

**Charles University in Prague**

Faculty of Social Sciences

Institute of Political Studies

**Dustin Breitling**

**Small Island Developing States and  
Statehood**

*Master's Thesis*

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Author: **B.A. Dustin Breitling**

Academic Supervisor: **Mgr. Martin Riegl, PhD.**

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## **Abstract:**

This thesis deals with the challenges Climate Change poses to the concept of statehood contained in the Montevideo Convention. It will explore the concepts and conditions of statehood as understood in the Montevideo Convention to understand how they could be challenged by Climate Change induced activity. It will test how statehood has evolved and whether statehood will be impacted for a group of nations due to an absence of criteria that is contained in the Montevideo Convention. Moreover, it will also project what measures could be undertaken to preserve elements that are associated with Statehood in the face of environmental and territorial degradation.

## **Keywords:**

Climate Change, Sovereignty, Small Island Developing States, UNCLOS

**Extent of Work:** 245,969 characters

**Declaration:**

I declare that I have completed presented work independently and used only literature quoted in the bibliography. I declare that this thesis was not used for obtaining another degree. I agree that this work might be published for research and study purposes.

In Prague On: 3.1. 2018

Dustin Breitling.....

## **Acknowledgement:**

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**Charles University in Prague**  
**Faculty of Social Sciences**  
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**Small Island Developing States and Statehood**

(Master's Thesis Proposal – Geopolitical Studies)

**Name:** Breitling Dustin

**Supervisor:** Mgr. Martin Riegl, PhD.

I agree with supervising:

Winter Semester 2017/2018

**Aim:**

The main aim of this thesis was to investigate the potential problems associated with the effects of climate change that are currently facing Small Island Developing States as they relate to the establishment, maintenance, and continuity of a state relative to the requirements of statehood based on existing theory (Declaratory and Constitutive), the Montevideo Convention, and international norms, law, and historical precedent. As will be discussed in this paper climate change is currently affecting, and will continue to result in loss of territory, population, and governments for Small Island States creating unique challenges that threaten the very survival of these states as they relate to the traditional and theoretical requirements for statehood. The overriding question is whether or not there are prototypes to fashion a state from, based on current or historical models, or will the effects of climate change force us to consider alternative frameworks to ensure the continuation of these Small Island States.

**Topic:**

The spate of warnings that have been issued concerning Climate Change and its damaging impact upon the livelihood of populations has garnered increasing acknowledgement and critical concern. In a century where the potential for states to be submerged, concerns are being raised about how states, especially Small Island Developing States, are susceptible to losing Statehood. Small Island Developing States are already being ravaged by higher sea levels and dramatic loss of livelihood through inundation and potential submergence of their territory by the end of the century. Already these concerns are catalyzing Small Island Developing States to seek out alternative arrangements for their populations and importantly to preserve their legal personality. These arrangements tie in decisive concerns that connect how States are understood within in the international community as possessing a permanent territory, effective governance, permanent population and the capacity to be recognized by others. The angle offered and explored here becomes what happens once a permanent territory is undermined by seawaters and populations are relocated to Host States. If these issues are bound to occur then can historical precedents

assisting in projecting what Small Island Developing States could resort to legally and resource-wise to maintain their standing and recognition amongst the International Community.

## **Existing Literature**

The major portion of this work will extrapolate from various research publications and theorists who have delved into the questions pertaining to Sovereignty especially among the likes of James Crawford, Maxine Burkett, Frederick Tse-shyang Chen, and Jenny Grote Stoutenburg. Their works will be explored in conjunction with reports released from IPCC, and news articles that are monitoring the impact of climate change. The theorists such as James Crawford are critical in the field of evaluating the mutating nature of statehood and particularly identifying examples that challenge the Montevideo Convention. James Crawford is decisive in unearthing the mutating nature of Statehood and evaluating how states have undergone various incarnations, yet have still maintained hallmarks of their identity which is necessary to explore here in terms of Small Island Developing States. Additionally, Maxine Burkett potentially provides a viable pathway that weaves an understanding of the inherent danger that Climate Change poses for Small Island Developing States and how through territorial loss it will be decisive for Small Island Developing States to consider alternative configurations of statehood such as Ex-Situ or a Trusteeship. Jenny Grote Stoutenburg is invaluable in her effort to comprehend international law. She investigates the role of derogation of statehood and its relation to peremptory norms or *jus cogens* that is a thread of focus throughout this thesis.

## **Research Questions**

1. How does Climate Change potentially threaten Small Island Developing States and conflict with the definitions of Statehood outlined in the Montevideo Convention?
2. In what ways have the Montevideo Convention and Declaratory Theory been challenged as it relates to Small Island Developing States? How does the evolving nature of these states affect our understanding of statehood?
3. What are the major issues that are likely to emerge if alternative configurations are proposed for Small Island Developing States in order to preserve their Statehood? More explicitly would Small Island Developing States be able to claim Statehood if they lack a component outlined in the Montevideo Convention?



## **Hypotheses:**

Two preliminary hypotheses underline our investigation, which concern the maintenance of Statehood for Small Island Developing States and the issues that will arise with respect to alternative configurations for Statehood. The first hypothesis stresses that Statehood itself is not an “absolute” principle but rather a ‘threshold’ principle whereby Statehood is merely recognized as process rather than an end goal. While “The Montevideo Convention” and “Declaratory Theory” may stipulate conditions that are needed to be recognized for Statehood, they are not explicit in what necessarily constitutes a criterion for accepting or conferring the status of ‘Statehood’ to geographical entities. For example, neither the Montevideo Convention nor the Declaratory Theory explain what the minimum threshold of a population that a State or territory must possess in order to qualify for Statehood. Therefore, States that are increasingly vulnerable to the damaging impact of Climate Change, regardless of population size, could potentially preserve their identity as long as they are perceived in the international community as having certain elements that would signify to that community that the territory is inhabited or being used in some capacity. Furthermore, what constitutes a “government” is also debatable considering that there are various incarnations of governments and states that exist all over the spectrum. Most importantly there are entities that operate in the absence of a “government” in their native territory. States have also emerged despite the absence of one or more of the accepted criteria. For example, while Croatia and Bosnia-Herzegovina were candidates for the statehood, they had no effective control over some of their territory. Conversely, states such as Burundi and Rwanda were recognized or admitted to the UN prior to establishing an effective government. Therefore, my hypothesis accepts James Crawford’s assertion that the rules of statehood have been “kept so uncertain or open to manipulation as not to provide any standards at all.” (Crawford, 2006: ) I contend that since the rules of statehood are so uncertain or open to manipulation they will work in favor of Small Island Developing States as outlined by the Montevideo Convention and Declaratory Theory as their criterion isn’t explicit on what a state needs to do to qualify at a minimum or maximum threshold of population. Lastly, my hypothesis asserts that it is misleading at best to accept the conventional requirements for statehood, insofar as states are required to meet a minimum population threshold to qualify for that designation. My hypotheses will be supported and demonstrated through an array of examples which highlight each component of the Montevideo Convention and discusses how States have

evolved and retained Statehood despite lacking the central requirements of the Montevideo Convention.

### **Outlook of the Work:**

1. The first part of this thesis will examine Small Island Developing States especially located in the Pacific and Indian Ocean that are considered exceptionally vulnerable to the destructive effects of climate change. First and foremost, it will explore their geographical specificity and also examine what renders them especially vulnerable through their elevation, location and crucially lack of resources that enable resilience in the face of rising sea levels. Secondly, we will explore the ramifications of high sea levels that are especially pertinent to the maintenance of these islands and assess the impacts they are bound to face in light of recent disaster events and consolidated research. Furthermore, we will attempt to establish a broad definition to enable a basis for comprehending the interrelationship between Climate Change and its influence on the *modus operandi* of Statehood.

2. The second part will attempt to comprehend the Montevideo convention and its conception of Statehood and to understand what are considered essential criteria to meet the qualifications for attaining recognition for Statehood. Here, we will explore the Declaratory Theory of Statehood to understand how it has shaped the discourse concerning what constitutes Statehood. The analysis of this “theory” will provide the basis for mapping out the dominant doctrine of the 1933 Montevideo Convention which has been regarded as a yardstick for the definition of Statehood. We will focus in on what are the elements that constitute this doctrine and tackle the question of how the four components of Statehood permanent population, government, permanent territory and the capacity to be recognized by other states could be critically jeopardized by the changes associated with Climate Change.

3. In the third part, we will examine what are the implications if one of these specific components is not fulfilled according to the requirements of the Montevideo Convention. Then specific case examples will highlight how or whether notions of statehood were impacted due to the exclusion of one of these factors. Once we have explored these factors we will progress toward an understanding of the variants of Statehood or quasi-forms of statehood that have been recognized by the international community especially Ex-Situ, Trusteeships and Governments-in-Exile. These

could be perceived as prospective routes for Small Island Developing States to pursue in an effort to preserve their statehood. Then we will evaluate the proposed alternative forms of statehood for Small Island Developing States examining them through historical precedents and provide opinions as what might be a viable avenue for them to undertake to retain this recognition from the international community.

4. In this final part we will summarize the findings concerning the ramifications of Climate Change in terms of it undermining Statehood through loss of territory. We will examine what will be the most viable route for Small Island Developing States to undertake when dealing with loss of territory in order to continue statehood recognition from the international community.

### **Theoretical Framework:**

The theoretical framework is organized around one of the major competing theories that are preeminent within the field of Statehood: Declaratory Theory. It will draw upon international law's understanding of this theory and its relation to how statehood becomes impacted by the role of climate change. It attempts to examine and probe the components of the Declaratory Theory Criteria, which are considered the minimum criteria that an entity must meet for statehood. To offer guidance we can understand that the Declaratory Theory is based on the belief that statehood and international legal personality emerges through the independence of recognition when certain objective criteria of statehood are met by an entity. Here, the creation of a state is a simple "fact" that is acknowledged by the recognizing states. This theory's object or doctrine becomes enshrined in the Montevideo Convention that will be briefly expounded upon here. The necessary criteria for statehood are outlined in the Montevideo Convention of 1933 that is normally accepted as customary under international law cites the following: "The State as a person of international law should possess the following qualifications : (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with the other states." (Montevideo ) Overall, the declaratory theory understands statehood as fully determined by a set of factual conditions—where once an entity fulfills these criteria it is recognized as a state. Recognition is nothing more than an official confirmation of a factual situation—a retroactive act that traces back to the moment at which the factual criteria were fulfilled and the entity became a state. Yet, issues have also arisen and been directed towards the declaratory theory on the grounds that *de jure recognized states do*

*not meet the objective criteria of statehood and de facto* states seem to be able to fulfill the aforementioned criteria.

It is critical to examine what the Declaratory Criteria stipulates concerning the minimal criteria. It is considered to be instrumental for an entity to attain statehood and what happens if those conditions are not met considering the fact that the Small Island Developing States as discussed and focused upon here will be adversely impacted especially by territorial loss, a prerequisite of the theory. Similarly, other criteria which are outlined in the Declaratory Theory and its synonymous relationship with the Montevideo Convention revolve around key components such as permanent population, permanent government and the capacity to be recognized. The prospect of the loss of a permanent population and government are also potential outcomes that Small Island Developing States could face as the result of climate change and therefore serve to derogate their possibility of meeting the Declaratory Theory requirements. These factors as we will see poses severe difficulties and presupposes that territorial entities can easily by virtue of their mere existence meet all of these components.

### **Methodology:**

The methodology that was employed in this thesis was primarily qualitative in nature relying heavily on documentary analysis with research focused on observational secondary data and content analysis. However, there were aspects of quantitative data employed as they relate to a discussion of the definition and effects of climate change. Overall, the work will analyze Statehood through the angle of a realist which understands the state to be a unit of representation within the international community. The first part of this work attempts to delve into the two major schools of thinking that are understood to be indicative of an entity attaining statehood. We will employ a ‘process tracing’ methodology that will derive historical examples to evaluate and provide a comparative means to understand on what grounds historical examples can and have served as a precedent for exceptions to the established notion of Montevideo definition of Statehood. This quantitative and qualitative approach can be defined as Process Tracing which consists of identifying novel political and social phenomena to describe them in their contemporary context. It also comprises of evaluating prior explanatory hypotheses that describe phenomena, discovering new hypotheses, and assessing these new causal claims based on the former. Thus, to further gauge how process tracing is critical to the focus of this thesis it critically looks at established patterns among two or more phenomena notes how a relationship has been uncovered repeatedly. Process tracing immediately relates to testing

how the four components of the Montevideo Convention have been historically challenged and similarly have confronted novel conditions and situations as that will be explored in the thesis. We will investigate first and foremost the first criterion of permanent population, permanent territory, permanent government and the capacity to be recognized on grounds where each of those components was not adequately fulfilled or importantly isn't adequately fulfilled due to *de jure* or *de facto* states. Once, we have investigated into these components we will also investigate into how states importantly have retained recognition through Statehood. These models will be accorded the following spotlight where we will look at governments-in-exile, cession of territory, trust systems, international personalities and the prospect of deterritorialized states and their success in procuring forms of recognition from the international community. We will then inquire how successful they have been in their implementations. It is through the employment of Process Tracing that we aspire to understand and recognize these historical exceptions and provide a basis for considering what avenues Small Island Developing States could undertake to retain statehood. First and foremost, we will provide a definition of the Declaratory Theory to grasp the implications for how a State acquires recognition within the international community. Once we have outlined their differences we will then investigate into particularly the dominant theory of the declarative theory of Statehood and how it has molded notions of Statehood on grounds that States must fulfill the following criteria: 1) Permanent Population 2) Permanent Government 3) Permanent Territory 4) The Capacity to be Recognized by Others. Once we have established these definitions we will proceed to outline how Climate Change potentially undermines claims and the preservation of Statehood on the grounds that Permanent Territory, Government, and Population are the criteria most likely to be undermined. Accepting that they will be undermined by these factors the central question and focus of this thesis then revolves around an investigation as to how Small Island Developing States could preserve their recognition from the international community. This question further formalizes the focus of the remainder of the thesis where we employ a quantitative and qualitative approach that identifies historical examples and important case studies where one of the components of the Declaratory or Montevideo Convention was absent and show how recognition of Statehood was maintained.

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## List of Abbreviations

DASR.....	Draft Articles on State Responsibility
EEZ.....	Exclusive Economic Zones
ILC.....	International Law Commission
IPCC.....	International Panel on Climate Change
LOSC.....	Law of Sea Convention
SIDS.....	Small Island Developing States
SMOM.....	Sovereign Military Order of Malta
UN.....	United Nations
UNCLOS.....	United Nations Convention on the Law of the Sea
UNFCCC.....	United Nations Framework Convention on Climate Change
UNRIAA.....	United Nations Reports of International Arbitral Awards



# 1. Introduction

The rising concern of the submergence of Small Island Developing States and the possibility of an undermined capacity to exercise governance, retain territory, and seek assistance from the international community has become a pressing issue over the course of the past several years. Mounting support and acknowledgement of the plight that inhabitants face on Small Island Developing States has received attention due to spotlighting the potential displacement of populations.

Moreover, it has generated inquiries about the nature of their statehood and how they could be impacted once such key components such as territorial jurisdiction or their inability to govern has eroded. Further, stern warnings are being issued about the ramifications that Climate Change poses for these states, where according to the Intergovernmental Panel on Climate Change (IPCC), climate change is “an important factor in threats to human security through (i) undermining livelihoods, (ii) compromising ,culture and identity, (iii) increasing migration that people would rather have avoided, and (iv) challenging the ability of states to provide the conditions necessary for human security.” (Human Security, 2014: 758) The potential submergence of a legally recognized state engenders novel and complex challenges to international law and existing notions of Statehood. Presently as it is understood, a state is a subject of international law that is understood to encompass the following elements: a permanent population, a defined territory, government, and capacity to enter into relations with other states. (Montevideo, 1933) One of the major outcomes potentially points to the probability that Small Island Developing States may lose their permanent population, defined territory and capacity to be recognized by the international community. The nexus of these concerns are pronounced due to beliefs that:

“{A}ccording to international law, a State becomes extinct with the disappearance of one of the criteria of statehood (territory, people and government) either because it has physically ceased to exist or has merged into a larger unit or split up into smaller units, thereby removing the social foundation of the former State.” (Fasternrath, 1987: 467)

Still debate is percolating regarding the interrelationship between state extinction and climate change. Through the works of Rosemary Rayfuse, we can grasp the contention that when a State’s

territory renders itself uninhabitable and the population is forced to evacuate, or submergence of territory occurs “the claim of statehood will fail.” Conversely, through the work of Jane McAdam, the idea of extinction following the loss of its material elements is the realization that Statehood isn’t irremediably lost. This could be supplemented by the view automatic state extinction opposes the “strong presumption in favour of the continued existence of a state.” (Wong, 2013:362) Yet, it could be understood that in general, and through what will be explored here, there is an open nature that undergirds the concept of statehood. It is mindful of the fact that there is an embedded predisposition of constructing and framing Statehood as a legal concept with political ramifications and also one that is subject to incessant evolution and reinterpretation. (Camprubi, 2016) Accordingly, we can understand the oscillation of the law on statehood from stability to flexibility, that it is fundamentally informed by the operation of two factors: the evolution of normative standards and the adaptation to events that bring about innovative challenges. Therefore, the reciprocal link between normative and topicality enables the emergence of factual situations to influence and enable normative positions to become altered according to the circumstances. (Camprubi, 2016)

This particular line of reasoning enfolds into the competing principles and tensions that define and influence the international law of statehood: between principles of effectiveness and legality. Through the principle of effectiveness, we are emphasizing the factual situation: principally, what matters is whether a State has a territory, population, government and a degree of independence. Conversely, the principle of legality in contrast posits that the extinction of States must not violate certain fundamental norms of the international legal order, or what are characterized as *jus cogens* norms. (Stoutenburg, 2015)

Overall, if we focus specifically on the Pacific Island States we can gauge and examine whether Small Island Developing States could set a precedent or be a challenge to both principles of effectiveness and legality. Factuality will be challenged on grounds of population displacement, territorial loss and concerns about the legitimacy of legal personalities amongst the international community. (Stoutenburg, 2015) Thus, the concept of ‘precedent’ here infers to projecting the implications of how displaced populations will be received, and particularly how states could lose or retain recognition amongst the international community. This is by virtue of the fact that novel factors such as environmental degradation and its relation to undermining territorial requirements have not been properly integrated into traditional doctrines such as the Montevideo Convention.

Heretofore, international law has addressed legality on grounds of the deprivation of nationality following the transfer of rights, obligations, and property from a prior state to a

successor state, yet confronts novel circumstances in which a state has totally disappeared but no successor state exists. Thus, climate change could severely jeopardize a state's recognition as a state under international law and as a consequence their enjoyment to the right to self-determination and recognition as personalities with the international community.

Thus, the thrust of concern becomes underscored if questions arise to whether Small Island Developing States are completely inundated, are they still entitled to claim the rights and responsibilities of statehood? Will they retain recognition as states by other countries, which is the basis of statehood under international law? Will they retain voting rights in the United Nations and other associated international bodies? What happens to their treaty obligations under international law? Do the citizens of these countries maintain citizenship rights, or do they effectively become stateless persons? Moreover, Ronald Jumeau has proposed critical questions that are afflicting his small island development states and future developments of submerged countries: “When you relocate and you lose your country, what happens? What’s your status in the country you relocate to? Who are you? Do you have a government there? Government of what?” (NPR, Seychelles) Ultimately, the issues here that are posed in this work intend to problematize the complexities associated with climate change and particularly international law that are posing extreme challenges and novel reconsiderations about statehood.

The unprecedented possibilities is that the extinction of sovereign Island States due to anthropogenic climate change will impact the arena of international law concerned with fundamental norms such as the right to self-determination and permanent sovereignty over natural resources. Even though these *jus cogens* norms are impacted by the disappearance of Small Island Developing States, which implies that their exercise will be factually undermined, it remains onerous to establish that states themselves have breached these in the technical sense of the law of State responsibility. (Stoutenburg, 2015) Moreover, the multi-causal nature of climate change as well as the weak obligations that are inherent in the doctrines of the climate change, it still makes it enormously difficult to assign legal responsibility for the inundation of an island state to one or even several States. The immense obstacles that are posed are centered on the legal duty of continued recognition of these states, and how they can be preserved or if the only recourse is to establish new configurations of Statehood in order to have international recognition.

## 2. Definitions and Concepts

### 2.1 Climate Change

Here, we will define climate change to understand the implications at hand for the thesis and critically how it particularly impacts Small Island Developing States that are located in within the Pacific and Indian Ocean. First and foremost, climate is normally understood as the average weather in a region encompassing factors such as patterns of temperature, precipitation, humidity, wind, and season. When understanding and employing the term ‘climate’, it is predominantly understand in how the atmosphere behaves over relatively long periods of time. Furthermore, climate is weather observation averaged over long periods of time, typically 30-year periods (Weingroff, "Introduction to Climate"). Here it is necessary to distinguish between climate and weather. Weather itself fluctuates daily where climate reflects the normal weather of a place varying over the course of seasons. Furthermore, weather does take account to the role of changes that individuals see and feel day to day or place to place and that varies according to the climate. (Dunbar, 2015) Scientists understand that the Earth’s climate has always been subject to variability, especially when it has been examined at the local and regional levels across shorter periods of time. (Stocker et al., 2013) The variations in climate are normally expected to be attributable to natural phenomena such as large volcanic eruptions, solar variations and subtle changes in the Earth’s orbit. To underline what these variations suggests, we can identify two major examples of it, with the Medieval Warm Period and the Little Ice Age, even though debate still remains about whether these observations were global or regional in nature. The Medieval Warm Period happened between A.D. 900 and 1300 and is projected to be the warmest period on Earth prior to the 20<sup>th</sup> century (Solomon et. Al, 2007). Conversely, the Little Ice Age was a cooling period that occurred between A.D. 1500 and 1850. Several scientists argue that the Little Ice Age was not a true ice age and others contend that it was more of a northern hemisphere observance, as opposed to global climate change. (Houghton et al., 2001) Both of these examples serve as naturally occurring subtle variations in climate. Yet, over the last 150 years climatologists have been underlining changes in the climate that appear to exceed what is perceived to be natural subtle changes that were observed previously. Underscoring what has exceeded to appear natural, becomes the focus on the last three decades and the successive

warming of the Earth's surface in the preceding decades since 1850. Moreover, in the Northern Hemisphere between 1983-2012 it was considered the warmest 30 year period of the last 1400 years. (IPCC, 2013) Furthermore, the Intergovernmental Panel on Climate Change has reported that atmospheric greenhouse gas concentrations have risen, mean surface temperatures for land and oceans have amplified, sea levels have risen and snow and ice levels have decreased. (Stocker et al., 2013) Consequently, Global Climate Change is also making the oceans warm. The world's oceans have absorbed as much as 90% of the stored energy in the climate system. (Stocker et al., 2013) Estimations that over 60% of the increase of energy in the climate system between 1971 and 2010 is stored in the upper 700m of the world's ocean. Moreover, the greatest ocean warming has occurred near the surface.

Climatologists are anticipating that oceans will continue to warm and especially effect the tropical regions and the subtropical regions of the Northern Hemisphere. (Stocker et al., 2013) Ocean temperatures have considerable ramifications for sea level rise as water volume tends to increase with temperature through thermal expansion, which also is responsible for between 30% and 50 % of sea level rise. Ocean temperatures can also impact ocean evaporation and salinity. Therefore, high salinity areas are characterized by higher evaporations which has implications for food production, especially for fisheries and marine ecosystems, that are crucial resources for SIDS.

## **2.2 Intergovernmental Panel on Climate Change**

The IPCC serves as an vital organ of research for the United Nations that is given the task to provide a clear scientific view on the current state of knowledge on climate change and its potential environmental and socio-economic impacts. Currently, over 195 entities are members of the IPCC and governments participate and conduct a review process where decisions about the IPCC work programme are taken and accepted, adopted and approved. <sup>1</sup> Accordingly, the initial task for the IPCC as outlined in UN General Assembly Resolution 43/53 of 6 December 1988, was to prepare a comprehensive review and recommendations with respect to the state of knowledge of the science of climate change; the social and economic impact of climate change, and possible response strategies and elements for inclusion in a possible future international convention on climate. (IPCC) Ultimately, the IPCC role intends to produce reports and analysis that are consonant with the goals established through the UNFCCC that functions as the chief international treaty on climate change. Through IPCC's research, it is designed to assist in the objective of the UNFCCC to

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<sup>1</sup> ORGANIZATION. (n.d.). Retrieved November 25, 2017, from <https://www.ipcc.ch/organization/organization.shtml>

“stabilize greenhouse gas concentration in the atmosphere at level that would prevent dangerous anthropogenic interference with the climate system.” (IPCC) The IPCC’s *modus operandi* aggregates scientific publications to release publications that examine and provide projections of the impact of Climate Change.

