Routine' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar Publishing 2021).

[86] In fact, what is described by Kammerhofer as "default legal positivism" or orthodoxy, in practice operates largely in contradictions to the theory of positivism according to him. See Kammerhofer (n 78) 98.

[87] ibid 97.

cynicism".[88] However, beyond the theoretical objections to choosing a doctrinal approach, there is undoubtedly value to "playing the game" of legal dogmatics if one intends to contribute to a specific debate, or to answer certain questions.[89] This is how arguments are articulated for and by international courts and actors, and the outcome of legal processes cannot be taken lightly for any actor in search of power and/or legitimacy, or simply seeking a specific outcome. The law is not an objective truth and its open-endedness makes it substantially more dynamic than it may appear, or be made to appear to the outsider.

Consequently, beyond awareness of the flaws and lacunae of doctrinal approaches to international law, there is still clear value to building doctrinal arguments within the set confines of the "law", as such arguments have consequences and implications beyond the restrictive confines of the legal system. In fact, awareness of what lies beyond may be of crucial relevance to what happens within the law's boundaries, although straddling the divide may further amplify the inherent contradictions that shape the international lawyer's personal narrative.[90]

More practically, this thesis' approach to sources remains firmly within the confines of mainstream doctrinal research, although the *lex lata* focus of its analysis implies a generally more restrictive approach to legal sources. Relevant treaties, decisions and state practice are generally given primacy over quasi-legal sources such as scholarly opinions, but this is made particularly complex by the lack of clear, authoritative guidance as to exactly what should be encompassed in the spectrum of relevant sources. This comes as a result of the unprecedented nature of the challenges faced by LLISs. Parallels can be drawn, but only imperfectly since international law simply has not had to contemplate the possibility of the physical disappearance of a state.[91]

Moreover, while a variety of sources can be identified as relevant, determining the decisive tipping points further complicates the task of answering specific questions such as whether or not deterritorialised statehood is possible under the current framework of the law of statehood, and why.[92]

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[88] Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in Jean d'Aspremont and others (eds), *International Law as a Profession* (Cambridge University Press 2017).

[89] This formulation (ie, "playing the game"), is also used by Hertzberg and uniquely encapsulates this thesis' understanding of doctrinal scholarship. Despite its shortcoming and contradictions, the appeal of doctrinal scholarship lies not so much in some overarching claim to internal coherence or some higher philosophical truth. Rather, its legitimacy and added value cannot be assessed independently from the knowledge community it is inextricably linked with. Thus, even if the legal scholar is (sometimes painfully) aware of the theoretical and practical shortcomings of a doctrinal outlook, the latter remains an unavoidable tool to investigate certain question, particularly if the overall goal is set within the context of "the law". Ultimately, this results in the necessity to "play the game" of doctrinal research to answer certain questions.

[90] As discussed by Koskenniemi. See generally, Koskenniemi (n 88).

[91] This is especially obvious in relation to the relevance of international refugee law for EDPs, as discussed in section 3.1.3.

[92] More substantively, this question is discussed in the first article through the role given to the presumption of continuity, in the context of determining whether or not deterritorialised

Accordingly, the crux of discussing most of the legal questions at stake lies as much in the question itself as in determining which sources should be considered, and importantly, in which context. Presently, key questions relating to the future of LLISs remain up for debate. In fact, the current work undertaken by the International Law Association (ILA)[93] and more recently by the ILC,[94] in addition to the efforts to bring the International Court of Justice (ICJ) into the fray,[95] highlight the dynamic nature of this discussion. Until a set of arguments or interpretations gains sufficient traction to overcome the uncertainty that currently prevails, the guidance provided by legal dogmatics remains crucial but also limited and highly contextual. This normative uncertainty is particularly acute with regards to statehood and protection, as will be discussed in section 5. This recurrent uncertainty as to what are the applicable norms and their interpretation results in a uniquely open-ended legal landscape, and one that is particularly well-suited to the implementation of a scenario-based approach.

4.1.2. From doctrine to scenarios

Here, it is necessary to address the relationship between the two key methodological approaches of this thesis. On the one hand is the dogmatic analysis of a particular set of norms: those relevant to the future of LLISs and their nationals. On the other hand is the choice of a scenario-based approach, which focusses on overcoming some of the shortcomings of doctrinal research when faced with significant factual and/or normative uncertainty, such as that which pertains to the future of LLISs.

Clarification is therefore needed as to how the two methodological components of the present thesis interface, and how they combine in practice. First, it is assumed that there is no inherent contradiction between the adoption of a doctrinal approach to legal research, and the acknowledgement of the latter's shortcoming in fully eliminating uncertainty relating to the legal questions at stake. A purely doctrinal analysis cannot by itself unilaterally settle the key questions at the heart of the future of LLISs, from the feasibility of deterritorialised statehood to the applicability of other regimes. One may even go further and characterise dogmatic discourse as inherently incapable of eliminating indeterminacy to the extent that it could produce lasting legal certainty:

> Legal hermeneutics, it has been pointed out, routinely distinguishes between "core meanings" on which professional lawyers agree and peripheral meanings that may be subject to political controversy, and the former suffice to give rise to a solid legal practice. But the claim of indeterminacy here is much stronger (and in a philosophical sense, more "fundamental") and states that where there is no semantic ambivalence whatsoever, international law remains

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statehood is possible under the current framework of international law. See generally Rouleau-Dick, 'Competing Continuities' (n 30).

[93] Vidas, Freestone and McAdam (n 40).

[94] International Law Commission (n 4).

[95] Ligaiula (n 5).

> indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled. To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future. Hence they agree to supplement rules with exceptions, have recourse to broadly defined standards and apply rules in the context of other rules and larger principles.[96]

"It's not a bug, it's a feature" is the ubiquitous answer of software developers when asked about a flaw in their product, and it seems this could also apply to international law's complex relationship with indeterminacy. That is, legal discourse on its own lacks the tools to express in which "future" it is set. Instead, most legal arguments are implicitly rooted in a future where the conditions necessary to their validity are assumed to be fulfilled, even if this is simply the status quo. While perhaps an oversimplification, this highlights the need for an external toolset to conceptualise and spell out the uncertainty inherent to the complex set of challenges faced by LLISs. This is precisely where the scenario-based approach comes in.

While the specific workings and implementation of the scenario-based approach will be discussed below, its methodological role can nevertheless be clarified here. In practice, the implementation of a scenario-based approach does not compete with the dogmatic arguments brought forward above. Rather, the scenario-based approach is understood as an additional lens, a device that allows for the conceptualisation of a broader scope of possibilities, doctrinal, factual, or both. Introducing scenarios plays a key role in allowing us to outline exactly in which context this thesis's contribution can be assessed. Here, the meaning of context can be defined as the choice of a specific setting, including clarifying the assumed outcome(s) of specific questions that would otherwise be sources of uncertainty.[97] Combining these two methodological outlooks is also crucial to ensure the relevance of the findings in light of this work's focus on preparedness, embodied by the "hope for the best, prepare for the worst" motto.

In conclusion, the choice of combining doctrinal methodology with a scenario-based approach provides findings that are relevant for both legal scholarship and LLISs. The use of doctrinal methodology is most prominent in the articles, while this summary introduces and discusses scenarios. A key element of this thesis's contribution lies in the highly contextualised setting of its findings, allowing the investigation of outcomes that may have otherwise remained underexplored or neglected in the search for optimal solutions.

[96] Koskenniemi (n 79) 590.(footnotes omitted)

[97] Most prominently, the position of other states on the possibility of deterritorialised statehood for LLISs, including the ultimate content assigned to the presumption of continuity, as discussed in the first article. See Rouleau-Dick, 'Competing Continuities' (n 30) 372–374.

4.2. Methodological overview of the articles

The first article[98] focuses on the principle known as the presumption of continuity and follows a conventional doctrinal approach to international through its use of state practice, custom, and legal decisions to outline what it presents as an alternative doctrine (introduced as the 'sameness assessment doctrine'). In its analysis of what are described as two distinct doctrines of continuity, the article's focus can be boiled down to the "stretchiness" of the law, or how far a new interpretation, such as that embodied by the ratchet doctrine of continuity, can stray from more established practices and interpretations of the same principle. The article's discussion and analysis rests upon cases of state practice, as well as on relevant scholarship on the presumption of continuity. This is an intentionally restrictive view of the normative setting relevant to the future of LLISs, an approach that follows from the worst-case scenario lens developed here. Such a *lex lata* focused analysis expectedly clashes with more generous interpretations but forms a key part of the puzzle.

The second article[99] also follows a similar black-letter approach to legal scholarship, relying on the precedents constituted by the SMOM, and to a lesser extent the Holy See, to investigate what added value the latter cases bear for the future of LLISs in a context where deterritorialised statehood may not be possible. One of the key assumptions that underlies the article's analysis is that there needs to be a spectrum of solutions available for the future of LLISs, as there is still sufficient uncertainty to warrant the investigation of alternative avenues. While this may technically depart slightly from a more restrictive approach to doctrinal scholarship, it is in keeping with the core assumptions of this thesis. In terms of sources and relevant norms, the article relies on the value of the SMOM's (and to a lesser extent the Holy See's) peculiar international legal personality as a precedent to construct a blueprint for a potential deterritorialised LLIS to maintain its ILP even if fully-fledged statehood were to prove impossible to maintain due to the lack of physical indicia.

The third article[100] pushes its use of scenarios further than the previous articles in that it specifies its use as a device to investigate a specific legal question, in this case the added value of the 1954 Convention to EDPs from LLISs. Notwithstanding this greater engagement with a scenario-based approach, the article also follows a doctrinal approach to the legal questions at stake. More precisely, a gap in the existing normative framework is identified, and it is argued that, at least under certain conditions, the 1954 Convention may prove a useful tool for the protection of EDPs. Methodologically, the main departure from a strict doctrinal approach is thus the inclusion of a scenario-based approach to assist in defining the contextual background to the analysis, a key variable to assessing the added value of the 1954 Convention in relation to EDPs.

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[98] Rouleau-Dick, 'Competing Continuities' (n 30).

[99] Michel Rouleau-Dick, 'A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta' (2020) 63 German Yearbook of International Law 621.

[100] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23).

Overall, the articles published in the context of this doctoral project do not depart substantially from the methodological outlook adopted here. Although they may not address it as explicitly, they all share a firm link with the worst-case scenario lens while also remaining primarily within the scope of doctrinal research.

4.3. Scenario-based approach

The use of a scenario-based approach may appear contradictory to a predominantly doctrinal analysis of the normative framework applicable to the future of LLISs, in no small part because of the appearance of determinacy that emanates from traditional approaches to international legal scholarship.[101] This is, however, misleading since it does not account for the possibility that in reality, several "correct" interpretations of the same norms are often possible, even if the factual backdrop for a specific analysis remains the same.[102] The possibility of widely varying legal outcomes is further magnified if the facts of a hypothetical case are not premised as static but are instead presumed to be dynamic and constantly evolving. Projecting norms onto the factual jungle that is the future requires embracing the diversity in opinions and interpretations that necessarily results from multiple contexts. It is precisely here that the use of a scenario-based approach has the most to offer, as it allows for a transition from "the" future to "a" future (or a set of futures). This is a crucial step: it transforms an indefinite myriad of outcomes into a workable number of "futures", a set of scenarios. The resulting scenarios can then be leveraged to provide context-sensitive analysis of specific futures, spelling out in the process the key premises that substantiate a particular scenario.

More specifically, two sets of scenarios will be used: the first set will focus on the possible outcomes of the complete loss of territory for LLISs in relation to the latter's ILP, and the second will address the various avenues available to the displaced nationals of the concerned LLISs in terms of protection.[103]

The use of a scenario-based approach consequently fulfills three key purposes. Firstly, it allows this work to examine the relevance and potential added value of norms that would have otherwise been left underexplored, more specifically, the possibility of a "worst-case scenario".[104] This is possible due to the degree to which the choice of a specific set of premises can enable the investigation of a less likely or desirable chain of events. Secondly, by

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[101] As Bianchi writes with a touch of irony when attempting to encapsulate such mainstream approaches "[…] problems are supposed to have one correct legal answer." Bianchi (n 77) 21.

[102] On this, efforts to address what was perceived as the increased fragmentation of international law can provide a useful illustration of the wide diversity of possible legal approaches to a specific problem and its translation into legal questions. See Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (International Law Commission 2006).

[103] This will be addressed at length in section 5.

[104] This is an underlying theme to both the second and third articles. See Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23) 290–294; Rouleau-Dick, 'A Blueprint for Survival' (n 99) 640–645.

emphasising the specific context in which the analysis of a particular normative framework is set, the choice of a scenario-based approach allows different interpretations to be conducted in parallel rather than in opposition (ie, in different possible futures, rather than as mutually exclusive outcomes of a single timeline). This can be contrasted with competing interpretations vying to determine what is the "correct" reading of a norm, or disagreements on what role a normative framework can (should?) play.[105] Thirdly, the use of a scenario-based approach reaches beyond the scope of the specific scenario examined here, since to identify such a worst-case scenario, there needs to be at least one other scenario to compare it to.

The merits of a scenario-based approach thus lie in the possibilities it opens for investigating alternative narratives without directly undermining or substituting themselves to other, arguably "better" legal outcomes that have been or are also being investigated. In fact, the use of scenarios also builds upon previous efforts to approach the future of LLISs through the spelling out specific outcomes.[106] Furthermore, the choice of a scenario-based approach also reflects the growing tendency in social sciences to use scenarios, as well as the need to provide a better interface for mutual intelligibility between social sciences and international law.[107] Scenarios have been a staple of climate change research where they have emerged as a proven and flexible tool to encompass the fast-changing future of our planet.[108] It is thus logical to embrace this tendency to broaden the scope of possible investigations, but also to ground them better contextually.

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[105] While they are not necessarily framed as such, disagreements as to the exact content of a norm are a key feature of legal scholarship. More broadly, discussions relating to scope or role can also pitch scholars against each other. For instance, see Heri, 'Climate Change before the European Court of Human Rights' (n 1); Zahar (n 1); Heri, 'Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar' (n 1).

[106] See for instance, Yamamoto and Esteban (n 32) ch 5; Emma Allen and Mario Prost, 'Ceci n'est Pas Un État: The Order of Malta and the Holy See as Precedents for Deterritorialized Statehood?' [2022] Review of European, Comparative & International Environmental Law 1; Alejandra Torres Camprubí, *Statehood under Water - Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 169; Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State' (2009) 16 International Journal on Minority and Group Rights 209; Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?' (2016) 21 Tilburg Law Review 72.

[107] Viljam Engström and Michel Rouleau-Dick, 'Last Chance? A Call for Mutual Intelligibility Between International Law and Social Sciences' (*International Law Blog*, 28 November 2022) <https://internationallaw.blog/2022/11/28/last-chance-a-call-for-mutual-intelligibility-between-international-law-and-social-sciences/> accessed 29 November 2022.

[108] See Brian C O'Neill and others, 'Achievements and Needs for the Climate Change Scenario Framework' (2020) 10 Nature Climate Change 1074; Alexandra Middleton and others, 'Scenarios for Sustainable Development in the Arctic until 2050' (2021) 2021 Arctic Yearbook 1; Brian C O'Neill and others, 'The Roads Ahead: Narratives for Shared Socioeconomic Pathways Describing World Futures in the 21st Century' (2017) 42 Global Environmental Change 169.

4.3.1. Scenarios as a tool to address uncertainty

While there are multiple reasons to adopt a scenario-based approach, they can all, ultimately, be traced back to one concept: uncertainty. The uncertainty that pertains to the future of LLISs is particularly complex to treat because it represents the sum of the myriad variables that influence the various dynamics at play, many of which could never be adequately factored in. Still, legal analysis is partially shielded from many geopolitical concerns that occur beyond the normative realm, even if external uncertainty has multiple entry points to the legal plane.

Uncertainty cannot be removed entirely, and it is not the purpose of this thesis to provide answers that go beyond the uncertainty that permeates the future of LLISs. Instead, while external, non-legal uncertainty cannot be excluded, the relevant legal landscape nevertheless restricts outcomes to a manageable spectrum of possibility, which the scenarios considered here aim to encompass. One dimension of dealing with uncertainty not included here is what some might term a change of paradigm. This type of change would mean that the rules and relevant legal landscape would be fundamentally changed in how they apply to the future of LLISs. For instance, this could mean that the concept of statehood shifts substantially in how it is conceived and applied in order to accommodate deterritorialised LLISs, with wide-ranging implications for all states. Indeed, some have argued that the rules that pertain to statehood are so inadequate and outdated that other, fundamentally different approaches to the concept are not only possible but should be prioritised.[109]

The problem with such an approach to the future of LLISs, especially if relying solely on it, is that it departs so thoroughly from an existing frame of analysis that while it may hold unforeseen opportunities, its outcome is not only uncertain but it could also result in less favourable outcomes. After all, new opportunities to undermine what current guarantees exist could also be discovered, particularly in the context of the approach adopted here. Ultimately, the amplitude of such a change is too important to properly encompass within the methodological framework used here. Consequently, while the possibility of a "paradigm change level of uncertainty" cannot be excluded, one of the premises of this thesis is that the applicable rules will remain firmly anchored in the current applicable legal landscape, and thus that uncertainty as it is understood here will be approached through the constraints of the current applicable normative framework.

Nevertheless, the possibility of a "local" paradigm shift, i.e., in the specific context of the application of a certain norm or principle, bears more relevance to the present analysis. Specifically, this is a possibility mentioned in the first article, in the context of the implementation and added value of the presumption

[109] See for instance, Willcox, 'Family Resemblance' (n 6); Catherine Blanchard, 'Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise' (2016) 53 Canadian Yearbook of International Law 66.

of continuity.[110] This is not unthinkable, and is certainly less radical than making a paradigm shift in the broader concept of statehood. However, until such change is confirmed and substantiated by either consistent state practice or an authoritative opinion, such a break from previous practice could endanger the legitimacy and/or validity of this new paradigm, a concern addressed in the first article with regards to the competing interpretations given to the presumption of continuity.

Overall, in addition to the direct consequences of climate change, the uncertainty it generates is a recurring obstacle for LLISs, as they strive to maintain their existence and protect their nationals in a climate-changed world. Uncertainty introduces volatility to questions that are particularly sensitive for the future of LLISs and thus compromises efforts to build lasting solutions. This is precisely why a preparedness focus is needed, including engagement with "inconvenient outcomes", in order to tackle uncertainty head on, and hopefully create a clear overview of what may lie ahead. While not a panacea, scenarios have proven useful to do exactly that.

4.3.2. Practical implementation

The elaboration of scenarios in climate change science is usually fairly straightforward on a conceptual level: the relevant variables are identified, a timeline is specified, and an interval is defined.[111] Even under the broad umbrella of social sciences, a number of scenarios known as the Shared Socioeconomic Pathways (SSPs) were created through collective efforts, as tools to enable further research on climate change and its societal impacts.[112]However, at least on a methodological level, these existing attempts at scenario-building do not translate well to the field of legal scholarship. The peculiarities and complexities of international law have so far meant that the use of scenarios have remained ad hoc, thus providing only limited guidance on the use of a scenario-based approach in legal research.[113]

Thus, confronted with the lack of a clear, established methodological toolset to approach scenario-making in the context of such a legal analysis, I elect to follow the path cleared by previous scholarship although with an emphasis on

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[110] Rouleau-Dick, 'Competing Continuities' (n 30) 381.

[111] There is obviously more to it than that, but the type of variables and the empirical grounding of natural sciences means that scenarios thus produced can be assessed more easily than scenarios about societal tendencies, for instance.

[112] O'Neill and others, 'The Roads Ahead' (n 108). These scenarios are intended as starting point for further research and can act as starting points for the creation of more specific sets of scenarios following the general trends identified in the SSPs.

[113] This can be contrasted with the increasingly pressing calls to develop such tools and to investigate some of the challenges faced by public international law. See for instance, Neil Craik and others (eds), *Global Environmental Change and Innovation in International Law* (Cambridge University Press 2018); Thijs Etty and others, 'Legal, Regulatory, and Governance Innovation in Transnational Environmental Law' (2022) 11 Transnational Environmental Law 223; Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change: Climate Change and Legal Disruption' (2017) 80 The Modern Law Review 173.

clarifying the process and making its premises explicit.[114] This is needed, since any legal discourse set in the future necessarily makes assumptions about the future it is set in, even if this is as fundamental as assuming the continued normativity of the norm(s) in question. Hitherto, what transpires from previous inclusions of scenarios in the relevant literature is that authors simply identify possible outcomes to the different legal questions discussed, whether they be purely legal or less so (e.g., the continued recognition, or not, of a deterritorialised LLIS).[115] Additionally, there seems to be a certain amount of cross-pollination between the scenarios selected by different authors, as one might expect from analyses with a common focal point.[116]

Consequently, the method adopted here to create the scenarios follows a two-pronged approach, relying both on future scenarios discussed or hinted at in the literature, but also on a close investigation of possible and plausible legal outcomes. Practically, this means that the scenarios used come as the culmination of the existing views on the future of LLISs in the relevant literature, but also of an analytical effort to extrapolate from defined areas of uncertainty, particularly the impact of recognition. It should be noted that this approach is chosen in part due to the palliative focus of this thesis. Pre-emptive solutions imply considerably more agency for the threatened states and their populations, as well as a much higher degree of flexibility, something that makes these simultaneously more desirable as possible outcomes and less suited to the type of approach to scenario-aggregation adopted. As they may rely on proactive agreements or negotiated settlements, pre-emptive solutions, such as the voluntary cession of sovereign territory to a LLIS, cannot easily be anticipated within the context of state obligations.[117] Conversely, palliative solutions are inherently constrained by the existing legal landscape, allowing for the elaboration of a clearer picture of what is possible, and what is not in the current context. While this may be rightfully criticized as self-limiting in the type of legal solutions outlined, it is a necessary caveat to the added value sought here.

It should be clear to the reader that the scenario-based approach is not expected to transcend all previous debates about the considerable uncertainty it attempts to encapsulate. The aim of the scenarios discussed is to create an adequate context to ground the "worst-case scenario" mentioned in the initial research question. It follows that the other scenarios are intended more as an overview of possible outcomes rather than as a comprehensive and in-depth

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[114] This focus reflects the hope that this process can eventually be systematised and clarified to the extent that it can becomes replicable and viable on a larger scale. Such progress could then open the door to better interfacing with other sciences. See Engström and Rouleau-Dick (n 107).

[115] Yamamoto and Esteban (n 32) ch 5.

[116] See for instance, Rouleau-Dick, 'Competing Continuities' (n 30) 360.

[117] At the time of writing, it goes without saying that state obligations evolve and that the challenges faced by LLISs may eventually result in corresponding duties for other states. The emergence of a "right to exist" for LLISs and a corollary obligation for other states to safeguard the existence of a threatened LLIS could, for instance, provide a new legal setting for assessing the statehood of deterritorialised LLISs. See Milla Emilia Vaha, 'Drowning under: Small Island States and the Right to Exist' (2015) 11 Journal of International Political Theory 206.

discussion of each possible future. Their inclusion is necessary as they play a role in situating the scenario that is the primary focus here, even if only by exclusion.

4.4. Limitations

4.4.1. The right to self-determination

The concepts of statehood and self determination are closely intertwined. Self-determination is often framed in opposition to existing states, and while it is widely recognised as bearing significant normative weight, its actual applicability is often severely curtailed by the context in which it has to operate. Despite its widely recognised *jus cogens* status,[118] the exercise of the right to self-determination can be as straightforward as it can be controversial.

The right to self-determination bears particular relevance to LLISs, as most share a colonial history and subsequent emancipation, eventually resulting in the fully fledged statehood they now enjoy. In fact, several LLISs are amongst the most recent additions to the community of states, with Kiribati and the Marshall Islands having gained their independence as recently as 1979.[119] This is important since a key element of dispute when investigating the right to self-determination often lies in determining which entity or group possesses such a right in the first place.[120] Climate change and anthropogenic SLR threaten the right to self-determination of the populations at risk of losing their homes through the possible loss of their statehood. As a result, the right to self-determination has been of particular interest to scholars interested in the future of LLISs,[121] and it occupies a significant share of the discussion on the future of LLISs. The choice to steer away from self-determination thus requires clarification.

There are two primary elements to this decision. The first is the approach adopted here. While the overall relevance of the right to self-determination is evident, its scope and effects beyond a certain context have not been discussed in sufficient detail to provide a solid starting point in the specific context of a

[118] International Law Commission, 'Report of the International Law Commission - Seventy-First Session (29 April–7 June and 8 July–9 August 2019)' (United Nations General Assembly 2019) A/74/10 147.

[119] United Nations Department of Political Affairs, Trusteeship and Decolonization, 'Issue on Kiribati (Gilbert Islands' (United Nations 1979) UNST. PSCA. (os). D3 No. 15 <https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_15-1.pdf> accessed 19 October 2023; United Nations Department of Political Affairs, Trusteeship and Decolonization, 'The Trust Territory of the Pacific Islands (Micronesia) Political and Constitutional Development' (United Nations 1993) UNST. PSCA. (os). D3 No. 44 <https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_44.pdf> accessed 19 October 2023.

[120] See for instance, James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 115.

[121] See for instance, Anemoon Soete, *The International Legal Personality of Island States Permanently Submerged Due to Climate Change Effects* (Maklu 2021); Ross (n 6); Stoutenburg, *Disappearing States* (n 26); Torres Camprubí (n 106).

worst-case scenario for LLISs. The highly politicised nature of the right to self-determination makes its use impossible without extensive discussion of its shortcomings and peculiarities. The second element is practical. The right to self-determination has generated considerable discussion and scholarship ever since it gained recognition, and engaging meaningfully with this sizeable body of scholarship is simply impossible to do under this format. It is consequently assumed that in the type of worst-case scenario discussed, the right to self-determination would not make a decisive difference or act as a tipping point.

Importantly, this should not be read to mean that the right to self-determination cannot or should not play a role in the future of LLISs. It should, and hopefully will. Rather, this choice is rooted in the use of a scenario-based approach and the preparedness focus of this work. It also reflects the complex relationship of self-determination with the broader scope of international law and the need to investigate further how this right could be exercised by the affected population.[122] This is reflected in the ILC's ambivalence when approaching the issue.[123]

4.4.2. Law of the Sea

The law of the sea undoubtedly presents a particularly relevant normative framework to examine some of the key challenges to LLISs. As LLISs all enjoy sizeable and valuable exclusive economic zones (EEZs), it is natural that the protection of these assets represents one of the most important legal questions at stake. Indeed, it may be argued that looking at issues of statehood and issues of maritime law in isolation risks overlooking some key elements of the future of LLISs, particularly in terms of financial resources.[124] Control over EEZs is likely to be crucial for the long term survival of LLISs.

As a result, the choice of not engaging more thoroughly with the issues raised by the predicament of LLISs from the perspective of the law of the sea may seem illogical. However, while there is certainly considerable merit in including this perspective to a thesis on the future of LLISs, the relatively self-contained nature of the international normative framework on the law of the sea, primarily constituted by the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[125], means that it can be disentangled comparatively easily from matters of statehood or migration. For this reason, I have opted not to explore

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[122] International Law Commission (n 4) para 235(c).

[123] While heavily emphasising the importance of the right to self-determination for resolving questions of statehood, the ILC also states that "At the same time, it was noted that the Commission should keep in mind the special historical and legal contexts of the right to self-determination and exercise caution in applying that principle in relation to sea-level rise." The relative significance of self-determination in this specific context is also contextualised by the length of the Commission's discussion, with only a short paragraph compared to six on matters relating to statehood and the presumption of continuity. ibid 199. For a broader discussion on the relevance and role of the right to self-determination in the context of the future of LLISs, see Ross (n 6).

[124] Wong (n 6) 349–350.

[125] United Nations Convention on the Law of the Sea (UNCLOS) 1994.

the possibilities and challenges presented by the law of the sea in the context of the future of LLISs.

However, the distinction is not airtight and there are exceptions. Indeed, some of the provisions found in the 1982 UNCLOS may potentially act as *lex specialis* and provide some clarification on what constitutes "territory". Article 121(3) of UNCLOS reflects international custom[126] and makes a distinction between islands and rocks, a nuance that could be interpreted to signify the outer boundary of what can constitute territory under public international law.[127] Consequently, while this thesis chooses to focus on matters of statehood and migration, the inclusion of relevant provisions from the UNCLOS in the analysis has not been precluded.

4.4.3. International legal system

The "worst-case scenario" approach is a relative rather than an absolute measure. To a large extent, the arguments presented rely on the existence of an intact international legal system, which is not necessarily a given in a climate-changed world.[128] Climate change brings considerable uncertainty, and it would be naïve to think that for some reason the international legal system would emerge unscathed when even now it struggles to make a convincing case for its relevance.[129] In fact, depending on how one looks at the present and future of international law, the latter can easily seem desperately outpaced by research in other fields while also struggling to find mutual intelligibility with the world it is meant to apply to.[130] In spite of this fragility, we must assume that states will still speak the language of international law to articulate their views and positions, regardless of what happens in the future.

4.4.4. Shortcomings and limitations of the scenario-based approach

Adopting a scenario-based approach comes with a number of key limitations. Although intended as a tool to clarify the assumptions that underpin current analyses, the creation of various scenarios implies a certain crystallisation of what is in fact a highly fluid legal and factual context. Indeed, fluidity now but

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[126] Territorial and Maritime Dispute, Nicaragua v Colombia, Judgment, ICJ GL No 124, ICGJ 436 (ICJ 2012), 19th November 2012, International Court of Justice [ICJ], par. 139.

[127] With the significant caveat that state practice and the jurisprudence relevant to the interpretation and implementation of Article 121(3) are mostly inconclusive. See South China Sea Arbitration, Philippines v China, Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration [PCA], Gilbert Guillaume, 'Rocks in the Law of the Sea: Some Comments on the South China Sea Arbitration Award' (*EJIL: Talk!*, 25 February 2021) <https://www.ejiltalk.org/ricks-in-the-law-of-the-sea-some-comments-on-the-south-china-sea-arbitration-award/> accessed 28 October 2021.

[128] See for instance, Daniel Bethlehem, 'Project 2100—Is the International Legal Order Fit for Purpose?' (*EJIL:Talk!*, 29 November 2022) <https://www.ejiltalk.org/project-2100-is-the-international-legal-order-fit-for-purpose/> accessed 29 November 2022.

[129] ibid.

[130] Engström and Rouleau-Dick (n 107).

also tomorrow cannot necessarily be encompassed adequately, and the act of projecting oneself or one's analysis in the future ripples back to the present:

> As such, anticipation is not just about estimating the risks and benefits that the future will bring. Whether or not those risks and benefits transpire, they have already had an affective bearing on our current lives.[131]

In the context of the future of LLISs, these ripples can already be felt and there are heavy consequences to the choice of narrative. Presenting their demise as an imminent, inevitable outcome directly undermines the support available for adaptation and resilience-building.[132] No absolute line can therefore be drawn between present and future. Furthermore, although the general study of law remains limited in its capacity to project itself forward, it is at the same time particularly influent in shaping what lies ahead.[133]

The scenario-based approach should be read against this backdrop: firstly, a comparative lack of methodological points of reference, and secondly, a heavy burden in terms of the interrelatedness of present and future. The choice of a narrow focus aims to mitigate these limitations. The merits of using a scenario-based approach lie predominantly in the opening it creates to investigate parallel outcomes, in contrast with framing the present analysis as a competitor to other paths forward. Inevitably, this distinction could never be completely water-tight, but by allowing for a clearer overview of this analysis's key premises, a scenario-based approach has the advantage of clearly outlining the contribution this thesis intends to bring to the discussion.

Additionally, while the scenarios are meant to cover a wide breadth of possible futures and could theoretically apply to different hypothetical contexts, they are not meant to reflect accurately any specific regional legal environment. This is particularly relevant to the various scenarios elaborated in relation to the "Scenarios of Protection" outlined in Section 5.2.3., since regional conventions could provide significant improvements over the limited scope of international protection, as highlighted in Section 3.1.3.

Furthermore, a clarification is needed as to the likelihood of various scenarios or solutions being implemented. While discussing the scenarios necessarily implies examining their strengths and shortcomings, my purpose is not to assess the likelihood of them being implemented by an LLIS. Although tempting, such an assessment cannot be made in the abstract and with the limited tools at our disposal. Other disciplines might have such opportunities, particularly in terms of examining specific domestic or regional geopolitical contexts, but such an analysis lies beyond the scope of this thesis. Consequently, the various scenarios discussed in this section are intended to clear the threshold of sufficient plausibility rather than being more or less likely outcomes.

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[131] Elen Stokes, 'Beyond Evidence: Anticipatory Regimes in Law' (2021) 43 Law & Policy 73, 77.
[132] Barnett (n 3). See also Bettini (n 46).
[133] Stokes (n 131) 78.

4.4.4.1. Timeline

Setting a timeline is a common practice when building scenarios.[134] It allows for a clearer focus, and a better grounding of the scenarios created. However, normative landscapes are ill-suited for such an exercise, particularly if the norms at stake do not have built-in “expiry dates” of some kind. On one hand, norms can evolve, emerge and disappear in a way that is largely inaccessible if one remains within “the law”. On the other, in theory at least, norms exist in a timeless plane that evolves because of normative development rather than time in its purest form, unless specified otherwise.[135]

Where a timeline could come into play is as a direct input from climate science, is as a way to engage with the current estimate about the future of LLISs. Such input has the potential to add a further axis to the analysis of the future of LLISs that will be approached here through a matrix. This potential third axis could add variation independent of the other variables already considered in section 5.2.4, but may vary substantially from one LLIS to another, being further influenced by the geopolitical, financial and global context in which a specific LLIS approaches adaptation, mitigation and/or relocation.

As a result, while there would certainly be value to including a timeline or time-bound element to this analysis, its normative nature means that it is not essential and would imply a significant incursion in very much non-legal territory, something that would require both time and knowledge that this author does not possess. Instead, the hypothetical nature of this thesis simply means that instead of detailing a specific timeline, it will identify certain milestones that could (or not) trigger legal changes or consequences, such as the complete loss of territory, or the loss of a permanent population. Exactly when these events might occur lies outside the scope of this thesis.

5. Multiple futures: implementing scenarios

The use of scenarios to approach the future is not new, far from it. Scenarios can be both a result of an analysis (e.g., the Representative Concentration Pathways (RCPs) developed to assess future levels of warming), or the origin of one (such as is the case with SSPs). Faced with considerable uncertainty due to climate change and the nature of any analysis that projects itself in the future, scenarios provide a valuable opportunity to engage constructively with uncertainty, and to

[134] See, for instance, Riina Haavisto and others, ‘Socio-Economic Scenarios for the Eurasian Arctic by 2040’ (Finnish Meteorological Institute) 2016:1.

[135] The law of the sea framework could perhaps be considered an exception, or indicative of the added value of interdisciplinary dialog, since its reliance on physical features means that the timelines defined and researched by other fields of science can bear direct relevance to the implementation of specific provisions. The wording of Art. 234 of the UNCLOS can be highlighted in this regard, see for instance, Łukasz Kułaga, ‘The Impact of Climate Change on States: The Territorial Aspect’ (2021) 23 International Community Law Review 115; Jan Jakub Solski, ‘The Genesis of Article 234 of the UNCLOS’ (2021) 52 Ocean Development & International Law 1.

an extent, explore what lies beyond. Yet, scenarios can be used in a wide variety of settings and without a solid methodological grounding they can easily become too speculative or superficial to be of any actual use. Therefore, for a scenario-based approach to be of any value, its needs to rely on clearly enunciated premises and a process that is as transparent as possible.

There are in fact many examples of scholarship on the future of LLISs that dabble in scenario-making, although the exact workings and premises of such exercises are not usually discussed.[136] This is not to say that such an in-depth discussion is necessarily needed; the scenarios thus mentioned follow the options that can generally be observed to have traction in the literature, in addition to the assumptions that the author(s) makes about the interpretation of the relevant norms. In fact, there is nothing wrong with this use of and approach to scenarios, but a more methodical and comprehensive attempt at a scenario-based approach would hopefully yield additional opportunities in terms of framing further research.

Choosing this approach also allows for a more targeted analysis of (a) future(s) that no one wants to happen. By definition, a worst-case scenario is not desirable but if it is considered at all it is because it is at least possible, even if only remotely plausible. Choosing a scenario-based approach thus enables the investigation of a specific scenario without endorsing its materialisation as either "better" or "most likely". The difference with "better" scenarios lies in the use that can be made of a better understanding of the scenario at hand, since a deeper understanding of a positive outcome will lead the way to better chances of it materialising, while a "bad" scenario can be more readily avoided if the way that leads to it is better understood.

