

‘DISAPPEARING STATES’, STATELESSNESS AND THE BOUNDARIES OF INTERNATIONAL LAW

Jane McAdam*

The ‘disappearing States’ or ‘sinking islands’ phenomenon has become the litmus test for the dramatic climate change impacts on human society. Atlantis-style predictions of whole countries disappearing beneath the waves raise fascinating legal issues. As a purely academic exercise, pondering the dissolution of a State because of climate change rather than conflict, cession, merger or succession entails novel questions that go to the heart of legal rules on the creation and extinction of States. However, much of this deliberation is taking place in the abstract, such that the premises for why, when and how States might ‘disappear’, and the consequences of this, do not always sit comfortably with the empirical evidence. This may lead to the adoption of well-intentioned but ultimately misguided policies. This paper is anchored in a case study of the small Pacific island States of Kiribati and Tuvalu, which have become emblematic of the so-called ‘sinking States’ and ‘climate refugee’ phenomenon. It argues that the focus on loss of territory as the indicator of a State’s disappearance may be misplaced, since small island States such as Kiribati and Tuvalu will become uninhabitable long before they physically disappear. In legal terms, the absence of population, rather than of territory, may provide the first signal that an entity no longer displays the full indicia of statehood. While the paper’s motivation is to determine the legal status of people displaced from ‘disappearing States’, its primary focus is on how and when such States would cease to exist, since this necessarily links to the ability to maintain nationality. In doing so, it examines mechanisms such as the government in exile as a means of enabling the State to continue even when the territory is uninhabitable, and briefly considers alternatives to full statehood, such as a self-governing territory in free association with another State.

I INTRODUCTION

‘It is for the people to determine the destiny of the territory
and not the territory the destiny of the people.’¹

The ‘disappearing States’ or ‘sinking islands’ phenomenon has become the ‘canary in the coalmine’²—the litmus test for the dramatic climate change impacts on human society. Atlantis-style predictions of whole countries disappearing beneath the waves raise fascinating legal issues. As a purely academic exercise, pondering the dissolution of a State because of climate change rather than conflict, cession, merger or succession entails novel questions that go to the

* BA (Hons) LLB (Hons) (Syd), DPhil (Oxon); Associate Professor, Faculty of Law, University of New South Wales, Australia; Research Associate, Refugee Studies Centre, University of Oxford. I am grateful to the Australian Research Council for funding this research, and to Emily Crawford for her research assistance. Any errors or omissions remain my own. This is a draft of a forthcoming chapter in J McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford, Hart Publishing, forthcoming 2010).

¹ *Western Sahara Case* (Advisory Opinion) [1975] ICJ Rep 12, 122 (Separate Opinion of Judge Dillard).

² See Address by President Mohamed Nasheed (Maldives) to the United Nations General Assembly (UNGA) (21 September 2009) <<http://www.unmultimedia.org/tv/unifeed/d/13548.html>>.

heart of legal rules on the creation and extinction of States. However, much of this deliberation is taking place in the abstract, such that the premises for why, when and how States might ‘disappear’, and the consequences of this, do not always sit comfortably with the empirical evidence.³ There is therefore a risk that however academically stimulating and challenging these questions of extinction are, their practical relevance is undermined by some of the assumptions on which they are based. This, in turn, may lead to the adoption of well-intentioned but ultimately misguided policies.

This paper is in part a response to the observation that a lack of specificity in climate migration research means that many of the normative and policy recommendations being made at the macro level are divorced from context.⁴ Accordingly, it is anchored in a case study of the small Pacific island States of Kiribati and Tuvalu, which have become emblematic of the so-called ‘sinking States’ and ‘climate refugee’ phenomenon.⁵

The paper argues that the focus on loss of territory as the indicator of a State’s disappearance may be misplaced,⁶ since small island States such as Kiribati and Tuvalu will become uninhabitable long before they physically disappear. In legal terms, the absence of population, rather than of territory, may provide the first signal that an entity no longer displays the full indicia of statehood (namely, a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States).

However, in the present context, the precise point at which a State loses its legal identity as a State is unclear. International law contemplates the formal dissolution of the State in cases of absorption (by another State), merger (with another State) and dissolution (with the emergence of successor States).⁷ The potential extinction of a State because of climate change is markedly distinct, however, because the territory it abandons will not (cannot) be assumed by any other State. While the motivation behind this paper is to determine the legal status of people displaced from ‘disappearing States’, its primary focus is on how and when such States would cease to exist, since this necessarily links to the ability to maintain nationality. In doing so, it examines mechanisms such as the government in exile as a means of enabling the State to continue even when the territory is uninhabitable, and briefly considers alternatives to full statehood, such as a self-governing territory in free association with another State.

II CONCEPTUAL PROBLEMS: MACRO VERSUS MICRO

One of the biggest drawbacks of much of the scholarship being generated on ‘climate migration’ is a tendency to treat climate-related movement as a single phenomenon that can be discussed in a general way. As Kälin’s chapter highlights, a number of very different scenarios are captured within this rubric, and it is only through examining them separately, with attention to their

³ G Hugo, ‘Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific’, in the present volume.

⁴ J Barnett and M Webber, ‘Migration as Adaptation: Opportunities and Limits’, in the present volume.

⁵ See, eg J McAdam and M Loughry, ‘We Aren’t Refugees’ *Inside Story* (30 June 2009) <<http://inside.org.au/we-arent-refugees/>>.

⁶ As Crawford observes, ‘the substrate of the State is not property, it is the people of the State seen as a collective’: J Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, Oxford, 2006) 717.

⁷ Succession can be described as a ‘change in sovereignty over territory’: MCR Craven, ‘The Problem of State Succession and the Identity of States under International Law’ (1998) 9 *European Journal of International Law* 142, 145.

distinctive and common features, that any meaningful policy or normative frameworks can be developed.⁸ While an overarching framework is helpful for identifying the range of climate impacts on human movement, the commonality of climate change as a driver is an insufficient rationale for grouping together a disparate array of displacement scenarios and proceeding to discuss policy responses in generic terms. Indeed, considerable conceptual confusion has arisen because of a lack of rigor and/or awareness in employing consistent terminology to describe those who move. Thus, despite an exponential expansion of the literature on environmental migration in the past few years, its ‘cascading’ or ‘mainstreaming’ effect has resulted in an oversimplification of the issues. As Barnett argues, we have in fact lost meaning because so much of the discussion lacks a real geo-social-political context.⁹ This is problematic for the development of law and policy, because it risks being inappropriate and inaccurately targeted if it does not reflect understandings about the differences in nature, timeframe, distance, scale and permanence of potential movement.

The ‘sinking island State’ phenomenon is one such example. It is frequently raised in the media and scholarly literature,¹⁰ but rarely analysed.¹¹ It has become emblematic of the most extreme impacts of climate change on human society, but is used haphazardly even by experts in the field.¹² In part, this may be because of the way that some small island States themselves have used the imagery of the drowning homeland to emphasise the impacts of climate change. Perhaps the most arresting example of this to date was an underwater Cabinet meeting held by the government of the Maldives in September 2009 to highlight its concerns about rising sea levels.¹³ At a more formal level, in June 2009, the Pacific Island States, with the support of a number of other countries, sponsored a UN General Assembly resolution on ‘Climate Change and Its Possible Security Implications’.¹⁴ During debate, delegates referred to the unprecedented ‘real possibility’ of ‘the disappearance of whole nations’,¹⁵ and the resolution’s ‘pursuit of greater guarantees of our territorial integrity’.¹⁶ The President of the Federated States of

⁸ W Kälin, ‘Conceptualising Climate-Induced Displacement’, in the present volume. Part of Kälin’s chapter is an attempt to disaggregate these scenarios for the appropriate institutional, legal and political responses to them.

⁹ Barnett and Webber, above n 4.

¹⁰ See, eg J Bone and R Pagnamenta, ‘We Are Sinking, Say Islanders, But There Is Still Time to Save the World’, *The Times* (23 September 2009); R Callick, ‘Don’t Desert Us, Say Sinking Pacific Islands’, *The Australian* (30 July 2009); R Colville, ‘Vanishing Homelands’, *Bangkok Post* (7 February 2008); C Lambert, ‘That Sinking Feeling: What Would You Do If Your Country Was Disappearing under the Sea?’ *The Times* (18 March 2009); J Lateu, ‘That Sinking Feeling: Climate Refugees Receive Funds to Leave Islands’, *New Internationalist* (March 2008); N Schmidle, ‘Wanted: A New Home for My Country’, *The New York Times* (10 May 2009); C Sherborne, ‘Sinking Sandbanks’, *The Monthly* (March 2009).

