

STATELESSNESS IN THE CONTEXT OF CLIMATE  
CHANGE: THE APPLICABILITY OF THE  
MONTEVIDEO CRITERIA TO “SINKING STATES”

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I. INTRODUCTION

As resource extraction and fossil fuel and greenhouse gas emission continue to fuel global climate change, nearly one billion people continue to live in high or very high climate exposure areas.<sup>1</sup> While most climate migrants fleeing such exposure (e.g. natural disasters, flooding, and drought) are likely to be internally displaced, small island nations are less likely to offer high ground to which individuals can relocate, prompting cross-border migration and raising serious questions about the possibility that these individuals may become stateless.<sup>2</sup>

The Universal Declaration of Human Rights first enumerated the right of every human being to a nationality in 1948.<sup>3</sup> Despite this longstanding principle, and because of restrictive national citizenship laws around the world, the U.N. High Commissioner for Refugees (UNHCR) estimates that there are as many as ten million stateless people globally.<sup>4</sup> This number may grow as the phenomenon of “sinking

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1. Stephanie Garcia, *What a UN Ruling Could Mean for Climate Refugees*, PBS NEWSHOUR (Dec. 13, 2019), <https://www.pbs.org/newshour/science/as-cop-25-ends-a-look-at-why-climate-migrants-dont-have-refugee-status>.

2. *Id.*

3. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15(1) (Dec. 10, 1948).

4. STATELESSNESS AROUND THE WORLD, <https://www.unhcr.org/en-us/statelessness-around-the-world.html> (last visited Mar. 22, 2021) (“Statelessness may occur for a variety of reasons, including discrimination against particular ethnic or religious groups or on the basis of gender; the emergence of new States and transfers between existing States; and conflict of nationality laws. Statelessness is often the product of policies that aim to exclude people deemed to be outsiders, notwithstanding their deep ties to a particular country.”); Petra Nahmias, *Better Statistics to Help End Statelessness*, UNHCR BLOGS (Jan. 21, 2020), <https://www.unhcr.org/blogs/better-statistics-to-help-end-statelessness>.

islands,” or small island nations threatened by inundation as a result of climate change-driven sea level rise, becomes more prevalent, endangering the lives of these islands’ citizens, forcing international migration, wiping territories off the map, and raising the question of what happens to a people when their nation’s territory ceases to exist.<sup>5</sup>

This annotation explores this issue by first examining the concept of statelessness under international law in Part II. Part III then examines the issue of statelessness in the specific context of climate change-driven displacement and territorial erasure. Part IV discusses potential responses to climate-driven climate change, and Part V concludes by noting the inadequacy of current international law frameworks in responding to the looming threat of climate-induced displacement and calling upon the international community to both develop stronger protections for communities likely to be most affected by climate change and invest in crucial climate adaptation and mitigation measures.

## II. THE CONCEPT OF STATELESSNESS AND INTERNATIONAL LAW

Put broadly, international law attempts to prevent and reduce statelessness, while also protecting those who are or may ultimately become stateless.<sup>6</sup> The concept of statelessness and the obligations of states under international law are primarily based on the 1954 Convention relating to the Status of Stateless Persons.<sup>7</sup> This document defines a “stateless person” as “a person who is not considered as a national by any State under the operation of its law.”<sup>8</sup> The Convention seeks to ensure rights protections for those who are or who may become stateless. In general, however, statelessness is “an anomaly under international law which should be prevented.”<sup>9</sup>

The 1961 Convention on the Reduction of Statelessness operates as the primary instrument seeking to prevent statelessness, and recommends in its Final Act that *de facto* stateless individuals should receive

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5. See generally Etienne Piguet, *Climatic Statelessness: Risk Assessment and Policy Options*, 45 POPULATION & DEV. REV. 865 (2019) (assessing the causes, risks, and policy options in the face of climate change-induced statelessness).

6. Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*, UNHCR DIV. INT’L PROT., at 16, U.N. Doc. PLA/2011/04 (May 2011).