Moreover, in addition to the role of the scenarios developed in this section, it is hoped that they themselves present a level of analytical value in their context but also methodologically. While this summary is intended as an internally coherent whole resting upon the three publications that are at its core, the inclusion of a scenario-based approach reflects benefits that go beyond this specific project, such as improved opportunities for interdisciplinary dialog or better engagement with existing sets of scenarios.[137]

The present thesis does not intend to create an entirely new set of scenarios independently from previous efforts. The issues and avenues identified by previous scholars constitute a particularly relevant set of sources if one is to identify the various possibilities for the future of LLISs, and in the absence of significant normative developments there is little need for starting from nothing. Nonetheless, most attempts at scenario-building, at least with a primarily normative outlook, remain unsatisfactory in that they do not fully address the

[136] See for instance, Allen and Prost (n 106) 3–4; Yamamoto and Esteban (n 32) ch 6; Stoutenburg, *Disappearing States* (n 26) ch 6.

[137] For instance, while this is not the approach adopted here, it could be possible to correlate the scenarios found in this thesis with a regional or international iteration of the existing SSPs scenarios, which are explicitly intended as enabling tools for societal research. See for instance, O'Neill and others, 'The Roads Ahead' (n 108).

entire spectrum of possible futures. This is particularly true in terms of the type of scenario that is specifically targeted here.

I will therefore aim to build upon the existing identifiable scenarios throughout the literature by clarifying and systematising their selection on an approximate axis from “best” to “worst”. Additionally, two distinct sets of scenarios will be included in order to reflect the different normative frameworks that apply respectively to statehood and international legal personality on one hand, and to the protection of individuals and their rights on the other. Although not a watertight distinction, the creation of two separate sets of scenarios is intended to allow the analysis of the dynamic relationship between these two broad areas of normative analysis. In practice, the two sets of scenarios will be combined orthogonally through a table that will show the interplay between the respective thematic focus of the scenarios.

Furthermore, the elaboration of scenarios, *a fortiori* two sets of scenarios, is an inherently approximate exercise in the absence of an empirical point of reference such as those that can be found in natural sciences, for instance. Some of the scenarios can hence be directly traced back to a certain author’s analysis while others are hinted at or can be derived as logical outcomes of a specific argument. By encompassing a broader spectrum of possible futures than what is strictly required by its narrow focus, I intend this summary to contribute to disentangling the complex web of possible outcomes that populate projections of the future of LLISs. It follows that beyond the specific scenarios examined in the context of this analysis, the rest of the two sets of scenarios are a broad survey rather than a detailed examination.

5.1. Two set of scenarios

The two sets of scenarios presented here will provide a crucial backdrop for the arguments developed. The first set of scenario focuses on the legal personality or statehood of the state, i.e., what happens to the international legal personality (ILP) of the concerned state as its physical indicia either disappears or becomes sufficiently eroded to substantiate questions about its statehood. This question is crucial for the collective rights and identity of the potentially displaced populations. As a vehicle for certain rights such as the right to self-determination, the ILP of the state or entity that exists (or not) in the post-relocation context matters tremendously. Stability, collective agency and representation need an anchor, and this is where the formal existence of an entity and the latter’s status can mean the difference between oblivion and a thriving presence as a member of the international community.

Furthermore, there is a clear financial dimension to this issue, resulting from the possible possession and jurisdiction on the remaining assets of the continued or former LLIS. Fishing rights and sovereignty over the waters of the LLIS could prove a tipping point in enabling sustainable and respectful relocation that allows for the maximal mitigation of the harm suffered by those who are forced to move. Additionally, post-relocation ILP is likely to shape the duties, responsibilities and obligations that pertain to the entity that remains, both in

relation to the other members of the international community and the displaced populations. Here, solid normative foundations might also mean the difference between an easily accepted general endorsement and a status contested by members of the international community.

The second set of scenarios that will be included is concerned primarily with the legal protection applicable to the nationals of LLISs that are displaced across borders. As discussed in section 3.1.3, a gap exists in the current legal framework concerned with the protection of EDPs.[138] Conversely, a number of legal frameworks could come into play, and the possibility that new instruments may be created can also not be excluded.

Ultimately, the protection of the displaced nationals of LLISs also relates to a certain extent on the continued (or not) ILP of their state of origin, which is reflected in the first set of scenarios. Having this second set of scenarios on the question of protection of EDPs thus allows the examination of specific intersections and interplay between the two thematic areas respectively encapsulated by the two sets of scenarios. In addition to the improved targeting enabled by this approach, the choice of highlighting these two dimensions of the future of LLISs and their nationals will also, hopefully, create a more nuanced and complete understanding of the relevant legal questions.

5.2. Statehood and Protection

Two sets of scenarios have been defined, with each set representing a specific variable in the context of the future of LLISs. The first set (numbered in the table, S0 to S6) is concerned with the ILP of a hypothetical LLIS in the event that the entirety of its territory becomes permanently submerged. These scenarios range from a deterritorialised LLIS retaining fully-fledged statehood to it ceasing to exist altogether. The second set of scenarios addresses various protection outcomes for the displaced nationals of LLISs (numbered in the table, P1 to P6). This set of scenarios ranges from the possibility of effective citizenship to *de jure* statelessness. The scenarios are loosely ordered from “best” to “worst” but the specific order is not a final or categorical assessment of the desirability of specific scenarios, as it stems primarily from the need for a relatively linear structure. In fact, even the boundary between various scenarios may not be as watertight as such a neat table implies. It should also be noted that while this table includes a variety of outcomes and scenarios, only those which are addressed in the articles have been investigated at length. The inclusion of other scenarios is indicative only, and represents a broad survey rather than a detailed compilation. One should also note that while all scenarios are intended to clear the threshold of plausibility, their likelihood is highly variable.

The two sets are first presented in separate tables to provide some context and content for the various scenarios. The two sets are then combined in a table where each set forms an axis, allowing for the creation of various pairings which

[138] As is indeed discussed in the third article. See generally, Rouleau-Dick, ‘Sea Level Rise and Climate Statelessness’ (n 23).

will then provide the context for the legal arguments presented in the articles and in this thesis.

5.2.1. Variables

In contrast with scenarios that rely on empirically grounded phenomena, the two sets of scenarios discussed in this section are not the result of isolated (or "isolatable") variables. The uncertainty they aim to encompass originates from the inherent indeterminacy of international law, but also from the speed and nature of climate change. Nevertheless, at least some of this uncertainty can be taken into account through a limited number of key variables, the respective impact of which can then be used to outline a spectrum of possibilities.

As the first set of scenarios seeks to survey the future of LLISs from the perspective of statehood and ILP, the primary aspect considered is whether or not a deterritorialised LLIS could maintain a level of ILP, ranging from full statehood to other alternatives, such as discussed in the second article.[139] Addressing the uncertainty that permeates statehood requires discussing the role of recognition of a state, as a state, by its peers.[140] While recognition is not synonymous with statehood, it is a useful proxy to shape the continuum of possible outcomes when it comes to ILP and statehood. Indeed, being both highly contested and central to statehood, recognition lies at the very core of the future of LLISs and the options that are available to them in a post-relocation future.[141]

Practically, the uncertainty pertaining to recognition can be articulated according to the answers given to three questions:

- *What is the normative weight attributed to recognition in the context of statehood?*
- *How ambiguous is the cumulative recognition of the entity in question?*
- *What is being recognised?*

The first question reflects the classic divide between the two scholarly poles of legal scholarship on the question, ie, the competing hypotheses that recognition is either constitutive of statehood or purely declarative and normatively irrelevant. It is not my goal to settle this debate, and both approaches to recognition fall short of providing a satisfying answer to the exact weight of

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[139] Rouleau-Dick, 'A Blueprint for Survival' (n 99).

[140] This is usually most prevalent in the process of accessing to statehood, but may be a key vehicle through which members of the international community could express their support or not of the deterritorialised statehood of an LLIS.

[141] A perfect example of the ambivalent relationship of legal scholarship's ambivalent relationship with recognition in the context of the future statehood of LLISs is how it is approached in relation to the role given to the presumption of continuity, as discussed in Rouleau-Dick, 'Competing Continuities' (n 30) 372–374. See also Alexander and Simon (n 64).

recognition in the context of statehood determination.[142] Instead, it is precisely here that the scenario-based approach becomes useful: both declarative and constitutive understandings of recognition (and everything in between) can be taken into account. Consequently, a scenario may assign a heavy normative weight to recognition while another might relegate it to a mostly irrelevant factor in the determination of statehood.

The second question is primarily rooted in "fact" (ie, a specific assumption about the factual setting of a scenario). That is, whether a LLIS would be recognised or not by other states. No particular numerical threshold is set for an answer, and the possible outcomes identified range from an unambiguous negative outcome to an unambiguous positive, including inconclusive positives and negative outcomes.[143] The relevance of this question is, of course, premised on the assumption that recognition is normatively relevant to determining the statehood of a deterritorialised LLIS.

The third question relates to the nature of the entity which is being recognised. While recognition as it is understood in the context of this question is centered on statehood (ie, the recognition of states), alternative types of ILP have been discussed as viable paths for an LLIS to continue existing if statehood were not to be possible to sustain.[144] In this context, the precise role of recognition may not be as prominent as for determining statehood, but securing significant recognition of the former LLIS's ILP could still be instrumental in ensuring the success of such an outcome.

Cumulatively, these three questions help narrow down the role and nature of recognition in the context of a specific scenario, as applied in the set of scenarios (S0 to S6). While recognition is not the sole source of uncertainty, it is central to any discussion on statehood and thus cannot be dismissed entirely, even if it is only to clarify that it is not considered in a specific context. Ultimately, however, even this set of questions is premised upon certain assumptions, starting with the idea that this analysis is set in the future, in a context where the LLIS in question is forced to relocate outside of its border and would thus qualify as "deterritorialised". This underscores the importance of properly approaching and understanding the conclusions reached in this analysis: the scenarios discussed are but one way of approaching the future of LLISs and they do so in the context of a highly dynamic normative environment.[145] This why the

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[142] For an excellent overview, see Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans, *International Law* (5th edn, Oxford University Press 2018) 204–208.

[143] Yamamoto and Esteban conduct a relatively similar exercise by outlining three "recognition scenarios", although they conflate more closely statehood and recognition. See Yamamoto and Esteban (n 32) 210–211.

[144] The possibility of transitioning to a NSSEIL is discussed at length in Rouleau-Dick, 'A Blueprint for Survival' (n 99). For an investigation of recognition in the context of the future of LLISs with a particular focus on the norms involved, see Stoutenburg, *Disappearing States* (n 26) 315–374.

[145] In fact, some may argue that the outcome of recognition in this specific case should not be framed as within the prerogative of states and thus ultimately a matter that should be settled "within the law" in the form of a duty to recognise or to maintain recognition, as shown in Figure 1. See Jenny Grote Stoutenburg, 'When Do States Disappear? Thresholds of Effective Statehood

opportunity they present for temporarily crystallizing key sources of uncertainty creates precious opportunity to gain additional insights that would otherwise be out of reach in an “unprocessed” assessment of the future.[146]

This approach is reflected in Figure 1, where the three questions highlighted earlier are positioned so as to outline their relationship and the impact of their respective outcomes on the scenarios discussed. Starting from the concept of recognition itself, the first question to be answered relates to the normative weight assigned to recognition. A primarily declarative understanding of recognition would thus be positioned on the “insignificant” side of the spectrum, leading to other normative factors being decisive in matters of statehood. This includes a broad range of options, including whether other states would even need to recognise a deterritorialised LLIS. Alternatively, if recognition is assumed to bear at least some normative weight, the two other questions can then be examined, and their respective answers combined.

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and the Continued Recognition of “Deterritorialized” Island States’, *Threatened Island Nations – Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 58–59. Alternatively, it may also be argued that “new” recognition would not be needed at all since it is irrevocable. See Ross (n 6) 163.

[146] That is, without the use of scenarios or other method of foresight.

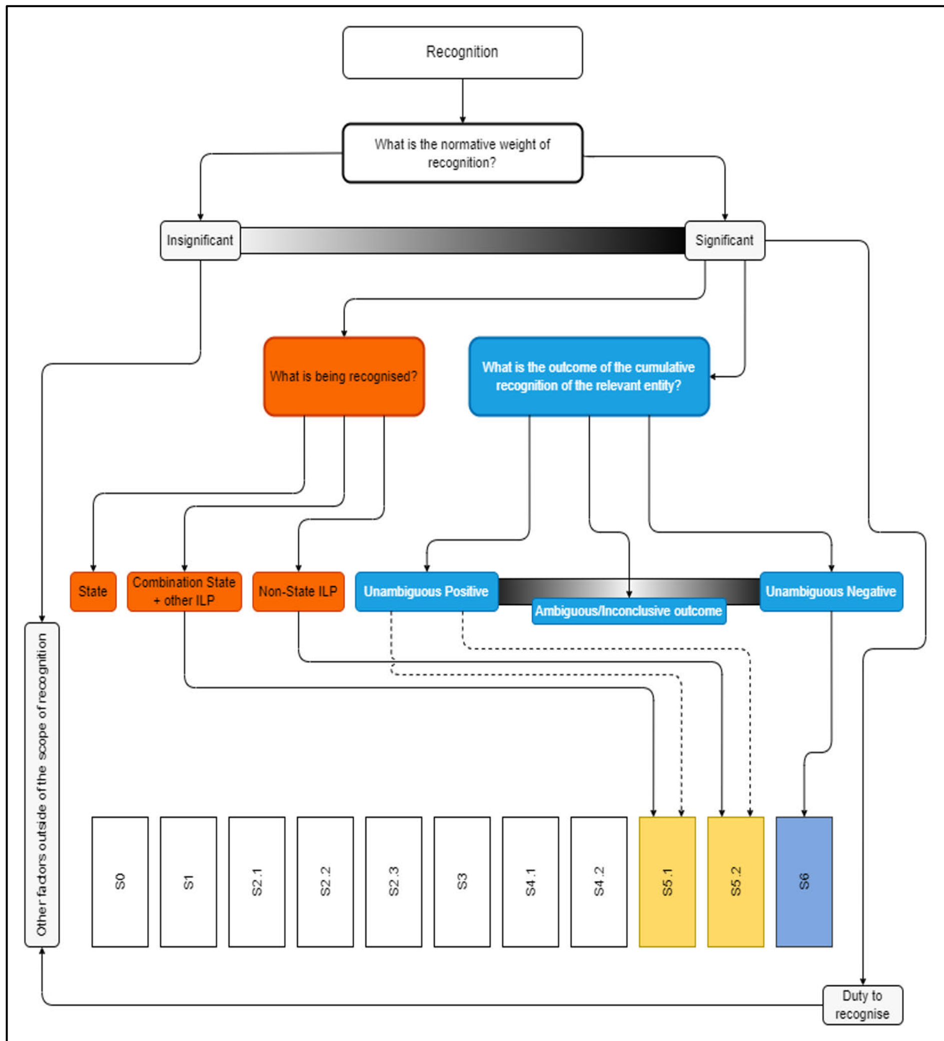

Figure 1: Recognition and scenarios of statehood for LLISs

While its object is factual rather than purely normative, the outcome of recognition remains important if the latter bears any normative weight. A clear outcome from either end of the spectrum, ie, an overwhelming positive or negative recognition, would yield an unambiguous answer as to the status of the LLIS and dispel any remaining uncertainty. However, this also needs to be read in combination with the nature of the entity that is being recognised. Indeed, whether the concerned LLIS aims to continue its existence as a fully-fledged state, a trusteeship, or a NSSEIL matters insofar as the weight given to recognition might vary. Moreover, the unprecedented nature of this process and the resulting outcomes means that even in the context of a scenario-based approach, there remains considerable uncertainty as to exactly how events may

unfold. In Figure 1, this is reflected by the use of dotted lines linking the highlighted scenarios and the outcome of recognition.

Figure 1 can be divided into two areas. The first concerns the questions and their answers outlined above, with the second and third questions colour coded for clarity. The second area includes the set of scenarios of statehood (S0-S6), with a special focus on S5.1(NSSEIL/Territorial entity duplex), S5.2 (NSSEIL ILP), and S06 (State death), as the latter are the focus of this thesis and are respectively covered in the articles. The colour-coding used in Figure 1 is also reflected in the scenario table included in section 5.2.4, with light yellow referring to the second article,[147] and the light blue to the first article.[148] The lines linking the two areas represent the premises (ie, the answers given to the questions discussed above) upon which these specific scenarios are based. For example, scenario 5.1 (NSSEIL/Territorial entity duplex) is linked directly with the box: "Combination State + other ILP" and linked with a dotted line with "unambiguous positive" in terms of the outcome of recognition. The dotted represents the uncertainty concerning the need for recognition of a different, non-state ILP.

Overall, the example of how recognition can be conceptualised as a source of uncertainty helps outline the impact one variable can have on the future of LLISs, particularly in relation to their status. Recognition is especially salient as it is both central to statehood and highly porous to external factors, but this process could be expanded to include other variables and systematise the process. However, the focus of this thesis is firmly rooted in a worst-case scenario and while the inclusion of other scenarios is an important element of context, it is primarily indicative, and the other scenarios act as a points of reference rather than objects of study.

The second set of scenarios reflects the protection gap highlighted in section 3.1.3. The spectrum of outcomes covered by the scenarios is thus reflective of the various variables, starting with whether or not the 1951 Refugee Convention's refugee definition could be opened to encompass EDPs, as contemplated in scenario P2.2 (Progressive/expansive interpretation of the current refugee protection framework). A similar question is at the root of scenarios P4.2 (*de facto* statelessness) and P6 (*de jure* statelessness under the 1954 Convention), which are discussed at length in the third article.[149] The scope of "protection" being broader than the relatively self-contained question of ILP and statehood, the scenarios included in the second set are not as easily differentiated and may show some overlap. For instance, citizenship is a prominent factor considered in the scenarios, but an expanded interpretation of the 1951 Refugee Convention would apply, regardless of citizenship, to those EDPs that qualify. Additionally, even though a soft law instrument could fall short of providing binding legal guarantees, it could nevertheless prove valuable as a complement to the other obligations of a country hosting EDPs.

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[147] Rouleau-Dick, 'A Blueprint for Survival' (n 99).
[148] Rouleau-Dick, 'Competing Continuities' (n 30).
[149] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23).

As with the previous set of scenarios, approaching the question of the protection of EDPs through the lens of a number of scenarios is not unprecedented. For instance, Oliver identified three scenarios: individual asylum, group asylum, and land acquisition, these three options were then assessed in the context of human rights law, environmental law, and refugee law.[150] The key variable in this case being the applicability of the relevant frameworks. In contrast, the scenarios of protection discussed in this thesis reflect the remedial focus of the worst-case approach adopted by this thesis, starting with the premise that EDPs face a protection gap, as discussed in section 3.1.3. Furthermore, as it is understood to be applicable in all scenarios, the value of international human rights law is not isolated even if it remains a relevant to the protection of EDPs.[151]

Ultimately, however, the specific scenarios considered in the context of this thesis (P4.2 and P6) are mutually exclusive and can be contrasted with each other, as was done in the third article of this thesis. They thus provide useful points of reference to then identify the intersection between the two sets of scenarios (P and S), as will be done in the scenario table found in section 5.2.4.

5.2.2. Scenarios of statehood (S0-S6)

Scenarios of statehood		Content
S0	Sovereignty Marker/"Lighthouse"	In such a scenario, a LLIS seeks to maintain a minimum, symbolic fulfilment of the physical indicia of statehood. This an effort materialises through the sustenance of a small, emerged area of the state's territory, upon which a small population may reside permanently to satisfy the population and territory criteria of the traditional definition of statehood. While specific features of an arrangement of this type may be open to scrutiny, such as its "permanence", at least it preserves appearances and might provide a strategic tool in avoiding the wider implications of seeking truly deterritorialised statehood. Other states may thus maintain their recognition of the LLIS without having to take a clear stance on deterritorialised statehood.[152] Practically however, it is doubtful whether this solution would actually

[150] Oliver (n 106) 233–240.

[151] See for instance, Sumudu Atapattu, 'Climate Change and Displacement: Protecting "Climate Refugees" within a Framework of Justice and Human Rights' (2020) 11 Journal of Human Rights and the Environment 86.

[152] This option is mentioned by Yamamoto and Esteban as the "lighthouse" scenario. It is doubtful whether this possibility could actually be implemented in a manner sufficient to sustain the statehood of the LLIS in question. This option may also be contemplated in combination with other solutions such as the acquisition of new territories from other states. See Yamamoto and Esteban (n 32) 155–157; Jenny Grote Stoutenburg, 'Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise' (2011) 26 International Journal of Maritime and Coastal Law 263, 281.

		be sufficient, particularly in light of its potential to act as a precedent for other claims to statehood.
S1	Norm-based deterritorialised statehood	This scenario is rooted in two distinct premises. As outlined in section 5.2.1, the first is that recognition has little to no normative influence on the statehood of an entity, and that statehood is thus purely norm-based, making it possible for a state to exist as such independently of any dissension about its status. The second premise is that the normative framework that applies to statehood can accommodate the notion of deterritorialised statehood. Consequently, within this scenario recognition is largely irrelevant as the normative anchor of deterritorialised statehood is sufficient to ensure the continued existence of the LLIS. Scenario S1 can also materialise through paradigmatic change, such as a shift in how statehood is conceptualised and defined.[153] Alternatively, the emergence or evolution of certain principles such as the presumption of continuity can shift sufficiently to normatively substantiate deterritorialised statehood, as investigated in the first article.[154] It should be noted that scenario S1 correlates closely with what appears to be the mainstream doctrinal approach to the future statehood of a deterritorialised LLIS, although the specific normative arguments for this option may vary.[155]
S2.1	Recognition-based deterritorialised statehood – Unanimous/quasi-	Scenario S2.1 assumes that a deterritorialised LLIS would enjoy such recognition by other states (ie, unanimous or quasi-unanimous recognition) that the intricate normative implications of deterritorialised statehood is rendered

[153] An excellent example of how such a paradigm change may materialise is Susannah Willcox's family account approach to statehood, see Willcox, 'Family Resemblance' (n 6); Blanchard (n 109).

[154] Scenario S1 correlates closely with the "ratchet effect" interpretation of the presumption of continuity outlined in the first article. See Rouleau-Dick, 'Competing Continuities' (n 30) 360–363.

[155] See for instance, Blanchard (n 109) 114–115; Jacquelynn Kittel, 'The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2014) 2014 Michigan State Law Review 1207, 1228–1229; Sabine Lavorel, 'Les Enjeux Juridiques de La Disparition Prévisible Du Territoire de Petits États Insulaires' in Albane Geslin and Paul Bacot, *Insularité et sécurité internationale* (Bruylant 2014); Devesh Kumar and Unmekh Padmabhushan, 'Land Ahoy? Solutions for Statehood in a Post Climate Change World' (*Völkerrechtsblog*, 16 March 2020) <voelkerrechtsblog.org/land-ahoy-solutions-for-statehood-in-a-post-climate-change-world/> accessed 16 March 2020; Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press 2019) 229; McAdam (n 2) 119–160; Ross (n 6) 242–243. Scenario S1 also shows some overlap with scenario S3, and the ambiguity of the NSSEIL has also prompted some scholars to cite the SMOM or the Holy See as precedents of deterritorialised states, even though this parallel is inaccurate, see Franck Duhautoy, 'Tuvalu, vers une nouvelle forme juridique des États' [2015] Comparative Law Journal of the Pacific - Journal de Droit Comparé du Pacifique, Polynesia 51; Rouleau-Dick, 'A Blueprint for Survival' (n 99) 626–630.

	unanimous recognition	irrelevant by the united support demonstrated by the international community. While not providing a definitive answer to the key legal questions at hand, this united support likely translates into forging clear state practice in favour of deterritorialised statehood. As states still occupy a unique position in shaping international law, sufficient willingness on their part would ensure that the concept of statehood evolves to accommodate deterritorialised LLISs, normatively and practically.
S2.2	Recognition-based deterritorialised statehood – Contested recognition	As with Scenario S2.1, Scenario S2.2 is also primarily focussed on the role of recognition. However, in contrast with the previous scenario, Scenario S2.2 is premised on the idea that recognition is ambiguous and inconclusive. This may materialise in different ways. For instance, a powerful state can express its opposition to a LLIS maintaining its statehood beyond the loss of its territory, and/or, a numerically significant number of other states adopt a similar stance. Notwithstanding the distinction some authors make between state inception and state continuity, the case of Kosovo can be indicative of how such a scenario might unfold.[156] In this case, it can also be expected that recognition may be a fluid affair where states can withdraw or confirm their support, only to change course later. In such context, LLIS statehood may effectively become "relative" and heavily shaped by the bilateral relations between the LLIS and its interlocutor.[157]
S2.3	Recognition-based deterritorialised statehood – Minority recognition	Still centred on the same premise as the two previous scenarios, Scenario S2.3 instead implies that recognition is heavily contested or simply lacking and would consequently struggle to substantiate the existence of a deterritorialised LLIS. As in Scenario S2.2, bilateral relations would be key to how a LLIS can interact, but the fact that recognition is so heavily contested means a lack of access to key prerogatives usually associated to statehood such as membership to international organisations and treaty-making powers.[158]

[156] In fact, the uncertainty relating to the recognition of Kosovo highlights the dynamic nature of recognition. See Papić (n 44).

[157] This correlates closely with the scenario P5 discussed below, which examines the possibility that the status of EDPs would be determined by the state of bilateral relations. See for instance, Park (n 21) 14–15.

[158] While usually deemed unlikely, this possibility is acknowledged by several scholars. See for instance, Seokwoo Lee and Lowell Bautista, 'Climate Change and Sea Level Rise - Nature of the State and of State Extinction' in Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill 2021) 211–212. As Kälin explains: "[it] t is also difficult to imagine that any other UN member state would want to tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion from that or other international organisations." Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement. Multidisciplinary Perspectives* (Oxford University Press 2010) 102. Jain also goes

		Scenario S2.3 displays some overlap with scenario P6, as it may be the last step before the legal personality of a LLIS can be considered extinct.
S3	*Sui generis* statehood	Sui generis statehood is relatively close to Scenario S1 (Norm-based deterritorialised statehood) in that it is primarily rooted in a normative basis. However, it can be distinguished from Scenario S1 in that it exists outside of the more clearly defined confines of traditional statehood, implying some type of normative development or state practice that would enable the continuity of statehood, or an *ad hoc* arrangement.[159]
S4.1	Modified trusteeship – Nation *ex-situ* (state)	This scenario is based on the use of the UN trusteeship framework to enable to the continuity of a LLIS' statehood. This existing but presently unused UN framework provides an interesting avenue for a deterritorialised LLIS. As opposed to S4.2, S4.1 implies the preservation of the LLIS's sovereignty and statehood.[160]
S4.2	Modified trusteeship – Nation *ex-situ* (non-state)	Scenario S4.2 is essentially similar to S4.1 in that it rests upon the use of the UN trusteeship framework to sustain the existence of the LLIS, with the important difference that in the context of 4.2, the LLIS would maintain its existence but not as a fully-fledged state. Consequently, while ensuring the LLIS' continued existence, the LLIS would exist as a *sui generis* entity, a UN trusteeship.
S5.1	NSSEIL/Territorial entity duplex (Article 2)	Scenario S5.1 is centred around the notion that a LLIS transitions into a different type of entity, inspired by the existence of two such entities: the Holy See and the Sovereign Military Order of Malta. These Non-State Sovereign Entities of International Law display a number of state-like prerogatives but exist independently from territorial sovereignty. In the specific case of Scenario S5.1 however, the NSSEIL LLIS still maintains a claim to the remaining territory of the LLIS through a similar relationship to that between the Holy See and the Vatican city. Under such an arrangement, the LLIS still *prima facie* fulfils the formal

further and claims that "[…] even if international law were to fail to protect statehood, international relations would achieve this result by ensuring continued recognition." Jain (n 65) 51.

[159] This possibility is briefly hinted at by Yamamoto and Esteban, extrapolating from this idea, one might imagine such a *sui generis* state to function essentially as a NSSEIL (see scenarios S5.1 & S5.2) but without the downgrade to "quasi-state" status. However, it should be noted that this option is discussed in close relation with the need for recognition. See Yamamoto and Esteban (n 32) 212, 287.

[160] The idea of a nation *ex-situ* was first proposed and discussed by Prof. Maxine Burkett, see Burkett (n 6). See also Stoutenburg, *Disappearing States* (n 26) 378; Torres Camprubí (n 106) 113–114; Yamamoto and Esteban (n 32) 206–208; Doig (n 106). Juvelier also discusses this option at length, see Ben Juvelier, 'When the Levee Breaks: Climate Change, Rising Seas, and the Loss of Island Nation Statehood' (2017) 46 Denver Journal of International Law & Policy 21.

		statehood criteria of territory and population even if its international legal personality as a NSSEIL is not premised upon the existence of the latter. This scenario is discussed at length in the second article.[161]
S5.2	NSSEIL ILP (Article 2)	Under Scenario 5.2, a LLIS maintains its existence and ILP but not as a fully-fledged state. Instead, building upon the precedents mentioned in Scenario S5.1, a LLIS continues existing as a NSSEIL. In contrast with Scenario S5.1, Scenario 5.2 implies a complete lack of territory and thus a fully "freestanding" ILP as a NSSEIL, in a similar fashion to how the SMOM currently exists and functions. This scenario is discussed at length in the second article.[162]
S6	State death	Scenario S6 consists of an interruption in continuity, state death. In this scenario, a LLIS ceases to exist as a state once a certain threshold is reached. Such threshold may vary substantially in accordance with how the relevant normative framework is interpreted and which variables are taken into account. A literal interpretation of the Montevideo criteria would mean that as soon as there is no "permanent population" remaining on the territory of the state in question, statehood ceases to exist, highlighting the impossibility of statehood fully removed from the physical indicia intrinsic to statehood.[163] Alternatively, one may set the threshold for state death at the point in time at which no one possesses the LLIS's effective nationality, as specified by the ICJ in Nottebohm.[164] The plausibility of this scenario stems in part from the consequences of the analysis found in the first article, which examines the role of the presumption of continuity and the latter's shortcomings in preventing the loss of statehood.[165]

[161] Rouleau-Dick, 'A Blueprint for Survival' (n 99) 638–640. The possibility of transitioning towards a NSSEIL ILP is mentioned by a number of authors in legal scholarship on LLISs. See for instance, Stoutenburg, *Disappearing States* (n 26) 377–378; Costi and Ross (n 72); Allen and Prost (n 106); Yamamoto and Esteban (n 32) 205; Michael Gagain, 'Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the "Constitution of the Oceans"' (2012) 23 Colorado Journal of International Environmental Law & Policy 77.

[162] Rouleau-Dick, 'A Blueprint for Survival' (n 99).

[163] See for instance, Rosemary Rayfuse, 'International Law and Disappearing States - Maritime Zones and the Criteria for Statehood' (2011) 41 Environmental Policy and Law 281, 284.

[164] *Nottebohm Case (Liechtenstein v Guatemala); Second Phase* (1955) ICJ Reports 1955 4 (International Court of Justice (ICJ)).

[165] Rouleau-Dick, 'Competing Continuities' (n 30). The possibility of state death is also mentioned by other authors, although the exact timeframe varies. See for instance, Sharon (n 6) 1081; James Ker-Lindsay, 'Climate Change and State Death' (2016) 48 Survival: Global Politics and Strategy 73, 85–86.

5.2.3. Scenarios of protection (P1-P6)

Scenarios of protection		Description
P1	Effective, deterritorialised citizenship	Scenario P1 is based on the assumption that an EDPs' deterritorialised country of origin maintains a sufficient level of sovereignty and related prerogatives so as to be able to allow its nationals to retain the effective nationality of their country of origin. This may be possible if the deterritorialised LLIS leases territory where its nationals can resettle, for instance.[166]
P2.1	New legal instrument with adequate provision of protection for EDPs	Under Scenario P2.1, a new instrument is implemented that provides an adequate legal framework to protect EDPs from LLISs. This is intentionally left as an open-ended and theoretical proposition, as it seems unlikely to materialise in a form that provides an adequate solution to the challenges faced by EDPs.[167] Other scholars simply argue for amending the 1951 Refugee Convention's definition to include EDPs.[168]
P.2.2	Progressive/expansive interpretation of the current refugee protection framework	Under Scenario P2.2, the current refugee protection framework is interpreted so as to include EDPs from LLISs. While this has so far been impossible, such as shown in the Teitiota case,[169] widespread and consistent state practice in that direction may create space for this to occur. Additionally, other legal frameworks could provide solutions where non currently exists at the international level.[170]
P2.3	Change in circumstances brings EDPs within scope of existing framework	Scenario P2.3 reflects the possibility that a specific set of events brings EDPs within the scope of the 1951 Refugee Convention's current refugee definition. For instance, a conflict or the behaviour of specific governments could create conditions amounting to persecution, sufficient to reach the threshold needed for refugee status.
P3	Soft law guidance	Scenario P3 is inspired by the influential guiding principles on internal displacement, which have proved to be highly valuable in dealing with some of the challenges implied by internal displacement, despite their non-binding status. Such principles have already been outlined in the *Sydney Declaration of Principles on*

[166] See for instance, Oliver (n 106) 238–240.
[167] This scenario has been identified as potentially problematic, see International Law Commission (n 4) 334. Interestingly, Juvelier proposes such a multilateral treaty as an instrument to settle any doubts on the status of potentially deterritorialised LLISs, see Juvelier (n 160). Kittel goes further and argues for such treaty to both protect the statehood of LLISs and provide a protection framework for their displaced nationals. Kittel (n 155) 1237–1250.
[168] See for instance, Juvelier (n 160) 41–43.
[169] *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* (n 50).
[170] See for instance, Wood (n 59); International Law Commission (n 4) 326, 334–335.

		the Protection of Persons Displaced in the Context of Sea Level Rise.[171]
P4.1	Partially ineffective citizenship ("light" *de facto* statelessness	In Scenario P4.1, an EDP's country of origin (ie, LLIS), retains its statehood and thus EDPs would not fall within the scope of *de jure* statelessness, as it is assumed that the LLIS keeps fulfilling some of its duties to its nationals. In such scenario, through various means and relying on adequate support from other states, the deterritorialised LLIS actively advocates for the rights of its nationals and provides them with a level of assistance that mitigates some of the challenges they face in a post-relocation context.
P4.2	*De facto* statelessness (ineffective citizenship)	In contrast with Scenario P4.1, Scenario P4.2 assumes that a deterritorialised LLIS would be unable to provide meaningful assistance to its displaced nationals, rendering them *de facto* stateless. EDPs would then formally be nationals of the deterritorialised LLIS but without any of the benefits usually related to nationality. This possibility is examined in the third article.[172]
P5	"Relative" citizenship (based on state of bilateral relations)	Scenario P5 is set in a context where the statehood of a LLIS is contested or not recognised by a significant number of states and members of the international community. Consequently, the nationality of its displaced nationals varies depending on what is the stance of the state they find themselves in, thus the idea of "relative" citizenship.[173]
P6	*De jure* statelessness under the 1954 Convention	Scenario P6 is premised on the idea that the EDP's country of origin is considered to have lost its statehood. As the citizenship of the state in question is considered to cease simultaneously, the displaced nationals of this former state fall within the scope of *de jure* statelessness, as defined in the 1954 Convention. This scenario is the subject of the third article of this thesis.[174]

[171] Vidas, Freestone and McAdam (n 40) 26–41.
[172] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23).
[173] This possibility is mentioned in Park (n 21) 14–15.
[174] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23).

5.2.4. Scenario table

	Scenarios of Statehood	S0	S1	S2.1	S2.2	S2.3	S3	S4.1	S4.2	S5.1	S5.2	S6
Scenarios of Protection	Description	Sovereignty Marker	Norm-based det. statehood	Recognition-based deterritorialised statehood			*Sui generis* statehood	Modified trusteeship – Nation ex-situ		NSSEIL/ Territorial entity duplex	NSSEIL ILP	State death
				Positive	Ambiguous	Minority		State	Non-state			
P1	Effective, deterritorialised citizenship											
P2.1	New legal instrument with adequate provision of protection for EDPs											
P2.2	Progressive/expansive interpretation of the current refugee protection framework (e.g., 1951 Conv.)											
P2.3	Change in circumstances (e.g., conflict) brings EDPs within scope of existing framework											
P3	New soft law guidance (already existent)											
P4.1	Partially ineffective citizenship ("light" *de facto* statelessness											
P4.2	*De facto* statelessness (ineffective citizenship)											
P5	"Relative" citizenship (based on state of bilateral relations)											
P6	*De jure* statelessness under 1954 Convention											

In the Scenario table presented in this section, the two sets of scenarios are combined so as to highlight the intersection between their respective scopes. The contributions of the published articles are colour-coded to highlight exactly where they are relevant. The first article addresses the role of the presumption of continuity and nuances the certainty with which the possibility of deterritorialised statehood is presented, thus highlighting the possibility of "state death", Scenario S6 (in blue).[175] The second article discussed the relevance of the precedent constituted by the SMOM for LLISs, particularly if deterritorialised statehood were to prove impossible or uncertain. The second article's contribution is coded in light yellow and encompasses both Scenarios S5.1 and S5.2, where S5.1 implies a Vatican-inspired duplex and S5.2 involves sole existence as a NSSEIL.[176] The third article's contribution is colour-coded in green and is predominantly focussed on protection through the law on statelessness. The scope of this legal framework is heavily dependent on the statehood of the EDPs' country of origin, which is represented by the intersection between Scenarios P6 and S5.2 and S6.[177]

While this table is limited to the scope of this thesis' analysis, the intersections it creates have the potential to allow for a more detailed investigation of the relationship between various scenarios for the future of LLISs and the opportunities the later may offer in terms of protection (or the lack thereof). The format limits the depth of the various scenarios that are not the focus of the articles, and the choice of a worst-case scenario approach means that other, better scenarios are not explored at length here.