The recent spate of literature emerging from IPCC has functioned as a program to detail and underline potential stresses and risks induced by climatic effects upon states and importantly elements that constitute livelihood for communities. The IPCC has pointed to how climate change will wreck an adverse effect on the physical territory of states in a myriad of ways, through the loss of viable eco-systems through desertification, increased soil salinity, flooding of coastal and low-lying regions or loss of reliable access to land due to increased severe weather events such as hurricanes. (IPCC, 2007) The particular focus upon low-lying coastal areas has been subject to extensive research and coverage, especially through the prevalent concern of shoreline erosion created by extreme weather events and sea-level rise. The two major causes of sea level rise are thermal expansion of the oceans water and the melting of glaciers and ice caps that are linked to climate change. (NOAA) Even though sea level rise is not the same cross the globe due to a multitude of factors that encompass changes in changes in ocean currents, winds, the Earth’s gravity field and land distribution, some of the highest rates of sea level rise are found in the tropical Pacific Ocean.

### **2.3 Sea-Level Rise**

Principally, the connection between climate change and sea-level rise revolves around understanding the core relationship between temperature rise that induces sea water to expand as its temperature rises. Similarly, through temperature rise the heat-trapping gases of the earth’s atmosphere accelerate the melting of glaciers and ice sheets that are adding water to the world’s oceans. The IPCC (Stocker et al. 2013) has concluded that sea levels over the last 150 years have increased more than in the previous two millennia. Between 1901 and 2010, sea levels have risen 0.19m, which roughly equates to 1.77mm per year. (Stocker et al. 2013). Moreover, climatologists have estimated nearly all the observed sea level rise since 1970 is due to glacier loss, Arctic sea ice reduction, Antarctic sea ice reductions, losses in the Greenland ice sheet and thermal expansion. Recent studies point out that land ice loss added nearly half a to global sea level from 2003 to 2007, which has contributed 75-80 percent of the total increase during that period. <sup>2</sup> The recent trend of

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<sup>2</sup>NATURE GEOSCIENCE | VOL 7 | SEPTEMBER 2014 | [www.nature.com/naturegeoscience](http://www.nature.com/naturegeoscience)

global warming and the melting of the ice sheets in Northern Hemisphere is unparalleled. In the twentieth century, sea level rise has increased globally by 108 mm/yr, yet regionally and locally this rise has found to be two to three times more.

The latest report from the IPCC in 2014 states that ‘human security will be progressively threatened as the climate changes; the risk of violent conflict will increase by exacerbating well-documented conflict drivers, such as poverty and economic shocks. Scientists have concluded with “very high confidence” that “[s]mall islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise, and extreme events.” (IPCC, Small Islands 2014: 689) Accordingly, the IPCC has outlined the adverse impacts that are bound to occur globally or from small islands to large continents and from the wealthiest countries to the poorest. The likelihood and increase of sea-level rise will exacerbate saltwater intrusion, that inevitable degrades fresh water resources. Increased air temperatures tend to also lead to higher evaporation rates that further reduce the availability of freshwater. Other concerns arise about the decrease in agricultural production as imminent, unless new resistance crops become introduced to offset these impacts. Additionally, coral bleaching may intensify further over the coming decades that will likely reduce in near shore fishing leading to a potential collapse of the fishing industry in the region. (IPCC, 2014)

## **2.4 Small Island Developing States**

Small Island Developing States have been considered and acknowledged by the international community as comprising of over thirty-eight United Nations Member States.<sup>3</sup> They are generally scattered geographically over the Caribbean, the Pacific, Atlantic and Indian Oceans, the Mediterranean and South China Sea, and they host a total population of more than 66 million. They can be comprised of a single island which is the case for Mauritius, Barbados, Malta. Also they can consist of several islands such as Tuvalu with nine, Vanuatu, twelve and Cape Verde fifteen. Moreover, the Seychelles has one hundred fifteen, Tonga one hundred eighty, and the Maldives twelve hundred. A majority of these islands are positioned between the Tropic of Cancer and the Tropic of Capricorn. One of their unique features becomes their Exclusive Economic Zones that are instrumental for their economic livelihood and how they are larger than their land area. For

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<sup>3</sup>.About SIDSA propos des petits états insulaires en voie de développement. (n.d.). Retrieved November 19, 2017, from <http://unohrlls.org/about-sids/>

example, Nauru's EEZ is nearly 15,000 times the size of its land area, where Samoa's is eight. (Moses, 2017) Also, many SIDS – the Maldives, for example have exclusively or mostly low-lying land areas; as opposed to countries such as Haiti that have a varied terrain. Moreover, SIDS benefit in various ways from an intimate relationship with their access to oceans. One of the major geographical advantages becomes for countries such as the Marshall Islands and Tuvalu that depend on their fish resources. Furthermore, sea-related tourism has become a mainstay of the economies.

## **2.5 Pacific Islands**

The core focus of this thesis will largely highlight The Pacific Islands and Maldives that are located in the Indian Ocean. These two areas of focus are made up of 22 countries and territories with a population orbiting around 9.2 million people and comprising of 7,500 islands of which 300 are inhabited spreading over an area of 30 million km. (History, 2017) Papua New Guinea has close to 7 million people and a large land mass which is more than the rest of the Pacific islands combined.

The region is classified into three ego-cultural sub-regions: Melanesia, Micronesia, and Polynesia. Melanesia consists of large, mountainous and mainly volcanic islands countries, while Micronesia and Polynesia are comprised of much smaller island landmasses; they generally contain small atolls with poor soils, with elevations usually between one and two meters (Kiribati, Marshall Islands, Tokelau and Tuvalu) also some islands of volcanic origin with more fertile islands e.g. Samoa, Tonga, the Federated States of Micronesia, Cook Islands. Some countries such as Nauru are only one island while others are composed of several hundred such as Papua New Guinea, Fiji.

These are countries that have formed uniquely one or more atoll islands. Generally, they are considered to be highly susceptible to climate change, due to the highest point in these islands only being a few meters above the sea level.

As a consequence of sea level rise and other climatic change the population would be incapable of moving to higher ground within the islands and would be forced to emigrate to foreign countries. Typical characteristics of these territories are they have a high ratio of coastline to land area, relatively high population densities, and low level of available resources for adaptive measures. Thus, it renders their economies highly vulnerable, and particularly more food insecure than other small island states. Overall, many of the settlements are in coastal locations, with the main city typically hosting the main port, airport and government institutions. (Gagain, 2009)



## 2.6 Regional Climate

Most of the Small Island Developing States are in maritime climates that are subject to trade winds almost all year round with only seasonal changes in intensity. Tropical cyclones in the Indian Ocean, typhoons in the Pacific Ocean, and hurricanes are the most important weather systems which influence these regions during the summer months, precipitating significant damage and disruption to their daily livelihood. Scientists have predicted that a warming climate will further exacerbate this global trend. Records suggest that temperature increases in both the air and the water will have a tendency to increase the severity of storms hurricanes and cyclones. Accordingly, the number of sudden-onset natural disasters has tripled since the 1970s and almost 90 percent of the recorded natural disasters today are climate-related. About 6 percent of the population all Pacific Islands countries were affected by sudden-onset disasters between 2000-2011, 87 percent of which were climatological and hydrometeorological disasters. (Brookings Institute, 2011)

The volume of reported disasters in the Pacific has increased considerably and that disasters are becoming more intense. Winds that are stronger than 117 km per hour have been increasing symmetrically in the southwest Pacific over the last thirty years. The total population affected by disasters has increased and economic losses have been enormous. Samoa's economic losses during disasters years have averaged 46 percent of their GDP while corresponding figures for Vanuatu and Tonga are approximately around 30 and 14 percent. (Brookings Institute, 2011)

Even though, the overall population in the region is comparatively small to other regions, the disasters are bound to generate major displacement in several Pacific Islands. Tsunamis that ravaged the Solomon Islands in 2007 and in Samoa in 2009 displaced 4.6 and 2.5 percent of the respective countries' populations. (Brookings Institute, 2011)

The Intergovernmental Panel on Climate Change (IPCC) holds that Small Island Developing States are at great risk from the projected impacts of climate change, particularly in terms of slow-onset effects such as rising sea levels: Sea-level rise poses by far the greatest threat to small island states relative to other countries. Although, the severity of the threat will vary from island to island, it is projected that beach erosion and coastal land loss, inundation, flooding, and salinization of coastal aquifers and soils will be widespread. (IPCC, 2014)

Moreover, protection costs for settlements, critical infrastructure, and economic activities that are at risk from sea-level rise will be burdensome for many Small Island Developing States. To highlight the predicament that these Small Island Developing States face we can underscore the

following examples especially with the Maldives and Papua New Guinea to highlight that some 50-80 per cent of the land area is less than 1 meter above mean sea level. Similarly, tourism—the leading revenue earner in many states—is projected to suffer severe disruptions due to sea-level rise. (IPCC, 2013)

The cost of natural disasters is particularly high for SIDS and Pacific Island States. Pacific Island countries are estimated to have annual losses totaling around 284 million on average with the annual losses for Vanuatu and Tonga estimated at 6.6 and 4.4 percent of their GDP. (PCRAFI, 2013) Furthermore, in developing countries there are domestic issues that are compounding the challenges that these low-lying states are facing especially in lieu of environmental changes. The IPCC has noted that “it has been suggested that the very existence of some atoll nations is threatened by rising sea levels” (IPCC AR5, 2014: 5) and that “land inundation due to sea-level rise poses risks to the territorial integrity of small-island nations.” (IPCC, 2014) While efforts are being orchestrated to obviate or mitigate the effects of climate change on low lying atoll states, it has been deemed unrealistic and unaffordable. The cost and benefit analysis has outweighed the possibility for protection against rising sea levels even with such cases as the Maldives which has invested into island protection, yet the costs of 6 billion for coastal protection was believed to be too expensive. Here, Fiji is required to spend an equivalent to its to its entire yearly gross domestic product over the next 10 years, according to the first comprehensive assessment of the small island’s national vulnerability to climate change.<sup>4</sup> Atoll states in the Pacific have an annual gross domestic product that ranges from US 27 million in Tuvalu to US 644 million in Vanuatu are severely limited in their capabilities to ramp up coastal protection. (Butler, Morris 2017)

## **2.7 Small Island Developing States: Pacific & Indian Ocean**

### **2.7.1 Tuvalu**

Tuvalu is located in the western South Pacific Ocean. It is one of the world’s smallest and most isolated island nations and consists of nine inhabited atolls and reef islands covering 500,000 km. It is located in the Pacific Ocean between Australia and Hawaii, and comprises of nine coral atolls, or coral reefs enclosing a lagoon. The total land area is 26 km with the highest elevation

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<sup>4</sup> Slezak, M. (2017, November 09). Fiji told it must spend billions to adapt to climate change. Retrieved December 15, 2017, from <https://www.theguardian.com/environment/2017/nov/10/fiji-told-it-must-spend-billions-to-adapt-to-climate-change>

being five meters above sea level. Five of the islands (Funafuti, Nukufetau, Nukulaelae, Nui, and Nanumea) consist of large lagoons enclosed by a coral reef.

Tuvalu has a population estimated around 10,544 people. (Philander, 2012) The highest point of Tuvalu is just four meters above the sea level yet with Tides reaching 3.4 meters in early 2015, the island foresaw the significance of future infrastructural damages. According to predictions, Tuvalu may be submerged within the next 50 years. (Roaf, S., Crichton, D., & Nicol, (2009) Most climate models project an increase of around 1 Celsius in global mean temperature by 2055, and a rise of more than 2.5 Celsius by 20. The intensity and frequency of days of extreme rainfall are also expected to rise. Extreme rainfall can produce higher salt water contamination. Agricultural production may fall in terms of crop yields due to salinization and increased transpiration, making food production costlier. (UNDP, 2007)

### **2.7.2. Maldives**

The Republic of Maldives comprises of over 26 coral atolls that are currently located in the Indian Ocean, southwest of India. It is the sixth smallest sovereign state in terms of land area, estimated to be approximately 235 sq km. The land is divided into over some 1,200 coral islands of which 96 percent are less than 1 square km in area. Also, only ten islands are more than 2.5 square km and the largest island, Laamu Gan has an area of 6.1 square km. (Maldives National Adaptation to Climate Change, 2009) The Maldives are estimated to have a population orbiting around 393,000 with the population predominantly living within 100 meters of the coastline. Presently, around 44 percent of the settlement of all islands are within 100m of coastline, where it equates to 42 percent of the population and 47 percent of all housing structures in the vicinity of the coastline. The considerable investment that has been poured into to develop the country's infrastructure is considered extremely vulnerable where its transport infrastructure that includes three major commercial sea ports, more than 128 island harbors and five airports of which two are international. The infrastructure of the two international airports is within 50 m of the coastline. (Maldives, National Adaptation to Climate Change, 2009)

Through a string of reports, especially the IPCC's infamous study, it is predicted by 2100 the sea level will rise by 50 cm. Maldives is the lowest-lying state in the world, and any one-meter rise will totally submerge the whole atolls under water. Already fourteen islands have been evacuated and six islands have been destroyed due to uninhabitable circumstances (Stoutenburg, 2015) Through climate change a host of other damages are due to incur irreversible damage upon

infrastructure and critically food crops due to saltwater flooding; shortages of water; and increased dengue and chikungunya epidemics.(Bush, 2017) Over the course of a decade Maldives has been subject to severe property damage, ocean swells that have also corroded their sea defenses. The Republic of Maldives proclaimed in its National Adaptation Program of Action that over 80 percent of its total land area is less than one meter above sea level and 44 % of the population lives within 100 meters of the coastline. Thus, “the small size, extremely low elevation and unconsolidated nature of the coral islands place the people and their livelihoods at very high risk from climate change particularly sea level rise” (National Adaptation Program of Action, Maldives: 19).

Furthermore:

“The scarcity of land in the Maldives, the smallness of the islands and extreme low elevation makes retreating inland or to higher grounds impossible. Building setback has limited utility and beach replenishment may only be temporary remedy for beach loss. Unless expensive coastal protection measures are undertaken the human settlements face the threat of inundation.” (ibid:37)

Already, in 2004, the Indian Ocean tsunami that killed hundreds of thousands of people across hundreds of thousands of square miles has made an indelible imprint on the populations living near the coastlines. The profound and disruptive impacts and effects of a underwater forty-foot high tsunami, that ravaged a considerable part of Southern Asia, ended up amounting to a death toll of more than 13,000 people across twelve states. The tsunami had a profound large wave temporarily submerged an estimated forty percent of the Maldives land mass, killing eighty-two people and destroyed the homes of some 15,000 Maldivians. (Lamb, 2005)

### **2.7.3. Kiribati**

Kiribati is located in the Central Pacific Ocean and is comprised of the Gilbert, Phoenix and Line Island group that covers an ocean area of 3.5 million km<sup>2</sup>. It consists of one raised limestone island (Banaba Island in the Gilbert Island Group) and 32 low-lying atolls that amount to total land area of 811km. 94 % of households that were surveyed in Kiribati have reported being impacted by environmental hazards over the past 10 years and 81 per cent of households were impacted by sea level rise over the same period. (Oakes, R., Milan, A., Campbell J. 2016) The highest elevation is 81m with a land area of 5.7km (Banaba Island) and its atolls that have a maximum height of 2 to 4

m (Oakes, R., Milan, A., Campbell J. 2016). Recent estimates and projections believe that Kiribati will be submerged within 30 years. Extreme events such as droughts and floods have already harried the islands of Kiribati with a severe drought in 1988-89 and 2007-2009. The combination of increases in temperature, annual rainfall, sea level, and ocean acidification has had an acute and adverse impact on the atolls. Particularly, the recurring phenomena of food shortages due to climate change with seawater contaminating the sources of fresh water are cause for significant concern. The particular focus on the increase in both temperature and the level of carbon dioxide has demonstrated damaging effects especially coral bleaching on the Phoenix Islands. Already, relocation of entire villages within Kiribati such as Tebunginako, underlines the environmental stresses they are confronting and bound to face in the near future. It has become compounded by high incident and exposure to malaria and dengue fish poisoning and food-borne illnesses that have been acquired from eating fish due to the increase water temperature has afflicted the country. The costs of protection and reparation of damages caused by coastal flooding is estimated to cost about 8.6 % of its GDP. Moreover, by 2030, under a high emissions scenario, this increase in temperature is projected to be in the range of 0.3-1.3 Celsius for the Gilbert and 0.4-12. Celsius for the Phoenix and Line Islands. Sea Level is expected to continue to rise in Kiribati. By 2030, under a high emissions scenario this rise in sea level is estimated to be in the range of 5-14 cm. (International Climate Change Adaptation Initiative, 2013)

### **3. State Centrism and Sovereignty**

One of the principal questions guiding the focus of this thesis is why should these States be concerned about remaining states, or maintaining a status of statehood? Secondly, what are the prospects for these Small Island Developing States to retain their statehood through important doctrines that will be examined momentarily such as the Montevideo Convention?

The primary concern as to why States are concerned about the loss of statehood is because international law accords primacy to states amongst the subjects of international law. The loss of statehood suggests a loss of this preferential status and consequently a considerable degradation of the international legal personality. (George Jain, 2014) Statehood gives access to United Nations membership which “is crucial because it provides a cost-effective method of maintaining international contacts, thus avoiding the need for a worldwide diplomatic apparatus.” (Wong, 2013:349) We can identify how the concept of the state and its role within the international system is both the subject and primary object of international law. Ultimately, we can understand the

components that define the modern state as extensive rule of law, citizenship rights, and broad economic and social responsibilities. (James, 2009) It is deemed a government can only persist and bear legitimacy on the grounds that its relations with its subjects are understood as stable and include responsibilities. It is crucial to understand a state exceeds a mere definition or understanding of a government, as governments are bound to change, but states outlast and endure the former. Therefore, a state could be identified as possessing a political community, territory and an independently organized government. One of the prominent concerns and aspects that also characterize a state is bound up with concepts such as a cultural self-identity that ties in terms such as a nation or a nationality, and its importance for the form of state organization. As we can see international law privileges states, whereas a 'people' have no right to an exclusive economic zone under the Law of The Sea Convention, whereas that right is only conferred to a state. Moreover, 'people' have no right to invoke the jurisdiction of the International Court of Justice. Finally, the major sources of international law--treaties and customary international law--can only be constituted by states. (George Jain, 2014)

We can also import two countervailing tendencies that do oppose the primacy of states in international law. These two tendencies are predicated on grounds that there is an increasing recognition of individuals and peoples as subjects of international law and the rights and endowments of state-like entities in international law. There has been an increasing recognition of non-state entities as subjects of international law, especially legal personalities of international organizations and groups under international law—for instance, the right of self-determination, and human rights of groups. (Cassese, 1995) Other examples include how foreign investors possess the capacity to arbitrate claims against host states through investor-state arbitration, individuals have the ability to approach international courts and commissions to protect their human rights and individuals can also be held responsible for contemptible violations of international law. (Cryer, 2005) Even though, latitude is provided for the recognition of the rights of individuals and other non-state entities, it is still beholden to the recognition of rights that are the result of state consent. We can further highlight the fact that international organizations are consensual associations of states and international norms such as human rights are accepted and enforced through consent. (Orakhelashvili, 2006) Similarly, international law does confer greater standing to state-like entities than individuals. This is demonstrated through entities such as permanent observers at the United Nations, territories under international administration, and entities that through affiliated to a particular state have autonomy. Importantly, none of these legal statuses are the equivalent to statehood. Furthermore, observer states do have some state-like rights such as the ability to

participate in the deliberations of the United Nations, but they lack the crucial right to vote. Furthermore, territories under international administration and autonomous entities are necessarily subject to the sovereignty of a state and still are considered inferior. Most international law principles are framed by reference to states. Importantly, the loss of statehood cannot be underestimated as it does present a significant downgrading of status. (George Jain, 2014) It could be understood for a state to be reduced to that status of a group is equivalent to losing its international legal personality. It potentially loses the right to have maritime entitlements under the Law of The Sea Convention, the right to negotiate international law as a sovereign equal, and the right to invoke international law on behalf of its people. (George Jain, 2014)

Focusing on our contemporary understanding of states and statehood we can also grasp how an expanded cast of international institutions and bodies have also been endowed extensive powers and international personality to influence states. Yet, it still underlines that overall states are important in the equation for these international bodies, in consenting to give power to an international organization in order to recognize major doctrines such as human rights and international law. One of the strongest and most contentions points surrounding issues pertaining to the intervention in the dominance of a state power lies in *jus cogens* rules, which are rules that the international community can affirm to have the power to override a state's will. (Raič, 2002) Other than the *jus cogens* rules, states still are the predominant players in the international arena that conduct their own affairs at the behest of their discretion.

Now, how a state procures statehood on a domestic and international level invites important insight to the evolution of statehood and particularly how they can possess territorial and material legitimacy, which is also subject to a temporal dimension. (Marek, 1968) These temporal conditions speak to the possibility that statehood faces the prospect of dissolution, and the privileges endowed with its recognition, as the former can be undermined as a legal personality in the international community.

When surveying the significance of state evolution and their likelihood to transform through internal domestic and external international factors, we can critically point to the fact that when states do undergo a form of change, there is the prospect that states can persist as the same state with their identity or undertake a path that supersedes it through secessionism. Therefore, the 'continuity of States' can be understood as responding to the question of whether a State that transforms its internal constitution structure or undergoes adjustments in its territory or population or both or is occupied by another state maintains its identity. The fundamental importance of continuity rests on how and if a State retains its previous legal identity; whether if a State retains

territorial changes that occur such as the dissolution of a State; or if dissolution unfolds *uno acto* or through a string of separations. Ultimately, considerations that spring here draw our attention how territorial transformations and the retention of state continuity are contingent upon a multitude of factors. (Zimmerman, 2006) These factors can evaluate the territorial size of the state that claims such an identity, albeit there is no determined requirement for a state to go forward with its claim as carrying on as international legal personality. These changes are also subject to scrutiny if these changes are compatible with applicable rules of international law and the principle of self-determination of peoples. Finally, the self-proclaimed will of a state is hinged upon the acceptance of such claims by third states that are actors within and outside of major international organizations. (Zimmerman, 2006)

### 3.1 Sovereignty

We can also identify the role and significance of ‘sovereignty’, which is considered the most important benefit of being a state, which entails understanding that it as a hybrid term for the totality of powers and privileges which states wield under international law. (Crawford, 2006) Thus, sovereignty isn’t simply the exercise of sovereign rights, since these rights can be exercised by a third state which does derogate from the first state losing its sovereignty. Secondly, sovereignty does not intend equal rights or competences amongst states in practice, due to states also possessing the right to restrict and dispose of their own sovereignty if they desire to do so. James Barnett, who has also interpreted the notion has understand it that it should mean it is as positive obligation states do what is in their power to avert to the loss of another’s state’s sovereignty. (Barnett & Neil, 2003) Furthermore, this principle is bound to the notion of an obligation to abstain from threats or a deployment of force against the territorial integrity of political independence of any states. The mutual respect between states is a linchpin principle for the international relations between sovereign states that operate via diplomacy and through treaties. A state can exclusively regulate its international affairs and bid upon internal rights and rules which encompass those regulating foreign policy. (UN Charter, Art 2. Princ.3)

Therefore, taking into account the vastness of the two latter privileges, a state can also be rendered accountable in the broadest sense of the word, due its action *vis-a-vis* the international community as a whole and all states separately.

Moreover, on a nation-level, sovereignty involves the means to exercise jurisdiction over a state’s population, and crucially a jurisdiction that is binding to the population even when they are



abroad. (McAdam, 2010) Another critical component linking the significance of national jurisdiction becomes jurisdictional space, where it recognizes the right of states the exclusive or legal and executive action over a territory. Jurisdictional space can also refer to decision-making on the use of community resources within a political community. Here, states also have the means to exercise sovereignty over natural resources, encompassing the ability to exert sovereign powers—over yet not necessarily bearing ownership of territory, which is not confined to land but also extends to several maritime zones. (UNCLOS, 1982: art.56)

Thus, in congruity with the evolution of historic state practice that partitions maritime territory, the widely ratified United Nation Convention on the Law of the Sea also divides the various sections from internal waters to the high seas. (UNCLOS, 1982) States are bestowed also rights concerning their internal waters, territorial sea, and the airspace above these areas, where sovereignty can be exercised in these areas to complement a sovereign power and their exercise over land territory. Thus, to further examine what the relationship between state and sovereignty requires we can comprehend how two major schools of thought were formative in constructing the notion of what the criteria requires.

### **3.2 Constitutive vs. Declaratory Statehood Theory**

In international law, two competing theories as to what constitutes a state have emerged: the Constitutive and Declaratory. The standard nineteenth century model of statehood is the Constitutive theory of statehood which encompasses the idea that emergence of a new state is dependent on its recognition by other states. Constitutive theory holds “it is the act of recognition by other states that creates a new state....and not the process by which actually obtained independence.” (Shaw, 2017: 330) Under this theory, a territory declares itself a state; it is at most a proto-state that eventuates its realization into a state, if at all, only if it accumulates significant recognition by other states. (Abdullah, 1996) Thus, even a territory that does not obviously fulfill the Montevideo Convention’s criteria may yet be ‘widely and judicially regarded as a state because most states recognize it.’ Yet, the theory is divided over to what extent this recognition requires whether it is ‘diplomatic recognition’ or ‘recognition of existence.’ (Crawford, 1977) Existing states already have a certain degree of leverage in determining and permitting a state to come into being. Yet, the Constitutive Theory has been strongly criticized on the premise that its leads to an extreme subjectivity in the notion of the state, “effectively destroying that which it seeks to define.”