7. MARILYN ACHIRON, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS 10 (2005).

8. Convention Relating to the Status of Stateless Persons, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

9. Park, *supra* note 6, at 16.

the same treatment as *de jure* stateless individuals in order to most easily acquire an effective nationality.<sup>10</sup> *De jure* and *de facto* statelessness differ in that the former refers to those who have not received nationality through any state's laws, while the latter may result from an individual with a rightful claim to a nationality being unable to demonstrate their citizenship or to avail themselves of national protection for practical reasons.<sup>11</sup>

Since 1996, the General Assembly has tasked the Office of the United Nations High Commissioner for Human Rights (OHCHR) with continuing to address issues facing stateless people, promoting accession to the 1954 and 1961 Conventions on statelessness, and lending technical and advisory assistance to states in the creation of domestic nationality legislation.<sup>12</sup>

The dissolution of a state due to political extinction has clear implications for its citizens' statehood status. Specifically, "should a state cease to exist, citizenship of that state would cease, as there would no longer be a state of which a person could be a national."<sup>13</sup> While the dissolution of a state extinguishes the status of those holding its nationality (typically to be replaced by a successor state's nationality, as is discussed below), it is less clear how complete loss of territory would affect nationality. Still, it is possible to draw parallels from the more well-understood context of political state dissolution.

At present, while there is no international, standard definition of a state, the criteria laid out in the 1933 Montevideo Convention on the Rights and Duties of States, which are regarded as customary international law, can serve as a basis to determine when an entity previously recognized as a state might cease to hold that status.<sup>14</sup> Specifically, these criteria require that the state possesses "a permanent population;

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10. *Id.*; see also Convention on the Reduction of Statelessness, Final Act Res. I, Aug. 30, 1961, 989 U.N.T.S. 175 ("The Conference Recommends that persons who are stateless *de facto* should as far as possible be

treated as stateless *de jure* to enable them to acquire an effective nationality.").

11. ACHIRON, *supra* note 7, at 11; see also Giulia Borsa, *Statelessness in the Context of Climate Change*, OXFORD MONITOR OF FORCED MIGRATION (Aug. 19, 2019), <https://www.oxforcedmigration.com/post/statelessness-in-the-context-of-climate-change>; Park, *supra* note 6, at 14.

12. G.A. Res. 50/152, ¶¶ 14–15 (Feb. 9, 1996).

13. UNHCR, *Climate Change and Statelessness: An Overview*, submitted to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the U.N. Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany, at 1 (May 15, 2009).

14. Park, *supra* note 6, at 4–5 (referencing JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* at 31, 37–45 (2d ed. 2006)).

a defined territory; government; and capacity to enter into relations with the other states.”<sup>15</sup> Three of these criteria will be applied to the sinking state context in the next section.

To date, the concept of the extinction of states has only arisen in contexts where a state was replaced by a successor state.<sup>16</sup> In such circumstances, there exists a presumption of continuity of statehood, even where the statehood criteria are only partially met.<sup>17</sup> In such a case, the 1961 Convention requires that, in the absence of a treaty to the contrary, citizens of the preceding states should acquire the nationality of the succeeding state if they would otherwise become stateless.<sup>18</sup> Article 21 of the International Law Commission’s (ILC) Draft Articles on Nationality of Natural Persons in Relation to Succession of States also reflects this principle, stating that “the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State”—an obligation that the ILC considers to be customary international law.<sup>19</sup>

Governments in exile have also continued to meet relevant criteria, such as maintaining diplomatic relations, so long as these governments continued to be recognized by other states.<sup>20</sup> However, such situations have traditionally assumed that this exile is temporary, leaving these presumptions untested in the context of total disappearance of a state’s territory or permanent exile of its population and government.<sup>21</sup>

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15. Convention on Rights and Duties of States (Montevideo Convention), art. 1, Dec. 16, 1934, 165 L.N.T.S. 19.

16. Park, *supra* note 6, at 6.

17. *Id.*

18. Convention on the Reduction of Statelessness, *supra* note 10, art. 10(2) (“...a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.”).