6. Context-based relevance: remedies and ways forward

The possibility that an LLISs could retain its statehood beyond the loss of its territory is certainly plausible and more importantly, desirable. Therefore, the key target of this analysis is not the mainstream narrative *per se*, but rather, the certainty with which it is presented. In practice, undermining this certainty could mean shifting towards a scenario-based approach to the future of LLISs, thus acknowledging the considerable uncertainty corollary to projecting a legal analysis in a climate-changed future. The reasons for such a shift are twofold.

First, events in the physical and political world are simultaneously closely related with the success of a claim to deterritorialised statehood and unpredictable, even more with the tools available to a purely doctrinal analysis. Unless these factors are settled with a level of certainty sufficient to prioritize a certain approach over another, doctrinal research cannot "pick and choose"

[175] Rouleau-Dick, 'Competing Continuities' (n 30).
[176] Rouleau-Dick, 'A Blueprint for Survival' (n 99).
[177] Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23).

whichever outcome to a factual or non-legal question fits its conclusions better. This is precisely the danger with assuming that other states would maintain their recognition of a deterritorialised LLIS. It assumes a specific outcome to events that require a fundamentally different forum and methodology to be discussed, something that cannot be settled at present, unless one risks a normative approach to recognition, which brings its own set of problems. Recognizing the limits of legal analysis and the shortcomings of its tools necessarily involves toning down the certainty with which one specific scenario is presented (whether that is the possibility of deterritorialised statehood or of disappearance).

Second, taking deterritorialised statehood for granted, in addition to possibly being premature, restricts the scope of possible futures and thus limits the investigation of other solutions that might be relevant to a scenario in which statehood cannot be sustained beyond the loss of a LLIS's territory. The need for creative legal thinking has been highlighted previously and has resulted in various insightful reflections, such as Willcox's interesting proposal for a family resemblance account of statehood to replace the current minimum threshold embodied by the Montevideo criteria.[178] However, the need for creative legal thinking extends to all scenarios and is perhaps even more acute in the context of a worst-case scenario, where other solutions might have already failed.

Section 5 discussed the spectrum of possibilities that populate the future of LLISs. The broader adoption of such approach could prove valuable moving forward. Embracing uncertainty would mean allowing for parallel reasoning, rooted in specific contexts and sensitive to different variables. Rather than an assessment of how plausible a specific legal forecast might be, this approach would instead aim to situate it within the spectrum of possible futures.

As a result, explicitly shifting towards a scenario-based approach would hopefully result in legal analyses that better incorporate the uncertainty inherent to a climate changed world. Without acknowledging the latter, it is hard, if not impossible, for a purely legal analysis to unilaterally reach a verdict without wandering into non-legal territory by making implicit assumptions about the general context in which it is set. In the context of LLISs, where our current understanding of the future is closely linked with how it may unfold, accurately contextualising legal analyses of the future may prove significantly more useful than promoting overreliance on premises that could subsequently prove shaky in a more hostile international environment. Provided that the search for better scenarios is prioritised, looking at worst-case scenarios now and identifying what could lead to such outcomes, in addition to the solutions available in such scenario could prove crucial to protecting the rights of EDPs.

It can be tempting after reviewing these different trends and narratives to present a neat, well-wrapped conclusion which makes sense of it all and outlines a clear way forward. Unfortunately, succumbing to this temptation would forget that legal analyses are inherently limited by their nature. The uncertainty

[178] Willcox, 'Family Resemblance' (n 6).

identified earlier is unlikely to be satisfactorily addressed by scholars alone, perhaps even less so by doctrinal legal scholars.

While it is essential to look to the threatened LLISs themselves for answers, this approach needs to be combined with a simultaneous investigation of the possibilities available if better options were to fail. Contingency planning and a preparedness focus can act as a failsafe to other solutions. Without being too cynical, one should not risk overlooking the international context within which these discussions are expected to play out.

My primary objective here is not to prescriptively push forward a certain outcome. Instead, a key takeaway should be that while certain paths clearly provide substantively better options for LLISs, the current international legal system cannot provide the certainty needed to fully commit to these better outcomes. Multiple scenarios do exist, and earnest engagement with the whole spectrum of future scenarios will almost certainly result in better preparedness from the perspective of planning ahead, whether this concerns LLISs themselves or their allies in this existential endeavour. Once this is acknowledged, prioritising one approach over another can be done in full knowledge of the implications of such a choice, and of the possible shortcomings of the option chosen. As the outcome will likely depend on how other members of the international community react and perceive their obligations, it is as necessary to create legal narratives of continuity as it is to examine alternatives in order to avoid being completely blindsided by a failure on that front. Engaging in earnest with more pessimistic scenarios could also play a key role in informing the current and future efforts of the threatened States in their prioritizing of resources and advocacy efforts. In essence, this is what the scenarios enumerated earlier aim to provide: a range of options, a map for preparedness instead of individual analyses limited by their internal logic of providing a "best" or "most plausible" solution.[179]

Let us now outline the respective contributions brought by the articles that were published in the context of this thesis. Their respective focus outlines a two-pronged approach to protection: collective (i.e., focused on the collective existence of the state and its ILP), and individual (i.e., centred on the protection available to EDPs in a post-relocation context). This structure is informed by the three publications associated with this thesis. The first publication highlights higher-than-expected uncertainty on the question of statehood due to a high reliance of most analysis on the principle known as the presumption of continuity, which is argued to be less decisive than previously assumed. This heightened uncertainty demonstrates the need for palliative solutions that incorporate the possibility that statehood may not be sustained in a post-relocation context. In keeping with this need, the two other publications respectively investigate the two "prongs" mentioned above.

[179] This comes with the clear caveat that LLISs may not be in a position to adopt such a broad approach to the issue. However, the international community and other actors sympathetic to the plight of LLISs may be in a position to examine such scenarios and constructively engage with less optimal outcomes.

The first element focuses on the collective dimension of the challenges faced by LLISs, investigating the possibility for a deterritorialised LLIS to maintain a level of ILP that is independent of statehood. This analysis examines the added value of the SMOM and its peculiar status as a NSSEIL and it is covered by the second article published in the context of this thesis. The second element is concerned with the international protection framework and its applicability to internationally displaced nationals of a deterritorialised LLIS. More specifically, the added value of the 1954 Convention Relating to the Status of Stateless Persons is investigated in the third publication.

6.1. The case for investigating avenues that do not assume deterritorialised statehood: competing continuities (Article 1)

This first article was published in volume 22(2) of the *Melbourne Journal of International Law* in the fall of 2021. The article's focus is a principle often cited in literature about small island states vulnerable to climate change and a rise in sea levels: the presumption of continuity. The paper starts by situating the need for a discussion of the principle by providing some context on the rise in sea levels and the threat it represents to the statehood of LLISs.[180] The research question can be framed as such:

- *Are there different doctrines of the principle discussed as the presumption of continuity, and if yes, what are they? How may these competing doctrines of the principle affect a hypothetical claim to statehood by a deterritorialised low-lying island state, and what are the implications going forward?*

The first section delves into the two proposed doctrines of the presumption of continuity. The first, defined as the "ratchet effect" doctrine, following an expression introduced by Susannah Willcox,[181] frames the presumption of continuity as a principle enshrining statehood as a status that "once achieved, is difficult to lose".[182] Section II.A then surveys the use and presence of this doctrine in scholarship.[183] Substantively, the ratchet effect doctrine argues that a deterritorialised statehood should be possible for a LLIS deprived of territory, relying on the idea that the presumption of continuity would weigh heavily against the loss of statehood. To make this claim, proponents of the ratchet effect doctrine rely on a number of precedents (discussed in later in the article) and a few citations by prominent scholars. In particular, a quote found in James Crawford's influential 2006 opus on the creation of states in international law is recurrent in scholarship on the presumption of continuity: "there is a strong

[180] Rouleau-Dick, 'Competing Continuities' (n 30) 359–360.
[181] Willcox, 'Family Resemblance' (n 6) 122.
[182] ibid.
[183] Rouleau-Dick, 'Competing Continuities' (n 30) 360–363.

presumption against the extinction of States once firmly established".[184] With a few exceptions, this doctrine of the presumption of continuity is generally constructed or used as a "failsafe" to other arguments about the possibility of deterritorialised statehood.[185]

Section II.B. is one of the key sources of novelty in the context of the discussion on the role of the presumption of continuity.[186] Rather than following the ubiquitous use of the ratchet effect doctrine, this section introduces a competing doctrine termed the sameness assessment doctrine. Originating from scholarship mostly external to the discussion on LLISs' statehood, this doctrine formulates the presumption of continuity as a presumption against the creation of a new state when one already exists. As such, the sameness assessment doctrine concerns more the identity of the entity under discussion than its statehood, which is determined according to different rules (i.e., the law on statehood).[187] The sameness assessment doctrine presupposes the existence of the subject to effect an assessment of its sameness with its putative prior self. This specific understanding of the presumption of continuity is linked with the duality between continuity ("sameness") and succession or extinction (failure of a sameness assessment by either lack of continuity in identity or lack of an entity with which sameness can be assessed). Following this doctrine of continuity, the presumption of continuity is thus largely irrelevant to determining statehood (i.e., status), limited instead to identity.

Part III of the article first engages critically with the precedents cited to support the relevance of the presumption of continuity to LLISs and then discusses the respective scopes of application outlined by the two doctrines of continuity.[188] In state practice, the examples of fragile states, existing without a government for years on end, is better explained by the assumed temporary nature of the interruption and the implications of accepting state termination (i.e., creation of *terra nullius*) than the presumption of continuity, as asserted by proponents of the ratchet effect doctrine.[189] The case of the Baltic states and their "miraculous" resurrection after the fall of the USSR follows. This example further emphasises the importance of the sameness assessment to performing continuity. The existence of a clear continuity in territory and population is interpreted as having had a decisive role to play in Estonia, Latvia, and Lithuania claiming continuity with their pre-WWII selves. Indeed, the importance of a stable territory-population nucleus is also demonstrated by state practice on governments in exile. Far from a precedent for statehood without territory, the precedent constituted by governments in exile appears to be rooted primarily in the illegitimacy of the occupying power. As a result, cases of governments in exile do not constitute an acknowledgement of the accessory nature of the need for

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[184] Crawford (n 120) 715. The use of this quote is roughly mapped at page 360. See Rouleau-Dick, 'Competing Continuities' (n 30) 360.

[185] See, for instance, Ross (n 6).

[186] Rouleau-Dick, 'Competing Continuities' (n 30) 363–364.

[187] ibid 8.

[188] ibid 365–378.

[189] ibid 365–367.

territory, but rather a necessary corollary of the illegality of the acts that necessitated their creation. The anomaly of Syria's brief incorporation in the ephemeral United Arab Republic (UAR) and its subsequent "resurrection" is then addressed as a case of *de facto* continuity in identity.[190] The extinction of the Socialist Federal Republic of Yugoslavia (SFRY)'s identity, despite the existence of a claimant to continuity (the Federal Republic of Yugoslavia or FRY) is also analysed, highlighting that "state death" is possible.[191]

Parts III.C. and III.D. turn to more fundamental issues on how the two doctrines of continuity are assumed to apply and what scope they respectively assign to the principle. Part III.C. investigates the role of recognition in defining the presumption of continuity as argued to apply to LLISs.[192] The prominent role assigned to recognition by the ratchet effect is identified as problematic, since effectively reliant on political decisions and potentially circular in how it is constructed.[193] This also has implications for the discussion found in part III.D. which concerns the putative scopes of application assigned to the presumption of continuity by the two doctrines of continuity investigated in the article. The sameness assessment doctrine is constructed around the notion of identity rather than status (statehood). In contrast, the ratchet effect doctrine effectively assigns the presumption of continuity a constitutive role to the principle, a shift identified as potentially problematic due to the outsized weight it gives to recognition. This is further developed in section III.D.1., particularly how the presumption of continuity interacts with the physical criteria of statehood found in the classical definition of statehood provided by the Montevideo Convention.[194] The outsized role given to the presumption of continuity in the determination of statehood by the ratchet effect doctrine is identified as problematic, or at minimum in need of further discussion.

Part IV of the article aims to provide a way forward, a way to "bridge the gap" between the two doctrines.[195] In light of how widespread the ratchet effect doctrine is in analyses of the future statehood of LLISs, the article argues that the gap between the two doctrines of continuity urgently needs to be addressed. Not doing so could leave a deterritorialised LLIS at the mercy of other members of the international community, one of the possible consequences of leaving LLISs' claim to statehood reliant on recognition. Ultimately, the current nature of the presumption of continuity is likely to remain undetermined until state practice provides some sort of answer.[196] Frustratingly, it may also be that this can only be satisfactorily assessed *ex post facto.* Emphasising preparedness, the article also underlines the need for these questions to be discussed and addressed now

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[190] ibid 370–371.
[191] ibid 371–372.
[192] ibid 372–373.
[193] ibid 372–373.
[194] ibid 375–378.
[195] ibid 378–381.
[196] The ILC's choice of a precedent to highlight the basis for the presumption of continuity is interesting in this regard, focussing on past cases of governments in exile. International Law Commission (n 4) paras 166–169.

rather than later when it might become a matter of life or death for concerned LLISs.

Although the publication of this article occurred before the ILC's recent reporting on this issue,[197] it should be noted that the ILC has maintained its focus on the presumption of continuity as a prominent legal principle in approaching the future of LLISs. The ILC's work reflects a comparatively more cautious approach to the principle but nevertheless seems to lean towards the "ratchet effect" doctrine highlighted in this article. Yet, the ILC report simultaneously raises a number of the concerns highlighted in this article, such as the distinction between identity and status.[198] It is the view of this author that the ILC report's overview of the presumption of continuity does not settle the concerns brought forward by the present article.

This article's contribution to this thesis is crucial. While there is clearly value to the other two articles even without the contribution of this first one, its analysis of the presumption of continuity serves as a springboard to substantiate the need for the subsequent analysis. Until the conflict between the two doctrines of continuity it highlights is settled for good, there will always be value to examining possible remedies in a context where deterritorialised statehood could not be substantiated; hence the need for the other two published articles.

The conflict between the two doctrines of continuity that constitutes the focus of this article would most likely have been pointed out at some point, whether in the context of an institutional forum such as the ILC, or through arguments brought forward by states before the ICJ, for instance. By shining light on this gap, this article (and this thesis) aims to generate a necessary discussion on how to bridge it. Until this is done, investigating avenues to protect both the legal personality of LLISs and their nationals in a context where deterritorialised statehood is not possible or available will remain relevant. This generally reflects the need to engage in earnest with "inconvenient arguments" that do not follow some of the underlying premises that have hitherto defined the various scholarly discussions on the future of LLISs. A climate-changed world cannot be assumed to be more accommodating, and stress-testing current arguments should be a priority if any lasting solution is to be found. It is in this spirit that this article nuances the "statehood ratchet" role currently assigned to the presumption of continuity by most scholars.

6.2. Collective – NSSEIL option (Article 2)

The second article is entitled "A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta", and was published in the *German Yearbook of International Law*.[199] The article expands upon the

[197] International Law Commission (n 4); Bogdan Aurescu and Nilüfer Oral, 'Sea-Level Rise in Relation to International Law - Additional Paper to the First Issues Paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law' (United Nations General Assembly 2023) A/CN.4/761.

[198] International Law Commission (n 4) para 204.

[199] Rouleau-Dick, 'A Blueprint for Survival' (n 99).

case of the Sovereign Military Order of Malta and its putative relevance as a precedent for LLISs. While authors such as Costi and Ross[200] or Allen and Prost[201] have also examined its specific relevance to LLISs, the present article explores the possibilities for a hypothetical LLIS to transition to a NSSEIL, the opportunities and difficulties associated with such a transition, as well as the process that may be required to make this option a reality.

The article first sets the scene by surveying some of the challenges faced by LLISs and the difficulties of sustaining statehood were the LLIS in question be left without the traditional physical markers of statehood, i.e., territory and population. Furthermore, the significance of maintaining a level of international legal personality (ILP) is discussed, emphasising the need for representation and continuity. The peculiar situation of the SMOM is then introduced, alongside some historical background to what essentially amounts to either an anomaly of the international legal system, or a relic of a long-foregone era. It should be noted here that the situation of the Holy See is not discussed at length but nevertheless bears some relevance as the only other plausible NSSEIL currently in existence. The nature of the SMOM's peculiar legal personality and its claim to a watered-down version of sovereignty, i.e., functional sovereignty concerned and limited to the exercise of its mission, are then discussed. It is crucial here to clarify that at no point in the article is the SMOM referred to as a precedent for deterritorialised statehood, an assumption that is also refuted at length by Allen and Prost.[202] The SMOM is most certainly not a state, and while the outline of its ILP can be confusing as it does not conform to the better known characteristics of either states or international organisations, it remains firmly outside of either category of international actors.

The article identifies two distinct roots to the SMOM's peculiar sovereignty: a functional one rooted in the SMOM's humanitarian mission, and comparatively less important territorial one which stems from the SMOM's prior sovereignty over the island of Malta, among other territories. The exact extent of the SMOM's sovereignty may remain blurry but it is hard to deny its existence in light of its activities and status at the international level.

The next section of the article links the precedent constituted by the SMOM (and the Holy See, to a lesser extent) and the specific case of LLISs, through a discussion of a possible modus operandi to a transition from fully-fledged statehood towards NSSEIL, including possible overlap between those two statuses. This "NSSEIL option" is then subsequently assessed in relation to other proposed alternatives and it is clarified that such a way forward does not constitute, in any form or shape, a panacea to all the challenges faced by LLISs. Yet, earnest engagement with the "NSSEIL option" demonstrates that the latter may in fact bear some relevance, even it is only as a baseline for the negotiation

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[200] Costi and Ross (n 72). From where the term "Non-state sovereign entity of international law" or NSSEIL is borrowed.

[201] Allen and Prost (n 106). It should be noted that Allen and Prost's article was published after the present article was accepted and went through the editing process.

[202] ibid.

of better solutions, or as a solution to provide certainty through the continuity of the LLIS's legal personality beyond the loss of its territory and population. The added value of this option to maintaining legal personality is also highlighted as being rooted in the low threshold of action required of other members of the international community, and thus being comparatively easier to implement in what could be a hostile international environment.

This characteristic is precisely what makes the "NSSEIL option" particularly relevant to this work. Were deterritorialised statehood to prove harder to maintain and to face additional obstacles such as an interpretation of the presumption of continuity that does not override the traditional criteria of statehood, the "NSSEIL option" could still provide an avenue to continued ILP and thus substantiate a level of sovereignty that, while limited, could still allow for efficient advocacy and the sustenance of the former LLIS's international relationships. This analysis is intended to offer a way forward to threatened LLISs as entities, in the context of a worst-case scenario where continued, deterritorialised statehood could not be sustained. Furthermore, as this option does not necessarily imply continued statehood, it is also compatible in scope with the possible protection afforded by the 1954 Convention Relating to the Status of Stateless Persons, which is investigated in the third article of this thesis.

It should be noted that the SMOM's and Holy See's peculiar position have subsequently been highlighted by the ILC for their relevance to LLISs in the context of the discussion on their statehood.[203] Both the Holy See's and the SMOM's status as "non-states" was highlighted by the ILC as largely negating their value as precedents.[204] However, the analysis in this article demonstrates that this conclusion should be nuanced by the context in which the value of NSSEILs for LLISs is assessed. Moreover, statehood and NSSEIL status are necessarily impossible to combine, as highlighted in Section IV of the article.[205]

Beyond the article itself, there are other possibilities that could combine well with the option explored in this article, one of which is the possibility of transitioning to "Large Ocean States" touted by the Organisation of Eastern Caribbean States (OECS) among others, although this proposal does not depart from statehood and is explicitly premised on a significant paradigm shift.[206] However, there may be some room in the context of a NSSEIL-type solution to accommodate some of the arguments brought forward in the context of other discussions.

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[203] International Law Commission (n 4) para 166.

[204] ibid 207.

[205] Rouleau-Dick, 'A Blueprint for Survival' (n 99) 638–645.

[206] See Organisation of Eastern Caribbean States (OECS), 'The OECS – from SIDS to Large Ocean States' (*OECS*, 24 September 2020) <https://pressroom.oecs.org/the-oecs-from-sids-to-large-ocean-states> accessed 2 December 2022; Leonardo Bernard and others, 'Securing the Limits of Large Ocean States in the Pacific: Defining Baselines Limits and Boundaries amidst Changing Coastlines and Sea Level Rise' (2021) 11 Geosciences 394; Nicholas Chan, '"Large Ocean States": Sovereignty, Small Islands, and Marine Protected Areas in Global Oceans Governance' (2018) 24 Global Governance 537.

With respect to the two sets of scenarios examined in section 5, the contribution of this article can be outlined clearly towards the end of the "scenarios of statehood". More specifically, this article investigates the existence and relevance of scenarios 5.1 and 5.2, in addition to a certain overlap with scenario 6. Both scenarios 5.2 and 6 are defined by state death, but under scenario 5.2 the hypothetical LLIS would retain a level of ILP through a transition to the status of NSSEIL, affording it a number of prerogatives and privileges that could prove valuable in its post-statehood existence, as examined in the article. Moreover, scenario 5.1 is rooted in a duplex-type arrangement inspired by the Holy See's coexistence with the Vatican City which is discussed in section IV.A. of the article.[207] The NSSEIL option assessed in the article is relatively self-contained and it is mostly of relevance to the statehood scenarios. However, when combining the two sets of scenarios one can observe that since the NSSEIL option can exist both with (S5.1) and without statehood (S5.2), its added value overlaps with that of the last article discussed in this thesis.

6.3. Individual – Stateless status as a last resort (Article 3)

The third article in this thesis is titled "Sea Level Rise and Climate Statelessness" and was published in the journal *Statelessness and Citizenship Review*. The article builds upon the worst-case scenario that itself relies on the discussion on the presumption of continuity that is found in the first article discussed above. In this regard, its added value parallels that of the second article, which is primarily concerned with the international legal personality of a deterritorialised LLISs if continued statehood were not possible. The third article investigates the relevance of the 1954 Convention Relating to the Status of Stateless Persons as a means to provide a legal status to EDPs from LLISs, in light of the current gap in available protection.

The article first proceeds to survey how previous scholarship has approached this question, and two key points are identified. Namely, that the law on statelessness[208] would only become applicable long after it was of any value to the displaced populations (ie, "too late"), and that even if it were applicable within a reasonable timeframe, it would still fall short of providing an actual solution to the predicament faced by EDPs from LLISs.

The article does not contest these arguments, but instead focuses on context to nuance the extent of these assumptions about the relevance of the 1954 Convention for EDPs from LLISs. Concretely, the article sketches what a worst-case scenario might consist of, and provides more background to the context in

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[207] Rouleau-Dick, 'A Blueprint for Survival' (n 99) 638–640.

[208] The term "law on statelessness" is understood, in the context of this article, to designate only the 1954 Convention and not the 1961 Convention on the prevention of statelessness, the discussion of which lies outside the scope of this article. See Rouleau-Dick, 'Sea Level Rise and Climate Statelessness' (n 23) 289–290. For a discussion of the 1961 in the relevant context, see Dobrić (n 63). Referring to the Convention on the Reduction of Statelessness, concluded 30 August 1961, entered into force 13 December 1975, United Nations, *Treaty Series*, vol. 989, p. 175.

which the law on statelessness might come into play as a means of protection and as a tool to provide legal status to those on the move.

The first element discussed "in context" is the claim that the law on statelessness would come into play too late to be of any relevance. This assumption is contrasted with an alternative reading of the law on statehood, relying upon some of the arguments that are discussed at length in the first

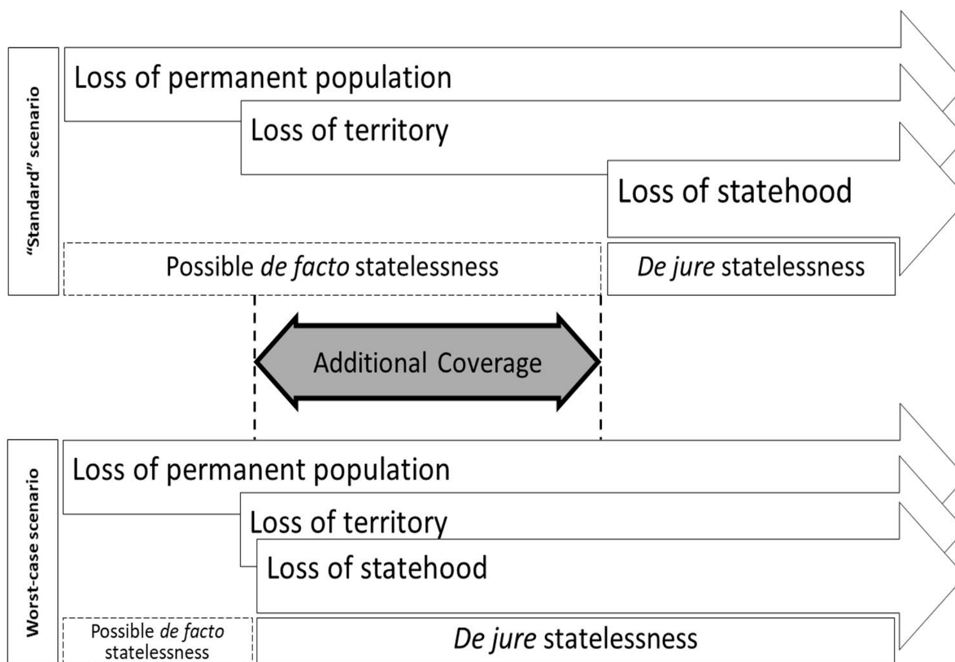

Figure 2: Comparative visualisation of the relative **relevance** *of the law on statelessness in two scenarios. Taken from "Sea level rise and climate statelessness", page 304.*

article of this thesis.[209] More precisely, the key element of this section is the idea that deterritorialised statehood, while certainly plausible and supported by many scholars, cannot necessarily be taken for granted. The loss of statehood could happen earlier than otherwise anticipated, bringing the former national of the LLIS in question within the scope of the law on statelessness.

The second factor considered is the idea that the protection and added value provided by the 1954 Convention are insufficient to be worthy of consideration. While the article does not challenge the inadequacy of the Convention, it argues that although the latter may indeed be inadequate, its relevance is more closely related to the availability of alternatives rather than to its overall adequacy in absolute terms. Consequently, the relative value of the 1954 Convention should be assessed in relation to the alternative, which in the scenario outlined earlier would likely be *de facto* statelessness. It is argued that in such a context, the law on statelessness should not be dismissed outright, as it may provide additional

[209] Rouleau-Dick, 'Competing Continuities' (n 30).

guarantees and opportunities that make it relevant, even if such relevance is very much context-dependant. The arguments outlined in the article are further illustrated using Figure 2, where the additional coverage provided by the 1954 Convention is highlighted by contrasting two different timelines, one consisting of a worst-case scenario. Since the article was published independently of this summary, the scenarios it discusses are self-contained. However, building upon the previous sections, the "standard" scenario in Figure 2 represents the intersection of scenario P4.2 (*de facto* statelessness) with the scenarios of statehood that include the continuation of statehood beyond deterritorialisation, such as S3 (*sui generis* statehood). In contrast, the "worst-case scenario" discussed in the article represents the intersection between P6 (*de jure* statelessness) and S5.2 (NSSEIL option) and S6 (state death). Moreover, article 3's contribution also covers the closer examination of scenario P6. Referring to the scenario table in section 5.2.4, the findings of article 3 are highlighted in light green.

Overall, the article is relevant to this thesis on three axes. The first lies in the relative and context-based approach that it adopts, in contrast with other approaches to scholarship which tend to prioritise prescriptive rather than descriptive conclusions. Such an approach reflects the scenario-based focus of this thesis, and its emphasis on preparedness rather than prescriptive narratives. The second element of relevance of the article is in its active engagement with the discussion on statehood. Indeed, a key premise of the discussion is the idea that deterritorialised statehood cannot be taken for granted. The third contribution of this article lies in how it addresses the individual protection element of a worst-case scenario future for LLISs.[210] While the second article remains at the institutional or collective level, this article focuses primarily on the legal status of EDPs in a post-relocation context.

Because the law on statelessness is so directly reliant on the status of the EDPs' state of nationality, the contribution of this article nevertheless intersects closely with the contribution brought forward by the two others. The first article demonstrated that the case for deterritorialised statehood still had to contend with significant uncertainty and the second article investigated the possibility for a deterritorialised LLIS to transition towards NSSEIL status, which, although the loss of statehood would nevertheless bring EDPs within the scope of the 1954 Convention. This is a highly contextual contribution, but one whose relevance can be assessed uniquely well through the scenario-based approach proposed here.

6.4. The way(s) forward

This research is firmly set in the context of international law. However, the solution(s) required to safeguard the rights and lives of EDPs from LLISs in

[210] Interestingly, in their most recent report the ILC chose not to acknowledge the narrow yet relevant contribution of the legal framework on the protection of stateless persons in the context specified in this article. See International Law Commission (n 4) paras 214–220.

reality may have little to do with the law on statehood as it is discussed here. Bilateral and multilateral negotiations, resulting in new instruments or binding agreements concerned with actual action and practical arrangements, are likely to be vastly more important to the fate of the vulnerable populations than any narrow doctrinal argument about statehood, no matter how well reasoned. Indeed, the development of new agreements could shape emerging state practice in ways that would fill the gap at the origin of this analysis. Whatever the law says remains ultimately very much dependent on how much willingness the international community demonstrates in its response to a particular challenge.

While the normative setting of this thesis has not substantially changed during its writing, it is likely that the events that occurred while it was being written will be discussed for the coming decades. The Covid-19 pandemic first demonstrated how quickly entire frames of reference in our world could suddenly change, and how borders could become an insurmountable obstacle to even nationals seeking to come back to their own country of origin.[211] Then, within weeks of the pandemic finally relenting in some regions, the illegal invasion of Ukraine by Russia and the response to the resulting flow of refugees showed how borders could also melt away instantly if states are willing to help those on the move.

It is characteristic of international law that it sometimes struggles to enforce compliance, especially if the concerned states do not show at least minimal willingness to comply with their previously agreed obligations. In the case of LLISs, while we can collectively hope that the international community steps in and tips the scale towards an adequate and lasting framework of solutions for adaptation, mitigation and relocation, we also need to acknowledge the inherent limitations of the tools that are at our disposal as international legal scholars. Consequently, while one can hope that international law provides solutions and opportunities, we should not be blind to the shortcomings of international law and the considerable gaps that exist on the key questions discussed in this thesis. Ignoring the latter and conveniently skipping ahead may ultimately prove counter-productive if our legal infrastructure all comes crumbling down at the first sign of pushback.

In addition to the very specific doctrinal discussion about solutions and avenues for deterritorialised statehood for LLISs, a key takeaway of this thesis is the comparative lack of a "meta-discussion" about the inherent shortcomings of legal scholarship in this specific context, particularly as a forecasting tool. In practice, this results in a disappointing lack of reflection about the agency of legal scholars and the role of international law. There seems to be a certain optimism about the potential of international law to solve questions relating to LLISs through the predominant view that deterritorialised statehood is not only possible but a likely option, disregarding the uncertainty that still permeates this question. This optimism is harder to substantiate once these questions are

[211] Renju Jose and Jamie Freed, 'After Two Years of Closed Borders, Australia Welcomes the World Back' (*Reuters*, 7 February 2022) <https://www.reuters.com/world/asia-pacific/australia-fully-reopen-borders-vaccinated-travellers-feb-21-2022-02-07/> accessed 16 February 2023.

situated in the broader context of the inadequacy of international law to settle the questions of the birth, life, and death of states.

As Koskenniemi famously demonstrated in his first opus, international law constantly needs to contend with its foundational duality between "evil" and "good", apology and utopia, cynicism and commitment.[212] While it may be tempting to commit to the "good" side, such commitment needs to be accompanied by a solid understanding of the alternative, and it is essential that its conclusions be adequately contextualised. In the absence of earnest dialogue with alternative views, the creeping optimism that stems from a hopeful interpretation of whatever the law is deemed to be risks misleading us into a sense of false security. We can certainly hope for the best, but it is naïve to think that because we do, such scenarios will necessarily materialise.

It may be that cautious optimism is indeed the best way forward, but optimism is largely a relative measure and thus requires an accurate understanding of the backdrop against which it is articulated. It should be clear to the reader by now that this thesis does not aim to find out which option is best or better for LLISs, or which is more likely to materialise. Instead, by willingly and earnestly engaging with what a worst-case scenario might imply for LLISs, I aim to investigate what an approach to the future of LLISs might consist of if the premise shifts to pessimism. Such an approach is not inherently new, and one could argue that it is counterproductive to encourage or engage with such an approach since it legitimises a certain type of discourse.[213] However, while this is undoubtedly a relevant dimension of this discussion, its pessimistic premise should not be seen as an end, but rather as an opportunity to constructively engage with the type of counter arguments that may be brought to bear against more positive or ambitious readings of the relevant normative framework.

Consequently, it is hoped that this thesis is more a thought experiment than anything of immediate value to any LLIS. In fact, as most of the issues discussed here are hypothetical, there is still a window of opportunity to prevent them from arising, and which is precisely where present efforts should be focused. Were the international community to fall short, falling back on less-than-ideal remedies may then become the best solution available and it would be absolutely inexcusable to not have contemplated this prospect while it was still only an unlikely outcome.

International law tends to be blurry and open ended, and is unlikely to fulfill the grandiose promises it holds. Working within its shortcomings and in full awareness of its limitations can, however, yield results and hopefully make a positive difference in the lives of those displaced by climate change from their island nations. International law can undoubtedly be a force for good but committing to this view requires acknowledging the intrinsic limitations of international norms.

In keeping with these limitations, it is also the role of legal scholars to inform the decision makers whose actions ultimately matter. It is in this spirit that this

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[212] Koskenniemi (n 79).

[213] See generally, Barnett (n 3).

work aims to contribute to a better understanding of both the relevant international legal landscape, but also of how the latter has been approached in the literature. It is worth re-emphasising that I personally hope the arguments brought forward here remain relevant only theoretically, and that the hypothetical future this thesis explores does not materialise.

7. Conclusion

This summary, and the articles that form its core arguments, set out to explore the legal options available to protect the legal personality of a submerged LLIS as well as to ensure the protection of their nationals in the context of a worst-case scenario. This choice, i.e., that of a worst-case scenario approach to the relevant normative landscape, stemmed from the preparedness focus of this thesis and the premise that engaging with worst outcomes can play a crucial role in avoiding them, or at least in mitigating their impact.

LLISs face an uphill battle, both in their fight against climate change and in their quest to envisage a sustainable way forward within the current international legal system for them and their populations. The unprecedented nature of the challenges they face also mean that they find themselves in the midst of a particularly active discussion on statehood and the protection of those forcibly displaced, thus adding further uncertainty to an already challenging future. Indeed, the inadequacy of current legal frameworks such as that pertaining to international protection and statehood have left LLISs in something akin to legal limbo, and even more so if their territory were to become fully submerged. Fortunately, this is not an immediate possibility, and there is still a window of opportunity to, if not completely settle the thorny legal questions that have been raised, at least build resilience, and provide decision makers with an accurate and comprehensive picture of the available options.

This thesis has taken a two-pronged approach to its analysis of the questions at hand. On one hand, a crucial element of context was provided by its scenario-based approach. This then allowed for the contribution of the articles that constitute this thesis' primary pillars to be precisely located and contextualised. Namely, the first article examined the role and content of the presumption of continuity in substantiating the possibility of deterritorialised statehood for LLISs, nuancing the role it has been given as a putative "statehood ratchet" and emphasising the need for solutions that could come into play if deterritorialised statehood were not possible to sustain. The second article then provided an avenue for maintaining the international legal personality of a deterritorialised LLIS, albeit in the form of a NSSEIL rather than that of a fully-fledged state. The third article investigated the possible added value of the legal framework protecting stateless persons in relation to the protection of EDPs from LLISs, concluding that it was narrow and highly contextual but still preferable to *de facto* statelessness.

