

CASCADING CONSEQUENCES OF SINKING STATES

MELISSA STEWART*

Sea level rise due to climate change and the impacts of this rise on small island states are some of the most pressing emerging issues in international law. This article examines the phenomenon of sinking states—low-lying island states at risk of the submergence of the entirety of their territory due to sea level rise. The existence of sinking states raises complex and profound questions related to statehood, nationality, and human rights, to which international law currently provides no sufficient answer.

This Article addresses the cascading consequences of sinking states. It evaluates proposals for addressing the phenomenon and analyzes the future implications of these potential solutions. The cascading consequences of sinking states include undermining the principles of the sovereign equality of states and the right to self-determination, redefining statehood in a manner that may unjustly exclude other similarly situated nations and peoples, exacerbating humanitarian crises related to climate change, and undermining the international legal order.

This Article is the first to examine what sinking states and the cascading consequences of their existence reveal about cracks in the foundation of international law. Specifically, sinking states reveal weaknesses in the state-centric model of international law and exemplify the peril of a retreat from the progressive development of a more just legal framework.

Sinking states serve as a metaphor for international law and the whole of humanity. If we fail to meet the urgency of the moment with a radical new vision for our collective security, we risk our own potential demise.

* Assistant Professor of Law, University of Hawai'i at Mānoa, William S. Richardson School of Law.

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I. INTRODUCTION

In November of 2021, the Foreign Minister of Tuvalu, Simon Kofe, addressed the United Nations COP26 climate conference in Glasgow via a pre-recorded video.¹ He stood in front of a blue screen at a lectern in a suit, flanked by the flags of the conference host, Great Britain, and the United Nations. The shot widened to reveal that he was standing in water with waves crashing around his legs.²

Standing on the outskirts of the nation's capital where land had disappeared under the sea,³ Foreign Minister Kofe described the threat that Tuvalu faces due to sea level rise. For Tuvalu and three other atoll states—Kiribati, the Maldives, and the Marshall Islands—the threat is nothing short of existential.⁴ While many places around the world are only starting to feel the impact of climate change through rising temperatures, heat waves, and extreme weather, these four states are already

¹ *Tuvalu Minister to Address Cop26 Knee Deep in Water to Highlight Climate Crisis and Sea Level Rise*, GUARDIAN (Nov. 8, 2021), <https://perma.cc/NVG9-T6H7>.

² *'We are Sinking': Tuvalu Minister Gives Cop26 Speech Standing Knee Deep in Seawater—Video*, GUARDIAN (Nov. 9, 2021), <https://perma.cc/BCU2-39MC>.

³ Forty percent of the central district of Funafuti is below sea level at high tide. Hon. Kausea Natano, Tuvalu Prime Minister, Tuvalu National Statement for the World Leaders Summit (Nov. 2, 2021) (transcript available at <https://perma.cc/PZX5-B9PV>).

⁴ Tuvalu, Kiribati, the Maldives, and the Marshall Islands are four states most at risk of becoming completely submerged by sea level rise. ALEJANDRA TORRES CAMPRUBI, STATEHOOD UNDER WATER: CHALLENGES OF SEA-LEVEL RISE TO THE CONTINUITY OF PACIFIC ISLAND STATES 103 (2016). Tuvalu has a land area of thirty square kilometers and its maximum height above sea level is five meters. *Tuvalu SPC Member Map*, PAC. CMTY. (Aug. 9, 2022, 4:25 PM), <https://perma.cc/JQY5-3PWE> [hereinafter *Tuvalu Map*]. The Marshall Islands has a land area of 180 square kilometers with a maximum height above sea level of 10 meters. *Marshall Islands SPC Member Map*, PAC. CMTY. (Aug. 9, 2022, 4:28 PM), <https://perma.cc/WFY9-Y3WL> [hereinafter *Marshall Islands Map*]. The highest point in the Maldives is less than three meters above sea level, the “lowest highest point . . . in the world.” Ken Jennings, *Map-head: Ken Jennings Finds the World's Lowest Highest Point*, TRAVELER (May 14, 2012), <https://perma.cc/M8Z7-LF3C>; Andrew Evans, *Climbing the Highest Point in the Maldives*, NAT'L GEOGRAPHIC (Nov. 5, 2013), <https://perma.cc/9G9Q-MTAT>.

experiencing devastating effects of a warming climate. These atoll states are most at risk of their territory becoming completely uninhabitable or sinking under the rising sea.⁵

The existence of so-called “sinking states” raises complex and profound questions of international law—questions to which the law currently provides no sufficient answer. For states that are at risk of losing one or more of the traditional elements of statehood, such as a defined territory or permanent population, international law is silent on how or when a state becomes extinct and the consequences of extinction.⁶ For citizens of states at risk of extinction, international law offers limited rights to acquire a new nationality and contains no binding obligations on states to accept them on a permanent basis or otherwise provide protection.

In the absence of law, it is unlikely that a new treaty or other binding international legal instrument will emerge to fill the void. States have never been more reluctant to enter into binding agreements,⁷ and there appears to be little to no appetite to clarify or strengthen the legal rights of individuals or provide pathways to redress for states or their populations. It is as if we have collectively decided that we have reached the end of history⁸ in international law and that no new hard law can be created.

It would be a tragic mistake to believe that due to their unique vulnerability, these four states are alone in facing a perilous future. Indeed, sinking states serve as a metaphor for international law and the whole of humanity. If we fail to meet the urgency of the moment with a radical new vision for our collective security, we risk our own potential demise. In the words of Tuvalu’s Foreign Minister Kofe, “We are sinking, but so is everyone else.”⁹

This Article addresses the cascading consequences of sinking states. It examines some of the most pressing questions related to statehood and nationality raised by this phenomenon. It goes beyond current scholarship by analyzing future implications of the various proposals currently under consideration and what these implications reveal about some of the foundational paradigms of international law.

Part II defines the sinking state. It provides an overview of the projections of global warming and sea level rise and outlines which states are at risk of extinction

⁵ *About Small Island Developing States*, U.N. OFF. OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES & SMALL ISLAND DEVELOPING STATES, <https://perma.cc/AXN9-44ML> (last visited Apr. 28, 2022) (noting that “sea level rise pose[s] an existential threat to small island communities, requiring drastic measures such as relocation of populations, and the related challenges this poses”).

⁶ FREDERIK VON PAEPCKE, *STATEHOOD IN TIMES OF CLIMATE CHANGE: IMPACTS OF SEA LEVEL RISE ON THE CONCEPT OF STATES* 207 (2015).

⁷ See, e.g., Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 3) (noting that “international relations are increasingly conducted by nonbinding international agreements”); Melissa Durkee, *The Pledging World Order*, 49 YALE J. INT’L L. 1, 4 (2023) (describing the emergence of “the pledging world order” in which pledges can be either binding or non-binding, legal or non-legal). But see, e.g., David B. Hunter, *The Hard Choice for Soft Commitments in the Climate Change Regime*, in *ADVOCATING SOCIAL CHANGE THROUGH INTERNATIONAL LAW: EXPLORING THE CHOICE BETWEEN HARD AND SOFT INTERNATIONAL LAW* 138, 158 (Daniel D. Bradlow & David B. Hunter eds., 2020) (arguing that climate negotiations and the agreement of non-binding standards, such as those adopted in the Paris Agreement, have taken place in the context of a binding agreement, the United Nations Framework Convention on Climate Change).

⁸ See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2006).

⁹ GUARDIAN, *supra* note 2.

and why. It also describes the legal void surrounding sinking states and their populations.

In Part III, I explore the cascading consequences of sinking states. I provide an overview of the main proposals currently under consideration followed by an analysis of their implications. By using the phrase “cascading consequences,” I mean to evoke imagery of building momentum, wherein each outcome increases in severity due to the prior outcome. I examine four such cascading consequences in this Part, although there are certainly more.

First, efforts to redefine statehood for sinking states will impact the options available to other states in the future should they lose habitable territory and, as a result, their permanent population. Additionally, if we allow for a new form of “de-territorialized statehood,” we must also account for other populations that are similarly deterritorialized and unable to exercise the rights and duties of statehood due to their historic or current lack of territory over which they exercise exclusive sovereignty. The effort to redefine statehood for this discrete category of states alone misses an opportunity for a more searching inquiry of the colonial foundations of the principle of territorial sovereignty and risks entrenching neo-colonial power structures.

Second, allowing for the extinction of sinking states, or, conversely, preserving their continuity through a lesser form of statehood or an international legal personality short of statehood would undermine the principle of sovereign equality of states. This would be a particularly egregious outcome, as the most vulnerable states are also those that have only recently exercised their right to self-determination. Thus, the phenomenon of sinking states exposes the falsity of the claimed sovereign equality of states.

Third, sinking states whose very existence is imperiled may be unable to effectively protect the rights of their populations. This becomes even more urgent if in the future they are deprived of their statehood under law or lack the capacity to exercise their sovereign rights and responsibilities in a deterritorialized form. If the territory becomes uninhabitable or disappears, the population will be displaced without a right to reside anywhere else in the world. A failure to proactively protect the rights of these populations will likely cause other states to respond to the displaced populations by erecting further barriers to entry, thereby exacerbating future humanitarian crises.

Fourth, underlying all is the threat of a catastrophic loss to world governance. Failures to address climate change as the underlying cause of the rising sea levels that are creating the sinking states, all in the name of preserving states’ sovereignty, may result in the collapse of the international legal order.

In Part IV, I examine what the phenomenon of sinking states and our failure to date to deal with these cascading humanitarian, political, and legal consequences reveal about the foundational framework and “currently accepted paradigms” of international law.¹⁰

¹⁰ INT’L LAW ASS’N, JOHANNESBURG CONFERENCE: INTERNATIONAL LAW AND SEA LEVEL RISE, INTERIM REPORT, at 9 (2016) [hereinafter ILA JOHANNESBURG CONFERENCE INTERIM REPORT] (noting that “an Anthropocene epoch may draw into questions some key aspects of international law, since these rely on the general stability of geographic conditions, and may require the re-examination of some currently accepted paradigms of international law”).

I argue that the state-centric model of international law fails to protect states' rights of sovereign equality and survival as well as the human rights of individuals. I make two claims. First, I argue that there is a fundamental imbalance between situations where a state's right to survival is threatened by the actions of a clearly identifiable state, such as an aggressor, and those where the locus of responsibility for a state's demise is not directly attributable to the actions of a clearly identifiable state. Second, I argue that human rights are situational rather than universal. I observe that states have the primary responsibility to protect their populations. However, the current international legal structure does not provide for a secondary responsibility to other states or international entities when a particular state is unwilling or unable to provide protection, or when a person is stateless. That is, under the current international legal structure, human rights depend on states being able to ensure their own survival and to provide their populations with territory and a nationality.

Sinking states also reveal the danger of our retreat from the progressive development of a more just international legal framework. The international legal community is failing to fill a clear gap in the law that is resulting in the destruction of states without legal recourse and without rights for the resettlement of their populations. Rather than confronting the concerns of sinking states as a reflection of the peril we all find ourselves facing, powerful states are hesitant to bind themselves to any legal framework that would address the underlying cause of their destruction.

Finally, I outline potential avenues of exploration to address the concerns identified in this Article. They include decolonizing the notion of statehood and preventing further entrenchment of neo-colonial norms in international law. We should pursue legal solutions with the aim of promoting environmental justice and racial justice. We should consider a more cosmopolitan approach that decentralizes the state and prioritizes the rights of individuals. Finally, we should renew our commitment to the purpose of international law—the creation of a more peaceful and just society.

The phenomenon of sea level rise and its impacts on island states are some of the most pressing emerging issues in international law. They challenge us to examine the notions of statehood, the relationship of individuals to their state of nationality, and the protection of rights when the bond between citizen and state has been irrevocably broken. The solution to the problems posed by sinking states must be a renewed commitment to a more just international legal framework centered on the rights of individuals and reflecting a commitment to our collective peace and security.

II. DEFINING THE SINKING STATE

Climate change has the potential to transform not only our natural world, but also the societal and legal structures that define humanity. Since the changes to our natural environment occur gradually over time, the differences can seem almost imperceptible. In order to emphasize the scale of the problem, researchers have created dramatic visualizations of the world's most populous cities under water to demonstrate what the world might look like in the coming centuries if we fail to avoid temperature rises of 1.5 °C or 3.0 °C.¹¹ The changes to the environment are so profound

¹¹ *Picturing Our Future*, CLIMATE CENT., <https://perma.cc/X3DF-GECG> (last visited May 26, 2023).

that we may be approaching or have already entered a new geological epoch, the Anthropocene.¹²

In 1988, the United Nations General Assembly recognized that the effects of climate change “could be disastrous for mankind if timely steps” were not taken to address it.¹³ States began engaging in multilateral negotiations to address the threat of climate change shortly thereafter.¹⁴ These negotiations culminated in the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. The objective of the Convention and any instrument negotiated pursuant to the agreement is to achieve the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁵ While a binding treaty, the UNFCCC contains no binding limitations on greenhouse gas emissions.¹⁶ Several agreements have been negotiated pursuant to the UNFCCC, including the Kyoto Protocol and the Paris Agreement.¹⁷ The goal of the latter is to limit global warming to well below two degrees Celsius compared to pre-industrial levels, but it lacks any mechanisms of enforcement.¹⁸ Rather, countries make pledges to reduce their greenhouse gas emissions through what are called Nationally Determined Contributions (NDCs). Thus far, state parties are

¹² There is no scientific consensus on when the geological epoch began. Simon Lewis and Mark Maslin argue that the Anthropocene era began in 1610, when the first geological evidence of the arrival of Europeans in the Americas can be observed. SIMON L. LEWIS & MARK A. MASLIN, *THE HUMAN PLANET: HOW WE CREATED THE ANTHROPOCENE* 318 (2022). The International Law Association (ILA) used the change in geological epochs as a framing device to emphasize the magnitude of the context in which these challenges in international law are occurring:

Scientific evidence increasingly indicates that, due to the nature and size of on-going and predicted changes, the Earth may already be undergoing a shift from the conditions of the current officially accepted geological time interval, the Holocene, to a new planetary state. The Holocene is the latest, and formally still current, geological epoch. It comprises the past 11,700 years, which have been marked by an exceptionally long period of relative environmental stability, especially during the last few thousand years. As such, the conditions of the Holocene were a key factor facilitating the development of human civilization and, ultimately, the territorial divisions of the political world as we know it today.

It has been argued that, because of the interaction between the global environmental effects of economic development and the increased human population, the Earth system has already left the Holocene and has entered a new epoch: the Anthropocene. So far, the ‘Anthropocene’ is an unofficial scientific term referring to the human imprint on the Earth system that is already so profound as to have reached geological significance.

ILA JOHANNESBURG CONFERENCE INTERIM REPORT, *supra* note 10, at 7–8; *see also* INT’L LAW ASS’N, WHITE PAPER 02: ANTHROPOCENE (2022) [hereinafter ILA WHITE PAPER]; Rakhyun E. Kim & Klaus Bosselmann, *International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements*, 2 TRANSNAT’L ENV’T L. 285, 286 (2013).

¹³ G.A. Res. 43/53, Protection of Global Climate for Present and Future Generations of Mankind (Dec. 6, 1988).

¹⁴ Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 471–75 (1993).

¹⁵ U.N. Framework Convention on Climate Change art. 2, *adopted* May 9, 1992, 1771 U.N.T.S. 107.

¹⁶ Hunter, *supra* note 7, at 144 (“[T]he UNFCCC’s language was intentionally negotiated to avoid any specific binding mandates, at least with respect to reducing GHG emissions.”). *But see* Bodansky, *supra* note 14, at 516 (“Indeed, it is questionable whether the Convention creates a legally binding target and timetable at all.”).

¹⁷ PHILIPPE SANDS, JACQUELINE PEEL, ADRIANA FABRA & RUTH MACKENZIE, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 300 (4th ed. 2018).

¹⁸ Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. CMTY. & INT’L ENV’T L. 142, 142 (2016).

failing to implement sufficient policies to meet their pledges made pursuant to the agreement. According to the U.N. Environment Program's Emissions Gap Report 2022, even if all states implement policies to fulfill their existing pledges, the world would be on track for a 2.6 °C increase in global temperatures by the end of the century.¹⁹

Moreover, even though a "rapid transformation of societies"²⁰ would leave us a narrow window of opportunity to avoid the worst impacts of climate change, many of the ongoing changes to our environment are already "irreversible."²¹ Among them is global sea level rise, which the U.N. Secretary General recently described as a "threat-multiplier."²² As noted in the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), "In the longer term, sea level is committed to rise for centuries to millennia due to continuing deep ocean warming and ice sheet melt, and will remain elevated for thousands of years."²³

In its 2019 *Special Report on the Ocean and Cryosphere in a Changing Climate*, the IPCC estimated that the global mean sea level will likely rise between 0.43 and 0.84 meters by the year 2100.²⁴ As sea level rise does not occur uniformly across the globe, individual states may experience sea level rise that is higher than the global mean.²⁵ In addition to variations in sea level rise, the IPCC outlined that low-lying islands are particularly vulnerable due to the compounding impacts of sea level rise, man-made changes to the environment, and demographic trends and settlement patterns.²⁶

The term "sinking states"²⁷ is used in this article as a descriptive term for a discrete number of low-lying island states at risk of the erosion or submergence of a

¹⁹ U.N. ENV'T PROGRAM, THE CLOSING WINDOW: CLIMATE CRISIS CALLS FOR RAPID TRANSFORMATION OF SOCIETIES *passim* (2022). According to the report, if states do not implement policies to meet these commitments, existing policies have put the world on track for warming of 2.8 °C above pre-industrial levels by the end of the century. This level of warming was recently described as a "death sentence for vulnerable countries" by António Guterres, the U.N. Secretary-General. U.N. Secretary-General, Secretary-General's Remarks to the Security Council Debate on 'Sea Level Rise: Implications for International Peace and Security' (Feb. 14, 2023), <https://perma.cc/7TF5-A6XG>.

²⁰ U.N. ENV'T PROGRAM, *supra* note 19, *passim*.

²¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], SIXTH ASSESSMENT REPORT: SUMMARY FOR POLICYMAKERS, at B.5.4 (2021), <https://perma.cc/T8VG-FXX8>.

²² U.N. Secretary-General, *supra* note 19. On the "climate-security nexus," see, e.g., Mark P. Nevitt, *The Climate-Security Nexus*, AM. BAR ASS'N (Jan. 3, 2023), <https://perma.cc/3HE7-757J>; Mark Nevitt, *Climate Change and the Specter of Statelessness*, 35 GEO. ENV'T L. REV. (forthcoming 2023) (manuscript at 16–23).

²³ IPCC, *supra* note 21, at B.5.4.

²⁴ IPCC, SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE 324 (2019).

²⁵ *Id.*

²⁶ *Id.*

²⁷ The term "sinking states" has been used by representatives of these states, media outlets, and scholars to describe the discrete number of states that are at risk of submergence. See, e.g., Natano, *supra* note 3 (stating that "Tuvalu, and other low-lying atoll nations, are sinking and our land is fast disappearing"); see also Katherine Purvis, *Sinking States: The Islands Facing the Effects of Climate Change*, GUARDIAN (Feb. 15, 2016), <https://perma.cc/9RMG-JBSC>; Patrick Sykes, *Sinking States: Climate Change and the Next Refugee Crisis*, FOREIGN AFFS. (Sept. 28, 2015), <https://perma.cc/P7AQ-2BWC>; Derek Wong, *Sovereignty Sunk: The Position of Sinking States at International Law*, 14 MELB. J. INT'L L. 346 *passim* (2013); Katrina Miriam Wyman, *Sinking States*, in PROPERTY IN LAND AND OTHER RESOURCES 439 *passim* (Daniel H. Cole & Elinor Ostrom eds., 2012). Another term that has been used to describe this category of states is "disappearing island states." E.g., Emma Allen, *Climate Change and Disappearing Island States: Pursuing Remedial Territory*, BRILL OPEN L. *passim* (2018),

significant portion or all of their territory due to sea level rise by the end of this century. It is likely that these islands will become uninhabitable due to lack of fresh water before they are completely inundated. They are not literally sinking, but rather at risk of submergence due to sea level rise.²⁸ However, the imagery of sinking and submergence is still an apt description of the unique vulnerability of these states.²⁹

Four states are most at risk of becoming completely submerged by sea level rise as their highest altitudes are between five and ten meters above sea level. They are Kiribati, the Maldives, the Marshall Islands, and Tuvalu.³⁰ These states are particularly vulnerable to the impacts of climate change, as they primarily consist of atolls or are mostly comprised of “reef-derived unconsolidated material.”³¹ Their vulnerability is compounded by man-made changes to the natural landscape and locations that may put them at risk for higher-than-average global sea level rise.

Other low-lying islands are at risk of significant submergence. For example, Vanuatu is at risk of the loss of seventy-five percent of the landmass of certain low-lying islands within its territory with just a one-meter rise in sea level, which may occur by 2100.³² While this presents profound challenges for these countries, the risk of significant territorial loss does not portend the same threat of state extinction that the loss of an entire territory entails.³³

<https://perma.cc/49RY-JRS4>; JENNY GROTE SOUTENBURG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* *passim* (2015). Additionally, “disappearing states” has been used. *E.g.*, Reed Koenig, *Climate Change’s First Casualties: Migration and Disappearing States*, 29 GEO. IMMIGR. L.J. 501 *passim* (2015); Rosemary Rayfuse, *International Law and Disappearing States*, 41 ENV’T POL’Y & L. 281 *passim* (2011). Although the U.N. High Commissioner for Refugees (UNHCR) has discouraged the use of the terms “sink” or “disappear” in reference to small island states, this seems to be in service to the principle that “the legal presumption of continuity of statehood needs to be emphasized,” rather than any recognition of the factual reality. U.N. HIGH COMM’R FOR REFUGEES, SUMMARY OF DELIBERATIONS ON CLIMATE CHANGE AND DISPLACEMENT (2011), <https://perma.cc/483N-D9U4>.