¹¹ For an exception, see C Farbotko, *Representing Climate Change Space: Isographs of Tuvalu* (PhD thesis, University of Tasmania, School of Geography and Environmental Studies, 2008); C Farbotko, ‘Tuvalu and Climate Change: Constructions of Environmental Displacement in the *Sydney Morning Herald*’ (2005) 87B(4) *Geografiska Annaler* 279.

¹² At a recent conference in Geneva, one distinguished academic referred to the ‘tens of millions of people who will sink from their islands’. The remark went uncontested despite the fact that the island States at risk do not have combined populations of anything near this magnitude.

¹³ See eg ‘Maldives Cabinet Makes a Splash’, BBC News (17 October 2009) <<http://news.bbc.co.uk/2/hi/8311838.stm>>.

¹⁴ UNGA Res 63/281 (3 June 2009). On climate change as an existential threat, see L Elliott, ‘Climate Migration and Climate Migrants: What Threat, Whose Security?’, in the present volume.

¹⁵ UNGA 63rd session, 9th plenary meeting (25 September 2008) UN Doc A/63/PV.9, Mr Chin (Palau).

¹⁶ *ibid*, Mr Litokwa Tomeing (President of the Marshall Islands).

Micronesia stressed the impact of climate change on ‘our own security and territorial integrity, and on our very existence as inhabitants of very small and vulnerable island nations.’¹⁷ The President of Vanuatu noted the risk that ‘some of our Pacific colleague nations will be submerged. If such a tragedy should happen, then the United Nations and its members will have failed in their first and most basic duty to a Member and its innocent people, as stated in Article 1 of the Charter of the United Nations.’¹⁸ Arguing along the same lines, the President of Nauru expressed the expectation that ‘the Security Council will review particularly sensitive issues such as the implications of the loss of land and resources and the displacement of people for sovereignty and international legal rights.’¹⁹

III THE NATURE OF DISAPPEARANCE

Though some States themselves use the ‘disappearing islands’ imagery to dramatic effect, the empirical evidence suggests that a simple ‘climate change’ cause and effect is not so straightforward, and motivations for movement even less so. That is not to say that climate change is not having real impacts on small island States; it is. But the Atlantis-style predictions that have captivated the imagination of some are unlikely to materialise as the means by which States cease to exist.

While ‘defined territory’ is one criterion of statehood, and though territory ultimately may disappear as a result of rising sea levels, it is more probable that the other indicia of statehood—a permanent population, an effective government, and the capacity to enter into relations with other States—will have been challenged prior to this occurrence. For low-lying islands such as Tuvalu and Kiribati, insufficient fresh water, as the water lens shrinks, has been cited as the most probable trigger for rendering these countries uninhabitable in the longer term.²⁰ Climate change threatens to reduce habitable land in other ways as well, including through coastal erosion and increased salination of the soil. This will impact upon agricultural capacity and, in turn, is likely to lead to greater urbanisation (as people move from the outer islands) and increased pressure on an already poor labour market. There are also negative health consequences as people become increasingly reliant on imported processed foods. It is therefore likely that long before the land disappears, the bulk of the population will have moved.

Movement away from island States such as Tuvalu and Kiribati, like the nature of the climate process itself, is likely to be slow and gradual, although climatic events such as cyclones or king tides may, in the interim period, trigger more sudden, but probably temporary (and internal) moves.²¹ Migration is, and has long been, a natural human adaptation strategy to

¹⁷ UNGA 63rd session, 10th plenary meeting (25 September 2008) UN Doc A/63/PV.10, Mr Emanuel Mori (President of the Federated States of Micronesia).

¹⁸ UNGA 63rd session, 11th plenary meeting (26 September 2008) UN Doc A/63/PV.11, Mr Kalkot Matas Kelekele (President of the Republic of Vanuatu).

¹⁹ UNGA 63rd session, 9th plenary meeting (25 September 2008) UN Doc A/63/PV.9, Mr Marcus Stephen (President of the Republic of Nauru).

²⁰ See eg N Mimura et al, ‘Small Islands’ in ML Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, Cambridge University Press, 2007).

²¹ The Red Cross in Tuvalu said that only four families have moved in response to flooding from king tides, and this was temporary: author’s interview with Red Cross representative, Tuvalu (27 May 2009). Most movement after the Samoan tsunami in 2009 was internal.

environmental variability. As Bedford notes, it is a normal response.²² But whereas Pacific islanders could once freely move to other islands in times of resource scarcity or climate change,²³ the legal (and sometimes physical) barriers to entry imposed by States today considerably restrict freedom of movement. Accordingly, a key policy objective of both the Tuvaluan and Kiribati governments is to enhance existing migration options to developed countries in the region, primarily Australia and New Zealand,²⁴ thereby building up ‘pockets’ of their communities abroad.²⁵

The discussion about ‘sinking islands’ is premised on the assumption that at some point, the territories of States such as Kiribati and Tuvalu will disappear—either completely, or to the point that they can no longer sustain permanent populations. Though international law contemplates the disappearance of States, it does so within the context of State succession. The conventional ways in which a State can become extinct—through voluntary absorption by another State, merger with another State, extinction by dissolution (voluntary or involuntary)²⁶—all presuppose that a successor State begins to exist on, or assumes control over, the territory of the previous State. Indeed, the two treaties on State succession define this as ‘the replacement of one State by another in the responsibility for the international relations of territory’.²⁷ There is never simply a void. As Marek observes in her leading work on the identity and continuity of States, a State’s extinction entails a succession and prevents any further continuity of that State; a ‘miraculous resurrection’ is impossible.²⁸

In the present context, unless the territory of Tuvalu or Kiribati were ceded to another State, the normal rules on State succession would not apply. For this reason, this paper turns its attention to the *creation* of States, to determine at what point the absence of certain criteria of statehood might lead other States (and the international community, through international organisations) to deny a State’s continued existence.

V WHAT IS A ‘STATE’?

Whether or not a State exists is a ‘mixed question of law and fact’.²⁹ The absence of a formal international law definition of a ‘State’ might be explained by the fact that questions about an entity’s nature only tend to arise in borderline cases, as well as by the tendency of States to preserve as much freedom of action as possible with respect to new States.³⁰ Logically, this

²² R Bedford, ‘Environmentally-Induced Migration within the Context of Existing Migration Patterns’ (Climate Change and Migration in the South Pacific Region: Policy Perspectives Conference, Wellington, 9–10 July 2009).

²³ See SR Fischer, *A History of the Pacific Islands* (Basingstoke, Palgrave, 2002) ch 1, on ancient Pacific mobility.

²⁴ Author’s interview with Anote Tong, President of Kiribati (12 May 2009); Bedford, above n 22.

²⁵ *ibid*; author’s interview with David Lambourne, Solicitor-General of Kiribati (8 May 2009).

²⁶ See generally Crawford, above n 6, ch 17.

²⁷ Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, art 2(1)(b); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (adopted 8 April 1983, not yet in force), art 2(1)(a).

²⁸ K Marek, *Identity and Continuity of States in Public International Law* (Geneva, Librairie E Droz, 1954) 5–6, referred to in Crawford, above n 6, 669. But see the case of Syria: 690.

²⁹ H Waldock, ‘General Course on Public International Law’ (1962) 106 *Recueil des Cours de l’Académie de Droit International* 5, 146, cited in Crawford, above n 6, 5. For an overview of the competing theories of statehood, see Crawford, above n 6, ch 1.

³⁰ Crawford, above n 6, 45; see also 40.

might also be said to apply in reverse, to enable States themselves to determine when an entity's loss of the indicia of statehood should indicate the end of that State. Crawford queries whether the rules determining statehood 'have been kept so uncertain or open to manipulation as not to provide any standards at all.'³¹

The classic formulation of statehood is contained in article 1 of the 1933 Montevideo Convention on the Rights and Duties of States,³² which is regarded as reflecting customary international law. The four elements of statehood are: a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States. While all four criteria would seemingly need to be present for a State to come into existence, the lack of all four may not mean the end of a State. This is because of the strong presumption of continuity of existing States,³³ which may account for the fact that since the establishment of the United Nations Charter in 1945, there have been very few cases of extinction of States and virtually none of involuntary extinction.³⁴ It is also significant that so-called 'failed States' have continued to be recognised as States even during the period when they were objectively failing.³⁵ As Craven observes, an analysis of State practice reveals that 'in many cases the issue is not simply one of determining the existence of the state, but rather the degree of identity and extent of continuity.'³⁶

The next section briefly highlights the key elements of each criterion of statehood to tease out possible implications for the 'sinking island' scenario.

A Defined Territory

Crawford writes: 'Evidently, States are territorial entities.'³⁷ But do they need to remain so in order to preserve their legal status? Certainly, there is no minimum amount of territory that

³¹ *ibid.*, 45. Crawford notes that at times States have treated as States entities that do not come within the accepted definition of the term, such as the Holy See (1870–1929), British India (1919–47), and the United Nations (UN) membership of Byelorussia and Ukraine.

³² Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

³³ Crawford says international law is 'based on this assumption': above n 6, 715, 701. He says 'there is a strong presumption against the extinction of States once firmly established': 715. See generally references referred to there: Marek, above n 28, 548; O Schachter, 'State Succession: The Once and Future Law' (1993) 33 *Virginia Journal of International Law* 253, 258–60; R Mushkat, 'Hong Kong and Succession of Treaties (1997) 46 *International and Comparative Law Quarterly* 181, 183–87; M Koskenniemi, 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the American Society of International Law* 22. Crawford, above n 6, 715.

³⁴ D Thürer, 'The "Failed State" and International Law' (1999) 81 *International Review of the Red Cross* 731. Crawford argues, however, that the notion of a 'failed State' involves some conceptual confusion, and that many cited cases of 'failed States' are in fact crises of government or governance, rather than about the extinction of the State in question: above n 6, 721–22. If a 'failed State' describes 'a situation where the structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new', the very notion of 'reconstitution' suggests that a reformulation of the State is possible, *qua* State, rather than as some other kind of entity: IW Zartman, 'Introduction: Posing the Problem of State Collapse' in IW Zartman (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder, Lynne Rienner Publishers, 1995) 1, cited in Crawford, above n 6, 720.

³⁵ Craven, above n 7, 160. He goes on to state: 'What this means is that emphasis should not be so much upon the existence of "external" rules of succession that allow for the "transference" of rights and duties from one subject to another, but rather upon determining the extent to which legal continuity should follow from elements of material (social, cultural or political) identity.'

³⁶ Crawford, above n 6, 46.

needs to be held, and loss of some territory at least should not affect the legal status of the entity, since it is not necessary for a State to have precisely defined boundaries.³⁸ The requirement is only that ‘the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory.’³⁹ Such territory does not have to be contiguous, and ‘[I]ittle bits of States can be enclaved within other States.’⁴⁰

The link between statehood and territory is crucial, and inherent in possession of territory (as an indicator of statehood) is exclusive control over it.⁴¹ Crawford therefore frames the territorial requirement of statehood as ‘a constituent of government and independence’ rather than as a separate criterion.⁴² While Lowe argues that the concept of a State ‘is rooted in the concept of control of territory’, this is arguably more about ensuring that the criterion of independence is met rather than about the territory per se, since such control is ‘to ensure that activities within its borders are not regulated by any other State’.⁴³ Jessup argued that the rationale for a State needing to possess territory was that ‘one cannot contemplate a State as a kind of disembodied spirit ... [T]here must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority.’⁴⁴

And yet, as will be examined below, States can continue to function even when their governments operate from outside national territory. The mechanism of the government in exile has enabled governments to function extraterritorially, although this has always been contemplated as temporary and exceptional. Furthermore, it is premised on the continued existence of a permanent population on the State’s territory (although the government in exile also retains jurisdiction over nationals abroad as well). Indeed, the general requirement that States have ‘a certain coherent territory effectively governed’⁴⁵ assumes that there remains a population on that territory to be governed.

B Permanent Population

³⁸ See eg *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 AD 11, 15 in which the German–Polish Mixed Arbitral Tribunal observed that it is sufficient that ‘territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited’.

³⁹ Crawford, above n 6, 46.

⁴⁰ *ibid.*, 47, referring to *Case concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* [1959] ICJ Rep 1959, 209, 212–13, 229; *Case concerning Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 1960, 6, 27. However, as a practical matter, there have been situations in the past where States have refused to recognise as States territories that are highly fragmented. For instance, the UK argued that ‘the fragmentation of the territory of Bophuthatswana within South Africa, the pattern of the population and the economic dependence on South Africa more than justify our refusal to recognise Bophuthatswana’: Minister of State, Foreign and Commonwealth Office, Hansard HC vol 105 col 100 (12 November 1986) cited in Crawford, above n 6, 47.

⁴¹ Crawford, above n 6, 48. ‘The only requirement is that the State must consist of a certain coherent territory effectively governed’: 52. See section IX below on leased land.

⁴² *ibid.*, 52.

⁴³ V Lowe, *International Law* (Oxford, Oxford University Press, 2007) 138.

⁴⁴ US Ambassador Jessup, UNSCOR 383rd meeting (2 December 1948), 11, cited in Crawford, above n 6, 44. Yet, in the context of belligerent occupation, Grant writes: ‘Territory is not necessary to statehood, at least after statehood has been established ... [it] appears to be the case that once an entity has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory’: TD Grant, ‘Defining Statehood: The Montevideo Convention and its Discontents’ (1999) 37 *Columbia Journal of Transnational Law* 403, 435.

⁴⁵ Crawford, above n 6, 52.

Just as international law does not require a State's territory to be a minimum size, nor is there minimum population requirement.⁴⁶ Indeed, Tuvalu is the second smallest State by population (after the Vatican). The notion of a 'permanent' population simply means that it cannot be transitory. For present purposes, the relevant question is whether a State ceases to meet this criterion of statehood when a large proportion—or all—of its population lives outside the State's territory.

There are already a number of Pacific countries with very large populations *outside* their territory, and yet this does not affect their ability to continue to function as States. For example, 56.9 per cent of Samoans and 46 per cent of Tongans live outside their own country.⁴⁷ Thus, the proportion of population living on the territory does not seem to be determinative of the population criterion for statehood. But if an exodus of population is accompanied by, or premised on, the imminent or eventual loss of territory, then does it assume a different significance? If no population remains on the territory, can the State continue to exist by retaining its own outpost on the territory (as is being contemplated in Kiribati) or elsewhere (as a government in exile or on territory that another State permits it to use)? This links to the next section: at what point does a government cease to function?

C Government

The existence of an effective government satisfies another requirement of statehood: independence. Crawford distinguishes between these two criteria as follows: 'government is treated as the exercise of authority with respect to persons and property within the territory of the State; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other States.'⁴⁸ He regards government as the most important criterion of statehood, 'since all the others depend upon it',⁴⁹ but notes that in practice its application may be much more complex (as it will be in borderline cases that its identification and scope will be tested).

States may nonetheless choose to recognise an entity as a State even where it is doubtful that the full signs of statehood exist. For example, in 1960 Congo was widely recognised as a State and was accepted as a UN member without dissent, even though it lacked an effective government.⁵⁰ Crawford concludes that this was because the requirement of government may be less stringent than thought, and, importantly, that it has two aspects: 'the actual exercise of authority, and the right or title to exercise that authority.'⁵¹ In that case, the conferral of

⁴⁶ On this point, see TM Franck and PL Hoffman, 'The Right of Self-Determination in Very Small Places' (1976) 8 *New York University Journal of International Law and Politics* 331, 383: 'infinitesimal smallness has never been seen as a reason to deny self-determination to a population.' On the position of the Vatican, see JC Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge, Cambridge University Press, 1996) 374, 411–12.

⁴⁷ See table in CW Stahl and RT Appleyard, *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* (Canberra, AusAID, April 2007) 7, which draws on census information from Australia (2001), New Zealand (2001) and the US (2000) to show the population at home and the population abroad of Pacific island countries.

⁴⁸ Crawford, above n 6, 55. With respect to 'territory', it refers in this sense 'to the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population. *Territorial sovereignty is not ownership of but governing power with respect to territory*': 56 (emphasis added).

⁴⁹ *ibid*, 56.

⁵⁰ *ibid*, 56ff.

⁵¹ *ibid*, 57.

independence by the former colonial power Belgium meant that there was no State against which the recognition of Congo could be unlawful, and the assumption followed that where a former sovereign grants full independence then the new State has the right to govern its territory.

The case of secession is different because the seceding State has to establish its adverse claim, which includes demonstrating effective and stable exercise of governmental powers.⁵² Indeed, this may explain why the presumption of continuity is so strong. First, premature recognition of another State could be seen as unlawful interference in the domestic affairs of the original State, which itself might undermine international stability.⁵³ Secondly, and related to the first point, there would otherwise be a void in international relations in which States would ‘find it difficult or impossible to continue many mutually advantageous economic, administrative and technical relations with other nations’.⁵⁴

Arguably, the case of ‘disappearing islands’ is more akin to the former, in that there is no competing claim and the presumption of continuity will apply until States no longer recognise the government (which may be in exile).⁵⁵ At the margins, the notion of continuity becomes quite subjective: ‘[i]n many instances the claim to continuity made by the State concerned will be determinative; other States will be content to defer to the position taken.’⁵⁶

D Capacity to Enter into Relations with Other States

The capacity to enter into relations with other States is a conflation of the requirements of government and independence. It is, accordingly, a consequence, rather than a criterion, of statehood.⁵⁷ Crawford regards independence (sometimes also called ‘sovereignty’⁵⁸) as 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.’⁵⁹ It has two main elements: a separate existence within reasonably coherent borders, and not being subject to the authority of any other State.⁶⁰

⁵² *ibid.*, 58. See also at 59, drawing on C Warbrick, ‘Recognition of States: Recent European Practice’ in MD Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Aldershot, Dartmouth Press, 1997) 14–16.