Together, these three articles and this summary add a contribution to the ongoing scholarly discussion relating to the future of LLISs. With its the use of scenarios, this thesis's contribution thus constitutes a particular set of solutions in the context of a worst-case scenario, albeit without implying a high likelihood or desirability. There is still time for better solutions to be implemented, solutions that can respect the agency of those displaced and compensate for the tremendous injustice that is at the core of the challenges faced by LLISs. International law provides a framework and provides some guidance as to the boundaries that international actors need to respect, but we must not forget that sometimes more is needed. Political will and proactive commitments can do things that legal scholars can only dream of, and in these times of crisis, such actions are needed more than ever.

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1

COMPETING CONTINUITIES: WHAT ROLE FOR THE PRESUMPTION OF CONTINUITY IN THE CLAIM TO CONTINUED STATEHOOD OF SMALL ISLAND STATES?

MICHEL ROULEAU-DICK*

While statehood is a central concept of international law, an unambiguous definition of it has so far remained elusive. The unprecedented situation of small island nations threatened by the rise in sea levels has created a novel angle of approach to statehood by challenging the necessity of a territory and population for a state to exist. Legal scholars have identified several elements of state practice and rely heavily on the existence of a strong presumption of continuity of existing states in international law to support a claim to continued statehood beyond the loss of its physical indicia (ie population, territory).

This article delves deeper into the subject by looking at the presumption of continuity and its past, present and possible future uses in international law and state practice. Throughout this exercise, two competing doctrines of continuity are identified and discussed. One defines the presumption of continuity as that which can be described as a type of ratchet effect, preventing the loss of statehood in most limit cases. Alternatively, the sameness doctrine of continuity, rooted in the rich legal scholarship on state continuity, centres on assessing whether a state is the 'same' before and after internal or external changes such as revolutions or territorial changes. The need for this discussion, the relationship between the two doctrines and their respective applications to the context of low-lying island states are then examined.

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I INTRODUCTION

While theoretically striving for justice, legal frameworks are far from impervious to a wide array of external influences. This is particularly true of international law to the point that some might go so far as to question the relevance of even bothering to apply a doctrinal approach to its study, a fortiori in the context of a crisis like climate change. On the other hand, major crises tend to bring to light realities which otherwise lie far removed from public attention and climate change is no exception. A paradox highlighted by the transition to a climate-changed Earth is the fact that some of the states that have least benefited from and contributed the least to the production of greenhouse gases might be among the first victims of the Anthropocene.[1] Low-lying island states ('LLISs') are characterised by their low elevation above sea level and their insularity. This makes them particularly vulnerable to the rise in sea levels caused by climate change which may first render their territory uninhabitable and later result in its physical disappearance. For instance, Tuvalu's highest elevation point is only five metres.[2] Kiribati, the Marshall Islands and the Maldives are other examples of states for which climate change presents an existential threat, with Kiribati possibly becoming uninhabitable within the next 10 to 15 years.[3] As the complex problems faced by LLISs have garnered more attention, the question of the continued statehood of threatened states has been brought to the forefront of legal discussions on statehood. The reason for this lies in international law's traditional approach to statehood, which is closely linked to the existence of physical indicia in the form of population and territory.

Due to both the lack of a fully satisfactory definition of statehood and the novelty of the predicament of LLISs, international legal scholars have shown a considerable amount of creativity in attempting to dissipate some of the uncertainty relating to the continued statehood of an LLIS beyond the loss of its territory and population. Ultimately, the core of current discussions lies in determining whether statehood is flexible enough to accommodate a de-territorialised state.[4] Using elements of state practice and past legal scholarship, the current discussion seems to indicate that yes, the current framework of international law can indeed accommodate such a possibility.[5]

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1 See generally Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1–2) *Climate Law* 70, 81–3.

2 Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (Research Paper No PPLA/2011/04, Division of International Protection, United Nations High Commissioner of Refugees, May 2011) 1.

3 Ibid; Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) 11–12 [9.10]–[9.12] ('*Teitiota v New Zealand*'). The exact extent of the challenges faced by LLISs is closely tied to the local severity of climate change. The tropical Western Pacific Region has experienced sea level rise rates up to four times the global average between 1993 and 2009: Leonard A Nurse et al, 'Small Islands' in Vicente R Barros et al (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2014) 1613, 1619.

4 See generally Susannah Willcox, 'Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood' (2017) 30(1) *Leiden Journal of International Law* 117; Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2(3) *Climate Law* 345.

5 See below Part II(A).

The importance of this analysis cannot be downplayed. Accurate legal foresight is key to adopting the right approach to preventing harm to the threatened populations and ensuring their rights in a climate-changed world. Law usually tends to lag behind society, and even more so in relation to the physical world. Here, however, this does not have to be the case. Understanding the challenges to be addressed is one of the keys to mitigating harm and preventing worst-case scenarios from becoming reality. It is here that the present article will attempt to add to the current discussion.

There are different angles from which statehood can be approached and the case of LLISs is particularly complex due to the lack of unequivocal, authoritative guidance. No state has physically disappeared before, and any state practice or legal scholarship relates only indirectly to this novel situation.[6] This is perhaps why the idea of a 'fail-safe' for arguments on the question of continued statehood is so tempting. An existing principle in international law that could tip the scales in favour of continued statehood, should other arguments fail to convince, would provide certainty where there might otherwise be only speculation.

However, such reliance needs to be substantiated by an analysis of proportional strength; otherwise, it risks giving a false impression of solidity to the legal analysis. In the present context, this fail-safe has materialised using the principle known as the presumption of continuity. Currently interpreted as cementing the continued statehood of a small island state beyond the loss of physical indicia, this article challenges the position given to the presumption of continuity in legal scholarship by identifying and discussing two competing doctrines of continuity.

The article proceeds in four steps.

- First, the two doctrines of the presumption of continuity are outlined, as well as their respective position in legal scholarship.
- Secondly, examples of state practice commonly cited in relation to the study of continuity are discussed in context, and their respective implications for both doctrines of continuity are surveyed.
- Thirdly, the relationship of physical indicia with statehood and continuity is examined with the purpose of establishing the scope assigned to continuity by each doctrine.
- Lastly, the article addresses the relationship between the two doctrines of continuity, explores possible overlaps and determines which factors need to be considered if the concept of continuity is to remain applicable in support of the continued statehood of small island states.

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[6] Burkett (n 4) 354. See also United Nations High Commissioner for Refugees, 'Climate Change and Statelessness: An Overview', Submission to the Ad Hoc Working Group on Long-Term Cooperative Action, 15 May 2009 <https://www.refworld.org/docid/4a2d189d3.html>, archived at <https://perma.cc/RJA9-MXLP>.

II A Tale of Two Continuities

A *The Ratchet Effect*

By reviewing the current legal research on the statehood of small island states, one can gain a reasonably good understanding of the presumption of continuity, particularly its assumed application to the hypothetical case of a de-territorialised LLIS. Susannah Willcox has perhaps best encapsulated this doctrine of the presumption of continuity of existing states through the use of an analogy with a 'ratchet effect'.[7] According to Willcox, this 'ratchet effect' means 'the status of statehood, once achieved, is difficult to lose'.[8] Simple and effective, this formulation will be preferred in this article to designate the predominant use of the presumption of continuity in the context of the discussion on the future statehood of LLISs.

Concretely, according to this definition of continuity, an island state's statehood would not automatically be extinguished with the complete loss of its territory and population, even though these constitute the key physical elements of statehood according to its traditional definition.[9] The presumed flexibility of the notion of statehood and the existence of the presumption of continuity mean that statehood could allow the existence of a de-territorialised LLIS. James Crawford is often cited as supporting this assumption: 'there is a strong presumption against the extinction of States once firmly established'.[10]

This 'ratchet effect' doctrine of continuity has also been endorsed in mainstream scholarship, as reflected by its use in a report of a United Nations High Commissioner for Refugees ('UNHCR') expert panel on Climate Change and Displacement,[11] or more recently in the International Law Association Committee on International Law and Sea Level Rise's report.[12] This conception of continuity has also permeated through other areas of international law such as

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7 Willcox (n 4) 122.

8 Ibid.

9 See *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1 ('*Montevideo Convention*').

10 James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007) 715. This specific citation is widely used throughout literature to support a ratchet-like continuity: see, eg, Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer, 2014) 176; Nathan Jon Ross, 'Low-Lying States, Climate Change-Induced Relocation, and the Collective Right to Self-Determination' (PhD Thesis, Victoria University of Wellington, 2019) 153–4; Jacquelynn Kittel, 'The Global "Disappearing Act": How Island States Can Maintain Statehood in the Face of Disappearing Territory' [2014] (4) *Michigan State Law Review* 1207, 1248; Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14(2) *Melbourne Journal of International Law* 346, 362; Burkett (n 4) 354.

11 United Nations High Commissioner for Refugees, *Summary of Deliberations on Climate Change and Displacement* (Summary, April 2011) 2 <https://www.unhcr.org/4da2b5e19.pdf>, archived at <https://perma.cc/FG6S-HLL7>. Park, writing for the UNHCR, also mentions the existence of a 'strong presumption of continuity for established states': Park (n 2) 3.

12 Davor Vidas, David Freestone and Jane McAdam, *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill, 2019).

scholarship on the law of the sea.[13] An often cited study by Maxine Burkett on the possibility of LLISs continuing their existence as de-territorialised states also makes reference to Crawford's influential opus on the creation of states in international law to assert that there exists a 'strong presumption that favours the continuity and disfavours the extinction of an established state'.[14] Crawford in turn cites Krystyna Marek and her 'leading study'[15] as the source of this presumption. Marek's 1954 thesis, despite its venerable age, has retained its relevance to this day and her pioneering work on continuity remains influential in the study of state continuity and identity.[16]

In his 2019 thesis, Nathan Ross gives a predominant role to the presumption of continuity, read in conjunction with the right to self-determination, to argue for the continued statehood of LLISs beyond the loss of physical indicia.[17] Jane McAdam briefly mentions the presumption of continuity,[18] as do Rosemary Rayfuse and Emma Crawford who mention it as a relevant principle to the case of LLISs without further assessing its exact role.[19] Hence, it seems clear that while its role is perhaps not universally accepted as a ratchet,[20] it is not a stretch to state that the ratchet effect doctrine of continuity has gained widespread

[13] Kate Purcell, *Geographical Change and the Law of the Sea*, ed Catherine Redgwell and Roger O'Keefe (Oxford University Press, 2019) 229.

[14] Burkett (n 4) 354; Crawford (n 10) 701.

[15] Crawford (n 10) 669.

[16] Indeed, Wong (n 10) 347, for instance, starts his article with a quote from Krystyna Marek's thesis, and Abhimanyu George Jain dedicates four pages to addressing some of the arguments Marek raises. See Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50(1) *Stanford Journal of International Law* 1, 19–22. Lauri Mälksoo also cites Marek's 'ground-breaking study' and Crawford to support framing continuity as a presumption: Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003) 11, 209.

[17] Ross (n 10).

[18] Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 142.

[19] Rosemary Rayfuse and Emily Crawford, 'Climate Change, Sovereignty and Statehood' (Research Paper No 11/59, Sydney Law School, The University of Sydney, September 2011) 6. Interestingly, in her 2009 article 'W(h)ither Tuvalu? International Law and Disappearing States', Rayfuse does not mention the existence of a presumption of continuity: Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (Research Paper No 2009-9, Faculty of Law, University of New South Wales, 1 April 2009).

[20] Vidas, for instance, briefly discusses the presumption of continuity, hinting that the role it is given might not be representative of the actual scope of the principle: Vidas (n 1) 82. Jenny Grote Stoutenburg also alludes to the difference between the continuity vs succession conundrum and the situation of LLISs: Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill Nijhoff, 2015) 303.

acceptance in mainstream scholarship and is routinely mentioned throughout both literature and institutional reports on the question of continued statehood.[21]

Conceptualised as a type of ratchet, continuity has also been linked with the existence of a right to survival of states, as such a right is mentioned briefly by the International Court of Justice ('ICJ').[22] Ross, for instance, goes so far as to equate the said right to state survival with the presumption of continuity.[23] While tempting, this argument nevertheless faces a hurdle in the form of the ICJ's decision itself. As discussed by Jenny Stoutenburg,[24] the said right of every state to survival is carefully framed by the ICJ within the context of self-defence: '[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the *Charter*, when its survival is at stake'.[25] Taking into account the last part of the Court's statement limits the scope of application of the right of every state to survival and curtails its use as a synonym of state continuity. However, framing continuity in this particular manner does provide some insight as to how the presumption of continuity has been described as applying to the case of small island states. Furthermore, framing continuity as a right to survival broadens the scope of continuity beyond a mere 'slowing down' factor, potentially delaying the eventual demise of submerged states. Rather, theorised as a right to survival, the presumption of state continuity renders involuntary state death quasi-impossible. Such a conclusion, in light of the source of a right to survival and of the nature of state continuity as discussed in the present article, appears to be a somewhat ambitious interpretation of the presumption of continuity even if one adheres to the ratchet effect doctrine.[26] That the presumption of continuity might delay the loss of statehood seems to be a more representative conclusion deriving from the ratchet effect doctrine of continuity.

Overall, according to the ratchet effect understanding of continuity, states do not die easily. An LLIS could thus maintain its claim to statehood longer than what a strict assessment of statehood according to the minimum threshold contained in the *Montevideo Convention on the Rights and Duties of States* ('*Montevideo Convention*') definition would seem to permit prima facie. Despite

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[21] See, eg, Catherine Blanchard, 'Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise' (2016) 53 *Canadian Yearbook of International Law* 66, 78; Sumudu Atapattu, 'Climate Change: Disappearing States, Migration, and Challenges for International Law' (2014) 4(1) *Washington Journal of Environmental Law and Policy* 1, 20; Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?' (2016) 21(1) *Tilburg Law Review* 72, 81. See also Veronika Bílková who mentions the ubiquitous presence of the presumption of continuity in the debate on the continued statehood of LLISs: Veronika Bílková, 'A State without Territory?' (2016) 47 *Netherlands Yearbook of International Law* 19, 37–8.

[22] *Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion)* [1996] ICJ Rep 226, 263 [96] ('*Legality of Nuclear Weapons*').

[23] Ross (n 10) 134.

[24] Stoutenburg (n 20) 357–8.

[25] *Legality of Nuclear Weapons* (n 22) 263.

[26] For a discussion of the right to survival within the context of small island states, see Stoutenburg (n 20) 356–9.

some notable exceptions,[27] most authors simply mention the existence of a presumption of continuity framed as a ratchet effect as a kind of fail-safe for the authors' other arguments supporting the continued statehood of a de-territorialised LLIS. The application of the presumption of continuity is largely framed as a self-evident fact. A closer look at its root in state practice and past legal scholarship unveils a different picture of what the principle does and does not seem to include. Researching state continuity beyond small island states reveals a rich body of scholarship which is only cited piecemeal, sometimes perfunctorily, throughout the discussion of the principle in the context of climate change. How then is continuity defined within that more general context?

B *A Sameness Assessment*

While continuity is usually discussed in relation to particular cases, one recurring idea is that of 'sameness'[28] rather than the quasi-irreversibility of statehood (once attained) argued by the ratchet effect doctrine. The question is not if continuity exists; such a principle is necessary to international law and is a logical and essential counterpart to state extinction and succession.[29] Rather, this article argues that the current reading of state continuity within the context of small island states does not correspond to how it has been defined and applied prior to and in parallel with this discussion. Namely, the presumption of continuity emerged as a helpful rule to assess the continued existence of the same state at different points in time in order to dissipate uncertainty about the identity of the current state in relation to a putative prior version. The existence of a presumption of continuity simply means that internal changes in a state need to be sufficiently substantial to trigger the law on state succession and that succession should thus be presumed against. The aim of such a presumption is to increase stability and reduce uncertainty. This is perhaps best explained by Crawford who states that 'the notion of continuity is well established and, given the State/government distinction, is even logically required'.[30]

Ineta Ziemele explains further:

> Continuity becomes an issue when States are subject to significant changes so that the question as to their continuity, extinction or identity arises. In a normal setting, the need to argue the continuity of States does not come up, although the relevant rules and principles which regulate statehood still apply.[31]

Thus, it seems that continuity is the 'by default' state of things. If this were not the case, a new state could potentially arise from any internal change, triggering the law on state succession and thus creating considerable instability. The

[27] See especially Ross (n 10) 127–67. Wong (n 10) 362–4 also addresses the assumed role of continuity as a ratchet but nevertheless fails to take into account the possibility raised in the present article of continuity instead being applied as a sameness assessment.

[28] Crawford (n 10) 667–8; Ineta Ziemele, 'Acceptance of a Claim for State Continuity: A Question of International Law and Its Consequences' [2016] (9) *Juridiskā zinātne / Law* 39, 43. See also Mälksoo (n 16) 6.

[29] See, eg, Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz, 1954) 6–7.

[30] Crawford (n 10) 668. Crawford also revealingly characterises succession in relation to discontinuity, illustrating the complementary nature of continuity and succession.

[31] Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers, 2005) 118 ('*State Continuity and Nationality*').

presumption of continuity, according to the sameness assessment doctrine, consists primarily of a presumption against the creation of a new state where a state already exists,[32] notwithstanding cases of self-determination such as the inception of a state through secession. In that latter case, even if a province were to secede from an existing state, the presumption of continuity and the assessment of sameness it implies mean that the 'parent' state remains the same state and maintains the same identity prior to and following the secession or change in territory.[33] The case of Bangladesh seceding from Pakistan provides a good example of such a case with the presumption of state continuity meaning here that Pakistan's identity was not affected by the secession.[34]

In contrast with Willcox's statement that 'the status of statehood, once achieved, is difficult to lose',[35] the sameness doctrine of continuity instead centres on the identity of the state rather than on its claim to statehood.[36] In fact, it has been argued that continuity is simply the dynamic dimension of state identity, effectively rendering the two notions inseparable.[37] While the relationship between the two concepts has generated a substantial amount of literature, it is worth noting that the different approaches to the distinction *vel non* between identity and continuity, regardless of their stance on the issue, all imply a 'sameness assessment' definition of continuity, addressing continuity downstream from its characterisation as either a ratchet effect or sameness assessment.[38]

Continuity can thus be said to be dependent on the existence of its subject, not constitutive of it. Moreover, at least within this specific understanding, continuity could not logically exist without its subject. Assessing the statehood of an entity must thus be different from assessing its continuity since doing otherwise would result in circular thinking. Cases not falling within the scope of continuity should then be assessed through the lens of succession and extinction, the logical alternative to continuity. In fact, this is how continuity is usually construed: as the opposite to extinction and succession.[39] The presumption of state continuity, defined as a sameness assessment, appears to assign a narrower scope to the principle as opposed to the ratchet effect doctrine which assumes continuity as a general principle effectively stopping states from going extinct.

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32 Heather Alexander and Jonathan Simon, 'Sinking into Statelessness' (2014) 19(1–2) *Tilburg Law Review* 20, 23–4.

33 That is, unless the change is so substantial that the parent state is found to be extinct, in which case the newly created state becomes the successor, which happened following the USSR's demise.

34 Ziemele, *State Continuity and Nationality* (n 31) 128.

35 Willcox (n 4) 122.

36 Crawford (n 10) 669.

37 Marek (n 29) 6.

38 For a critical review of the different attempts at defining the relationship between continuity and identity, see Anne Østrup, 'Conceptions of State Identity and Continuity in Contemporary International Legal Scholarship' (Conference Paper No 11/2015, European Society of International Law Research Forum, 14–15 May 2015). The relativist or deconstructivist approaches to the identity/continuity dichotomy identified by Østrup either question their value or outrightly dismiss these concepts as irrelevant.

39 See, eg, Mälksoo (n 16) 10.

III Contrasting Views

A *Origin Story*

While there are clearly differences between the two definitions of continuity discussed above, a possible reason why this contrast has not been brought to light earlier may be the lack of contextualisation of the presumption of continuity in its ratchet effect iteration.

As discussed earlier, most scholars take into account the presumption of continuity in their assessment of LLISs' continued statehood, but do not discuss its substance or scope.[40] An exception to this rule is Abhimanyu George Jain, who instead analyses the impact of the loss of territory on the statehood of small island states.[41] Discussing state continuity, Jain correctly contextualises Marek's and Crawford's respective analyses of continuity by acknowledging their reservations about continuity as a general ratchet against state extinction,[42] while these exact sources are used widely as the starting point of the proponents of the ratchet effect. However, taken out of context, it is easy to see how the ratchet effect doctrine took root in the current debate on LLISs' continued statehood and eventually gained a life of its own.

Notably, the use of the presumption of continuity is firmly rooted in a nation-state centred conception of international law, relying on elements of state practice and literature to substantiate its applicability even if this has so far been almost exclusively in the context of the ratchet effect doctrine. The role or scope of a ratchet effect under a different account of statehood is discussed by Willcox,[43] but there is no doubt such ratchet effect is first and foremost linked with the minimum threshold account of statehood associated with the *Montevideo Convention* criteria.[44] While the concept of the nation-state has been problematised,[45] it still provides the foundation upon which the future statehood of LLISs is discussed and thus the context within which both doctrines of continuity should be assessed.

B *State Practice*

1 *Fragile States*

Whether framed as a general ratchet or as a sameness assessment, the arguments found to support either doctrine primarily hinge on examples of past state practice. Major changes in the internal components of states are particularly relevant, as they are key to the putative application of the principle to the case of small island states. Exactly which factors are at play when a state 'continues' instead of going extinct is central to defining the scope and application of the presumption of continuity.

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[40] See above Part II(A).
[41] Jain (n 16).
[42] Ibid 27–8, citing Marek (n 29) 7 and Crawford (n 10) 46, 701–3, 715.
[43] See generally Willcox (n 4).
[44] Ibid 135.
[45] See, eg, Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) 53–97.

Fragile states (also known as 'failed states', although this term has been criticised as inadequate and unhelpful)[46] are states that fail to fulfil the requirement for an effective government. Somalia is perhaps the best example of such a fragile state, often cited as the '*locus classicus* of State failure'.[47] It lacked a central government from 1991 to 2004 and, despite more than a decade of major internal turmoil, Somalia's statehood was not challenged, maintaining its membership in the United Nations even while leaving its seat vacant from 1991 to 2000.[48] While this example is used by proponents of the ratchet effect doctrine, who cite it, rightfully, as a case of continuity,[49] the continued existence of Somalia appears to be explained somewhat more convincingly by a sameness assessment, where the population and territory provided an empirical basis for a continuation of the status quo of statehood. Crawford supports this assessment of the facts, pointing to the existence of territory and people as compensating for the 'virtual absence of a central government' in the case of Somalia.[50]

While the case of fragile states does imply the presumption of continuity, since Somalia remained Somalia despite the major internal changes, the statehood of Somalia itself was never challenged. Why exactly this was so may be open to debate, but a combination of different factors is probable. Crawford, discussing Somalia's particular situation, categorises it as a 'cris[i]s of government', thus not affecting the statehood of entities facing similar internal turmoil.[51] The simple absurdity and complete unacceptability of the alternative, namely, the creation of terra nullius or of a 'sovereignty vacuum'[52] due to the absence of a competing claim to sovereignty over Somalia's territory, is also to be taken into account. As Christian Tomuschat cleverly summarises, '[f]or the international community, it is much simpler to carry a man half-dead with it, contending that he is well and alive, instead of issuing a death certificate, which inevitably gives rise to struggles about inheritance.'[53]

Linking back to the *Montevideo Convention* definition of statehood, cases of fragile states maintaining unchallenged statehood seem rooted more in their presumed sovereignty over a territory and population than in a presumption of continuity. This is not to say that the presumption of continuity does not play a part, but simply that in its embodiment of the status quo, even conceptualised as a ratchet effect, the presumption of continuity's putative role is arguably dwarfed by the existence of a territory and population. These physical components would have been left in a legal vacuum had Somalia's statehood been extinguished.

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[46] Alejandra Torres Camprubí, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff, 2016) 212–14.

[47] Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers, 2004) vol 50, 65.

[48] Ibid 71. See also Ross (n 10) 150–1.

[49] Ross (n 10) 150–1.

[50] Crawford (n 10) 223.

[51] Ibid 721–2.

[52] Mariano J Aznar-Gómez, 'The Extinction of States' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C Wellens* (Martinus Nijhoff Publishers, 2012) vol 5, 25, 26. See also Mälksoo (n 16) 203, qualifying the idea of creating terra nullius as 'obviously absurd' in the context of his analysis of the Baltic states' claim to continuity.

[53] Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (Martinus Nijhoff Publishers, 2001) 111 [30].

Crawford's further analysis of the situation seems to again confirm the weight of physical indicia in supporting maintained statehood:

> In effect whereas in some States (eg Somalia) the existence of territory and people have compensated for the virtual absence of a central government, in the case of the Vatican City the strength and influence of the government — the Holy See — have compensated for a tiny territory and the lack of a permanent population.[54]

This assumption is also emphasised by Marek: 'A State, temporarily deprived of its organs, can be conceived; but the idea of organs deprived of their State is simply inconceivable.'[55] Marek then goes on to specify that this 'would be the case of a State passing through a temporary period of anarchy: such would also be the case of post-war Germany, in the period following her military defeat'.[56]

Ultimately, the uncontested statehood of a fragile state is reliant on the assumption that there will be a government at some point, that the interruption is temporary due to the existence of physical indicia.[57] Giving all the credit to the presumption of continuity overestimates its scope of application by ignoring the unacceptability of the alternative to continued existence, and the fundamental difference between interruptions in government and the complete loss of physical indicia.

2 *Baltic States*

The case of the Baltic states is perhaps the most extreme application of state continuity yet in international law. Invaded by Joseph Stalin in 1940, Estonia, Latvia and Lithuania effectively ceased to exist for fifty years until the collapse of the Soviet Union in the early 1990s allowed the Baltic states to regain their independence.[58] Core to their claim to statehood and identity was the idea that these were the same states that were invaded and suppressed by Stalin in 1940, meaning that their existence had merely been interrupted.[59] By reinstating their suspended constitutions and emphasising de jure continuity, the Baltic states aimed to strengthen and emphasise their claim to continuity with the pre-1940 Baltic states.[60]

Key to the Baltic states' claim was also the existence of a clear, identifiable territory and population which provided an unassailable physical anchor to their claim to continuity.[61] Although it can be mostly implicit, the sameness

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[54] Crawford (n 10) 223. The Vatican City's statehood can also be framed as resting on the symbolic fulfilment of the physical criteria of statehood. This hypothesis is supported by the original intention of the Lateran pacts, in which Italy agreed to grant the Holy See sovereignty over a territory in order to be politically sovereign. Granting sovereignty over the Vatican City was agreed to be sufficient in substance to provide a physical basis for statehood: see Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996) 411.

[55] Marek (n 29) 89 (citations omitted).

[56] Ibid.

[57] Wong (n 10) 366–7. Matthew CR Craven also credits the absence of a putative successor state to the reluctance of other states to withdraw recognition: Matthew CR Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9(1) *European Journal of International Law* 142, 159.

[58] Ziemele, *State Continuity and Nationality* (n 31) 18–41.

[59] Ibid 41.

[60] Ibid.

[61] See ibid 129.

assessment doctrine of continuity consists of evaluating the 'sameness' of an entity with the assumption that the physical dimension of statehood provides a factual anchor to the assessment:

> [W]e assume continuity of our States even as their governments, constitutions, territories and populations change. International law is based on this assumption. It embodies a fundamental distinction between State continuity and State succession: that is to say, between cases where the 'same' State can be said to continue to exist despite sometimes drastic changes in its government, its territory or its people and cases where one State has replaced another *with respect to a certain territory and people*.[62]

Marek, writing in 1954, already hints at the possibility that the Baltic states might one day come back to life, due to the continued existence of their territory and peoples.[63] In her opinion, as long as the reasonable possibility of an '*ad integrum restitutio*' exists, it would be premature to assume the finality of the disappearance of the Baltic states.[64] She somehow prophetically states that '[it] would be a bold thing to assert to-day that the possibility of a restoration of the three Baltic States has finally vanished beyond all hope'.[65]

Also relevant to the case of the Baltic states is the illegality of their annexation to the Soviet Union in 1940. In accordance with the principle *ex injuria jus non oritur*, acknowledging the formal extinction of the Baltic states would have meant giving normative weight to an illegal act of annexation. This approach was explicitly followed by the United States, for instance, and has been reaffirmed by the Baltic states.[66]

The relevance of the Baltic states' continuity to the present discussion lies in two elements. First is the sheer length of the interruption in their existence. Most cases of continuity address cases of major internal changes.[67] Claiming continuity after several decades of annexation provides an extreme example of how far continuity can be stretched, although other elements of the Baltic states' situation certainly played a crucial role in allowing the reinstatement of their existence as mentioned above. Second is the value of this case as an illustration of the sameness doctrine of continuity. Contrary to the competing ratchet effect, which is mostly concerned with the statehood of the entity in question, continuity within the context of the Baltic states was more a problem of identity than status.[68] Russia's position that the Baltic states joined the Soviet Union voluntarily in 1940 means that it denied being bound by any pre-1940 treaties with the Baltic states, not that the Baltic states did not enjoy statehood in 1991; Russia explicitly recognised Estonia's sovereignty in 1991.[69] Ultimately, the disagreement between the Russian Federation and the Baltic states lies in the

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[62] Crawford (n 10) 667–8 (emphasis added) (citations omitted).

[63] Marek (n 29) 415–16.

[64] Even if, in practice, the length of the Soviet era in the Baltic states has resulted in the impossibility of a full restitutio in integrum: see Mälksoo (n 16) 289.

[65] Marek (n 29) 416. This was indeed one of the core elements of the claim to continuity made by Estonia in 1990; for instance, see Ziemele, *State Continuity and Nationality* (n 31) 27–8.

[66] Marek (n 29) 399; Ziemele, *State Continuity and Nationality* (n 31) 27–8.

[67] Crawford (n 10) 667–8.

[68] Status here refers to the statehood (or not) of the entity discussed.

[69] Markku Suksi, *On the Constitutional Features of Estonia* (Åbo, 1999) 22; Mälksoo (n 16) 66–9.

former characterising the latter's reinstatements as cases of succession rather than continuity.

3 *Governments in Exile*

Governments in exile have also been cited to support the possibility for a small island state to continue to exist beyond the loss of physical indicia.[70] Indeed, they seem to provide a precedent for statehood without a territory and population, possibly evidence of a ratchet effect at work in preventing their demise. However, such an interpretation of the continued existence of governments in exile overlooks other principles at play in addition to mischaracterising their status.

First, governments in exile do not exist independently from physical indicia. Underlying the existence of any government in exile is the idea that the said government will eventually return to its territory and population, as well as to its existence as the pre-existing state that it temporarily represents from abroad.[71] Indeed, the legal personality of the government in exile is not independent from the state it claims to represent.[72] The second element that weighs heavily is the legal position of the insitu authority: 'governments in exile will, as a rule, be established, and more importantly will be recognised as such only if the belligerent occupation is the result of the illegal use of force by the occupant'.[73] The principle of *ex injuria jus non oritur*, overriding the principle of *ex factis jus oritur*, again plays a sizeable role in ensuring that the claim of governments in exile, displaced by illegal occupation, is recognised as legitimate by other members of the international community. Not doing so would effectively result in giving normative weight to a violation of a *jus cogens* norm, accepting the consequence of such violation as legal.

Hence, while precedents of governments in exile do indeed provide interesting insights as to how a de-territorialised LLIS could function in practice, several intrinsic differences mean that such cases bear limited relevance for the purpose of defining the presumption of continuity. For instance, even if a ratchet effect had been at play in sustaining the existence of the Belgian government exiled in London during the Second World War, the other elements discussed above are likely to have been decisive in ensuring Belgium's continued existence. Conversely, as there was little doubt that Belgium remained Belgium during this time, the sameness doctrine simply emphasises such a situation as one of continuity, rather than succession.[74] While not completely irrelevant in such contexts, continuity can hardly be construed as a primary element in assessing the status of governments in exile.

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[70] Burkett (n 4) 356–7; Ross (n 10) 151–3; Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' (Research Paper No 2010-2, Faculty of Law, University of New South Wales, 21 January 2010) 9 ('Disappearing States').

[71] Mälksoo poetically describes such situations as involving 'sleeping states': Mälksoo (n 16) 300.

[72] Stoutenburg (n 20) 285.

[73] Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford University Press, 1998) 219.

[74] Crawford interprets cases of governments in exile as further illustrations of the necessary distinction between government and state: Crawford (n 10) 34.

4 *Voluntary Extinction and 'Resurrection': Syria*

A unique case of what could only be described as 'continuity of identity without continuity', Syria's voluntary extinction to become part of the short-lived United Arab Republic ('UAR') between 1958 and 1961 (and its subsequent 'resurrection') presents a perplexing situation.[75] Syria did not claim continuity with its pre-1958 self, but nevertheless regained its identity with no major hurdles or opposition from the international community.[76] Described by Ziemele as the sole case of a distinction between identity and continuity,[77] this particular case may seem to present a challenge to the sameness assessment doctrine of continuity. Indeed, if this is how the presumption of continuity applies, why did Syria not claim continuity with its former self?

One could interpret this as a case of succession, since Syria's 1961 iteration inherited some of the UAR's obligations.[78] This, however, is not entirely satisfactory, as succession implies a change in identity, and Syria's identity prior to and after its absorption into the UAR was accepted as the same by the international community.[79] Perhaps a more adequate explanation is that, while not described as such by Syria, the relationship between pre-1958 and post-1961 Syria was simply a case of de facto continuity, a return to the previous status quo. Syria's avoidance of claiming continuity could be explained by its desire to remain bound by the treaties it ratified while being a part of the UAR.[80] Furthermore, due to the short length of the interruption in Syria's identity, it might have been easier to simply reclaim its identity to avoid triggering a thorny discussion on continuity or succession. The voluntary nature of Syria's temporary dissolution also likely came into play: claiming continuity would have created a rather awkward situation as it could have been understood to imply the complete renouncement of obligations it had committed to while a part of the UAR.

While this might not succeed in dissipating the uncertainty relating to the exact nature of Syria's transitions in 1958 and 1961, describing the situation as a case of de facto continuity seems to be the most plausible characterisation, since categorising this case as one of succession faces the major obstacle of Syria's unchallenged claim to effectively continued (though interrupted) identity. As the presumption of continuity can be formulated as the manifestation of the status quo, one might question whether there is even a need to make a legal claim to continuity for it to apply, as it is the default state of things, a presumption. By avoiding the specific wording of continuity, Syria simply sidestepped categorising the situation in order to allow for more flexibility while still

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[75] Syria's peculiar situation can be contrasted with post-war Austria's successful claim to continuity with pre-Anschluss Austria: see Robert E Clute, *The International Legal Status of Austria 1938–1955* (Martinus Nijhoff, 1962).

[76] Ziemele, *State Continuity and Nationality* (n 31) 120–1.

[77] Ibid 128.

[78] See Konrad G Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer Law International, 2001) vol 38, 58–61.

[79] Syria's membership to the United Nations as an original member was simply resumed: Ziemele, *State Continuity and Nationality* (n 31) 121.

[80] See generally ibid. The intention to de-legitimise the former regime's action could have also played a part in Syria's exit from the UAR, being the result of a coup d'état.

implicitly claiming continuity through its 'resurrection' as Syria and not exclusively as a new successor state to the UAR. Additionally, the continuity in nationality observed after the re-emergence of Syria, in line with the presumption of continuity of nationality mentioned by Ziemele,[81] also helps frame the Syrian case as one of continuity rather than succession.

5 *Failed Sameness? Socialist Federal Republic of Yugoslavia ≠ Federal Republic of Yugoslavia*

One of the grounds used to substantiate the ratchet effect doctrine of continuity is the rarity of state extinction in the modern era. In fact, within both the sameness and ratchet effect doctrines, this outcome is framed as implausible since the presumption of continuity weighs heavily against involuntary extinction. There is, however, at least one case of extinction despite a claim to continuity. The dissolution of the Socialist Federal Republic of Yugoslavia ('SFRY') in the early 1990s, due to major internal turmoil and the declarations of independence of four of its federal units, is a case of extinction and it does present relevant insights as to the nature of the presumption of continuity. The SFRY was eventually declared extinct by the Arbitration Commission of the Peace Conference on Yugoslavia,[82] despite the Federal Republic of Yugoslavia's ('FRY') attempt to claim continuity.[83]

This involuntary dissolution of the SFRY would appear to be somewhat puzzling in light of the ratchet effect doctrine. While Willcox, for example, does not claim that statehood is impossible to lose, the framing of continuity as a ratchet implies that statehood is 'difficult to lose'.[84] Willcox also cites Vaughan Lowe as saying that the 'road to statehood is a one-way street',[85] implying that although it might not be an absolute principle, it is as close as can be. How then does an existing state go extinct despite the existence of an entity claiming continuity if there is indeed a ratchet effect at work?