(Crawford, 1999: 95, 114) Furthermore, there is no rule that majority recognition is binding on third states in international law. Similarly, the constitutive theory leads inevitably to the proposition that another state is not bound to treat an entity as a state if it has not recognized it. (Crawford, 1990)

Conversely, the Declaratory Theory, 'statehood' is designated once the entity has met the components of statehood, and therefore recognition, is not truly necessary as it "merely declares the existence of that fact." (Lauterpacht, 1947: 41) Therefore, the Declaratory theory on the other hand, opines that recognition is merely an acknowledgement of the existing statehood status, and that the act of recognition isn't satisfactory to confer status. The Montevideo Convention is regarded as a restatement of customary international law as it codified existing legal norms on statehood. In Article 1, the Convention sets out the four criteria for statehood:

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

The upholding and affirmation of a customary international law that emerges from uniform, consistent practices of states creates widely held beliefs that such practices are obligatory (*jus cogens*), establishes requirements of statehood that are enshrined in the four criteria of Article 1 of the Montevideo Convention Rights and Duties of States (1933). Therefore, the Montevideo Convention here provides what can be conceived of as a "objective test" of statehood applied without reference to whether a territory is recognized or not. Crucially, according to the Declaratory view of statehood, once an entity satisfies the above four criteria, it becomes a state, and "the political existence of the state is independent of recognition by other states." (Montevideo Convention, 1933: Article 12) Yet, one of the conditions underlying the declaratory theory is that it supposes that there are concrete and objective characteristics of statehood, which could lead to highly politicized exercises.

The ramifications that are anticipated to follow if certain Declaratory theory notions are determined as 'factual', harbors important questions and considerations, especially under the legality of these criteria. These criteria are legal, heretofore as the international legal discourse must forge a consensus between states as to which criteria to take into account in the first place to determine the factual existence of states. However, there is no authoritative or binding exposition of the criteria of statehood that exists in international law. The International Law Commission abstained from codifying the subject of recognition of states and governments, remarking that "although had legal consequences it raised many political problems which did not lend themselves to regulations by law." (Crawford, 2006: 40) The ILC's 1949 Draft Declaration on the Rights and

Duties of States did not possess any conclusive definition of the terms of the state, rather deciding the term in the sense commonly accepted in international practice. When another opportunity has risen on the matter to clarify the meaning of statehood during the elaboration of the Vienna Convention of the Law of Treaties, the ILC also found difficult to establish a common parlance about its meaning. Thus, a draft prepared by Special Rapporteur Fitzmaurice in 1956 defined states not only as “an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such”, yet also included “entities recognized as being States on special grounds.” (11 UN Yearbook of the International Law Commission 107) Therefore, the permeability of borders and boundary disputes can still allow for flexible interpretation where according to the International Court of Justice pointed in the North Sea Coincidental Shelf Cases in 1969 there is “no rule that the land frontiers of a State must be fully delimited and defined and often in various places and for long periods they are not.” (ICJ North Sea Continental Shelf cases, Rep 1969) Ultimately, it is states themselves that wield rights in the participation in both creating international law and also its operation among the international legal system.

To return back to the issue of recognition or what falls under constitutive theory has become an increasingly salient method as there have been proliferations of new states that are connected to the role of recognition. We can identify the case of Bosnia, with the US and the EU recognizing and stamping it a legal status that would otherwise remain complicated. Yet, even if only some countries recognize a certain state, it is still unclear if it represents a state only to them or to the world. There are several entities such as Kosovo, Taiwan, Abkhazia, and South Ossetia that have obtained very limited recognition. (Mass & Carius, 2013) Moreover, the recognition by other States can also involve a tit for tat strategy or what are understood as vested political and economic interests. Here, an extreme example becomes the political character of the recognition of States such as Abkhazia, which became a province of Georgia during Soviet Times. One island state Nauru recognized the independence of Abkhazia on December 15, 2009 in exchange of 50 million in aid for this recognition.<sup>5</sup>

Ultimately, recognition is largely deemed as essential to Statehood, where we can understand it as semi-constitutive, because doubts can arise according to whether a territory qualifies under the declaratory theory's criteria. Yet, it is through the procurement of recognition that can trigger or be considered the tipping point to statehood, whereas non-recognition is usually a consensus by states

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<sup>5</sup>.Barry, E. (2009, December 15). Abkhazia Is Recognized — by Nauru. Retrieved November 26, 2017, from <http://www.nytimes.com/2009/12/16/world/europe/16georgia.html>

that a territory doesn't fulfill the standard criteria of statehood. (Schoiswohl, 2004) Malcolm Shaw contends:

“[T]he role of recognition, at least in providing strong evidential demonstration of satisfaction of the relevant criteria, must be acknowledged . . . There is also an integral relationship between recognition and the criteria for statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the objective demonstration of adherence to the criteria.” (Shaw, 2017: 164)

Therefore, if states cannot be permitted to be in a perceived subordinate position to other states than the Declarative theory would have greater purpose in framing and understanding Statehood with the following corollary that States should not dependent on each other to exist.

Nonetheless, even if a State does not depend on others to exist, a lack of recognition of its status through the international community can curtail its ambitions and activities with others. This can be understood as follows:

“Through political communities (...) can without recognition continue to operate as states within the 4 walls of their domestic territorial enclave, they cannot enter into relations with any other states unless that other state expressly or by putting up with such relations impliedly recognize(s) that political community is a subject of international law.” (Farley 2010: 792)

Overall, through the framing of recognition from the international community and the factual components listed by the Montevideo Convention we can proceed to question the effectiveness and challenge that is posed to the Small Island Developing States. This framing concerns how to gauge if their capacity for recognition from other states will be maintained taking into consideration their geographic isolation, limited natural resources, and tiny population. Conversely, the traditional view that statehood is applicable to entities that possess and exercise substantial political and economic influence is also debatable. However, it does suggest that there is no obligation for states to recognize an entity as recognition is predicated upon the political aptitude of states.

#### **4. Montevideo Convention**

One of the major precedents that is crucial in shaping the procedural understanding of statehood revolves around the Montevideo Convention. Overall, the Montevideo Convention is

considered to be reflecting, in general terms, the requirements of statehood in customary international law. Moreover, the Montevideo criteria are “based on the principle of effectiveness among territorial units,” i.e., the criteria define statehood because they represent the bare minimum required for effective control. (Crawford, 2006) It is also worth to highlight the Montevideo Convention was a regional agreement among the International Conference of American States that only nineteen signatories and sixteen states parties forged in 1933. Yet, the Montevideo criteria has over the course of time cemented itself as a standard for providing the determination as to whether an entity is considered a state.

Ultimately, both customary law and the Montevideo Convention only offer requirements for a new state to be established and gain statehood. However, neither specifies the requirements for the continued existence of states. Article 6 of the Montevideo Convention codifies this principle: ‘recognition of a state is unconditional and irrevocable.’ (Montevideo Convention) Further supplementing Under article 4 of the Montevideo Convention on the Rights and Duties of the State, the privileges of statehood include being:

“Judicially equal enjoying the same rights and having equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.” (Montevideo Convention, Art.4, 1933)

The principal tenets according laid down by Article 1 of the Montevideo Convention on the Rights and Duties of States accordingly defined the State as a person of intentionality law that should possess the following qualifications:

- a) A Permanent population
- b) A defined territory;
- c) Government; and
- d) Capacity to enter into relations with other states.

(Montevideo Convention, 1933)

The Convention was only binding in 19 Latin American state parties. (Mendes, 2010) To fulfill the requirements of customary international law, the Convention had to be followed, not just

by state practice, but also followed out of a sense of legal obligation, the requirement of *opinion juris*. (Mendes, 2010) Continuing in this thread, the Montevideo Convention was applicable to new claims of statehood. It emerged out of a meeting of independent Latin American States in 1933 that arose out of colonial status and desire to exhibit their full personality to the world and to counter any last residue of claims by their former colonial rulers (Mendes, 2010)

States possess these rights simply by having met the statehood criteria. The fundamental reasoning behind the equal sovereignty and full legal capacity of states is that states make international law and other international subjects derive their legal personality from states. State recognition is important and states can therefore create new legal principles in regard to the scenario emerging for low-lying states.

Even though there is still debate concerning the scope and criteria for statehood and the convention as a reflection of customary international law, there have been numerous exceptions or situations that render it questionable. We can begin to identify them under grounds of (1) military occupation, (2) governments in exile, or (3) territorial sessions with no clear transfer of legal title. (Chen, 2001) In addition, the Montevideo Convention was drafted at a time when concepts such as the principle of self-determination were not generally recognized in international law and similarly the implications of nascent rule prohibiting the use of force between states had not been worked out. This specific criticism have raised charges about the legitimacy of the criteria and perceived inadequacy to respond to novel conditions. According to Thomas Grant the Criteria for the Convention has stoked a “source of puzzlement” accordingly:

“The Convention includes elements that are not clearly prerequisite to statehood, and it excludes elements that writers now widely regard as indispensable to a definition of the state ... It addresses a concept that had been in flux over the century leading up to its framing and that continued to change thereafter. It posits a definition of statehood highly contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated.” (Grant, 1999:453)

Moreover, it has been argued that in practice the customary rules of the Montevideo Convention may not have an authoritative application to states that arise out of the break-up of existing non-colonial multi-ethnic states. These examples include the former Yugoslavia or states that were attempting to disassociate from their long standing colonial ties like the Congo, or from military occupation like East Timor and Palestine. These examples further challenge the core tenets

or ascription of a necessity for effective government in control of its territory as a prerequisite. (Mendes, 2010) However, throughout the course of history “there are certain actors of international law that were treated like States (and are even sometimes defined as States) although they did not meet all the criteria that are traditionally deemed necessary for them to be called as such.”(Acquaviva, 2005: 9) Another problem that pertains to the employment of the Montevideo criteria is that it strictly requires States to have a territory. The treaty limits itself to the creation of a state and not with its extinction. Thus, as Thomas D. Grant asserts:

“It therefore appears to be the case once an entity has established itself in international society as a State it does lose statehood by losing its territory or effective control over that territory. To be sure the Montevideo Convention was concerned with whether an entity becomes a State, not with how an entity might cease to be a State.” (Grant, 1999: 435)

The corollary follows here that Small Island Developing States have been accepted into the United Nations and play a decisive role in numerous international treaties. The point being here is that States can be considered for membership in an organization, even though there is an exclusive provision that only States may be admitted. This crucial point relates to the significance of recognition by other states and under what circumstances those States will fail to recognize an entity then terminate diplomatic relations. It is particularly pertinent as it relates to what occurs when a state no longer abides by the criteria of the Montevideo Convention. One possible outcome is suggested by Article 6 of Montevideo Convention that asserts that:

“The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law, Recognition is unconditional and irrevocable.” (Montevideo Convention, 1933:Art.6)

Therefore, recognition is not only irrevocable accordingly to Article 6 of the Montevideo Convention, but it implies a continuity of a State once a State has its statehood tested, insofar as it continues to exist even if some requirements are lacking.

According to Kreijen “States may have a complicated birth, but they do not die easily.” (Kreijen, 2004: 73) However, in international law it can be argued that there isn’t an unequivocal distinction or rule concerning state emergence, continuation, and extinction. We can also indicate that these evolving phenomena and their acknowledgement in wake of changed world since 1934

also stresses another pivotal consideration regarding that “no proposals codifying statehood have been accepted since {Montevideo Convention}. {T}his problems has been attributed in part to a political reluctance by states to announce a clear definition of statehood.” (Grant, 1999 :447). Irrespective of the elements that are employed to define statehood and ascertain the existence of an entity as a state, we will focus here on whether and how these criteria can be preserved and applied when confronted by the escalating effects of climate change and sea-level rise.

#### **4.1 Permanent Population**

States are constituted by the groups of individuals inhabiting their territories. Thus, the component of a permanent population is considered a necessary requirement for statehood. However, there is no criteria stipulating a minimum requirement to the size of the population; We can see for example Bermuda with its 61,666 inhabitants is as much as State as India, which now has currently over one billion inhabitants. Crucially, International Law doesn’t establish any requirements about the nature of the population: the population can comprise of nomads (such as in Somalia), it may be the ethnically homogeneous such as Iceland or heterogeneous (former Soviet Union) Also, it should be underscored that the requirement of a permanent population does not relate to the nationality of a population: it merely mandates that states have a permanent population.

Moreover, the absence of a part of the population over a period of time doesn’t undermine a States’ status. Thus, to have a broad understanding of state’s population we can define it as encompassing all permanent residents, also resident aliens that do not possess the nationality of the state they currently reside. Confirmation of this fact is that in many states non-nationals also form an integral part of the population such as in Switzerland, Germany, or France and even constitute the majority of inhabitants especially in Qatar or Kuwait. The assessment becomes further substantiated by Article 9 of the Montevideo Convention. Article 9 affirms the jurisdiction of states within the limits of their national territory to be applicable to all inhabitants. (Montevideo Convention, 1933 Art. 9) Furthermore, the provision proceeds to proclaim “nations and foreigners are under the same protection of the law and the national authorities”, and “that foreigners may not claim rights other or more extensive than those of the nations.” Finally, the last part asserts that “the foreigners may not claim rights other or more extensive than those of the nations.” Yet, this does not entail that nationals are automatically given more rights than non-nationals. (Stoutenburg, 2015: 268) Ultimately, we can deduce that the notion of permanent population is profoundly territory-related, where populations are not strictly identified through their ethnic or cultural ties, yet through



inhabitation and presence on a territory. Furthermore, a 'population without a territory' does not follow an objective attribute of recognition. Moreover, a conception of exclusive 'populations in exile' also cannot exist whereby a uprooting from their territory, would deny them the only criterion that associates them with that territory.

## **4.2 Defined Territory**

The key criterion 'defined territory' is generally regarded as a prerequisite for the existence of states. Overall, territory is considered an essential constituent for statehood because it provides security, economic and cultural resources and importantly delimits and protects the jurisdiction and sovereignty of the state. Firstly, territory enables a source of security that facilitates international organization against external threats. Also, It is considered as an axiom for Statehood whereas multiple legal scholars contend that "statehood is inconceivable in the absence of a reasonably defined geographical base." (Shaw, 1982: 1) A draft prepared by Special Rapporteur Fitzpatrick in 1956 defined states not only as "an entity consisting of a people inhabiting a defined territory under an organized system of government, but as having the capacity to enter into international relationships binding entity as such."(11 UN Yearbook of the International Law Commission 107 1956) Overall, while territory vouches for the sphere of validity of the national legal order territorial supremacy, it is not regarded as an order or criterion in its own right, but rather as a reflection of the defining character of a state, which is its ability to establish a coercive legal order. Therefore, international law anchors itself in the position that territory serves as a precondition for statehood, and that the territory requirement is necessary for effective governance. A fundamental question that arises is whether territory indispensable for effective governance? James Crawford affirms that yes where he contends "the State must consist of a certain coherent territory effectively governed." (Crawford, 2006: 52) It is a formula that suggests that the requirement of territory is rather a constituent of government and independence than any distinct criterion of its own. Principally, once the territory is no longer habitable, it can be contended that an aspect of the coercive power of the state is diminished insofar its ability to preclude foreign elements from intruding within its space. Secondly, territory is a source of economic resources. Therefore, this emphasis on the economic utility of territory and the ability to provide resources and means for the sustenance of individuals and communities is a manifestation of the entitlement aspect of jurisdiction. Thirdly, territory affords the effective exercise of jurisdiction. Territorial borders enable states the certainty of knowing the extent of their jurisdiction and permitting them to evade conflict with other states. It

has been suggested that this produces economically valuable certainty. Finally, a territory is a source of historical and cultural resources. (George Jain, 2014) Territory exploits and develops a pre-existing cultural identity, and also facilitates the growth of a new common identity predicated on ties to territory and its physical attributes. The past demonstrates that the existence of fully determined and demarcated boundaries is not required and crucially the most important matter becomes the existence of an effective political authority bearing control over a particular portion of land. Even though states must be able to dispose of some territory, international law does not prescribe a minimum area of territory necessary for a state to exist.

### **4.3 The United Nations Convention on the Law of the Sea**

The UNCLOS further complements and spotlights the focus on the potential loss of statehood in addition to the loss of maritime zones. Importantly a state has the right under international law to not only exercise sovereignty within its border, but also to varying forms of jurisdiction over the waters of its shores. Maritime Zones are extremely important economically to coastal states, which enables the exercise of sovereign rights over the natural resources found in those areas. The range of land-based resources is relatively limited for Small Developing Island States and maritime zones are economically imperative, especially through fisheries that contribute to one of their sustainable resources.

It is a broad convention that focuses on: establishing navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and a binding procedure for settlement of disputes between States, among other topics. (UNCLOS, 1982) In addition, UNCLOS established several different rights for coasts over a myriad of regions that are adjacent to a certain baseline. The maritime zones that are detailed in UNCLOS also encompass the territorial sea, the contiguous zone, the Exclusive Economic Zone, and the continental shelf. The convention has entered force on 16 November 1994 and resulted from the third United Nations Conference on the Law of the Sea which took place from 1973 through to 1982. (UNCLOS)

## **4.4 Effective Government**

An effective government requires a system of government that is in general control of its territory, to the exclusion of other entities. To examine it further we can understand that a state as an effective legal entity, needs to possess a government able to prescribe, implement and enforce governmental authority through the State's subjects and to be able execute its obligations under international law. The prerequisite of an effective governmental authority became increasingly a focus, especially to respond to the realities of emerging states that were birthed under decolonization and their striving for self-determination. (Stoutenburg, 2015) However, it does point out that effectiveness of government does remain a malleable definition especially for newly emerging States where it is centered on the capability for an entity to exercise authority over a given territory. Yet, the standard of 'effective government' varies across the spectrum, where through examples in the context of secession (where the former sovereign (Serbia) objects to the putative State's Kosovo's claim of statehood) as opposed the situation where a new State is granted full formal independence by a former sovereign. Ultimately, 'effective government' requires only the establishment of basic institutions and law and order rather than a sophisticated apparatus of executive and legislative organs. To accentuate the aforementioned concern about low-lying states and their ability to fulfill basic functions becomes the potential problem of a dependency on funding from their states that may curtail their ability to guarantee basic rights and services for their citizens. (Stoutenburg, 2015)

## **4.5 Capacity to enter into relations with the other states**

The capacity for relations with other states affirms that each state conducts its relations with other states on the basis of particular understandings of the legal status of those other states. The capacity to enter into relations with other states could be understood as a conflation of the requirements of government and independence. It is accordingly, a consequence rather than a criterion of statehood. Ultimately, as James Crawford contends independence or what we term as sovereignty is the central criterion for statehood, since it is the right to exercise "in regard to a portion of the globe...to the exclusion of any other State, the functions of a State. It has two main elements: a separate existence within reasonably coherent borders, and not being subject to the authority of any other state. Therefore, it is comprised of two central elements: a separate existence within reasonably coherent borders, and not being subject to the authority of any other State."

(McAdam, 2010; Crawford, 2006; Island of Palmas, 1928) There are two main international law aspects to the recognition process.

--Recognition can play a role in the international legality of the object of recognition: sometimes, a state is or is not a state legally because, amongst other things, other states have decided to treat it as such.

--The recognition itself is regulated by international law, in that states are sometimes constrained in their choices when comes to recognition.

(Chatham House, 2013)

A state must have a recognized capacity in order to maintain external relations with other legal persons. This capacity itself is indispensable for a sovereign State; a lack of such capacity will undermine the entity from being an independent State.

Similarly, a recognized capacity also distinguishes States from other entities such as members of federation of protectorates, which cannot manage their own foreign affairs, and broadly are not recognized by other States as full-members of the international community. In numerous instances, these understandings are unproblematic and simply are a form of recognition of the *status quo*: such as the UK and its dealings with France. However, a state can emerge within the existing order that challenges its architecture and framework for criterion such as claims of Kosovo in 2008 and Turkish Republic of Norther Cyprus.

## **4.6 Government-in-Exile**

Wedding the question as to how a State has continuity and specifically about if it needs to be rooted in a territory becomes a government-in-exile. A government-in-exile could be defined as moved to or formed in a foreign land by exile who aspires to rule when their country is liberated. Here, as contended there is a strong presumption that in international law that States continue to exist even if there is a period where they are bereft of an effective government. (McAdam, 2010) Yet, a government-exile challenges the preconceived notion that territory is essential to preserve political power and international recognition. This claim can be reinforced by the fact that governments-in-exile and international organizations have had their status guaranteed in the international community. Cases such as Somalia and other governments in exile emphasis how *de jure* recognition of a State by other States is of paramount importance to the issue of recognition, a

government bereft of territory still has the possibility to be recognized as a State by other countries. (Delaney, 2008) Governments-in exile notably have been recognized by their allies as government of an enemy-occupied State during the course of the conflict and pending its outcome. It is argued that it is almost impossible to set out clear-cut criteria for governments-in-exile, as the relevant decisions concerning the attribution of competence lie exclusively with the governments of the recognizing states. (Talmon, 1999)

## 4.7 Legal Personalities

Legal personalities are entities that assume roles and responsibilities under international law. Generally a legal personality or legal subjectivity is comprehended as the capacity of a person to be a holder of rights and obligations under a given legal system. Principally, a legal personality has a multilevel function whereas it has the capacity to be a holder of legal rights and obligations and also the capacity to produce legal effects with its own actions. (Shaw, 2017) The latter case especially emphasizes the capacity of the person to conclude contracts, to undertake legal actions that protect their own rights and crucially to bear legal responsibility for illegal acts. Therefore, an international legal personality is a status procured once an entity acquires rights and obligations under international law, in conjunction with some form of community acceptance. In 1948, the International Court of Justice recognized the array of entities that wield the recognition as international legal personalities. (Portmann, 2010) One of the major cases that validates the role of international legal personalities is the ICJ case which found that International Organizations could indeed have international legal personality and have rights and obligations under international law. This is particularly due to the emergence of international organizations that entailed the expansion of international legal personalities and the extended role of international accountability. The wide range of participants includes: international organizations, regional organizations, non-governmental organizations, public companies, private companies and individuals. (Shaw, 2003) Importantly, sovereign states are the dominant subjects of international law as they obtain rights, obligations, and international legal personality once coming into existence. However, not all such entities will constitute legal persons, yet they may act with some level of influence upon the international plane. (Abdulrahim, *A State as a Subject of International Law*). The latter element is contingent upon several factors, importantly as to what is the type of personality under question. Furthermore, it may be incarnated and displayed in a variety of forms and may in certain cases be

inferred from practice. Moreover, it can be argued that these types of personalities are reflecting and responding to a need where various branches of international law play a major role. These various branches include Humans rights law, the laws relating to armed conflicts and international economic law are considered important in engendering and mirroring increased participation and personality in international law. (Shaw, 2003) What is pursuant to the Montevideo Convention is how entities can have a limited international legal personality and still possess state-like features.

This is especially highlighted through mandated territories that are for example, administered by a third party according to the terms stipulated by the mandate and while the third-party can direct the affairs of the territory, the potential for the breach of obligations can terminate the mandate. Furthermore, examples of a condominium territory-where there are two or more states that exercise sovereignty over it in accordance with a treaty does possess a distinction personality of its own, yet the government is enforcing a jointly delegated authority. There are numerous *sui generis* international legal personalities that are deprived of a territory. Prominently, the United Nations and the European Union are examples of international non-state legal persons who partake in international relations. The EU has also been part of the United Nations as an observing member and in 2011 it acquired additional participatory rights. The prospect of islands of affording island states the possibility to engage in UN remains relevant. The preservation of an islanders' group identity would be maintained as it would be represented by the *sui generis* legal personality.

#### **4.8 Deterritorialized Entities**

Deterritorialized entities are discussed in the work of Maxine Burkett. She conceptualizes deterritorialized and ex-situ states as a potential response to the loss of land to nation-states, and foresees that international law could accommodate an entirely new category of international actors. Ex-Situ nations accordingly are a status that enables the continued existence of a sovereign state, where it is conferred all of the rights and benefits of sovereign amongst the family of States. Burkett envisions that this practice would require the creation of a government framework that would be able to exercise authority over a diffuse people.

Deterritorialized entities are conceived under the umbrella of international actors that provide a model and example for what will be elaborated below with specific examples such as the Sovereign Military Order of Malta and the Holy See. These entities such as the Sovereign Military Order of Malta and the Holy See appear to have governance without a native territory that partake

in international relations on a par with landholding states. International law recognizes the former as a sovereign subject, even though it is based in Rome and it still lacks the traditional hallmarks of statehood such as a permanent population and territory. The Holy See is similar. It has consistently wielded full legal personality under international law, maintained diplomatic relations with most states and partakes in intergovernmental and international agreements. Critically, the historical changes in the territorial control, as well as population have not impaired the possibility of an international personality for the Holy See. (Burkett, 2013)

Also, governments in exile are considered examples of functional, yet non-territorial sovereignty, that international law also generally recognizes. The cast includes Palestinians, indigenous nations, such as the Maori or Tibetans, who are examples of communities where through the process of invasion, or colonization, dislocation or deterritorialization has occurred. It is understood and assumed that no interference in the exiled government's function still enables independence despite its incapability to govern within its own land. Furthermore, the international community has also maintained recognition of "failed states" even during the period in which they are effectively failing.