²⁸ INT’L LAW ASS’N, LISBON CONFERENCE: FINAL REPORT 23 (2022) [hereinafter ILA LISBON REPORT] (noting that “[r]ecent studies have found that, for many atoll islands, *habitability* may be threatened as soon as the middle of the 21st century—which is far sooner than indicated by studies that focus on the *permanent inundation* of these islands”); Jane McAdam, “*Disappearing States*,” *Statelessness and the Boundaries of International Law* 4 (Univ. N.S.W. L. Rsch. Paper No. 2010-2, 2010), <https://perma.cc/8SSY-LFN2>.

²⁹ For example, just as low-lying island states are at risk of losing access to potable water, other states may be face the risk of losing arable land. *See* U.N. GAOR, 74th Sess., 10th & 11th mtgs., U.N. Doc. GA/EF/3519 (Nov. 1, 2002).

³⁰ CAMPRUBI, *supra* note 4, at 103. Tuvalu has a land area of twenty-six square kilometers and its maximum height above sea level is five meters. *Tuvalu Map*, *supra* note 4. The Marshall Islands have a land area of 181 square kilometers with a maximum height above sea level of 10 meters. *Marshall Islands Map*, *supra* note 4. The highest point in the Maldives is less than three meters above sea level, the “lowest highest point . . . in the world.” Jennings, *supra* note 4; Evans, *supra* note 4. Kiribati has land area of 810 square kilometers and its maximum height above sea level is 81 meters. *Kiribati Results Summary 2021*, PAC. CMTY., <https://perma.cc/AR5H-4C86> (last visited June 11, 2023).

³¹ IPCC, SEA LEVEL RISE AND IMPLICATIONS FOR LOW-LYING ISLANDS, COASTS AND COMMUNITIES: SUPPLEMENTARY MATERIAL 12 (2019), <https://perma.cc/Q9SA-UCZY>.

³² Bogdan Aurescu & Nilüfer Oral, (Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law), Int’l Law Comm’n, 72nd Sess., *First Issues Paper on Sea-Level Rise in Relation to International Law*, U.N. Doc. A/CN.4/740, para. 216 n. 446 (2020); Charles Di Leva & Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?* 8 (The World Bank, Law and Development Working Paper Series No. 5, 2008). Vanuatu is not at risk of complete disappearance, as its highest point above sea level is 1,877 meters. *Vanuatu SPC Member Map*, PAC. CMTY., <https://perma.cc/TC4L-MDLC> (last visited Apr. 29, 2023).

³³ During a meeting of the Sixth Committee, Singapore stated that it “faced an existential threat from rising sea levels.” U.N. GAOR, 76th Sess., 6th Comm., 20th plen. mtg. para. 22, U.N. Doc. A/C.6/76/SR.20 (Dec. 10, 2021).

Although no island state has yet lost its entire territory, individual islands have been lost due to sea level rise, including islands in Micronesia and five of the Solomon Islands.³⁴ This demonstrates that the loss of significant landmass due to rising seas is already occurring and highlights the real and present danger to low-lying island states.

While the island territory of low-lying states is disappearing below the surface of the ocean, the fact of these states' existence is emerging into a legal void.³⁵ The legal status of a state once its territory is fully submerged or its population has permanently departed is unclear for several reasons. First, while there is a traditional conception of what constitutes a state under international law, there is no legally binding definition.³⁶ Even under the traditional conception, it is unclear at which point a sinking state will cease to exist, as there has never been an extinction of a state due to physical causes.³⁷ If the principle of the continuity of states is favored over extinction through an expansion of the traditional notion of statehood, it is unclear how continuity will be preserved in the absence of territory or permanent population.

With respect to the populations of the sinking states, they too slip into a legal void. If the states become completely uninhabitable, these populations have no right to legal residence elsewhere, as such a right does not exist in international law. The framework for protection under international refugee law is based on protection from persecution by government actors. As noted in Part III below, the risk to their lives has not been considered sufficiently imminent to be provided protection against *refoulement* back to their state of origin under current human rights law. If they become stateless upon the extinction of their state, their so-called "right to a nationality" has little meaning, as there are no corresponding binding obligations on states to grant them a nationality in these circumstances.

There is a consensus that the phenomenon of sinking states presents novel questions in international law and that the framework to govern the issue either does not exist or is inappropriate. This is particularly true with respect to the legal status

³⁴ Allen, *supra* note 27, at 2.

³⁵ VON PAEPCKE, *supra* note 6, at 34 (noting that the question of whether an island that has lost all inhabitable territory can still be considered a state under international law "has not yet occurred in the history of states or international law, making the question a new one, and one urgently requiring an answer").

³⁶ *Id.* at 200; Int'l L. Comm'n, Study Group on Sea-Level Rise in Relation to International Law, U.N. Doc. A/CN.4/L.972, paras. 11, 39 (July 15, 2022) (recalling that "there was no generally accepted notion of a 'State'" and that "statehood was a complex issue deserving of caution, and . . . there was neither a generally accepted definition of a State, nor clearly defined criteria for the extinction of a State"); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 37 (2007) (noting that "there has long been no generally accepted and satisfactory legal definition of statehood"); Karen Knop, *Statehood: Territory, People, Government*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 95, 95 (James Crawford & Martti Koskeniemi eds., 2015) (stating that "there is no generally accepted legal definition of statehood"); Tanvi Bhargava & Rebecca Cardoso, *An Examination of Palestine's Statehood Status Through the Lens of the ICC Pre-Trial Chamber's Decision and Beyond*, 54 INT'L L. & POL. 14, 16 (2021); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 408 (1999) (noting that "[i]n fact, international legal sources provide no satisfactory definition of 'state'" and that "codifying statehood has proven fraught with difficulty").

³⁷ Patrícia Galvão Teles & Juan José Ruda Santolaria (Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law), Int'l Law Comm'n, 73d Sess., *Second Issues Paper on Sea-Level Rise in Relation to International Law* pt. IV, U.N. Doc. A/CN.4/752 (2022); JENNY GROTE STOUTENBURG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* 264 (2015) (stating that "[i]t thus seems to there exists no precedent in international law for a state without a territorial basis"); see also ILA LISBON REPORT, *supra* note 28, at 25 (describing the "diminishing aspects of statehood" due to sea level rise as an "unprecedented legal situation").

of individuals once their state ceases to exist as a factual or legal matter or both. The following part will examine some of the proposals to address the phenomenon of sinking states and the cascading consequences of those proposals.

III. THE CASCADING CONSEQUENCES OF SINKING STATES

Although there is some uncertainty regarding the timing and severity of sea level rise, the IPCC has concluded that sea level rise is certain to occur and will remain irreversible for hundreds if not thousands of years.³⁸ From this starting point, this Article will proceed under the assumption that sinking states will continue to lose habitable territory and will likely lose their entire territory at some point in the future.

In order to examine the cascading consequences of sinking states, it is necessary to examine some of the proposals for preserving the statehood of sinking states at risk of extinction in the event of a total loss of territory or permanent population. These include preserving and protecting existing territory, creating new territory, purchasing territory or having states cede territory, merging or associating with existing states, or evolving our understanding of a state to include some deterritorialized form. If it is not possible to preserve statehood *per se*, some have suggested preserving the international legal personality of the state, following the historical examples of the Holy See or the Sovereign Order of Malta. The primary proposals and illustrative frameworks are outlined below.

Jane McAdam has argued that concerns over state extinction are in some ways overblown.³⁹ It might be possible, at least in the near term, for the population to stay on the island state through climate change adaptation measures that states are already undertaking. Such measures might include efforts to prevent the sea from encroaching on the territory or land reclamation that would reinforce or expand existing territory. The preservation of territory, even in a diminished or changed form, might allow the population to stay *in situ* and avoid losing two of the traditional defining characteristics of statehood.

Some scholars have suggested that sinking states could create new territory for themselves through land reclamation or the creation of new artificial islands. Land reclamation has long been used by states to reinforce territory against the encroachment of sea water. States that are at risk of losing their territory could conceivably use land reclamation and other adaptation measures to preserve the existence of their territory. However, engaging in large-scale land reclamation or adaptation measures is incredibly costly.⁴⁰ Given the low elevation of these states' existing territory and the projections that the sea will continue to rise over thousands of years, even if states could afford it or received funding, land reclamation and adaptation may be a time limited solution.⁴¹

³⁸ IPCC, *supra* note 21, at 50 (noting that "it would take several centuries to millennia for the global mean sea level to reverse course even under large net negative emissions of carbon dioxide").

³⁹ McAdam, *supra* note 28, at 2 (arguing that "the focus on loss of territory as the indicator of a State's disappearance may be misplaced").

⁴⁰ The Maldives estimated that the cost of protecting "the inhabited Maldivian islands alone would cost up to \$8.8 billion." Permanent Mission of the Republic of Maldives to the U.N., *Information and Examples of State Practice on 'Sea-Level Rise in Relation to International Law': A Submission by the Republic of Maldives*, at 16 (Dec. 31, 2019), <https://perma.cc/W8SZ-XQB5>.

⁴¹ ILA LISBON REPORT, *supra* note 28, at 29–30.

Although some scholars have argued that the principle of continuity of states is distinct from the rules applicable to the creation of states, it seems unlikely that a state could base its claim to continuity on the basis of artificial islands alone. Thus, artificial islands that are created in a location where there was no prior territory likely could not serve as the sole basis for a state's claim to territory in defense of its own statehood.⁴² As James Crawford put it, "[A]rtificial islands cannot form the basis for territorial States any more than can ships."⁴³ Although not directly addressing the question of what territory sufficiently constitutes a state, provisions of the United Nations Convention on the Law of the Sea (UNCLOS) can provide some guidance. Under Article 121, an island is defined as a "naturally formed area of land, surrounded by water, which is above water at high tide." Article 121 was interpreted for the first time by the Permanent Court of Arbitration in the *South China Sea Arbitration*. There, the Tribunal found that whether a maritime feature was to be considered to be a rock or an island was to be "determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own."⁴⁴ The determination of a state's "natural capacity" to remain above sea level at high tide may be connected to the question of whether to freeze baselines for the determination of a state's maritime entitlements.⁴⁵ While questions on the existence of territory for the purpose of determining the existence of a state are distinct from the issue of the maintenance of maritime entitlements once baselines are established, one could imagine similar arguments that a state's "territory" consists of the land that existed above sea level prior to sea level rise.⁴⁶

Preservation of territory through artificial means may not preserve another element of statehood, namely a permanent population. It's unclear if land reclamation alone could prevent groundwater salinization or preserve soil quality sufficient to sustain agriculture. Furthermore, as demonstrated in the *South China Sea Arbitration*, land reclamation activities on atoll islands can cause devastating environmental

⁴² James Crawford, *Islands as Sovereign Nations*, 38 INT'L & COMP. L.Q. 277, 279 (1989) (observing that "artificial islands cannot form the basis for territorial States any more than can ships"); Imogen Saunders, *Artificial Islands and Territory in International Law*, 52 VAND. J. TRANSNAT'L L. 643, 676 (2019); Allen, *supra* note 28, at 7 (contrasting a sinking state's efforts to create territory in order to preserve its claims at statehood with efforts to create an entirely new state of the Republic of Minerva through the creation of an artificial island).

⁴³ Crawford, *supra* note 42, at 279.

⁴⁴ The South China Sea Arbitration (Phil. v. China), 2016 PCA Case Repository No. 2013-19, Award of Jul. 12, 2016, para. 541, <https://perma.cc/RA33-LKM6>.

⁴⁵ See Nilüfer Oral, *International Law as an Adaptation Measure to Sea-level Rise and Its Impacts on Islands and Offshore Features*, 34 INT'L J. MARINE & COASTAL L. 415, 428–30 (2019). While there is not currently full consensus on the issue, states have indicated more openness to maintaining maritime zones established using baselines that would remain unmodified regardless of sea level rise. Pacific Islands Forum [PIF], *Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise* (Aug. 6, 2021), <https://perma.cc/VSB2-FBSN>.

⁴⁶ See generally Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the Constitution of the Oceans*, 23 COLO. J. INT'L ENV'T L. & POL'Y 77 (2012) (arguing that states such as the Maldives should advocate for an amendment to the Law of the Sea Convention to expand the legal status of artificial islands in order to maintain their claims to statehood in the event of sea level rise); ILA LISBON REPORT, *supra* note 28, at 27 (discussing as a hypothetical "whether the concept of 'territory' might be extended *de lege ferenda* to include maritime zones such as the territorial sea, and perhaps also submerged lands which are inundated by sea level rise").

consequences, including the destruction of marine habitat, and drive biodiversity loss.⁴⁷ Efforts to preserve territory in this manner might not preserve and might instead further undermine the population's ability to continue to survive on subsistence agriculture or fishing and preserve indigenous ways of life. Thus, land reclamation and other artificial means of territorial preservation may not prevent the displacement of a state's population.

Christina Hioureas and Alejandra Torres Camprubí have suggested that states at risk of extinction due to loss of territory could potentially purchase territory from another state.⁴⁸ This *might* solve the problem of displacement for a state's population if the state purchased land from a nation that allowed for the immigration of the purchasing state's population (which cannot be presumed), but it does not seem to solve the issue of statehood. Kiribati has already purchased land in Fiji, but the land was purchased from the Church of England and for the purpose of economic development.⁴⁹ The land is thus not Kiribati sovereign territory, and it seems unlikely that Fiji would cede sovereignty over the territory to Kiribati.⁵⁰

The purchase of territory seems to be an unlikely solution to the preservation of statehood. Lassa Oppenheim has stated that a state's territory "must not be confounded with private property."⁵¹ In 1954, writing in her expansive study on the topic, *Identity and Continuity of States in Public International Law*,⁵² Krystyna Marek observed that the "'property theory' [of territory] proved generally untenable."⁵³ In connecting this directly with the complete disappearance of territory and the continuity of the state, she wrote,

[T]he logical result of the conception of territory as the 'property' of the State would be that even a total and final loss of territory would in no way interfere with the State's continued existence. For property, being something external to the owner, can be lost without the personality of the owner being affected. Such a conclusion would, however, run

⁴⁷ The South China Sea Arbitration, *supra* note 44, paras. 976–83.

⁴⁸ CHRISTINA HIOUREAS & ALEJANDRA TORRES CAMPRUBÍ, CLIMATE, STATE, AND SOVEREIGNTY: SELF-DETERMINATION AND SEA LEVEL RISE 5 (2021).

⁴⁹ IPCC, SPECIAL REPORT: GLOBAL WARMING OF 1.5 °C, at 396 (2018), <https://perma.cc/RL7J-P6E2>; Allen, *supra* note 27, at 11.

⁵⁰ Allen, *supra* note 27, at 7. Furthermore, cession does not happen through a purchase and sale, but rather can only happen through "an agreement embodied in a treaty between the ceding and acquiring State." 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 548 (8th ed. 1955). Camprubí examines the purchase of land by Kiribati and the potential for this as a solution more extensively in her book, *Statehood Under Water*. There, she acknowledges that the purchase of land was a "commercial transaction," that the land remained under Fijian sovereignty, and that the prospects that Fiji will renounce its sovereignty over the purchase land are unlikely. CAMPRUBÍ, *supra* note 4.

⁵¹ OPPENHEIM, *supra* note 50, at 451–52.

⁵² In a contemporary review of Marek's book, Alfred Verdross described it as "the first comprehensive monograph on that so topical problem, the international legal identity and continuity of states." Natasha Wheatley, *What Can We (She) Know About Sovereignty?: Krystyna Marek and the Worldedness of International Law*, in WOMEN'S INTERNATIONAL THOUGHT: A NEW HISTORY 327, 330 (Patricia Owens & Katharina Rictzler eds., 2021) (internal citations omitted).

⁵³ KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 19 (2nd ed. 1968).

counter to the obvious principle of international law according to which a total loss of territory means the end of the State.⁵⁴

As James Crawford has noted, even the “analogy of territorial sovereignty to ownership of real property is misguided.”⁵⁵ According to Crawford, to consider that a state could sell a portion of its territory to another state would undermine the principle of self-determination in a similar way to how a state’s sale of its people would be a violation of the prohibition against slavery.⁵⁶

Aside from traditional objections, the purchase of territory is an unlikely solution to the preservation of a state as it does not guarantee the acquisition of sovereignty over the territory. As the preceding paragraphs outline, without the transfer of sovereignty from the selling state, the purchasing state would not be able to act with the requisite independence nor would it be able to guarantee the relocation of its population. It would remain subservient to the state from which the territory was purchased.⁵⁷

In the International Law Commission’s (ILC) *Second Issues Paper on Sea-Level Rise in Relation to International Law*, the co-chairs of the study group, Patrícia Galvão Teles and Juan José Ruda Santolaria, considered the prospect of one state ceding territory to another state.⁵⁸ According to the paper, this could be accomplished with or without the transfer of sovereignty. Unless accomplished with an accompanying transfer of sovereignty, agreements would have to be executed between the state ceding territory and the sinking state concerning the nationality of those who may move to the ceded territory as well as the status of the government entities in the ceded territory and any preservation of privileges and immunities. An agreement would not be necessary if the ceded territory included a transfer of sovereignty. However, the paper noted that while legally possible, a transfer of sovereignty over ceded territory “would be very difficult to achieve in practice.”⁵⁹

⁵⁴ *Id.*

⁵⁵ CRAWFORD, *supra* note 36, at 717.

⁵⁶ *Id.* at 717. (“If the State does not ‘own’ its people—an impossible proposition for a legal system which outlaws slavery and has regard, if not always consistently, to the principle of self-determination—then it does not own territory as property either, and the persistent analogy of territorial sovereignty to ownership of real property is misguided.”). However, Crawford seemed to contemplate elsewhere that the purchase of territory from another state was possible. Crawford, *supra* note 42, at 279 (noting that although creating an artificial island was not a possible pathway for creating a new state, it might be possible to purchase an island “from an accommodating State and, as part of the arrangement, to have independence conferred on the new owner of the island by the vendor”). While not dismissing the idea of a potential market for sovereign territory, Karen Knop has written about the challenges facing such a solution. Karen Knop, *A Market for Sovereignty?: The Roles of Other States in Self-Determination*, 54 OSGOOD HALL L.J. 491, 494 (2017) (noting that “international lawyers are likely to find the prospect of states competing in a market for territory either so far-fetched as to be unworthy of serious attention or, to the contrary, disturbingly reminiscent of the so-called ‘scramble for Africa’ among European colonial powers in the nineteenth century”).

⁵⁷ Similar issues would be created by a lease of territory. As the ILA explained in its 2022 report, “The rights that are transferred by a territorial lease can be defined as a sort of servitude that limits the active exercise of sovereignty by the lessor State and extends the sovereign competences of the lessee State in the area involved.” ILA LISBON REPORT, *supra* note 28, at 30.

⁵⁸ Teles & Santolaria, *supra* note 37, paras. 198–204.

⁵⁹ *Id.* at 19. The ILA put it in even stronger terms, noting that “this is hardly a realistic option because there is little incentive for the host State to give up its sovereignty over parts of its own territory.” ILA LISBON REPORT, *supra* note 28, at 31.

Emma Allen has suggested that sinking states might be able to seek remedial territory as a form of reparation for internationally wrongful acts committed by states that failed to control emissions contributing to climate change.⁶⁰ This poses several challenges, some of which Allen recognizes, including jurisdictional challenges around finding a forum and the unlikelihood that a tribunal would award such territorial reparation. Even if a tribunal would grant a sinking state remedial territory within the territory of another state, it seems unlikely that a state would comply with such an award. Granting such remedial territory also would require finding land that is currently uninhabited, finding ways to relocate and compensate current inhabitants, or ensuring that current inhabitants can become citizens of the state that receives the ceded territory. This last aspect of the “remedial territory” solution seems to undermine its purpose. It’s unclear how displacing part of a population and potentially stripping them of citizenship in order to provide territory to a different population at risk of losing their territory and citizenship is a reasonable solution or respectful of the rights of the ceding state’s population.

Some scholars and the ILC’s study group have proposed that sinking states might merge with existing states in order to secure territory for themselves and citizenship for their populations.⁶¹ This proposal obviously would not preserve the existing territory of the sinking state or even the identity of the state itself, as merger results in the creation of a new state,⁶² but it could provide a durable solution for the sinking state’s population.

Another proposal is a sinking state might associate with another state, as is the case for the Cook Islands with New Zealand or for the Federated States of Micronesia, the Marshall Islands, and Palau with the United States.⁶³ In this case, the sinking state could negotiate for rights of its nationals to acquire the citizenship of the state of association, or, in the alternative, work authorization and residency in the event the associated state does not agree to grant citizenship.⁶⁴ As observed by James Crawford, associated statehood is often not dissimilar to protectorates, thus limiting—to greater or lesser degrees—the independence of the state.⁶⁵ Thus, associated statehood might result in a loss of some rights under international law.⁶⁶ Moreover, association with another state would not preserve existing territory or provide new territory for the state. Thus, if a state ends up losing its territory, association might not provide for the continuity of the state.

Maxine Burkett has suggested a new “deterritorialized” category of statehood, the nation *ex-situ*, that would “allow[] for the continued existence of a sovereign state, afforded all of the rights and benefits of sovereignty amongst the family

⁶⁰ Allen, *supra* note 27.

⁶¹ Teles & Santolaria, *supra* note 37, para. 216.

⁶² C. Emanuelli, *State Succession, Then and Now, with Special Reference to the Louisiana Purchase (1803)*, 63 LA. L. REV. 1277, 1278 (2003).

⁶³ Teles & Santolaria, *supra* note 37, para. 205.

⁶⁴ *Id.*

⁶⁵ Crawford, *supra* note 42, at 282.