The sameness assessment doctrine provides some explanation as to why the FRY failed in its claim to continuity with the SFRY. Relevant to such a sameness assessment is the fact that the FRY was constituted of only two of the six federal entities formerly constituting the SFRY: Serbia and Montenegro.[86] The 'core' of the SFRY could thus hardly be said to be present to ensure continuity, a reality reflected by the lack of constitutional continuity with the FRY.[87] This, in conjunction with the absence of a devolution agreement to support its claim to continuity as well as the opposition of other former federal

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81 Ibid 248–50.

82 The Commission concluded 'that the process of dissolution of the SFRY referred to in Opinion No 1 of 29 November 1991 is now complete and that the SFRY no longer exists': see Maurizio Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31(6) *International Legal Materials* 1488, 1523.

83 Stoutenburg (n 20) 280.

84 Willcox (n 4) 122.

85 Ibid, quoting Vaughan Lowe, *International Law* (Oxford University Press, 2007) 165.

86 Hubert Beemelmans, 'State Succession in International Law: Remarks on Recent Theory and State Praxis' (1997) 15(1) *Boston University International Law Journal* 71, 77.

87 See generally Crawford (n 10) 671.

entities of the SFRY, seems to have weighed against continuity.[88] Additionally, the grave humanitarian situation undoubtedly affected the FRY's claim to continuity with the SFRY, prompting members of the international community to deny the former's claim.[89] This denial of the FRY's claim to continuity may have been the decisive factor in ensuring that the SFRY did not survive its dismemberment.[90]

Exactly which element proved to be the tipping point is very much open to discussion and this remains a contentious event in terms of its legal implications. However, regardless of which element tipped the scale, the presumption of continuity framed as a ratchet fails to present a convincing explanation as to why the SFRY was dissolved despite the existence of a putative 'continuing entity' in the form of the FRY.[91] Tellingly, the fact that the presumption of continuity is conceptualised as a presumption does imply that it is, by nature, not absolute. The case of the SFRY seems to be one where powerful forces weighed heavily enough to reverse the presumption of continuity of existing states which then resulted in the simple, involuntary and irreversible death of the SFRY. Besides its implications for continuity, this failed claim highlights two elements which might need to be factored in when assessing a claim to continued statehood from a small island state: first, the role played by ethical or moral considerations, and second, the weight of recognition in assessing claims to continuity.

C *The Role of Recognition*

One of the fundamental differences between the ratchet effect and the sameness doctrine is the role they respectively afford to recognition. McAdam, for instance, argues that continuity and statehood in the case of LLISs will eventually become subjective, resting upon the claim of the state in question to continued existence, which other states would simply defer to.[92] A ratchet effect could thus be assumed to prevent the loss of statehood as long as other states recognise the statehood of the concerned entity. Recognition has its limits, however. Endless debates about recognition as being either constitutive or declaratory highlight some of the problems implicit in its use as the decisive element in assessing a legal question.

The argument that a de-territorialised state could continue to survive based on the existence of a ratchet effect ends up relying on circular thinking, since the effect remains largely dependent on its being buttressed by recognition by the international community, which plays a constitutive role compensating for the loss of physical indicia. The argument essentially goes as follows: the ratchet effect would prevent a de-territorialised LLIS from losing its statehood, since the international community would recognise the state's continued statehood, based on the existence of said ratchet effect. If, as discussed in the present article, the

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88 Beemelmans (n 86) 71, 82.

89 Stoutenburg (n 20) 303.

90 Crawford (n 10) 670.

91 This is particularly relevant in light of the ubiquitous references to Crawford's words that a 'State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three', a statement usually cited by proponents of the ratchet effect as reflecting the quasi-immortality of states: see ibid 700.

92 McAdam, 'Disappearing States' (n 70) 9, citing Crawford (n 10) 668.

ratchet effect's legal foundations were to be challenged, would recognition then still suffice? Conversely, were recognition to be partial or contested, what would then be the status of the de-territorialised LLIS? Similarly, McAdam's assessment that 'the presumption of continuity will apply until States no longer recognise the government [of the state]'[93] ends up facing the same problem of reliance on a circular argument, ultimately being dependent on other states effectively recognising the existence of a ratchet effect operating even beyond the loss of physical indicia.

In contrast, the sameness doctrine implies a different role for recognition, limiting its relevance to a confirmation *vel non* of the sameness of the state in question at different points in time. In cases of continuity, like the re-emergence of the Baltic states, recognition can provide a useful tool for assuming continued existence, or its absence, as in the case of the FRY. Marek or Ziemele's opinion that recognition operates within existing norms seems to best define the role of recognition in cases of state continuity,[94] following the sameness doctrine. While it might not alone and of itself ensure continuity, recognition can provide a useful tool for assessing sameness, and if positive, 'facilitate the concrete manifestation of such survival'.[95] Accordingly, if one follows the sameness doctrine, the role of recognition is limited to the scope of the presumption of continuity. It would thus be unlikely, if not impossible, for recognition alone to supersede the complete loss of physical indicia for instance, as this could be said to fall outside of the scope of the sameness doctrine of continuity.[96] Going further, Heather Alexander and Jonathan Simon state:

> If recognition were constitutively sufficient for statehood, then if the community of nations, for whatever reason, decided to recognise a boiled egg as a state, then that boiled egg would be a state. But this is absurd. It follows that no amount of recognition extended to some entity could guarantee that that entity were in fact a state.[97]

It seems safe to say that while recognition can, within certain boundaries, provide a useful tool for assessing claims of continuity, it cannot create or sustain statehood out of thin air, nor can the presumption of continuity, even when framed as a ratchet effect. Underlying the inherent limitations of recognition as a tool for assessing continued statehood is the weight of statehood's physical indicia. Indeed, even if states are legal creations, their existence and relevance in a world largely populated by international organisations, transnational corporations and NGOs remain deeply rooted in the physical reality of their existence. Although the proponents of the de-territorialised state option portray it as largely obsolete, the need for physical indicia is very much at the core of the legal fiction of the state.

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[93] McAdam, 'Disappearing States' (n 70) 9.
[94] Marek (n 29) 160–1; Ziemele, *State Continuity and Nationality* (n 31) 126.
[95] Marek (n 29) 160.
[96] See below Part III(D)(1).
[97] Alexander and Simon (n 32) 24.

D *Scope(s) of Application*

The physical elements of statehood are key to setting tentative boundaries to the scope of the concept of continuity, at least if conceptualised as a sameness assessment. Implicit to the notion of 'sameness' is the existence (or not) of a common core upon which that sameness can be assessed,[98] an extra-legal anchor that exists beyond the legal obligations and relationships of the state, a unique identity.[99] It is inherent to cases where questions of continuity arise that this core has gone through various changes or faced different challenges, but this core of population and territory seems to be an implicit requirement to apply continuity (or succession for that matter).[100] Derek Wong, for instance, implicitly acknowledges this:

> Difficult issues would also arise where a government is able to exercise effective control, loses control and subsequently regains it. Without the presumption of continuity, a state could have periods of extinction and revival, followed by extinction.[101]

By effectively acting as a presumption against the creation of a new state, the presumption of continuity ensures that this does not happen. The example of the Baltic states discussed above provides an excellent example of the relevance of such a core upon which continuity can be assessed.[102] Post-war Austria's claim to continuity with pre-Anschluss Austria also highlights the relevance of resting such a claim on the similarity in territory and population.[103]

The ratchet doctrine of continuity instead adopts a broader approach to the issue. While not necessarily constructed so as to turn states into immortal creatures, it assumes state death to be highly unlikely and, to a certain extent, differentiates between state inception and continued statehood.[104] As discussed above, under this understanding of continuity, recognition gains a quasi-constitutive weight. The implicit outer boundaries of the ratchet effect would thus be defined by the (de-)recognition of the de-territorialised state at an undetermined time after the physical indicia of statehood are no longer fulfilled. However, this shift towards recognition fails to engage fully with the role of the physical foundations of statehood[105] and risks overlooking the role of the latter in the application of the presumption of continuity to the case of small island states. Moreover, the ratchet effect doctrine relies on the presumption of continuity to argue the obsolescence of the orthodox definition of statehood. This, however, mischaracterises the relationship between physical indicia, statehood and continuity.

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[98] Crawford (n 10) 671. This concept of an essential core or nucleus is already present in William Edward Hall's analysis of the role of territory in matters of continuity and identity: William Edward Hall, *A Treatise on International Law* (Clarendon Press, 1890) 18–19.

[99] Craven (n 57) 160.

[100] Crawford (n 10) 667–8.

[101] Wong (n 10) 364.

[102] See above Part III(B)(2).

[103] Clute (n 75) 109.

[104] See, eg, Ross (n 10) 242.

[105] Willcox instead opts for an alternative approach to defining what a state is: Willcox (n 4) 127–32.

1 *Physical Indicia and the Minimum Threshold Account of Statehood*

The traditional definition of the state is found in the 1933 *Montevideo Convention on the Rights and Duties of States*, and is usually taken as a starting point to discuss the continued statehood of small island states.[106] Inadequate and heavily criticised for its failure to provide a workable definition,[107] the popularity of the *Montevideo Convention* definition and its generally accepted status as representative of customary law nevertheless make it hard to dismiss.[108] Indeed, were it completely and thoroughly outdated, international law would have certainly moved on. Rather, it seems more plausible that while the *Montevideo Convention* fails to provide a satisfactory definition, it nonetheless sets a minimum standard that allows enough flexibility for it to be favoured by states.[109] Although it fails at clarifying certain limit cases, its minimum threshold still provides a basic outline of which criteria a state is expected to fulfil to be a member of the club.[110] Rather than characterising it as a comprehensive and watertight definition,[111] one can still extract significance from some of its elements by linking it with what is generally considered the root of states' existence and legitimacy: population and territory. By focusing primarily on what the *Montevideo Convention* definition fails to do, it is easy to overlook what it does succeed in doing: providing a minimum threshold, regardless of how unhelpful it is in clarifying certain unclear cases.[112]

Arguably, part of the relevance of the *Montevideo Convention* definition lies in its reflecting customary international law and its statement that the existence of a state is rooted in fact.[113] Beyond the ad nauseam references to the Peace of Westphalia as the watershed moment of the sovereign state's domination on the international level, it remains that the territoriality of the state is at the core of its victory over its competitors during the centuries that led to its eventual triumph.[114] While the monopoly of states on international lawmaking has since eroded, one can hardly declare states as irrelevant. Borders and domestic legal orders remain central to international governance; the recent fight against COVID-19 is only the latest example of borders being more than meaningless

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[106] Wong (n 10) 353. See also Mälksoo (n 16) 41.

[107] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 403; Wong (n 10) 354.

[108] David Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7th ed, 2010) 92; Mälksoo (n 16) 13.

[109] Crawford (n 10) 45.

[110] Jan Klabbers, *International Law* (Cambridge University Press, 2013) 73.

[111] The fact that it is not is used as the basis for the complete dismissal of the definition. This approach overlooks the continuing position of the *Montevideo Convention* definition in international law, regardless of its well-known and thoroughly discussed flaws. The fact that such a supposedly 'bad' definition still holds a predominant position testifies to the existence of at least some relevant elements among the outdated requirements. Its ubiquitous presence in legal scholarship emphasises further that fact: see, eg, Bílková (n 21) 43.

[112] This indeed seems to be the consequence of a minimum threshold set too low; it fails to reach the theoretical desired threshold of an effective definition, which could clarify any case of disputed statehood.

[113] Interestingly, art 1 of the *Montevideo Convention* was adopted with very little debate, in stark contrast with the attempts at defining the state that were to follow: see Grant (n 107) 416.

[114] Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton University Press, 1994) 151–80.

lines on a map. States are legal fictions, but only to a certain extent; they retain a firm grasp on the physical world even today, regardless of how much some want to believe that the sovereign state is dead.

Essentially, the core of the discussion on continuity lies in its relationship with physical facts. Can the presumption of continuity supersede the factual disappearance of some or all the components of a state as the ratchet doctrine seems to imply? Were this to be the preferred understanding of continuity, it would effectively frame the presumption of continuity as the hypothetical primary constitutive element of a de-territorialised state, in contrast with the sameness doctrine, which instead limits the scope of continuity to matters of identity. The weight given to the different elements of the *Montevideo Convention* definition is also crucial, as the non-fulfilment of one criterion might not have as wide-ranging consequences as others. Here, the case of fragile states is of particular importance, since it is cited by proponents of the ratchet effect doctrine as highlighting the flexibility of the notion of statehood and the possibility of retaining statehood despite the complete loss of one of its elements.[115] Although this instance of state practice is discussed above in the context of continuity, its implications as to the weight given to government as an element of statehood is relatively clear: a state does not necessarily need a government to continue existing, or, even to become a state.[116] Wong attributes this flexibility of the government criterion to the temporary nature of such events; the underlying assumption being that 'there will be a government at some point'.[117] Hence, this leeway does not mean that all *Montevideo Convention* criteria are to be assessed similarly.

Another element of state practice used to illustrate the non-necessity of territory and the strength of the presumption of continuity as a ratchet is the case of governments in exile.[118] However, this would be true if the governments in exile did not claim any territory, which is not the case. As discussed above in Part III(B)(3), the weight of *jus cogens* norms and of other principles of international law heavily diminishes the purported role played by the presumption of continuity. Consequently, the clear link between governments in exile with a defined population and the territory from which they are temporarily disconnected (as the notion of exile indeed implies) clearly negates the claim that their existence is independent from the existence of the physical indicia of statehood. The legal personality of a government in exile is not independent from the state it claims to be, and its existence removed from the state it represents is, in Marek's words, 'simply inconceivable'.[119]

Hence, for the purpose of defining a working scope to the presumption of continuity, the ratchet effect doctrine assumes a wide, general scope of application. The sameness doctrine instead limits the scope of continuity to the

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115 Ross (n 10) 150.

116 The case of Congo's hurried independence from Belgium in 1960 is particularly striking: see Crawford (n 10) 56–8. The fourth criterion listed in the *Montevideo Convention*, ie the capacity to enter into relation with other states, is not discussed in the context of this article as it is broadly considered outdated or irrelevant: at 61–2.

117 Wong (n 10) 366–7.

118 Ross (n 10) 151–3; Burkett (n 4) 356–7; McAdam, 'Disappearing States' (n 70) 10–11. See also McAdam, *Climate Change, Forced Migration and International Law* (n 1818) 135–8.

119 Marek (n 29) 89; Stoutenburg (n 20) 285.

clarification of the identity of a state, excluding matters of statehood and status. Hence, while the ratchet doctrine relegates the *Montevideo Convention* definition to an outdated fiction for the purpose of assessing continued statehood, these matters simply fall outside of the scope of continuity under the sameness doctrine. The reason for the latter is simple: in order to assess sameness, there needs to be an object to such assessment, and the existence of that object is defined under a different set of rules (arguably the *Montevideo Convention* definition) which overlaps with the sameness assessment only in so far as a similarity in a common core can contribute to assessing continued identity. Under this doctrine, the law on state continuity thus cannot supersede the normative framework applying to statehood, as these are different in nature and fundamentally distinct.

This is clearly reflected in the work of Professor Krystyna Marek, whose research has contributed substantially to the study of continuity and state identity.[120] While Marek discusses in depth the question of state continuity, she explicitly dismisses the idea that continuity could override the physical disappearance of a state:

> Traditional doctrine generally seeks to simplify the problem by affirming that a State becomes extinct with the disappearance of one of its so-called 'elements', — territory, population, legal order. With regard to the material elements of a State, the argument is so obvious as to be unnecessary. That a State would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (eg an island which would become submerged) can be taken for granted. But with regard to the real and decisive problem the traditional view leads nowhere. A State — it is said — ceases to exist when its legal order (or 'government' as is sometimes said) ceases to exist. But this is precisely the question: *when* does the legal order cease to exist? For there can be no doubt that it is around this question that the whole problem centres, and that it is precisely this question which is juridically relevant.[121]

The role of continuity is thus defined as a tool for clarifying the sameness of the state in light of changes in its internal elements, mainly its legal order, not as an immortality pill overriding the loss of territory and population. Marek simultaneously emphasises physical indicia as being essential to statehood while declaring unhelpful the inclusion of government as a criterion of statehood, presciently hinting at the case of so-called 'failed states'. Numerous cases of succession and continuity have arisen since Marek wrote in 1954,[122] but, while the body of state practice has grown, the problems and principles she describes are still relevant to the current discussion and help define the scope of continuity. Indeed, her opinion is still commonly discussed and cited in current scholarship.[123]

Marek's insights concerning the importance of material indicia are also pertinent to a key element of the ratchet effect doctrine, namely, the idea that the

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[120] Marek (n 29).

[121] Ibid 7 (citations omitted) (emphasis in original). This view in relation to continuity overriding the physical disappearance of state is supported by Craven (n 57) 159.

[122] See Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 695–700.

[123] See, eg, Wong (n 10); Jain (n 16); Mälksoo (n 16).

rules applying to the creation of states do not apply to the continuation of states.[124] In other words, the threshold required to become a member of the club of states is substantially different from that required to remain a member. This approach to statehood is illustrated by the considerable leeway afforded to existing states in the fulfilment of the traditional constitutive elements of statehood. While seemingly supported by state practice on the question,[125] this interpretation of state practice fails to fully consider the weight of physical indicia as an anchor for statehood. Indeed, while the government criterion is only applied loosely, if at all,[126] the need for physical indicia, both at inception and during a state's continued existence, cannot be dismissed easily. The lack of discussion on such a need in the literature prior to the case of LLISs is not due to the accessory nature of physical indicia, but rather to the self-evident nature of such a requirement for entities that remain fundamentally rooted in their exclusive claim to a piece of the earth's emerged mantle.

Whether at its birth or throughout its life, the need for a state to maintain at least a symbolic physical existence cannot be underestimated. Novelty indeed presents challenges to the interpretation of international law. However, the fact that the need for an element of statehood has always been taken for granted and thus left relatively undiscussed in this precise context does not automatically result in its being irrelevant and easily waived as a requirement for continued statehood. The implied leap required to conceptualise a state without a territory cannot be justified by the presumption of continuity alone. Rather, stretching statehood beyond territoriality represents such a fundamental shift that reliance on a relatively narrow principle such as the presumption of continuity, never framed as constitutive of statehood hitherto, appears both very optimistic and perhaps even hazardous. The purpose of the present article is to challenge the bases of the current debate on the continued statehood of LLISs beyond the complete loss of territoriality. This particular assumption is why the reliance on the presumption of continuity could be counterproductive for the development of an accurate legal forecast and for work on possible solutions for the people who are or will be displaced. States are first and foremost territorial entities; ignoring this fact risks the creation of major blind spots with potentially disastrous consequences for those who are most vulnerable. This is not because the implementation of the ratchet effect doctrine in itself would be a negative outcome, but rather because an over-reliance on the presumption of continuity could prove counterproductive if the latter is eventually deemed largely inapplicable to the situation of LLISs.

IV Bridging the Gap

Discussing the presumption of continuity in this light inevitably raises the question of overlap and the possibility of reconciling the two doctrines discussed. Since both doctrines share common roots and invoke similar elements

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[124] See, eg, Ross (n 10) 242.

[125] See above Part III(B)(1).

[126] The case of Somalia discussed above in Part III(B)(1) is perhaps the most well-known example of such flexibility. Congo's uncontested accession to statehood in 1960 is another instance of the loose application of the need for a government: Crawford (n 10) 56–8.

of state practice, is the gap separating them too wide to bridge? One could even go further and ask: are there really two different doctrines of continuity?

Here the answer can only be speculative. As we do not know if Schrödinger's unfortunate cat is alive or dead until we open the box, it is impossible to accurately assess the nature of continuity in the context of small island nations without an adequate body of state practice. Even if legal scholarship on the matter may bear a certain normative weight, it is far from invulnerable to challenges by states. Moreover, certain claims to continuity can only be assessed accurately ex post facto, such as the Federal Republic of Germany's claim to continue the German Reich's identity, which found a conclusive answer only following the German reunification.[127] Until then, competing theories and doctrines remain speculative. Nonetheless, it is still possible to attempt an answer.

First, yes, there seems to be two different understandings of the presumption of continuity. As demonstrated above, one can identify discrepancies between how continuity has been applied outside of the discussion on small island states, and the role it has been given as the ultimate fail-safe to arguments supporting continued statehood beyond the loss of physical indicia. Alternatively, it may be that a solid case can be built to support a ratchet-like presumption of continuity. However, if such arguments exist, they are not to be found in the current literature on the subject. As shown here, the existence of a ratchet effect preventing the loss of statehood is not as easily framed as a self-evident fact as one may believe after reviewing what has been written on the subject to date.

This highlights perhaps the single most important point of this analysis, which is the asymmetry between the widespread use of the presumption of continuity and the comparative lack of a solid foundation to ground its use as a ratchet effect in the context of LLISs. Consequently, what is problematised in the present article is not the possibility that the ratchet effect doctrine would successfully help secure the statehood of a de-territorialised LLIS (which would be a positive development, particularly compared to the logical conclusion of prioritising the sameness doctrine of continuity, ie the loss of statehood). Rather, it is the outcome of a scenario in which current legal forecasts present a conclusion (ie the possibility of de-territorialised statehood based on the existence of a ratchet effect), with a confidence that is later proved to be overstated by a hostile use of the sameness doctrine to undermine the use of the presumption of continuity to support an LLIS's claim to de-territorialised statehood.

Therefore, before resting further arguments on the presumption of continuity, either the arguments supporting the ratchet effect need to be clarified to a degree proportional to the role given to continuity by its proponents, or alternatively, the gap between the two doctrines needs to be addressed. Not doing so risks dangerously weakening further reasoning, as well as potentially opening the door to challenges to the continued statehood of a de-territorialised LLIS. Even

[127] Mälksoo (n 16) 36–7. Mälksoo characterises the German reunification as an 'extralegal' phenomenon, a political development.

continuity in its sameness iteration is far from removed from politics, despite its narrower scope and partially self-evident character.[128]

The dynamic relationship between the two doctrines is perhaps best illustrated using hypothetical State A, an LLIS which finds itself unable to claim sovereignty over a territory or population. State A may claim continued statehood based on a ratchet effect interpretation of the presumption of continuity, as defined in Part II(A) above. However, because State A's statehood is now mostly reliant on its recognition by other states, it may be easy for State B to disregard State A's statehood by claiming that state practice and prior scholarship support continuity as a sameness assessment rather than a ratchet effect. As a result, State B could ignore any statehood-related prerogatives claimed by State A on the basis that State A's statehood is inexistent due to the absence of the traditional criteria of statehood required by international custom. Were State B to be an influential and weighty actor in the international community, the legal personality of State A would then become relativised, possibly politicised to the point of being more a hindrance than an advantage for State A to represent the interests of its displaced population.[129]

The situation of LLISs is peculiar in that it offers a window of opportunity for preparedness and strategising. Discussions can take place now before they become a matter of life and death for vulnerable states. Consequently, thorny questions such as the scope and nature of the presumption of continuity are better assessed in the current context of an academic article than in the broader forum of international relations.

As this and other analyses remain largely scholarly speculations, it is also likely that the context within which an LLIS would need to substantiate its claim to de-territorialised statehood would be substantially affected by the uncertainty inherent to a climate-changed world. While the nature and range of this climate-induced uncertainty remain impossible to predict, a careful analysis of the relevant legal norms *now* is crucial to their applicability *later*, when the stakes may be multiplied by a variety of factors. The approach adopted by this article may appear rather conservative in its outlook, failing to engage with the unique nature of the climate crisis. However, this is a corollary effect of the goal of this contribution, which is to be relevant now, not once the statehood of an LLIS hangs in the balance. One can only be hopeful that a climate-changed world will allow for more flexibility and provide a favourable environment for de-territorialised statehood, but this cannot be relied upon. As the former president of Kiribati, Anote Tong, highlights, it is better to 'plan for the worst and hope for the best'.[130]

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[128] Addressing the realist's position on the Baltic states' claims to continuity, Mälksoo (n 16) 268 (emphasis in original) summarises it as such: '*De facto*, there is "continuity" only to the extent that power can guarantee it'.

[129] Such a scenario intentionally excludes the possibility of alternative types of non-statehood international legal personality, such as that enjoyed by sui generis entities such as the Sovereign Military Order of Malta or the Holy See: see, eg, Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer, 2017) 101, 123–6.

[130] Kenneth R Weiss, 'Before We Drown We May Die of Thirst' (2015) 526 *Nature* 624, 626.

Secondly, the possibility that both doctrines of continuity can be reconciled should not be dismissed. In fact, this outcome is necessary if continuity is to remain a key element in claims to de-territorialised statehood. Part of the gap this article seeks to fill is that the ratchet effect doctrine of continuity neither acknowledges nor addresses the sameness assessment doctrine. To build sound foundations for further scholarship using continuity, the chasm between the two doctrines must be bridged. This need is perhaps more acute due to the extent to which the sameness doctrine has dominated the study of continuity hitherto, notwithstanding the situation of LLISs. In fact, it may even be misplaced to refer to the sameness doctrine as a doctrine at all, since it appears that this is the firmly established definition of continuity rather than one of several interpretations of continuity.[131] One may thus need to qualify the ratchet effect doctrine as requiring a change in paradigm rather than an alternative reading of the state practice and scholarship on the issue.[132]

Alternatively, the approach adopted by a specific threatened state can be adjusted to take into consideration the possible limited scope of the presumption of continuity. For instance, Stoutenburg's conclusion that statehood is possible as long as symbolic physical indicia, such as a population nucleus, are recognised by the international community, could present a modus operandi for a small island state to pre-empt challenges to its statehood.[133]

International law is dynamic, and international norms evolve. Further discussion on continuity may eventually help clarify the respective roles and relationship between the two doctrines of continuity discussed here. Using the consecrated analogy with a living tree used in 1929 by the Privy Council in its decision to grant women the right to vote in Canada,[134] the evolution of the presumption of continuity into a ratchet effect could be framed as a natural progression of the principle. However, before that branch can be fully attached to the tree's existing branches and trunk, its position and connection with the tree need to be clarified with regard to the branch it connects to: the sameness doctrine. The normative weight of legal scholarship alone might struggle to tip the scales if undermined by gaps left unaddressed. Before a way forward emerges, the substantial body of existing legal scholarship on continuity needs to be reconciled with the use of, and scholarship on, continuity in the context of LLISs. In short, the achievement of a 'continuity of continuities' appears to be one of the possible remedies needed to bridge the gap identified by this article. Conversely, this is but one of the relevant elements to the discussion on the continued statehood of LLISs. The role of legitimacy and the right to self-determination could also be key in substantiating statehood beyond the possible loss of territorial sovereignty.[135]

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131 While clearly the source of abundant literature and debate, the key contentious elements of the study of continuity hitherto lay more in the relationship of continuity with succession and identity than in the existence *vel non* of a putative ratchet effect: see Østrup (n 38) 2–3.

132 Alternatively, a fundamental change in how statehood is approached could achieve the same goal, as discussed by Willcox through her proposal for a 'family resemblance' account of statehood: see Willcox (n 4) 127–32.

133 Stoutenburg (n 20) 448.

134 *Edwards v Attorney-General of Canada* [1930] 1 DLR 98, 106–7, 112–13.

135 See generally Ross (n 10).

V Conclusion

This article originally set out to discuss what it defines as two different doctrines of continuity. One is described as the ratchet effect doctrine, according to which the principle known as the presumption of continuity essentially acts as a ratchet, preventing existing states from going extinct despite sometimes major internal changes. This approach to continuity has been shown to be mostly confined to the ongoing discussion on the continued statehood of de-territorialised small island states. While the ratchet doctrine invokes several elements of state practice and legal scholarship, a closer examination of these arguments reveals, in certain cases, a degree of conflict between the meaning they are given, and their meaning once taken together with their context.

Where the present article hopes to contribute to the current debate is in its interpretation of the doctrine of sameness, which, instead of framing the presumption of continuity as a ratchet, understands it as a sameness assessment. According to this doctrine of continuity, the presumption of continuity is a core principle of international law, as also argued by the ratchet effect doctrine. However, instead of applying to the status of the state in question, the sameness doctrine limits the scope of continuity to questions of identity: is state X the 'same' legal entity as it was before changes in its constitutive elements? By looking at the elements of state practice often cited to support the ratchet effect, such as the existence of fragile states or governments in exile, the current article argues that, when properly contextualised, the state practice on the subject does not support the existence of the ratchet effect mentioned by legal scholarship on the question of the statehood of small island states. Instead, there seems to be only limited evidence of the existence of such a ratchet effect as it is currently assumed to apply to the hypothetical case of a de-territorialised island state.

The study of international law is a venerable art, and the political nature of the questions it aims to address has sometimes curtailed the ambition of international legal scholars. This is particularly true of the study of statehood. It is thus not surprising that the opening of a new front in the long-drawn-out attempt to bring statehood fully within the grasp of international law would result in endeavours to challenge the traditional understanding of the notion. While the efforts to secure continued statehood for a de-territorialised LLIS are commendable, doing so without embracing the unpredictable nature of the international arena risks unnecessarily jeopardising such efforts. A first step in bolstering the arguments currently brought forward to support continued statehood would be to take a deeper look at the dynamics involved. The interpretation of international law does not happen in a vacuum, and crises are tremendous catalysts. The Anthropocene and the major changes it brings will shake international law to its core and bring about a fresh opportunity to look at some of the underlying mechanisms at play. On a short-term basis, discussing and including these dynamics may hopefully help prevent the creation of blind spots in the analysis of continued statehood. Ultimately, one hopes avoiding these pitfalls may mitigate the consequences of abstract legal reasoning and international politics on the lives of those who must grapple with the eventual loss of their homes.

Rouleau-Dick, Michel, 'A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta' (2020) 63 German Yearbook of International Law 621-646.

2

A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta

Michel Rouleau-Dick

Abstract

This article examines the relevance of the Sovereign Military Order of Malta as a precedent for safeguarding the legal existence of Low-Lying Island States threatened by climate change and the rise in sea levels. The unprecedented nature of this phenomenon means international law offers no unequivocal guidance on the way forward for the threatened States. As a result, most solutions to the problem rely either on the creation of new legal instruments, the reinterpretation of existing norms, and to varying extents, on the goodwill of other States. However, due to its State-like characteristics and existence independent from a territorial claim, non-state sovereign entities of international law such as the Sovereign Order of Malta could provide an interesting blueprint for a low-lying island nation to transit towards once the indicia of statehood becomes vulnerable to possible challenges. The core of the Sovereign Order of Malta's sovereignty is discussed and outlined, followed by a survey of the relevance and added value of this option for threatened low-lying island States.

Keywords: low-lying states, sovereign military order of Malta, non-state sovereign entity of international law, climate change, relocation, international legal personality

A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta

Michel Rouleau-Dick[1]

I. Introduction

Climate change presents an unprecedented threat to humanity and the international community. From increasing the likeliness of extreme weather events to slow-onset disasters such at the rise in sea levels, the time for debates on the reality or not of climate change is long gone.

With highest elevations points below ten meters, States such as the Maldives, Tuvalu, or the Marshall Islands are in a particularly precarious position and might find themselves deprived of a territory within the next few decades.[2] Despite having made only negligible contributions to greenhouse gas emissions, a number of States face a threat to their very existence.[3] However, contrary to most previous crises that the international community has faced before, we are still in a position to hopefully prevent, or at least mitigate the possible consequences of this upcoming crisis. However, the window of opportunity to build such preparedness is narrowing quickly.[4]

Urgency and the inherent complexity of creating bespoke legal solutions to the respective problems of the threatened nations call for solutions that can draw on precedents and existing legal frameworks rather than rely on the solidarity of the international community, a rare commodity today, and *a fortiori* in a climate-changed world. In keeping with this logic, the present article examines the possibility of a threatened Low-lying island State (LLIS)

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[2] Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States* (2011), at 1–2.

[3] It is hard, if not impossible to precisely identify exactly how many States face the possible loss of their entire territory. This is caused in part to the differences in their respective levels of adaptability, but also to the important variations in the expected levels of sea level rise (SLR) and the impact of human factors. The tropical western pacific region has experienced SLR rates up to four times the global average between 1993 and 2009. *See* International Panel for Climate Change (IPCC*), Fifth Assessment Report (AR5) (2014)*, at 1619, and generally Chapter 29, section 29.3.1. A 2009 report posited the number of forty nations facing an existential threat in the form of SLR, *see* Koko Warner et al., *In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and* Displacement, United Nations University, CARE, CIESIN-Columbia University, 2009, at 19.

[4] Christina Voigt, 'ANZSIL Conference Keynote 2019 Climate Change, the Critical Decade and the Rule of Law', 37 *Australian Year Book of International Law* (2020) 50, at 50.

transitioning into a non-State sovereign entity of international law (NSSEIL)[5] such as the Sovereign Military Order of Malta (SMOM)[6] in order to preserve its international legal personality beyond the possible loss of its territory.

Exploring this option first requires surveying the challenges faced by LLIS and assessing some of the solutions proposed as remedies. The second step in the process explores the position of the Order of Malta in international law. While admittedly descriptive in nature, this step is crucial to understanding the value of the Order's position for LLISs. Last, the Order's peculiar status and the prerogatives it entails are discussed as a potential framework for maintaining the legal personality of LLISs beyond the loss of territorial indicia.

II. The Problem

Were a State to lose its territory in its entirety, the legal implications would be substantial due to the heavy reliance of the traditional definition of statehood on the notion of territory and territorial sovereignty.[7] Indeed, international law's occasional reliance on physical features might become more of a curse than a blessing. For instance, the choice of coastlines as the basis on which to determine the exclusive economic zone (EEZ) pertaining to a State was intended to provide an elegant, factual solution to clarify the often-controversial disputes over the definition of territorial waters between neighbouring States. The assumption at the time was that coastlines constituted an uncontroversial, undisputed fact of nature, which could provide a solid fact-based basis to solve legal disagreements. Climate change has, and will increasingly change that.[8]

In the case of low-lying island States, which share a common vulnerability to the rise in sea levels, this threat is an existential one. The changes in the earth's climate could mean the cross-border migration of their population and the eventual complete disappearance of their territory.

[5] The use of this term in the present article is based on its use by Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future', in Petra Butler and Caroline Morris (eds.), *Small States in a Legal World* (2017) 101.

[6] Hereinafter referred to as the Order, the Order of Malta, or the Sovereign Military Order of Malta (SMOM).

[7] Although it does not provide unambiguous guidance on statehood, it is usually considered that Article 1 of the 1933 Montevideo Convention reflects customary international law on this subject. *See* Montevideo Convention on the Rights and Duties of States 1933 (1934) 165 LNTS 19.

[8] *See* for instance Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs', 4 *Climate Law* (2014) 70.

Though the exact nature of the threat, as well as the form it might take, is complex and can best be explained with the tools of disciplines other than law, the legal implications of this phenomenon are wide-ranging, and worth discussing prior to its occurrence in order to mitigate uncertainty and potential harm.

Problems arise in this context mostly due to the traditional understanding of statehood, which is very much territory-centered: States have always been primarily territorial entities,[9] a different colour on the world map.[10] Though numerous States may have ceased to exist in the past, their territory and population remained, and a body of norms on the succession of States regulates the transition from old to new. The situation of LLISs is different, and, questions thus arise concerning the way forward. Could a State retain its statehood despite losing the physical elements of statehood?

A. Palliative Versus Pre-Emptive

While this is far from being a settled debate,[11] this article chooses to adopt a worst-case scenario approach to the question, assuming that the law on statehood would be applied restrictively to the case of LLISs, possibly resulting in challenges to their statehood. Although this is not a foregone conclusion, the present article adopts a 'hope for the best, prepare for the worst' approach. The following arguments are certainly not without flaws, but they aim to avoid relying on the good will of other members of the international community, as opposed to different approaches to the problem proposed by other scholars.[12]

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[9] Derek Wong summarizes the need for territory as part of statehood as such: 'territory is a leg upon which the state must be created; the leg may be bent, but it must exist.' *See* Derek Wong, 'Sovereignty Sunk? The Position of 'Sinking States' at International Law', 14 *Melbourne Journal of International Law* (2013) 346, at 354.

[10] Karen Knob, 'Statehood: Territory, People, Government', in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), at 95.