## **5. Montevideo Criterion and Exceptions Application**

This section explores the four pillars of the Montevideo Convention to analyze what the core components are and fundamentally examine how these components could be compromised specifically by Climate Change related activity for Small Island Developing States. In due course, the substance of the focus of the remaining paper will examine the core elements of the Montevideo Convention and highlight examples that have been exceptions to the conventional doctrine for Statehood. To reiterate, the central focus is how does Climate Change potentially challenge the components laid out by the Montevideo Convention? In what manner will Small Island Developing States be impacted and what do the historical examples tell us about whether or not 'Statehood' will be impacted due to one of the required components being found lacking. These chapters will delineate a list of possible solutions that could be conceived for Small Island Developing States to preserve a hallmark or trace of statehood territorially or in a deterritorialized manner. In terms of framing the concept of territoriality it will employ the following examples such as: Cession of territory, Construction of Coastal protection works and raising the levels of the islands,

Construction of artificial islands and amendments of UNCLOS to accept artificial islands as a “defined territory”. Further, it will explore the prospects of a deterritorialized state including application of the United Nations International Trusteeship system in order to create an ex-situ nation which would consist of a deterritorialized State. It will also attempt to tackle and bridge the significance of principles of self-determination and import as a *jus cogens* principle that potentially could enhance the prospects for enabling continuity of recognition of inhabitants of Small Island Developing States. To recap, the latter half will test and focus on cases where permanent territory, permanent population, effective government, and the capacity to be recognized by others have been derogated and retained. We will first investigate what have been determined to be potentially minimal conditions concerning each category i.e. a permanent population, territory, capacity to be recognized, and government. Then, we will examine what has unfolded after these conditions were not met. Secondly, if these conditions were or are undermined what were the alternative configurations that emerged such as government-in-exile, trusteeships, nation ex-situ and we will determine whether or not they constitute valid avenues of consideration. In this regard, it is vital to understand how a form of recognition has been preserved such as a legal personality which enables its capacity to conduct itself with quasi-state features.

Importantly, the criteria for each category varies due to the fact that population and territory could inhere a quantitative component such as a ‘minimum population’ or a ‘minimum territory size.’ Conversely, a government and or a capacity to be recognized by other States is dependent on a variety of factors that cannot simply be boiled down to a discrete quantitative measure. Rather, these latter categories could be considered to be dependent upon a population and a territory and also recognition from other states.

This section will then focus on the following elements:

--Population: This section explores if there is a minimum amount of persons required to inhabit a territory to fulfill the Montevideo Population Criterion. Furthermore, does a minimal amount satisfy the criterion on the basis of amount or does it also extend to notions of how a definition of a ‘population’ is also conceived on grounds beyond a quantitative metric.

--Territory: This section explores an identical question-whether or not there is a minimum territorial size required and what happens if it has been impacted. Are there other means to fulfill a territorial requirement? This section focuses on entities that have lost territory, and current entities that are



potentially seeking to exercise their UNCLOS jurisdictional rights. Primarily, we will probe the repercussions of entities that have lost territory and how their claim to Statehood was either preserved or undermined.

--Government: We investigate into what is the effective definition of Government and what about the emerging phenomena of Government's-in-Exile or Failed States? Does the Montevideo Convention bear recognition or consideration over those situations? Can these cases provide any guidelines of consideration for Small Island Developing States.

--Capacity for Relations with Other States: If exceptional circumstances arise where there is a loss of territory or government can legal personalities become the benefactors or representatives of the Small Island Developing States.

--Alternative Solutions:

The latter half comprises of an Alternative Solution section that is devoted to exploring proposed solutions that have been conceived in an attempt to retain components of statehood by other arrangements such as The cession of territory, transfer of territory, and the historical implications of a government-in-exile that could be a feasible avenue for Small Island Developing States. Furthermore, we will provide two case studies that attempt to draw parallels to Small Island Developing States and historically what has unfolded when they have been uprooted and relocated.

--Deterritorialized Entities:

This section investigates two case examples that potentially serve as a pathway that Small Island Developing States could undertake based on the SMOM and Vatican City models. These models fulfill parts of the Montevideo Criterion yet they are not regarded as States in the conventional sense of that definition. These two examples constitute "states" that are widely recognized in the international community and could serve as extant models that Small Island Developing States could aspire to.

## 5.1 Population

If a claim for Statehood could be severely undermined on grounds of failing to fulfill a component of the Montevideo Condition, the element of population elevates itself as a primary concern due to the high likelihood of uninhabitable land. Here, we can then draw an immediate conclusion that if all permanent residents of a low-lying Small Island Developing State were forced to vacate the islands, the island state would no longer have a population and therefore lack the condition of effective statehood.

The underlying thrust of the interrelationship between climate change and statehood becomes highlighted here on the grounds of examining how the prospect of displacement will induce shifts in the demographics and overall numbers of the population. Thus, a question that is bound to emerge are: what percentage of people must emigrate for the remaining inhabitants to no longer count as a population? (Stoutenburg, 2015) It has been identified that generally “even a considerable diminution of the population, due to wars, emigration, etc., does not per se affect the existence of a State.” (Vukas. B 1991: 284) One inductive approximation holds that a minimum quantitative standard for a permanent population can be understood through a comparison with the smallest self-governing territory that has been provided independence by the UN, the Pacific island territory of Pitcairn. Pitcairn contains a permanent population of about 50. In several UN General Assembly resolutions, the UN has acknowledged the right of the Pitcairn inhabitants to become a sovereign state in exercise of their rights to self-determination. The United Nations General Assembly Corroborated the claim their “Right to become a sovereign state in exercise of their right to self-determination” (UNGA 1971, Stoutenburg, 2013: 62) Thus, already serving an example in its own rights, and rather pointing to a notion of state creation instead of continuation, it demonstrates that the number of 50 people is the smallest number to have been internationally reorganized as forming a—potential—state population. (UNGA Res 69/105 of 5 December 2014) A pronounced example that acknowledges this difficulty also is a concrete reality for several Pacific Island States where half of their population doesn’t currently reside in the country. These islands states and populations such as Samoans account for 56% and Tongans 46% who are outside of their home countries, where it does underline that population percentage is not an intrinsic element determining the population with the state. (McAdam, 2010)

Even though the number 50 people serves as a useful guideline, the quantitative standard must be equally assisted by qualitative considerations as to what are the necessary attributes of a permanent population. (Stoutenburg, 2015) Judge Jose Luis Jesus, who like Jon Van Dyke, affirms

what is termed as a restrictive view of the maritime features that should qualify as islands, arguing that in order to count as habitable, islands must be able to support schools, entertainment facilities, health services, religious structures, and businesses, in short, all the “usual and expected amenities that human habitation implies in today’s societies.” (J.I. Jesus, 2003: 579) Thus, it establishes an important functional parameter as to what an congregation of people and their organization must contrive in order to conform to certain standards that have been enabled and established by the international community. One of the key suggestions that has been offered and explored concerning Jesus’s contention becomes Jenny Grote Stoutenburg in her understanding the difficulty that Pacific Islands States face in providing higher education services or hospitals, especially on the island territory of Pitcairn, where the occurrences of provision and medical services occurs episodically and post-primary students have to also rely on correspondence schools. (Stoutenburg, 2015)

Therefore, questions further emerge as to what further parameters or standards that an aggregate of people should organize into as social and political communities. We will investigate into the Principality of Sealand that responds to a broader definition of what a permanent population suggest.

### **5.1.1 Principality of Sealand**

We can key in on the Principality of Sealand which was a former World War II sea fort that was located in international waters off the coast of Great Britain, which numerous individuals claimed to have created and recognized as a sovereign state. Yet, the court rejected the submission by a German National who claimed that he lost his German Citizenship and instead acquired one that of the ‘Principality of Sealand’. Yet the Judge’s rejoinder was the Principality could not have validly given nationality to him as it did not qualify as a state due to the lack of a defined territory and a permanent population. The court however did concede that the 106 persons who were claiming to be Sealand Nations’ technically in principle are a population, as there is a not a minimum standard for inhabitants. Yet he underlined it lacked an important ingredient of a communal life (*Gemeinschaftsleben*). Ultimately, the objective of the States as a union becomes the promotion of communal life of its members. A communal life was one of the elements sorely lacking on Sealand, as those who maintained a permanent presence on the island simply served to maintain and guard its facilities; and where the other ‘nations’ only made sporadic visits. Therefore, the opinion of the court indicated that vital necessities were paramount to operate and maintain Sealand which assisted people from their birth to their death, including providing for (continued)

education, help with all the vicissitudes of life, and the possibility to earn a living. (Stoutenburg, 2015) We can deduce here that the living standards for a population should include basic infrastructural elements that accommodate communal living. Furthermore, it is suggestive that the people using the infrastructure also must have the desire to form a social and political community to develop their lives on the given territory, and not be merely present. We can point to this fact through the State of the Vatican is a case that exemplifies constitutive recognition. Inhabitants of the Vatican whether they are in possession of citizenship or not, can be subject to expulsion from the Vatican territory at any time through a withdrawal of the residence permit. Yet, the question of their purpose or function eludes the determination or characterization that it is a ‘human society that stays united in its territory’ and cannot qualify as having a permanent population in the statehood definition. Furthermore, this understanding extends to other presences of a group of people on a given territory that might be hinged on purposes not conforming to nurturing a communal life. These examples include the presence of a group on a given territory where those would for example maintain a certain facility such as a lighthouse or for the mere pursuit of a natural resource. At the same time, even though a lack of a permanent population is not part of the Vatican City we can still see it fulfills the territorial component of statehood.

### **5.1.2 Population Conclusion**

Ultimately, a conclusion could be drawn that if there is still an original island and infrastructure remaining for subsistence that even enables a tiny amount of people to continue living as a community, it could meet the element of statehood. According to Stoutenburg, we can also stress how Vatican City demonstrates the definition of what are ‘caretakers’ or a ‘caretaker population’ that operates within the Vatican City. To further reinforce the important of the lack of a permanent population we can also point to a territory like Vatican City that does not have a permanent population but yet can qualify as having state-like features. In the case of Vatican City we must acknowledge it is hinged upon the recognition of other states. Therefore, a semblance of population potentially could be ensured and achieved by the role of caretakers that might stay on the remaining territory, yet that also begs the question as to how the international community would recognize such a caretaking population. (Stoutenburg, 2015)

## 5.2 Permanent Territory

We can examine how the Montevideo Convention and its definition of a territory requirement should be satisfied by the existence of some territory. However, it does not matter whether the territory is small or large, contested or not. Importantly, one of the crucial insights about the Montevideo Convention becomes its lack of dictating a minimal area of land. We can identify how the states and their size don't undermine their claim of fulfilling a territorial criterion. We can observe how Nauru, Tuvalu, the Marshall Islands, Saint Kitts and Nevis, the Maldives and Malta, embody the world's smallest states. <sup>6</sup>

### Areas of Smallest States

Vatican City	0.4 sq km
Monaco	1.5
Nauru	21
Tuvalu	26
San Marino	61
Liechtenstein	160
Marshall Islands	181
St. Kitts & Nevis	267
Maldives	298
Malta	315

Also, there isn't any rule that prescribes contiguity of the territory of the State. This could be understood that separation within borders or from borders doesn't undermine territorial claims. This could be substantiated through the separation of East Prussia from Germany between 1919 and 1945, and East Pakistan from West Pakistan before 1971. In our present case, it is especially pertinent concerning archipelagic states e.g. Federated States of Micronesia, the Marshall Islands that comprise of tiny land areas that are separated by vast expanses of ocean. (George Jain, 2014)

Moreover, we can also point to the legal fact that indeterminacy as to border demarcation does not automatically undermine the fulfillment of the territorial requirement. It could be

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<sup>6</sup>McMullan, R. (2014, August 27). The 10 Smallest Countries In The World. Retrieved November 18, 2017, from <http://www.worldatlas.com/articles/the-10-smallest-countries-in-the-world.html>

understood that A new state may exist despite claims to its territory, just as an existing States continues despite such claims. We can reference the case of Israel, that when it came into existence there were questions raised on the grounds as to whether it could exercise valid legal title over the territory in its possession. This example stems from the Resolution of the General Assembly that was proposed to establish an Arab state and Jewish state in Palestine. The partition of this then-British mandate raised objections on behalf of Arab and other Islamic states on the basis of self-determination. At that point in history, the population of the mandated territory was predominately Arab accounting for two thirds and one-third Jewish. (Pillar, Goldstein, Hays, & Abdo, 2017) The General Assembly's resolution had not been implemented yet on May 14, 1948, one day prior, the announced termination of the mandate was proclaimed. Questions surrounded the demarcation and definition of Israel's territory with the representative of the United States characterizing the issue as one of "undefined frontiers" only which would not violate the requirement of a defined territory, and not one of undefined territory which would violate it and elaborate:

"One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers.... The formula in the classic treaties somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement."(SCOR 383<sup>rd</sup> mtg 2 December 1948, 11)

Yet, criticism arose through the Soviet Union contending that it was incorrect to challenge Israel's territory as undefined due to "its territory is clearly defined by an international decision of the United Nations" namely by the resolution adopted on 29 November 1947 by the General Assembly. (SCOR 383<sup>rd</sup> mtg 2 December 1948, 22)

Conversely, the representative of the United Kingdom who is the former mandate of Palestine, objected to the undefined territory asserting: "The ultimate fate or at least the ultimate shape of the State of Israel remains yet to be determined and is not yet to be known." SCOR 383<sup>rd</sup> mtg 2 December 1948, 16) A similar sentiment was posed by the representative of Syria pointing that "The State of Israel has no territory which is not contested. The Arab States and all the neighboring

States of the Near East contest the existence of that State; it is not only its frontier that is in contest, but the existence of the State itself.”<sup>7</sup> Overall, Israel was admitted into the United Nations in the following year, after it had confirmed its readiness to abide by the General Assembly resolution on the internationalization of Jerusalem and non-Arab refugees that resulted from a war between Israel and five Arab states in 1948.

### **5.2.1. Permanent Territory Conclusion**

Similar cases could be shown with Belize, Kuwait, Mauritania and Oman where doubts arose concerning the demarcation of their territory, yet as it was demonstrated it didn’t necessarily affect their statehood. (Crawford, 2006) Therefore, it can be understood on the basis that the porous and indeterminate definition of borders does provide a benefit in understanding that it has been displayed in prior historical cases. It could be understood that the legal fact that indeterminacy concerning borders does not entirely detract from a fulfillment of the territory requirement. (George Jain, 2014)

### **5.3 Loss of Territory & Statehood**

It is unclear that the Montevideo criteria were conceived of as being capable of permanent extinction of territory rather than merely reallocation or temporary loss. (George Jain, 2014) On the grounds of losing territory we can already identify precedents and particularly their outcomes concerning how elements of Statehood have been potentially challenged. It is established that the acquisition or loss of territory does not in itself impact the continuity of the State. This is even the case when the territory that has been acquired or lost is significantly greater in area than the original or remaining State territory. The presumption is rooted and especially pronounced when the constitutional system of the State prior to acquisition or loss continues in force. (Crawford, 2006) Questions have also been posed which pertain to issues that entangle the concept of the identity of the State and the lack of effective control which is mostly symptomatic of illegal invasion or annexation of States. This is brought to light through the case of the Baltic States, where few States formally recognized the annexation of the Baltic States, yet it was through the continued recognition by some States of Latvia, Lithuania, and Estonia that signified their continued

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<sup>7</sup>U.N. SCOR, 3rd Sess., 385th mtg. at 3 (1948)

existence. (Crawford, 2006) This lends credence to the notion that the rule protecting State personality against illegal annexation has also acquired a peremptory character, mirroring the peremptory character of the rules relating to the use of force. In the post-Charter era, no state has lost its statehood due to loss of territory. Rather, states disappear but the territory remains—yet it becomes part of the territory of another state or states. The legal issues that emerge from the disappearance of the State are focused upon within the regime of succession, or what is defined as “the replacement of one State by another in the responsibility for the international relations of territory.” (Vienna Convention on Succession of States, 1978) Through an extensive survey undertaken by James Crawford, he list seven instances of extinction of states in the Charter age: Hyderabad, Somaliland, Tanganyika, Republic of Vietnam, Yemen Arab Republic, German Democratic Republic, Yugoslavia and Czechoslovakia. (Crawford, 2006) None of these states have ceased to exist. Rather, these cases as will be emphasized have disappeared due to voluntary dissolution. We can point to examples such as the unification of Germany that involved the extinction of the German Democratic Republic and the disappearance of its seat at the United Nations. Subsequently, The Federal Republic of Germany became enlarged while preserving its identity. Yemen here qualifies as an ‘Extinction by Merger’ when the States of North and South Yemen entered into an Agreement on the Establishment of the Republic of Yemen on 22 April 1990. In this case it has been characterized as a double succession, with neither North nor South Yemen absorbing or annexing the other, yet rather becoming extinct and their union generating one new State instead. (Crawford, 2006) Thus, involuntary dissolution, due to loss of territory, while it is not impossible or illegal in international law is extremely rare. Here it could be understood that it does not eliminate the existence of a state. Therefore, the dissolution of Pakistan in 1971 into Pakistan and Bangladesh, while involuntary, in that the former Pakistani state was opposed to such dissolution did not necessarily terminate the existence of the Pakistani state (Crawford, 2006). Yet, the one possible example of involuntary dissolution that led to extinction of the original state is the case of the former Yugoslavia. The former implies some element of self-determination and conscious will of the peoples (especially in the case of the former Yugoslavia); the latter is completely involuntary. This difference makes it very difficult to analogize between the former Yugoslavia to exist because of the loss of their territory.

#### Extinction of States 1945–2005

Name	Date	Comment
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United Arab Republic	Feb 1 1958	Political Union between Egypt and Syria and ratified in nationwide plebiscites. Sept. 28 1961, Syria declared itself independent of Egypt. Egypt retained United Arab Republic until September 2. 1971, and alternated its name Arab Republic of Egypt.
United Arab States	Mar 8 1958	A confederation of the United Arab Republic (Egypt and Syria) and North Yemen.
Somaliland	1 July 1960	Voluntary union with Somali's Republic on latter's independence.
Arab Federation	July 14 1958	A union between Iraq and Jordan or what has been considered a de facto confederation. Dissolved 1958.
Tanganyika/ Zanzibar	26 April 1964	Voluntary merger in United Republic of Tanganyika and Zanzibar (name changed to Tanzania, 1 November 1964).
Republic of Vietnam	2 July 1976	Merger into Chapter 10 Socialist Republic of Vietnam after forcible change of government in April/ May 1975.
Senegambia Confederation	30 September 1989	Merger between Gambia and Senegal and a confederation emerged. Dissolved in 1989.
Yemen Arab Republic/ People's Democratic Republic of Yemen	26 May 1990	Voluntary merger in Republic of Yemen.
German Democratic Republic	3 October 1990	Voluntary union after plebiscite.
Union of Soviet Socialist	25 December 1991	Dissolution became

Republics		Commonwealth of Independent Republics.
Socialist Federal Republic of Yugoslavia	Uncertain (not before 29 November 1991)	Involuntary dissolution (despite initial claim to continuity by FRY).
Czech and Slovak Federal Republic	1 January 1993	Voluntary dissolution.

(Table Derived from Crawford, 2006 and expanded upon)

Even in events of annexations, whether they are regarded as voluntary, the temporariness or permanence of such an event does not completely detract from a form of continued recognition. A continuing thread through International Law is predicated on the notion that states continue to exist even if there is a period without an effective scheme of governance. James Crawford contends that international law underscores a fundamental distinction between State continuity and State succession: that is the relation where the ‘same’ State can be regarded to exist despite sometimes drastic changes in its government, its territory it people. Ineta Ziemele refers to a basic rule that is applicable in determining state ‘extinction’ as the following: “Changes affecting the basic criteria of statehood such as territory, population and government, separately or together, do not automatically affect the existence of a State unless territory and or population disappears.” (Ziemele, 2013: para 3.) Furthermore, State continuity describes the continuity or identity of States as legal persons in international law, subject to relevant claims and recognition of those claims, as determined, in principle, in accordance with the applicable international law rules or procedures when statehood is at issue. Ultimately, general international law asserts firmly that the rule that “territorial changes and international revolutions in no way affect the identity and continuity of States.” (Marek, 1968: 15) Also, when states are considered absolutely defunct, the possibility of resurrecting their sovereignty propagates questions about the feasibility of becoming recognized again.

This bears considerable relevance to the present case of Small Island Developing States which can no longer fulfill the criterion of territory. It is not inconceivable that the future may bring the prospect of the relevant island state's land territory the possibility of resurfacing again. The possibility of understanding the temporariness that might be the fate of these state's and their reluctance to accept their demise could be indicative that the island state ought to be regarded as

continuous for a certain period of time after its submergence as there is no way of fully knowing if the submergence is only temporary.

We can also further explore how Law of The Sea is acutely important especially for Small Island Developing States due to the probability of its territory potentially submerging and how that transforms its sovereign jurisdiction. We can also highlight that if a “disappearing state” does lose its territory it could prompt questions concerning the relocation of its population to such a territory where actual territory exists. This consideration will be engaged momentarily, yet we will steer our focus towards examining the significance of UNCLOS and its relevance for Small Island Developing States.

## **5.4 United Nations Convention on the Law of the Sea**

The question addressed here is whether it is possible to argue that ‘submerged territory’ meets the territory requirement? Here we can expound on the role of the United Nations Convention on the Law of the Sea and how they determine what territory can form the basis for sovereign state. The designed purpose of these rules is to demarcate and determine the circumstances under which a territory can claim to international law rights. Yet, there is inherently an important distinction as to what statehood refers to on the basis of an international legal personality, as opposed to those under the UNCLOS which are merely entitlements of subjects of international law.

Several small island states depend on fishing and tourism-related activities that occur in the territorial waters and the EEZ of coastal states. The primary concern here assumes that territorial loss means potential loss of resources would follow. In the case of SIDS, Maritime zones are intrinsically linked to the resources that acquire revenue from fishing licenses and the fishing industry. In 2007, fishing licenses constituted 42 percent of all government revenues in Kiribati and 11 percent of all government revenues in Tuvalu. In the Maldives, 10 percent of the gross domestic product is attributable to fisheries. It has been understood that “the combined exclusive economic zones of the Pacific island states are several times larger than the whole of the European Union, and with the potential of blue-sea fishing and deep-sea mining, the EEZs are important economic assets.” (Mass & Carius, 2013:656) The identity and welfare of these communities are “closely intertwined with the resources, ecosystems, goods and services available in those particular regions.” (Puthucherril, 2012:258) The rising of the sea impacts part of the EEZ and the territorial waters as well, which could induce economically disastrous effects on the States' economies. This

could potentially unfold through the submergence of an entire island, or through the partial inundation of islands that makes them uninhabitable. (Yamamoto & Esteban, 2014)

Sovereignty and sovereign rights become imperiled through rising sea levels, raising the question and difficulty of how to demarcate boundaries in maritime time environment which become keenly contested and subject of dispute. This is especially due to the Oceanic territorial claims that are constituted by an international treaty designated as the United Nations Convention on the Law of The Sea, or UNCLOS. Through UNCLOS there are four different levels of sovereignty that states can exercise over their adjacent seas. One of the principal levels and or tiers is Article 3 of UNCLOS: stipulating 12 nautical miles from the coastline area are a state's territorial water, in which it has the capability to enforce unbridled sovereignty and is in full control over its resource exploitation. It applies to all nations as it would apply on land. The sovereignty of this area is extended to the airspace over the territorial sea and its bed and subsoil (UNCLOS, 1982: art.5) Additionally there are other forms of maritime claims once there is an extension beyond the 12 nautical miles. The sea area from 12 to 24 nautical miles from the coast is called the contiguous zone, where states in this regard cannot fully exercise sovereignty yet domestic regulations that are imposed such as customs, taxation, immigration and pollution still are enforced. In the next tier which is composed of the 24 natural miles out to sea, UNCLOS proceeds on the basis of two competing claims about maritime sovereignty. First, a state can claim an exclusive economic zone or what is normally termed in an EEZ as up to 200 nautical miles from its shoreline. In this zone it has the right to claim exploitation rights over natural resources in the water column of the sea, on the sea floor and under the seabed. (Yamamoto & Esteban, 2014) Additionally, a state can also have the right over its continental shelf, to the end of the continental margin where the shelf drops off into the deep ocean. A continental shelf can extend to either 200 nautical miles off-shore or to wherever the shelf ends. The difference between an EEZ, a continental shelf claim entitles a state to exploit resources on the sea bed and under the sea floor but not in the water column itself. (UNCLOS)

Surrounding the importance of land territory we can understand how an island is defined by the UN Convention on the Law of the Sea. Here, UNCLOS defined it as 'a naturally formed area of land, surrounded by water, which is above water at high tide.' In Article 121 (1) defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide." This definition precludes types of formations, including islands constructed artificially and land masses at low-tide elevations, from having the legal status of islands. In addition, UNCLOS further states in Article 60 (8) at least in the context of the EEZ and through Article 80 concerning the continental

shelf, that “[a]rtificial islands, installations and structures do not possess the status of islands.” (EEZ, Art. 60, 8) Albeit, an artificial island isn’t compatible with the legal definition of an island, a coastal state does have the explicit right to construct them within maritime zones according to the UNCLOS.