⁵³ On which, see O Schachter, ‘State Succession: The Once and Future Law’ (1993) 33 *Virginia Journal of International Law* 253, 259.

⁵⁴ International Law Association, ‘Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of Their Successors’, Annex E to *International Law Association Report of the Fifty-Second Conference* (1966) 584, cited in Mushkat, above n 33, 183. As Craven notes, ‘states are not willing to jeopardize legal relations with an entity where there is clearly no successor state’: above n 7, 159.

⁵⁵ On the other hand, the absence of any other State staking a claim over the territory may make it easier for States to deny its continuity, since there is no adverse claim (and thus no risk of premature recognition which could constitute interference in the State’s domestic affairs).

⁵⁶ Crawford, above n 6, 668, referring also to R Mullerson, ‘The Continuity and Succession of States, By Reference to the Former USSR and Yugoslavia’ (1993) 42 *International and Comparative Law Quarterly* 473, 477; B Stern, ‘La succession d’Etats’ (1996) 262 *Recueil des Cours de l’Académie de Droit International* 9, 82–86; W Czaplinski, ‘La continuité, l’identité et la succession d’Etats—évaluation de cas récents’ (1993) 26 *Revue Belge de Droit International* 374, 391–92.

⁵⁷ Crawford, above n 6, 61.

⁵⁸ *ibid.*, 89. Crawford says that ‘it is better to use the term “independence” to denote the prerequisite for statehood and “sovereignty” the legal incident.’

⁵⁹ *Island of Palmas Case (United States of America v The Netherlands)* (1928) 2 RIAA 829, 838.

⁶⁰ Crawford, above n 6, 66 (fn omitted).

It is important to distinguish between independence as an ‘initial qualification’ for statehood, and its role for a State’s ‘continued existence’.⁶¹ Crucially, for present purposes, the strong presumption of continuity of existing States means that other States may continue to treat it as such despite a lack of effectiveness,⁶² or even a ‘very extensive loss of actual authority’.⁶³ As Thürer notes in the context of so-called ‘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.⁶⁴

Similarly, when a government operates in exile, the State continues to exist but its governmental functions are (the assumption is, temporarily) unable to be performed from within its own territory. Since the principle of territorial sovereignty means that a government may only act as a government in exile with the consent (express or implied) of the State in which it is located,⁶⁵ the powers of such a government are necessarily more circumscribed than when it operates within its own territory. For example, in cases concerning the scope of jurisdiction of the courts of governments in exile within Britain in the 1940s, it was observed that ‘the sovereignty of any State is unrestricted on its own territory only, while on foreign territory it naturally yields to the sovereignty of the foreign State’,⁶⁶ and ‘this jurisdiction [of Dutch service courts] is only possible so far as it is authorised by the British legislature and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute’.⁶⁷ However, provided the government in exile’s functions are not interfered with, or controlled by, the host State (or any other), its independence is preserved.

VI GOVERNMENTS IN EXILE

There is a strong presumption in international law that States continue to exist even if there is a period without a (or an effective) government.⁶⁸ This shows the distinction between the ‘State’ and ‘government’, on which the legal position of the government in exile depends.⁶⁹ It might also suggest that States are willing to tolerate a hiatus between the loss of indicia of statehood and acknowledgement that a State has ceased to exist.

⁶¹ *ibid.*, 63.

⁶² *ibid.* The examples Crawford has in mind are unlawful invasion or annexation of a State.

⁶³ *ibid.*, 89.

⁶⁴ Thürer, above n 35, 752.

⁶⁵ See further S Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford, Oxford University Press, 1998) 215ff. The host State can determine the extent to which the courts of the government in exile may exercise jurisdiction: 217.

⁶⁶ *Allied Forces (Czechoslovak) Case* (1941–42) 10 AD No 31, 123, 124, cited in Talmon, above n 65, 217.

⁶⁷ *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, 159 (Lord Wright), cited in Talmon, above n 65, 217. However, the host State cannot prescribe how that jurisdiction is to be exercised: 218.

⁶⁸ Crawford, above n 6, 34.

⁶⁹ *ibid.*, 34 (fn omitted).

The term ‘government in exile’ does not denote a special status or subject of international law, but rather reflects the domicile of a government (namely, ‘the depository of a State’s sovereignty and its representative organ in international relations’).⁷⁰ History is replete with examples of governments of a State being able to operate as a government in exile in the territory of another State.⁷¹ The institution is most common in the case of belligerent occupation or illegal annexation. Traditionally, it has operated on the assumption that it is a time-bound mechanism which enables a government to operate outside its territory until it once again becomes possible for that government to reassert its control there.

The fact that governments can operate in exile suggests that the existence of territory, while essential to the original constitution of that entity as a State, is not integral to the exercise of certain governmental functions. As the French Foreign Minister wrote in 1814: ‘A sovereign whose States are conquered ... by the conquest only loses *de facto* possession and consequently retains the right to do everything that does not require that possession.’⁷² Though a government’s absence from its State does not automatically suspend or terminate existing treaties,⁷³ if it has to operate in exile then certain treaties may be terminated (or suspended) for reasons such as impossibility of performance or a fundamental change of circumstances.⁷⁴

Functions that governments have continued to perform in exile include treaty-making, maintaining diplomatic relations, and conferring immunities, privileges and jurisdiction over nationals.⁷⁵ In particular, the exercise of diplomatic protection has included the provision of consular representation, the lodging of protests, arranging deportations of nationals, the conclusion of amnesty agreements and the provision of passports and identity documents to prevent nationals from being treated as stateless persons.⁷⁶ This last function is of particular relevance to the climate-displacement context. In this regard, however, it is interesting to note that such documents have also been validly issued or extended by authorities in exile recognised in a lesser capacity than a government.⁷⁷

The government in exile idea is premised on there still being an identifiable population over which the government has jurisdiction. In the conventional case, the majority of those people will continue to reside in the State’s territory, from which the government is temporarily severed. In the ‘disappearing State’ scenario, the need for the government to operate in exile is premised on the uninhabitability of the State’s territory, at least for the majority of the

⁷⁰ Talmon, above n 65, 16 (citation omitted).

⁷¹ See *ibid.*

⁷² CM de Talleyrand-Périgord, *Mémoires du prince de Talleyrand* (Paris, Calmann Levy, 1891) vol ii, 214–54, cited in *ibid.*, 174.

⁷³ Talmon, above n 65, 136; see also *Valk v Kokes* (1950) 17 ILR 114, 358.

⁷⁴ See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 61(1), 62; Talmon, above n 65, 136ff.

⁷⁵ Talmon, above n 65, 15; see further 146–49.

⁷⁶ *ibid.*, 204–5 and citations there. The State’s ‘personal sovereignty over its nationals’ can protect them and their interests abroad: see generally 202–3. On the possible withdrawal of consular protection, see Hansard HC vol 353 cols 229–30 (8 November 1939), cited at 203.

⁷⁷ Talmon, above n 65, 205. See further JF Engers, ‘The United Nations Travel and Identity Document for Namibians’ (1971) 65 *American Journal of International Law* 571; (1968) 4 *Revue Belge de Droit International* 293–94 (discussing Belgium’s acceptance of travel documents issued by unrecognised governments in exile). For example, during the Second World War the US recognised the French Committee of National Liberation (CFLN) not as the government of France, but ‘as functioning within specific limitations during the war’, namely ‘as administering those French overseas territories which acknowledge its authority’: see Talmon, above n 65, 25, referring to a statement by the US on 26 August 1943.

population. Accordingly, given that the bulk of the population will be residing in other sovereign States, they will be subject to the laws and jurisdiction of those States. The role of the home State therefore becomes the same as the jurisdiction that any State can exercise with respect to its nationals abroad (predominantly diplomatic protection). Once people begin to acquire dual nationality, then the presumption of diplomatic protection may gradually favour the State in which the person resides (on the assumption that this is where nationality is more 'effective').⁷⁸ Over time, the function of the government in exile will wane. In particular, if the government in exile over time merged with the organs of the host State, especially if done voluntarily,⁷⁹ then this would normally result in the first State's extinction (provided 'there is no other perceived international interest in asserting the continuity of the State').⁸⁰

As Kälin notes in his contribution to this volume, it is unlikely that small island States will readily relinquish their claims to statehood.⁸¹ State practice suggests that the international community would be willing to continue to accept maintenance of the status quo (recognition of on-going statehood) even when the facts no longer seem to support the State's existence. Furthermore, the point at which a State such as Tuvalu or Kiribati could be said to have finally ceased to exist would depend not just on isolated acts of non-recognition by individual States, but their cumulative effect.⁸² In this regard, we are looking for 'a general acceptance by the international community as a whole that the situation has been resolved', rather than any particular length of time passing.⁸³ Accordingly, '[a] State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three.'⁸⁴ Indeed, its legal identity may be preserved to a degree even if it becomes a protectorate with some international legal personality.⁸⁵

VIII STATELESSNESS?