[11] In fact, due to the absence of authoritative guidance or State practice on the subject, there exists several conflicting opinions on the continued statehood for a deterritorialised LLIS. For competing opinions, see for instance Heather Alexander and Jonathan Simon, 'Sinking into Statelessness', 19 *Tilburg Law Review* (2014) 20 , at 25, and Jane McAdam, ''Disappearing States', Statelessness and the Boundaries of International Law', 2010–2 *University of New South Wales Faculty of Law Legal Studies Research Paper Series* (2010) 1.

[12] While not being overly cynical, one must acknowledge the influence of unpredictable external factors on the interpretation and implementation of international law, and particularly on the law on statehood. Reliance on the implicit assumption that international law represents progress should also be addressed with a healthy dose of scepticism, as it tends to be more porous to political matters than one might wish. *See* Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', 26 *International Relations* (2011) 3.

Options proposed to allow for the continued existence of a deterritorialised LLIS cover a wide spectrum of solutions, from *in situ* adaptation to merger with another State, and from finding a replacement to their territory to solutions independent from a territorial claim. Burkett, for instance, argues in favour of ex-situ nationhood, a trusteeship-inspired solution to maintain the existence and statehood of LLISs beyond the loss of their territory, as well as on the need to reshape the notion of statehood.[13] *En masse* relocation schemes, involving the resettlement of vulnerable populations to the territory of another State have also been envisaged by some of the threatened States such as Kiribati.[14] McAdam underlines the possibility of implementing a system of self-governance in free association with another State, such as is the case with the current relationship between the Cook Islands and New Zealand, for instance.[15] A more radical option, consisting of a full merger of the former LLIS with another sovereign State, has also been mentioned as a means to safeguard the former State's population through framing the transition into a case of succession of States.[16] Additionally, ad hoc solutions such as bilateral or multilateral agreements could provide a bespoke framework of protection to safeguard the rights of the threatened populations.[17]

A distinction can also be drawn between the solutions that attempt to maintain the statehood of the threatened LLISs in accordance with the traditional statehood criteria,[18] and those which aim to preserve the State's legal personality independently from a territorial claim. For instance, *in situ* adaptation could take the form of maintaining a lighthouse-type artificial structure, with the aim of maintaining at least symbolic physical indicia of statehood.[19] Additionally, options like Burkett's previously mentioned Nation Ex-Situ argue for continued statehood, but in a different form, under a mechanism inspired by the UN's trusteeship framework. Alternatively,

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[13] Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', 2 *Climate Law* (2011) 345.

[14] Jane McAdam, *Climate Change, Forced Migration, and International Law* (2012), at 144–145. *See also* Selma Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State', 16 *International Journal on Minority and Group Rights* (2009) 209, at 214–215.

[15] Oliver, *supra* note 12, at 154. *See also* Zbigniew Dumienski, 'Shared Citizenship and Sovereignty - The Case of the Cook Islands' and Niue's Relationship with New Zealand', in Steven Ratuva (ed.), *The Palgrave Handbook of Ethnicity* (2019) 221.

[16] Park, *supra* note 2, at 18.

[17] *Ibid.*, at 19.

[18] *See* Montevideo Convention, *supra* note 7.

[19] Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law – Climate Change Displacement and Sovereignty* (2014). 155-157.

others have also argued for a better definition of statehood, one which might accommodate LLISs beyond the loss of their territorial claim.[20]

On a broader level, the possibility of creating a new and dedicated framework of protection for those forced to cross borders due to climate change has also been proposed. The inadequacy of the current refugee law framework certainly seems to support the need for such an instrument.[21] However, the current political context presents a major obstacle to any development in this direction. Even within the current framework, problems of implementation can be attributed mostly to a lack of political will, not to a lack of legal provisions.[22] Hostility towards migrants, in conjunction with a trend of increasingly framing migration as a security issue,[23] creates a climate unfavourable to effective legal developments. Convincing States to enter additional obligations with regards to environmentally displaced persons would likely present a sizeable challenge, one that has the potential of backfiring in States, possibly putting into question their current commitments on refugee protection.

Some of the proposals mentioned above also imply significant challenges. Self-governance within another State for instance, would require this State to agree to the creation of such a framework, and consequently cover some of the costs and assume the responsibilities involved. Options such as the formal acquisition of land from another State would also rely on the willingness of another State, as a formal cession would also require a complete change in sovereignty over the territory in question, different from a private transaction.[24] McAdam evaluates the likeliness of this happening as remote.[25] In fact, most of the current putative solutions identified in the literature rely to some extent on the goodwill of at least one member of the international community. Within the context of a worst-case scenario approach to the

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[20] *See* Susannah Willcox, ‘Climate Change and Atoll island States: Pursuing a "Family Resemblance" Account of Statehood’, 30 *Leiden Journal of International Law* 1 (2016) 117.

[21] Sumudu Anopama Atapattu, 'A New Category of Refugees? ‘Climate Refugees’ and a Gaping Hole in International Law', in Simon Behrman and Avidan Kent (eds.), *‘Climate Refugees’ Beyond the Legal Impasse?* (2018) 287, at 40–43. *See also* McAdam, *supra* note 12, at 42–48.

[22] McAdam, *supra* note 14, at 199. *See also* Atapattu, *supra* note 21, at 45–47.

[23] *See* Likim Ng, 'Securitizing the Asylum Procedure: Increasing Otherness through Exclusion', 15 *No Foundations* (2018) 23.

[24] This could also be made more complex by some States not allowing such a cession of territory. Norway for instance, found itself in the impossibility of gifting part of a mountain to Finland due to Norwegian territory being indivisible under the country’s 1814 constitution. *See* BBC, *Norway Will Not Give Halti Mount Summit to Finland*, 14 October 2016, BBC, available at https://www.bbc.com/news/world-europe-37662811.

[25] McAdam, *supra* note 14, at 149.

problem, it is thus critical to identify options minimizing reliance on hypothetical good Samaritans.

Furthermore, some of the mentioned solutions adopt a resolutely pre-emptive approach to migration due to climate change, which is indeed needed to mitigate the potential harm caused as much as possible. However, in the event that these could not be implemented, there is also a clear need to look at palliative approaches. While every LLIS's situation is unique and presents its own challenges, it is essential to look for options that can be enacted even if other solutions fail. This might prove relevant, even if only to help dissipate the uncertainty surrounding the legal personality of the affected LLIS.

Although many questions remain unanswered, an anomaly of international law might provide a promising path to a solution, one which might allow an LLIS to secure some level of legal personality even beyond the possible loss of its statehood. This anomaly stems from the existence of two entities, which, despite sharing a number of common characteristics with States, do not possess full statehood, yet still display several characteristics usually thought to be exclusive to States: the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta, and the Holy See. Though both entities arguably belong to the same category of international actors, the focus of this article will be primarily (though not exclusively) on the situation of the Sovereign Military Order of Malta, since, as opposed to the Holy See, the SMOM lacks any links to either a territory or a population.[26]

III. The Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta

The Sovereign Military Order of Malta was created by Italian merchants in 1042, with the intent of caring for poor Christian pilgrims on their way to the holy land.[27] Gaining official recognition by the Holy See in 1113, it is the oldest surviving religious order. Initially exclusively dedicated to its humanitarian mission, the Order's role expanded to encompass a variety of other activities, notably becoming a prominent military power in the region. With the

[26] Debate over the Holy See's exact nature and situation in relation to the Vatican also affects the usefulness of its situation for the purpose of the present article, this distinction is discussed in section IV.A. *See*, for instance, Jason J. Kovacs, 'The Country Above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta', 11 *National Italian American Bar Association Journal* (2003) 27, at 42.

[27] Charles D'Olivier Farran, 'The Sovereign Order of Malta in International Law', 3 *International and Comparative Law Quarterly* (1954) 217, at 219.

loss of the holy land, the Order of Malta temporarily relocated to Cyprus, leaving in 1310 when it settled on the island of Rhodes.[28]

After a long siege in 1523, the Order of Malta was ousted from Rhodes by the Ottoman Empire. It remained landless until Charles V, Emperor of the Holy Roman Empire granted the island of Malta to the Order. There, it successfully withstood another siege by the Ottomans, until it lost its territorial possessions to the victorious armies of Napoleon in 1798.[29] While the Order hoped to regain control over its former possession after the defeat of the French emperor, the United Kingdom retained sovereignty over Malta from the Vienna Congress in 1814[30] until the island eventually became independent in 1964.

The Order has thus remained landless since 1798. Its headquarters relocated to Rome following the loss of Malta and has remained there since.[31] With the loss of its territorial possessions, the Order has instead emphasized its humanitarian mission, which has been at the core of its existence since its foundation. In practice, this has meant that the Order has been at the centre of humanitarian relief in natural disasters, wars, and conflicts, actively providing care and maintaining healthcare facilities for treating the wounded, while keeping a strict neutrality.[32]

Throughout its existence, the SMOM has maintained diplomatic relations with States, even after the loss of its territory.[33] In fact, the peculiar status of the Order, removed from territorial claims, is precisely what makes it worth examining. Before looking further, however, the question of what exactly the Order is must be addressed. Due to its peculiar status and history, the SMOM has remained relatively under-studied in English language scholarship. With the exception of a few cases in Italian courts and occasional articles, the last time the SMOM attracted any attention was when the Holy See attempted to clarify the Order's status through a Cardinalitial tribunal. This relative obscurity may be undeserved however, as the Order's legal personality is a fascinating subject of inquiry.

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[28] *Ibid.*

[29] *Ibid.*, at 220.

[30] Eduard Ivanov, 'Mission of the Order of Malta as a Subject of International Law in the 21st Century', 2014 *Higher School of Economics Research Paper* (2014) 1, at 6.

[31] Kovacs, *supra* note 27, at 39.

[32] This neutrality finds its source in the initial conditions to the Order's possession of Malta. Charles V insisted on making the perpetual neutrality of the SMOM in conflicts between Christian princes a condition for the Order's ownership of the Maltese archipelago. *See* D'Olivier Farran, *supra* note 28, at 220.

[33] Kovacs, *supra* note 27, at 39.

A. Nature of the Order's Legal Personality

Arguably self-evident in most cases such as with well-established States, the exact contours of the ability to participate in international law-making and to be an integral part of the international legal system is highly dependent on one's understanding of the concept.[34] This understanding has evolved substantially, from international legal personality (ILP) defined as being an exclusive synonym of statehood to the elaboration of definitions based instead on agency at the international level.[35]

While there are several competing conceptions of precisely which entities enjoy international legal personality, this article adopts the conventional understanding that legal personality is derived from either explicit or implicit recognition by States of its existence in an entity. Within this understanding of ILP, States are thus the primary persons of international law.

Although other conceptions of international legal personality might accommodate a wider scope of legal personality,[36] the more restrictive 'recognition conception' and its correspondingly higher threshold for ILP can still be satisfied relatively easily by the SMOM. This analysis therefore does not require adopting a wider discussion of the concept. Rather, as its legal personality is demonstrated clearly below, through the Order's extensive interactions with States, the focus of this article is on the substance and scope of the Order's ILP and its applicability to the case of a hypothetical deterritorialised low-lying island State.

Authors have employed a number of different terms to describe the Order's position within the international order, including *sui generis* entity of international law, non-State subject of international law, or as used in this article, non-State sovereign entity of international law

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[34] Nijman, for instance, highlights how the concept of ILP tends to be defined in relation to a specific context and varies in substance depending of the purpose of the inquiry. *See* Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (2004), at 25–27.

[35] Roland Portmann, *Legal Personality in International Law* (2010).

[36] While other conceptions of ILP might allow for a LLIS to maintain legal personality beyond the loss of physical existence, the present article will not discuss this possibility, as this discussion would require more than a few paragraphs. Furthermore, even if a deterritorialised LLIS were to retain its statehood, the precedent set by the SMOM would still retain much of its relevance as a blueprint for legal personality beyond the loss of territory.

(NSSEIL).[37] The length and elements of this terminology highlight three key characteristics of the Order of Malta:

a. First, it is not a State, despite exhibiting several State-like characteristics;
b. Second, it detains some level of sovereignty;
c. Third, it enjoys legal personality on the international level.

Conversely, besides not being a State, the SMOM also does not belong to the category of governments or monarchs in exile. While this claim may have had merit immediately after the events, it can be unequivocally dismissed in the present context since the Order maintains diplomatic relations with Malta and has relinquished any claim to its former territory. Hence, describing the SMOM as an exiled monarch or government in exile would be inaccurate. Its existence is permanent and stable, not reliant on a claim to an occupied territory.

This absence of a territorial link further highlights the fact that the Order of Malta is not a State, even if it occasionally behaves like one. Contrary to States, which possess *general* international personality, the Order of Malta possesses what can be described as *particular* international personality.[38]

The Order maintains formal diplomatic ties with 110 States, as well as official relations with five other States and the European Union.[39] The Order of Malta possesses the ability to issue its own postage stamps, and some of its officials hold diplomatic passports in the Order's name and enjoy diplomatic immunity.[40] However, the Order does not have citizens as such. The Order's headquarters in Rome and its embassies throughout the world enjoy extraterritoriality. The SMOM has entered into international agreements,[41] although all have been related to its

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[37] The European Union (EU) defines the SMOM as a 'sui generis subject of public international law', *see* European Union, *The Order of Malta and the EU*, 6 February 2020, European Union External Action, available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/2381/The%20Order%20of%20Malta%20and%20the%20EU. *See also* Malcolm N. Shaw, *International Law* (7th ed., 2014), at 178.

[38] James Crawford, *The Creation of States in International Law* (2nd ed., 2006), at 30. The choice to predominantly use States rather than international organisations as points of reference for discussing the SMOM's legal personality is rooted primarily in the peculiar 'State-like' nature of the SMOM. While the SMOM may share similarities with international organisations, it is those prerogatives usually associated with statehood that make it relevant to the situation of LLISs, as discussed below in section IV.B.

[39] Sovereign Order of Malta, *Bilateral Relations*, Sovereign Order of Malta, available at https://www.orderofmalta.int/diplomatic-activities/bilateral-relations/.

[40] Royal Curia of the Kingdom of Hungary (*Magyar Királyi Kúria*), *Case No. 798/1943*, 12 May 1943.

[41] For instance, a cooperation agreement between the Republic of Poland and the Order of Malta, concluded on 14 July 2007, cited by Karol Karski, 'The International Legal Status of the Sovereign Militarry Hospitaller Order of

mission of humanitarian relief. Additionally, since 1994, the Order has had the status of non-State permanent observer to the United Nations.[42] These extensive interactions with States underline their recognition of the Order's legal personality. Its ability to enter into binding agreements with States further establishes the SMOM international law-making capacity.

As the Order has existed in its current form since the conquest of Malta, it has been able to maintain its ILP even at a time when this status was generally considered the exclusive privilege of States, reflecting the then predominant States-only conception of ILP in the Grotian tradition.[43] Even as legal personality has evolved to become 'acquired through recognition by states' [44], such recognition has confirmed the position of the Order in international law-making, with the caveat of being limited in scope by the order's particular mission. This caveat results in the Order's status essentially being a watered-down version of that of States, rendering it both unattractive and difficult to obtain as a means of gaining or retaining international legal personality. This may explain why NSSEILs are so few and why the SMOM has not attracted more attention.

While recognizing that the concept of international legal personality is both a theoretical battleground and a concept of limited use in practical terms this cursory overview seeks to demonstrate that the Order's extensive interactions with States should provide factual proof of the Order's agency and law-making capabilities at the international level. Alternatively, the concept of sovereignty will be used as a vehicle to further discuss the extent of the Order's prerogatives. This choice is motivated by the concept's narrower scope and widespread use in literature discussing the SMOM.[45]

B. Sovereignty of the Order

St. John of Jerusalem and of Malta', 12 *International Community Law Review* (2012) 19 , at 25. or another cooperation agreement between the Order and Hungary, *see* Sovereign Order of Malta, *International Cooperation Agreement between Hungary and the Order of Malta*, 11 March 2011, Sovereign Order of Malta, available at www.orderofmalta.int/2011/03/11/international-cooperation-agreement-between-hungary-and-the-order-of-malta/?lang=en.

[42] Permanent Observer Mission of the Sovereign Order of Malta to the United Nations, *About*, available at www.un.int/orderofmalta/about.

[43] Lauri Mälksoo, 'Contemporary Russian Perspectives on Non-State Actors: Fear of the Loss of State Sovereignty', in Jean d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011) 126, at 126–127. *See also* Portmann, *supra* note 36, at 43.

[44] Portmann, *supra* note 36, at 118–119.

[45] Kovacs, *supra* note 27, at 28. *See also* D'Olivier Farran, *supra* note 28, at 223.

Crawford defines sovereignty as follows:

> In its most modern usage, sovereignty is the term for the "totality of international rights and duties recognized by international law" as residing in an independent territorial unit – the State. It is not itself a right, nor is it a criterion for statehood (sovereignty is an attribute of States, not a precondition). It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence.
>
> (…)
>
> As a legal term "sovereignty" refers not to omnipotent authority - the authority to slaughter all blue-eyed babies, for example – but to the totality of powers that States may have under international law. [46]

The concept might thus appear inadequate for the purpose of describing an entity such as the SMOM, as sovereignty here is so closely intertwined with statehood. Used separately from statehood, however, the notion of sovereignty can still provide a useful background to outline the legal personality of the Order and help define its scope under international law. In a 1935 case, the Italian court of cassation defined the Order's sovereignty as:

> a complex notion which international law, from the external point of view, contemplates, so to speak, negatively, having only in view independence vis-à-vis other States. For this reason it is sufficient to require merely proof of the autonomy of the Order in its relation to the Italian State. … Such attributes of sovereignty and independence have not ceased, in the case of the Order, at the present day – at least not from the formal point of view in its relation with the Italian State. Nor has its personality in international law come to an end, notwithstanding the fact that such personality cannot be identified with the possession of territory.[47]

More succinctly, Koskenniemi's summary is perhaps more helpful to encapsulate (external) sovereignty, defined as 'the legal position of the State *vis-à-vis* other States.'[48] Here, one may rephrase the Order's unique sovereignty as the legal position of the SMOM *vis-à-vis* States. It is both a requirement and a consequence of the Order's ability to interact with other sovereign entities of international law on its own behalf.While using sovereignty to assess the SMOM's position may depart from the predominant understanding that sovereignty and statehood are inextricably linked, sovereignty nevertheless reflects the unique State-like nature of the Order.

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[46] Crawford, *supra* note 39, at 32–33.

[47] Hersch Lauterpacht, *Annual Digest and Reports of Public International Law Cases, 1935-1937* (1941), at 2–7.

[48] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), at 241.

Drawing further from Koskenniemi's discussion of sovereignty, which he also characterises as an entity's 'liberty' in international law,[49] the use of the concept to describe the Order's position reflects its (admittedly limited) 'liberties', namely, the scope of its State-like prerogatives and activities. As explained by Cox: The Order may be sovereign in a limited sense, but not necessarily a State.'[50]

The SMOM is not an international organisation and thus does not owe its existence to an initial agreement. Its State-like prerogatives seem to be due partly to what can only be described as sovereignty, i.e. *de facto* and *de jure* recognition by other States through the numerous interactions of the Order with members of the international community. What, then, lies at the root of the Order's sovereignty? This article adopts a two-pronged approach to evaluating the source of the SMOM's sovereignty, conflating its functional root with the transformative influence of a former claim to territory.

C. Functional Root

Throughout its history, the Order of Malta has had humanitarian relief as its primary mission. The importance of the Order's humanitarian activities, as well as the requirements of such a mission, particularly in wartime, are usually thought to lie at the core of the Order's peculiar international personality. This mission is described by the Order itself as:

> [..] caring for people in need through its medical, social and humanitarian works. Day-to-day, its broad spectrum of social projects provides a constant support for forgotten or excluded members of society. It is especially involved in helping people living in the midst of armed conflicts and natural disasters by providing medical assistance, caring for refugees, and distributing medicines and basic equipment for survival. Across the world, the Order of Malta is dedicated to the preservation of human dignity and the care of all those in need, regardless of their race or religion.[51]

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[49] Koskenniemi, *supra* note 49, at 300.

[50] Noel Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem of Rhodes and of Malta', 13 *Australian International Law Journal* (2006) at 211. Beyond the Order's self-characterisation as 'Sovereign', most authors have also used sovereignty to discuss the Order's position and character. *See* for instance, Kovacs, *supra* note 27, at 44, or Alejandra Torres Camprubí, *Statehood under Water - Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (2016), at 112-113. Karski, who concludes that the SMOM does not possess genuine sovereignty, nevertheless assesses the Order's position through its scope. *See* Karski, *supra* note 42.

[51] Sovereign Order of Malta, *Mission*, available at www.orderofmalta.int/sovereign-order-of-malta/mission/.

As Breycha-Vauthier elegantly explained it in 1954, the Order's sovereignty is both a condition and a consequence of its mission[52]. This is because the Order's role in armed conflicts required neutrality, and effectively created a need for sovereignty in order to fulfill its role. Arguably, if the Order's mission had not required such sovereignty, the Order's legal personality would be different or inexistent.

In practice, this mission has acted as an anchor point, which means, conversely, that the Order's sovereignty is essentially confined to activities relating to its mission. This is illustrated by Italian case law on the immunity of the Order.[53] Italian courts have consistently found cases relating to the Order's activities to fall within the Order's diplomatic immunity, with the scope of those activities acting as an outer boundary to the immunity in question. A good example of such a situation is the case *Association of Italian Knights of the Sovereign Military Order of Malta* v. *Guidetti* .[54] Here, the Italian court found that since the events were related to the Order's humanitarian activities, in this case a fundraising campaign for building a new hospital, the Order's activities did not fall within the court's jurisdiction, despite the events having taken place on Italian territory. The Order's legal personality thus stems from its mission, which in turn acts as the defining limit to its prerogatives, distinguishing it in nature and scope from that of States. The Order's peculiar status and position may not be solely explained by its mission, however.

D. A Territorial Relic

The existence of a residual dimension to the Order's sovereignty is perhaps more controversial, although it should be understood as a logical component of the Order's position in international law.[55] It is rooted in the uniqueness of the Order's position. Why, for instance, has the

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[52] Arthur C. Breycha-Vauthier and Michael Potulicki, 'The Order of St. John in International Law - A Forerunner of the Red Cross', 48 *American Journal of International Law* (1954) 554, at 562.

[53] *See*, for instance, *Association of Italian Knights of the Sovereign Military Order of Malta* v. *Guidetti*, 18 March 1999, Italy, Court of Cassation.

[54] *Ibid.*, discussed in Benedetto Conforti et al. (eds.), *The Italian Yearbook of International Law – Volume IX - 1999* (1999), at 154–155.

[55] Breycha-Vauthier and Potulicki, for instance, disagree with this approach to the Order's sovereignty, emphasizing instead the Order's unique legal personality, regardless of its past territorial claims: '[…] the status of which [the Order of Malta] depended on supra-national membership and activity, the past existence of its varied territorial sovereignty having no determining power.' Breycha-Vauthier and Potulicki, *supra* note 53, at 561.

International Committee for the Red Cross (ICRC) not attained a similar status to that of the Order of Malta? Both share a relatively similar mission and long history, and if one adopts an exclusively functional approach to the Order's sovereignty, it might be natural for the ICRC to also benefit from such sovereignty.

The existence of 'residual' sovereignty may offer an answer to this question. In other words, to fully explain the Order's status, one should also account for the Order's former territorial claims. The fact that the Order formerly possessed full statehood, with the requisite territory, population, and government that statehood typically entails, would signify that the Order's current status is also partly a result of a 'downgrade' from a general to a particular subject of international law. Thus, from being able to enjoy full legal personality, the Order's sovereignty was effectively stripped down to what it needed to accomplish its mission. The fact that the transition happened in this precise direction is what is conveyed by the idea of residual sovereignty; i.e. the former existence of territorial sovereignty.

The exact impact of this dimension of the Order's sovereignty is particularly challenging to assess, in contrast with its functional root identified earlier. This is in part because the weight of 'residual' sovereignty should be assessed in relation to the legal status of the Order itself, as opposed to its status while it exercised territorial sovereignty over Malta. The Order was founded independently from any territorial claim, and while its legal status became blurred with its territorial claims over time, it is hard, if not impossible to disentangle the respective influences of the Order's independent legal personality and that of its former territorial sovereignty. While the Order arguably qualified as a State until 1798, its status following the loss of Malta remained uncertain. Cox suggests that the Order may have taken advantage of this uncertainty to shift the root of its legal personality to the functional sovereignty discussed in section III.C., now buttressed by its humanitarian mission.[56] Alternatively, Torres Camprubì attributes the unusual position of the SMOM (and Holy See) to its long history and the development of its legal personality in parallel to that of the modern sovereign State.[57]

Determining the precise impact of the Order's former claim to territorial sovereignty on its present legal personality is a question better suited for a historian or a political scientist. However, it is possible to speculate on why it may have helped the Order to thrive to this day.

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[56] Cox, *supra* note 51, at 219, and generally at 216-220.

[57] Torres Camprubì, *supra* note 51, at 113.

The downwards transition from statehood, in contrast to the possibility of its occurring as an 'upgrade' from an extraterritorial entity, might explain the broad acceptance by other States of the Order's sovereignty and its other State-like characteristics. The almost-impossible-to-fulfill condition to attain this status means that the Order's potential to be used as a dangerous precedent is negligible. For instance, such a threshold signifies that a secessionist region could not invoke the Order's existence and privileges as a precedent. The continued international personality of the Order could also represent a favor done to a former 'club member' if one thinks of States as members of an exclusive club. States seem likely to be more tolerant towards a State's legal personality transitioning from general to particular.

Additionally, it should be noted that the ICRC's status is directly rooted in the mandate it is given under the Geneva Conventions regime.[58] Its existence and activities are thus not independent, strictly speaking, from the devolved sovereignty of States. This contrast between the mandate given to an independent private organisation and the Order's self-defined mission is at the core of the standalone existence of the Order, and thus of its sovereignty and legal personality.

E. Other Religious Orders

The Order of Malta is not the only religious order to have claimed to be a subject of international law. In fact, the Order of Santa Maria Gloriosa attempted in 1978 to claim a similar status and the tax exemption it entailed under Italian jurisdiction.[59] This attempt was unequivocally rebuffed by the Italian Court of Cassation, which emphasized the unique sovereignty of the Order of Malta.[60] Despite the singularity of the SMOM among other religious orders, the various and often contrasting positions of the latter can support and clarify some of the elements of the Order's sovereignty.

An argument supporting the existence of the Order's functional sovereignty can be found in its fate compared to that of other religious orders of the Catholic Church, such as the Order of Brothers of the German House of Saint Mary in Jerusalem (known as the Teutonic Order) for

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[58] International Committee of the Red Cross, *Mandate and Mission*, available at www.icrc.org/en/who-we-are/mandate.

[59] This was clarified in a 1978 by the Italian Court of Cassation. *See Ministero delle Finanze* v. *The Association of Italian Knights of the Order of Malta*, 1978, Italy, Court of Cassation, cited in Kovacs, *supra* note 27, at 48.

[60] *Bacchelli* v. *Commune di Bologna*, 1978, Italy, Court of Cassation, cited in *Ibid.*

instance. While there was a time when several religious orders maintained territorial claims and legal personality, the SMOM is the only one to have retained this status to this day.[61]

As argued convincingly by Breycha-Vauthier, the Order's sovereignty is anchored predominantly in its humanitarian mission. If the SMOM repudiated its mission, and/or became an exclusively religious order in mission, it would lose its sovereignty as a result.[62] This clearly distinguishes it from other Orders, which were, or have become primarily religious in nature.

The existence and history of other religious orders can also add to the understanding of the Order's residual sovereignty. As Cox emphasizes, its mission cannot solely explain the Order's sovereignty, at least for the first centuries of its existence. The possession of Rhodes, and subsequently Malta, provided the territorial anchor needed for the Order to assert its international personality.[63]

This is highlighted by the examples of other religious orders, such as the Iberian Orders or the Knights Templars, which were not granted sovereign status, while the Teutonic Order was, due to its territorial claim over Prussia.[64] Hence, territorial sovereignty also clearly played a role in asserting the legal personality of the Order. While the SMOM has relinquished all claims to its former possessions, the shadow of territorial sovereignty still plays a role in legitimizing the legal personality of the Order, though admittedly a discreet one.

F. Contested Sovereignty

While the arguments raised above concerning the roots to the Order's sovereignty might explain its peculiar status in international law, some doubts have been raised as to the effective nature of that sovereignty. In particular, the close links between the Holy See and the SMOM have been identified by Karski as intrinsically incompatible with the notion of sovereignty, since the Holy See maintains a substantial amount of formal and effective control over the Order's internal functioning.[65] More precisely, since the Order of Malta is a religious order of the Catholic Church, it is formally subordinated to the authority of the Holy See, which could block

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[61] Breycha-Vauthier and Potulicki, *supra* note 53, at 562.

[62] *Ibid.*

[63] Cox, *supra* note 51, at 218.

[64] *Ibid.*

[65] *See generally* Karski, *supra* note 42.

the election of a new Grand Master, for example. The last instance of such action by the Holy See lasted from 1951 to 1961. Notably, however, there have been no further examples of such interference by the Holy See since then, and this process has been altered to in 1997 through a change in the Order's Constitutional Charter. The Grand Master's election is now communicated to the pope, rather than requiring his approval.[66]

The authority of the Holy See over the SMOM is also demonstrated by the unilateral creation of a Cardinalitial Tribunal in 1951. The tribunal composed of five cardinals appointed by the Holy See, was given the task to clarify the Order's position in international law and as a religious order, as well as its relationship with the Holy See. Although the tribunal acknowledged the Order's mixed nature as both a religious order and a functionally-sovereign, quasi-State entity of international law,[67] Karski instead argues that the extensive, unilateral authority of the tribunal over the Order means that the Order's sovereignty is effectively meaningless:

> Had the Cardinalitial Tribunal decided at the time that the Order should be dissolved, the dissolution would have taken place. If it had concluded that the Order's autonomy was to be abolished, the decision would have been implemented.[68]

The possibility for the Holy See to unilaterally dissolve the Order exists to this day, and it currently holds the power to confirm changes to the Order's constitutional charter. This, according to Karski, disqualifies the Order from using the term sovereign, since its constitution must be approved externally.[69]

However, this exact type of relationship between two sovereign entities, where the head of one must approve changes to the other's constitutional order is not unprecedented when it comes to States. Although admittedly within the context of a different legal tradition, the past and present relationship between the United Kingdom and some of its dominions, e.g. Canada, bears some similarities to the one that exists between the Order of Malta and the Holy See.

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[66] Ivanov, *supra* note 31, at 14.

[67] Extract translated by Breycha-Vauthier and Potulicki from the text published in the *Acta Apostolica Sedis*, 30 November 1953, pp. 765-767. *See* Breycha-Vauthier and Potulicki, *supra* note 53, at 561–562.

[68] Karski, *supra* note 42, at 25.

[69] *Ibid.*, at 27.

Until 1982 the Canadian constitution was a British law,[70] thus ensuring its supremacy over Canadian laws. To modify its content, the Canadian parliament had to request that the British parliament change the text of one of its own Acts. In theory, the British parliament could thus have unilaterally dissolved Canada. In fact, even the position of prime minister of Canada is heavily reliant on the use of the Queen's royal prerogatives over the Canadian legislative assembly to govern and exercise executive power.[71] Crawford also highlights that this type of arrangements is not incompatible with the notion of sovereignty: 'a State may continue to be sovereign even though important governmental functions are carried out on its behalf by another State or by an international organization.'[72]

Despite Canada's formal subordination to the United Kingdom and absence of direct control over its own constitution, there is little doubt that it was, and is, a fully-fledged sovereign State, even before the repatriation of its constitution in 1982. Hence, dismissing the Order's sovereignty on this basis may be too hasty. Conversely, the Order's relationship with an increasing number of States, and its uncontested treaty-making powers on issues related to its mission [73] instead point towards a confirmation of the Order's sovereignty. This being clarified, the value of the Order's position and status for the future of small island nations can be examined with a solid basis for discussion.

IV. A Blueprint for Survival

A. Modus Operandi

Transitioning into an NSSEIL is not a perfect solution for LLISs, nor is it likely to be the best way forward for all States whose existence is threatened by climate change. As explained earlier, proposed solutions centered on the agency of the populations in danger of being displaced, as well as pre-emptive frameworks of sustainable relocation, would undoubtedly provide a substantially better alternative.[74]

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[70] British North America Act of 1867, 29 March 1867.

[71] Stephen Brooks, *Canadian Democracy: An Introduction* (5th ed., 2007), at 233–234.

[72] Crawford, *supra* note 39, at 33.

[73] Barbara Mielnik, *Ksztatrowanie Sic Pozapaiistwowej Podmiotowoki w Prawie Mirdzynarodowym* (2008), at 141, cited in Karski, *supra* note 42, at 26.

[74] The manner in which relocation might happen could affect substantially the well-being of those affected, as well as the success of the relocation, as highlighted by previous examples of relocation in the pacific region. *See* Gil

Recent migratory events have highlighted the difficulties related with prompting States to pro-actively welcome displaced persons. Moreover, current trends towards the securitization of migration[75] underlines the need for a 'hope for the best, plan for the worst' approach to migration. This is where the potential of NSSEIL as a model for LLISs becomes apparent. It should be clear that this article is not advocating for NSSEIL to become a 'solution' for protecting migrants from LLISs, but rather for a palliative approach to the problem, a framework that would allow LLISs to keep on working in the best interest of their citizens.

Key to the relevance of the present option is also that it does not rely on a LLIS maintaining its statehood beyond the loss of territory. Avoiding doing so may prove crucial in a climate-changed world, were members of the international community to challenge a LLIS's statehood. With the context of this option's relevance clarified, a possible *modus operandi* can be outlined in two steps.

First, there could be a progressive dissociation between the legal entity that is the government of the low-lying island State and the physical elements of the State. This arrangement would emulate the SMOM's relationship with its various territorial possessions until the loss of Malta in 1798. While the nature of such a relationship is somewhat blurry, it could probably be best described as a 'personal union'[76] between the territorial sovereign State, and the non-State sovereign entity of international law, both existing in their own right, but cohabiting under the umbrella of that relationship.[77] Reaching back to the 18th century might seem far-fetched but this could also describe the current relationship between the Holy See and the Vatican City, the

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Marvel P. Tabucanon, 'Protection for Resettled Island Populations - The Bikini Resettlement and Its Implications for Environmental and Climate Change Migration', 5 *Journal of International Humanitarian Legal Studies* (2014) 7. *See also* Gil Marvel P. Tabucanon, 'Social and Cultural Protection for Environmentally Displaced Populations: Banaban Minority Rights in Fiji', 21 *International Journal on Minority and Group Rights* (2014) 25.

[75] *See* Ng, *supra* note 23.

[76] D'Olivier Farran, *supra* note 28, at 224. For an overview of the co-princes arrangement that governed Andorra until 1993, *see* William Thomas Worster, 'Relative International Legal Personality of Non-State Actors', 42 *Brooklyn Journal of International Law* (2016) 207, at 258.

[77] Cedric Ryngaert, 'The Legal Status of the Holy See', 3 *Goettingen Journal of International Law* (2011) 829, at 832.

former being a NSSEIL and the latter a sovereign State.[78] Both are distinct entities, even if the Holy See acts 'on behalf of the State of the Vatican City'.[79]

In the context of LLISs, this could take the form of a progressive dissociation between the government of the LLIS and its territorial jurisdiction. The governmental apparatus could emphasize its role as representative and guardian of its citizens and their culture. Differentiating the two entities by using distinct names and assigning specific spheres of activity could provide a practical means with which to highlight the coexistence of two entities under the same umbrella. As mentioned above, this would emulate the current relationship between the Holy See and the Vatican. Both are members of international organizations, in some cases simultaneously. The choice of which entity should access membership of an international organization is defined as follows by Ryngaert:

> The Vatican acts internationally in the field of more technical matters that are closely tied to the practical needs of the Vatican City State. In contrast, the international competence in spiritual matters, e.g. human rights and peace and security belongs rather to the Holy See. This explains why the Vatican State rather than the Holy See is a member of the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Telecommunications Satellite Organization (INTELSAT), EUTELSAT, UNIDROIT, the World Intellectual Property Organization (WIPO) and the International Grain Council, whereas the Holy See rather than the Vatican is a member of the Organization for Security and Co-operation in Europe (OSCE), the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, the Organization for the Prohibition of Chemical Weapons and - also – the WIPO. As the example of WIPO membership illustrates, the distinction between technical and non-technical matters is not watertight, however, and in any event, the Holy See construes its spiritual mandate rather broadly, by including the non-proliferation of weapons of mass destruction therein.[80]

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[78] While mostly accepted in the literature, this has been contested by Morss, who conflates both Holy See and Vatican together. *See* John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex', 26 European Journal of International Law (2015) 927.

[79] Jorri C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1996), at 400. *See also* Ryngaert, *supra* note 78, at 832.

[80] Ryngaert, *supra* note 78, at 835–836.