⁶⁶ *Id.* at 282–83 (“[O]ne of the difficulties with associated statehood is that it does not fit readily into the existing international framework for dispute settlement, especially third-party dispute settlement. Associated States are probably not eligible to become parties to the Statute of the International Court, or (though this is less certain) to invoke as against the ‘associating State’ the dispute resolution provisions of the United Nations Charter.”).

of states, in perpetuity.”⁶⁷ Her vision for the nation *ex-situ* would have it exist as a “modified political trusteeship system,” creating a legal entity that would exist even in the absence of territory. While this proposal creates a vision for a state that does away with the requirements of territory or permanent population, it leaves unanswered the question of whether a deterritorialized state, administered as a trust, could exercise the requisite independence.⁶⁸ As will be explained below, this type of expansion of the conception of statehood would have drastic implications beyond protecting the continuity of a discrete number of sinking states.

Only the ability to remain within the territory through climate change adaptation measures or the merger or association with another state aligns with our current conception of statehood. All other proposals to avoid the extinction of the sinking states—the creation of entirely new territory through artificial means; the acquisition of new territory in an existing state through purchase or the award of remedial, reparatory territory through judicial proceedings; or the continuity of the state without a territory or permanent population—involve redefining our conceptions of statehood. Even if states are able to avoid unprecedented extinction due to a loss of territory or permanent population, the new precedent could usher in a paradigm shift in international law.

A proposal that would not necessarily preserve statehood but would provide for an international legal personality draws from historical examples of entities retaining international legal personality despite losing all territory—the Sovereign Order of Malta and the Holy See.⁶⁹ If sinking states followed this example, they could continue to engage in international organizations and execute treaties with states and other entities with international legal personality, but the sinking states themselves would not necessarily engage on equal footing with other states. Such a system could be accomplished through the establishment of a seat in international organizations for continuing representation of sinking states—a seat that would not require these states to establish sovereignty over territory. However, some have cautioned against the reliance on this as precedent for the continuity of the state, as the Sovereign Order of Malta and the Holy See were not states, but rather “non-State sovereign entities.”⁷⁰

Also of interest to scholars and the ILC’s study group are examples of governments in exile that were able to retain their international legal personalities and that exercised their personalities through the execution of treaties and participation in international organizations.⁷¹ However, the historical examples of governments in

⁶⁷ Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 346 (2011).

⁶⁸ James Crawford, *Kosovo and the Criteria for Statehood in International Law*, in THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 280, 281 (Marko Milanovic & Michael Wood eds., 2015) (questioning whether a territory subject to a “transitional administration by the United Nations” could “ever be deemed independent so as to fulfill the criteria for statehood”).

⁶⁹ See, e.g., Teles & Santolaria, *supra* note 37, paras. 112–37; Rosemary G. Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States* 10 (Univ. N.S.W. L. Rsch. Paper No. 2009-9, 2009), <https://perma.cc/LL79-XB8Q>; Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood* 10 (Sydney L. Sch. Rsch. Paper No. 11/59, 2010) (using the full title “The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta”), <https://perma.cc/P5LB-8KUB>; Burkett, *supra* note 67, at 356–57; McAdam, *supra* note 28, at 21–22.

⁷⁰ Emma Allen & Mario Prost, *Ceci n’est pas un État: The Order of Malta and the Holy See as Precedents for Deterritorialized Statehood?*, 31 RECIEL 171, 171 (2022).

⁷¹ See, e.g., VON PAEPCKE, *supra* note 6, at 195.

exile are typically time limited.⁷² A government in exile is typically protected and its status preserved until it can return to its territory and restore governing control. While governments in exile may provide examples of governments exercising some governing responsibilities outside of their territory, they do not provide historic examples of the continuity of states. The governments in exile either never return or eventually return to govern an existing territorial state. They do not exist in perpetuity in the territory of another state, as the governments of these sinking states would have to.

As I argue below, the proposals to preserve the continuity of these states in the event of the loss of population or territory or to allow the states to preserve their international legal personality in the absence of formal statehood represent a sort of “consolation prize” statehood or international legal personality.⁷³ While preferable to extinction and the extinguishment of international legal personality, these proposals fall short of what the states in these situations desire and fail to address the root cause of such states’ disappearance, namely climate change caused by human activity.

A. Redefining Statehood

Many efforts to preserve the continuity of sinking states attempt to ground proposals in historical examples to demonstrate that the preservation of a state in the absence of a territory or permanent population does not represent a redefinition of our conception of statehood. However, most solutions other than merger and association with another state represent radical departures.⁷⁴ Any new conception of statehood may determine for decades to come how to address the consequences of climate change when a state’s territory or permanent population is imperiled. Additionally, there are many peoples and nations that are similarly “deterritorialized” as they have either been dispossessed of their land or have been unable to assert a right to claimed sovereign territory. Failure to account for these populations risks further entrenching historic injustices. Furthermore, efforts to include sinking states within historic definitions without acknowledging the radical departure from the traditional notions of statehood misses an opportunity for a more searching inquiry of the imperialist foundations of our notions of territorial sovereignty as well as an opportunity to reimagine statehood free of its colonialist legacies. Finally, efforts to redefine statehood to include “deterritorialized” states risk creating a two-tiered system of statehood.

There is no agreed-upon definition of a state under international law.⁷⁵ In the absence of an authoritative definition, the most often cited source for the definition of a state is the 1933 Montevideo Convention on the Rights and Duties of States.⁷⁶

⁷² This was acknowledged by members of the ILC’s study group in recent comments in reaction to the second issues paper, who noted that the “cases of governments in exile, which were by definition temporary and did not involve the disappearance of a territory, were not considered directly relevant.” Int’l L. Comm’n, *supra* note 36, para. 59(b).

⁷³ Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT’L L. 447, 453 (1993) (arguing that “[i]nternational law has developed techniques to ignore or interpret away alternative structures” other than traditional states”).

⁷⁴ See Allen & Prost, *supra* note 70, at 172, 174.

⁷⁵ See *supra* note 36.

⁷⁶ While some scholars have referred to the convention definition as reflecting customary international law, this conclusion seems to be at odds with statements by states that the Montevideo definition is not binding, statements that it does not reflect state practice, a reluctance to frame the definition in legal terms, and the disagreement over if the definition applies only to the creation of states or also the

This Convention defines a state as possessing “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”⁷⁷

Definitions in the years since 1933 have echoed, if not completely replicated, the definition in the Montevideo Convention. Writing in 1941, Hans Kelsen elaborated on what he considered to be the three elements of statehood. Namely, (1) a state must “be politically organized”; (2) there must be “a power or authority capable of enforcing the enduring obedience of the individuals living within a certain territory”; and (3) it must be independent or “not be under the legal control of another community, equally qualified as a state.”⁷⁸ Writing in 1989, James Crawford stated that “there are two essential elements to statehood: the existence of a separate territorial community with its own system of government, and the independence of that territorial community from all others.”⁷⁹

The Charter of the United Nations does not define the term “state.” Rather, under Articles 3 and 4, membership is open to original member states and “all other peace-loving states.”⁸⁰ As elaborated by Frederick Tse-shyang Chen, the assessment of entities that have qualified as states within the meaning of the Charter has been far more flexible than might have been expected.⁸¹

extinction of a state. *See, e.g.*, Permanent Mission of the Principality of Liechtenstein to the U.N., Report of the International Law Commission on the Work of its Seventy-First Session (Cluster II) (Oct. 31, 2019), <https://perma.cc/DP5L-EZFA> (noting that statehood had thus far “been insufficiently addressed in other authoritative fora”); Permanent Mission of the Principality of Liechtenstein to the U.N., Submission by the Principality of Liechtenstein to the International Law Commission on the Topic ‘Sea-Level Rise in Relation to International Law’ (Oct. 12, 2021), <https://perma.cc/ZZ2U-A3QP> (observing that “in cases where the ‘Montevideo Criteria’ have not been met, ceasing to meet these criteria has not resulted in itself in challenges to State persistence”); Permanent Mission of the Solomon Islands to the U.N., Draft Statement Delivered by Solomon Islands at the Sixth Committee on Agenda Item 82 (Oct. 29, 2021), <https://perma.cc/2XX5-4XBL> (“State practice supports the notion that states may continue to exist despite the absence of Montevideo Convention criteria.”); Permanent Mission of Tuvalu to the United Nations, Statement for the Sixth Committee Agenda Item 82 (Oct. 28, 2021), <https://perma.cc/X62U-7GGW> (noting that “the argument is growing on the criteria provided by the Montevideo Convention only for the determination of the birth of a State”); Permanent Observer Mission of the Holy See to the U.N., Report Of The International Law Commission On The Work Of Its Seventy-Third Session (Cluster II) (Nov. 1, 2022), <https://perma.cc/ZN3B-R4E9> (noting that “[a]lthough, from an academic point of view, the traditional criteria of territory, population and government provide a useful analytical tool, the fact is that those criteria do not reflect state practice”). Furthermore, the Convention only has fifteen state parties, none of which are located outside of the Americas. CRAWFORD, *supra* note 36, at 45 (calling it the “best known formulation of the basic criteria for statehood”). Crawford later added the “and perhaps least helpful” descriptor to the formulation. Crawford, *supra* note 68, at 281. *But see* LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW CASES AND MATERIALS* 279 (7th ed. 2019) (noting that “many states, tribunals, and scholars have regarded its terms as reflecting customary international law”).

⁷⁷ Although not relying on the text of the Montevideo Convention, J.L. Brierly similarly described “the essential characteristics of a state” as “an organized government, a defined territory, and such a degree of independence from control by any other state as to be capable of conducting its own international relations.” J. L. BRIERLY, *THE LAW OF NATIONS* 149 (Andrew Clapham ed., Oxford University Press, 7th ed. 2012) (1928). James Crawford has described the Montevideo criteria as “circular” and argued that “the central criterion for statehood . . . is a given territorial community’s *independence*.” Crawford, *supra* note 68, at 281–82 (emphasis added).

⁷⁸ Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 607–08 (1941).

⁷⁹ Crawford, *supra* note 42, at 285 (observing that “the rights and duties of States depend upon their treaty and other commitments”).

⁸⁰ U.N. Charter art. 3; U.N. Charter art. 4, ¶ 1.

⁸¹ Frederick Tse-shyang Chen, *The Meaning of States in the Membership Provisions of the United Nations Charter*, 12 IND. INT’L & COMP. L. REV. 25, 26 (2001) (“[T]he term states in the above Charter provisions has not been given one uniform meaning but instead a number of plainly discordant meanings.

The ILC, the United Nations body established for the purpose of promoting the progressive development and codification of international law,⁸² has thus far declined to wade into the “delicate” matter of defining statehood or the recognition of states.⁸³

During its consideration of the Draft Declaration on the Rights and Duties of States in 1949, the ILC “concluded that no useful purpose would be served by an effort to define the term ‘State.’”⁸⁴ Instead, “‘State’ [was] used in the sense commonly accepted in international practice.”⁸⁵ The ILC also declined to decide on “the qualifications to be possessed by a community in order that it may become a State”⁸⁶ and concluded that an article on the right to recognition “was too delicate and too fraught with political implications to be dealt with” in the Declaration.⁸⁷ The Draft Declaration ultimately did not contain a definition of “state,”⁸⁸ and the ILC declined to move forward with the project as a whole.

The initial draft articles on the law of treaties presented to the ILC in 1956 contained a definition of a “state” as “an entity consisting of a people in habiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly or through some other State” and “includes the government of the State.”⁸⁹ This definition was ultimately not included in the Vienna Convention on the Law of Treaties.⁹⁰

The ILC’s current work on sea level rise in relation to international law includes issues of statehood within its scope, including the creation and continuity of states.⁹¹ While definitions of statehood have been examined, including those found within the Montevideo Convention, the ILC still has not defined statehood.⁹² As noted in the *First Issues Paper on Sea-Level Rise in Relation to International Law* by Co-

An entity may appear to fall short of statehood in one or another important respect yet be held a state eligible for membership. Conversely, an entity may appear to be well-qualified as a state yet be refused the status of statehood remaining ineligible for membership. Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, an entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, an entity without a government, an entity with a disputed territory, and so on.”).

⁸² G.A. Res. 174(II) (Nov. 21, 1947).

⁸³ See Int’l L. Comm’n, Rep. on the Work of Its First Session, U.N. Doc. A/CN.4/13 & Corr. 1–3, para. 50 (1949) [hereinafter ILC First Session Report]; see also Int’l L. Comm’n, *supra* note 36, para. 39 (stating that “there was neither a generally accepted definition of a State, nor clearly defined criteria for the extinction of a State”).

⁸⁴ ILC First Session Report, *supra* note 83, para. 49.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* para. 50.

⁸⁸ G.A. Res. 375 (IV) (Dec. 6, 1949); see also Int’l L. Comm’n, *supra* note 36, para. 39.

⁸⁹ Gerald Fitzmaurice (Special Rapporteur on the Law of Treaties), *Report on the Law of Treaties*, [1956] 2 Y.B. Int’l L. Comm’n 104, 107–08, U.N. Doc. A/CN.4/101.

⁹⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; see also Teles & Santolaria, *supra* note 37, para. 75.

⁹¹ Int’l L. Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 328–29 (2018).

⁹² Teles & Santolaria, *supra* note 37, para. 75. See also the Statement by the Republic of Cyprus outlining the history of the “significant political difficulties” surrounding the lack of agreement on a definition of statehood and describing that, to date, “the Commission had been unable to agree on a definition of statehood.” U.N. GAOR, 73rd Sess., Sixth Comm., 23rd mtg. at 7–8, U.N. Doc. A/C.6/73/SR.23 (Nov. 14, 2018).

Chairs Bogdan Aurescu and Nilüfer Oral, the issue remains contentious, and states have already expressed concern that the current study on sea level rise in relation to international law might raise questions about the definition of statehood that would be difficult to resolve.⁹³

If it is unclear how to define a state and when it exists under international law, it is even less clear when and how a state becomes extinguished.⁹⁴ There is a paucity of examples of state extinction, and all such examples involve an existing state merging with another existing state or being succeeded by a new state.⁹⁵

The U.N. Charter outlines procedures for the acquisition of membership in the United Nations by “peace-loving states,” the suspension of membership, and conditions for expulsion.⁹⁶ While the Charter does not define the term “state,” the existence of a state has been debated in relation to applications for membership.⁹⁷ However, the Charter is silent on the issue of state extinction. While no member state has been expelled to date, if a member were to be expelled pursuant to Article 6, the expulsion would not extinguish its existence as a state—just its U.N. membership.

The circumstances surrounding the dissolution of the Socialist Federal Republic of Yugoslavia might offer insights into how the Security Council and General Assembly might procedurally, if not substantively, address the question of state extinction in the future. In that case, the Security Council recognized that the state had “ceased to exist.”⁹⁸ However, the primary question the Security Council considered was whether the Federal Republic of Yugoslavia would continue the U.N. membership of the former Socialist Federal Republic of Yugoslavia. The Security Council recommended to the General Assembly that the new state—the Federal Republic of Yugoslavia—should apply for membership. The General Assembly referred to the state as the “former Socialist Federal Republic of Yugoslavia,” but did not precisely say it “ceased to exist.”⁹⁹ This dispute was largely tied to questions on the continuity of a state in the circumstance of state succession and related to questions of U.N. membership. It is unclear if the Security Council has the authority to declare a state “extinct,” or to recommend to the General Assembly that it considers a state to be “extinct,” for the purposes of preserving its U.N. membership or otherwise. Such lack of clarity may present a particular problem in this instance where the dispute would not concern a new entity claiming to continue the legal personality of a former state for the purposes of U.N. membership, but a state contesting the characterization of extinction itself.

⁹³ Aurescu & Oral, *supra* note 32, at 16.

⁹⁴ MAREK, *supra* note 53, at 7.

⁹⁵ CRAWFORD, *supra* note 36, at 716–17; Allen & Prost, *supra* note 70, at 171.

⁹⁶ See U.N. Charter arts. 4–6.

⁹⁷ U.N. Comm’n on the Admission of New Members, Rep. of the Comm’n on the Admission of New Members Concerning the Application of Palestine for Admission to Membership in the U.N., U.N. Doc. S/2011/705, at 2 (2011).

⁹⁸ S.C. Res. 1022, ¶ 9 (Nov. 22, 1995) (recognizing “the fact that [the State formerly known as the Socialist Federal Republic of Yugoslavia] has ceased to exist”); S.C. Res. 821, ¶ 2 (Apr. 28, 1993) (“Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist . . .”).

⁹⁹ S.C. Res. 777, ¶ 3 (Sept. 19, 1992) (stating that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted”); see also CRAWFORD, *supra* note 36, at 708–09.

The substantive question is also unclear under international law. Krystyna Marek took the position that a state becomes extinct if one or more of the “material elements” of statehood are no longer present (i.e., territory or population). She used a sinking state as an illustrative example of when a state would cease to exist, although not in the context of climate change:

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 (e.g. *an island which would become submerged*) can be taken for granted.¹⁰⁰

It is unclear how the loss of a “material element” of statehood will impact the sinking states now that the total loss of territory has moved from purely hypothetical to potential reality. James Crawford has written that “there is a strong presumption against the extinction of States once firmly established.”¹⁰¹ This presumption against extinction is also described as a presumption of state continuity and many have argued that this presumption should apply in the case of sinking states.¹⁰² However, for Crawford, “[T]he determination of . . . continuity [is] dependent on the basic criteria for statehood. A state’s existence may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people.”¹⁰³ How far the presumption of continuity of states would extend for sinking states is unclear, with some arguing that a presumption of continuity should apply even after a state has lost all habitable territory, as explained above.

Jane McAdam has argued that the four criteria outlined in the Montevideo Convention are applicable to a state’s creation but that the loss of one or more elements does not necessarily entail the loss of statehood.¹⁰⁴ In the case of sinking states,

¹⁰⁰ MAREK, *supra* note 53, at 7 (emphasis added).

¹⁰¹ CRAWFORD, *supra* note 36, at 715.

¹⁰² This includes several states speaking about the report of the International Law Commission—“Sea-Level Rise in Relation to International Law”—on the topic. Permanent Mission of the Principality of Liechtenstein to the U.N., *supra* note 76 (“We similarly support the presumption of continuity of statehood outlined as a starting point.”). *But see* Permanent Mission of the Republic of Korea to the U.N., *Report of the International Law Commission on the Work of its Seventy-Third Session* (Nov. 1, 2022), <https://perma.cc/7QVQ-KXUG> (noting that “the loss of territory due to sea-level rise raises the fundamental question of international law, particularly concerning state continuity”); Statement by the Republic of Poland, *Report of the International Law Commission on the Work of its Seventy-Third Session 3* (Oct. 27, 2022), <https://perma.cc/LTY9-8C37> (noting that the “total inundation” of a state’s territory is “a completely unprecedented circumstance” and that “simply declaring that a state continues to exist, even when its territory is totally and permanently submerged, cannot suffice without some explanation of its future *modus operandi*”).

¹⁰³ CRAWFORD, *supra* note 36, at 671.

¹⁰⁴ Jane McAdam, *Disappearing States?*, BROOKINGS INST. (Mar. 30, 2013), <https://perma.cc/LH9A-R87N>. Other states have recently expressed this opinion. Permanent Mission of Papua New Guinea to the U.N., *Report of the International Law Commission on the Work of its Seventy-Third Session 3* (Nov. 1, 2022) <https://perma.cc/LTY9-8C37> (“Our delegation’s understanding is that the Montevideo Convention was concerned with how an entity becomes a State, not with how an entity might cease to be a State. This understanding is reflected in international historical practice.”).

the loss of territory and population would likely be gradual over time, and the loss of a permanent population is likely to occur prior to the complete loss of territory.¹⁰⁵ If the loss of territory or population *would* result in the extinction of the state, where the tipping point occurs is unclear as it is without precedent. While “no minimum limit has been set in international law for the size or population,”¹⁰⁶ it has thus far been presumed that statehood ought to include territory of some kind.¹⁰⁷

Teles and Santolaria, co-chairs of the ILC’s work on sea level rise, appear at least open to the presumption of continuity extending to sinking states that have lost an element of statehood. They noted in their second issues paper, “With regard to small island developing States whose territory could be covered by the sea or become uninhabitable owing to exceptional circumstances outside their will or control, a strong presumption in favour of continuing statehood should be considered.”¹⁰⁸

For sinking states, the moment of extinction, should it occur, might not coincide with a particular change in the territory, or the complete loss of territory, or even the substantial decline of a permanent population. Extinction might occur gradually as other states cease to recognize a sinking state as a state.

Whatever the reason for the reluctance to address and define the meaning of a state or its moment of extinction, many of the proposals to address the issue of sinking states would drastically alter our conception of statehood. Territory has historically been and remains central to the conception of the state. As noted earlier, James Crawford observed that “a separate territorial community with its own system of government” is one of the “two essential elements to statehood.”¹⁰⁹ Oppenheim observed that “a State without a territory is not possible.”¹¹⁰

Furthermore, it is difficult to imagine that preserving the continuity of a state in the absence of territory would not impact its independence. Independence has *also* been deemed to be an essential element of statehood. Unless a state government is fully established and continues to exist on an artificial island created in place of the prior territory, the government of the territory-less state would have to relocate to the territory of another state. This would impact not only its own independence, but also the sovereign rights of another state. As noted by the representative of Poland during a recent debate in the Sixth Committee, “it is difficult to imagine that such a state could continue to exist without obliging other states to accept some limitations on their own sovereignty in the territorial or functional sphere.”¹¹¹

While proposals to preserve the continuity of states appear to be tailored to the sinking states, it is unclear if these proposals would be exceptions to the traditional definitions of states (such as they were) under the law of statehood or the start of a complete rewriting of the law of statehood. If exceptions, what other

¹⁰⁵ McAdam, *supra* note 104.

¹⁰⁶ Crawford, *supra* note 42, at 280–81.

¹⁰⁷ MALCOLM SHAW, *TITLE TO TERRITORY*, at xi (2005) (arguing that “[t]he role of territory in international law is central, for without territory there can be no state, and without states there would be no international system as is currently known” and that territorial sovereignty is “the heart of the system”).

¹⁰⁸ Teles & Santolaria, *supra* note 37, para. 194.

¹⁰⁹ Crawford, *supra* note 42, at 285 (observing that “rights and duties of States depend upon their treaty and other commitments”).