A coastal or land-locked state may also construct artificial islands on the high seas. Artificial islands constructed in the coastal state's internal waters and territorial sea, enable the state to exercise sovereignty. In both the EEZ and Continental Shelf, the coastal state wields exclusive jurisdiction over such artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations. Albeit, the coastal state does have jurisdiction, it is equal to sovereignty. Moreover, the right to construct artificial islands also encompasses several legal responsibilities attributable to the state. A prime example, concerning artificial islands constructed in the EEZ and continental shelf, the coastal state is obligated to give other states notification of their construction, as well as maintain a permanent warning system of their existence. Similarly, they are disallowed to construct where there is a presence that would undermine the use of internationally acknowledged sea-lanes. The coastal state is mandated to pass laws to preclude marine environmental pollution from the construction of its artificial islands. Also, if an artificial island becomes partially or completely abandoned, then the coastal state has a general obligation to remove it, to alert other states about its dimensions, location and the depth that remains. (Yamamoto & Esteban, 2014)

The “naturally formed” mandate under the UNCLOS’s island definition has had a peculiar existence due to it being incorporated as a recent addition within international law. The Sub-Committee II of the Second Commission (Territorial Waters) of the 1930 Hague Conference implicitly allowed artificial islands to make territorial state seas, because they observed that “the definition of the Island does not exclude artificial islands, provides these are true portions of territory and not merely floating works, anchored, buoys, etc.” (Report of the Second Commission) The Hague Codification Conference yet failed to adopt a comprehensive convention, and thus of artificial islands bearing the ability to generate maritime zones remained unclear for some time. .

#### **5.4.1 Definition of a Natural Island**

According to the Montego Bay Convention, an island and an island State is defined as: “a naturally formed area of land, surrounded by water, which is above water at high tide.” (UNCLOS, Prov. 239, 1982) However, it appears that with: “[t]he rise of the water level, atolls may be

completely submerged, remaining in the form of some emergent rocks. A rock is defined, according to Article 121 (3) of the aforementioned Convention, as a place which “cannot sustain inhabitation or economic life of their own” (UNCLOS, Art. 121 3) with, as a consequence “no exclusive economic zone or continental shelf.” Therefore, the uninhabitable character and potentially new shape of the submerged island creates important considerations as to where there is a preservation of a sea zone and can it be considered as a territory to ensure the survival of a State.

The consideration has been questioned and considered along a similar and endeavor of the President of Kiribati to establish “ a small government outpost on the State’s only high ground, Banaba Island, so as to retain the State and its control over resources.”<sup>8</sup> (McAdam, 2010:126) would not satisfy the criterion of maintaining a population in the true sense of the term. The presence of some government officials might obviate the island from being downgraded to a rock in the sense of Art 121 93) UNCLOS the personal component of effective statehood would be lost. As the example of the purported state of the ‘Principality of Sealand’ exhibits, periodic visits by expatriate nations are not enough to constitute or maintain a population of permanent residents on the territory if only to guard or maintain any remaining facilities.

#### **5.4.2 Maldives and The Creation of Artificial Islands**

The possibility of creating artificial islands has been strongly considered as a means to avert submergence and to relocate populations. Once again, the Maldives also becomes another primary example of this course of action with the creation of an artificial island of Hulhumalé. Originally intended as a way to meet the demand of a housing, industrial and commercial demand that has been rapidly developing, it was created out of a small landmass that already existed, costing around 63 million USD. In 2011, the Kiribati president also announced the prospect of a 9.3 million Australian Dollar plan to build structures that are structurally similar to oil rights. Thus, the clear advantages of creating artificial islands are underlined: the state would in principle have land and states would continue to have access to resources in the maritime zone.<sup>9</sup> The population could have its own place, in contrast to potential problems or issues concerning assimilating or mixing cultures.

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<sup>8</sup> Climate Change, Migration and Security Climate change not only disrupts ecosystems; it also poses threats to the livelihoods and survival of people worldwide. (n.d.). Retrieved November 12, 2017, from <http://www.klimanavigator.de/dossier/artikel/055512/index.php>

<sup>9</sup>Government land purchase within grasp. (2013, August 23). Retrieved January 03, 2018, from <http://www.climate.gov.ki/tag/press-releases-2/>

The viability of artificial islands has been gaining interest as a potentially effective solution to enable the sustenance of statehood.

The greatest concern still revolves around whether consensus will be acquired on the legal status of artificial islands. The discourse that has been raised concerning creating artificial islands has been gaining traction concerning with regard to its feasibility. It has been realized in a multitude of cases. One of the salient examples is The Spratly Island of Layang in the South China Sea which was artificially constructed by Malaysia through filling in the shallow sea between two reefs in order to create a tourist resort. Another is Hong Kong's airport which is built over two connected islands by land reclamation. (Kelman, 2015)

The prospects that are emerging concern the possibility of carving out territorial states through artificially created islands now include such examples such as Dubai with its artificial archipelago of 300 islands was constructed by dredging sand from Dubai's shallow coastal waters. Legal obstacles and challenges inevitably would afflict a course of action if the constructions of artificial islands are within 200 nautical miles of a coastal state. The state can exercise jurisdiction and the coastal state is the only entity possessing the capability to authorize their construction. (UNCLOS)

Additionally, when the International Law Commission reevaluated the issue in 1956, it excluded any 'naturally formed' requirement in its definition in Article 10 of the draft articles concerning the Law of the Sea.' Comment 2 to draft Article 10 excluded only two features from the proposed definition of island, neither of which addressed artificial islands explicitly. The first exclusion was formations at low tide elevation, pertaining to those with installations, A major issue is where artificial islands could be rebuilt to maintain sovereign rights such as statehood and maritime claims. Concerning archipelago states such as the Maldives, these states can claim sovereignty over their archipelago water as well. Other considerations that inevitably arise are to point out how the impact of the position of the island would have on the right of passage of ships if the artificial island is constructed in the territorial sea or archipelagic waters, and also to choose a location for the island that would violate this right under the UNCLOS. (Gagain, 2009) Similarly, the limitation imposed upon where the state may build artificial islands, in order to maintain their statehood and maritime zones is considered indispensable. It is due to the fact that the farther out of the sea coastal state jurisdiction stretches, the less influence it can exercise. Through the EEZ and Continental Shelf the coastal state only has "sovereign rights" which cannot be equivalent to absolute sovereignty which is tantamount to "functional jurisdiction." (UNCLOS, 1982) Also, constructing artificial islands in the high seas in conjunction with the ability to impose maritime

zones could lead to a corresponding state sovereignty claims. In the 1950s, during the ILC's deliberations over whether to incorporate a requirement of natural formation into the definition of islands, concerns arose about the manipulation of artificial island construction to expand maritime zones. One of the solutions to obviate potential abuse of attempting to expand maritime zones becomes the requirement of the constructing state to permanently demarcate its baselines in the face of rising sea levels that could modify the baselines. Irrespective of whether an artificial island is granted the ability to generate maritime zones, its presence would at least lend greater legitimacy to freezing maritime zones in the absence of naturally formed land. UNCLOS does elevate primacy to settling disputes through what are considered informal means such as negotiation, yet if the parties to the dispute cannot reach a settlement, the parties can select among a number of third-party adjudicatory tribunals to have the power to render binding decisions. (Yamamoto & Esteban, 2014)

One of the proposals conceived through the absence of a concrete legal doctrine, becomes how the Maldives could advocate for further developing in the Law of Sea Convention, a recognition-based theory by the international community to give effect to artificial island construction for this purpose. Even if, states establish a practice toward the treatment of artificial structures, currently under international law construction need not be approved at the international level. (Gagain, 2009) Also, legal commentators may provide a considerable amount of guidance in terms of distinguishing between an "installation" defined as human built structures made out of steel or concrete, and "artificial island" which is constructed with natural materials such as soil and rocks. (Yamamoto & Esteban, 2014)

Regarding the Maldives, the construction of Hulhumalé was a reclamation project, which was preferred by dredging sand from the sea floor and positing it in a shallow lagoon, which is compatible with the definition of a territory. Even considering that a natural island is artificially constructed it would not lose its status as an "island." Still the grounds or merit of the argument as to what the definition of an island is still revolves around the notion that it must constitute "an area of land." Here, we shift our focus to the possibility that an island can no longer sustain a population and how that would critically impact certain rights under EEZ.

### **5.4.3 Scenario I: Barren Rock**

According to the legal point of view, in the case of an island that could no longer sustain a human population they would be stripped of their right to claim the Exclusive Economic Zone due to "barren rocks" which do not satisfy a the basis for claiming an island. Yet, the Island State could



proceed to claim a territorial sea and a contiguous zone since these elements are not regulated by the article island statute, but on grounds of UNCLOS applicable to ‘other land territory’ Art.12(2) Additionally, it would also be stripped of its sovereign rights over the Continental shelf if it didn’t establish its outer limits according to UNCLOS. Yet, it may be possible to claim that the interpretation of an island could rely on Art.121 (11) of UNCLOS and not Art.121 (3), and therefore maintain a claim to the EEZ even though the legal case would be extremely complicated.

The rise in water level has already precipitated large scale damage to the vegetation in several atolls such as the Carteret Islands in Papua New Guinea. The small islands are experiencing unremitting water stress at present, as pollution and high levels of extraction are already exhausting this resource. One of the tremendous concerns that has been pointed out is the impact of extreme weather events or what are referred to as the “king tides” in the Carteret Islands that would reduce the availability of fresh water. (Maclellan, 2009) Coral bleaching also can lead to the disappearance of the fish stocks that depend on the corals for survival and coral reefs are not anticipated to be resilient against the multiple stresses that are currently affecting them. (Yamamoto & Esteban, 2014)

One action that has been pondered was that of the president of Kiribati who has considered anchoring his government on a single highly elevated point of Kiribati to be able to retain its statehood and EEZ including the natural resources present. Other proposals advise to build a lighthouse or another construction on the island that will remain above seawater as a sort of sovereignty marker. Deriving the claim that when islands being completely submerged a tall structure such as a lighthouse could be built to maintain a claim on the adjacent waters. This structure would entail a population a limited number of people, such as maintenance personnel or weather observers. Even though the costliness of this implementation would outweigh its construction, it could assist in facilitating the island from being classified as we previously identified as a barren rock under Art. 121 (3) of UNCLOS. Yet, it still remains unclear concerning whether these people would be categorized as a population, due to the necessity for the islands to have an “economic life of their own.” Moreover, it is actually unlikely that a Small Island Developing State would be able to fund a sufficiently large structure to house over 50 individuals, which has been suggested as constituting the minimum number of people required to consider that an island has an “economic life of its own”. Also, in reference to the dictates of the Convention on the Law of the Seas, military and governmental facilities do not fulfill the requirement of economic life and hence it is unlikely they would prevent the island from being re-classified as a rock. The purpose of this symbol of hope becomes to demonstrate *animus possendi* of the island state and to

claim back land if the sea level would ever decrease again. This approach enables the understanding that if an island state would suffer a mere temporary loss of territory it would be able to preserve and resurrect all its previous international rights and duties. A theory which endorses this line of reasoning is the *uti possidetis* doctrine.<sup>10</sup> This modern concept of the doctrine was utilized so that per-colonial territorial borders in Central and South America could return after the decolonization process of the nineteenth century. The Doctrine was characteristic of decolonization practices and reappeared in 1992 to give Yugoslavia its original boundaries back. On the concept of *uti possidetis*, the Badinter Commission also agreed that the concept is malleable to fit beyond its former application in decolonizing times that it can be applied in instances of self-determination unrelated to decolonization. (Pellet, 1992)

Other approaches that have been entertained are along the lines of Seasteading that contemplate the possibility of artificial islands or installations that are located in international waters.<sup>11</sup> Presently, there are no specific laws concerning the construction of sea-based communities, whereas Seasteading could open the practice to more individuals to take part. The recent example of building the principality of Sealand which is about seven nautical miles from the British coast is an area that is formerly part of international waters. Yet, no state has recognized this micro nation as a microstate, which accentuates the significance of the act of recognition. The Indonesian Minister of Maritime Affairs has entertained the possibility of leasing or renting out 7,500 islands to climate refugees. Yet, in such situations, sovereignty over the area would remain with the leaser, though the leasee would also receive jurisdiction. The division of powers who possibly could be altered since there are no binding international rules on lease and it will be hinged on the treaty that governs the lease. (Ronen, 2008)

#### **5.4.4 Scenario II: Submergence**

Point 3 of Art.121 of UNCLOS is unequivocal in that an island which is entirely submerged would lose its ability claim an EEZ around it. Already, it has been reported that two small

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<sup>10</sup>. Uti Possidetis is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power...Its major purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored. There is a Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Judgment, 22 December , 1986.

<sup>11</sup>. The present legal analysis understands that rights and obligations regarding the the use of the oceans are delegated to tates rather than natural or legal persons such as individuals seasteaders or burgeoning organizations like the easteadng Institute.

uninhabited Kiribati islands have disappeared under the waves. One of the prominent cases that has emerged relates to September 2009, when the tiny island of Bermeja, in the Gulf of Mexico could no longer be found. As a consequence, the USA asserted that without an island there could be no claim on the EEZ which would lead to a dramatic reduction of maritime territory of Mexico. (Yamamoto & Esteban, 2014)

#### **5.4.5. UNCLOS Conclusion**

We can draw attention to the chief conclusions concerning UNCLOS and its rules, first and foremost, submerged territory is not territory and that territory must be capable of sustaining human habitation or economic life. In what we have seen is in its rules for the measurement of the territorial sea, and exclusive economic zone, the UNCLOS is unequivocal in its findings that submerged territory doesn't support any claims to maritime spaces or resources. Importantly, for an island to form the basis of maritime entitlements under the UNCLOS, it must again be "a naturally formed area of land...which is above water at high tide control over large swaths of the sea as the various islands within their territory are submerged, which could dispossess them of important government revenues such as fishing licenses." Moreover, in the treatment of rocks as a basis for maritime entitlements, the UNCLOS unequivocally states that "rocks which cannot sustain human habitation or economic life" cannot form the basis of maritime entitlement. In the 2001 Qatar/Bahrain Case, the International Court of Justice rejected Bahrain's contention that "low-tide elevations by their very nature are territory" instead affirming that the existing rules "do not justify a general assumption that low-tide elevations are territory in the same sense as islands." This rule is a restatement of widespread state practice that requires territory to be capable of occupation and employ if it were to be used as a basis for claiming marine entitlements. (Qatar v. Bahrain Judgment of 16 March 2001)

Ultimately, we can deduce that these regulations underline the fact that international law has comprehended the claims to territory on the functional ability to control and use such territory.

### **6. Effective Government**

One of the key criterion of the Montevideo Convention has been questioned on grounds concerning what is the definition of an effective government. Government is regarded as a central

criterion for claims to statehood which is believed to warrant claims of independence and the aspiration of recognition from the international community. This is particularly challenged by what are deemed as 'Failed States.' Thus, many states still retain statehood without functioning governments. The 2017 Failed States Index has listed 10 states that are unable to provide public services required of government. (Fund For Peace, 2017). State failure is characterized as the inability of a State to carry out its obligations towards its citizens and towards the international community in general. The consensus aligns behind the affirmation that the loss of stable and effective government' does not remove the attribute of statehood, once statehood has been acknowledged. Moreover, it is accepted that once statehood has been recognized, a temporary disruption of governmental effectiveness does not terminate it. Again, Failed States are defined by an implosion of State's structures, which renders governmental authorities incapable of performing their functions, including providing security, respecting the rule of law, exercising control, supplying education and health services and maintaining economic and structural infrastructures.

According to Daniel Thürer in the context of 'failed states':

“Even when States have collapsed, their borders and legal personality have not been called in question. Such 'fictitious' States have not lost their membership of international organizations, and on the whole their diplomatic relations have remained intact. Though they are unable to enter into new treaty obligations, the international law treaties they have concluded remain in force.”  
(Thürer, 1999: 752)

State failure can be regarded as a condition in which the State is unable to provide political goods to its citizens and to the international community. These specific goods include security, border control, a political structure, physical infrastructures, a judicial system, education and health care, and commercial and banking systems. (Giorgetti, 2010 ) Yet, questions could arise as to what the definition precisely is concerning 'effective' government, considering cases such as Croatia and Bosnia-Herzegovina were independent states that were recognized by the European Community despite the fact that non-governmental forces controlled a significant amount of their territories. Also, we can point to Somalia which has been deprived of a government for more than a decade, the Democratic Republic of Congo which is shattered by fissiparous rivalries and the presence of regional troops that are competing for its mineral resources. It appears that failed States and generally all States, will persist to be States even when the dimension of effective government is

lacking or altered. In fact, “civil wars and international disturbances, while often rendering the domestic legal order of State totally ineffective are not treated by State practice or legal theory as situations that annul the legal personalities of States.” (Giorgetti, 2010: 61) A major example becomes the continuation of statehood which has been recognized in the case of Somalia, which has been deprived of a functioning government since 1991. Accordingly, in Security Council Resolution 1558, of 17 August 2004, endorsing the Somali National Reconciliation Process, the Council reaffirmed “the importance of the sovereignty, territorial integrity, political independence and unity of Somalia.” (S.C. Res. 1558, U.N. Doc. S/RES/1558, 2004)

Another major period that arose to confirm that an ‘effective government’ does take away from Statehood can be pointed out through the Decolonization Process in the 1960s, where numerous states acquired independence even if there were no existing powers that were able to exercise governmental functions. We can illuminate the example of the Congo, which obtained its independence from Belgium on 30 June, 1960 even in the middle of internal fighting. After independence, the Congolese Public Force revolted, Belgian Troops intervened and one of the major provinces, Katanga announced secession from the main territory. Yet, the Congo was admitted to the United Nations in September 1960, as two different factions of government attempted to be accepted at the UN as legitimate representatives. Another prime example involves the independence of Guinea-Bissau from Portugal, when under Portuguese rule, the African Party for the Independence of Guinea and Cape Verde declared independence unilaterally. A UN General Assembly vote took place in 1973 that denounced illegal Portuguese aggression and occupation, and a dialogue underwent concerning the issue of “illegal occupation by Portuguese forces” of the territory of Guinea-Bissau. Western States didn’t acknowledge the existence of the necessary criteria for statehood, but GA Resolution 3061 XXVIII accepted the “recent accession to independence of Guinea-Bissau” albeit its government controlled neither a majority of the population nor its main towns. (Giorgetti, 2010)

Overall, statehood has subsisted even when governments of existing states had limited effectiveness. This supports the rule that the form of government in itself is insignificant.. The ICJ commented in the Western Sahara advisory opinion that:

“No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.” (Western Sahara, Advisory Opinion, I.C.J. Reports, 1975)

In addition, Crawford's assertion: "International law lays down no specific requirement as to the nature and extent of this [governmental [control [of territory], except that it include some degree of maintenance of law and order and the establishment of basic institutions." (Crawford, 2006: 59) He further asserts that: "[T]here is a distinction between the creation of a new State on the one hand and the subsistence or existence of an established State on the other. In the former situation the criterion for effective government may be applied more strictly." (Crawford, 2006:51) If we dissect the third requirement of the Montevideo Convention, an argument could be made that a low-lying state could very well continue to have a government. Perhaps, we can tease the following implication that for the purposes of the continuity of the existing Small Island Developing States, that any form of government, even encompassing an ex-situ government could suffice. Yet, it also presupposes there is an exercise of some form of degree of control of its territory. Albeit, major concerns around revenue, securing governmental services, and human rights still need to be addressed if this criterion would cease to be satisfied.

We can further emphasize the particular vulnerability of Small Island Developing States and their exposure to natural hazards that is believed to further degrade their effective governance abilities.

## **6.1 Effective Government Conclusion**

In addition, possible conceptions that could emerge are 'States-in-Exile' or those states that do not have dominion over their original territory due to its destruction. One of the incarnations of governance entities that are without a territory that participate in intergenerational relations on a with landholding states has been referenced as the Sovereign Military Order of Malta and the Holy See. Although International law recognizes the former a sovereign subject, with its basis in Rome it still lacks what are considered the traditional criteria of statehood—a permanent population and territory.

The issue brought forth in the following chapter regarding governments-in exile- will inevitably engender challenges if populations are relocated elsewhere. Therefore, how could a government-in-exile have the capacity to exercise authority over the territory and importantly persons who would residents of other states? These, mounting difficulties could arise, where a government may lack both the right to authority and the actual authority necessary for the establishment of a legitimate government.

## **7. Capacity to enter into relations with the other states and Independence**

The 'capacity to enter into relations with States' is not the exclusive entitlement of States: autonomous national authorities, liberation movements and insurgents are all capable of maintaining relations with States and other subjects of international law. Moreover, the capacity to enter into relations is interdependent on the existence of a government. Thus, the capacity to enter into relations is consequentially defined through statehood. Presently, the island states are still recognized in international law, leading to their capability and disposition towards entering into relations with other states. It could be understood that the capacity to enter into full range of international relations can be a valuable measure, yet the capacity or competence in this sense is also contingent in part on the power of the government, without which a State cannot carry out its international obligations. The ability of the government to independently fulfill its obligations and accept responsibility for them is hinged upon the notions of effective government and independence. Legal independence is regarded as an essential criterion for statehood, and under this understanding, the island state would not lose its independence even if the diminished territory precluded it from upholding its previous level of self-reliance, as long as it did not subordinate its legal order to that of another state. (Stoutenburg, 2015) This could be the case even if the government established itself in exile insofar as governments in exile represent an existing State that continues to enjoy legal independence, even if the factual exercise of this independence might be restricted in some circumstances by the territorial sovereignty of the host State.

The capacity for states to exist even though they are dispossessed of certain elements defined in the criterion still can be challenged. Through a multitude of ongoing territorial disputes unfolding globally, there are still considerations that statehood itself remains ongoing. Secondly, even with a fluctuating population and migration patterns, a statehood status doesn't become entirely jeopardized. Also, through the debilitation of effective governments or what are now termed as failed states, a definition of statehood still remains intact. To further buttress the significance of the fourth criterion, it can be understood that it manifests the ability and willingness of a state's ruling power to observe international law. Thus, the ability of entering into relations with other states should not be of a state since the creation of entities such as the European Union which also possess this same capability. Critically, independent relations remain a crucial element, especially when considering the notion of state continuity, rather than state creation. Ideally, a state would be regarded as independent on a formal level and also a legal level, and on a factual or actual level. Factual independence then relates to being self-sufficient. A myriad of situations are not conceived

of as obstacles for factual state independence which encompasses illegal intervention, a small size of resources or territory, and political alliances or policy orientation between states.

Overall, it can be considered that the effectiveness of a state has to be judged according to the conditions and circumstances that lead to its contextual understanding. The fundamental challenge becomes anchored in the relation between what will be acceptable on grounds of external control and true alien dominance. This is especially pertinent in the concept of *ex-situ* which bears the onus attempting to divorce itself from too much interference from the state containing the government *ex-situ*, and the also the numerous states that will be hosting.

Fundamentally, the strong presumption of continuity of existing States means that that other States may continue to treat Small Island Developing Island States as such even though there is lack of effectiveness. (McAdam, 2012) In cases such as a when a government operates in exile, the State can continue to exist, yet its governmental function incapable of being performed within its own territory. The principle of territorial sovereignty suggests that a government may only act as a government-in-exile with the consent of the State in which it is located. The power of such a government are bit circumscribed than when it is operational within its own territory. The cardinal take away from the consideration regarding independence can extend to government-in-exile's where critically if its functions are not interfered with or crucially controlled by other host State than independence can be preserved. (McAdam, 2010)

## 7.1 Non Recognition

In favor of ensuring the retention of recognition from the international community we can cite 'The duty of non-recognition' which derives its notion from the notion of effectiveness, rather from the notion of legality. Non-recognition is only considered as an option if the unreliability of the new state as a partner in international relations couldn't be called on to fulfill its international obligations and responsibilities. (Stoutenburg, 2015) Ultimately, non-recognition is only considered as option if the unreliability of the new state as a partner in international relations appears to be so serious that the community of states, on the account of its self-image as a legal community abstains from incorporating the new state and wards it from recognition within the wider international arena. This duty is hinged upon the Articles of Responsibility of States for Internationally Wrongful Act as a means to repair injustice brought on by a breach of peremptory norms. (Responsibility of States for Internationally Wrongful Acts, 2001) Arguments that the overruling nature of peremptory norms involves that an entity cannot be called a state, even if its effective when it breaches a peremptory



norms. Peremptory norms or *jus cogens* rules are stipulations of international law deemed so vital by the international community that they are prioritized at the top of the hierarchy of international regulations, that they overrules all others. The Convention on the Law of Treaties specifies that a treaty is void if at the time of its termination, it violates a peremptory norm of general international law. The same article defines peremptory norms as “a norm accepted and recognized by the international community of States as whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” (VLCT, 1978: Art.53) Yet, it is accepted in international legal doctrine that the extent of *jus cogens* exceeds the bounds of law of treaties. This is particular notable in the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrong Acts of 2001. These Articles 40 and 41 DASR define the particular consequences for a grave breach of an obligations that emerges under a peremptory norm of general international law. Here a breach of *jus cogens* is defined as serious in Article 40 (2) DASR “if it involves a gross or systematic failure by the responsible State to fulfill the obligation.” This import is crucial in pointing that a serious breach occurs, States are *inter alia* prohibited from recognizing the resulting situation as lawful. This duty of non-recognition is vital to the application of the concept of *jus cogens* to issues concerning territorial status. (Stoutenburg, 2015) The corollary follows that there is a denial of the status of statehood to effective territorial entities that are created through fundamentally illegal circumstances. Here, state practice has denied the status of statehood to effective entities that have originated by aggression or the use of force, which exemplifies a gross violation of the right to self-determination. Some countries choose to no longer recognize states with racial discrimination. One of the earliest manifestations of this is the State of Manchukuo which was established by Japan on Chinese territory in 1931, which prompted the League of Nations to reject recognition. Similarly, the Turkish Republic of Northern Cyprus, which came into existence in 1983 due to Turkish military intervention, follows a parallel line in terms of refusal of recognition among the international community. (Stoutenburg, 2015) Moreover, the instances that have arisen regarding creation of states that breach the right to self-determination and the enforcement of racial segregation are equally exemplified by the white minority regime established in Rhodesia in 1965 which neglected the will of the majority of the population. The common thread of all these cases is that non-recognition became a duty that was exercised collectively through the political forums of the League of Nations and subsequently the UN. Cases that have been outlined so far of involuntary State extinction has been attributable to foreign influence have been indicative of a forcible intervention of other countries.