If the State does cease to exist, then what is the legal status of its (prior) population? In the absence of having acquired a new nationality, could its people be considered 'stateless' as a matter of international law?

Even when a State becomes extinct according to conventional international law, the resultant legal status of the population on the territory is unclear.⁸⁶ There is no general right to nationality in customary international law, although there is certainly 'a strong presumption in favor of the prevention of statelessness in any change of nationality, including in a state

⁷⁸ In dual nationality cases, the contemporary approach, based on the rule of real and effective nationality, is to 'search for "stronger factual ties between the person concerned and one of the States whose nationality is involved"', involving consideration of 'all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment': *Islamic Republic of Iran v United States of America*, Case No A-18 (1984) 5 Iran-US CTR 251, 25.

⁷⁹ For example, if a self-governing colony reverts to imperial rule: see Crawford, above n 6, 701.

⁸⁰ *ibid*, 701 and citations there.

⁸¹ Kälin, above n 8.

⁸² Crawford, above n 6, 704–5. See also Talmon, above n 65, 174ff.

⁸³ Crawford, above n 6, 704.

⁸⁴ *ibid*, 700.

⁸⁵ *ibid*, 700–1. See section X below on self-governing territories.

⁸⁶ See generally P Weis, *Nationality and Statelessness in International Law*, 2nd rev edn (Alphen aan den Rijn, Sijthoff and Noordhoff International Publishers, 1979) 135ff.

succession.⁸⁷ Although article 15 of the Universal Declaration of Human Rights contains a right to a nationality, it lacks a correlative duty on the State to confer nationality.⁸⁸ Indeed, the absence of a right to nationality in the International Covenant on Civil and Political Rights has been ascribed to the complexity of the issue and States' inability to agree on its inclusion in the treaty.⁸⁹ The closest one comes to locating such a duty is the 'negative duty' arising under the statelessness treaties.⁹⁰

While treaty law aims to prevent the inhabitants of an existing State from becoming stateless when a new State emerges on that territory,⁹¹ there is divergent practice on whether nationality automatically changes or whether further provision has to be made by the new State for that to occur.⁹² Crawford believes that the better view, in line with the decision of the Permanent Court of International Justice in the *Question concerning the Acquisition of Polish Nationality*, is that, subject to any stipulation to the contrary, people habitually resident in the territory of the new State acquire its nationality, for all international purposes, and lose their former nationality, although the new State may choose to delimit further who it will regard as its nationals.⁹³ While the issue of State succession does not apply to the Kiribati or Tuvalu context, the relevant point here is that existing international law lacks uniform practice in satisfactorily resolving the issue of nationality when one State ceases to exist. Though poorly ratified, the

⁸⁷ JL Blackman, 'State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law' (1998) 19 *Michigan Journal of International Law* 1141, 1183.

⁸⁸ Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217A (III) ('UDHR').

⁸⁹ JMM Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition' (1991) 12 *Human Rights Law Journal* 1, 4–5. The only ICCPR provision relating to the right to a nationality is article 24 on a child's right to acquire a nationality; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'). See also the views of Hernández-Truyol and Hawk, who propose a 'deterritorialized, relational, and identity-based' citizenship based 'not on the nation's view of the individual, but rather the individual's view of themselves': BE Hernández-Truyol and M Hawk, 'Traveling the Boundaries of Statelessness: Global Passports and Citizenship' (2005) 52 *Cleveland State Law Review* 97, 111. See also the notion of 'pragmatic citizenship' suggested in E Mavroudi, 'Palestinians and Pragmatic Citizenship: Negotiating Relationships between Citizenship and National Identity in Diaspora' (2008) 39 *Geoforum* 307, 309: 'The assumption that there is a naturalised and potentially exclusive relationship between territory, national identity and citizenship, whereby national identity is neatly located in a clearly demarcated and bounded nation-state can be seen as problematic.'

⁹⁰ Blackman, above n 87, 1176. See, in particular, the Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention), arts 1(1), 1(3), 1(4), 4 and 10.

⁹¹ 1961 Convention, especially arts 8–10; International Law Commission's (ILC's) Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, annexed to UNGA Res 55/153 (12 December 2000).

⁹² Crawford, above n 6, 52–53; Contrast the views of I Brownlie, 'The Relations of Nationality in Public International Law' (1963) 39 *British Year Book of International Law* 284, 320; DP O'Connell, *State Succession in Municipal Law and International Law*, vol 1 (Cambridge, Cambridge University Press, 1967), 497–528. See *AB v MB* (1951) 17 ILR 110, which refers to the 'absurd result of a State without nationals'.

⁹³ Crawford, above n 6, 53, referring to *Questions concerning the Acquisition of Polish Nationality* (Advisory Opinion) PCIJ Series B No 7 (1923) 15; see also N Berman, "'But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106 *Harvard Law Review* 1792, 1834–42.

1961 Convention on Reduction of Statelessness obliges States to ensure that any transfer of territory does not render people stateless.⁹⁴

Perhaps unsurprisingly, the two international treaties on statelessness do not envisage the eventuality of literal, physical statelessness.⁹⁵ In any event, the legal definition of ‘statelessness’ is carefully and deliberately circumscribed to apply only to *de jure* statelessness—premised on the denial of nationality through the operation of the law of a particular State.⁹⁶ It does not even extend to the situation of *de facto* statelessness—where a person formally has a nationality, but which is ineffective in practice, although the non-binding Final Act of the 1954 Convention relating to the Status of Stateless Persons suggests that ‘persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality’. Thus, the instruments’ tight juridical focus leaves little scope for arguing for a broader interpretation that would encompass people whose State is at risk of disappearing (unless, of course, the State formally withdrew nationality and through that act brought them within the legal concept of statelessness).

However, UNHCR’s institutional mandate to prevent and reduce statelessness encompasses *de facto* statelessness as well.⁹⁷ In the ‘sinking State’ context, UNHCR has argued that even if the international community were to continue to acknowledge a State’s on-going existence, despite signs that it no longer met the full indicia of statehood, its population could be regarded as *de facto* stateless. This view is based on the many practical constraints that the government would face in such a scenario, which would mean that ‘their populations would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased.’⁹⁸ From an institutional perspective, UNHCR is empowered to engage with States about preventing statelessness and therefore advocating on behalf of affected populations. In this regard, it has suggested that multilateral comprehensive agreements would facilitate planned and orderly movement to other States, and that the early introduction of

⁹⁴ 1961 Convention, art 10. See also the ILC’s Draft Articles on Nationality, above n 91, art 1 of which contains a ‘right to nationality’; art 4 requires States to take measures to prevent statelessness as a consequence of succession.

⁹⁵ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Convention); 1961 Convention on the Reduction of Statelessness.

⁹⁶ 1954 Convention, art 1(1): ‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’

⁹⁷ See eg UNGA Res 50/152 (9 February 1996), reiterated in UNGA Res 61/137 (25 January 2007), UNGA Res 62/124 (24 January 2008), UNGA Res 63/148 (27 January 2009). The work of the United Nations High Commissioner for Refugees (UNHCR) extends in some cases to situations of *de facto* statelessness, such as in trying to get ‘States to cooperate in the establishment of identity and nationality status of victims of trafficking, many of whom, especially women and children, are rendered effectively stateless due to an inability to establish such status, so as to facilitate appropriate solutions to their situations, respecting the internationally recognized human rights of the victims’: Executive Committee of the High Commissioner’s Programme, ‘Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons’ (14 February 2006) UN Doc EC/57/SC/CRP.6, para 7. See also UNGA Res 50/152 (9 February 1996) paras 14–15; UNGA Res 3274 (XXIX) (10 December 1974); UNGA Res 31/36 (30 November 1976).