¹¹⁰ OPPENHEIM, *supra* note 50, at 548.

¹¹¹ Permanent Mission of the Republic of Poland to the U.N., *supra* note 102, at 3.

circumstances might qualify? If not exceptions, what would be the impact on how we understand statehood and sovereignty?

If territory has always been an essential element of statehood and crucial to our notions of territorial sovereignty, the suggestion that a state could continue to exist in the absence of territory *or* population would represent a true Grotian moment.¹¹² It would upend our conception of statehood and drastically redefine the elemental building blocks of the international legal order.

Some of the proposed solutions also attempt to redefine statehood by suggesting that a state can continue to exist long after it ceases to have the essential elements of statehood. While there is no example in history of a state becoming extinct due to the disappearance of its territory, a failure to confront when or how a state becomes extinct may lead to unintended consequences. As noted by Krystyna Marek, the presumption of the continuity of states is not meant to lead to the indefinite existence of states. In her words, "There is a beginning and an end to the State, as to everything else. States are born and die, and the determination of these two facts is precisely the proper function of international law. Whatever the claims and aspirations of existing States, it would be legally unsound and historically untrue to affirm their immortality."¹¹³

Despite the lack of precedent, there are efforts to tie the preservation of states in absence of territory or permanent population to historical practice. For example, the ILC study group is examining governments in exile as precedent for the continuation of states. However, these historical examples were temporary. The implication is that the governments of sinking states could continue to exist in perpetuity if they are "in exile" from their former territory. Indeed, that is precisely what Maxine Burkett has suggested the deterritorialized form could accomplish.

The question must be posed as to whether the redefining of statehood could be contained and how this might affect other states impacted by climate change in the future. For example, imagine that a state becomes completely subsumed by heat and drought such that there is no longer arable land and nearly the entire population has left. Will we continue to recognize the state in that instance? Will we negotiate for the relocation of their population? Alternatively, to consider an example outside of the context of climate change, what if a state is temporarily or permanently occupied? Would the government be able to petition for a "deterritorialized" form of statehood, and how would that impact their international legal obligations vis-à-vis the former territory?

Continuing to recognize a state without a territory or permanent population leads to questions about other peoples and nations that have been deprived of statehood or have yet to exercise their right to self-determination. There are currently

¹¹² Milena Sterio has argued that our current conception of statehood is no longer satisfied by the four criteria outlined in the Montevideo convention, as the fourth element—the capacity to enter into international relations—contains additional sub-elements. According to Sterio, recognizing these additional sub-elements represents a "Grotian moment" in the law of statehood. The sub-elements are "the need for recognition by regional partners, as well as the most powerful states . . . a demonstrated respect for human/minority rights; and a commitment to participate in international organizations, and to abide by a set world order." Compared to the proposals by Maxine Burkett and others, this is a relatively incremental change to our conception of statehood, if it is indeed integral to our current definition. Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 210 (2011).

¹¹³ MAREK, *supra* note 53, at 5–6.

seventeen territories recognized by the United Nations as Non-Self-Governing Territories¹¹⁴ “whose people have not yet attained a full measure of self-government.”¹¹⁵ The Non-Self-Governing Territories are almost exclusively islands and include several territories that are similarly at risk of sea level rise, such as New Caledonia, Pitcairn, and Tokelau.¹¹⁶ If these territories lose some or all of their habitable territory prior to exercising their right to self-determination, will that permanently foreclose the exercise of their right to self-determination? Or will they be permitted to petition for a form of “deterritorialized” statehood similar to the sinking states?

The redefinition of statehood also opens questions about the future for nations and peoples not formally recognized as states or Non-Self-Governing Territories and their right to self-determination.¹¹⁷ If the existence and continuity of states that have been lost to sea level rise must be preserved, what is the justification for failing to recognize the statehood, or in the very least the international legal personality, of these populations? This is particularly true with respect to recognizing the statehood of a population that in the future may exist as a diaspora while failing to recognize the collective rights of other diasporas. Examples of stateless diasporas include the Kurds, Palestinians, Roma, Sikhs, and Tibetans.¹¹⁸

If this redefinition is framed in terms of an exception to our understanding of statehood, it misses an opportunity for a more searching inquiry of the conception of statehood in international law and its imperialist and colonialist foundations. Anthony Anghie notes that “sovereignty was constituted through colonialism,” and it is impossible to separate our conceptions of territorial sovereignty from its colonialist foundations.¹¹⁹ There is rich scholarship investigating these claims and reimagining the international legal order if it is divested of its imperialist foundations.¹²⁰ It is a missed opportunity to fail to examine the violent origins of our current conceptions of sovereignty, statehood, and territorial boundaries.

¹¹⁴ *The United Nations and Decolonization: Non-Self-Governing Territories*, U.N. DEP’T OF POL. & PEACEBUILDING AFFS., <https://perma.cc/6RPU-HBKT> (last visited May 26, 2023). The seventeen Non-Self-Governing Territories recognized by the United Nations are Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn, and Tokelau.

¹¹⁵ U.N. Charter art. 73, ¶ 1.

¹¹⁶ G.A. Res. 76/101, ¶ 14 (Dec. 16, 2021) (noting that “the self-determination process of the Territory could not be addressed in isolation from the threat of climate change, the rise in sea level and the challenges to the 2030 Agenda for Sustainable Development”). Gerard Prisen and Séverine Blaise have identified forty-two “non-self governing islands,” a list that includes the fifteen U.N. Non-Self-Governing Territories that are islands (i.e., not Western Sahara and Gibraltar), nineteen islands that are included on the CIA’s list of “nonindependent entities,” and eight “other non-self-governing islands that are remnants of colonial histories.” Gerard Prinsen & Séverine Blaise, *An Emerging “Islandian” Sovereignty of Non-Self-Governing Islands*, 72 INT’L J. 56, 77 (2017).

¹¹⁷ Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, *Climate Change and Challenges to Self-Determination: Case Studies from French Polynesia and the Republic of Kiribati*, 129 YALE L.J.F. 648, 653 (2020), <https://perma.cc/9A2E-66SA> (arguing that the right of a people to self-determination includes peoples “whether or not they already constitute a state”).

¹¹⁸ GABRIEL SHEFFER, *DIASPORA POLITICS: AT HOME ABROAD* 156 (2003).

¹¹⁹ ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 38 (2005).

¹²⁰ See generally Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720 (2021); Rony Emmenegger, *Unsettling Sovereignty: Violence, Myths and the Politics of History in the Ethiopian Somali Metropolis*, 90 POL. GEOGRAPHY 1 (2021); Julie MacArthur, *Decolonizing Sovereignty: States of Exception Along the Kenya-Somali Frontier*, 124 AM. HIST. REV. 108 (2019); Yarimar Bonilla, *Unsettling Sovereignty*, 32 CULTURAL ANTHROPOLOGY 330 (2017).

Finally, there is a risk that current efforts to potentially redefine statehood would create two tiers of statehood. On one level would be states that maintain the traditional indicia of statehood, including a territory and permanent population. On another level would be states that lack the traditional indicia of statehood. This bifurcation could further entrench inequalities between states and, as I argue below, undermine the principle of the sovereign equality of states.

B. Undermining Sovereign Equality of States

Proposals for deterritorialized statehood or an international legal personality short of statehood would undermine one of the fundamental principles of international law—the sovereign equality of states. Philip Jessup, scholar and former judge at the International Court of Justice (ICJ), wrote, “Equality ranks traditionally with sovereignty and independence as an inherent and unimpeachable attribute of the state.”¹²¹ Sovereign equality has been said to be closely tied to a state’s existence, and “the negation of equality would endanger a state’s continued existence as such.”¹²²

Sovereign equality was a central principle at the founding of the United Nations. The Joint Four-Nation Declaration of 1943 “recognize[d] the necessity” of establishing a new “general international organization, based on the principle of the sovereign equality of all peace-loving states”¹²³ The United Nations Charter establishes that the organization is “based on the principle of the sovereign equality” of member states.¹²⁴ These principles have been reaffirmed through multilateral statements, such as the language of “the equality of all nations large and small” that emerged from the Bandung Conference¹²⁵ and was later elaborated on in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States.¹²⁶

The principle of sovereign equality applies regardless of a state’s territorial size or population.¹²⁷ Sovereign equality does not mean factual equality, but rather

¹²¹ Philip Jessup, *The Equality of States as Dogma and Reality*, 60 POL. SCI. Q. 527, 537 (1945).

¹²² Ann van Wynen Thomas & A.J. Thomas, Jr., *Equality of States in International Law. Fact or Fiction?*, 37 VA. L. REV. 791, 796 (1951).

¹²³ Joint Four-Nation Declaration at the Moscow Conference, China-U.K.-U.S.-U.S.S.R., art. 4, Oct. 30, 1943.

¹²⁴ U.N. Charter art. 2, ¶ 1.

¹²⁵ Asian-African Conference of Bandung, Final Communiqué, para. G.3 (April 24, 1955), <https://perma.cc/5Q7S-2TR6>.

¹²⁶ G.A. Res. 2625 (XXV) (Oct. 24, 1970).

¹²⁷ R.P. Anand, *Sovereign Equality of States and International Law*, 197 RECUEIL DES COURS 17, 20 (1986).

juridical equality.¹²⁸ Often, particularly in the case of small island developing states, the gap between formal equality and factual equality is quite large.¹²⁹

Some might rightly point out that sinking states are currently exercising their rights of sovereign equality. They are participating fully in the debates of the General Assembly, the Sixth Committee, and at the United Nations Climate Change Conferences, both individually and collectively as a group—the Pacific Small Island Developing States.¹³⁰ They are using their powers of persuasion to gain support for General Assembly resolutions and to obtain a referral from the General Assembly to the ICJ for an advisory opinion.¹³¹ In some ways, small states exercise outsized power relative to their populations,¹³² a reason for small states' traditionally vociferous defense of the right to sovereign equality.¹³³

However, the prospect of state disappearance imperils the juridical equality of these states. While “[t]he rights of a particular State (no matter how large or small) cannot be disposed of by a majority of votes of the other States,”¹³⁴ what is occurring at present is that the rights of particular states to exist are being disposed of by the actions and inactions of a majority of other states. Even if states are able to preserve their existence through quasi-statehood or maintain an international legal personality short of statehood following the loss of territory or permanent population, their capacity will invariably be reduced, making it more difficult to exercise their rights and uphold their international obligations.¹³⁵ And as I argue above, efforts to redefine statehood or relegate states to an international legal personality short of statehood could entrench a tiered system of statehood in which only some states possess the full indicia of statehood.

Of course, international law does not uphold perfect sovereign equality of states.¹³⁶ For example, the U.N. system is constitutionally unequal due to the veto

¹²⁸ MALCOLM SHAW, *INTERNATIONAL LAW* 155 (7th ed. 2014); ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 168 (2010); see also Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 605 (1998) (noting that in the development of international organizations during the twentieth century, “sovereign equality was thought to mandate membership open to all states, equality in voting power, and unanimity rules in certain binding decisions and with respect to reservations to multilateral treaties”); Schreuer, *supra* note 73, at 447 (“[T]he concept of equality among States is to a large extent based on fiction. The enormous differences between participants in terms of power and wealth have created a constant tension between basic conceptions of international law and reality.”).

¹²⁹ Crawford, *supra* note 42, at 277.

¹³⁰ Statement by Bruce Bilimon, Minister of Health & Hum. Serv., Republic of the Marshall Islands on Behalf of Pacific SIDS at COP 26 (Nov. 9, 2021), <https://perma.cc/6P9H-YPD9>.

¹³¹ Law Report, *Vanuatu's Push for International Court Action on Climate Change*, ABC RADIO NAT'L (July 12, 2022), <https://perma.cc/H4G9-GNAZ>; Bernadette Carreon, *Vanuatu to Seek International Court Opinion on Climate Change Rights*, GUARDIAN (Sept. 26, 2021), <https://perma.cc/LA6W-ZTYX>; *Vanuatu Launches the ICJAO Campaign*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE (Sept. 26, 2021), <https://perma.cc/LA6W-ZTYX>.

¹³² Crawford, *supra* note 42, at 285.

¹³³ Jessup, *supra* note 121, at 528–29 (noting the growing influence of small states from the early stages of the development of the League of Nations through the Dumbarton Oaks Proposals).

¹³⁴ Crawford, *supra* note 42, at 286.

¹³⁵ Int'l L. Comm'n, *supra* note 36, para. 51; see also Thomas & Thomas, *supra* note 122, at 798; ILA LISBON REPORT, *supra* note 28, at 23 (noting that one of the “real problem[s] for sinking states will be the “declining capacity of governments to perform their tasks and duties, including those towards their populations”).

¹³⁶ Sovereign equality arises from the doctrine of the “absolute equality of states.” See TRINDADE, *supra* note 128, at 72.

power given to the permanent members of the Security Council.¹³⁷ And states do not in fact have “equal rights and duties” as proclaimed in the Declaration on Friendly Relations.¹³⁸ Rather, they possess rights and duties that reflect the nature of their territory, whether they be landlocked or littoral, and the treaty commitments to which they have entered into.¹³⁹

However, we are stretching the limits of formal equality when states cannot even guarantee their own survival.¹⁴⁰ This is all the more tragic as the states at risk of disappearance only recently exercised their right to self-determination. Three obtained their independence from Great Britain—the Maldives in 1965, Tuvalu in 1978, and Kiribati in 1979—while the Marshall Islands obtained its independence from the United States in 1986.¹⁴¹ Thus, states that had previously been “excluded from the realm of sovereignty”¹⁴² are at risk of losing their sovereign rights mere decades after gaining them.

Suggestions to place these states in a new trustee system reverses progress on the exercise of the right to self-determination,¹⁴³ a right considered to be a *jus cogens* norm.¹⁴⁴ Such proposals create a system of neocolonial subordination, effectively taking away the rights conferred through decolonization¹⁴⁵ and marginalizing these states within the community of nations.¹⁴⁶ “A State in the grip of neo-colonialism is not master of its own destiny.”¹⁴⁷

¹³⁷ Jessup, *supra* note 121, at 531; HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 51 (1951) (“The privileges conferred in Articles 27, 108 and 109, upon the states which are permanent members of the Security Council are incompatible with the principle of ‘equal rights of nations large and small’ as well as with the principle of ‘sovereign equality’ of the Members.”); Thomas & Thomas, *supra* note 122, at 804; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 381 (July 8) (J. Weeramantry, dissenting); CARMEN E. PAVEL, *LAW BEYOND THE STATE: DYNAMIC COORDINATION, STATE CONSENT, AND BINDING INTERNATIONAL LAW* 166–67 (2021).

¹³⁸ G.A. Res. 2625 (XXV), *supra* note 126, at 124.

¹³⁹ Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 208–09 (1944) (noting that littoral states possess a different set of rights than land-locked states); Crawford, *supra* note 42, at 285 (observing that “the rights and duties of States depend upon their treaty and other commitments”).

¹⁴⁰ Deepa Badrinarayana, *International Law in a Time of Climate Change, Sovereignty Loss, and Economic Unity*, 104 PROC. ANN. MEETING AM. SOC. INT’L L. 256, 257 (2010).

¹⁴¹ CAMPRUBI, *supra* note 4, at 31–39 (noting that the reason these states were only recently able to exercise their rights to self-determination was due to a “fear of dilution of the United Nations by several territories allegedly too small to support their own statchood”); SOUTENBURG, *supra* note 27, at 245 (noting that small island states were “among the first to be colonized by the European powers and among the last to be released”); *Timeline—Story of Independence*, MALDIVES INDEP. (July 26, 2015), <https://pcrma.cc/B6XL-SAEU>.

¹⁴² ANGHIE, *supra* note 119, at 197.

¹⁴³ See *In re Secession of Quebec*, [1998] 2 S.C.R. 217, 284 (noting that a “right to external self-determination accrues where a people is subject to alien subjugation, domination or exploitation outside a colonial context”). But see SOUTENBURG, *supra* note 27, at 339 (arguing that the right to self-determination “does therefore not apply to the populations of small island states threatened by sea level rise who fight not for the acquisition, but for the preservation of their statchood”).

¹⁴⁴ ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 171 (1995); Int’l L. Comm’n, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/77/10, para. 43 (2022).

¹⁴⁵ See E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1539–42 (2019).

¹⁴⁶ See CASSESE, *supra* note 144, at 5.

¹⁴⁷ Achiume, *supra* note 145, at 1542 (quoting KWAME NKRUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM*, at x (1965)).

Sinking states have expressed the opinion that climate change poses a threat to their right to self-determination.¹⁴⁸ In its submission to the U.N. High Commissioner for Human Rights to contribute to its study on human rights and climate change, the Maldives argued that the right to self-determination encompasses “the rights of peoples to be recognized as a State vis-à-vis the rest of the international community.”¹⁴⁹ Furthermore, “The permanent loss of statehood, without a successor State to take its place, violates a people’s right to self-determination.”¹⁵⁰ The Maldives concluded:

In the long-term, unchecked sea-level rise will inundate the whole of the Maldives. The extinction of their State would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination.¹⁵¹

The right to self-determination has been connected to the right of continued existence of sinking states by the Office of the High Commissioner for Human Rights, the United Nations Special Rapporteur on the rights of indigenous peoples,¹⁵² and other United Nations Special Rapporteurs on human rights.¹⁵³ This connection was further confirmed by a statement from United Nations Deputy High Commissioner for Human Rights Flavia Pansieri, who stated that “in a number of small island States and coastal communities, the very right to self-determination and existence” was undercut by “human-induced climate change.”¹⁵⁴

States are not choosing to preserve their continuity through a deterritorialized form or an international legal personhood that is less than statehood.¹⁵⁵ None have expressed a desire to merge with another state or form an association. They have been explicit in their desire to find ways to adapt to allow their populations to remain *in situ* and to preserve their territory. However, they may be powerless to prevent the eventuality that the seas will overtake their territory.

¹⁴⁸ John H. Knox (Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Individual Report on the U.N. General Assembly and the Human Rights Council, Including the Universal Periodic Review Process, ¶ 106 (2013), <https://perma.cc/Q58G-AF3M>; see also ILA LISBON REPORT, *supra* note 28, at 26, 34 (noting that under the International Covenant on Civil and Political Rights and International Covenant on Economic and Social Rights, the right of self-determination of peoples entails the right “to determine their political status and freely pursue their economic, social and cultural development”).

¹⁴⁹ Republic of Maldives, Maldives Submission Under Human Rights Council Resolution 7/23, at 4 (Sept. 25, 2008), <https://perma.cc/DEN2-2ZU9>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 21.

¹⁵² U.N. Off. of the High Comm’r for Hum. Rts., Understanding Human Rights and Climate Change, paras. 14–15 (Nov. 27, 2015), <https://perma.cc/HK8R-YNWK>.

¹⁵³ U.N. Off. of the High Comm’r for Hum. Rts., The Effects of Climate Change on the Full Enjoyment of Human Rights, para. 52 (Apr. 30, 2015), <https://perma.cc/H3B7-M44R> (“[T]he greater the temperature rise, the more quickly and drastically the peoples living in small island states will be faced with challenges to their ability to continue to live on their traditional territory, and therefore faced with challenges to their ability to enjoy and exercise their right to self-determination.”).

¹⁵⁴ U.N. Off. of the High Comm’r for Hum. Rts., *supra* note 152.

¹⁵⁵ Even though it is not their choice, states are planning for the eventuality. For example, Tuvalu is working towards digitizing all government functions in order to “secure the nation’s future.” *The Future Now Project*, GOV’T OF TUVALU DEP’T. OF FOREIGN AFFS., <https://perma.cc/JK4S-GTCW> (last visited May 31, 2023).

For example, even while the Government of Tuvalu acknowledges the need to plan for the eventual migration of the population, the official policy is “against relocation as a solution to the climate crisis.”¹⁵⁶ The Tuvalu government is working to secure recognition of permanent statehood for Tuvalu and has pledged to “only form new bilateral relations with nations that recognize Tuvalu’s Statehood . . . as permanent.”¹⁵⁷

The rights to equality, self-determination, and territorial integrity are all intimately related.¹⁵⁸ Pull at the thread of one and the others unravel. Efforts to preserve the existence of states in a deterritorialized form or to grant them an international legal personality short of statehood cannot adequately protect these states’ right to equality if inaction on climate change continues to erode that right.¹⁵⁹ Thus, one of the cascading consequences of sinking states will be the undermining of the principles of sovereign equality and self-determination.

C. Humanitarian Crisis

Under international law, states have the responsibility to respect, protect, and fulfill human rights. A state that is facing its own demise will eventually have a diminished capacity to fulfill these obligations and protect the rights of its population.¹⁶⁰ If deprived of its right to sovereign equality because it is determined to be extinct under law, because it has diminished capacity in deterritorialized form, or because it exists with a legal personality short of statehood, a state may not be able to effectively ensure a durable solution for its population.

Whether sinking states may preserve their statehood *de jure*, the fact remains that they are losing habitable territory and, under current projections of global warming without additional state action,¹⁶¹ they are confronted with the likely eventuality that the entirety of the territory will be submerged under the sea. The initial displacement of the population will likely be internal,¹⁶² which does not raise international

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *In re Secession of Quebec*, *supra* note 143, at 282 (“The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states.”).

¹⁵⁹ But see Jenny Grote Stoutenburg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States*, in *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE* 57, 85–86 (Michael B. Gerrard & Gregory E. Wannier eds., 2013) (arguing that a state “would continue to benefit from the presumption of sovereign equality of States” while “the government of the island State would continue to represent its State in international fora on an equal footing with other States and would keep exercising all those international rights and competences of States that do not require a territorial basis”). Tony Anghie has argued that these states’ rights to equality were negated through the process of self-determination, as they were forced to “significantly compromise[] their internal sovereignty and their cultural distinctiveness in order to be accepted as legal subjects” of international law. ANGHIE, *supra* note 119, at 86–87.