19. For the text of Article 21 of the Draft Articles on Nationality of Natural Persons in relation to the Succession of States and Commentary (6) stating that Article 21 is customary international law, see Int’l Law Comm’n, Rep. on the Work of Its Fifty-First Session, U.N. Doc. A/54/10, at 41–42 (1999) [hereinafter “Draft Articles on Nationality”]. Additionally, the Statute of the International Court of Justice (ICJ) explicitly recognizes customary international law as a source for its jurisprudence and decision-making. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 3 Bevens 1179, 59 Stat. 1055, T.S. No. 993, *entered into force* 24 Oct. 1945.

20. Park, *supra* note 6, at 6.

21. *Id.* at 7.

## DISPLACEMENT

To date, permanent inundation due to sea-level rise or other forms of state disappearance in the context of climate change have not yet been realized, but the possibility raises questions about whether that state as a legal or political entity would continue to exist. Even prior to full inundation, many island states may become uninhabitable as a result of the loss of sources of fresh water and fertile land and the impact of habitat loss on drivers of local economies, ultimately forcing entire populations and their governments into exile.<sup>22</sup>

The Montevideo Criteria provide an opportunity to analyze at what point a state finding itself “sinking” may cease to be considered a state under international law. Primary among these are the questions of territory, government, and capacity to enter into relations with other states, also framed as “independence.”<sup>23</sup>

With respect to the territory criterion, scholars have posited that in the event that an island state becomes uninhabitable, it may still be able to point to even “miniscule” areas of land in order to meet the criteria of territory.<sup>24</sup> Some functional interpretations of statehood, however, maintain that uninhabitable land should not be considered sufficient to meet the territory criterion.<sup>25</sup> States may also implement artificial protections, such as elevating the existing island with surrounding material or building seawalls, to prevent complete inundation without risk of losing territorial status.<sup>26</sup> In the event that all of a state’s territory becomes permanently inundated, however, those sunken states would not likely meet this criterion without receiving new territory from another state.<sup>27</sup>

The government criterion has been described as the “requirement

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22. UNHCR, *supra* note 13, at 2.

23. The population criterion also leaves space for debate and discussion. This annotation gives less weight to questions of population because individuals are likely to continue to identify with the nation of their initial citizenship, which may provide a state with a population touchstone, particularly in light of the general undesirability of statelessness globally. For a more in-depth discussion on the population criterion, see Jenny Grote Stoutenburg, *When Do States Disappear?*, in *THREATENED ISLAND NATIONS* 57, 63–66 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

24. Park, *supra* note 6, at 8.

25. Stoutenburg, *supra* note 23, at 61.

26. *Id.* at 62.

27. It has also been argued that under international maritime law, an existing state that relies on the creation of wholly artificial islands to maintain its territory may have altered maritime rights with respect to those islands due to their artificiality but may nevertheless retain a “defined State territory.” *Id.* at 63.

of effective governmental authority”<sup>28</sup> or “the existence of an effective government, independent from the influence or control of other states.”<sup>29</sup> Under the former definition, a government may struggle to maintain its authority in the face of climate change-induced emigration if, for instance, the state’s economy begins to struggle as a result of shrinking territorial seas and exclusive economic zones, leading to a lack of state funds and associated protections, such as law enforcement or public services.<sup>30</sup> Additionally, if flooding and erosion so greatly wipe out a state’s population and land mass, it may no longer be reasonable to claim that the state’s government is in fact governing anything at all.<sup>31</sup>

Assuming that an island nation’s territory becomes uninhabitable, its government might find itself “hosted” by another state in a form of government in exile. Historically, governments have been driven into exile by political events such as civil war or external occupation, but so long as that government has remained internationally recognized and its claimed territory has continued to physically exist, the government has retained its traditional competences, such as entering diplomatic relationships or exercising personal jurisdiction over its nationals abroad.<sup>32</sup> Without a defined territory, the government in exile would rely exclusively on the international community for recognition as a state and its capacities could be limited to the authority and competences that its hosting state is willing to grant.<sup>33</sup> Such a tenuous situation would likely strain the ability of the government to provide basic protections, like policing or security, and services, such as issuing travel or identity documents.<sup>34</sup>

The latter definition of the government criterion mentioned above indicates how closely the government and independence criteria are linked. In the event that rising sea levels fully inundate a state’s territory and force its people and government into exile, questions of independence and the maintenance of sovereignty become difficult to avoid.<sup>35</sup> A state’s independence relies on both the self-sufficiency of its

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28. *Id.* at 67.

29. Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood*, SYDNEY L. SCH., LEGAL STUD. RES. PAPER NO. 11/59, at 1, 5 (2011).

30. Park, *supra* note 6, at 12.

31. Stoutenburg, *supra* note 23, at 67.

32. *Id.*, at 68–69.

33. *Id.*, at 69–70.

34. Park, *supra* note 6, at 13.

35. *Id.*, at 7–8; *see also* Stoutenburg, *supra* note 23, at 70–72 (discussing situations in which legal independence may still apply to de-territorialized states).

government and the freedom of that state from subjection to any other state's authority.<sup>36</sup> Although scholars have tended to take the view that only the latter freedom criterion is significant for determining independence, both are threatened by a government forced to live in exile in the territory of another state.<sup>37</sup>

Without any physical territory to ground its statehood, a government in exile is wholly reliant on other governments to validate its statehood. Some authors have posited that there may be a moral, if not a legal, duty to continue recognizing governments in exile in such a circumstance.<sup>38</sup> Further, depending on the status of a sunken state's population within a new host state, individuals may experience restrictions on their mobility and other freedoms and rights.<sup>39</sup> While many of these rights are covered by international agreements like the Convention relating to the Status of Stateless Persons, it may be difficult for the exiled government to guarantee their citizens' rights in practice should the hosting state decide to violate them.<sup>40</sup>

A major question remains: having previously satisfied all of the Montevideo Criteria, how many factors would a sinking state need to "lose" in order for its statehood to come into question? Under the general presumption of continuity of states, the loss of statehood remains an anomalous international phenomenon. Until now, extinguished states have been replaced by new ones, and governments have suffered exile only temporarily or have ultimately been wholly replaced by new governments.<sup>41</sup> Total inundation and resulting wide-scale population

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36. Stoutenburg, *supra* note 23, at 71.

37. *Id.*, at 71–72.

38. For a discussion on the points of law applicable to such an obligation, see *id.* at 72–86 (explaining international duties and norms that suggest an obligation to continue recognizing disappearing states).

39. See Park, *supra* note 6, at 7–8 (describing the difficulties exiled governments and people will face if housed in the territory of a foreign sovereign).

40. Convention Relating to the Status of Stateless Persons, *supra* note 8. See also, *id.* at 13–14 (“Unless they met the definition of a refugee, had some durable legal status, or had another nationality, the affected population could experience restrictions on their freedom of movement, including detention; the inability to seek employment; and lack of access to property or even basic health care. While they should enjoy protection under international human rights law, in practice such rights could be difficult to secure.”).

41. Some examples of such successor states include those arising out of the former Yugoslavia and former Soviet Union, among others. Jeffrey L. Blackman, *State Succession and Statelessness: The Emerging Rights to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1441, 1145 (1998). While history has seen a number of governments in exile, some notable examples include the Allied governments that relocated to London during the Second World War. For further examples as well as a

movements are as yet unprecedented, and it may be incumbent on the international community to continue recognizing the governments of sunken states as legitimate, allowing them to at least partially fulfill the criteria for statehood.

#### IV. POTENTIAL PATHS MOVING FORWARD

How should island states and the international community more broadly prepare to address the questions of statelessness brought on by climate change? Naturally, the best response to this problem would be to invest heavily in climate adaptation and mitigation measures. However, in the event that mass emigration of a state is unavoidable, a number of options to prevent statelessness are available.