⁹⁸ UNHCR, supported by the International Organization for Migration and the Norwegian Refugee Council, ‘Climate Change and Statelessness: An Overview’ (Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC), 1–12 June 2009, Bonn) (19 May 2009) <<http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>> 2.

educational and other measures to prepare people for displacement could not increase their resilience and adaptability once they move, but also while they remain on their islands.⁹⁹

Furthermore, the 1954 Convention's drafting history reveals that while its authors recognised that many *de facto* stateless persons were in the same position as *de jure* stateless persons (because despite legally being nationals of a particular State, they could not derive any benefits from it), their reluctance to include the latter class within the definition of a stateless person stemmed in part from the difficulty in *proving* loss or lack of nationality in such cases.¹⁰⁰ Arguably, in the case of Tuvalu and Kiribati, at a certain point the objective evidence will make clear that continued habitation in those territories is imminently impossible. In keeping with the object and purpose of the treaty, and the recommendation in the Final Act of the 1954 Convention that *de facto* stateless persons be treated in the same way as *de jure* stateless persons, one might argue that the benefits of the Convention should be extended to them. However, the Convention only binds States that have ratified it, and only in relation to stateless persons within their territory. Few States even have a status determination procedure to identify stateless persons, by contrast to refugees. Accordingly, its practical application may be limited. Attention would therefore be better focused on States' duty to prevent statelessness,¹⁰¹ as outlined by UNHCR in the present context:

To prevent temporary statelessness, acquisition of an effective nationality should be foreseen prior to the dissolution of the affected State. Dual nationality may therefore need to be permitted at least for a transitional period. As well, a waiver may be required of formal requirements for renunciation or acquisition of nationality which might be difficult to fulfil for affected populations. Such arrangements would need to provide *inter alia* for the right of residence, military obligations, health care, pensions and other social security benefits. Citizens of affected States that might have been displaced earlier, possibly to third States not party to the agreement, may also need to be considered.¹⁰²

IX RELOCATION

As a matter of principle, there is nothing in international law that would prevent the reconstitution of a State such as Kiribati or Tuvalu within an existing State, such as Australia

⁹⁹ *ibid.*, 3.

¹⁰⁰ See N Robinson, 'Convention relating to the Status of Stateless Persons: Its History and Interpretation' (Commentary by Nehemiah Robinson, Institute of Jewish Affairs, World Jewish Congress, 1955, reprinted by UNHCR, 1997), commentary on art 1.

¹⁰¹ UNHCR argues that the prevention of statelessness is a corollary of the right to a nationality: above n 98, 2. That right is contained in its broadest form in UDHR, art 15; and in relation to children in the ICCPR, art 24(3); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 7; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93, art 29. See also Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 9; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 5(d)(iii); 1961 Convention on the Reduction of Statelessness.

¹⁰² UNHCR, above n 98, 3.

(although the political likelihood of this happening today seems remote).¹⁰³ Theoretically, too, it would be possible for one State to ‘lease’ territory from another, although one might query the extent to which power could then be freely exercised sufficiently to meet the other requirements of statehood in such a case: while a State might be afforded jurisdiction over that territory, it would not be unencumbered by the ‘landlord’ State’s territorial jurisdiction unless expressly obtained from the previous sovereign.¹⁰⁴

A related issue, and one perennially discussed in the ‘sinking State’ context, is the *en masse* relocation of a State’s population to another country. Both Kiribati and Tuvalu have raised this on occasion with Australia and New Zealand,¹⁰⁵ but most recently, and most vocally, it has been embraced by the President of the Maldives who, on coming to office, boldly stated that he was seeking to purchase land in India or Australia to which to relocate his nation.¹⁰⁶ Subsequently, although it is unclear whether this was in direct response, the Indonesian Maritime Minister announced that Indonesia was considering renting out some of its 17,500 islands to ‘climate change refugees’.¹⁰⁷

¹⁰³ The right to self-determination does not operate so as to give the inhabitants of these States a right to claim land in other States.

¹⁰⁴ *ibid*; see also R Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963) 24. Note that the case of New Iceland in Canada was not a State within a State, as has sometimes been suggested: see, eg Steina Sommerville (nee Stefansson) in *The Interlake News* in 1946, who dubbed New Iceland ‘The Twelve Year Republic’; R Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’, *University of New South Wales Faculty of Law Research Series, Working Paper No 9* (2009) 8 <<http://law.bepress.com/unswwps/flrps09/art9/>>. It was created as an Icelandic ‘reserve’ by a Canadian Order-in-Council No 875 of 8 October 1875 to provide land to Icelandic immigrants who had left considerable environmental degradation and poverty at home, and was ultimately dissolved by Order-in-Council No 2306 (9 October 1897). This process of creation and dissolution alone indicates that it was not a sovereign equal of Canada, and historians have consistently emphasised that the settlers had no intention of creating an Icelandic colony: WJ Lindal, *The Icelanders in Canada* (Winnipeg/Ottawa, National Publishers, 1967) 135. This is reflected in an address given on the occasion of the Canadian Governor-General’s visit to New Iceland on 14 September 1877: ‘We have gathered under the flag of our new land, and as British subjects ... We accept gladly our new way of life as British subjects with the opportunity to acquire all the freedom and rights which pertain thereto. As British subjects, we desire that these rights be granted to us, and we are firmly resolved to preserve them. We are prepared to do our share in the maintenance of public order, and in the defense of our country, to perform the duties which England expects of every citizen’: Address by Friðjón Friðriksson, cited in N Gerrard, ‘“A Matter of Honour”: The Constitution of New Iceland: Then and Now’ (Building a New Relationship Conference, University of Manitoba, 27 October 2000) <<http://www.sagapublications.com/articles.html>>.

¹⁰⁵ See eg Senate Foreign Affairs, Defence and Trade Committee, *A Pacific Engaged: Australia’s Relations with Papua New Guinea and the Island States of the South-West Pacific* (Canberra, Commonwealth of Australia, 2003) para 6.78; author’s interviews with Aote Tong, President of Kiribati (12 May 2009); Sir Kamuta Latasi, Speaker of the Tuvaluan Parliament (and former Prime Minister) (27 May 2009); B Crouch, ‘Tiny Tuvalu in Save Us Plea over Rising Seas’, *Sunday Mail* (5 October 2008) <<http://www.news.com.au/adelaidenow/story/0,22606,24440703-5006301,00.html>>.

¹⁰⁶ R Ramesh, ‘Paradise Almost Lost: Maldives Seek to Buy a New Homeland’, *The Guardian* (10 November 2008) <<http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change>>.

¹⁰⁷ ‘Indonesian Islands for Rent’, *The Straits Times* (6 May 2009) <http://www.straitstimes.com/Breaking%2BNews/SE%2BAsia/Story/STIStory_373069.html>; ‘Indonesia Offers Pacific Climate Refugees Island Rental’, *Pacific Beat*, Radio Australia (3 June 2009) <<http://www.radioaustralia.net.au/pacbeat/stories/200906/s2588395.htm>> (citing Secretary-General of the Maritime Affairs Ministry, Dr Syamsul Maarif); see also S Holland, ‘Indonesia’s Rent-an-Island Answer to Climate Change’, *ABC News* (3 June 2009) <<http://www.abc.net.au/news/stories/2009/06/03/2588165.htm>>.

There is much more to relocation than simply securing territory, however. Those who move need to know that they can remain and re-enter the new country, enjoy work rights and health rights there, have access to social security if necessary, be able to maintain their culture and traditions,¹⁰⁸ and also what the status of children born there would be. The acquisition of land alone does not secure immigration or citizenship rights, but is simply a private property transaction.¹⁰⁹ Unless individuals personally acquire such rights (and in some cases, even if they do but retain dual nationality¹¹⁰), there is little in international law that would prevent a host country from expelling them should it wish to do so. It is only with formal cession of land at the State-to-State level that one State acquires the lawful international title to it and nationals can move to that area as part of their own national territory. The likelihood of this happening today is remote. Thus, if *en masse* relocation to another country is to be considered as a permanent solution, then issues other than land alone need to be considered in order to provide security for the future.¹¹¹

Even when such legal issues are resolved, relocation may still not be a popular option. As the following example from the Pacific region illustrates, concerns about the maintenance of identity, culture, social practices and land tenure are very real to those whose movement is proposed, and these may not be readily understood by outsiders. This, in turn, may lead to misunderstandings and misguided policies, which can have negative long-term, inter-generational affects.¹¹²

In the 1960s, as a result of the immense environmental destruction caused to that island by phosphate mining, it was proposed that the population of Nauru be resettled in Australia.¹¹³ Sites were originally investigated in and around Papua New Guinea but did not meet the three necessary requirements: ‘employment opportunities enabling Nauruans to maintain their standard of living; a community which would accept the Nauruans; and willingness and

¹⁰⁸ See, eg ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (15 January 2009) UN Doc A/HCR/10/61, 17–18; Economic and Social Council, Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights), ‘Prevention of Discrimination: Prevention of Discrimination and Protection of Indigenous Peoples’ (Expanded working paper by Françoise Hampson on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened with Extinction for Environmental Reasons) (16 June 2005) UN Doc E/CN.4/Sub.2/2005/28; S Humphreys (ed), *Human Rights and Climate Change* (New York, Cambridge University Press, 2010).