¹⁶⁰ ILA LISBON REPORT, *supra* note 28, at 25 (explaining that “the more fragmented the location of the population and government, the more exposed they are to the sovereignty of one or more other States, the more the State’s ability to perform the core functions of a State or to exercise sovereign power over its population, including the protection of human rights, is compromised,” and also stating that states will have “[a] diminishing ability to perform the core functions of a State”).

¹⁶¹ IPCC, *supra* note 31, at 7, 12.

¹⁶² As scholars and international organizations have observed, most displacement due to climate change has occurred and will likely continue to initially occur within the territory of the state. This is not

protection concerns.¹⁶³ Many have already relocated to higher ground or to areas within their own countries that have habitable land with access to fresh water.¹⁶⁴ This internal migration is already straining available resources as land is limited and available water might be appropriate for agriculture but is not necessarily potable. As the sea level continues to rise, it is expected that it will become more challenging for the populations of sinking states to relocate internally as urban areas become crowded and habitable land decreases.¹⁶⁵

Sinking states have limited capacity to adapt to climate change and accommodate internal displacement.¹⁶⁶ For these states, there will come a point in the not-too-distant future when the remaining habitable land will not be able to sustain the population, there will be no remaining habitable land, or the land will fully sink below the surface of the sea. A cascading consequence of grave concern is the humanitarian crisis that may emerge as a result of the displacement of entire states' populations with no right under international law to acquire a new nationality and limited rights to remain in countries other than their country of origin.

While the populations and governments of impacted states have expressed their strong preference to remain *in situ*, some countries are already planning for the relocation of their populations.¹⁶⁷ Those who have no pathway to planned relocation and regular migration may be displaced across borders with uncertain prospects for finding entry and permanent status in another country.

International law provides limited protection, as no binding international frameworks specifically address those displaced across borders by climate change.¹⁶⁸

unique to sinking states, but generally reflective of displacement because of climate change. Walter Kälin and Nina Schrepfer noted, "The magnitude of *internal displacement* due to climate change-related events and processes is substantial and likely to increase in the foreseeable future." Walter Kälin & Nina Schrepfer, Div. of Int'l Prot., U.N. High Comm'r for Refugees, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (Feb. 2012), <https://perma.cc/4E3N-LS32>; see also KANTA KUMARI RIGAUD ET AL., GROUNDSWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION 157–58 (2018), <https://perma.cc/SZ33-H3MD>; Miriam Cullen, *Disaster, Displacement and International Law: Legal Protections in the Context of a Changing Climate*, 8 POL. & GOV. 270, 274 (2020).

¹⁶³ The law governing the displacement of people within the territory of their nationality or permanent residence is human rights law and soft law principles outlined in the Guiding Principles on Internal Displacement. U.N. HIGH COMM'R FOR REFUGEES, THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (1998), <https://perma.cc/JWN9-DMKM>; Elizabeth Ferris, *The Relevance of the Guiding Principles on Internal Displacement for the Climate Change-Migration Nexus*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 108 (Benoît Mayer & François Crépeau eds. 2017); ANTÓNIO GUTERRES, U.N. HIGH COMM'R FOR REFUGEES, CLIMATE CHANGE, NATURAL DISASTERS AND HUMAN DISPLACEMENT: A UNHCR PERSPECTIVE 4 (2009).

¹⁶⁴ Half of the population of Tuvalu has migrated to the capital atoll of Funafuti. See Nobuo Mimura & Leonard Nurse, *Small Islands*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 687, 708 (Martin Perry et al. eds., 2007).

¹⁶⁵ See U.N. HIGH COMM'R FOR REFUGEES, *supra* note 163, at 15.

¹⁶⁶ See, e.g., U.N. Secretary-General's High-Level Panel on Internal Displacement, *Pacific Regional Consultation on Internal Displacement: Pacific Perspectives and Practices on Climate Change and Disaster Displacement*, at 1 (Feb. 11, 2021), <https://perma.cc/XW9C-YSXJ>.

¹⁶⁷ Tuvalu has stated that it would pursue the relocation of its population as a "last resort." Eleanor Ainge Roy, *'One Day We'll Disappear': Tuvalu's Sinking Islands*, GUARDIAN (May 16, 2019, 4:51 AM), <https://perma.cc/H5NQ-4RVZ>. The Government of the Marshall Islands has stated that its "priority is to ensure that [its] citizens can fulfil their right to remain in their home islands, and that it is their choice whether and when to migrate." Gov't of Marsh. Is., *Adaptation Communication—Republic of the Marshall Islands (RMI)*, at 29 (2020), <https://perma.cc/9UFV-PM8A>.

¹⁶⁸ Susan Martin, *Climate Change, Migration, and Governance*, 16 GLOB. GOVERNANCE 397, 403 (2010) ("There are no international instruments that specifically address international migration

Except in limited circumstances, this population does not meet the definition of a refugee and thus does not qualify for protection under the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.¹⁶⁹ A refugee is one who is outside of their country of nationality or habitual residence and is unable or unwilling to return due to a well-founded fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group.¹⁷⁰ The United Nations High Commissioner for Refugees (UNHCR) has stated that those displaced due to climate change would not qualify for protection unless they separately meet the Convention definition of “refugee.”¹⁷¹ A more recent examination by UNHCR of the legal considerations in this context is slightly more liberal in its approach to outlining the circumstances in which a person displaced by climate change may qualify for refugee status, but it still requires that individuals meet the Convention definition.¹⁷² While individual status determinations must always be made, the refugee definition generally does not apply to the situation of populations displaced from islands that lose habitable territory due to climate change.¹⁷³

Given this gap in the law, there have been calls for an expansion of the definition of “refugee” under international law or the creation of a new category of displaced persons that would qualify for international protection. For example, in 1985, Essam El-Hinnawi suggested a definition for “environmental refugees” as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by

stemming from climate change or other environmental factors.”); THE NANSEN INITIATIVE, AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACED PERSONS IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE, VOL. 1, at 8 (2015), <https://perma.cc/HE32-3W5H> (“International law does not explicitly address whether and under which circumstances disaster displaced persons shall be admitted to another country, what rights they have during their stay, and under what conditions they may be returned or find another lasting solution.”); Jane McAdam, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of ‘Non-Refoulement’*, 114 AM. J. INT’L L. 708, 712 (2020).

¹⁶⁹ Matthew Scott has referred to this as the “dominant view” of how the Refugee Convention applies to individuals displaced due to climate change. MATTHEW SCOTT, CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION 1 (2020).

¹⁷⁰ Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

¹⁷¹ U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 13 (2019), <https://perma.cc/A3Y3-X4KQ>; *see also id.* at 19 (noting that the definition “rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated”); U.N. High Comm’r for Refugees, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters*, para. 6 (Oct. 1, 2020) [hereinafter *UNHCR 2020 Climate Change Legal Considerations*], <https://perma.cc/9LJB-VJBU> (“No special rules exist for determining refugee claims made [in the context of the adverse effects of climate change and disasters]. Like any other claim, one made in the context of climate change or a disaster must show that the claimant meets the criteria set out in Article 1A(2) of the 1951 Convention.”).

¹⁷² UNHCR has said that individuals fleeing “in the context of the adverse effects of climate change and disasters may have valid claims for refugee status under the 1951 Convention.” However, they must still demonstrate a well-founded fear of persecution. They may be able to demonstrate this if they are being “disproportionately affected or even targeted” by the withholding of climate change adaptation assistance or discriminatorily denied relief in the aftermath of a disaster. Displacement due to the loss of habitable territory, without additional factors, is insufficient for refugee status under the Convention. *UNHCR 2020 Climate Change Legal Considerations*, *supra* note 172, paras. 64–106.

¹⁷³ *See, e.g.,* Elizabeth Keyes, *Environmental Refugees? Rethinking What’s in a Name*, 44 N.C. J. INT’L L. 461, 465 (2019); EUR. PARL. RSCH. SERV., THE CONCEPT OF ‘CLIMATE REFUGEE’: TOWARDS A POSSIBLE DEFINITION 2 (2021), <https://perma.cc/7SF2-7VES>.

people) that jeopardized their existence and/or seriously affected the quality of their life.”¹⁷⁴ In 2006, delegates to the Maldives meeting proposed that the Refugee Convention be extended to cover “climate refugees.”¹⁷⁵ Frank Biermann and Ingrid Boas have called for a Global Protocol to the United Nations Framework Convention on Climate Change to protect “climate refugees.”¹⁷⁶ Bonnie Docherty and Tyler Giannini have proposed a stand-alone convention to provide protection to climate refugees, whom they define as “an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.”¹⁷⁷

International actors have been clear that the Refugee Convention definition of a refugee does not extend to so-called “climate refugees” or “environmental refugees.”¹⁷⁸ There are fears that revisiting the Refugee Convention might lead to a reduction of protection for those currently covered by the Convention rather than an expansion of protection to a new category of people.¹⁷⁹ Even if there were a movement to revisit the Refugee Convention, no consensus exists for a definition of “climate refugees,” many feel that the label is inappropriate,¹⁸⁰ and there is little appetite among states to negotiate a new binding convention for the protection of persons displaced due to climate change.¹⁸¹ All of the current proposals provide protection for a broader group than those living in sinking states. For while the people living in sinking states face potential unavoidable and irreversible destruction of their entire country, they are not the only ones who may be forced to leave their country of origin due to factors related to climate change.

Even those that do meet the definition of a refugee have no right to asylum, as international law does not protect such a right and the granting of asylum is within

¹⁷⁴ ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES 4 (1985).

¹⁷⁵ Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENV'T. SCI. & POL'Y FOR SUSTAINABLE DEV. 8, 11 (2008).

¹⁷⁶ Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOB. ENV'T POL. 60, 83 (2010).

¹⁷⁷ Bonnie Docherty & Giannini Tyler, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV'T L. REV. 349, 361 (2009).

¹⁷⁸ GUTERRES, *supra* note 163, at 8 (“The phrase ‘refugee’ is a legal term. A person who has been determined a refugee will have satisfied the criteria under the 1951 Refugee Convention, the 1969 OAU Convention, or UNHCR’s mandate. For this reason, just as a reference to an ‘economic refugee’ is not a reference to a recognized term under international law, neither are ‘climate refugee’ nor ‘environmental refugee.’ While often used, particularly in the media, it would be incorrect to give the words a legal meaning that has not been endorsed by the legal community.”). See UNHCR 2020 *Climate Change Legal Considerations*, *supra* note 171 (describing how the refugee definition might apply to those displaced in the context of climate change).

¹⁷⁹ GUTERRES, *supra* note 163; Vikram Kolmannskog & Lisetta Trebbi, *Climate Change, Natural Disasters and Displacement: A Multi-Track Approach to Filling the Protection Gaps*, 92 INT’L R. RED CROSS 713, 720 (2010); Christel Cournil, *The Inadequacy of International Refugee Law in Response to Environmental Migration*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 85, 100–01 (Benoît Mayer & François Crépeau eds., 2017).

¹⁸⁰ Cournil, *supra* note 179, at 108.

¹⁸¹ For example, the most recent negotiation regarding migrants and refugees resulted in the adoption of the Global Compact for Refugees and Global Compact for Migration, which the U.N. is quick to point out are not legally binding. *Global Compact for Migration*, U.N. REFUGEES & MIGRANTS, <https://refugeesmigrants.un.org/migration-compact> (last visited May 29, 2022).

the discretion of the state.¹⁸² Rather, refugees have a right to *non-refoulement*—a right to not be returned to their country of nationality or habitual residence where they have a well-founded fear of persecution.¹⁸³

If a person is displaced in the context of climate change, under the International Covenant on Civil and Political Rights (ICCPR), he or she might have protection against refoulement back to their country of origin if there is a “real risk of irreparable harm,” due to a real risk that they will be deprived of their life or that they will be subject to torture or cruel, inhuman or degrading treatment or punishment.¹⁸⁴ However, this protection against refoulement has yet to be applied to displacement resulting from climate change.¹⁸⁵

This specific issue has recently been examined in the context of sinking states. In *Teitiota v. New Zealand* in 2019, the Human Rights Committee adopted views on whether New Zealand’s deportation of a Kiribati national back to his country of origin violated his right to life under the ICCPR.¹⁸⁶ The petitioner, Ioane Teitiota, migrated from Kiribati to New Zealand where he sought asylum. His claim was denied. He appealed the decision up to the Supreme Court of New Zealand, which also denied his asylum application. He filed a communication with the Human Rights Committee after his domestic appeal was denied, but he was deported to Kiribati before the Committee issued its views.

The Human Rights Committee considered it possible that deporting an individual to a state impacted by climate change, including a sinking state, may in some circumstances violate the individual’s right to life. Its reasoning on the potential violation was as follows:

The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending State. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.¹⁸⁷

¹⁸² Elihu Lauterpacht & Daniel Bethlehem, *Opinion: The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89, 113 (Erika Feller, Volker Türk & Frances Nicholson eds., 2009) (noting that “the 1951 Convention and international law generally do not contain a right to asylum”).

¹⁸³ *Id.*

¹⁸⁴ U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004); McAdam, *supra* note 168, at 712–13.

¹⁸⁵ Cullen, *supra* note 162, at 273 (also noting that “we are yet to see a single successful case where non-refoulement has been expressly activated on these grounds”); McAdam, *supra* note 168, at 708.

¹⁸⁶ U.N. Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) [hereinafter *Teitiota v. New Zealand*].

¹⁸⁷ *Id.* para. 9.11.

The New Zealand state authorities in the case confirmed that in some circumstances environmental degradation could require New Zealand to provide protection but argued that the necessary circumstances were not present in this case.¹⁸⁸ The Committee agreed with New Zealand's view and declined to find that the deportation was a violation of the petitioner's right to life, instead finding that he had failed to demonstrate a "real and reasonably foreseeable" risk of a threat to his right to life. This was despite the fact that the Committee considered evidence that the land was eroding,¹⁸⁹ that no island in Kiribati had surface fresh water, and that Teitiotia's child suffered from a case of blood poisoning and the family was unable to grow crops because the water had become salinated and undrinkable.¹⁹⁰ The Committee focused on the fact that Kiribati would not become uninhabitable for ten to fifteen years, and this was not sufficiently "imminent" for the deportation to constitute a violation of the petitioner's right to life.¹⁹¹

The decision inspired dissenting opinions from Committee members Duncan Laki Muhumuza and Vasilka Sancin, who disagreed with the conclusion that New Zealand had not violated Teitiotia's rights under Article 6 of the Covenant.¹⁹² Muhumuza found that "[t]he action taken by New Zealand is more like forcing a drowning person back into a sinking vessel, with the 'justification' that after all, there are other passengers on board."¹⁹³ He urged the Committee to "handle critical and significantly irreversible issues of climate change with an approach that seeks to uphold the sanctity of human life."¹⁹⁴

A recent decision by the Human Rights Committee demonstrated just how challenging it will be for inhabitants of sinking states to demonstrate that the conditions on their islands threaten their right to life. In *Daniel Billy et al. v. Australia*, a group of indigenous Torres Strait Islanders submitted a communication to the Human Rights Committee alleging, among other things, that Australia had violated their right to life under Article 6 of the ICCPR by failing to adopt climate change mitigation and adaptation measures.¹⁹⁵ While a part of Australian sovereign territory, the Torres Strait Islands are similarly situated to sinking states in terms of their vulnerability to climate change. Indeed, some of these islands are only one meter above sea level and located in an area of the world where sea levels are rising by double the global average.¹⁹⁶

The petitioners alleged that the islands would become uninhabitable within ten to fifteen years. The Committee recognized that states have an obligation to protect individuals from "reasonably foreseeable threats and life-threatening situations that can result in the loss of life," even if they "do not result in the loss of life."¹⁹⁷ The

¹⁸⁸ *Id.* para. 4.5.

¹⁸⁹ *Id.* para. 2.6.

¹⁹⁰ *Id.* para. 5.

¹⁹¹ *Id.* para. 9.12.

¹⁹² *Id.* (Duncan Laki Muhumuza, dissenting, para. 1); *id.* (Vasilka Sancin, dissenting, para. 6).

¹⁹³ *Id.* (Duncan Laki Muhumuza, dissenting, para. 6).

¹⁹⁴ *Id.* (Duncan Laki Muhumuza, dissenting, para. 1).

¹⁹⁵ U.N. Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019*, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022) [hereinafter *Billy v. Australia*].

¹⁹⁶ Madeline Roach, *The Mayor Fighting to Save Her Island Home from Climate Change*, TIME (Apr. 22, 2019), <https://perma.cc/QQZ2-5XK8>.

¹⁹⁷ *Billy v. Australia*, *supra* note 195, para. 8.3.

Committee further observed that these threats may come from the adverse effects of climate change or environmental degradation and that the risk of territory being submerged under the sea “may become incompatible with the right to life with dignity before the risk is realized.” However, the Committee concluded that Australia had not violated the petitioner’s right to life, as the petitioner had failed to demonstrate current “adverse impacts to their own health or a *real* and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life.”¹⁹⁸ The Committee noted that Australia could still take measures to protect the petitioners—including relocating them—in the ten to fifteen years prior to the islands becoming uninhabitable.¹⁹⁹

The Committee did find that Australia violated the petitioners’ rights under Article 17 to a home, private life, and family,²⁰⁰ and their Article 27 rights as a minority indigenous group to enjoy their own culture.²⁰¹ Both findings relied on evidence that Australia had failed to adopt adaptation measures that would protect access to natural resources and prevent the degradation of indigenous land.²⁰² Explicit in the finding was that the petitioners would not be able to maintain their traditional way of life on mainland Australia. This fact and the finding that the loss of the use of petitioners’ traditional land violated petitioners’ rights under Articles 17 and 27 are in clear tension with the Committee’s suggestion that Australia can protect the petitioners’ right to life by relocating the indigenous population. The Committee stated that Australia is under an obligation to provide the petitioners with adequate compensation, to conduct a needs assessment with the impacted community, and to implement “measures necessary to secure the communities’ continued safe existence on their respective islands.”²⁰³

Similar to the *Teitiota* decision, the Committee’s decision in the Torres Strait Islanders case inspired individual and dissenting opinions. Arif Bulkan, Marcia V. J. Kran, and Vasilka Sancin argued in their joint partially dissenting opinion that the Committee improperly applied the “real and foreseeable risk” standard from *Teitiota* and should have applied the “reasonably foreseeable threat” standard applicable to threats to the right to life outside of the context of displacement.²⁰⁴ Even applying the more restrictive *Teitiota* standard, these Committee members would have found a violation of the right to life due to the evidence showing the loss of the petitioners’ crops, the impact of erosion on agriculture, and the threat to one of their primary sources of food due to the rising water temperature, in addition to damage caused by flooding.²⁰⁵

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ *Id.* para. 8.7.

²⁰⁰ *Id.* para. 8.12.

²⁰¹ *Id.* para. 8.14.

²⁰² *Id.* paras. 8.9–8.14.

²⁰³ *Id.* para. 11.

²⁰⁴ *Id.* (Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin, partially dissenting, para. 2).

²⁰⁵ *Id.* (Arif Bulkan, Marcia V. J. Kran and Vasilka Sancin, partially dissenting, para. 3). The dissenting opinion echoes an amicus brief filed by the current and former U.N. Special Rapporteurs on Human Rights and the Environment, Dr. David Boyd and John Knox. The dissenters found that the petitioners had provided evidence that more than sufficiently demonstrated that the petitioners could meet any standard applied in the case, whether it be that the risk of harm was “more than a theoretical possibility,” foreseeable, or imminent. Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment, para. 22, *Billy v. Australia*, Human Rights Comm., U.N. Doc. CCPR/C/135/D/3624/2019 (2022) [hereinafter Boyd & Knox Amicus Brief] <https://perma.cc/MP8Q-E5BU>.

Both the *Teitiota* and *Billy* decisions included language about states' obligations to protect their populations from the adverse impacts of climate change. Both cases also contained statements that a failure to protect their populations or the return of someone to a country at risk of becoming uninhabitable or completely submerged may present a violation of the right to life.²⁰⁶ As a result, many have applauded the decisions as groundbreaking for recognizing the human rights impacts of climate change.²⁰⁷ However, both decisions failed to find a violation of the petitioners' right to life, despite both cases including evidence of current harm and that the islands in question would be uninhabitable within ten to fifteen years. These decisions set the bar too high.²⁰⁸ Under *Teitiota* and *Billy*, it is possible that the submergence of a state will be all but certain and nearly complete before the risk to the right to life will be sufficiently "imminent." While the recognition in *Billy* of the violations of rights under Articles 17 and 27 is important, neither violation would implicate the *non-refoulement* obligations of states. This demonstrates a hesitancy on the part of the Committee to fully protect the rights of inhabitants of sinking states.

The rights of the populations of sinking states are not proactively protected. Under current caselaw, they must wait until the conditions on the islands have deteriorated to the point that they can demonstrate current or imminent uninhabitability. The result of this lack of protection will be a humanitarian crisis as people attempt to survive on rapidly dwindling land or escape through potentially perilous routes. Even if the Human Rights Committee or another tribunal, such as the European Court of Human Rights, does issue a decision fully protecting the *non-refoulement* rights of the populations of sinking states, other states may respond by erecting barriers to prevent those displaced from reaching their shores.²⁰⁹ Further solidifying barriers to

²⁰⁶ *Teitiota v. New Zealand*, *supra* note 186, para. 9.11 (noting that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized"); *Billy v. Australia*, *supra* note 195, para. 8.7 (using almost identical language).

²⁰⁷ *UN Landmark Case for People Displaced by Climate Change*, AMNESTY INT'L (Jan. 20, 2020), <https://perma.cc/A8BG-TKJE> (calling the decision a "groundbreaking asylum case"); Press Release, Off. of the High Comm'r for Hum. Rts., Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims (Jan. 21, 2020), <https://perma.cc/ZGT9-FDMY>; Monica Feria-Tinta, *Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights*, EJIL: TALK! (Sept. 27, 2022), <https://perma.cc/9DWK-UIJQ>; *Australia: Groundbreaking Decision Creates Pathway for Climate Justice on Torres Strait Islands*, U.N. NEWS (Sept. 23, 2022), <https://perma.cc/R2Y9-R4PB>.