Such a duplication in the international legal personality of the LLIS would thus not be unprecedented. It would allow the flexibility necessary for the LLIS to retain the whole of its international legal rights and duties as a State, with the added benefit of strengthening those most crucial to the possible future role of protection and advocacy of an LLIS existing as an NSSEIL.

As highlighted in the discussion on the functional nature of the SMOM's sovereignty, it would be crucial for a putative NSSEIL LLIS to outline its mission. Such mission might emphasize the protection of the rights and interests of those represented, as well as their culture and traditions. Depending on the outcome of relocation, whether the entire population of the former LLIS were relocated together or dispersed, the former government of an LLIS would have a role to play, although perhaps not as a government under the traditional understanding of the term.

The last step would be triggered when the LLIS's claim to statehood would be challenged. Regardless of the exact moment this might occur, a time will come when the status of the LLIS would come into question, to the point where the LLIS would no longer be able to sustain a solid claim to full statehood. The legal significance of such a challenge would substantially diminish if the LLIS's government had already secured an independent legal personality as an NSSEIL. The loss of statehood would not affect the LLIS's membership in international organizations, or erase other States' obligations towards it.[81] The differentiated personality between the territorial State and the NSSEIL government would ensure that the doubts surrounding the LLIS's statehood would not affect its capacity to interact with other States, at least on matters related to its mission. Such a capacity to participate in international relations might be essential in safeguarding the rights of displaced populations, as well as in ensuring that the rights of the State were secured. Financially, this would provide a platform from which an LLIS could defend itself against possible legal challenges to its various assets and claims, provided the transition to NSSEIL was done to ensure continuity.

B. Assessing the 'NSSEIL Option'

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[81] Wong, *supra* note 9, at 350.

The challenges faced by LLISs are unprecedented and the solutions required to rise to them require both creativity and a willingness to explore uncharted waters. Furthermore, the unfolding of future events is shaped by our understanding of the present, particularly in terms of the law. Pending the implementation of an effective and durable solution, there will always be value to disposing of a variety of solutions. Conversely, this means that the relevance of the different proposed solutions can be best appreciated in relation to the respective contexts within which they have potential value. The numerous variables at play in the future of LLISs may eventually result in considerable uncertainty. A wide array of measures, ranging from *in situ* adaptation to extensive planning will likely come into play to mitigate this uncertainty and hopefully prevent harm to the vulnerable population. Ultimately, however, even if worst-case scenarios can be avoided, it may prove useful to have a failsafe in the event that better solutions cannot be implemented, particularly in the event a LLIS does not succeed in maintaining its claim to statehood beyond the loss of its territory.

Transitioning into an NSSEIL would signify a downgrade in status, with a consequent loss of rights and duties. The very flexibility of such a transition and new status also imply a lack of solid legal framework to anchor this new legal personality. Indeed, there can be no assurance that this 'NSSEIL Option' is itself failsafe. However, this also constitutes a strength as it relies only minimally on affirmative action by other members of the international community. Maintaining statehood beyond the loss of its physical indicia could prove to be an uphill battle if challenged by other States, and the current failure of the international community to tackle climate change does not bode well for the future of LLIS. Numerous extralegal factors could result in such challenges, and the complex interactions between States are far from always driven by morality and pure good will. Herein lies the value of the present 'NSSEIL Option': possessing legal personality beyond statehood could allow a deterritorialised LLIS to pursue its essential role in representing and protecting its displaced population. Furthermore, this task would be assisted by the ability to participate in international law-making,[82] the enjoyment of sovereign immunity for its head of 'State', the right of legation, and the possibility to retain its membership in international organizations.[83]

Not relying on statehood could also avoid the possible relativization of the legal personality of a deterritorialised LLIS. As emphasized by McAdam, the statehood of a hypothetical

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[82] Worster, *supra* note 77, at 256.

[83] Costi and Ross, *supra* note 5, at 125.

deterritorialised LLIS would eventually become subjective, reliant on the recognition of other members of the international community.[84] While relying exclusively on recognition to substantiate statehood may result in a number of difficulties, perhaps the most problematic aspect of this approach relates to the possibility of this recognition being disputed. If this were the case, the statehood of a deterritorialised LLIS could become a politically charged issue. In turn, this could easily result in a claim to statehood being more a problem than an asset for a LLIS trying to protect its displaced population. While this could also apply to a NSSEIL LLIS, if done properly the transition towards a new type of legal personality could assert the status of the entity before the loss of physical indicia and thus shield it against such challenge to its existence. Furthermore, by securing a legal personality independent from statehood and its problematic requirements, the NSSEIL option could help a deterritorialised LLIS to retain recognition, as its object ('what is being recognized') could not be said to have disappeared. Hence, even if statehood is usually seen as the holy grail of international legal personality, it may also come with substantial shortcomings once its traditional requirements go unfulfilled.

Although perhaps preferable in terms of the guarantees they may provide, bilateral or multilateral treaties also suffer from several shortcomings. The inherent complexity of negotiating such agreements is compounded by the context in which these negotiations might take place. Climate change is unpredictable and liable to move faster than expected. Most States are already facing environmental pressure and will have to bear a growing burden by the time such agreements are needed. Even then, however, the option of transitioning to NSSEIL may provide a useful starting point to discussions on the legal personality of a deterritorialised LLIS.

Indeed, were no solution to be implemented to prevent the loss of status, the option of a deterritorialised LLIS becoming a *sui generis* entity of international law is sometimes mentioned.[85] However, instead of framing it as a purgatory or a perpetual limbo, this article explores what embracing this option could signify for a deterritorialised LLIS. Contextualized and assessed in relation to other proposed solutions, it seems that becoming a NSSEIL could provide a solid platform for advocacy and might help a former LLIS maintain its network of international relations.

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[84] McAdam, *supra* note 11, at 9.

[85] Burkett, *supra* note 13, at 356–357. Rosemary Rayfuse and Emily Crawford, 'Climate Change, Sovereignty and Statehood', 11 *Sydney Law School Legal Studies Research Paper* (2011) 1, at 10. Wong, *supra* note 9, at 350.

The exact extent of what an NSSEIL LLIS could do in practice under this status is hard to delineate, since it may rely substantially on the *raison d'être* of the entity. The SMOM's interactions with Italian courts illustrate perfectly the decisive role of its humanitarian mission in defining the scope of its sovereignty. Here the *modus operandi* outlined in this article would create a transitional period during which the NSSEIL could be shaped into its desired form while still benefiting from the weight of statehood to strengthen the nature and scope of its mission.

Indeed, the weight of statehood could be crucial for as long as it exists to limit external influences. International legal personality is largely a relative concept, defined by the entity in question's interactions with other members of the international community. However, as inter-State interactions are largely dependent on the actors involved and on a myriad of external and geopolitical factors, any solution for maintaining the legal personality of LLIS beyond the loss of territory essentially consists of building a strong case, for maintaining statehood or, as presented here, for allowing a transition towards NSSEIL. The ultimate success of any plan will largely be in the hands of other members of the international community. Herein perhaps lies the single strongest point of value that the SMOM's precedent provides for the future of LLISs. The peculiar position of the Order and its free-standing nature, removed from a founding agreement or any type of devolution, result in a very low threshold required by members of the international community to confirm a transition towards NSSEIL. In fact, the lack of a pretension to territorial sovereignty, as opposed to a State's, may reassure potential 'host' States that their own sovereignty would not be threatened by the NSSEIL LLIS, were they to provide it with a physical haven. This makes the NSSEIL option particularly relevant as a 'worst-case scenario' solution since one can assume that the failure of other more ambitious options may have been due to a lack of affirmative action and cooperation by other States.

It is not a stretch to assume that climate change will induce pressure on every State on our planet. While the impacts of climate change will vary substantially depending on a variety of factors, our highly integrated world has already shown that strictly local crises are a thing of the past. Hence, assessing the different options available to LLISs at present should also consider the deteriorating forecasts and de-stabilizing effects of the very crisis at the source of the predicament of LLISs. It may be tempting to isolate and compartmentalize the issue relating to LLISs, but this could be a disservice to those in danger of being displaced.

Ultimately, benefiting from a 'by default' option which could be implemented with relatively limited support from external actors can hardly be described as a bad thing. Even if this course

is not ultimately adopted by an LLIS, it could prove useful as a starting point. Moreover, the range of the SMOM's status and prerogatives described above would provide a relevant option even as a primary option. The substantial flexibility it would provide could result in a highly adaptable, bespoke solution for an LLIS to continue existing beyond the loss of its statehood. In fact, there has been considerable emphasis on the importance of statehood and how it might accommodate a State without territory. However, regardless of exactly when and how the statehood of a deterritorialised LLIS begins eroding, unless it can secure a territorial jurisdiction the latter will eventually be reduced to carrying out tasks that an NSSEIL could perform. Its citizens having acquired other nationalities,[86] the activities of a hypothetical deterritorialised State would essentially equate those performed by the SMOM *mutatis mutandis*.[87] This shift in purpose is reflected in Rayfuse's conclusion on the possibility of deterritorialised statehood, deemed a transitional option.[88] Other alternatives, such as 'abstract States' inspired by the precedents of governments in exile,[89] or political trusteeships,[90] would also eventually face the same problem. A time would come when no former citizen of the LLIS would hold its effective citizenship, thereby removing the need and possibility for the ex-situ nation to provide diplomatic protection, since no one could effectively claim such a privilege.[91] As Wong explains:

> If the people were to be scattered in other states, they would presumably become part of that other state. Even accepting the "deterritorialised state", the population residing in other states would be subject to their jurisdiction. If dual nationality is obtained, "the presumption of diplomatic protection may gradually favour the State in which the person resides". The "deterritorialised State" would thus fulfil no real function in a legal sense: its principal role would likely become one of advocacy for its diaspora.[92]

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[86] ICJ, *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, ICJ Reports 1955, 6 April 1955, 4.

[87] Most of the prerogatives exclusive to States such as voting and implementing laws, taxation powers or the monopoly on legitimate violence would be either irrelevant or unimplementable for a deterritorialised State after its population has migrated if a 'host' State does not allow the LLIS to exert these powers within the host State's jurisdiction.

[88] Rosemary Rayfuse, 'W(h)Ither Tuvalu? International Law and Disappearing States', *University of New South Wales Faculty of Law Legal Studies Research Paper Series* (2009) 1, at 13.

[89] Rayfuse and Crawford, *supra* note 86, at 8.

[90] Burkett, *supra* note 13, at 363–367. S*ee also* Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?', 21 *Tilburg Law Review* (2016) 72, at 86. Wong, *supra* note 9, at 86–87.

[91] McAdam, *supra* note 14, at 136–137.

[92] Wong, *supra* note 9, at 385–386.

In such a context, being able to participate in the creation of international customary law,[93] benefitting from sovereign immunity for its head of State and the right of legation, as well as membership in international organisations,[94] would constitute crucial assets in comparison to a possible complete loss of legal personality.

As maintaining the physical indicia of statehood becomes increasingly challenging, this option could dissociate the LLIS's legal personality from the unsubmerged parts of its territory, providing stability and a solid platform for its continued existence. This may prove decisive in securing help or loans to ensure the protection of the threatened populations. Indeed, the Order of Malta's longevity could also vouch for the stability and sustainability of this particular type of legal personality. Conversely, Alexander and Simon warn against prioritizing deterritorialised statehood at all cost and over other options:

> As a result, continuing to formally recognise submerged states seems desirable because it appears to prevent displaced islanders from losing their cultural identity and legal rights, but in reality we will be creating an empty fiction that may impede a long-term solution.[95]

While it is clearly far from a panacea, the 'NSSEIL option' should not be dismissed outright simply because it does not secure statehood. Indeed, this might be the strongest point of this option: it does not rely on statehood. This article attempts to show that there are merits to considering the current position of the Sovereign Military Order of Malta as a framework for continued existence, and the Holy See's association with the Vatican City also demonstrates that statehood and an NSSEIL can harmoniously cohabitate.

Due to the absence of an 'expiry date' and the timeless nature of its hypothetical mission, an NSSEIL LLIS could reasonably retain international legal personality for as long as needed or desired. Were the submerged territories to resurface, an NSSEIL could also possibly regain territorial sovereignty over the recovered land area. This would avoid the creation of *terra nullius*, i.e. unclaimed land.[96]

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[93] Worster, *supra* note 77, at 256.

[94] Costi and Ross, *supra* note 5, at 125.

[95] Alexander and Simon, *supra* note 11, at 25.

[96] This possibility, although mentioned in the context of a hypothetical government in exile scenario, is mentioned by Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty', 53 *Ocean & Coastal Management* (2010) 1, at 7–8.

Retaining international personality and playing an active role in the advocacy and protection of the culture and traditions of the displaced populations might play a major role in a post-relocation context. Appropriate protection of community rights and collective identity could also make a substantial difference in the relocation process.[97] Interestingly, collective identity is one of the pillars that allow the SMOM to thrive. As Burkett emphasizes: 'Indeed, this appears to be the most powerful binding force for the Sovereign Order of Malta, whose members remain bonded by history, spirituality, and service.'[98]

V. Conclusion

What the future holds for low-lying island States is uncertain. The challenges brought by the rise in sea levels and climate change must not be underestimated, and preparedness is key to meeting them. The window of opportunity for this preparation is narrowing quickly, and the feeble efforts of the international community made thus far do not inspire confidence in the probability of an adequately planned and executed collective attempt to safeguard the rights of those who are most vulnerable. In the absence of a clear and unequivocal legal framework to address the challenges faced by Low-lying Island States, the need for exploring the different options available is pressing.

This is where the present article attempts to add to the current research. While matters relating to the continued statehood of a deterritorialised LLIS belong to a separate discussion, the possibility remains that the loss of a State's population and territory could result in it losing its statehood. The highly political nature of the concept and the enduring weight granted to sovereignty and physical indicia mean that solutions to preserve the legal personality of a LLIS beyond the loss of its statehood are relevant, even if only as a plan B, or C.The possibility of a deterritorialised LLIS becoming a *sui generis* entity of international law is mentioned throughout the literature but has not been fully explored as an actual option for maintaining the international legal personality of an LLIS. By examining the extent and content of the Sovereign Military Order of Malta's unusual legal personality, this article charts some of the prerogatives available to an LLIS if it were to become a Non-State sovereign entity of international law.

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[97] Park, *supra* note 2, at 20. *See also* Tabucanon, *supra* note 75.

[98] Burkett, *supra* note 13, at 369. It should be noted, however, that the SMOM can only issue diplomatic passports; it does not have nationals per se.

Using the SMOM (and the Holy See to a lesser extent) as a blueprint, the possibility of an LLIS becoming a NSSEIL can be laid out as a useful 'default' option to retaining legal personality, an alternative to other options that rely on the active support of other States.

While the 'NSSEIL option' is far from an ideal solution to retaining international legal personality, it deserves a place in the wide spectrum of solutions which have so far been discussed. Its merits and shortcomings, such as the loss of statehood and the low threshold of effort required from other States should be assessed in context, and its usefulness may simply lie in its existence as a contingency plan. Even if the existence of this option only succeeds in reducing uncertainty surrounding the continued legal personality of an LLIS, the 'NSSEIL option' will have played a role in confronting some of the challenges faced by the threatened States.

As the window for action narrows, the need for concerted action becomes increasingly urgent. While there is yet time for pre-emptive measures and *in situ* adaptation, the current response by the international community is far from sufficient to remove the need for contingency plans. Even if one can hope that worst-case scenario solutions will not be needed, exploring such solutions now can be a constructive exercise since concrete solutions will undoubtedly be constructed on the theoretical foundations we lay today.

Rouleau-Dick, Michel, 'Sea Level Rise and Climate Statelessness' (2021) 3 Statelessness and Citizenship Review 287-308.

3

SEA LEVEL RISE AND CLIMATE STATELESSNESS: FROM 'TOO LITTLE, TOO LATE' TO CONTEXT-BASED RELEVANCE

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Several low-lying island states currently risk the loss of their entire territory before the end of the century. Combined with the inadequacy of the existing framework of international refugee law to address the challenges faced by those displaced, this situation has made the law on statelessness an interesting candidate for securing an alternative path to obtaining a legal status in a post-relocation context. However, while several authors have examined this possibility, the majority conclude that it fails in its putative task by providing too little, and by coming into play too late to be of any significant relevance to the situation of environmentally displaced persons in low-lying island states. This article challenges this narrative by re-examining the relevance of the law on statelessness along with the context within which it might have to play a role.

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I INTRODUCTION

After decades of doubt and uncertain progress towards awareness of climate change, attitudes are starting to change. Numerous governments now acknowledge that humanity is in a state of 'climate emergency' or facing a 'climate crisis', and various actors in civil society have also changed the way they discuss climate change to reflect the urgency of acting.[1] Unfortunately, these pious declarations alone are unlikely to slow the pace of climate change, and while key in increasing pressure on governments, climate litigation is often limited by the narrow scope

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1 Damian Carrington, 'Why the Guardian Is Changing the Language It Uses about the Environment', *The Guardian* (online, 17 May 2019) <https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>.

of inadequate legal frameworks. The changes effected by climate change have steadily increased in scope and severity, with no sign of relenting.[2]

Climate change does not affect everyone equally. Citizens of low-lying island states ('LLISs') such as Tuvalu, Kiribati or the Maldives have known for some time that the existence of their country lies in the balance. Despite their infinitesimal contributions to the causal drivers of climate change, such vulnerable states are likely to be hit the hardest by the slow- and fast-onset effects of climate change. The increase in extreme weather events such as typhoons and king tides, coupled with the steady rise in sea levels, present well-documented threats to their very existence.[3]

Narratives taking for granted the loss of LLISs should be avoided, as they can undermine efforts to build local resilience and *in situ* adaptation. However, the reality of climate change is such that strategic planning is also needed to mitigate its impact on vulnerable populations, which presents a dilemma for the affected states in how they distribute their limited resources.[4] Conversely, the predicament faced by LLIS also raises several novel questions about international law, in part due to the unprecedented possibility that an existing state could physically lose its entire territory. As statehood has traditionally been rooted in territorial sovereignty (or at least a claim to it), it is unclear if a deterritorialised LLIS would be able to retain its statehood beyond the loss of its territory, or if its entire territory becomes uninhabitable. Climate change thus poses a threat both to the physical and legal existence of the most vulnerable states.

II CLIMATE STATELESSNESS

The possible physical disappearance of a state would also imply the cross-border migration of its nationals. While bilateral or multilateral agreements could secure a safe haven for the displaced populations, the lack of such a pre-emptive framework for relocation is particularly problematic in light of the lack of protection afforded by the current framework of refugee law. The definition of 'refugee' found in the 1951 *Convention Relating to the Status of Refugees* ('*1951 Convention*')[5] centres the need for protection around the notion of persecution. As migration triggered by the rise of sea levels hardly involves a discriminatory intent or persecution on the grounds defined by the *1951 Convention*, it is widely accepted that environmentally displaced persons ('EDPs') from LLISs that have been displaced exclusively due to environmental factors fall outside of the scope of international refugee law. This was examined at length in the 2014 New Zealand case of *Teitiota v Chief Executive Ministry of Business, Innovation and Employment*, in which an I-Kiribati man unsuccessfully tried to claim protection

2 A recent example being the worrying slowdown of the gulf stream: see Levke Ceasar et al, 'Current Atlantic Meridional Overturning Circulation Weakest in Last Millennium' (2021) 14(3) *Nature Geoscience* 118.

3 Curt D Storlazzi et al, 'Most Atolls Will Be Uninhabitable by the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding' (2018) 4(4) *Science Advances* 1.

4 Jonathon Barnett, 'The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries' (2017) 58(1) *Asia Pacific Viewpoint* 3.

5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 2951, 189 UNTS 37 (entered into force 22 April 1954) art 1(A) ('*1951 Convention*').

under the *1951 Convention*, an outcome in line with most academic analyses of the relevance of the *1951 Convention* for EDPs.[6]

Thus, in the absence of pre-emptive solutions to relocation, there is a risk that EDPs from LLISs would fall through the net of international protection, outside the scope of the international instruments that have hitherto protected those on the move.[7] This does not mean that refugee law bears no relevance to the migration of EDPs, as the principle of non-refoulement was recently found by the United Nations Human Rights Committee to (eventually) provide protection against forced return.[8] While undoubtedly a positive development, the principle of non-refoulement is narrow in scope and fails to offer both legal status and substantive protection to EDPs.[9]

However, a comparatively lesser-known instrument might bear some relevance for EDPs from LLISs: the 1954 *Convention Relating to the Status of Stateless Persons* ('*1954 Convention*').[10] This article will attempt to assess the relevance of the law on statelessness for the protection of cross-border, EDPs from LLIS within a hypothetical worst-case scenario. By the term 'worst-case scenario', this article aims to describe a future timeline within which pre-emptive solutions cannot be implemented and palliative solutions thus need to rely on the currently existent and applicable legal framework with minimal reliance on proactive action by other members of the international community.

Statelessness in the context of climate change could take different forms, ranging from the accrued vulnerability of already stateless populations, such as the Rohingyas, to the very literal possibility of those who may lose their country of nationality. The present analysis is concerned with the latter, based on the premise that the nationals of a state become stateless upon the extinction of their former state's statehood. In the context of LLISs, this can be translated as the

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6 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. For a discussion of the lacunae in the *1951 Convention* (n 5) with regards to EDPs from LLISs, see Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 42–48 ('Forced Migration'). See generally, António Guterres, 'Nansen Conference on Climate Change and Displacement; Statement by António Guterres, United Nations High Commissioner for Refugees' (Speech, UNHCR 6 June 2011) <https://www.unhcr.org/4def7ffb9.html>; Jenny G Stoutenburg, *Disappearing Island States in International Law* (Brill 2015) 402. This is why the use of terms such as 'climate refugees' is problematic, as it implies the existence of protection where there is little to none available, notwithstanding specific states broadening their domestic implementation of international refugee law to include EDPs.

7 This also applies to a number of domestic frameworks that explicitly or practically excluded persons displaced by natural disasters from their protection frameworks. See, eg, 'Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection — Risk to Life or Risk of Cruel and Unusual Treatment or Punishment', *Immigration and Refugee Board of Canada* (Web Page, 15 May 2002) s 3.1.4 <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/ProtectLifVie.aspx#s3>; Camilla Schloss, 'Climate Migrants — How German Courts Take the Environment into Account When Considering Non-Refoulement', *Völkerrechtsblog* (Blog Post, 3 March 2021) <https://voelkerrechtsblog.org/climate-migrants/>. Other states such as Finland and Sweden suspended or removed domestic legal provisions that could have been used by EDPs. See Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (2020) 114(4) *American Journal of International Law* 708, 723.

8 Human Rights Committee, *Views: Communication No. 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 12 [9.11] ('*Teitiota v New Zealand*').

9 For a detailed interpretation of the Human Rights Committee's decision, see McAdam, 'Non-Refoulement' (n 7).

10 *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('*1954 Convention*').

assumption that if an LLIS were to lose its statehood, its former nationals would then qualify under the definition of stateless person found in the *1954 Convention*:

> For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.[11]

The resulting 'climate statelessness' is accepted by most scholars.[12] This conclusion is also supported by the statement of a United Nations High Commissioner for Refugees ('UNHCR') Expert Panel on the concept of a stateless person under international law:

> When applying the definition it will often be prudent to look first at the question of 'State' as further analysis of the individual's relationship with the entity under consideration is moot if that entity does not qualify as a 'State'. In situations where a State does not exist under international law, the persons are *ipso facto* considered to be stateless unless they possess another nationality.[13]

Beyond the link between statehood and statelessness however, the relevance of the latter is defined by the timeline of events relating to the former. Professor Jane McAdam, who led the discussions in the UNHCR panel mentioned above, identifies the gap between the physical disappearance of a LLIS and the recognition by the international community that the state in question has ceased to exist as one of the main obstacles to the law on statelessness playing a role in the protection of the former state's nationals.[14]

It should be noted that the present article focuses exclusively on the *1954 Convention* and intentionally avoids engaging with the possible relevance of the 1961 *Convention on the Reduction of Statelessness*.[15] While the latter certainly bears some relevance to the plight of those vulnerable to climate change, the context of this relevance is fundamentally quite different to the type of scenario in which the *1954 Convention* could come into play and to the protection it provides (ie assuming the loss of the concerned LLIS's statehood). Therefore, this choice is not motivated by a lack of relevance, but rather by the approach adopted by this piece.[16] Moreover, in the context of this article, the 'law on statelessness' refers primarily to the *1954 Convention*.

Using the law on statelessness as a protection framework for EDPs is not an unexplored option, but it has so far essentially been deemed a dead end by most

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[11] ibid art 1(1).

[12] Alejandra Torres Camprubí, *Statehood under Water — Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 198–200; Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 5; Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States* (Background Paper No PPLA/2011/04, Division of Internal Protection and UNHCR, May 2011); Marija Dobrić, 'Rising Statelessness Due to Disappearing Island States' (2019) 1(1) *Statelessness and Citizenship Review* 42, 52–53. Walter Kälin instead argues that the loss of nationality cannot be assumed to be automatic: Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement. Multidisciplinary Perspectives* (Oxford University Press 2010) 81, 101.

[13] *Expert Meeting on the Concept of Stateless Person under International Law* (Summary Conclusions, UNHCR, 28 May 2010) 2 (emphasis in original).

[14] McAdam, 'Forced Migration' (n 6) 142.

[15] *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 185 (entered into force 13 December 1975) ('*1961 Convention*').

[16] For a broader approach to the issue of 'climate statelessness' under the two statelessness conventions, see Dobrić (n 12).

authors, and thus left potentially under-researched in this specific context.[17] The reasons for this can be summarily divided into two broad categories. First, the law on statelessness is argued to come into play too late to be of any relevance, due to the fact that a deterritorialised LLIS would likely retain its statehood long after its population has had to relocate, or its territory has been fully submerged. Second, the shortcomings of the *1954 Convention* and its implementation essentially render it useless as a protection framework.

However, while these conclusions may be warranted in the context(s) they have so far been discussed to apply in, they do not cover the full range of possible futures. This article adopts a 'worst-case scenario' approach, revisiting the conclusions previously reached on the relevance of the *1954 Convention* in this light. The article first sets the scene by outlining the idea of climate statelessness and how the concept has been discussed in literature thus far. This is followed by the introduction of a scenario-based approach, which is then used to determine the extent to which the law on statelessness could prove relevant for the displaced nationals of LLIS, and in which context. To do so, the article revisits the arguments presented earlier that have hitherto justified the relative lack of interest in the *1954 Convention's* relevance for EDPs from LLISs.

III Too Little, Too Late

A *Too Late*

The first conclusion reached by most authors who have discussed the relevance of the *1954 Convention* for EDPs from LLISs is that it is very unlikely that it would apply when it is needed the most, ie during or immediately after the cross-border migration of those displaced by climate change.[18] Assessing that the law on statelessness would therefore be triggered too late to have any practical relevance is directly related to how likely an LLIS is to maintain its statehood beyond the loss of its physical indicia (ie population and territory). While the possibility of deterritorialised statehood may initially seem counterintuitive if approached purely based on the 'traditional' criteria of statehood,[19] several arguments have been raised to support the possibility of a LLIS maintaining its statehood beyond the loss of its territory.

The first argument proposed is that the 'minimum threshold' account of statehood, embodied by the criteria found in art 1 of the *Montevideo Convention*

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[17] Jane McAdam's assessment is that 'the statelessness treaties provide a very weak "solution" in the present context, which is already highly contingent on other factors.' McAdam, 'Forced Migration' (n 6) 139–43. Heather Alexander and Jonathan Simon conclude that the statelessness conventions 'do not provide a ready solution [to the plight of EDPs]': Heather Alexander and Jonathan Simon, 'Sinking into Statelessness' (2014) 19 *Tilburg Law Review* 20, 25. Jenny Grote Stoutenburg also posits that the loss of statehood of a LLIS would result in *de jure* statelessness for its displaced population but concludes her analysis on the relevance of the stateless status in this context by emphasising the shortcomings discussed in Part III.B. Stoutenburg (n 6), 409.

[18] McAdam, 'Forced Migration' (n 6) 142.

[19] These criteria are found in the 1933 *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1. They are commonly accepted to reflect international custom: see eg Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50(1) *Stanford Journal of International Law* 1, 17; McAdam, 'Forced Migration' (n 6) 128.

on the Rights and Duties of States ('*Montevideo Convention*' and '*Montevideo* criteria') should simply be sidelined. Whether it is by dismissing the relevance of the criteria altogether,[20] restricting their scope to the creation of states,[21] or deeming them inadequate,[22] most authors agree that they fail to provide clear guidance in the case of LLISs. Past cases such as fragile states,[23] or governments in exile,[24] highlight the flexibility of the criteria in practice. As a result, it is argued that it would be premature to assume that a LLIS could not exist beyond the loss of its physical components.

Furthermore, scholars rely on the existence of a strong presumption of continuity, which would guarantee that an LLIS retains its statehood long after it has lost its claim to territorial sovereignty. This principle would have a 'ratchet effect',[25] ensuring that statehood, once obtained, is not easily lost. Crawford explains it as such: 'there is a strong presumption against the extinction of States once firmly established'.[26] While the exact workings of the presumption of continuity are not always discussed, the principle is closely linked with the role assumed to be played by recognition.

Indeed, recognition is understood to be the means through which the international community would confirm (or reject) the statehood of a deterritorialised LLIS. For instance, McAdam states that the international community would defer to the concerned state's claim to continued existence in deciding whether to maintain recognition or not.[27] As long as the deterritorialised state maintains a claim to statehood, it should benefit from the continued recognition of the international community.[28]

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20 For a discussion of the minimum threshold and a potential alternative, see Susannah Willcox, 'Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood' (2016) 30 *Leiden Journal of International Law* 117.

21 Nathan J Ross, 'Low-Lying States, Climate-Change-Induced Relocation, and the Collective Right to Self-Determination' (PhD Thesis, Victoria University of Wellington, 2019) 161 ('Low-Lying States'); Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law — Climate Change Displacement and Sovereignty* (Springer-Verlag Berlin Heidelberg 2014) 176.

22 Jain (n 19) 29.

23 Ross, 'Low-Lying States' (n 21) 150–51; McAdam, 'Forced Migration' (n 6) 134.

24 Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2(1) *Climate Law* 345, 356; Ross, 'Low-Lying States' (n 21) 151–53; Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' (Research Paper No 2010-2, University of New South Wales Faculty of Law Legal Studies Research Paper Series, 21 January 2010) 9.

25 Willcox (n 20) 122.

26 James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 715. These words are widely cited to support the existence of the presumption of continuity. See, eg, Burkett (n 24) 354; Jacquelynn Kittel, 'The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2015) 2014 *Michigan State Law Review* 1207, 1248; Ross, 'Low-Lying States' (n 21) 154; Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 *Melbourne Journal of International Law* 346, 362; Yamamoto and Esteban, 'Atoll Island States' (n 21) 176.

27 McAdam, 'Boundaries' (n 24) 9.

28 Kälin (n 12) 101–102.

In short, the timeline supported by most authors locates the loss of statehood of a LLIS (if it ever occurs) much later than the loss of the state's physical elements.[29] McAdam summarises the situation as follows:

> In light of the presumption of continuity of statehood, such recognition [that a State has ceased to exist], if forthcoming at all, would likely occur long after the population had moved. The application of the law on statelessness may have little practical benefit such a long time after the fact.[30]

B *Too Little*

The other element that has weighed against the study of statelessness as a means of protection for EDPs from LLISs lies in its shortcomings as a protection framework. Not only would it apply long after EDPs would have had to leave their homes, but its actual added value would be so little as to be essentially worthless in practical terms.

Firstly, based on the line of arguments discussed above, it is assumed that there would be a gap between the loss of physical indicia and the loss of statehood. During this period, EDPs would not qualify for the protection of the *1954 Convention*, as they would still be considered as nationals of a state. However, while they would not qualify as de jure stateless under the *1954 Convention*, EDPs would likely find themselves outside their own state's jurisdiction and unable to avail themselves of its protection, rendering their nationality essentially ineffective.[31]

EDPs from deterritorialised LLISs would thus find themselves in the loose category of de facto stateless persons: formally nationals of a state, but unable to enjoy the different elements of nationality such as the possibility to return to their state of nationality.[32] In contrast with de jure statelessness defined under the *1954 Convention*, de facto statelessness has proven to be a contentious concept.[33] A UNHCR background paper defines de facto stateless persons as follows: 'persons

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29 Several solutions have also been envisaged to secure continued statehood beyond the loss of territory, such as Burkett's 'nation ex situ': Burkett (n 24) 346. See also Wong (n 26) 383–89; Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?' (2016) 21 *Tilburg Law Review* 72.

30 McAdam, 'Forced Migration' (n 6) 142.

31 Park (n 12) 14.

32 An interesting parallel could be drawn with persons temporarily stranded due to restrictions on travel in the context of the COVID-19 pandemic: see eg, Sandeep Singh, 'Opinion: Indian Travel Ban Leaves Kiwis Stateless', *New Zealand Herald* (online, 11 April 2021) <https://www.nzherald.co.nz/nz/opinion-indian-travel-ban-leaves-kiwis-stateless/ZNDHSAYCD53DG3UFUDVCLK455U/>. On the specific subject of the duty to readmit nationals see Heather Alexander and Jonathan Simon, 'No Port, No Passport: Why Submerged States Can Have No Nationals' (2017) 26(2) *Washington International Law Journal* 307, 316–19 ('No Port, No Passport').

33 Jason Tucker, 'Questioning De Facto Statelessness, by Looking at De Facto Citizenship' (2014) 19(1–2) *Tilburg Law Review* 276. The distinction between de jure and de facto statelessness has also been criticised as being counterproductive in most contexts by Laura van Waas and situations of de facto statelessness are explicitly not addressed by the UNHCR's handbook on statelessness: see Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 64, 80–81; Katia Bianchini, 'Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom' (2020) 32(3) *International Journal of Refugee Law* 440; *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (UNHCR 2014) 5 [7] ('*UNHCR Handbook*').

outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.[34] Consequently, de facto stateless persons find themselves sitting uneasily between the protection afforded by the *1951 Convention* (under which refugee status is determined on the basis of a facts-based assessment) and by the *1954 Convention* (under which stateless status is determined on the basis of a purely legal assessment).

Under such circumstances, the only relevance of the *1954 Convention* for de facto stateless EDPs would lie in the non-binding recommendation of the *1954 Convention*'s final declaration that state parties 'consider sympathetically the possibility of according to that person the treatment which *the Convention* accords to a stateless person'.[35] Hence, during this crucial gap in time, the law on statelessness would fail to provide any actual protection for EDPs, as they could only be described as de facto stateless and would thus fall outside of the *1954 Convention*'s scope.[36]

While the protection of stateless persons was originally intended to be included as an additional protocol to the *1951 Convention*, the *1954 Convention*'s drafters instead opted to protect stateless persons through a standalone instrument.[37] This was based on the reasoning that a separate instrument would allow states to ratify only the statelessness instrument without having to first ratify the *1951 Convention*, as would have been needed for an additional protocol.[38] This has failed to materialise and ever since, the *1954 Convention* has lagged behind the *1951 Convention* in terms of ratifications.[39]

However, the number of ratifications can be a poor indicator of practical relevance since to be of any value to stateless persons, the instrument must be implemented domestically through a statelessness determination procedure ('SDP'). In this, the law on statelessness also trails behind the *1951 Convention*. Numerous state parties lack SDPs, and even those that have established one do not always do so in full accordance with the *1954 Convention* or the guidance provided by the UNHCR in its handbook on statelessness.[40] As a result, claiming stateless status is a complex and uncertain process even in states that have implemented SDPs. In those that have not, it is often simply not a possibility.

Furthermore, these substantial lacunae are also compounded by the lack of ratifications to the *1954 Convention* in the geographical areas most relevant to the

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34 Hugh Massey, *UNHCR and De Facto Statelessness* (Background Paper No LPPR/2010/01, Division of Internal Protection and UNHCR, April 2010) 61.

35 *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, opened for signature 14 December 1950, 360 UNTS 117 (entered into force 28 July 1951) [III], quoted in Torres Camprubí (n 12) 200 (emphasis added). This approach is also emphasised in the *1961 Convention* (n 15): see Park (n 12) 14.

36 Park (n 12) 14.

37 van Waas (n 33) 68–69.

38 ibid 68.