State practice concerning the ongoing existence of State whose effectiveness or challenged legitimacy has been declared in violation of peremptory norms of *jus cogens*, remains restricted to cases of states that have been illegally occupied or annexed through the unlawful use of force. Article 41 DASR also extends the duty of non-recognition to all serious violations of *jus cogens*, without rendering a particular distinction as to what peremptory norm has been breached. This underlines a general principle, where there is a duty not to recognize the extinction of a State catalyzed by a serious violation of *jus cogens*, and to continue the recognition of the international legal personality of the affected State. Jenny Grote Stoutenburg further ponders whether the extinction of low-lying island States that is due to the escalation of anthropogenic climate change could generate a serious violation of peremptory norms of general international law. She points to how several fundamental international norms would be adversely impacted by the disappearance of an island State. She acknowledges that the nontechnical term “affected” is utilized intentionally, because there is still a difference between saying that has a right has been affected (i.e. that is exercise has been factually undermined) and that it has been violated through a breach attributable to another party such as State. (Stoutenburg, 2015)

This duty has been recognized as beneficial to oppose recognition of changes of power that is inaugurated through revolution, racist policies, the recourse to illegal force or actions that are a violation of the right to self-determination. This duty has already been recognized as a precedent in the past and was endorsed by the UNSC to call upon all states to regard the declaration of independence of the Turkish Republic of Northern Cyprus, or of any prior State other than the Republic of Cyprus as invalid and to abstain from recognizing the creation of such an entity. Similarly, the duty has often been employed in a part in the non-recognition of the demise of states. One reference can be made to Kuwait and the Baltic States, which potentially would be considered extinct if were not for the international community’s duty not to recognize their new status as illegally annexed entities. The ICJ has also confirmed the existence of a duty of nonrecognition in providing two advisory opinions on the Namibia Advisory Opinion of 1971 and the Wall Advisory Opinion of 2004.

One of the loci of emphasis becomes the loss of their territorial basis of statehood that would be severely impact the islanders’ right to self-determination. The right to self-determination has gained traction as an established norm of international law and has obtained the highest possible status in the elementary hierarchy of international law. Stoutenburg references the East Timor case, which the ICJ asserted that “Portugal's assertion the right of peoples to self-determination as it evolved from the Charter and from United Nations practice, has an *erga omnes* character is

irreproachable.” (East Timor Portugal v. Australia, Judgement I.C.J., 1995) Here it is being generally understood that this *erga omnes* effect of the “right to self-determination derives from its recognition and qualification as a peremptory norm of international law.” This is to be understood that this *erga omnes* effects of the right to self-determination derives from its qualification as a peremptory norm of international law. (Stoutenburg, 2015)

Furthermore, The Common Article 1 (1) of the two International Human Rights Covenants of 1966 specifies that by virtue of their right to self-determination, all peoples “freely determine their political status and freely pursue their economic, social and cultural development.” (ICESCR, 1966 art. 2) Here, the devastating impact precipitated by Climate Change is bound to severely impact State economies, destroy the social fabric and displace island cultures. Thus, the destruction of a physical basis for an island as would occur with the submergence of a small island would undermine the ability of the islanders to determine their political, economic, social and cultural future. (Stoutenburg, 2015)

## **8. Alternative Solutions**

Here we can examine the following solutions that attempt to preserve certain facets of the criterion insofar as potentially be a means for recognition from the international community. These solutions cover the following alternative arrangements that could be amenable for retaining a criterion within the Montevideo as considerations for: Cession of Territory, Transfer of Territory. The inclusion of a case study that explores the implications of islanders being relocated and falling under a different jurisdiction, Government-in-Exile and Deterritorialized States to test whether they can be resources for continuing a semblance of statehood.

### **8.1 Cession of Territory/Land Acquisition**

The desire for the preservation of sovereignty without relinquishing the ‘territorial’ criterion also provides another slew of considerations to undertake for Small Island Developing States. Yet, it can be possible for example if one State does ‘lease’ territory from another, one might inquire to what extent that it could be exercised in a manner that would suffice to meet the other requirements of statehood. The cession or the transfer of a part of the territory between States is among one of the modes of acquisition and the transfer of territory traditionally recognized as lawful under

international law. Therefore, an entity must have a government “in general control of its territory, to the exclusion of other entities not claiming through or under it.” (Crawford, 2006: 59) In the cession of territory, a transfer of sovereignty over a certain territory would take place between the owner-State and a Small Island Developing State that has lost its last islands. Thus, a cession of territory represents a “bilateral mode of acquisition which requires the co-operation of the two States concerned, where the other modes are unilateral.”(Akweenda, 1997: 140) The exchanges of territory have been frequent occurrences throughout the course of history. The prime example becomes the eighteenth century transfers that were commonplace especially when monarchs would cede territory by marriage or testament. The voluntary cession of territory between countries has been highlighted in modern times, through examples such as the selling of Louisiana by France to the United States in 1803, Alaska by Russia to the United States in 1867, or Denmark ceding the Danish West Indies to the United States in 1917.<sup>121314</sup> Furthermore, Prussia’s endeavor to maintain its presence in the area resulted in their purchase of the Marianas and Caroline Islands from Spain, which decreased the boom on a massive colonial empire that had lasted for over three centuries. (Camprubi, 2016) One of the underlying principles of the treaty of cession must be followed by tradition, which is the transfer of the property but subsequent to the ratification of a treaty. (Oppenheim, 2008) The practice of buying and selling these territories at their will, without consultation with the local inhabitants has appeared to historically occur. We can identify historically how the cession of territory was attributed to the fact that environmental disasters have unfolded and created historical precedents as in the 1870s when Iceland suffered a volcanic eruption that exacerbated the incapacity for sustenance on the island. It followed that Canada granted Icelanders a piece of land and provided them with Canadian citizenship, which guaranteed a dual Canadian-Icelandic citizenship. Ultimately, the New Iceland joined the province of Manitoba and become incorporated into Canada. (Yamamoto & Esteban, 2014) Albeit, the preceding examples of the cession of territories were not unprecedented, Rosemary Rayfuse has underscored especially in the case of Small Island Developing States that it would be inconceivable from a practical perspective, since it would be difficult to find a State which would agree to cede part of its territory unless the territory is uninhabited, uninhabitable, not subject to any property, personal, cultural or other claims, and devoid of all resources and value whatever to the ceding state. (Rayfuse, 2010)

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<sup>12</sup> Treaty concerning the Cession of Louisiana to United States, 20 October 1803. Available on the internet at

<sup>13</sup> Treaty concerning the Cession of the Russian possessions in North America by his Majesty the Emperor of all the Russians to the United States of America :June 20, 1867, available on the Internet at

<sup>14</sup> Convention on the cession of Danish West Indies, between the United States and Denmark January 25, 1917

Speculation has transpired as to what course could be undertaken for Small Islands in their effort to maintain a form of livelihood and statehood. In their endeavor for an alternative land to relocate to, two ways that Atoll Island Group could acquire a variety of types of lands could be defined as the following:

“Islands where the Atoll Island State would acquire (in some form or another) the entire island of another country Portions of land belonging to a larger landmass, which would result in the sharing of small island or a territory being locate in a continental mass or large island.” (Yamamoto & Esteban 2014: 189)

Thus, through the acquisition of the land, the implications are bound to ferment dramatic changes for the culture of islanders, as they would shift from a situation of relative isolation to one of interaction. Also, it could entail a change from having the sea as the boundary of their lands to a situation where people and good would live and adapt to land territory. Finally, and importantly the citizens of these island would also lose the status of being the main actors on the land.

## **8.2 Transfer of Territory**

One of the following examples also sheds light on the possibility of transferring a sovereign entity to a new territory, which also highlights how an entire cultural group migrated while preserving their identity and government. We can trace this particularly through the Free State of Orange. The Dutch settled the Cape of Good Hope in 1652, and had the area remain under Dutch sovereignty until 1806. During this time, Boer farmers were incessantly on the move in terms of their settlements, yet this transformed after the change in administration from the Netherlands to Great Britain in 1814, where disenchantment began to brew amongst the population that disagreed with several policies of the new colonial state such as the abolition of slavery in 1833. It propelled the African-Dutch community to form the Free State of Orange, the African-Dutch Republic and the Colony of Natal. (Yamamoto & Esteban, 2014) The population decided to establish a new colony on an independent basis on lands that were considered as ‘*terra nullius*’<sup>15</sup> with no imposed restriction by Great Britain. This example would be considered a case where a total change of territory unfolded, with the old entity still maintaining their sovereignty while relocating to new lands. In fact, the resettlement was enabled due to the fact that Western Nations and their colonists

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<sup>15</sup>. 'Terra nullius' is a Latin word, which means 'land belonging to no-one.'

assumed that the lands around them were regarded as *terra nullius*, which allowed them to profit from their occupation whether or not other persons were already inhabitants of the land. Yet, the solution of a total transfer of population to a new territory is highly improbable, as a State that would be willing to cede some of their land to another country still is a contested practice. (Yamamoto & Esteban 2014)

The acquisition of land does not guarantee immigration or citizenship, it would be considered under the auspices of a private property transaction. Furthermore, international law would be relatively limited in preventing a host country from expelling host state from doing so, on the condition if another country is obligated to admit them. (Yamamoto & Esteban, 2014) The issues arising here stem from the question of whether the land acquisition options will be followed and promoted by host states. Land acquisition as pointed out above with Maldives could be contrived as a long-term adaptation strategy supported through a sovereign wealth fund that would enhance the possibility of the acquisition and purchase of new land.

A Kiribati minister stressed to the UN Human Rights Council in January 2015, the government intends to buy land when its islands are rendered uninhabitable, and importantly affirming it will supply the option to 'migrate with dignity'.<sup>16</sup> Australia then proposed that the population would manage its local administration and could make domestic law applicable to its own community, while simultaneously acquiring Australian citizenship. Furthermore, states are apprehensive to relinquish their sovereignty as a result of an international obligation and potentially issues that arise with states withdrawing or reducing their obligations than by extending them.

Kiribati and Tuvalu have also scoped in on the prospects of relocating their populations to New Zealand and Australia. Yet, it also yields historical examples that have precedents with the Russia selling Alaska in 1867 to the United States. Also, the Tuvaluan Vaitupu people purchased land from Fiji or the Kioa Island in 1947 and the Banabans from Kiribati purchased the Rabi island in Fiji in 1945. (Brookings Institute, 2011) Also, Kiribati purchased land in 2014, in Fiji for 8.77 million USD. (Camprubi, 2016) Yet, if the population is relocated to another state, the island state does face the problem of not possessing the same legal status. A myriad of issues could transpire if the land will be bought as a private property purchase, will not coincide with rights given to citizens, and importantly the possibility of the laws of the selling country will overrule the former State. Also, other concerns that emerge underscore the scenario and concern that if a host state desires to reclaim its purchased land, international law could not obstruct this action. (Yamamoto & Esteban, 2014) Thus, the core principle of territorial integrity will show itself to be a major obstacle

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<sup>16</sup>. Climate change 'threatens self-determination' of citizens in island States, UN rights council told. (2015, March 06). Retrieved November 25, 2017, from <http://www.un.org/apps/news/story.asp?NewsID=50257>

in the preservation of island state sovereignty. A state also parceling out its territory and giving its territory or legislative powers to another will inevitably confront objections and issues, especially with issues that could revolve around how human rights standards differ in their domestic law. (Yamamoto & Esteban, 2014) Ultimately, the exercising and the enforcement of jurisdiction in the territory of another state is difficult because it is widely regarded as a breach of the territorial integrity of the host state. (George Jain, 2014) It remains politically unlikely that host states will consent to allow other states to exercise enforcement jurisdiction within their borders. It would be likely that there will have to be a reliance on the cooperation of the executive organs of the host state.

Mohamed Nasheed who was the former president of the Maldives expressed his interest in acquiring lands in 2008 to evade the possibility of losing statehood once Maldives becomes submerged by the oceans. The possible list of countries that he believed could offer lands were Sri Lanka and India, pointing to the compatibility between culture, cuisine and climate with Maldives. Nasheed affirmed that the funds for procuring these territories would come from a “sovereign wealth fund” that would be generated by a tax on tourists. Kiribati has purchased land on Fiji where the president has conceded it too late for Kiribati to survive sea levels prompting them to purchase land. It is a 5500 acre Nabavatu Estate, a freehold property worth up to 8.77 million in 2014.<sup>17</sup> Presently, Fiji's current prime minister asserted his embrace of climate refugees from Tuvalu and Kiribati, yet the question over legal precedents or ways of enforcing this in the event of future changes. In 2008, Tuvalu had also requested the government of Australia to grant resettlement to Tuvaluans though the Australia government did not endorse the request. Yet, one of the representatives of Torres Strait Island, which belongs to Australia, did informally promise the use of their islands. Yet, the effectiveness of this response is questionable. (Yamamoto & Esteban, 2014) Considering that these islands would similarly face the effects of climate change and they would also confront the problem of a massive flood of people from the low-lying swampy southern coast of Papua New Guinea. One of the critical points to emphasize as it relates to cession of territory is that Kiribati purchase’ does not entitle sovereignty over this land. Furthermore, there is no legal guarantee that the Kiribati could move to the land and the terms of the migration will still be in the hands of the Fijian administration to determine. (Ellsmoor J., & Rosen, Z., 2016) If a territory does remain, legal implications will inevitably transpire due to the partial loss of land territory. Conversely, an alteration of treaty-limits can also entail an automatic extension of treaties' effects over newly gained state territory.

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<sup>17</sup>.Kiribati's land purchase in Fiji: does it make sense? (2016, January 10). Retrieved November 12, 2017, from <http://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/>

We can further highlight historically what have been the significant challenges that have occurred for inhabitants of Small Island Developing States, especially those who are considering the prospects of a cession of territory and merger with another State.

### **8.3 Case Study: Banabas**

To further illustrate the potential ramifications that a total transfer of population between two islands can have on its population we can steer our attention towards Banaba. The Banaba Island is an island in the Pacific Ocean that is a raised coral island that is west of the Gilbert Island Chain and 298 km east of Nauru. It is part of the Republic of Kiribati, and it is 6.0 km and the highest point on the island is also the highest point in Kiribati 81 meters high. The Banaban people and their lifestyle changed drastically after their island was annexed by the British Empire after it found that 80% of the island was composed of phosphate. Between 1901 and 1979, all but 60 hectares of their 595 hectare home island of Banaba was mined and shipped off by colonial interests. Thus, Banabans were forced to leave their island with the origin of the phosphate extraction beginning 1900, when the Pacific Islands Company secured the sole rights to mine the island for 999 years in exchange for 50 pounds per year. Phosphate was critical in boosting the developing of farming in New Zealand and Austria. (Hindmarsh, 2002) In 1901, a British warship raised a British flag on the island, which then labeled as a protectorate, which eventually become transformed into a colony in 1916. (Yamamoto & Esteban, 2014) In 1942, Japanese troops proceeded to occupy the island and left three years later, when the British Phosphate decided to relocate the remaining population to Rabi island, 2,400 km away from Banaba Island which now belongs to the Republic of Fiji. (Hindmarsh, 2002) Rabi Island was purchased with the Banaban Provident Fund of the Islands. Now it is under the sovereignty of Kiribati, while Banabans live on Rabi island, which is part of the Republic of Fiji. The administration system on Rabi Island was established in the 1945 Banaban Settlement Ordinate No. 28. (Sigrah & S. M. King, 2001) The community was then under the control of Europeans who became advisors to the Banabans. In the 1960s, the Banabans acquired more autonomy under the Rabi Council of Elders. Banabans embraced the freedom of movement to Banaban Island and their land interests, payment of annuities from mining in Banaba. In 1979, mining was terminated and the Banabans lost their annuity and their economic situation became increasingly precarious. It became clear that Banabans had limited resources to develop economically and their autonomy was severally curtailed by economic factors since there were not many jobs available on Rabi Island. In terms of their legal status, the Banabans were classified as



Fijians according to the 1970 Constitution, under the same category as indigenous Fijians. Other groups such as the Tuvaluan community were registered as “General Voters.” Yet, following the Constitution of 1990 and 1997, the status of the Banabans switched from “Fijians” to “Generals”. Their current legal status within Fiji is that of a minority group in the same way as that of Romans, Indians, Europe, part Fijian and Chinese Minorities. (Yamamoto & Esteban, 2014) Their status has relegated them to limited rights and education benefits, which could result in their being excluded from mainstream economic and education benefits. Practically, this suggests that Banabans are incapable of being able to access special benefit schemes of affirmative action afforded to indigenous Fijians. Banabans are allowed to vote in national elections and the process of formal naturalization began in 2005, when the government affirmed they could apply for citizenship in three months. (Yamamoto & Esteban, 2014)

Banaba Island is presently under Kiribati’s sovereignty and its status is provided for in Chapter IX of the Kiribati Constitution. (McAdam, 2011) These provisions include some safeguards to Banabans, where they retain rights certain over their land. For example, all land that that was acquired by the Crown before Kiribati Independence Day would be returned to the Banabans upon the completion of Phosphate extraction. Also under these provisions, Banabans are entitled to enter and reside in Banaba ,and the administration of Banaba is provided by the Banabans through the Banaba Island Council. Banabans, also have their status confirmed in the legislation of both Kiribati and the Republic of Fiji.

#### **8.4.1. Case Study: The Chagossian Displacement**

The Chagos Archipelago is a group of atolls located in the Indian Ocean, between India and Africa. The largest island in the archipelago is Diego Garcia which was leased to the US by the UK and currently is host to the largest US military base outside the United States.<sup>18</sup> The Chagos Archipelago was the British colony of Mauritius for an estimated 200 years and was on the verge of becoming independent on November 1965 under the BIOT Order of the Queen of England. Through this order, Chagos remained under control of the United Kingdom while Mauritius became independent in 1968. (Yamamoto & Esteban, 2014) The archipelago is currently under American and British control, though the Republic of Mauritius also has claims of sovereignty over it. The

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<sup>18</sup>.Shapiro, A. (2015, April 16). Islanders Pushed Out For U.S. Base Hope For End To 40-Year Exile. Retrieved November 25, 2017, from <https://www.npr.org/sections/parallels/2015/04/16/399845336/hope-builds-for-islanders-displaced-in-shameful-chapter-of-u-k-history>

Americans operate the base and the British manage the police, court system, work and entry permits. In order for the United States to build its base, the UK was compelled to remove the entire population which was around 1,800 people at the time. Through the purchasing of Chagos, Agalega became the only company on the island which was involved in the extraction of copra. The UK claimed that copra had decreasing profits, and thus terminated the extraction and resettled the inhabitants to other islands. The process of expelling the residents began by a reduction in the amount of food supplies impelling people to leave the island. In 1971, the remaining inhabitants were also removed from Diego Garcia to Peros Banhos and Solomon and finally in 1973 to Mauritius where there were neither resettlement nor reintegration plans for them. (Yamamoto & Esteban, 2014)

In the same year, the British government also agreed to pay 650,000 to the government of Mauritius for the resettlement, a process and amount that took over 5 years to be handed to the Chagossians. Later in 1979, the government agreed to pay 1.25 million with a final settlement finalized in 1982 with the inhabitants receiving 4 million. Ultimately, the Mauritian government established a trust to manage the funds. Albeit, displacement is a core theme among the Banabans and Atoll Island States, there still remain fundamental differences between the Banabans and the Chagossians. The major difference in the former becomes that the displacement of Banabans boiled down to the guarantee of an entire island where they could resettle and not face statelessness. Conversely, the Chagossians arrived in Mauritius and Seychelles without any guarantee of land or any land provided for resettlement. (Yamamoto & Esteban, 2014) Currently, a process of renegotiating is underway concerning 20 year rollover lease on the islands, with the UK government mulling over the option of stipulating if the Chagossians are allowed return to one the outlying islands away from Diego Garcia.<sup>19</sup> Yet questions concerning the feasibility of returning to the island are still up for questions as a dearth of proper modern public services, health care, education and economic opportunities, and particularity job prospects could hamper its realization.

#### **8.4.2. Banabans & Chagossians Conclusion versus the Atoll Islands and Small Island Developing States**

Numerous striking parallels can be identified between the resettlement of the Banabans and Chagossians and potential cases of Small Island Developing States in their endeavor to relocate.

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<sup>19</sup>Wintour, P. (2016, October 26). British government nearing decision on fate of exiled Chagossians. Retrieved November 25, 2017, from <https://www.theguardian.com/world/2016/oct/26/chagos-islands-british-government-nearing-decision-exiled-chagossians>

(Edwards, 2014) One of the principal similarities becomes how both cases of displacement are linked to man-made phenomenon. With regard to Banabas, phosphate mining forced resettlement of the islands, an action that wasn't approved by the Banabans. Similarly, the displacement of the Chagossians was due to the construction of a United States Military Base. In the case of the Atoll Island States, the displacement is expected to be precipitated by the rise in sea-levels attributable to the emission of greenhouse gases and the elimination of the coral reefs, both of which are a consequence of anthropogenic interference through global climate change. Yet, there is a limitation in drawing the parallels, while the relocation of the Banabans and Chagossians had a definite man-made agent, in the case of the Atoll Island States there is no easily identifiable agent considering the fact that the actors of Climate Change are distributed. (Yamamoto & Esteban, 2014) There are also visible differences in the case of the Banabans and Chagossians concerning issues such as self-determination that were not embraced as an important doctrine in these displacements. In the case of the Chagossians they are precluded from returning to their island. Further, the British Empires' unchallenged capability to forcibly remove those populations without consultation would face at least minimal difficulty in the present international environment. Since UNCLOS was not established at that time of these displacements, other considerations that would center around EEZs , continental shelves or other maritime zones also were absent. (Yamamoto & Esteban 2014). If we were to project and estimate the possibilities in the present day for Small Island Developing States, it would also be highly improbable that relocation would be related to the acquisition of natural resources. Secondly, if these populations are relocated to other maritime environments that would enable them to make an income it is highly unlikely that his income would be able to sustain their subsistence in any viable way. Further, even if another country were to cede its EEZ it can be presumed that it would be of negligible benefit as most counties would not cede anything of value to another non-resident population. Presently, the inhabitation of both Rabi and the maintenance of Banaba Island, allow Banabans to have augmented the territory in which they reside. Also, it has enabled them to fall under the jurisdiction of both Kiribati and Fiji. (Yamamoto & Esteban, 2014)

However, Banaba is deprived of an agricultural base that would enable them to support their population. They are for all intents and purposes relegated to a subsistence economy reducing their capability of sufficiently administering the infrastructure of both islands. A plausible scenario for a Small Island Developing States might be having two different territories where one territory consists of a non-submerged "inhabitable" piece of land with associated the maritime rights. However, if the "inhabitable" land subsequently becomes completely submerged the population would incur the loss of a critical economic resource. These particular cases could foreshadow the

ramifications of Small Island Developing States resettling to, or in the confines of other territories and how they will adapt to novel conditions.

Visual Comparison of Banabans & Chagossians Displacement versus the anticipated displacement of the Atoll Island States as the result of climate change.