One avenue suggested by the UNHCR is the cession of territory by another existing state to the disappearing state, allowing it to maintain its physical existence on new territory.<sup>42</sup> In order for the relocating state to maintain its independence, the host state would need to fully forfeit its sovereignty over the designated territory.<sup>43</sup> One nation considering this option is the Maldives, whose president has floated the idea of purchasing land from Sri Lanka or India.<sup>44</sup> Alternatively, states facing sea-level rise could create artificial islands for habitation, although these pose further questions of territoriality under the U.N. Convention on the Law of the Sea, which limits the expanse of territorial waters and state jurisdiction as they relate to artificial islands.<sup>45</sup>

Another possibility is uniting with another state, perhaps in some form of union or federation, which would implicate provisions of the Convention on the Reduction of Statelessness with respect to state succession, as well as Draft Articles on the Nationality of Natural Persons in Relation to Succession of States.<sup>46</sup> For instance, if a new union is

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discussion on the application of statehood to governments in exile, see Fiona McConnell, *Governments-in-Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty*, 3 GEOGRAPHY COMPASS 1902, 1906 (2009) (discussing considerations of statehood and statelessness for governments in exile, focusing on the Tibetan context).

42. UNHCR, *supra* note 13, at 2.

43. Park, *supra* note 6, at 18.

44. *Id.*

45. Rayfuse & Crawford, *supra* note 29, at 11.

46. UNHCR, *supra* note 13, at 2; *see, e.g.*, Convention on the Reduction of Statelessness, *supra* note 10, art. 10 (“Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer.”), and Draft Articles on Nationality, *supra* note 19, art. 4 (“States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor



created, the nascent successor state would be obliged to grant citizenship to the extinguished state's population if they would otherwise become stateless.<sup>47</sup>

A state might also maintain its government in exile, although limitations on territorial sovereignty in such a situation would likely impose significant challenges on the ability of the hosted state to exert authority over its relocated population via law enforcement mechanisms.<sup>48</sup> This may ultimately result in *de facto* statelessness.<sup>49</sup>

Although retaining statehood would likely constitute the ideal and least disruptive option, it may ultimately be necessary to accept the extinction of the state. In this case, the now-extinct state may retain its status as an "entity with international personality," with one example being the Order of Malta.<sup>50</sup> In this case, however, the state's population would be without citizenship and would need to acquire nationality elsewhere.<sup>51</sup> Similarly, citizens of the disappearing state could receive some form of dual or sole nationality with accepting states, likely in the context of multilateral agreements.<sup>52</sup>

## V. CONCLUSION

As the threat of climate change continues to grow in severity, the question of the fate of these small island nations becomes more pressing. While there is a general presumption against statelessness, if a state is so completely submerged such that it can no longer fulfill the Montevideo Criteria, its government and its citizens enter into untrodden territory. Despite the options presented above, full scale emigration will likely disrupt and even break apart families and communities and

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State from becoming stateless as a result of such succession.").

47. Park, *supra* note 6, at 18.

48. *Id.* at 6.

49. ENVTL. JUSTICE FOUND., FALLING THROUGH THE CRACKS: A BRIEFING ON CLIMATE CHANGE, DISPLACEMENT AND INTERNATIONAL GOVERNANCE FRAMEWORKS 11 (2014).

50. Park, *supra* note 6, at 15. The Order of Malta was historically sovereign over Rhodes and Malta, ceding sovereignty to Napoleon in the eighteenth century. The Order has since retained a headquarters in Rome, buildings which have been granted extraterritoriality. The Order is considered to have international personality, although it is not a state. Rayfuse & Crawford, *supra* note 29, at 10. For one definition of "international legal personality," see *International Personality*, OXFORD LEXICO, [https://www.lexico.com/en/definition/international\\_personality](https://www.lexico.com/en/definition/international_personality) ("[T]he fact or status of having rights and obligations under international law.").

51. See Park, *supra* note 6, at 15 ("If the extinction of the State concerned were accepted, whether implicitly or explicitly, the entire population of the affected State would be rendered stateless, and they would remain stateless unless they acquired the nationality of another State.").

52. UNHCR, *supra* note 13, at 3.

should be avoided where at all possible. Permitting states to become extinct through loss of territory threatens to render individuals vulnerable to violations of their rights, and there is therefore an urgent need for the international community to not only develop frameworks specifically targeting the needs of those displaced by climate change, but also to commit to mitigating climate change and its effects in the first place.