¹⁰⁹ Examples include the purchase of Rabi island in Fiji by the Banabans (from Kiribati); the purchase of Kioa island in Fiji by the Vaitupu people of Tuvalu. As Crawford notes, above n 6, 717, ‘the persistent analogy of territorial sovereignty to ownership of real property is misguided’, indicating the vastly different functions that State links to territory serve.

¹¹⁰ For example, Britain can revoke citizenship from nationals if doing so would not render them stateless: British Nationality Act 1981 (as amended in 2002 and 2006), s 40.

¹¹¹ Furthermore, as Campbell discusses, the ability of States to give away land is itself may raise serious human rights considerations for those already inhabiting (or with claims to) that land: J Campbell, ‘Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land’, in the present volume.

¹¹² See *ibid.*

¹¹³ Nauru had been a British mandate territory administered on behalf of the League of Nations. In 1919, Australia, the UK and New Zealand entered into an Agreement about to jointly control the administration of Nauru, predominantly to facilitate phosphate mining. When the UN’s international trusteeship system succeeded the League’s mandate system, it became a trust territory of Australia, New Zealand and the United Kingdom (the ‘partner governments’).

readiness on the part of the Nauruans to mix with the existing people.’¹¹⁴ On 12 October 1960, the partner governments of Australia, New Zealand and the United Kingdom agreed to offer permanent residence and citizenship in those countries to any Nauruans willing ‘to transfer to those countries and are likely to be able to adapt themselves to life there’.¹¹⁵ While Australian government documents state that: ‘It was envisaged that the transfer should take place gradually over a period of 30 or more years and that some material assistance to that end would be given’,¹¹⁶ the Nauruan view was that ‘[i]t was never envisaged that all Nauruans would take up the offer. Many would stay, and it was understood that Nauru would always remain a spiritual home for those resettled.’¹¹⁷

The resettlement offer was rejected by the Nauru Local Government Council on the basis that the very nature of the scheme ‘would lead to the assimilation of the Nauruans into the metropolitan communities where they settled’.¹¹⁸ The Nauruans instead requested an island of their own in a temperate zone, and in 1963 Australia offered them Curtis Island (near Gladstone, Queensland). The Nauruans were to be given freehold title; pastoral, agricultural, fishing and commercial activities were to be established; and ‘and the entire costs of resettlement including housing and community services such as electricity, water and sewerage etc would be met out of funds provided by the Governments of Australia, New Zealand and the United Kingdom. It was estimated that the cost would be in the region of 10 million pounds.’¹¹⁹ While Australia made clear that ‘Australian sovereignty would not be surrendered over any mainland or island location’,¹²⁰ those resettled would ‘be enabled to manage their own local administration and to make domestic laws or regulations applicable to their own community’, subject to their acceptance of ‘the privileges and responsibilities of Australian citizenship’.¹²¹

Nauru again rejected the offer, deeming these political arrangements unsatisfactory. The Nauruan representatives feared that they would not be able to maintain their distinct identity and would be ‘assimilated without trace into the Australian landscape.’¹²²

Your terms insisted on our becoming Australians with all that citizenship entails, whereas we wish to remain as a Nauruan people in the fullest sense of the term even if we were resettled on Curtis Island. To owe allegiance to ourselves does not mean that we are coming to your shores to do you harm or become the means whereby harm will be done to you through us. We have tried to assure you of this from the beginning. Your reply has been to the effect that we cannot give such an assurance as future Nauruan leaders and people may not think the same as we do.¹²³

¹¹⁴ *Case concerning Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice) (Preliminary Objections of the Government of Australia) vol 1 (December 1990), para 60.

¹¹⁵ *ibid*, para 61, citing Annex 4.

¹¹⁶ *ibid*, para 61.

¹¹⁷ *Case concerning Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice), Written Statement of Nauru, para 19.

¹¹⁸ Preliminary Objections of the Government of Australia, above n 114, para 61.

¹¹⁹ *ibid*, para 63, citing statement by the Australian Minister for Territories (20 August 1964).

¹²⁰ *ibid*, para 62.

¹²¹ Trusteeship Council Official Records, 13th session (May/June 1963) UN Doc T/SR.I203-1224, 6, cited in *Case concerning Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice) (Memorial of the Republic of Nauru) vol 1 (April 1990), para 169.

¹²² Memorial of the Republic of Nauru, above n 121, para 171.

¹²³ Nauru Talks 1964, 1–2, Annexes, vol 3, Annex 1, cited in *ibid*.

Nauruan and Australian perspectives on the issue of relocation reveal quite different approaches as to why it failed. Nauru claimed that resettlement in Australia was offered as a quick-fix solution that would cost the Australians far less than rehabilitating the land.¹²⁴ It saw it as ‘an attempt to break up the Nauruan identity and their strong personal and spiritual relationship with the island’,¹²⁵ ignoring Nauruan land tenure laws and ‘the right of the Nauruan people at international law to permanent sovereignty over their natural wealth and resources.’¹²⁶ The Nauruans maintained that they were never ‘seeking full sovereign independence’ over Curtis Island, but that ‘anything which did not preserve and maintain [their] separate identity was quite unacceptable.’¹²⁷ By contrast, the Australian government believed it was making ‘a genuine and generous attempt to meet the wishes of the Nauruan people’,¹²⁸ and regarded the sovereignty issue as the sticking point in negotiations.

Cultural misunderstandings about the importance of land and cultural identity remain at the heart of discussions today about relocating entire Pacific communities in response to climate impacts. While some suggestions to relocate entire communities are no doubt well-intentioned, there are significant implications of doing so with a top-down approach. As Campbell notes, the effects of dislocation from home can last for generations, and can have significant ramifications for the maintenance and enjoyment of cultural and social rights by resettled communities.¹²⁹

X SELF-GOVERNING ALTERNATIVE

Relocation does not, of itself, necessarily preclude claims that the State continues to exist, especially if some of the original population remains in the home State.¹³⁰ Indeed, one of the ideas proposed by the President of Kiribati is the establishment of a small government outpost on

¹²⁴ Written Statement of Nauru, above n 117, para 22. See also para 18: ‘Resettlement was simply a *quid pro quo* for depriving the Nauruan community of suitable and productive living space as a consequence of the devastation of their land (*cf.* Nauru Memorial, para. 177). It was also, perhaps, a way of avoiding the issue of rehabilitation.’

¹²⁵ *ibid.*, para 20.

¹²⁶ *ibid.*, para 74.

¹²⁷ ‘Statement by Hammer Deroburt, OBE, GCMG, MP, Head Chief, Nauru Local Government Council’, Appendix 1 to Nauru Memorial, above n 121, para 21. The issue resurfaced in 2003, when the Australian Foreign Minister, Alexander Downer, was reported as saying that he was considering the resettlement of all Nauruans in Australia, or giving them a vacant island to move to. This was dismissed by the President of Nauru, who again said it would undermine Nauru’s identity and culture: K Marks, ‘Australia Moots Radical Future for Bankrupt Nauru’, *The Independent* (20 December 2003) <<http://www.independent.co.uk/news/world/australasia/australia-moots-radical-future-for-bankrupt-nauru-577190.html>>: ‘Mr Downer said Canberra was “very concerned” about the situation in the tiny island state, which is bankrupt and widely regarded as having no viable future. ... He later played down the idea of giving Australian passports to Nauruans and resettling them, observing that other Pacific nations might expect similar treatment.’

¹²⁸ UNGA Official Records, 18th Session, 4th Committee, 1513th Meeting (12 December 1963) UN Doc A/C.4/SR.1513, 565, para 4, cited in Nauru Memorial, above n 121, para 170.

¹²⁹ Campbell, above n 111.

¹³⁰ Indeed, as Nauru observed about its own negotiations with Australia: ‘But Nauru would, at that point, still have remained under Trusteeship. Resettlement would not have granted to Australia or the British Phosphate Commissioners any further title to the land than that which they could claim under the Trusteeship. By the act of resettlement, Nauru was not to be annexed to Australia. As a self-determination unit, the Nauruan community could still seek control in Nauru both politically, through independence, and economically, in respect of the phosphate industry’: Written Statement of Nauru, above n 117, para 18.

the State's only high ground, Banaba Island, so as to retain the State and its control over resources, such as those generated by its extensive exclusive economic zone (EEZ).