		Atoll Island States	Banabans	Chagossians	
	Cause of displacement	Sea level rise and the possible death of coral reefs (and other climate change related causes brought about by anthropogenic influences in the climate	Phosphate extraction destroyed the environment of the island	Construction of a military base required removing all local population	
	Cession of territory	This solution could preserve their status as a sovereign country although it is probably not feasible since it is unlikely any other country would agree to provide lands	Yes. Purchase the uninhabited island of Rabi which belongs to Fiji Republic (while the Banaban Island belongs to Kiribati)	No. Population spread over Seychelles and Mauritius	
	Merge of territory	This solution would result in a loss of sovereignty to the Atoll Island State	Yes. Their old territory was merged with Kiribati while the new island belongs to Fiji	No. They did not have any exclusive territory in which the population could resettle	
	Statehood	Yes. Tuvalu, Marshall	No. Before the resettle-	No. Chagos was separated from	

		Islands, Maldives and Kiribati are all States (and members of the UN), but if they merge with another country they could lose it	ment Banaba was part of the British Empire. Currently, the constitutions of Kiribati and Fiji guarantee some right	Mauritius before independence. The population was relocated before independence was declared. This has perpetuated UK sovereignty over the territory	
	Resettlement location	Still to be decided, if any. Many inhabitants of these islands currently reside in other States, such as Australia or New Zealand	Another uninhabited island	Other inhabited islands and States	
	Statelessness	It can be avoided if dual citizenship is granted or if other States continue to recognize the sovereignty of the Atoll Island State	No, they have dual citizenship	Yes, they lost British citizenship, but recovered it after 30 years	
	Type of territory for resettlement	If population resettles to a larger land mass it would represent change of identity and possibly the assimilation of the population	Island	Island	
	Beneficiaries of the resettlement of the Islanders	Primarily large polluting nations, which can	Australia and New Zealand: main recipients of the	US and UK: established military base in Diego Garcia	

		continue to pollute without taking drastic mitigation action	mined phosphate		
	Plans for resettlement	Some indications have been made by some countries (such as the Maldives or Kiribati) that they could be eventually forced to resettle. However, no formal plans exist yet	Yes, partially. An island was acquired, but lack of infrastructure and jobs caused impoverishment	No. UK provided some compensation to Mauritius to invest on the resettlement, but it took a long time for the Chagossians to receive it	

Table 6.1:

Comparison of Banabans and Chagossians in relation to the possibility of the future relocation of Atoll Island States (Source: Esteban & Yamamoto, 2014: 199 )

### 8.4.3. Land Acquisitions & Transfer Conclusion

Ultimately, we can pinpoint and draw up some of the obstacles that Small Island Developing States will face if land acquisition does become a palpable reality. First and foremost, we must consider the will of external states to host, the funding of such an acquisition if necessary from other parties, and the potential threat to a sense of community and culture, and the risk of conflict. There is a Pacific notion that blood and mud mix together to create identity. Most Pacific Islanders are resistant to group relocation because they perceive it as a permanent rupture with their home, land, and identity. (McAdam & Ferris, 2015) Other problems that could arise could center around the necessity to reach agreements on several issues *ex ante*. George Jain as outlined and conceived of the possible scenarios that Small Island Developing States would also confront in their new host state such as reaching agreements on the apportionment of relative powers of taxation: The citizens of the state will be earning livelihoods in and through the resources of the host states and those

states will naturally demand a share of taxation revenues. Extending that concern becomes how as we have just underlined the necessity to decide how to resolve conflicts of law—which laws will apply when the two laws demand different results if they differ between the Small Island Developing State and host State. (George Jain, 2014)

## **9. Government-in-Exile**

To reiterate the focus and definition of a government-in-exile we can understand that they are created in situations of occupations or annexations and normally are considered as temporary, operating from another territory until the government can return control over its home territory. Ultimately, the government is capable of operating, and can exercise its statehood even though it is deprived of its territorial element. Thus, a government-in-exile "accepts governments that are detached from the requirement of territory, or at least locality." (Stoutenburg, 2015) Even though, the legitimacy of governments-in-exile is recognized in international law, these cases are attributed to invasion and colonization as opposed to climate change displacement. These propagate important question as to whether environmental displacement could be employed as a resource for populations and government. A multitude of diverse authorities in exile have transpired encompassing Coalition Government of Democratic Kampuchea-CGDK(1979-90), the Delvalle Government of Panama(1988-89), the Sabah Government of Kuwait(1990- 91), the Aristide Government of Haiti (1991-94), the Kinigi Government of Burundi (1993), and the Kabbah Government of Sierra Leone (1997-98) have been recognized by States and international organizations as the 'legitimate government' of the respective countries. (Talmon, 1999) Albeit, practice exhibits the fact that states do not feel obligated to recognize any authority in exile they like 'as the legitimate government of' another state. Yet it has already been substantiated that government-in-exile which had to flee their country 'state' as a criterion of governmental status will usually induce few problems. It has been already instantiated by the fact that neither belligerent occupation nor illegal annexation affects the continued legal existence of a state. Through cases such as the annexation of Kuwait by Iraq on 8 August 1990 could bear no impact on the legal status of the Kuwaiti Government-in-exile. The establishment of a 'puppet State' in the territory under belligerent occupation also doesn't lead to the extinction of a previously existing State. Understood a belligerent occupation cannot obtain sovereignty by virtue of the occupation but by the occupation it cannot transfer sovereignty to the new State. Through the creation under Axis auspices puppet States of Slovakia, Croatia and

Montenegro thus proved no legal obstacle to the continuity of Czechoslovakia and Yugoslavia. However, it still raises the question as to what specifies or provides a criterion for governmental status other than territorial effectiveness. Rene Cassin has asserted that States can recognize a government-in-exile “if they regard it as being representative of the national will” and Giuseppe Sperdutti has submitted that “the recognition of a government-in-exile requires that it shows a sufficient quality by which it seems an emanation of the community for which it intends to act.” (Talmon, 1999)

This prospect exists in the case of the disappearance of the territory of a Small Island Developing State. It also bears importance on grounds concerning the hallmark of independence that is considered integral for Legal Personalities for where for an authority to qualify under international law as the government of a State and not merely as the subsidiary organ or subordinate body of another State’s government. Importantly, independence stresses the necessity be free from direct or indirect control by the host government or any other government. Also, this concept of independence should not be conflated with the legal question of privileges or immunities of a government-in exile and its members in the Host State. Here, privileges and immunities are considered a legal consequence of (recognized) governmental status, not necessarily a prerequisite.

Also, governments-in-exile who do not enjoy privileges and immunities in their host States may also be recognized as governments by other States. The major example here becomes the British Government on 6 July 1945 who withdrew recognition from the Polish Government in London and, and no longer bestowed diplomatic privileges to its members. Even though it loss privilege in the host State, the Polish Government in London continued to be recognized as the Government of Poland by other states until 1958. Similar situations unfolded for the Spanish Republic Government in Paris (1946-1977) and the Afghan Interim Government in Peshawar, Pakistan, who were recognized by several states, albeit because of non-recognition by their host states they did not possess the privileges and immunities there. Yet, government-in-exile normally have existed on the pretext of restoring power in their own country and only until recently has this been more connected to situations of international (Poland and the Baltic Countries during World War II) or national conflicts (Taiwan and China). (Yamamoto & Esteban, 2014) In World War II after Germany’s invasion, Poland’s government-in-exile was considered continuous with the pre-1939 government. After the Yalta and Potsdam Agreements, Poland’s population and territory became redistributed, and a different constitutional system was implemented, even though in practice the State remained the same as before 1939. Moreover, historical examples also underline that when States were rendered ineffective, it wasn’t an obstacle for them to continue to be



considered as state. These examples are entities that have been annexed illegally such as Ethiopia, Austria, Poland or the Baltic States. (Talmon, 1999) In the case of Poland, Yugoslavia and Czechoslovakia they were accepted as having international status as governments-in exile by the Allied Powers during World War II. Still the possibility that a non-recognized government-in-exile will be severely curtailed in its functioning in the host State, yet that doesn't derogate from the fact they can exercise independence of the host state. International practice instantiates that even if there is non-recognition, governments in exile still have been tolerated and in certain instances actively endorsed by their host State.

Still the matter at hand regarding independence, becomes entangled in a historical example demonstrating that 'independence' itself is complicated due to the fact that a certain dependence structure might arise. The dependence structure is due to the need for funding, logistics, military and political support for the situation of a States' government being in exile. This is demonstrated through the Czechoslovak Government in London who was financially dependent on United Kingdom credit, where the Treaty had to approve the dispatch of each military or diplomatic mission to other countries. Therefore, a lack of recognition that is symptomatic of the fact that the government is bereft of its home base is considered as undermining its independence. Accordingly, to substantiate a lack of independence, one must demonstrate "foreign control overbearing the decision making of the entity concerned on a wide range of matters of high policy and doing so systematically and on permanent basis." (Brownlie, 1973: 72) This could be interpreted on grounds that for an authority in exile to be potentially denied recognition as a government, it would be denied on the grounds that it appears to be a mere puppet of the host State. (Talmon, 1999)

## **9.1 Government-In-Exile Conclusion**

To respond to our contemporary situation, we must emphasize strong distinctions between past cases of governments in exile and the potential for SIDS, where as we have identified the population has normally been concentrated on one territory, while the government authorities have been away in another territory. In the case of SIDS, while the populations that will be displaced could be organized under resettlement plans, one of the major points of difference draws around the possibility of the population being dispersed. Secondly, a government-in-exile conventionally acts temporarily because there should always be "the possibility of restoring its power over a determined territory."(Yamamoto & Esteban, 2014: 208) This most likely would not be the case with SIDS considering the fact the territory would be unlikely to reappear once it was submerged, although this

should not be officially jettisoned. This conclusion feeds into untangling what the Capacity to Enter into Relations entails and importantly what does the meaning of ‘independence’ signify for Small Island Developing States.

## **10. Deterritorialized Entities**

We examine here how international law is already familiar with the emergence of entities that lack a clearly defined territorial basis. Nonetheless, the absence of this basis could work in favor to facilitate the acceptance of the concept of the deterritorialized state. Non-territorial entities are recognized under international instruments and they also exercise limited forms of functional or non-territorial sovereignty.

We will further explore what are deemed as ‘deterritorialized’ entities and to critically highlight that The Holy See and Vatican and the order of Malta are not necessarily deterritorialized states. Yet, It is true that these entities have been deterritorialized in terms of being deprived of territory on a permanent basis. Here we can conclude immediately they would lack one of the key criterion of a permanent territory and permanent population. However, it is also true that even with the loss of their territory they have maintained the ability to conclude treaties or have diplomatic missions. We can then proceed to understand that the Holy See/Vatican and the Order of Malta are legal persons under international law. (Bilkova, 2016)

### **10.1 Sovereign Military Order of Malta**

The Sovereign Military Order of St. John of Jerusalem, of Rhodes and Malta is an ancient religious order presently dedicated to the provision of medical services. Subsequent attempts were made after 1798 to regain territory for the Order, yet to no avail did they secure anything meaningful. Thus, deprived of a territorial base, the Order continued to maintain hospitals, which it still does to this day. For a few years, it also retained its public status in Germany as a member of the Holy Roman Empire, with voting rights in the College of princes and retained a vote in the College of princes of the Empire, until these bodies collapsed with the abdication of France II in 1806. (Esteban & Yamamoto, 2014) Throughout its history, it bore sovereignty over the islands of Rhodes (1310-1528) and then Malta (1530-1798) from where it was ejected by Napoleon in 1798.

Yet, up to that date SMOM was a state, albeit retained sovereignty under international law, despite not being a State any more. Yet, the Order of Malta's peculiar status could be attributed to the fact that it was a possessor of the fiefdom of Malta for 200 years and of Rhodes even earlier. However, after it ceased to rule Malta it retained certain attributes of sovereignty, at a time when international law was slowly developing new concepts of statehood. The Papal tribunal further provided that "the status of the Sovereign Order is functional, that is to say, intended to assure the fulfillment of the scope of activities of the Order and its development through the world." (Crawford, 2006: 232) Reiterating the component of State to have a permanent population, a defined territory, have a government and capacity to enter into diplomatic relations. The Order of Malta at one time met all these criteria for statehood. Most importantly, the Sovereign Military Order of Malta claims, and is sometimes acknowledged to be a sovereign State in its own right. This status has been claimed since at least the fourteenth century, well before international law began to accord legal personality to international organization.

Yet, there are still complications on the grounds that the Order does not have a sovereign territory nor a population which are constitutive attributes of Sovereignty and also have been regarded by some States to be an obstacle to endow the Order full diplomatic recognition. "The Sovereign Military Order of Malta is a sovereign entity according to international law, but is actually used as a classic example of an entity which is sovereign (like a country) but is not a country. It does not have a territory, and therefore, it does not live up to the requisites of a country. A sovereign entity does not have to be a country. SMOM is an example of this. For sovereignty, it is generally considered that the entity should be recognized as such by other sovereign entities." (Wallace, 1992: 76) Although it has been described as sovereign state, it also been characterized as a Sovereign person, since it does not possess any territorial imperium. (Crawford, 2006) Yet, the debate whether it qualifies as a country with or without a territory also depends on the headquarters of SMOM comprising of a building and a garden that is totaled to be 6000 square meters. The headquarters have an extraterritorial state, yet over it is a territory of the SMOM or it is the embassy of SMOM in Italy. Yet it still retains what are considered key functions of a country: it has diplomatic relations with many countries, issues passports, and its' a member of a few international organizations. SMOM has diplomatic relations with over with 75 countries. It is also endowed with a permanent observer status and the UN and Italian recognition of its extraterritorial rights over its properties in Rome.

## 10.2 Vatican City and The Holy See

The Vatican City and the Holy See is a recognized example of an entity where possession of a clear territory has not always been the case. The Pope until 1860, was sovereign over the so-called Papal States, which then become annexed by Italy during the unification of the country. The Papal See was recognized as a state despite possessing no territory, until it was bestowed sovereignty over the Vatican City by the Lateran Treaties of 1929. The Vatican City is considered a “vassal” territory of the Holy See. Henceforth, unlike any other modern nation, the Vatican City does not exist to support its citizens. Its purpose is to provide a base for the central administration of the Roman Catholic Church. (Center For Research on Population and Security, "Church or State? The Holy See at the United Nations") Only 0.44 square kilometers in size, the Vatican City is the smallest area in the world that “claims” to be a state. Its population is nominally 800 residents and 400 citizens, who are comprised of Church officials who critically are there on a “non-permanent” basis. Italy thus carries out a several official functions for the Vatican City by providing the police force to patrol it, providing for the punishment of crimes committed within the city and also the maintenance of water and railway systems for the area. The Vatican City also is reliant upon Italy for freedom of communications and transportation. Even the Holy See was deprived of any territory during this period it did not profoundly impact its status as an international subject as it continued to send delegates and emissaries which were recognized by countries through the world. Albeit, it could be understood that this notion of a deterritorialized entity might not be applicable to the case of the Vatican as it now possess a territory, the reality is far complex. The fact is that The Vatican and the Holy See are two separate entities.

The Roman Catholic Church is in a unique position to exercise influence and international deliberation on a whole array of issues concerning population, family planning, and women’s rights. Since the founding of the United Nations, the Roman Catholic Church has played an assertive role in partaking in several international conferences organized by the former. The Roman Catholic Church elected to participate in the United Nations under the banner of the Holy See” where what we understand as the The Holy See it is “the supreme organ of government of the {Catholic} Church” (Hyginus Eugene Cardinale, *The Holy See And The International Order*), with the Pope designated as its head in the Code of Canon Law (*Codex Iuris Canonici* (1917)). The Holy See consists of the Pope, the College of Cardinals, and the central departments that govern the Church. (Graham, 1959) It is by definition, a non-territorial religious entity prior to 1870, the Holy

See was associated with the government of the Papal States, which had been founded by Pepin-le Bref and his son Charlemagne.

The complicated relationship especially among the Holy See and with the Vatican becomes difficult to navigate, as States hold diplomatic relations with the former as opposed to the latter. The position of the Holy See within the United Nations operates as a Permanent Observer State, and also a party to diverse international instruments and members of various United Nations subsidiary bodies, specialized agencies and international intergovernmental organization. This is also becomes pronounced in the fact that the Holy See does not have a permanent population or a defined territory and even though it has a relation with the Vatican City it did not possess between 1870 and 1929. Theoretically, it could be claimed that the Holy See was a “government-in exile” during this time, although it remains or more complicated and nuanced in this case.

In 1944, the Roman Catholic Church made tentative inquiries concerning the eligibility of the Vatican City in its request to become a member state of the United Nations. Reiterating our focus on the United Nations and its lack of providing a definition for the term s a “state,” yet mandating as we pointed out that An applicant to the United Nations must : (1) be a State (2) be peace-loving (3) accept the obligations of the United Nations Charter; (4) be able to carry out these obligations; and (5) be willing to do so. (UN Charter, Art. 4) There has already been historical record that member states did regard Vatican City as being ineligible for United Nations Membership on the grounds that it did not meet the requirement for admission. However, the Holy See has been an active participant in the United Nations. The rules that are constructed concerning access to and procedure for United Nations conferences are determined by the specific United Nations agency delegated with organizing the meeting. The organizing body can thus determine whether it will permit a permanent observer to attend. The access to conferences is convened by the General Assembly or ECOSOC that is constituted by the parameters set out by these United Nations agencies. Due to the current United Nation trend of providing widespread access to international conference, tacit participation in these meetings has been given. The recent General Assembly Resolution that has been convened has invited “all States’ to participate. Henceforth, States invited to participate in a conference are able to participate “in full, with full voting rights” unlike the restricted manner in which other types of permanent observers participate. It follows that states that are invited to participate in a conference in this framework are afforded the possibility to possess “full voting rights” unlike the demarcated manner of other permanent observers. Due to the fact that the United Nations regards the Holy See as a state, the Roman Catholic Church is able to participate fully and to vote in most conferences.

### **10.3 Deterritorialized State Part Two:**

This section explores and conceptualizes this route for Small Island Developing States while remaining fully aware that there are numerous issues that would inevitably rise which have been underscored in the prior chapters concerning relocating populations in new host States. This *sui generis* concept shifts away from the idea that territory altogether is a constitutive requirement for the existence of states. The logistics will not be fully delved into here concerning the actual day-to-day operation of such a state neither will it focus on the separate negotiations that it would entail. Therefore, its fructification will be up for questions on practicality, yet we can still contemplate how a deterritorialized entity and state fulfills certain criterion importantly on the grounds of its capacity to be recognized by others and a form of governance. Also, it does underline that the legitimacy of these proposed ideas would be “subject to the acquiescence of the international community.” (Burkett, 2013:366) To reiterate the concept of A deterritorialized State:

“Would have a population in states (host states) spread across the globe. Its government could be located anywhere in the world—inside the territory of another state {...} its government would exercise its internal sovereignty remotely and would continue to engage in international relations as before.” (George Jain, 2014: 49)

Now, we can further build upon an understanding as to what will be conceived of through the framework of Maxine Burkett and her ideas regarding both A deterritorialized state and her conceptual innovation of a ‘nation ex-situ’. First, we can identify that deterritorialized states builds on a continuum that is inspired by the model of governments-in-exile. Yet, as we will see it also does generate a slew of question about the nature, functionality, and feasibility of deterritorialized states conceptualized here.

### **10.4 Nation Ex-Situ**

Maxine Burkett’s work has elaborated and speculated on the possibilities of international law accommodating altogether an entirely new category of international actors, or what she termed as

Nation Ex-Situ. Accordingly, Nation Ex-Situ “is a status that allows for the continued existence of a sovereign state, afforded all of the rights and benefits of sovereignty amongst the family of states, in perpetuity. In practice accordingly it would require the creation of a government framework that would exercise authority over a diffuse people.” (Burkett, 2013: 345) It has compatibilities with the focus on governments-in-exile where the diffusion of the population and potential uprooting from native territory enables further considerations whether the prospect of a Nation Ex-Situ provides conditions adequate for international recognition. (Burkett, 2013) The Ex-Situ nationhood would still allow a degree of leeway for sovereign states to be bestowed all the rights and benefits of sovereignty among the family of nations.

These examples demonstrate the possibility of a full legal personality under international law, and the capacity for the maintenance of diplomatic relations with most states and the participation in intergovernmental and international agreements. Furthermore, it joins various intergovernmental organizations, it is a party to a substantial number of bilateral and multilateral treaties, it also sends and receives diplomatic representatives, and is granted permanent observer status at the United States. (Burkett, 2013)

The outline and structure that underpins Burkett’s vision is predicated on a common-law trust, or a political trustee that could administer the territories that they hold in trust for the benefit of the inhabitants of that territory. The guiding question becomes in the event where the territory is no longer habitable does this obligation extend to facilitating relocation?

One of the underlying differences or terms of departure postulated by Burkett becomes the degree or role of influence within the confines of the Security Council or the General Assembly. Under a traditional arrangement, another state, a group of states, or the United Nations itself, holds the territory under supervision in trust. (Burkett, 2013) Thus, the UN’s presence in the internal structuring of the arrangement would be indispensable. Ideally, the respect of a continued sovereign equality of the endangered states would relegate United Nations and member states to the role of acting only to support the transition to and establishment of ex-situ nationhood. Yet, one of the chief benefits identified concerning the establishment would be the international community playing a significant supportive role in the administration and financing of the ministerial affairs of the deterritorialized state. One of means of enacting this would be having the United Nations, establish office that would facilitate the transition and long-range governance of endangered states, due to their limited resources.

## 10.5 Nation Ex-Situ & Political Trusteeship

The Nation Ex-Situ responds to a novel political and legal environment that climate change may induce. This position is already affirmed through Walter Kalin, the representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, who stated: “People from islands and territories will start to migrate, legally or with an irregular situation and overall the society will slowly disintegrate. For a certain time there will be a government, but it will be a fiction. It will be a slow process of whole nations dying in the social sense in addition to the geographical sense.” (Rachel Morris, Mother Jones) If properly planned and supported, there could be advantages for the new state and particularly for its citizens. In aspiring to maintain an effective participation for the endangered states in the international community, the Nation Ex-Situ strives to guard against a declining failure of a state that is overcome by increasing outward migration. (Burkett, 2013) Thus, a proposed trusteeship would be established in order to manage the assets of the citizens of Small Island Developing States that would find themselves residing in host States or in a diaspora. This authority would represent the deterritorialized state at the international level and their interests as citizens in their new host States. (Burkett, 2013) The proposal or designation is also known as a ‘deterritorialized state.’ Government ex-situ is suitable for the building of a voluntary political trusteeship. The historical concept of trusteeship was contrived to guide trust territories to self-government and post-colonial transitory time. In the historical examples, the trustees were external United Nations Member States. The UN Trusteeship System excluded territories that had become Members of the United Nations, where the exclusion operated in the principle of sovereign equality, which the UN Trusteeship was to respect. In this case also an external state, what is conceived here as the state hosting the island states’ government ex-situ could fill in the position of a temporary trustee with the purpose of surrendering governmental power to the ex-situ government as soon as possible. To further emphasize the imbroglio that could emerge from an arrangement of internationalized territory is the potential infraction of the United Nations as being perceived as infringing upon sovereign powers by taking away their territory. The League of Nations, the United Nations and other *ad hoc* international trusteeships have demonstrated the viability of these arrangements under international law. To underscore a difference in the application of the trusteeship system it is oriented around an arrangement that would maintain self-government and self-determination, and elected citizens of the nation ex-situ themselves would serve as trustees. (Burkett, 2013)



Trusteeship derives its model from the United Nations Trusteeship Council that was designed to ensure that trust territories and advancement of the inhabitants of Trust Territories towards their progressive struggle for self-government or independence. The League of Nations, the United Nations and other ad hoc international trusteeships have exhibited the tangibility of these arrangements under international law. (Burkett, 2013) Yet one of the major differences in the contemporary application of the trusteeship system is that the purpose of the arrangement is to maintain self-governance and self-determination. This would also potentially be The UN trusteeship system in a contemporary climate change context which would aspire to allow elected citizens to be trustees so that self-governance and self-determination can still prevail. The idea was that post-colonial territories would be under the supervision in trust by another state or the United Nations. The last trusteeship came to an end in 1994 where in the case of Bosnia and Herzegovina resembling one of trusteeship attempting to take into account the fundamental role of international organizations and their representatives in the decision-making and the supervision of the implementation of the Dayton/Paris Agreement. (European Union Institute for Security Studies, 2007)

Chapter XII of the UN Charter provides for an international trusteeship system for the purposes of *inter alia*, a means for the progressive development towards self-government (with or without independence); the respect for human rights; and furthering international peace and security. (Charter of the United Nations) One of the salient examples or recent precedents are the interventions in Bosnia, Kosovo, East Timor, Afghanistan and Iran. (UN Charter Chap. XII) Legitimacy of the nation ex-situ is still hinged and subject to the acquiescence of the international community, importantly on the fact that a multitude of host states which islanders migrate. Henry Perritt elaborates that international legitimacy is essential in this regards “so that a critical mass of the international community will recognize and protect the trustee and its successors. Without international legitimacy, the trustee will likely lack necessary resources, and may face state-sponsored existence.” (Perritt, Jr., 2003)

Generally it would encompass a ‘government’ or ‘authority’ elected by the registered voters of the state which would operate as a trustee of the assets of the state for the benefit of its citizens in their new location. The endangered states would elect who is going to participate and their citizens would determine the specific terms of the trusteeship through what would be conceived as an interactive process of evaluation and amendment. The Trusteeship Agreement would proceed to detail how the endangered state would be governed from transition and throughout the period of uninhabitability. Thus it would encompass a ‘government’ or ‘authority’ that would be elected by

the registered voters of the state, acting as a trustee of the assets of the state for the benefit of its citizens in their new location. Even though it is restricted from exercising and enforcing its sovereignty over the new land, it does have the capacity to represent the state at the international level as well as in relations with the host state. (Burkett, 2013)

## **10.6 Ex-Situ History**

The Republic of the Marshall Islands Ex-Situ is one of four Atoll-only nation-states in the Pacific that, in particular, has been highlighted as vulnerable to a climate-related loss of territory. (Burkett, 2013) The RMI in conjunction with several other Pacific island states has also operated under a trusteeship agreement designating it the Trust Territory of the Pacific Islands. The TTPI, was a strategic trust, wherein the United States was responsible to only the Security Council for its administration and provided preferential treatment in all economic matters. The TTPI consisted of the Marshall Islands, Caroline Islands, Palau Islands and the northern Marianas Islands and all of Micronesia except for Guam. Scattered across roughly three million square miles of the western Pacific, these islands were notable for their geographical and cultural heterogeneity; and a population comprising of at least six distinct ethnic groups with mutual unintelligible languages. This Trust relationship of the United States succeeded both German colonization and Japanese administration of the islands, and bur preceded the Compact of Free Association with the United States that established Marshallese Independence in 1986. (Burkett, 2013) The compact supplied, along with other things, sustained economic support by the United States and also granted the United States full authority and defense of the RMI.