39 As of 2021, there are 95 states party to the *1954 Convention* (n 10), versus 146 for the *1951 Convention* (n 5): see '2. Convention Relating to the Status of Refugees', *United Nations Treaty Collections* (Web Page, 19 March 2021) <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en>; '3. Convention Relating to the Status of Stateless Persons', *United Nations Treaty Collections* (Web Page, 19 March 2021) <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en> ('Signatories of the *1954 Convention*')

40 *UNHCR Handbook* (n 33) [57]–[124]. On national implementation of statelessness determination procedures, see, eg, Bianchini, 'Identifying the Stateless' (n 33) 440. For country-specific information in Europe, see 'Countries', *Statelessness Index* (Web Page, 22 March 2021) <https://index.statelessness.eu/countries>.

protection of EDPs from LLISs in the Pacific region. Currently, only Australia and Fiji have ratified the *1954 Convention*. The former lacks a SDP that would enact its protection for stateless persons within its jurisdiction,[41] and no information is available on whether or not Fiji even has a SDP. As for the Maldives, neither of its two closest neighbours India and Sri Lanka have ratified the *1954 Convention*.[42]

Substantively, the *1954 Convention* lacks an obligation to provide citizenship to those who qualify for its protection.[43] Although the right to a nationality is found in art 15 of the *Universal Declaration of Human Rights*,[44] no corresponding obligation exists for states to grant nationality, an absence also observed in the 1966 *International Covenant on Civil and Political Rights*,[45] as well as in other human rights treaties.[46] Additionally, the *1954 Convention* provides relatively little added value in the context of the general framework of human rights protection, as its general provisions, while not irrelevant, are also mostly found in other international norms.[47] To add to the weaknesses of the *1954 Convention*, the UNHCR's mandate on statelessness and, consequently, the *1954 Convention*'s implementation, is comparatively weaker than its supervisory responsibility under the *1951 Convention*.[48] Under art 35 of the *1951 Convention*, state parties are required to cooperate with the UNHCR in the exercise of its responsibilities, while the UNHCR's mandate on statelessness is rooted in the UN General Assembly Resolution 50/152 of 21 December 1995.[49] In practice, this has not proven to be a

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[41] Michelle Foster, Jane McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure' (2016) 40(2) *Melbourne University Law Review* 401, 445–54; *Statelessness in Australia* (Report, Refugee Council of Australia, 7 January 2019) 14.

[42] Stoutenburg (n 6) 409.

[43] van Waas (n 33) 66.

[44] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

[45] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3).

[46] Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 11, 14–15, 26.

[47] Katia Bianchini, *Protecting Stateless Persons — The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 99–100. For an in-depth discussion of the substantive relevance of the *1954 Convention*, see van Waas' excellent opus: Laura van Waas, *Nationality Matters — Statelessness under International Law* (Intersentia 2008). See also, Edwards and van Waas (n 12).

[48] Despite sharing much of their contents, the *1954 Convention* (n 15) does not have a similar provision to *1951 Convention* (n 5) art 35, which enshrines the duty to cooperate with the United Nations High Commissioner for Refugees ('UNHCR') in the text of the treaty. See Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019) 46–47.

[49] *Resolution Adopted by the General Assembly on the Report of the Third Committee (A/50/632)*, UNGA, UN Doc A/RES/50/152 (9 February 1996), citing *Report of the Third Committee*, UNGA, UN Doc A/50/PV.97 (21 December 1995). See also 'Mandate of the High Commissioner for Refugees and His Office' (Executive Summary, UNHCR) <https://www.unhcr.org/publications/legal/5a1b53607/executive-summary-of-the-mandate-of-the-high-commissioner-for-refugees.html>; 'UNHCR's Mandate for Refugees, Stateless Persons and IDPs', *United Nations High Commissioner for Refugees* (Web Page) <https://emergency.unhcr.org/entry/55600/unhcrs-mandate-for-refugees-stateless-persons-and-idps>. See also Matthew Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28(1) *International Journal of Refugee* Law 7.

problem for the UNHCR in engaging with state parties,[50] but it is nevertheless relevant to any discussion on the implementation of the *1954 Convention*.

In summary, even if EDPs from LLISs were to qualify as stateless under the *1954 Convention* upon the de jure extinction of their state of nationality, they would be (1) unlikely to be able to avail themselves of the protection provided by the *1954 Convention*; and (2) even if they were, it is doubtful whether the protection would add anything worthwhile to that already provided by other international instruments. As a result, it is safe to say that the law on statelessness does not provide a 'solution' to protect EDPs from LLISs. This is the conclusion reached by most scholars who have discussed the issue thus far: 'the Statelessness Conventions do not provide a ready solution to their plight'.[51] McAdam frames the issue as such: 'Accordingly, the statelessness treaties provide a very weak "solution" in the present context, which is already contingent on other factors'.[52] While a fairly clear rebuttal to any attempt at framing statelessness as a possible 'solution', McAdam's statement nevertheless leaves open the possibility that in some scenario(s), the law on statelessness could still play a role in the protection of EDPs.

IV Worst-Case Scenario

Legal research, particularly that concerned with international law, is ill-equipped to project itself into the future. The sheer scope of possibilities deals a severe blow to any claim of certainty a fortiori once one takes into account the political nature of some of the deciding factors to be considered in order to reach any conclusion.

Rather than to elaborate a complex analysis and present it as 'the future', it may thus be more practical to adopt a context-based approach to assess the multiplicity of legal futures. In doing so, one can hope to better identify the implicit assumptions necessary to prioritise one conclusion over another. Beyond the methodological value of this approach, it also benefits the overall value of the analysis it produces by ensuring that the preconditions for its relevance are discussed.

This article is not an attempt to create a mutually exclusive alternative to previous research on the relevance of the law on statelessness in the context of climate change. Other analyses discussed are all likely to have added value to the common understanding of the future(s) LLISs may face. Instead of presenting a single timeline that relies upon a specific chain of events and legal interpretations as 'the' future, this article approaches legal analysis of the future as part of a broad spectrum consisting of multiple, possible parallel futures, with the eventual aim of discussing 'a' future. One could imagine this spectrum to range from 'optimistic' futures to more 'pessimistic' ones. At one end of the spectrum is a reversal in current environmental trends and the withdrawal of current threats to the existence

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50 Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 88, 91.

51 Alexander and Simon, 'Sinking into Statelessness' (n 17) 25.

52 McAdam, 'Forced Migration' (n 6) 142. McAdam had earlier stated that 'the instruments' tight juridical focus leaves little scope for arguing for a broader interpretation that would encompass people whose State disappears': see Jane McAdam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' (Research Paper No. 08/121, The University of Sydney, Sydney Law School, October 2008) 9.

of LLISs. At the other end of the spectrum is a faster-than-expected rise in sea levels and an unfavourable international geopolitical context. This is not a likeliness assessment; all efforts should be directed towards bolstering local resilience and building durable solutions that both minimise harm to local populations and sustain their agency. However, even if all efforts are invested in the 'positive' end of the spectrum of futures, the sheer amount of uncertainty involved, and the highly political dimension of certain key elements (such as recognition) highlight the need for the type of approach described by former I-Kiribati president Anote Tong: 'I'd rather plan for the worst and hope for the best'.[53] For a state, this may involve complex trade-offs in the allocation of resources, but in terms of legal research, this could provide an opportunity to create better legal forecasts, which in turn could help with a state's allocation of its resources.

The use of a spectrum to conceptualise possible futures also reflects the uniqueness of the challenges faced by the different states threatened by climate change. There can be no single solution based on a 'one size fits all' approach.[54] Discussing different solutions in the context of various possible futures has the benefit of allowing reasoning that would not be possible without allowing for several discussions to occur in parallel.

In keeping with this approach, the current article aims to revisit the assessment of the law on statelessness outlined in the previous section, this time in the context of a hypothetical 'worst-case scenario'. The bases of the analysis do not change, but the context within which the relevance of the law on statelessness is assessed does. Such context can be briefly summarised by the premise: 'what if almost everything that can go wrong does?' In practice, this is assumed to mean that the loss of a LLIS's entire territory would result in the loss of its statehood earlier than otherwise expected under the narrative presented in Part III(A) and that a number of EDPs would find themselves excluded from most legal frameworks traditionally protecting those on the move. Against this backdrop, what would then be the added value of the law on statelessness for EDPs from LLISs?

V STATELESSNESS IN CONTEXT

A *Too Late?*

The importance of statehood cannot be understated when it comes to determining which protection would be available to EDPs from LLISs:

> [W]hat is certain is that the fate of the State of origin is the key to the determination of the legal status that the displaced population may uphold: the total de-population of a State leads to its loss of statehood, which in turn results in rendering its population stateless.[55]

As discussed in Part III(A), most scholars agree that the loss of an LLIS's statehood would happen only some time after it loses its territory, if at all. According to this narrative, the length of the gap between the displacement of an

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53 Kenneth R Weiss, 'Before We Drown We May Die of Thirst' (2015) 526(7575) *Nature* 624, 626.

54 This is one of the potential problems with creating a 'climate refugee' treaty: see generally McAdam, 'Forced Migration' (n 6) 186–211.

55 Torres Camprubí (n 12) 203.

LLIS's population and the loss of that state's statehood would effectively render useless the law on statelessness, since EDPs would only qualify for the legal protection of the statelessness regime long after they had been displaced. While this premise is mostly taken for granted, some scholars have also raised doubts concerning the bases of this assumption.

1 *Statehood*

While a scenario-based approach lowers the threshold needed for an outcome to be worth discussing from 'likely' to 'plausible', the current state of legal research on the statehood question is insufficient to allow us to actually delineate this threshold with sufficient certainty as to remove it from the equation. Examining critically the arguments brought forward in Part III(A) in support of continued statehood beyond deterritorialisation will allow for a better understanding of the uncertainty involved, and the corollary need to investigate alternative scenarios. The highly political nature of statehood and the substantial unpredictability that this implies mean that it may be premature to assume that the claim to deterritorialised statehood of a LLIS would not face any opposition or legal challenges, particularly in light of the legal arguments that can be brought to bear against those in favour of continued statehood.

The first argument raised in the mainstream narrative of deterritorialised statehood concerns the irrelevance, inadequacy or sheer obsolescence of the traditional account of statehood, embodied by the criteria found in art 1 of the *Montevideo Convention*. Indeed, demonstrating the lacunae of the *Montevideo Convention*'s definition of statehood is not a particularly challenging endeavour. However, two elements seem to have been either overlooked or downplayed hitherto. First, the status of the *Montevideo* criteria. While Thomas D Grant argues that the *Montevideo Convention* itself was at best 'soft law',[56] it is commonly accepted as reflective of international custom.[57] Thus, it would seem premature to dismiss altogether the criteria it sets without engaging with their content and application in state practice.

Second, while the *Montevideo Convention*'s criteria can be described as a 'minimum threshold' of statehood,[58] it remains unclear where exactly this threshold lies. The criteria it sets out have been thoroughly discussed, as have their respective implications for the future of LLISs. However, little attention has been given to their relative weight in the context of the broader relevance and status of the *Montevideo Convention*'s definition. Practically, this means that the different arguments weighing against a stricter application of the traditional account of statehood to the future of LLISs have been rooted in dismissing the criteria collectively rather than on a more detailed scrutiny of their specific individual weight and significance. Namely, this has resulted in the need for a territory and a population being dismissed based on, among other arguments, the considerable flexibility of state practice on the need for a government.[59]

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56 Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 403, 456.

57 Jain (n 19) 17; McAdam, 'Forced Migration' (n 6) 128.

58 Willcox (n 20) 3.

59 The precedent set by state practice on fragile states such as Congo in 1960 and Somalia in the 1990s and early 2000s is often invoked to illustrate this point: see, eg, Kittel (n 26) 1226–27; Willcox (n 20) 7; Ross, 'Low-Lying States' (n 21) 150–51.

As is often the case, this is also a matter of interpretation. Past examples of governments in exile have been characterised as setting a precedent for continued statehood despite the lack of a territory and population. [60] However, this overlooks the *exiled* nature of a government in exile: the Dutch government in exile in London during the Second World War did not claim to exist in abstraction from its occupied territory and population, but rather on their behalf.[61] There can be no government without a state.[62] Furthermore, governments in exile are established and recognised based on the illegality of the occupation they are a victim of;[63] their existence can thus be construed as a corollary of a breach of a *jus cogens* norm, where accepting the extinction of the illegally invaded state would give legal value to an illegal act.[64] As a result, framing state practice on the matter as a precedent for the assertion that a lack of territory or population does not affect statehood does not accurately reflect the reality and legal foundations of the existence of governments in exile. Consequently, while the ineffectiveness or absence of a government has been shown not to affect the statehood of an existing state in state practice, it seems a stretch to argue that a government could exist as a state without a territory and a population, particularly in the absence of clear state practice to suggest so.[65]

The fact that the definition of statehood found in the *Montevideo Convention* fails at providing a useful tool to clarify limit cases does not automatically mean that it can be dismissed as a whole. Instead, a closer look at the threshold it sets, in light of its application in state practice, highlights the potential problems it might present to a LLIS attempting to claim deterritorialised statehood.

Another argument that is commonly used to attempt to dissipate the uncertainty around the possibility of continued, deterritorialised statehood is the existence of a strong presumption of continuity. As discussed in Part III(A), this presumption is interpreted to act as a sort of 'ratchet', preventing existing states from going extinct once they have been created. A closer examination of the principle reveals that its scope could stop short of overriding the legal consequences of the disappearance of a LLIS's physical indicia.[66] Indeed, rather than being concerned mainly with status (ie statehood), as assumed by those who frame the presumption

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60 Burkett (n 24) 356; Ross, 'Low-Lying States' (n 21) 151–53; McAdam, 'Boundaries' (n 24) 9.

61 Stoutenburg (n 6) 285.

62 Stefan Talmon, 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Stefan Talmon and Guy S Goodwin-Gill (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) 499, 501.

63 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press Oxford 1998) 219.

64 The existence and recognition of a government in exile as a result of an illegal invasion can be explained as the principle of *ex injuria non oritur* ('illegal acts do not create law') overriding its alternative principle of *ex factis jus oritur* ('facts create law'). This approach was adopted by the United States in relation the Baltic states: see, eg, Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers 2005) 27–28; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz 1954) 399.

65 Bilkova emphasises this point, noting that claiming that the relevance of territory has changed is 'not the same as demonstrating that territory has lost all its relevance': Veronika Bilkova, 'A State Without Territory?' in Martin Kujier and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016* (Springer 2017) 19, 38.

66 This is mentioned or hinted at by a few authors: see Alexander and Simon, 'Sinking into Statelessness' (n 17) 25; Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1–2) *Climate Law* 70, 82; Bilkova (n 65) 38.

of continuity as a 'ratchet effect', the principle can also be interpreted in the context of the dichotomy between the law of continuity and the law of state succession. This narrower understanding of continuity (ie that State A is the *same* entity that existed before Province X seceded from State A) instead centres its relevance on a dynamic assessment of identity. Thus framed, the presumption of continuity is restricted to a presumption against the creation of a new state where one already exists, essentially irrelevant to matters of statehood per se. Here, the unprecedented nature of the challenges faced by LLISs means that it remains unclear how the international community would understand the role and scope given to the presumption of continuity. Practically, whether the international community understands a 'ratchet effect' to be at work or not is likely to play a central role in confirming or disconfirming an LLIS's claim to deterritorialised statehood. Until then, a definitive answer remains out of reach.

The manner itself through which other states may need to express their respective opinions is also particularly challenging to assess as part of a legal analysis. Recognition by other states remains tantalisingly out of reach for those in search of a solid normative framework regulating accession to, and arguably loss of, statehood. Beyond the classical constitutive and declarative approaches, it remains particularly challenging to draw a line or draft a required number of acts of recognition that accommodates both the geopolitical realities and the normative framework that surrounds statehood.

In the context of LLISs, it has been assumed that no other state would want to be the first to 'derecognise' a deterritorialised LLIS.[67] McAdam further explains that for acts of 'derecognition' to bear legal weight, their cumulative weight should signify a general acceptance by the international community that the state in question has ceased to exist.[68] This assumption, while sensible, remains at the level of political analysis. McAdam stops short of formulating an obligation to maintain recognition, and thus any claim that other states would not dare 'un-recognise' an LLIS is a political assessment, not a legal one. State practice in the case of Kosovo further highlights the fact that recognition is a matter left to the discretion of other states. As Tatjana Papić emphasises:

> There is no duty to recognize an entity fulfilling statehood requirements; for example, Iraq does not have to recognize Israel, and vice versa. This is an issue entirely left to states' discretion. States should, likewise, be free to revoke recognition, as they were free to afford it in the first place. To think otherwise would presuppose that an act of recognition is a legal transaction, which it is not.[69]

The relevance of recognition also has to be considered together with its relative weight in assessing statehood. For instance, dismissing the need for physical indicia (ie territory, population) would result in making recognition effectively the sole constitutive element of statehood, an assumption that may not only face the usual criticism addressed at the constitutive doctrine of recognition, but also risks overstretching the (admittedly vague) boundaries of statehood.[70] This simply highlights some of the risks involved in relying, directly or indirectly, on recognition as a definitive marker of statehood.

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67 Kälin (n 12) 102. See also McAdam, 'Forced Migration' (n 6) 137.

68 Crawford (n 26) 704, quoted in McAdam, 'Forced Migration' (n 6) 138.

69 Tatjana Papić, 'De-Recognition of States: The Case of Kosovo' (2021) 53 (Winter) *Cornell International Law Journal* 683, 728–29.

70 Alexander and Simon, 'Sinking into Statelessness' (n 17) 24.

Pragmatically, Walter Kälin might be right in assuming that no other state would want to be the first to un-recognise an LLIS. However, within a worst-case scenario, the possibility remains that other states may not be stopped by ethical or moral reasons and may contest the statehood of a deterritorialised LLIS. While this is clearly not a desirable future, it remains a possible one. This could take different forms. McAdam sets the threshold relatively high for the loss of statehood to be completed by requiring widespread, general acceptance of the loss of statehood, but this would be preceded by a period of divided recognition, during which some states might maintain their recognition, while others remove it. Since, in the absence of physical indicia, a deterritorialised LLIS's statehood would almost exclusively rely on recognition by other states, this would put the concerned LLIS in a particularly precarious position.

For the purpose of assessing statelessness, this could mean that:

> [w]here only certain States would cease recognition, given that nationality would be dependent on the recognition by a particular State, individuals would be left in a situation whereby they could be considered stateless in relation to some States but not others.[71]

Indeed, this risk is compounded by the possibility that state officials tasked with evaluating an applicant's qualification for stateless status could follow their respective 'State's official stance on an entity's legal personality and make decisions influenced by politics'.[72]

The key takeaway from the present section is that any claim to provide a clear legal timeline for the future of LLISs rests upon an assessment of political realities that remain out of reach for purely legal forecasts.[73] For the purpose of determining the relevance of the law on statelessness for EDPs from LLISs, this means that in a worst-case scenario, an LLIS could lose its statehood earlier than otherwise forecast, and consequently mean that its displaced nationals would qualify for stateless status. Hence, it may be premature to dismiss the *1954 Convention* purely on the basis that it would apply long after EDPs had left their country. While it is likely that there would be a gap between the cross-border migration of EDPs and the loss of a LLIS's statehood, the length of this gap could be shorter than previously thought. However, while this means that in the context of a worst-case scenario the law on statelessness could apply to EDPs, it does not remedy the *1954 Convention*'s shortcomings as a protection framework.

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71 Park (n 12) 14–15.

72 *UNHCR Handbook* (n 33) [20], quoted in Bianchini, 'Protecting Stateless Persons' (n 47) 85.

73 Indeed, examining the geopolitical context relating to the future statehood of LLISs would require a deeper analysis of the dynamics at play. So far, the moral arguments in favour of maintained recognition have been key to claiming that no other state would contest the continued statehood of a deterritorialised LLIS. However, other factors may prompt members of the international community to withdraw their recognition. For instance, Ross mentions access to the rich exclusive economic zones of many LLISs, or their votes in multilateral fora as possible grounds for de-recognition: see Ross, 'Low-Lying States' (n 21) 162. Papić highlights the limitations of international law in addressing highly political situations: viewing state recognition as revocable recognises the limits of international law in managing controversial social realities, such as contested statehood. Namely, in such situations, it cannot be expected that international law will step in, translate political controversies into legal questions and somehow magically solve them: Papić (n 69) 729.

B Too Little?

The possible relevance of the *1954 Convention* has not only been downplayed due to how late it has been assumed to apply to EDPs, but also by how little it provides.[74] The low number of ratifications and lack of domestic implementation through the necessary SDPs mean that availing oneself of stateless status is a complex endeavour, even in states where such a determination procedure exists. This would obviously not be affected by whichever stance the international community adopts on the statehood of potential deterritorialised LLISs. It remains, however, context dependent.

Pre-emptive solutions such as bilateral or multilateral agreements, or a new international convention on climate displacement are ultimately all reliant on several premises, one of which is the willingness of at least one other member of the international community to commit to the protection of those who are displaced.[75] Were this not to be the case, there is currently very little in terms of legal frameworks to provide any level of protection to potential EDPs from LLISs. While human rights protection theoretically applies to everyone within the jurisdiction of a state, without a legal status to enable those rights, it can be exceedingly difficult for people to benefit from this protection and access the legal remedies needed to enforce it.[76]

As things stand, it is generally agreed that EDPs from LLISs would eventually find themselves in a 'legal limbo' if their state of nationality were to find itself in the impossibility of providing protection and basic services.[77] In summary, their nationality would become ineffective due to the effects of climate change, rendering them de facto stateless.[78] Namely, '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'[79] and thus left out of the protection afforded both by the *1951 Convention* and that offered by the *1954 Convention*. Hence, were EDPs from LLISs to find themselves de facto stateless, they could benefit only from general human rights norms and principles that have gained customary status such as the principle of non-refoulement.[80] In the absence of a legal status, it may be a challenge to benefit from the protection of human rights, as Agnieszka Kubal

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74 For an overview of the few elements of substantive protection provided by the *1954 Convention* (n 15) and some of the latter's shortcomings on the matter, see Dobrić (n 12) 58–60.

75 Lilian Yamamoto and Miguel Esteban, 'Migration as an Adaptation Strategy for Atoll Island States' (2017) 55(April) *International Migration* 144.

76 Dobrić (n 12) 43. Currently, the only binding international treaty to explicitly address climate change displacement is the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, opened for signature 23 October 2009 (entered into force 6 December 2012).

77 Yamamoto and Esteban, 'Migration as an Adaptation Strategy' (n 75) 155.

78 Park (n 12) 14; Torres Camprubí (n 12) 200–01; Alexander and Simon, 'No Port, No Passport' (n 32). Stoutenburg disagrees with this assessment, on the dual basis that an EDP's nationality would not be rendered ineffective through the actions of either the state or the national, as has been implied in the concept of de facto statelessness hitherto, and that it is doubtful whether EDPs would find themselves removed from the protection of their state of nationality: see Stoutenburg (n 6) 423–24.

79 Massey (n 34) 61.

80 Climate change was accepted by the Human Rights Committee as possibly triggering the prohibition against refoulement if conditions in an EDP's state of origin were sufficiently dire: *Teitiota v New Zealand* (n 8) 5 [9.11].

notes: 'people with ineffective nationality quite often find themselves locked in a complex legal limbo'.[81]

The threshold against which the protection afforded by the *1954 Convention* should be assessed is thus a low one. In the absence of any pre-emptive agreement or solution, EDPs would eventually need to find a safe haven beyond the borders of their state of origin. Once this becomes uninhabitable, it is likely that they would find themselves unable to avail themselves of the protection of their country of nationality and would thus become de facto stateless. This situation could last until an EDP gains another nationality, or until their state of nationality is accepted as having lost its statehood. In this context, the relevance of the protection afforded by the *1954 Convention* should thus be determined in relation to that available to de facto stateless persons.

Therefore, the very existence of a legal framework could offer valuable help to EDPs seeking a legal status. While the *1954 Convention* trails behind the *1951 Convention* in many ways, stateless status is nevertheless well defined in international law, and under different regional and domestic jurisdictions.[82] The shortcomings of the law on statelessness identified in Part III(B) would likely still undermine its implementation and universality, but were it possible, EDPs who were able to avail themselves of the protection afforded by the *1954 Convention* would still likely fare better than those remaining de facto stateless.

As several states face an existential threat because of climate change, there is a distinct possibility that different states may experience different fates or different timelines, both environmentally and legally. The coexistence of different timelines would mean that de facto and de jure EDPs could find themselves within the same jurisdiction but with differing status and levels of protection, assuming their state of residence was party to the *1954 Convention* and that the latter's protection was enacted through an SDP. In such a context, the protection afforded to de jure stateless EDPs could also benefit de facto stateless EDPs. In the context of post-Soviet statelessness, for instance, legal advances benefitting de jure stateless persons have been observed to be a 'catalyst leading to legally productive changes for other noncitizens — or de facto stateless persons — in precarious legal situations'.[83]

Indeed, even if no EDPs from LLISs were to qualify as stateless persons under the *1954 Convention*, the latter could still provide helpful guidance for receiving states. Since the UNHCR had its mandate on statelessness confirmed and strengthened in 1995, there has been a positive trend towards better protection for stateless persons and increased protection against the emergence of statelessness.[84] Although it still lacks widespread ratification, several states have become parties to it in recent years, the latest being Iceland on 21 January 2021.[85] From only 55 state parties in 2003, this number has almost grown twofold since, currently numbering 95 (as of 2021).[86] This may be attributed to the UNHCR's renewed efforts to raise awareness to the problem of statelessness and the

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[81] Agnieszka Kubal, 'Can Statelessness Be Legally Productive? The Struggle for the Rights of Noncitizens in Russia' (2020) 24(2) *Citizenship Studies* 193, 197. See also Dobrić (n 12) 59.
[82] Kubal (n 81) 197.
[83] ibid 203.
[84] Foster and Lambert (n 48) 47–49.
[85] 'Signatories of the *1954 Convention*' (n 39).
[86] ibid.

challenges faced by stateless persons, notably through its #IBelong Campaign.[87] In parallel to the UNHCR's efforts, the increased interest in statelessness in the literature has also most likely contributed to a better understanding of the phenomenon.

Again, this is not to say that statelessness offers a ready solution to the protection of EDPs from LLISs. The present analysis remains anchored in a worst-case scenario, and even then, the relevance of the law on statelessness is largely contingent on external factors, mostly relating to the statehood of the relevant LLIS. Beyond these clear limitations, it remains that the law on statelessness may eventually have a legally productive role to play in the protection of those displaced by rising seas.

As set in Part IV, the assessment of the relevance of the law on stateless for EDPs is closely linked to the context in which it is assumed to take place and the alternatives available in such context. Consistent with the scenario-based approach adopted by this article, two scenarios are presented in Figure One below. The first one is the 'standard' scenario, a loose aggregate of what could be described as the 'mainstream' legal forecast of the future of LLISs. This scenario follows the assessment of future statehood found in the literature cited in Part III(A), which posits the existence of a substantial gap between the loss of physical indicia and the loss of statehood.

The second scenario is the 'worst-case scenario' discussed in the present article. The underlying assumptions to the worst-case scenario timeline are that sustained recognition would not be possible to secure following the loss of an LLIS's territory, and that statehood would be interpreted in its narrower meaning. In contrast, the 'standard' scenario relies on the international community maintaining its recognition of the deterritorialised LLIS, at least for some time after the loss of its physical indicia. This, of course, remains a relatively narrow understanding of a worst-case scenario, purely concerned with the legal dimension of the challenges faced by LLISs and their nationals. As a result, other factors such as faster or slower effects of climate change are not considered. Common to both, however, is the assumption that no other solution could, or would be implemented to provide the concerned EDPs with an alternative framework for protection.

The key difference between the two scenarios, from the perspective of protection, is the length of the assumed period of de facto statelessness before EDPs qualify for the stateless status provided by the *1954 Convention*. Were its statehood to be maintained beyond the loss of physical indicia, the displaced nationals of an LLIS would find themselves outside the scope of the protection afforded by the law on statelessness. Alternatively, if an LLIS lost its statehood, the state's former nationals would fall within the scope of the *1954 Convention*.

[87] '#IBelong Campaign', *United Nations High Commissioner for Refugees* (Web Page, 2021) <https://www.unhcr.org/ibelong/>.

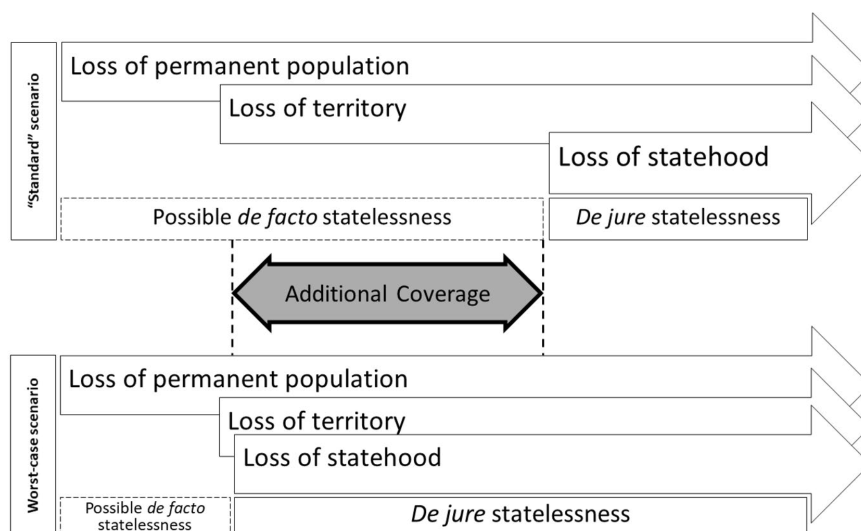

Figure One: Comparative visualisation of the relative relevance of the law on statelessness in two scenarios.

The reasoning at the core of this article highlights the need for a better understanding of the role of a deterritorialised state for its nationals.[88] Ultimately, the benefits of statehood should be carefully weighed against its potential downsides. Indeed, while nationals of a deterritorialised LLIS are generally assumed to fall within the loose category of de facto stateless persons, this assumes a failure by the deterritorialised state to provide effectiveness to their nationality, or the impossibility of doing so. Consequently, the technical challenges faced by a deterritorialised state might eventually become the decisive factor in assessing the relevance of both statehood and the *1954 Convention* for the purpose of the protection of EDPs.

Alternatively, while statehood still holds an unparalleled position in international law and politics, other forms of international legal personality could allow an LLIS to maintain most of its relevant activities without needing to maintain a possibly contested claim to statehood. Example of sui generis entities such as the Holy See or the Sovereign Military Order of Malta, for instance, have been mentioned as relevant for the future of LLISs.[89] However, this is a separate

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88 For instance, Alexander and Simon conclude that

> continuing to formally recognise submerged states seems desirable because it appears to prevent displaced islanders from losing their cultural identity and legal rights, but in reality we will be creating an empty fiction that may impede a long-term solution.

Alexander and Simon, 'Sinking into Statelessness' (n 17) 25.

89 See, eg, Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer 2017) 101, 125; Burkett (n 24) 356–57; Torres Camprubí (n 12) 110–14.

discussion, one that also needs to be context sensitive and nuanced by the protection needs of the displaced nationals of LLISs.

C *Context-Based Relevance*

What emerges from the present analysis is that while the protection provided by the *1954 Convention* stops short of providing an adequate framework to bridge the current gap in the protection of EDPs from LLISs, it could nevertheless prove to be a valuable tool in certain scenarios. The nature of such scenarios, ie the fact that the relatively weak protection and limited scope of the law on statelessness would be relevant only in the absence of better options, has meant that, thus far, little attention has been devoted to assessing its relevance in the context of climate-induced migration.

Approaching the future through a spectrum of scenarios does not imply an assessment of desirability. Conversely, the present article does include a discussion on the future statehood of possible deterritorialised LLISs, but with the purpose of nuancing what has become a widely accepted conclusion, and one that may also prove to be premature not with regards to its forecast but to the certainty with which it presents this forecast. Abstract discussions on the possibility of deterritorialised statehood are fascinating and open a new perspective on several core issues of public international law. However, statehood remains a slippery concept for legal scholars, and presenting any conclusion as definitive, even implicitly, risks overlooking the numerous contingencies inherent to such a politically charged topic.

The present analysis aims to add to the scope of scenarios and corresponding solutions that collectively constitute the future of states threatened by climate change. Admittedly, it describes a poor solution in most futures. However, the present article demonstrates that the *1954 Convention* may nevertheless have a role to play in the protection of the rights of environmentally displaced persons from LLISs. With its minimal reliance on proactive action by the international community, the *1954 Convention* could provide a useful starting point upon which to build better solutions, or a possible source of protection for EDPs who find themselves within the jurisdiction of state parties to the *1954 Convention*.

A clear limitation of this analysis is its mostly theoretical nature. Practical access to the protection afforded by the *1954 Convention* remains challenging, and hypothetical EDPs intending to avail themselves of the latter would likely face substantial obstacles, possibly due to the ambiguity of their state of origin's status. Indeed, the clarity of the statehood, or lack thereof, of their state of origin would likely influence the success of their claim to stateless status.[90] Here, country-specific analyses could yield more practically relevant results. However, for this to be possible, the relevance (albeit highly context-reliant) of the law on statelessness needs to be acknowledged.

VI CONCLUSION

Climate statelessness is not a new subject of interest for scholars interested in the challenges faced by LLISs. However, most inquiries on the matter do not

[90] Stoutenburg (n 6) 407. Bianchini also emphasises that the high complexity of certain cases can negatively influence the outcome of the statelessness determination process in the context of the United Kingdom: Bianchini, 'Identifying the Stateless' (n 33) 456.

investigate the possible added value of the law on statelessness, particularly the *1954 Convention*, instead dismissing it for being ill-adapted to the task and for its applicability being contingent to the concerned LLIS losing its statehood shortly after becoming deterritorialised, an unlikely occurrence according to the dominant narrative. As a result, the assumed lack of relevance of the *1954 Convention* rests upon the idea that it is effectively 'too little, too late'.

The present article aims to nuance this conclusion and introduce a context-sensitive approach to the relevance of the law on statelessness for EDPs from LLISs. In doing so, the current analysis is thus not aiming to provide a unique, better legal forecast but instead, to contribute to the better understanding of the various possible futures facing LLISs, and the solutions available in each respective future scenario. More precisely, the present article adopts a 'worst-case scenario' approach to evaluating the relevance of the law on stateless for EDPs from LLISs. Inherent to this hypothetical worst-case scenario is the assumption that preferred pre-emptive or palliative solutions such as bilateral or multilateral agreements could not be enacted, as they rely on the good will of other states, a currency that cannot be taken for granted, or relied upon in legal terms.

A critical analysis of the arguments brought forward in the current literature also reveals that the statehood of a LLIS deprived of its territory and population cannot necessarily be relied upon, warranting the need for alternative solutions. As statehood would essentially be in the hands of the international community and rest upon the cumulative weight of what are ultimately political decisions, it may be premature to take deterritorialised statehood as a given. Were other states to interpret the boundaries of statehood restrictively, the protection afforded by the *1954 Convention* would be triggered, providing a potentially valuable framework for EDPs to secure a legal status.

Conversely, the added value of the legal framework on the protection of stateless persons may reside in the comparative situation of EDPs who would find themselves de facto stateless upon their cross-border migration, due to the continued existence of their state but ineffectiveness of their nationality. While afflicted by several shortcomings, the *1954 Convention* nevertheless provides an established framework which could benefit EDPs in their host country. Furthermore, even for EDPs who would find themselves with an ineffective nationality, the protection afforded by the 1954 Convention could still provide valuable guidance for the receiving country. Increased visibility of the phenomenon of statelessness and positive trends towards ratification and implementation of the *1954 Convention* could also positively benefit EDPs from LLISs if all other solutions were to fail.

Ultimately, the added value of the *1954 Convention* for EDPs would also depend on the benefits derived from their link with their respective deterritorialised LLISs. Exactly how much a deterritorialised state could do for its stranded nationals remains to be seen, but in the absence of precedents or binding frameworks, it may be useful to adopt a 'hope for the best, plan for the worst' approach. Reality is likely to prove much murkier than any neat legal forecast, which inevitably ends up relying on simplified scenarios. For instance, divided recognition could mean that the statehood of a deterritorialised LLIS regresses into the grey purgatory of quasi-states. Alternatively, it cannot be excluded that a LLIS could continue to exist as a sui generis entity, possessing international legal personality but falling short of detaining full statehood.

As all these options remain in the spectrum of possible futures, the current window of opportunity available for planning needs to be used to provide both legal forecasts of how the future may look like, but also a variety of legal solutions to the spread of legal problems that may eventually be faced by both LLISs and their nationals. Neglecting to examine every possible solution, whether pre-emptive or palliative in nature, is a luxury we cannot afford.

Michel Rouleau-Dick

Statehood, Statelessness, and Continuity in a Climate-Changed World

A worst-case scenario analysis

This dissertation investigates some of the challenges facing Low-lying island states in the context of climate change from the perspective of public international law, including the threat climate change presents to their statehood. The thesis adopts a scenario-based approach to the question and investigates possible remedies in the context of a worst-case scenario.

ISBN 978-952-12-4327-1