²⁰⁸ McAdam, *supra* note 168, at 714 (noting that while the decision is significant, the Committee's threshold was arguably too high). However, McAdam has more recently written that "future claims may have a greater chance of success" and that "a different individual might already have a valid protection claim." Jane McAdam, *Moving Beyond Refugee Law: Putting Principles on Climate Mobility into Practice*, 34 INT'L J. REFUGEE L. 440, 444 (2022); Simon Behrman & Avidan Kent, *The Teitiota Case and the Limitations of the Human Rights Framework*, 75 QUESTIONS INT'L L. 25, 33 (2020) ("The bar, however, is set too high for reaching the necessary conditions to engage protection under the ICCPR.").

²⁰⁹ UNHCR has interpreted the *non-refoulement* obligation to "unambiguous[ly]" apply on the high seas. U.N. High Comm'r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, at 24 (Jan. 26, 2007), <https://perma.cc/U3D3-8EUZ>; *see also* Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 ¶ 219 (Aug. 19, 2014) (interpreting the *non-refoulement* obligation to extend to any alien "over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the airspace of the State"). However,

entry through the externalization of border controls²¹⁰ will have lasting impacts on populations displaced across borders due to the impacts of climate change, exacerbating future humanitarian crises.

These cases also set a disturbing precedent for others who may be displaced across borders due to climate change in the future. The evidence presented by the petitioners was stark in terms of their lack of access to potable water, dwindling food sources, and the prospect that their entire territory would be uninhabitable in a short period of time. It seems unlikely that individuals from states not facing such an extreme existential threat will be able to demonstrate harm sufficient to implicate a state's *non-refoulement* obligations under the ICCPR if returned to their country of origin. Given the language in *Billy*, the Committee will likely find that such petitioners should relocate internally rather than seek protection in another state. The language regarding relocation as an option to protect the right to life could also have staggering implications for indigenous populations unable to survive on their native lands.²¹¹ Conflicts between indigenous populations' right to life under Article 6 and their right to their indigenous culture under Article 27 will inevitably arise.

There are also concerning consequences in terms of the capacity of states to respond to the needs and protect the rights of their populations. If their populations

states have not agreed that their obligations apply extraterritorially. *Salc v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993) (holding that the *non-refoulement* obligations under the Refugee Convention as incorporated in the 1980 Refugee Act do not apply extraterritorially to aliens intercepted on the high seas); Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1, 11, 15 (1994); see also ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW 111–19 (2016) (describing policies enacted by the Regan and H.W. Bush administrations to interdict, detain, and return Haitians who attempted to reach the United States by sea); Selinc Trevisanut, *The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection*, in 12 MAX PLANCK Y.B. U.N. L. 205 (2008).

²¹⁰ Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190 (2016); Maribel Casas-Cortes, Sebastian Cobarrubias & John Pickles, *Riding Routes and Itinerant Borders: Autonomy of Migration and Border Externalization*, 47 ANTIPODE 894 (2015); see also Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 241 (describing the practice as the “politics of *non-entrée*” which is “based on a commitment to ensuring that refugees shall not be allowed to arrive”); Achiume, *supra* note 145, at 1515 (“Third World migrants who dare risk their lives to migrate to First World countries without legal authorization are confronted with increasingly militarized border regimes negotiated by First and Third World nation-states, and which amount to multilateral projects for regional containment of Third World persons beyond the First World.”); E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. REV. 1386, 1423 (2021) (describing the Italian and European efforts to “embed[] [their] borders within the front of Libyan sovereignty; pushing [their] externalization efforts further south and east on the African continent” in response to a decision by the European Court of Human Rights that interception at sea violated the obligation of non-refoulement.); Ayelet Shachar, *Instruments of Evasion: The Global Dispersion of Rights-Restricting Migration Policies*, 110 CAL L. REV. 967, 969–70 (2022) (referring to the practice as the “shifting border” and stating “[b]y relying on shifting border techniques, destination countries achieve buffer zones and ‘rights of protection,’ allowing them to bar would-be immigrants from reaching their respective territories and concomitant legal protections while continuing to profess commitment to the protection of human rights around the world”).

²¹¹ This is reflected in a statement by Maria Tiimon, a climate activist from Kiribati living in Australia: “Some of us might think climate change is just about moving people to a safer place. But it’s about equity, identity and human rights.” Carol Farbotko and Heather Lazrus, *The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu*, 22 GLOB. ENV’T CHANGE 382, 383 (2012); see also Oliver Milman, *UN Drops Plan to Help Move Climate-Change Affected People*, GUARDIAN (Oct. 6, 2015), <https://perma.cc/EH5T-PVNN> (quoting Tiimon as stating, “I speak to the young people [in Kiribati] and they say they don’t want to move. This is where our ancestors came from . . . Displacement really has to be the last resort. Pacific islands need help to adapt and the rich countries need to cut their greenhouse gas emissions.”).

are forced to remain *in situ* without a right to protection elsewhere, or if these populations are returned after seeking protection in another state, states may face increasingly urgent humanitarian concerns. The available habitable land will continue to shrink as the need for things like food and safe and sustainable shelter continues to grow.²¹²

All of this will occur in parallel with the potential diminution of the capacity of the state itself. A state may experience reduced tax revenue, for example, if members of its population lose access to traditional sources of income, incur expenses responding to climate change related risk and damage,²¹³ and further lose essential infrastructure due to flooding, erosion, or disasters.²¹⁴ A state may also face serious questions about the prospects of its continuity as a state, either as a factual reality or in terms of recognition by other states under international law. All of this may strain a state's ability to fully participate in multilateral negotiations that directly impact its very survival.²¹⁵

These issues have compounding effect, with the humanitarian needs potentially outpacing the capacity of the states, and negotiations about potential solutions happening as a state is fighting for its very survival. As the pathway for international protection of its population is narrow, a state may need to rely on external assistance in a climate where available financing is already constrained.²¹⁶ All such circumstances create a troubling precedent for how states and their populations may be protected by international law in the future.

D. Collapse of the International Legal Order

Sinking states represent a small fraction of the world's population impacted by climate change, but they shoulder a disproportionately large burden of the most harmful effects. The crises they face are urgent, but many states are reluctant to agree to anything viewed as an encroachment on their sovereignty, even if it would contribute to our collective security. As discussed above, even the Human Rights Committee is hesitant to issue views that would require states to refrain from sending individuals displaced by climate change back to their country of origin, even when

²¹² For example, Tuvalu expects that the crops that many rely upon for subsistence agriculture will be destroyed due to saltwater intrusion in the near future. This will lead to dependence on imported food and increasing numbers of Tuvalu's population living in absolute poverty. Roy, *supra* note 167, at 43.

²¹³ Kiribati evaluated the cost of climate change related risk and found that it was thirty-five percent of the national GDP as of 2007. KIRIBATI MINISTRY OF ENV'T, LAND & AGRIC. DEV., REPUBLIC OF KIRIBATI NATIONAL ADAPTATION PROGRAM OF ACTION (NAPA), at iii (2007), <https://perma.cc/T2B5-LAJC>.

²¹⁴ Infrastructure may be located in flood prone areas or along coast lines. See Republic of Maldives, *supra* note 149, at 19; Gov't of Marsh. Is., *supra* note 167, at 10.

²¹⁵ Sinking states and other similarly situated states are already participating in multilateral negotiations with comparably limited resources. See E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Ecological Crisis, Climate Justice, and Racial Justice*, para. 73, U.N. Doc. A/77/2990 (Oct. 25, 2022) (noting that while "states in the Global North are typically capable of fielding large negotiating teams and relying upon well-resourced national bureaucracies operating in English, other states are limited to smaller negotiating teams with limited support from their capitals").

²¹⁶ Kate Abnett, *Rich Countries Failed to Meet Their Climate Funding Goal*, REUTERS (July 29, 2022), <https://perma.cc/6ET5-7M2U>; see also Zinta Zommers, *Addressing Climate Risks in Small Island States—Opportunities for Action*, IISD (June 22, 2020), <https://perma.cc/HKR4-AYN9>.

these countries of origin are approaching uninhabitability. The Human Rights Committee's cautious approach is in contrast with the urgency with which others, including the current and former high commissioners for human rights and the environment, describe the situation.²¹⁷

Climate change has the potential to be disruptive not only to the human environment but also to international law. As our legal structures prove themselves incapable of preventing catastrophic loss and displacement, states may become more protectionist in the face of diminished resources. Legal structures may break down as a result. Many have acknowledged that climate change may require a reexamination or a transformation of international law.²¹⁸ However, the protective posture of states to preserve their own sovereignty may lead to a collapse of the international legal order that facilitated the development of modern society marked by comparatively greater peace and prosperity.

One of the main purposes of the modern international order is the maintenance of peace and security.²¹⁹ The connection between climate change and international peace and security is clear.²²⁰ In 2004, a U.N. High-Level Panel on Threats, Challenges, and Change defined a threat to international peace and security as "any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system."²²¹ Under this definition, rising sea level is a threat to the territorial integrity of sinking states.²²² Sea level rise has been recognized by the Pacific Islands Forum as an "existential national security risk."²²³ This rise has broader implications as climate-change might be an impetus for or exacerbating the risk of conflict. Already, wars are being fought in which climate

²¹⁷ Boyd & Knox Amicus Brief, *supra* note 205, at 49, 51 ("The world faces a dire and unprecedented global climate emergency that is already inflicting grievous impacts on human rights, disproportionately affecting poor, vulnerable and marginalized people such as the Torres Strait Islanders . . . The time for action to address the climate crisis and prevent catastrophic impacts on human rights is rapidly running out. As the IPCC has stated, 'Every bit of warming matters, every year matters, every choice matters.'").

²¹⁸ SOUTENBURG, *supra* note 27, at 387 (describing how giving rights of statehood to deterritorialized states "would require the greatest structural transformation international law has seen since the establishment of the so-called 'Westphalian order'"); Burkett, *supra* note 67, at 346.

²¹⁹ ALFRED DE ZAYAS, BUILDING A JUST WORLD ORDER 46 (2021) ("The paramount principle of the international order is peace."); see also OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 338 (2017).

²²⁰ See, e.g., Mark Nevitt, *Is Climate Change a Threat to International Peace and Security?*, 42 MICH. J. INT'L L. 527, 527 (2021) (arguing that the "climate-security century is here"); Kirsten Davies & Thomas Riddell, *The Warming War: How Climate Change is Creating Threats to International Peace and Security*, 30 GEO. ENV'T L. REV. 47 (2017); Oli Brown & Robert McLeman, *A Recurring Anarchy? The Emergence of Climate Change as a Threat to International Peace and Security*, 9 CONFLICT, SEC. & DEV. 289 (2009); Christopher K. Penny, *Greening the Security Council: Climate Change as an Emerging "Threat to International Peace and Security"*, 7 INT'L ENV'T AGREEMENTS, POL. L. & ECON. 35 (2007).

²²¹ Rep. of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, at 12, U.N. Doc. A/59/565 (Dec. 2, 2004).

²²² Permanent Rep. of Malta to the U.N., Letter dated Feb. 2, 2023 from the Permanent Rep. of Malta to the U.N. addressed to the Secretary-General, U.N. Doc S/2023/79 (Feb. 2, 2023); POLYNESIAN LEADERS GROUP, POLYNESIA AGAINST CLIMATE THREATS: TAPUTAPUĀTEA DECLARATION ON CLIMATE CHANGE 3 (2015), <https://perma.cc/53SU-EK2X> (calling on state parties to the UNFCCC to "accept that climate change and its adverse impacts are a threat to territorial integrity, security and sovereignty, and in some cases to the very existence of some of our islands because of the submersion of existing land and the regression of our maritime heritage").

²²³ PAC. ISLANDS F., BOE DECLARATION ACTION PLAN 10 (2018), <https://perma.cc/PM6P-UAWX>.

change is a contributing factor to the conflict.²²⁴ The continued degradation of the natural environment increases the risk of the emergence of new conflicts or the prolongation of existing conflicts.

Some states have been reluctant to fully confront the danger posed by climate change to international peace and security and to respond to that threat through coordinated multilateral action. For example, in December of 2021, Russia vetoed a draft Security Council resolution that called for a “whole of UN approach to address climate change” and requested that the U.N. Secretary-General “integrate climate-related security risk as a central component into comprehensive conflict-prevention strategies of the United Nations.”²²⁵ This veto occurred despite the fact that within the U.N. structure, the Security Council has the “primary responsibility for the maintenance of international peace and security.”²²⁶ While climate change was included as one of the security challenges of Small Island Developing States addressed in a 2015 Security Council debate²²⁷ and the Security Council held a debate on “climate and security” in 2021,²²⁸ only in 2023 did the Security Council address sea level rise as the core focus of an open debate.²²⁹ Many states participating in the debate supported the issue’s inclusion on the Council’s agenda, but the support was not unanimous. For example, Brazil expressed opposition as it felt climate change fell outside of the purview of the responsibilities of the Security Council.²³⁰

During the opening of that recent Security Council debate, U.N. Secretary-General António Guterres highlighted the hundreds of millions of people living in areas at risk of being inundated by the rising seas, especially inhabitants of low-lying coastal areas and small island states.²³¹ He described a potential “mass exodus of

²²⁴ See, e.g., Ban Ki-moon, *A Climate Culprit in Darfur*, U.N. (June 16, 2007), <https://perma.cc/QZ4R-798H>; Jeffrey Mazo, *Darfur: The First Modern Climate-Change Conflict*, 49 ADELPHI PAPERS 73, 73 (2009); Peter H. Gleick, *Water, Drought, Climate Change, and Conflict in Syria*, 6 WEATHER, CLIMATE, & SOC’Y 331, 331 (2014); Tobias Ide, *Climate War in the Middle East? Drought, the Syrian Civil War and the State of Climate-Conflict Research*, 4 CURRENT CLIMATE CHANGE REPS. 347, 347 (2018).

²²⁵ U.N. SCOR, 76th Sess., 8926th mtg. at 2, U.N. Doc. S/PV.8926 (Dec. 13, 2021). Russia was opposed to “creating a new area in the Council’s work that would establish a generic, automatic connection between climate change and international security, turning a scientific and socioeconomic issue into a politicized question.” *Id.* at 3.

²²⁶ U.N. Charter art. 24. For an analysis of potential actions that the Security Council could take to address climate change and the dangers it poses to sinking states, see Nevitt, *supra* note 22.

²²⁷ During the debate, the representative of Tuvalu urged the “Security Council to recognize climate change as a global security threat, put the issues of climate change and environmental security on its agenda and take immediate steps to address them.” U.N. SCOR, 70th Sess., 7499th mtg. at 86, U.N. Doc. S/PV.7499 (July 30, 2015). The U.N. Development Programme in the Pacific has a project on Climate Security in the Pacific. However, the countries at risk cannot address the threats to their security through their own actions alone. *Climate Security in the Pacific*, U.N. DEV. PROGRAMME, <https://perma.cc/V6QM-LJ9G> (last visited Apr. 6, 2023, 10:05 PM); see also Cary Coglianse, *Solving Climate Risk Requires Normative Change*, WHARTON RISK MGMT. & DECISION PROCESSES CTR., <https://perma.cc/GM88-W5WR> (last visited May 16, 2023) (arguing that “[c]limate change is a collective action problem on steroids”).

²²⁸ See generally U.N. SCOR, 76th Sess., 8864th mtg., U.N. Doc. S/PV.8864 (Sept. 23, 2021).

²²⁹ The Security Council previously touched on these issues in a 2007 debate on “Energy, Security, and Climate.” See generally U.N. SCOR, 62nd Sess., 5663rd mtg., U.N. Doc. S/PV.5663 (Apr. 17, 2007).

²³⁰ Ministério das Relações Exteriores, Statement by the Deputy Permanent Representative Ambassador João Genésio de Almeida Filho during the Security Council Open Debate on ‘Sea-Level Rise – Implications for International Peace and Security’ (Feb. 14, 2023), <https://perma.cc/8TUL-TFPL>.

²³¹ U.N. Secretary-General, Remarks to the Security Council Open Debate on ‘Sea-Level Rise: Implications for International Peace and Security’ (Feb. 14, 2023), <https://perma.cc/X7R9-BWZK>.

entire populations on a biblical scale.”²³² Even if massive population movement doesn’t lead to conflict, it can destabilize the existing balance of political power. For example, there are already connections being drawn between migration in the context of climate change and the rise of far-right nationalistic political parties.²³³

The International Law Association (ILA) recently published a white paper on law in the Anthropocene. It foreshadows what is to come if international law does not prioritize mitigation measures. The white paper examines several possible future scenarios based on different increases in temperature and the impact on international law and global governance. In the “Uninhabitable Earth Scenario: The Worst Case Scenario,” the authors outline a potential outcome were global temperatures to rise by 4.4 °C by the end of the century. Based on our current scientific understanding, they predict that this extreme rise in temperature will be “unstoppable” and “irreversible” and, as a result, potentially lead to a partial collapse of the nation-state system and the “advent of a ‘non-state world.’”²³⁴ This scenario comes about due to a failure of multilateralism and an increase in isolationism and nationalism.²³⁵

The type of destabilization described in this hypothetical is terrifying as it feels all too plausible. Some states that are party to the Paris Agreement are failing to meet their pledged commitments meant to limit the global temperature rise this century to 1.5 °C. Scientists currently estimate a fifty-fifty chance that we reach this level in the next *five* years, decades before the end of the century.²³⁶ The chaos that may be unleashed due to the rise in temperature threatens to undermine the conditions necessary to preserve societal stability that is central to the maintenance of the rule of law.

Sinking states are at the forefront of testing the malleability of international law. Thus far, international law has proven ineffective in protecting the human rights of their populations and sinking states’ very survival. Instead, international law has offered options of lesser statehood, worked towards solutions that potentially narrow future pathways for other communities to find inclusion as equal members, and failed to provide protection for populations displaced by the rapidly deteriorating conditions of their home states. If the law will not bend to be responsive to our current crisis, it may break.

IV. CRACKS IN THE FOUNDATION

Sinking states reveal cracks in the foundation of international law. They uncover uncertainty about our basic understanding of fundamental principles of international law. They expose deeply entrenched inequities and the impotency of legal frameworks that were created to protect the most vulnerable among us. They lead us to see the chasm that exists between the promise and the reality of international law.

²³² *Id.*

²³³ See *Climate Ripples and the Rise of the Right*, NPR (Feb. 6, 2023), <https://perma.cc/5JGH-DM5U>.

²³⁴ ILA WHITE PAPER, *supra* note 12, at 37.

²³⁵ *Id.* at 38.

²³⁶ *Climate: World Getting ‘Measurably Closer’ to 1.5-Degree Threshold*, U.N. NEWS (May 9, 2022), <https://perma.cc/F9PG-DP6K>.

Sinking states reveal weaknesses in the state-centric orientation of international law. When there is an absence of an aggressor state or a state that is clearly responsible for committing internationally wrongful acts, the corresponding rights of states are poorly protected, even when they are as fundamental as their right to exist. For individuals, when the reason for the lack of state protection falls outside the typical scenarios of the state as a violator of human rights or persecutor, individual rights become completely unenforceable. This in turn reveals a further weakness in designating the state as responsible for the protection of individual rights without an effective mechanism to step in or designate a secondary state when that protection fails.

Sinking states also reveal a reluctance towards progressive lawmaking and the development of binding international norms. Sinking states are a stark example of the consequences of climate change. However, the issue is being addressed in isolation without the urgency that is required and without discussion of how it reflects the danger faced by the entire world. Instead of evaluating the ways in which the law is not currently responsive to the crisis and creating new, more just frameworks for our collective security, states are content to continue their retreat from multilateralism and the creation of binding law.

A. *The State-Centric Model*

The sovereign nation-state is at the heart of the modern international legal system. State obligations are to a large extent formed of their own consent.²³⁷ Violations of the rights of states occur when another state fails in its obligations. What happens when a state's rights are violated but the responsible state is unclear? In examining a state's right to survival, sinking states reveal a fundamental imbalance between states whose right to survival is threatened due to aggression and states whose right to survival is threatened due to the collective action or inaction of states to prevent climate change.

Sinking states are fighting for their very survival. There is a principle that states have a "right to survival" or the right "to ensure its preservation."²³⁸ While there may be debate as to whether the survival of a state has normative value,²³⁹ this Subpart examines the right to survival as a legal right. The right to survival is best understood as a right to self-defense in the context of hostilities. In the face of armed aggression, there is little question as to the existence of the right.

Following the Russian invasion of Ukraine, the U.N. General Assembly convened an emergency special session under the Uniting for Peace Resolution.²⁴⁰ It was the first time the Uniting for Peace Resolution had been invoked in more than thirty years. During the debate, Permanent Representative of Ukraine to the United Nations Sergiy Kyslytsya made his belief clear that state survival is central to the international legal order:

²³⁷ Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 445, 476 (1964); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62 (1993) (arguing that a norm of *jus cogens* cannot be repealed by state consent).

²³⁸ Int'l Law Comm'n, *supra* note 36, ¶ 47–77.

²³⁹ PAVEL, *supra* note 137, at 78.

²⁴⁰ Michael Ramsden, *Uniting for Peace: The Emergency Special Session on Ukraine*, HARV. INT'L L.J. ONLINE (Apr. 2022), <https://perma.cc/CE56-6T3V>.

If Ukraine does not survive, international peace will not survive. If Ukraine does not survive, the United Nations will not survive. Let us have no illusions.²⁴¹

The survival of sinking states is arguably *less* certain than the survival of Ukraine. Yet there is no galvanizing force within the international community to ensure their survival. This is due, in part, to the lack of clarity about the scope of the right to survival in the context of climate change²⁴² as well as the diffuse nature of state responsibility for climate change and sea level rise.²⁴³ If the right to survival is not recognizable in this context, what does the right to survival mean and what are the implications for the state-centric model of international law?