Other issues which to need to be resolved focus around of how island states can resolve cultural misunderstandings ‘including the importance of land and cultural identity.’ One precedent example concerns phosphate mining in Nauru when Australia offered to resettle the Nauruan population in Australia. Nauru also provides a precedent example of how to address the environmental harm that was inflicted upon its lands after 90 years of Australian mining. Nauru held Australia accountable for its violation of their trusteeship obligations which it had accepted under Article 76 of the UN Charter and under the Trusteeship Agreement of Nauru of 1st November claiming heavily damaged land that was rendered unusable. (Burkett, 2013) The case terminated with a bilateral agreement between Nauru and Australia where in Australia promised to rehabilitate the mined areas of Nauru. This case created an unparalleled framework for a political trusteeship system demonstrates how to govern a nation without a habitable territory. Applying this to Small

Island states, Rosemary Rayfuse suggests an “authority” could be endowed with a capability to manage maritime zones to the benefit of the displaced population, through resource rents that would fund relocation and livelihood in the new host state. (Rayfuse, 2010)

## **10.7 Ex-Situ Conclusion**

We can draw a few conclusions and pose additional questions that will challenge the validity of deterritorialized states. First, it still remains questionable whether a deterritorialized state would be equal to other states, and if the relegation of a former state to a lesser sovereign entity could complicate their legitimacy. Secondly, as previously discussed what happens to the status of the population if they are dispersed into other states? Would those populations be citizens of those other states? Could it end up relegating the role of the deterritorialized state to that of an “advocate for its diaspora.” There are practical challenges concerning jurisdiction and how it would be exercised over nations abroad. The challenges arise out of what is termed as “adjudicative” jurisdiction and the question of whether or not this “adjudicative jurisdiction” could be exercised through cooperation with host states. This form of jurisdiction could be problematic insofar as they could engender potential charges of interference with exercises of enforcement and not be regarded as legitimate by the host state. (Blanchard, 2016)

## **11. Conclusion: The Ideal of Statehood**

By returning to the principal questions concerning how climate change impacts notions of Statehood and what are the possible or novel configurations that can evolve, we can draw conclusions here about the options that Small Island Developing States possess by reiterating the principal questions concerning:

1. How does Climate Change potentially threaten Small Island Developing States and challenge the nature of Statehood as understood in the Montevideo Convention?
2. What ways has the Montevideo Convention and Declaration Theory been challenged and what do these challenges or exceptions demonstrate in the evolving nature and understanding of Statehood that is relevant for Small Island Developing States?

3. What are the major issues that are likely to emerge in proposing alternative configurations for Small Island Developing States to preserve their Statehood? Or through the examples examined here would Small Island Developing States be able to claim Statehood if there is absence of a component of criteria as understood in the Montevideo Convention?

To refocus on the principal question concerning the inextricable relation between statehood and territory we can identify an unprecedented scenario arising that challenges the classical Montevideo framework. If we understand that territory is the underlying physical foundation of power, jurisdiction, nationality and the organization of political community and ultimately what lends legal and international acceptance/recognition; we can comprehend the implications of how statehood could adversely be impacted by lack of territory.

We can also demonstrate that it remains improbable that States will be wholly stripped of their recognition and right of a status even if one of the elements required by the Montevideo Convention is absent. This is especially underpinned by Montevideo's important presumption of continuity by stating that once recognition has been given, it is irrevocable as asserted by Article 6. It could be inferred from this line of reasoning, that SIDS that already have been recognized by the international community would most likely have the right to have their legal personality acknowledged irrespective of a lack of components of Statehood. This paper attempted to highlight through various cases which examined each component constitutive of the Montevideo Convention that it can be viewed as open-ended and subject to interpretation with regard to the definition of Statehood. Even though the Montevideo Convention might be perceived as a customary doctrine that laid down the framework for *de facto* recognition, exceptions abound and vary according to circumstances. As Thomas D. Grant asserts a definition of statehood is "highly contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated." Yet, in the case of Small Island Developing States the definition of statehood still remains to be tested insofar as whether or not the submergence of territory inevitably equates to a lack of recognition, thereby confirming territory as an essential element of statehood. However, this is not to say that the dissolution of a territory precludes the possibility of an entity obtaining an alternative means of recognition such as the cases of the Sovereign Order of Malta and The Holy See illustrate. Additionally, the semblance of a form of statehood can be critically preserved by relying on the recognition of other States or international organizations. This would require the cooperative effort of those States and international organizations to develop some standards to compensate for the lack of territory and /or population that could provide the status of State *sui*

*generis*. Even though, there is a difference between the criteria for the initial recognition of statehood and the continuity of statehood, a fusion of both elements relying on legal and political judgments could enable statehood to be preserved, even if the last island in an archipelago disappears. Finally, this paper sought to examine the presumptions underlining the emergence of statehood and to critically assess how exceptions arise to enable continuity in various forms such as trusteeships, government-in-exile, legal personalities. These non-traditional entities are of significance in pointing out how they have been overlooked and are generally not connected to traditional States.

One of the founding assumptions underlying the focus on Small Island Developing States is the traditional perception that every nation deserves its own State. Yet, as we have illustrated, there remains a fundamental question as to whether sovereignty and statehood will remain as relevant in the future in the face of climate change which is far more complex in its implications. Sovereignty and statehood potentially could morph into an 'absolute' concept and thus become more blurred and relative. Through historical perspectives, cases studies, alternate configurations, estimates and projections that have been discussed throughout this paper we can surmise only some the possibilities of what will unfold for the Small Island States in the face of climate change.

Achim Maas and Alexander Carius postulate how:

“Various international forums, such as the climate negotiations or the Doha development round, have revealed the great diversity of interests and thus also the very limited space for consensus in several policy areas. (...) Instead, it is quite likely that fragmentation may further increase, with various states choosing to recognize or not recognize states dispossessed by climate change. The main consequence of climate change in the Pacific and elsewhere may thus be that international relationships become more complex and approaches to deal with various entities claiming political legitimacy become more pragmatic in absence of global consensus. Yet this would erode the global system of nation states symbolized by the United Nations further, making the definition of states ever more arbitrary and blurred (...) While this would open up possibilities for developing innovative, more reflective and adequate institutions and mechanism on a regional level, this global devolution may also bear the risk of fracturing international solidarity in terms when the challenges of climate change would require global, coordinated responses.” (Mass & Carius 2013: 662)

We can further pinpoint that the cession of territory, one of the viable solutions previously discussed could afford the possibility for Small Island Developing States to acquire new territory. However, how realistic an option this might be for Small Island Developing States is questionable as it is highly improbable that any sovereign State would be willing to cede a part of its own territory. Even if a case does emerge in which a Small Island Developing State is not able to find land on which to resettle and its population becomes dispersed this does not necessarily mean that the State would lose its recognition in terms of international law. The issue of whether a deterritorialized State is possible brings into focus entities such as government-in-exile which are outside the rule of a “traditional State”. These entities are generally overlooked by international law due to their lack of association among more prominent and powerful states. One of the contentions of this thesis is that the continuity of statehood does not strictly require the existence of all of these elements stipulated in the Montevideo Convention as the issue of recognition is inextricably bound to the political will and interests of the international community.

### **11.1.1 Projection Scenarios**

We can further map out and envisage several different examples that will unfold concerning the recognition of Small Island Developing States and their preservation of statehood if their land becomes submerged. We can follow from the work of Yamamoto & Esteban who have conceived scenarios and the projected responses of those scenarios from the international community.

#### A Continued Recognition Scenario:

Small Island Developing States that are completely submerged would still retain recognition by other states, maintaining their membership in international organizations, even if their seat of government would be relocated. They could possess their status as UN Members or be delegated the status of Permanent Observer at United Nations, as what happened with the SMOM. It is also conceivable that States which are geographically close to them would accept to host their functions of government. The question still remains regarding if the international community would find this form of statehood acceptable. If the ability of the deterritorialized State to provide passports to displaced populations is recognized then these citizens could possibly retain their nationality and as recognized citizens might not face considerable challenges. (Yamamoto & Esteban, 2014)

### A Selective Recognition Scenario:

Only a certain amount of states would continue to recognize States whose territories that had become submerged, which could also imply a cessation of diplomatic relations. Yet, as previously discussed it is highly improbable that these state would be expelled from the UN, as States can only be expelled for violating the principles of the UN Charter or a by a subsequent recommendation to expel issued by the UN Security Council. However, the lack of recognition by some UN members does not lead to an expulsion from the UN or other bodies, as we have seen in the cases of Turkey and Cyprus. If expelled from the UN or denied recognition, it would represent a considerable problem for the citizens of a displaced entity as there is a distinct possibility that their passport would not be recognized some countries. For example, there is conjecture that in exchange for a country to recognize a submerged Atoll Island State by providing it a place to relocate its seat of government and financial funds, it would require that the relocated state give the receiving state access to resources within its former EEZ. (Yamamoto & Esteban, 2014)

### Complete Loss of Statehood Scenario:

Once a Small Island Developing States is deprived of its territory, it could be expelled from the UN and other international organization and without their international personality being recognized by anyone in the international community. However, this is a highly scenario simply because it is extremely difficult to expel the country from the UN. (Yamamoto & Esteban, 2014)

In summary, the focus of this thesis has been an investigation into the interrelationship between definitions of sovereignty, statehood, and climate change, and an examination of the likelihood of attaining certain conclusions about the continuity of ‘statehood by alternative means.’ Overall it rests on a presumption that the examples that have been offered will no doubt evolve into novel settings and bridge a myriad of new ideas with regard to the preservation of a state or statehood as climate change progresses.

## 11.1.2. Conclusion Index: Prospects for Small Island Developing Nations

Below are models that also could be guidelines for Small Developing Island Nations including already extant examples and as well as the ones that have been generated as alternative solutions. These models serve to consolidate the previous points and to organize them in a more coherent framework with regard to their characteristics and the potential ways they can procure and retain elements of Statehood that have previously been discussed in prior examples.

I would contend that the family of Nation Ex-Situ, deterritorialized States, and Trusteeships are the most viable options for a form of state continuity aligned with the capacity of recognition.

**Table 1**

### Exceptions and Recognition to the Montevideo Convention

Montevideo Convention	Degree of Necessity:	Exceptions and on Their Grounds:
Population	There are no criteria stipulating a minimum requirement to the size of the population. Population is tied to territory and is considered the basic ingredient for a population to be recognized. However, 50 has been the baseline—See Pitcairn Islands.	Varying accounts as to what constitutes a minimum threshold. A Permanent Population has been shown not to be a requisite on grounds that as long as the State or entity is ‘recognized’ it does not need to fulfill the criteria of permanence.
Territory	Regarded as a prerequisite for the existence of states. There isn’t a minimum size requirement for territory. Furthermore, territory is not exclusively land-bound as it extends to Maritime Rights. However, loss of territory hasn’t derogated the recognition of Statehood.	Israel, Albania, Oman, Belize lacked defined territories. Hyderabad, Somaliland, Tanganyika, Republic of Vietnam, Yemen Arab Republic, German Democratic Republic, Yugoslavia and Czechoslovakia.
Government	There is the retention of Statehood without effective government.	Failed States—still recognized as ‘States’



	Historically, Decolonization Process in the 1960s occurred where numerous states acquired independence even if there were no existing powers that were able to exercise governmental function.	albeit their governments are debilitated and considered ineffective.
Capacity for Recognition	Generally, understood as a conflation of the requirements of government and independence.	An indispensable criterion on the grounds for international personalities, entities that represent on behalf of governments-in-exile and international personalities.

**Table 2:**

International Personalities & Statehood

Montevideo Convention	SMOM	Vatican City Holy See
Population	There is no military or police force, as there is no territory, or population, to defend or police.	It cannot be seen to have a permanent population. The population can be regarded as caretakers that maintain a presence.
Territory	Non-Permanent	Questionable on grounds since itself the government of both the Roman Catholic Church and the Vatican that possesses a government.
Government	Classified as A Non-Member State/	See Above Regarding
Capacity for Recognition	Maintains Diplomatic Relations	The Holy See is party to international treaties and it, rather than the Vatican City, receives foreign envoys.

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**Appendix:**

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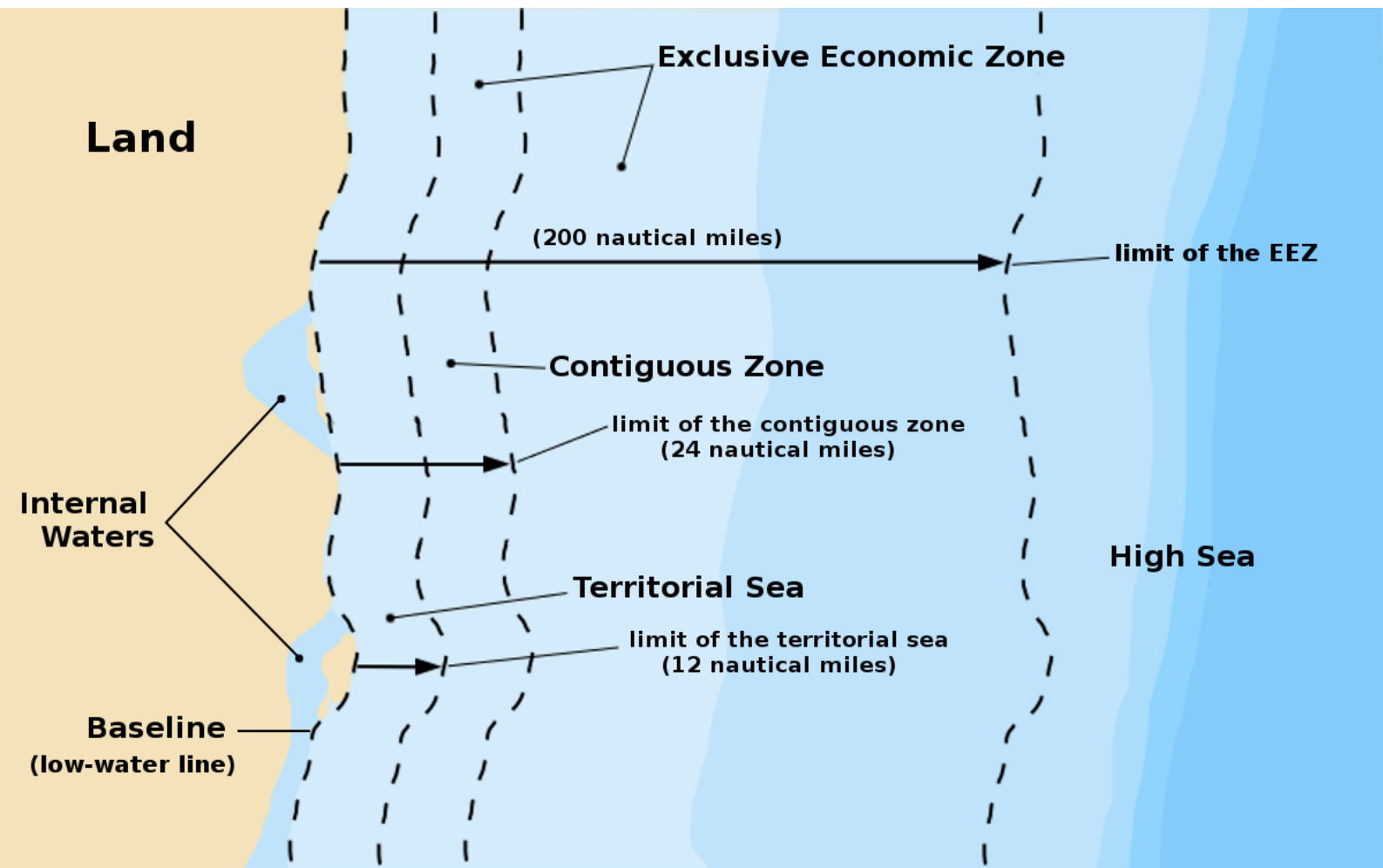
Appendix no. 5: Maldives

Appendix No. 1: Oceania (Map)



Source: <https://www.globalsecurity.org/military/world/oceania/images/map-oceania-05.gif>

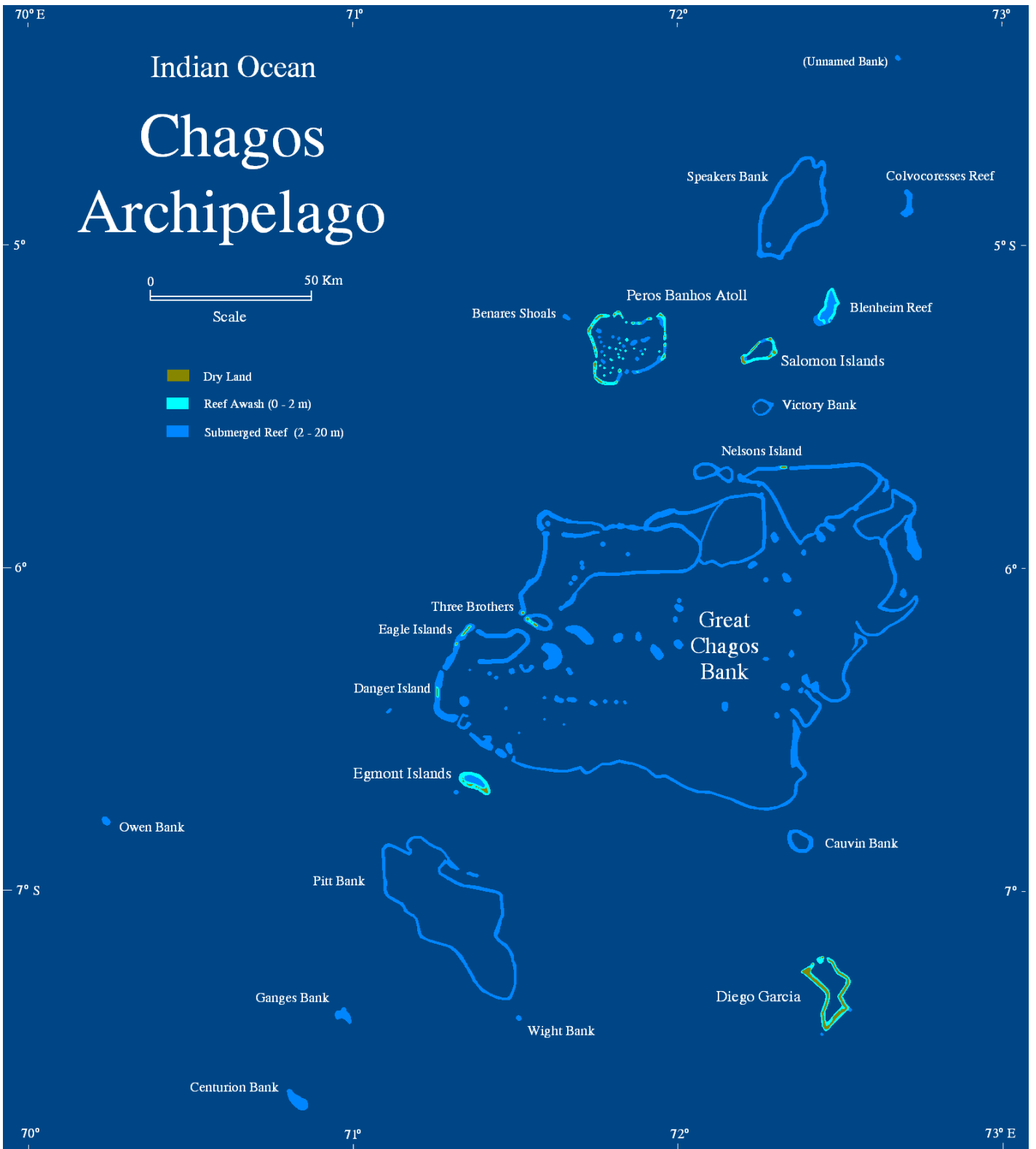
Appendix No. 2: UNCLOS



Source: UNCLOS

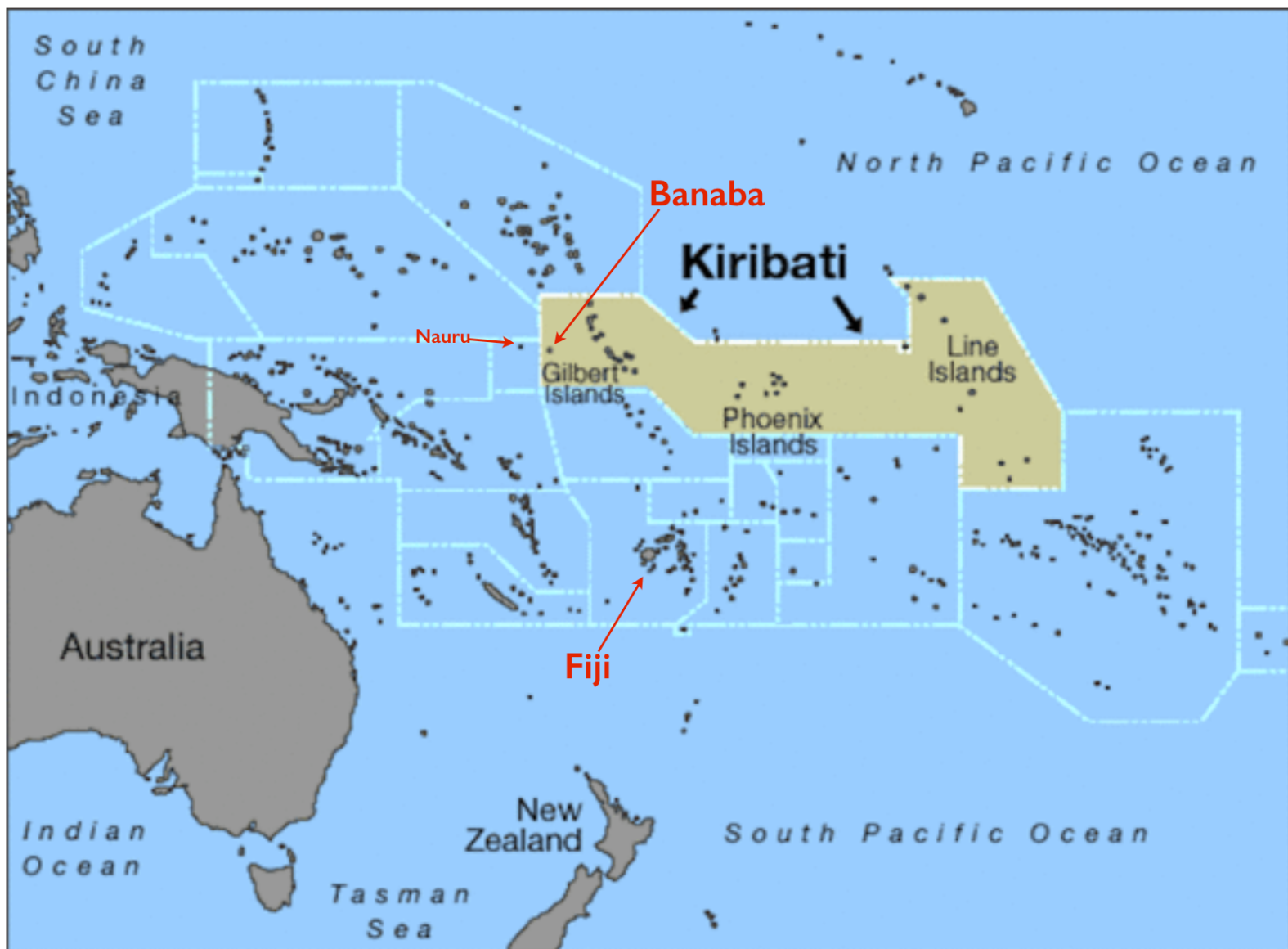
<https://commons.wikimedia.org/wiki/File:UNCLOS-en.png>

Appendix No. 3: Chagos Archipelago



Source: <http://www.genealogie.mu/index.php/en/2015-09-23-14-09-28/outer-islands>

Appendix No. 4 : Banaba Island



Source: <http://www.geocurrents.info/place/australia-and-pacific/the-anomaly-of-banaba-island-part-of-kiribati-but-administered-from-fiji>

Appendix No. 5: Maldives



Source: <https://maldivesfinest.com/location-map>