An assumption underpinning the consideration of all proposals for the continuity of sinking states is that the seas will continue to rise and there is neither the legal recourse for states to obtain reparations for what they have lost and will lose nor the legal ability to order states to comply with their obligations under the Paris Agreement. In many respects, the study of any potential solution for sinking states is completely divorced from confronting the underlying causes of their imperiled existence. Indeed, the ILC's study group has specifically excluded from its consideration of the topic the causes of climate change and state responsibility.²⁴⁴

Despite these challenges, small island states are working to clarify the obligations of states to prevent climate change and the rights of states to be protected from the adverse effects of climate change. The Commission of Small Island States on Climate Change and International Law (COSIS)²⁴⁵ submitted a request for an advisory opinion to the International Tribunal for the Law of the Sea (ITLOS) on December 12, 2022.²⁴⁶ The case has been listed with the ITLOS registrar. In advance of

²⁴¹ U.N. GAOR, 11th Emergency Special Sess., 1st plen. mtg. at 7, U.N. Doc. A/ES-11/PV.1 (Feb. 28, 2022).

²⁴² See SOUTENBURG, *supra* note 27, at 358.

²⁴³ Durwood Zaelke & James Cameron, *Global Warming and Climate Change—An Overview of the International Legal Process*, 5 AM. U. INT'L L. REV. 249, 263 (1990) (observing that “the present system of state liability is inadequate, in many respects, for dealing with the consequences of transboundary pollution and other environmentally damaging activities having international consequences”).

²⁴⁴ This was done for diplomatic and political reasons as some states, including the United States, remain resistant to the inclusion of the topic at all. Teles & Santolaria, *supra* note 37, para. 51 (noting that the ILC will not deal with issues pertaining to the “protection of the environment, climate change *per se*, causation, responsibility and liability”) (internal citations omitted).

²⁴⁵ The Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law was signed in October 2021 at COP26. The most significant feature of the agreement, and some would argue its *raison d'être*, is that it authorizes the Commission to request an advisory opinion from ITLOS. See Rozemarijn J. Roland Holst, *Taking the Current When it Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change*, RECIEL (SPECIAL ISSUE) 1, 1 (2022); Malgorzata Materna, *Introductory Note to the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, 61 INT'L LEGAL MATERIALS 739, 740 (2022).

As of January 9, 2022, the Commission of Small Island States on Climate Change and International Law was comprised of just six state parties—Antigua and Barbuda, Niue, Palau, St. Lucia, Tuvalu, and Vanuatu. *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, INT'L TRIBUNAL FOR THE L. OF THE SEA [ITLOS] (Dec. 12, 2022), <https://perma.cc/B92Q-YFAX>.

²⁴⁶ The Commission asked for an opinion from the Tribunal on the following questions: What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (“UNCLOS”), including under Part XII:

oral hearings schedule for September 2023, the registrar has received written statements from state parties to the U.N. Convention on the Law of the Sea as well as from other intergovernmental organizations invited to submit written statements.²⁴⁷

The ITLOS advisory opinion proceedings are moving forward in parallel with efforts to obtain an advisory opinion on the obligations of states in respect of climate change from the ICJ. Vanuatu, which is also a state party to COSIS, obtained support from the General Assembly to request an advisory opinion from the ICJ on climate change and international law.²⁴⁸ In November 2022, Vanuatu announced a draft resolution for the advisory opinion request and posted the finalized language of the draft resolution in February 2023.²⁴⁹ The resolution was adopted by consensus on March 29, 2023 with over 130 co-sponsor states. An advisory opinion from the ICJ would likely be broader in scope as it would not be limited to interpreting obligations under UNCLOS and would have the benefit of broader political support, as a referral to the ICJ from the General Assembly requires the support of a majority of voting United Nations member states.

Advisory opinions occupy a unique space in international law. They are not legally binding, even on the parties seeking an opinion,²⁵⁰ but they are “authoritative statement[s] of international law on the questions with which [they] deal[]” with “legal effect.”²⁵¹ It is unclear if the request to the ICJ for an advisory opinion will result

To prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

To protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Request for Advisory Opinion of Dec. 12, 2022, <https://perma.cc/AV5L-MWFZ>.

²⁴⁷ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Order 2022/4 of Dec. 16, 2022 at 2, <https://perma.cc/V29B-SD47>; Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Order 2023/4 of June 30, 2023 at 3, <https://perma.cc/4FB2-UABY>.

²⁴⁸ Bernadette Carreon, *Vanuatu to Seek International Court Opinion on Climate Change Rights*, GUARDIAN (Sept. 26, 2021), <https://perma.cc/LM3W-8CD8>; *Vanuatu Launches the ICJAO Campaign*, PAC. ISLAND STUDENTS FIGHTING CLIMATE CHANGE (Sept. 26, 2021), <https://perma.cc/4W6K-3FBA>.

The request for an ICJ advisory opinion follows earlier efforts by Palau and the Marshall Islands to garner support from the General Assembly to seek an advisory opinion on the duties of states to prevent harm due to the emission of greenhouse gasses. *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, U.N. NEWS (Sept. 22, 2011), <https://perma.cc/T7LX-UZCX>. The full question Palau and the Marshall Islands had sought to present before the ICJ was: “What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?” DOUGLAS A. KYSAR, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE 8 (Yale Ctr. for Env’t L. & Pol’y ed., 2013).

²⁴⁹ For the finalized language of the precise legal question in the draft resolution, see G.A. Res. 77/276, at 3 (Apr. 4, 2023). Vanuatu’s Prime Minister Bob Loughman Weibur explained the country’s rationale for seeking an advisory opinion in a July 2022 article. Bob Loughman Weibur, Opinion, *If We are to Have a Future, Climate Justice Needs a Legal Footing*, AL JAZEERA (July 21, 2022), <https://perma.cc/5LNR-9T4H>.

²⁵⁰ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30).

²⁵¹ Dispute Concerning Delimitation of Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), ITLOS Case No. 28, Judgment on Preliminary Objections of Jan. 28, 2021 paras. 202, 205, <https://perma.cc/WN98-NCKZ>.

in a transformational shift in the law or even a positive outcome.²⁵² In discussing potential outcomes if the ICJ were to give an advisory opinion, Douglas Guilfoye has speculated that the ICJ could state “that there are obligations under international law for historic polluters to compensate climate change effected states for loss and damage,” but he believes that this would be a “radical” outcome. In his opinion, the court is more likely to say that “international environmental law . . . embodies obligations of due diligence and precautionary principle that require action and maybe that there is also an intergenerational human rights element.”²⁵³ In other words, there is very little chance that the opinion will offer compensation to impacted states. However, an advisory opinion may impact state behavior. As Daniel Bodansky noted in 2017, prior to the current efforts being undertaken, a decision by the ICJ could help to establish “a common language” in climate negotiations for discussing nationally determined contributions in a future global stocktake of the Paris Agreement.²⁵⁴

Sinking states currently have no legal avenue to pursue compensation from other states for their loss of their entire nation. States in the Global North have been reluctant to consider reparations for loss and damage resulting from their disproportionate contributions to the underlying causes of climate change.²⁵⁵ The recent agreement on loss and damage at COP27 offered some progress on this front, but as one writer suggested, it is “vague and toothless,” leaving out key details on implementation and enforcement.²⁵⁶ While no one would suggest that states facing their demise due to climate change have a right to resort to self-defense in this context, the imbalance between their available remedies when facing annihilation is stark.

The potential disappearance of these states reveals another weakness in the state-centric system of international law. The protection of the human rights of a state’s population is predicated upon the existence of that state. This is true in two respects. First, states are tasked with the responsibility to respect, protect, and fulfill human rights. The traditional narrative assumes that human rights violations are caused by the state and accountability must be pursued with the responsible state.²⁵⁷ Second, individuals are deemed deserving of human rights protection from another state when they can demonstrate that their state of origin was responsible for their persecution, violated their right to life, or subjected them to torture or to cruel,

²⁵² See Benoit Mayer, *International Advisory Proceedings on Climate Change*, 44 MICH. J. INT’L L. 41, 41 (2023) (arguing that the advisory proceeding efforts “are almost certain to fall short of their goals and may even be counterproductive”); Holst, *supra* note 245, at 9 (stating that whether an advisory opinion “has the potential to bring about a sea change remains to be seen”); see also Melissa Stewart, *Climate Change Advisory Opinion Requests: Risk and Reward*, LAWFARE (March 27, 2023, 8:31 AM), <https://perma.cc/9M5M-4MB6>.

²⁵³ ABC RADIO NATIONAL, *supra* note 131, at 9:50.

²⁵⁴ Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 709 (2017).

²⁵⁵ In 2009, countries agreed to provide \$100 billion per year to help less developed countries cope with the adverse impacts of climate change. This pledge has been reaffirmed at several COPs since, but the pledge has yet to be fulfilled. Fiona Harvey, *Climate Finance for Poor Countries to Hit \$100bn Target by 2023, Says Report*, GUARDIAN (Oct. 25, 2021), <https://perma.cc/CMX8-M6GG>; Fiona Harvey, *Rich Countries Must Urgently Help Poor Nations Hit by Climate Crisis, Says V20*, GUARDIAN (Oct. 17, 2022), <https://perma.cc/C2ER-5WXD>.

²⁵⁶ David Wallace-Wells, Opinion, *The World Took a Bold, Toothless Step Forward on Climate Justice*, N.Y. TIMES (Nov. 23, 2022), <https://perma.cc/HPJ9-B9ZH>.

²⁵⁷ See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 202 (2001) (presenting a theory in which states are the violators of human rights and cast as “savages”).

inhuman, or degrading treatment or punishment. This narrative breaks down in both respects when the state simply disappears and the rights violation or displacement is caused not by the action of the state but its disappearance.²⁵⁸ In such an event, the locus of responsibility is unclear.

Similar to the imbalance described above between states facing their demise due to armed aggression versus climate change, there is an imbalance in the lack of legal protection for human rights when lives are imperiled due to “natural” causes rather than by state action.²⁵⁹ In contrast to the robust legal framework applicable to conflict, binding international law specifically applicable to disasters—whether or not they are caused by climate change—is lacking. Human rights law is generally applicable, but the international community has thus far failed to create a comprehensive binding international framework. In the absence of such a framework, the community instead has drafted non-binding guidelines, such as the Sphere Standards that guide international humanitarian response.²⁶⁰ Even the ILC’s work on the “protection of *persons* in the event of disasters”²⁶¹ does very little to outline the rights of individuals. Rather, it is focused on the rights and obligations of states in their interactions with each other with respect to the provision of assistance. It does very little to elaborate the rights of the affected populations beyond recognizing the “inherent dignity of the human person” and that these populations are “entitled to the respect for and protection of their human rights.”²⁶²

If the sinking states are indeed submerged, as explained above, their populations will have very little protection under international law. To say that there are cracks in the foundation of international law does not begin to adequately describe the problem. The prospect that a state’s entire population could be displaced due to the uninhabitability and eventual disappearance of its territory without legal recourse to asylum, residence, or nationality reveals the impotence of the international legal framework. While impacted countries are actively seeking solutions and negotiating with other nations to plan for contingencies involving eventual relocation of their populations, the truth remains that those displaced by climate change do not have a legal right to a place in the world. While there have been suggestions to create new

²⁵⁸ Bartram S. Brown examined this phenomenon in the context of “disintegrating states” such as Yugoslavia and the former U.S.S.R. He noted, “Action by the international community to protect internationally recognized human rights is all the more problematic when the state within which the threatened individuals are located begins to disintegrate. The implicit state-centric assumption that a local regime could provide remedies to protect these rights, is inapplicable in these situations.” Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI. KENT L. REV. 203, 203 (1992).

²⁵⁹ While the disappearance of a state is not a “sudden-onset disaster,” as defined by the Platform on Disaster Displacement, it is without a doubt a “slow-onset disaster.” *Key Definitions*, PLATFORM ON DISASTER DISPLACEMENT, <https://perma.cc/7RV4-E7YF> (last visited May 16, 2023).

²⁶⁰ *Humanitarian Standards*, SPHERE (last visited May 16, 2023), <https://perma.cc/7GGG-5WVH>.

²⁶¹ Int’l Law Comm’n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc A/71/10, at 12–17 (2016) (emphasis added).

²⁶² For example, the draft articles outline that states have a duty to cooperate and that the affected state should seek external assistance if it is needed, but states can only provide assistance if the affected state consents and the affected state may place conditions on that external assistance. The draft articles also say that “the inherent dignity of the human person shall be respected,” that individuals “are entitled to the respect for and protection of their human rights,” and that the affected state has the duty to ensure protection of these rights. It is unclear as to what rights individuals have if the disaster exceeds the capacity of their state to respond and their state does not, or is not able to, seek external assistance or the international community does not provide it. *Id.* at 14–15.

statuses of protection under international law, there is very little likelihood that states will agree to new binding norms of international law.

The potential solutions also suffer from a structural weakness that human rights protection is dependent upon the linkage between the state and an individual. Before the creation of the modern system of human rights, there were those who proposed that international law should confer rights directly on individuals, regardless of their nationality status or lack of nationality.²⁶³ This structure was abandoned in favor of enshrining a right to a nationality, putting the state at the center of human rights protection. But as explained below, this right is largely ineffective.

As observed in the eighth edition of Oppenheim's treatise on international law edited by Hersch Lauterpacht, "[S]o long as nationality is the link between the individual and the protection of rights accruing to him by virtue of International Law, it is both illogical and offensive to human dignity that International Law should permit a condition of statelessness."²⁶⁴ Nearly seventy years later, international law *still* permits a condition of statelessness. When faced with the prospect that a state will lose the entirety of its territory, there is a tacit acknowledgement that international law neither protects the rights of the population nor anticipates a realistic pathway to change that reality. Either international law needs to decouple access to rights with a nationality or it needs to create enforceable rights so that no man is without a country.

In our state-centric framework, the right to a nationality is central to preserving an individual's rights under domestic and international law. It is the essential link between an individual and a state—"the legal bond between a person and their home State."²⁶⁵ This right has also traditionally been the link between an individual and international law.²⁶⁶ Although international human rights law is meant to protect the rights of the individual on the basis of being human regardless of their nationality status, as I have written elsewhere, in reality it falls far short of that promise.²⁶⁷

The right to a nationality, while provided for in several legal instruments, does not guarantee citizens of sinking states a right to a nationality in other states should they lose their nationality as a result of displacement or state extinction. Even though human rights *should* protect all of humanity regardless of their nationality or lack of nationality, in the absence of a revolution in the human rights framework, the right to a nationality remains essential "so long as the world is organized on the basis of states."²⁶⁸

The right to a nationality is enshrined in Article 15(1) of the Universal Declaration of Human Rights, which states that "[e]veryone has the right to a nationality" and "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to

²⁶³ MIRA SIEGELBERG, STATELESSNESS: A MODERN HISTORY 166 (2020).

²⁶⁴ OPPENHEIM, *supra* note 50, at 673.

²⁶⁵ MICHELLE FOSTER, NICOLA HARD, HÉLÈNE LAMBERT & JANE MCADAM, THE FUTURE OF NATIONALITY IN THE PACIFIC: PREVENTING STATELESSNESS AND NATIONALITY LOSS IN THE CONTEXT OF CLIMATE CHANGE 4 (2022), <https://perma.cc/7JD2-FT58>.

²⁶⁶ PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 13, 59 (1979).

²⁶⁷ Melissa Stewart, "A New Law on Earth": Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to have Rights, 62 VA. J. INT'L L. 115 (2021).

²⁶⁸ PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 71 (1948).

change his nationality.”²⁶⁹ Although not a binding treaty, the Universal Declaration is generally considered to reflect customary international law.²⁷⁰

Subsequent human rights conventions included a right to acquire a nationality, primarily for children. The ICCPR provides that “[e]very child has the right to acquire a nationality.”²⁷¹ Similarly, the Convention on the Rights of the Child states that every child shall have “the right to acquire a nationality.”²⁷²

The challenge with the right to a nationality, or the right to acquire a nationality, is that there are very few corresponding obligations on states for the effective realization of this right. According to Paul Weis, “The right of a State to determine who are, and who are not, its nationals is an essential element of [a state’s] sovereignty.”²⁷³ He further states that “nationality is a matter of exclusive domestic jurisdiction,” and at the time he was writing, there were “few, if any, general principles of law having specific regard to nationality” that would constrain state action on nationality.²⁷⁴ As nationality laws are within the discretion of sovereign states, the bestowing of nationality is ultimately left to the determination of individual states.

This deference to states in the determination of their nationals was codified in the 1961 Convention on the Reduction of Statelessness. While the Convention establishes “safeguards that prevent statelessness,” it was by design meant “to balance the rights of individuals with the interests of States.”²⁷⁵ Rather than establishing a general obligation on states to eliminate statelessness within their borders, the Convention imposes obligations on states to grant their nationality in specific and limited circumstances. The Convention also allows for exceptions that permit states to grant statelessness, such as when “the person concerned has always been stateless.”²⁷⁶ The 1954 Convention Relating to the Status of Stateless Persons in some ways entrenches statelessness by focusing on the rights to be afforded to stateless persons that are presumed to exist under the operation of international law.

The tension between a right to a nationality and the power to confer nationality within the purview of the state was highlighted by the Human Rights Council in

²⁶⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 15(1) (Dec. 10, 1948).

²⁷⁰ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of Judge Ammoun, 1971 I.C.J. 16, para. 6 (June 21) (describing the Universal Declaration of Human Rights as a codification of custom); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 29 (B.G. Ramcharan ed., 3d ed., 1979) (“The thesis . . . is that, in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive, have now acquired the force of law as part of the customary law of nations.”).

²⁷¹ International Covenant on Civil and Political Rights art. 24(3), adopted Dec. 16, 1966, 999 U.N.T.S. 171.

²⁷² Convention on the Rights of the Child art. 7(1), adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁷³ WEIS, *supra* note 266, at 65. Writing twenty years earlier on the plight of the stateless, Hannah Arendt emphasized this was due in part to the fact that “sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion.’” HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 278 (1951) (quoting Lawrence Preuss, *La Dénationalisation Imposée pour des Motifs Politiques*, in *REVUE INTERNATIONALE FRANÇAISE DU DROIT DES GENS* (1937)).

²⁷⁴ WEIS, *supra* note 266, at 88.

²⁷⁵ UNHCR, TEXT OF THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS WITH AN INTRODUCTORY NOTE BY THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 3 (2014), <https://perma.cc/HBF5-RDMU>.

²⁷⁶ Convention on the Reduction of Statelessness arts. 1(2)(d) & 1(4)(c), adopted Aug. 30, 1961, 989 U.N.T.S. 175.

2012 in Resolution 20/5—“Human Rights and Arbitrary Deprivation of Nationality.” This Resolution stated that “everyone has a right to a nationality and no one shall be arbitrarily deprived of his or her nationality,” while also recognizing that states had the ultimate authority “to establish laws governing the acquisition, renunciation or loss of nationality.”²⁷⁷ Though these laws are to be “in accordance with international law,” international law does not *require* states to grant nationality to individuals, nor does it *prohibit* states from depriving individuals of their nationality in all circumstances.

This tension has been present since the earliest attempts to address the loss of nationality and statelessness. At the Hague Codification Conference in 1930, the tension was described as being between “the principle of the sovereignty of the State which determines, by its laws, who are its nationals; [and] the necessity for these laws to take into account the principles generally recognized by States.”²⁷⁸

That international law allows stateless persons to fall within a legal black hole is highlighted in the ILC’s Draft Articles on Nationality of Natural Persons in Relation to the Succession of States. In the commentary to Draft Article 2, the ILC made a point of noting that the “person[s] concerned” in the draft articles did *not* include stateless persons residing in the territory of one of the “States concerned.”²⁷⁹ If the draft articles are adopted into a convention, stateless persons residing within a state party’s territory would have no right to the nationality of the successor state under international law.²⁸⁰

While states are somewhat limited in their discretion in the determination of nationality under international law, it remains essentially within the domain of national law.²⁸¹ The ILC explains, “[I]nternational law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness.”²⁸²

If populations of sinking states are permanently displaced, it is disputed whether they would become stateless. In a recent fact sheet on statelessness and climate change, UNHCR claimed that “[m]ost experts . . . have concluded that the ‘sinking island’ scenario will not inevitably leave island inhabitants statelessness,” as states are undertaking adaptation and mitigation measures to prevent displacement.²⁸³ According to UNHCR and others, the risk of statelessness arises as a result

²⁷⁷ G.A. Res. 20/5, para. 5 (July. 16, 2012).

²⁷⁸ Conference for the Codification of International Law, *Final Act*, 24 AM J. INT’L L. 169, 217 (1930).

²⁷⁹ *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States with Commentaries*, [1999] 2 Y.B. INT’L L. COMM’N 23, at 26, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 2) [hereinafter *Draft Articles on Nationality*].

²⁸⁰ This was reiterated in the commentary to draft article 4, which stated, “Article 4 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons.” *Id.* at 28.

²⁸¹ *Id.* at 39; U.N. Secretary-General, Rep. of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality, para. 19, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009) (“While acquisition and loss of nationality are essentially governed by internal legislation, their regulation is of direct concern to the international order.”).

²⁸² *Draft Articles on Nationality*, *supra* note 279, at 40.

²⁸³ U.N. HIGH COMM’R FOR REFUGEES, STATELESSNESS AND CLIMATE CHANGE FACT SHEET 1 (2021), <https://perma.cc/5YXP-KU53>. Not all experts agree with this view. *See, e.g.*, Martin, *supra* note 168, at 411 (arguing that “in the case of island states that are affected by rising sea levels, the absence of an appropriate international response could render large numbers of people stateless because they are unable to remain at home, but have no legal recourse for entry elsewhere”).

of any displacement from a state, regardless of whether the cause of the displacement is the state's submergence or another climate related issue.

Even though Jane McAdam has questioned the conclusion that citizens of sinking states are at risk of statelessness, a recent analysis she co-authored with Michelle Foster, Nicola Hard, and Hélène Lambert on the nationality laws of impacted states illustrates that without changes to domestic laws, many people are at risk of statelessness if permanently displaced elsewhere. This remains true even if their state of origin is able to maintain indicia of statehood and continue to be recognized as a state. McAdam and her coauthors describe, "Nationality laws in the Pacific have clear gaps that expose people to the risk of becoming stateless, losing their nationality or being prevented from passing down their nationality. Many of these risks are increased when people move across borders."²⁸⁴ As outlined in the article, while Kiribati is the only small island state at risk of disappearance that has ratified both statelessness conventions, its laws are not in compliance with the conventions.²⁸⁵ For example, the law does not allow women to pass on I-Kiribati citizenship to children born outside of Kiribati unless the child is born out of wedlock.²⁸⁶ Naturalized citizens of Tuvalu are at risk of statelessness as they can be deprived of their citizenship if they reside abroad because Tuvalu law requires naturalized citizens to demonstrate an intention to remain in Tuvalu permanently.²⁸⁷ Residents of sinking states that resettle abroad may risk the loss of their nationality if they exercise rights afforded to them in their new country of residence. For example, nationals from Vanuatu are at risk of losing their citizenship if they vote in the elections of another country.²⁸⁸ As international law does not impose binding obligations on states to confer nationality on individuals who have lost their nationality, even when the individuals are permanent or habitual residents and at risk of statelessness, citizens of sinking states are at risk of statelessness if permanently displaced from their country of origin.

To confer nationality, a state must first exist. As described above, many of the proposals for the preservation of sinking states contemplate the continuance of a state with receding territory, a deterritorialized form of statehood, or international legal personhood that falls short of full statehood. In these scenarios, most, if not all, of the population faces temporary or permanent displacement abroad. So while it might be possible for a state that has retained its international legal personality in a deterritorialized form to confer nationality, the most likely scenario is *de facto* statelessness, where individuals retain their nationality but do not enjoy an effective nationality.²⁸⁹ In other words, while the individual retains a nationality, the state of their nationality is either unwilling or unable to provide the protection normally offered to nationals of states.²⁹⁰ While many of the proposals offered suggest that a state existing

²⁸⁴ FOSTER ET AL., *supra* note 265, at 12.

²⁸⁵ *Id.* at 13, 17–18.

²⁸⁶ *Id.* at 17. Thus, the child is at risk of statelessness if the mother is married, the father is not a Kiribati citizen, and the child is born in a country that does not grant citizenship on the basis of *jus soli*.

²⁸⁷ *Id.* at 23.

²⁸⁸ *Id.* at 29.

²⁸⁹ HUGH MASSEY, UNHCR AND *DE FACTO* STATELESSNESS 27 (2010), <https://perma.cc/3DKF-7GJA>.

²⁹⁰ *Id.* at 3 (quoting INTERGOVERNMENTAL COMMITTEE ON REFUGEES, STATELESSNESS AND SOME OF ITS CAUSES: AN OUTLINE 3–4 (1946)).

in deterritorialized form can offer diplomatic protection to its nationals living abroad, one can easily imagine that this might be practically infeasible.

The *de facto* stateless exist in a state of legal perilousness.²⁹¹ These individuals do not qualify for the protection offered to the *de jure* stateless as they are not covered by the 1954 Convention Relating to the Status of Stateless Persons; they do not qualify for refugee status under the 1951 Refugee Convention and its Protocol unless they qualify separately; and they do not have a right to acquire a new nationality in their country of habitual residence.

Even if populations become stateless *de jure*, either because their state ceases to exist or other states cease to recognize their nationality, it is unclear that they would automatically fall within the protections of the 1961 Convention on the Reduction of Statelessness. If these populations had not always been stateless, state parties may not be obligated to grant them its nationality.²⁹² And while the 1961 Convention creates obligations on states to confer their nationality in situations of the transfer or acquisition of territory, the disappearance of territory is not envisioned by the Convention.²⁹³

The consequence of sinking states is large scale displacement without guaranteed protection under international law. Unless permanent resettlement is negotiated, there is a risk that entire populations will be displaced, potentially in extremely perilous circumstances on the high seas. The populations of sinking states may be forced to exist as bare humanity, unable to access rights supposed to be guaranteed to them under international law, including a right to a nationality. The world is ill-prepared and ill-equipped to deal with the displacement of the populations of entire states.

As demonstrated above, the inability of states to guarantee their own existence and the corresponding lack of protection for their populations illustrate weaknesses in the state-centric system of international law. In the existing state-centric international legal framework, the rights of individuals remain to a large extent dependent upon the possession of an effective nationality. However, the state-centric model also allows states to retain discretion over who is or is not a national with limited binding obligations to confer nationality on those who would otherwise be stateless.

Even if nationals of sinking states are able at some point in the future to obtain protection from *refoulement*, they do not have a right to permanent status in any country. In such cases where their home state is disappearing under rising tides, return will likely be unavailable and a durable solution will be needed. While individuals may try to retain their nationality, particularly if the state is able to maintain statehood on a reduced territory or in a deterritorialized form, it may be necessary for them to acquire a dual nationality in order to fully access all rights available to those in the territory of their residence. It would be disadvantageous for multiple generations to live in one state and maintain the nationality of another state, staying in a state of perceived exile, existing in the in-between, neither belonging to their current

²⁹¹ See U.N. HIGH COMM'R FOR REFUGEES, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS, at 12 (2005), <https://perma.cc/ZT4U-X7P3>.

²⁹² Convention on the Reduction of Statelessness arts. 1(2)(d) & 1(4)(c), *adopted* Aug. 30, 1961, 1989 U.N.T.S. 175.

²⁹³ *Id.* art. 10.

home—in some cases their country of birth—nor able to return to their country of nationality.

The ability of citizens of sinking states to acquire a new nationality if permanently displaced from their current state is far from certain. International law provides no guarantee of entry into another country, much less a right to permanent legal status in another country.

Our state-centric model of international law leaves the *de facto* stateless in a state of extreme vulnerability. Even if populations of sinking states retain the nationality of their state under the law, should that state be unable to provide protection due to a lack of capacity or the disappearance of its territory, international law does not provide for a clear designation of a secondary state or international entity that must step in to provide protection.

B. Retrenchment from Lawmaking

The story of sinking states reveals a reluctance towards lawmaking in the face of a legal void and a retreat from binding international law with strong mechanisms of enforcement. It is uncontroverted that the legal status of the sinking states and their populations represents a lacuna in international law. There is no clear answer under international law on the status of states that have lost their territory or permanent populations. Nor is there protection under the law for the displaced populations to be guaranteed permanent residence or nationality in another state.

There is very little movement to fill this legal void. The International Law Commission is the closest entity the United Nations has to a legislative body.²⁹⁴ Its

²⁹⁴ The United Nations lacks a legislative body as such. However, the current structure of international lawmaking differs significantly from that which existed at the time that J. L. Brierly observed “an international legislature, in the sense of a body having power to enact new international law binding on the states of the world or on their peoples, has not been created.” BRIERLY, *supra* note 77, at 103. The International Law Commission is tasked with “the promotion of the progressive development of international law and its codification.” Statute of the International Law Commission art. 1(1), Nov. 21, 1947, U.N. Doc. A/519. It is comprised of thirty-four members who are “persons of recognized competence in international law,” with each member possessing a different nationality. *Id.* art. 2. The Commission’s work is directly influenced by the input of states, which may comment on the work of the Commission during debates in the United Nations Sixth Committee and provide comments on draft articles before they are submitted to the General Assembly. Donald McRae, *The Work of the International Law Commission, 2007–2011: Progress and Prospects*, 106 AM. J. INT’L L. 322, 323 (2012).

While it is true that none of the work of the Commission becomes binding on states immediately or without additional action by the General Assembly, several projects undertaken by the Commission have been adopted as binding international law. This includes the 1961 Convention on the Reduction of Statelessness, the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on the Succession of States in Respect of Treaties, and the 1998 Rome Statute of the International Criminal Court. *Texts, Instruments and Final Reports*, U.N. INT’L L. COMM’N, <https://perma.cc/247V-TFGT> (last visited Apr. 29, 2022).

While its legislative functions are distinctly different from those of domestic legislatures, its work outlining principles of international law and elaborating draft conventions has been described as “legislative” in nature. Maurice Kamto describes the Commission as both “an indicator of the law . . . and as a quasi-legislator, because of the power it is given to formulate rules on the basis of often scattered material.” He also describes the Commission as “the highest-level technical codification body in the international system” and discusses how “[c]odification, which may include elements of the progressive development of international law, is a normative process, not merely a doctrinal one.” Maurice Kamto, *The Working Methods of the International Law Commission, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE* 198, 203, 206 (U.N. ed., 2021).

work on sea level rise in relation to international law is illustrative of this point, showing the reluctance of states to engage in lawmaking on the issue. The ILC appointed a study group to oversee the topic, a structure that has only been undertaken three other times in the Commission's seventy plus year history.²⁹⁵ According to the ILC, study groups are appropriate when the topic "len[ds] itself more to the undertaking of a research study, as opposed to the formulation of draft articles."²⁹⁶ So unlike other topics which result in draft articles that may be recommended to the General Assembly for the elaboration of a treaty, a study group only issues reports.²⁹⁷ Also unlike other topics, study group debates are not public and the discussions are summarized instead of being made available to livestream or review.²⁹⁸ There have been comments within the Sixth Committee that the current study group represents "a departure from the normal procedure within the Commission."²⁹⁹

This sort of stagnation is reflective of the development of international law in general. As described above, there is a lack of consensus around the meaning of a state—the elemental building block of the international legal system. States are reluctant to define the primary subject of international law. Consequently, not much appetite exists to *redefine* the state.

There are incremental steps in norm creation related to climate change. For example, the Human Rights Committee and the General Assembly both recently adopted resolutions recognizing the human right to a clean, healthy, and sustainable

Meanwhile, Hisashi Owada outlines three categories of international legislation undertaken by the ILC: (1) "codification" meaning the reduction into writing, in the form of a code, of norms which already exist as unwritten rules of customary international law"; (2) "codification and development of the law in areas in which the law has not been satisfactorily clarified or in which it has not yet been sufficiently developed in legal form in the practice of States"; and (3) "law-making *de novo*—that is, the making of rules on matters which have not yet been the subject of international regulation. Hisashi Owada, *Presentation*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50—PROCEEDINGS OF THE UNITED NATIONS COLLOQUIUM ON PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW 70, 70–71 (U.N. ed., 1998).

Finally, Georges Abi-Saab notes that there is "always an element of legislation in the process of codification" and refers to the work of the ILC as a "legislative process" resulting in "legislative instrument[s]." Georges Abi-Saab, *Presentation*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50—PROCEEDINGS OF THE UNITED NATIONS COLLOQUIUM ON PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW 72, 72–73 (U.N. ed., 1998).

While it is not the *exclusive* international lawmaking body, the Commission differs from United Nations bodies that have expertise in specific areas in that it takes up a broad range of subjects of international law that are often more general in character. Yuri Kolosov, *Presentation*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50—PROCEEDINGS OF THE UNITED NATIONS COLLOQUIUM ON PROGRESSIVE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW 74, 74 (U.N. ed., 1998) (arguing that "the Commission is perhaps the only law-making mechanism in existence which successfully combines the tasks of codifying and of progressively developing international law").

²⁹⁵ *About the Commission*, INT'L L. COMM'N., <https://perma.cc/V8KQ-BHQH> (last visited Apr. 29, 2022).

²⁹⁶ *Id.*

²⁹⁷ Kamto, *supra* note 294, at 201 (observing that "reports of study groups more closely resemble an academic project than an exercise in progressive development and codification of international law").

²⁹⁸ INT'L L. COMM'N, *supra* note 36, para. 29 (noting that the ongoing work is not yet "a traditional topic" and lacks "public debates in a plenary format").

²⁹⁹ INT'L L. COMM'N, Rep. on the Work of Its Seventy-First Session: Topical Summary of the Discussion Held in the Sixth Committee of the G.A. during its Seventy-Fourth Session, Prepared by the Secretariat, para. 44, U.N. Doc. A/CN.4/734 (Feb. 12, 2020).

environment.³⁰⁰ However, recognition of a right falls short of the realization of that right, and both resolutions urged states to fully implement their existing obligations.³⁰¹

Climate change is humanity's most urgent crisis. And sinking states are among the first to experience the most extreme impacts. The inability of states to address sinking states' urgent concerns is reflective of a broader trend in international law away from the creation of binding international norms with corresponding enforcement mechanisms to ensure compliance and towards either binding agreements with weak monitoring provisions or pledges without monitoring or enforcement whatsoever.³⁰² The result is uncertainty over the progress towards avoiding the most catastrophic effects of climate change and a lack of accountability for those most responsible for emissions contributing to warming.

The lack of clarity around an essential building block of international law, the failure to address the lacuna in the law, and the retrenchment from binding international law together imperil fundamental rights of both states and individuals. At stake are a state's right to survival and the guarantee of human rights.

C. Addressing the Cracks

The cracks in the foundation of international law that have been exposed and examined in this Article suggest that a radical reimagining of international law may be required in order to address the unprecedented nature of climate change and its potential to transform modern society. This may include examining and addressing the colonialist foundations of international law and our conceptions of statehood, as well as the place of the individual in international law and the state-centric framework for their protection. I do not presume to be able to fully address such structural issues within the confines of this paper. However, I will briefly outline some potential avenues that are ripe for further exploration in terms of how they might help uncover solutions for the structural issues revealed by sinking states.

One thing that seems certain is that if powerful states in the Global North were facing the loss of their entire territory in the next century, the response from the international community would not be so tepid. In her final report as Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, E. Tendayi Achiume argues that the reason for this imbalance is that Small Island Developing States are located in what she terms to be "racial sacrifice zones."³⁰³ Countries in the Global North continue to benefit financially from the extraction of natural resources and pollution of the environment, while sinking states are sacrificed. Achiume calls for a climate justice approach that includes racial justice. She calls for the decolonization of the international legal system in order to

³⁰⁰ G.A. Res. 76/300, para. 3 (July 28, 2022) (noting that the promotion of the right "requires the full implementation" of relevant international agreements); Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13 (Oct. 8, 2021) (encouraging states to adopt policies for the enjoyment of the right).

³⁰¹ Press Release, U.N. Off. of the High Comm'r for Hum. Rts., Bachelet Calls for Urgent Action to Realize Human Right to Healthy Environment Following Recognition by UN General Assembly, U.N. Press Release (July 28, 2022), <https://perma.cc/7PZJ-LHY5>.

³⁰² See, e.g., Durkec, *supra* note 7.

³⁰³ Achiume, *supra* note 215, para. 2.

create a legal framework that protects the rights all people, in particular those historically marginalized.³⁰⁴

Decolonizing the international legal framework may involve reexamining traditional notions of statehood. Ryan Mitra and Sanskriti Sanghi argue that the Westphalian notions of statehood cannot be divorced from the colonial underpinnings of international law.³⁰⁵ They argue that viewing the potential “death” of sinking states through a decolonial lens reveals the connection between our territorial conception of the state and Western notions of statehood that are tied to imperial and colonial legacies.³⁰⁶ A reimagined modern definition of statehood would rid itself of this history of oppression and dispossession that has characterized the experience of sinking states.³⁰⁷

A reexamination of the Western notions of statehood might be coupled with a reevaluation of the state-centric model of international law. To be sure, there are aspects of modern international legal system that transcend the state-centric model. For example, the duty of cooperation is inherently not state-centric. Strengthening the obligations of states to cooperate in the context of climate change could potentially encourage progress on addressing climate change, but it will not alter the fundamental structure of international law. Calls for the creation of a human right of peoples and individuals to international solidarity come closer to a restructuring of the state-centric framework for international law.³⁰⁸ A human right to solidarity naturally entails the ability of individuals as rights holders to call upon the obligations of states other than their own or those in whose jurisdiction they are currently located. More radical reimaginings could draw upon existing scholarship in this vein, including feminist³⁰⁹ and postcolonial critiques of international law as well as those that have demonstrated that the modern state system was not inevitable³¹⁰ or called for a “diffusion of power” beyond the state.³¹¹ Gerard Prinsen and Séverine Blaise have argued that the Westphalian model of a sovereign state may be “waning or undergoing fundamental modifications.”³¹² In analyzing the actions of a group of forty-six

³⁰⁴ *Id.* para. 77.

³⁰⁵ Ryan Mitra & Sabsjrutu Sanghi, *The Small Island States in the Indo-Pacific*, ASIA PAC. L. REV., at 6 (2023).

³⁰⁶ *Id.* at 13–14.

³⁰⁷ *Id.* at 14.

³⁰⁸ Obiora Chinedu Okafor & Maxwell Miyawa, *A Right of Peoples and Individuals to International Solidarity? Analyzing its Suitability, Provenance, Character and Orientation*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND SOLIDARITY 15 (Cecilia Baillet ed., forthcoming) (on file with author) (noting that “the currently proposed right to international solidarity is not at all state-centric”).

³⁰⁹ See, e.g., Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L 613, 644 (1991) (arguing that a “feminist transformation of international law” could “lead to a challenge to the centrality of the state in international and to the traditional sources of international law”); Karen Knop, *Why Rethinking the Sovereign State is Important for Women’s International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 153, *passim* (Rebecca J. Cook ed., 1994).

³¹⁰ See Natasha Whcatley, *Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State*, 35 L. & HIST. REV. 753, 765 (2017) (noting that during the interwar years, the law was unsettled in terms of the consideration of non-state entities as qualifying for international legal personality).

³¹¹ See, e.g., Schreuer, *supra* note 73, at 453.

³¹² Gerard Prinsen & Séverine Blaise, *An Emerging “Islandian” Sovereignty of Non-Self-Governing Islands*, 72 INT’L J. 56, 77 (2017).

“non-self-governing islands,” they argue that a new form of sovereignty, which they term “Islandian sovereignty,” may be emerging.³¹³

Others have also called for a climate justice approach to sinking states. As outlined above, sinking states have no right to protect their existence in this context and no legal remedy for compensation from other states for the harm they have suffered and will suffer. Maxine Burkett argues that the international legal regime should evolve to accommodate the creation of remedies for states that are most vulnerable to climate harms, including sinking states.³¹⁴ This would address the fact that countries have been allowed to profit from the precise activities that have led to the certain destruction of sinking states. One could also imagine a restorative justice framework that draws upon indigenous conceptions of environmental justice.³¹⁵

Another possible avenue of research would be the exploration of a more cosmopolitan framing of international law. I do not propose a creation of a global state, but rather a greater centering of the individual within international law.³¹⁶ This would place individuals as the “ultimate units of concern”³¹⁷ or prioritize the “dignity of the individual human being” as “the ultimate unit of all law” that is “of direct concern to international law.”³¹⁸

Finally, all the above proposals could be combined with a renewed commitment to international law. In her recent book, *Law Beyond the State*, Carmen Pavel reminds readers of the purpose of international law—the creation of an international legal order characterized by peace and justice.³¹⁹ As sinking states reveal, international law currently falls very short of this promise. The vulnerability of these states and the structural barriers to the realization of human rights are due to the failure of the international community to create non-state-centric legal frameworks that protect all states and individuals equally. We must address these issues with urgency because the alternative will take us down a path to further destruction and injustice.

V. CONCLUSION

Climate change provides an opportunity to reexamine our assumptions about international law. Instead of engaging in the type of searching inquiry the

³¹³ *Id.*; see also Epeli Hau'ofa, *Our Sea of Islands*, in *WE ARE THE OCEAN: SELECTED WORKS* 27, 35 (2008) (arguing that resources of Pacific Island nations “are no longer confined to their national boundaries”).

³¹⁴ Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633, 633 (2013).

³¹⁵ D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. J. ENV'T L. 157, 160 (2016).

³¹⁶ In this way, I differ from Martha Nussbaum and Kwame Anthony Appiah in viewing the nation-state as the best entity for the protection of individual rights. See MARTHA C. NUSSBAUM, *THE COSMOPOLITAN TRADITION* (2019); KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (ISSUES OF OUR TIME)* (2007); see also Kingsbury, *supra* note 128, at 623 (“It is not clear, however, why human flourishing is better promoted by the construction of an identifiable ‘other,’ an ‘us’ and ‘them’ from amongst the myriad ways of understanding and classifying the world.”).

³¹⁷ Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48 (1992).

³¹⁸ Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 27 (1946).

³¹⁹ PAVEL, *supra* note 137.

circumstances require, we passively applaud incremental steps in hopes that eventually the law will catch up to the reality of our crumbling ecosystem.

Sinking states are like the two astronomers in the 2021 movie, *Don't Look Up*, played by Jennifer Lawrence and Leonardo DiCaprio. Armed with the knowledge that a comet is on a collision course with earth, they plead with people to understand that the entire planet is about to be destroyed, only to be brushed aside as alarmists. Similarly, the leaders of sinking states plead with world leaders to meet their commitments on climate change and help avert disaster. Instead of treating sinking states as harbingers of things to come that will affect the whole of humanity, they are brushed aside as isolated problems that have very little bearing on the rest of the international community.

Instead of approaching the growing crisis structurally and addressing the underlying issue with the urgency it requires, the international legal community is creating exceptions to rules while seeming to claim these exceptions are only applicable in specific cases. It is as if the underlying causes of climate change need not be addressed and we can feel satisfied that we have allowed these states to exist only through the “consolation prize” statehood.

The proposals to address the phenomenon of sinking states will unleash a series of cascading consequences which will in turn imperil the sovereign equality of states, the rights of individuals, and the international legal order. States remain conservative in their approach to potential solutions in the name of sovereignty, but it is our very survival that they are gambling on in the name of this value.

Ultimately, sinking states reveal cracks in the foundation of the international legal order. In the absence of binding and enforceable law, fundamental rights remain perilously vulnerable. These cracks, once widened, will undermine our faith in the law. For if the current system of international law cannot protect the rights to our very survival, what good is it providing?

We need to create a more just framework. One that does not entrench neo-colonial power structures, but rather rids itself of its colonial foundations. Finally, we need a renewed commitment to international law that protects the rights of all states and people. Without it, states are unable to preserve their own survival and the rights of the populations that depend upon it.