A more radical alternative, however, would see the deliberate, earlier dissolution of the independent, sovereign State, but with the aim of preserving the 'nation'—as an identifiable national, linguistic and cultural community—for longer.¹³¹ For many Tuvaluans and i-Kiribati, the issues of key importance to them are the retention of 'home'—land, community, identity—rather than preserving the political entity of the State itself.¹³² Indeed, a claim to self-determination does not necessarily involve a claim to statehood and secession.¹³³

There are a number of ways in which a move away from fully-fledged statehood to a self-governing alternative could be undertaken. For present purposes, the option considered is one based on a well-established model within the Pacific: self-governance in free association with another State. The rationale behind this model is to respect 'the individuality and the cultural characteristics of the territory and its peoples' and give the associated territory 'the right to determine its internal constitution without outside interference',¹³⁴ while certain functions (such as defence) are carried out by another State. Crawford describes association as 'one of the more significant possibilities of self-government communities (especially island communities) that are too small to be economically and politically viable standing alone.'¹³⁵ It is also familiar in the Pacific context, being the relationship of the Cook Islands and Niue vis-à-vis New Zealand.¹³⁶

That there is no single concept of self-governance is borne out in the different approaches of Niue and the Cook Islands.¹³⁷ The Cook Islands has continually stressed its independence,¹³⁸ while Niue has resisted being treated like an independent State¹³⁹ (indeed the constitution of Niue commits New Zealand to provide it with 'necessary economic and administrative assistance'). Nonetheless, both are separate administrative entities within the Realm of New Zealand, their governments have full executive powers and their parliaments can make their own laws. By agreement, Niueans and Cook Islanders hold New Zealand citizenship (and do not have additional Niuean or Cook Islands citizenship) and can freely enter, live and work in New Zealand (and thus also Australia).¹⁴⁰

There are historical reasons for this relationship.¹⁴¹ Given the absence of such strong historical ties with Kiribati and Tuvalu, it is questionable whether New Zealand or Australia

¹³¹ See generally J Crawford (ed), *The Rights of Peoples* (Clarendon Press, Oxford, 1988).

¹³² Author's interview with government official, Ministry of Foreign Affairs in Kiribati (12 May 2009).

¹³³ I Brownlie, 'The Rights of Peoples in Modern International Law', in Crawford (ed), above n 131, 6.

¹³⁴ UNGA Res 1541 (XV) (15 December 1960), Principle VII.

¹³⁵ Crawford, above n 6, 626.

¹³⁶ Crawford writes that the Cook Islands and Niue 'are not States but have some separate international status by virtue of the relevant association agreements': above n 6, 492.

¹³⁷ The status of associated territories depends on the specific arrangements made, and their implementation: Crawford, above n 6, 632.

¹³⁸ 2001 Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand.

¹³⁹ See A Quentin-Baxter, 'Niue's Relationship of Free Association with New Zealand' (1999) 30 *Victoria University of Wellington Law Review* 589, 593.

¹⁴⁰ See Cook Islands Constitution Act 1964 (NZ); Niue Constitution Act 1974 (NZ); Constitution of the Cook Islands (Schedule to the Cook Islands Constitution Act); Constitution of Niue (Schedule 2 of the Niue Constitution Act).

¹⁴¹ The Cook Islands and Niue are former British protectorates which were annexed as dependent territories by New Zealand at the turn of the 20th century. Through acts of self-determination overseen by the UN, in 1965 and 1974 respectively their populations chose to become self-governing territories in free association

would be willing to enter into a similar free association with them. Alternatives such as federation¹⁴² or incorporation¹⁴³ might be perceived as more attractive, given the economic benefits that could be gained by merger, such as control over the extensive EEZs of Kiribati and Tuvalu.¹⁴⁴ In any event, the political likelihood of the Tuvaluan and i-Kiribati populations determining by referendum to move to a self-governance model, let alone to dissolve the State altogether through merger, seems remote in light of how recently independence was obtained.¹⁴⁵

XI CONCLUSION: THE BOUNDARIES OF STATES, THE BOUNDARIES OF LAW

State practice suggests that there is likely to be a presumption of a State's continuity for some time, even as the legal indicia of statehood begin to wane. However, at some future point this may cease as the objective characteristics of statehood start to recede,¹⁴⁶ and States, unilaterally or collectively, may gradually withdraw their recognition of an entity as a State.¹⁴⁷

International legal personality is not confined to States, and other entities, such as international organisations, groupings of States, Taiwan and the Sovereign Order of Malta, operate to differing degrees at the international level. While they do not have the same extensive

with New Zealand, which is a status distinct from full independence: see respectively UNGA Res 2064 (XX) (16 December 1965); UNGA Res 3285 (XXIX) (13 December 1974).

¹⁴² A federal State is 'a sole person in the eyes of international law': Montevideo Convention on the Rights and Duties of States, art 2. Federation is not discussed here, since it would require the dissolution of Kiribati or Tuvalu as a State. As a system of political organisation in which a State is comprised of different national groups, Brownlie regards federalism as 'probably better able than any other system to provide a regime of stable autonomy which provides group freedoms within a wider political cosmos and keeps the principle of nationality in line with ideas of mutuality and genuine coexistence of peoples': Brownlie, above n 133, 6. See further Crawford, above n 6, 483–89.

¹⁴³ This is the basis on which the Cocos (Keeling) Islands joined Australia. Principle IX of the Annex to UNGA Res 1541 (XV) (15 December 1960) assumes that the people of the State that integrates into another should be treated as equal citizens of the integrating State, accorded full citizenship rights and freedom of movement: see Crawford, above n 6, 624.

¹⁴⁴ See AHA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37 *Netherlands International Law Review* 207. Rayfuse, above n 108, 11 has suggested that conditions of merger could include a requirement that any revenue generated from these territorial acquisitions be placed into a trust fund to pay for the resettlement of the merging State's population (including on-going costs that might normally be borne by the State, such as pensions, although it should be noted that there is very little social security in Kiribati or Tuvalu).

¹⁴⁵ Author's interview with David Lambourne, Solicitor-General of Kiribati (8 May 2009); Tebao Awerika, Ministry of Foreign Affairs in Kiribati (12 May 2009).

¹⁴⁶ Rayfuse, above n 104, 13 writes: 'in an international community still based on the Westphalian notion of states, it may not be appropriate or realistic to envisage the permanent establishment and continuing existence of deterritorialised states *ad infinitum*. Rather, it may be useful to view this status as transitional, lasting perhaps one generation (30 yrs) or one human lifetime (100 yrs), by which time it is likely that much else in the international legal regime, including the existing law of the sea regime, will have to be reconsidered and reconfigured, in any event.'

¹⁴⁷ Although the better view is that recognition is declaratory, rather than constitutive, of statehood, it is acknowledged that 'the present state of the law makes it possible that different states should act on different views of the application of the law to the same state of facts': DJ Harris, *Cases and Materials on International Law*, 6th edn (London, Sweet and Maxwell, 2004) 145.

‘full’ powers of States to act, they have certain functional powers that enable them to operate as persons of sorts at the international level.¹⁴⁸

If Tuvalu and Kiribati were at some point regarded as having acquired a different kind of international legal personality, other than as a State, then (in the absence of acquisition of a new nationality) their former nationals could be said to meet the definition of a ‘stateless person’ in article 1 of the 1954 Convention relating to the Status of Stateless Persons: people ‘not considered as a national by any State under the operation of its law’. This is because in international law, when a State ceases to exist, so does nationality of that State.¹⁴⁹ States parties to the 1954 Convention would thus be obliged to afford former nationals the rights contained within it, including ‘as far as possible facilitat[ing] the[ir] assimilation and naturalization’.¹⁵⁰ While this would finally bring those displaced within an existing legal category, it is far from adequate as a means of addressing potential displacement from small island States. It is reactive, rather than proactive; requires people to leave their homes and be present in the territory of a State party to the Convention in order to claim its benefits; and in the absence of any status determination procedure for stateless persons, there is no clear means by which those benefits could be accessed.

While there is no simple legal ‘solution’ to the ‘disappearing States’ phenomenon and the status of those displaced, it is important to be aware of the human rights implications of certain mooted alternatives, in particular with respect to (and for) individual and community decision-making and choices. Historical examples from the Pacific show that relocation *en masse*, while theoretically a means of maintaining cultural integrity, has been fraught with difficulties in practice, and risks being seen as a top-down ‘solution’ that strips individuals and communities of agency. By contrast, self-governance in free association with another State is an option that would preserve a degree of autonomy and sense of ‘nation’ and culture for some time, but it is questionable whether this move away from full statehood would presently appeal to recently independent States such as Kiribati and Tuvalu, and, moreover, to potential partner States like Australia and New Zealand.

Paradoxically, planned and staggered migration over time—the solution favoured by Pacific islanders if *in situ* adaptation to climate change is not possible—may ultimately start to erode longer-term claims to continued sovereignty and statehood, since the State’s ‘disappearance’ may begin once the bulk of the permanent population has moved abroad and obtained a legal status in that new country (either through naturalisation or by being born a citizen there). Additionally, though the ‘population’ criterion of statehood does not require that a majority of nationals live within the State’s territory, a substantial loss of population would start to erode the effectiveness of the State’s government as its economic base declined. However,

¹⁴⁸ It is not certain that small island States such as Kiribati and Tuvalu would ever fall into this category, only because States sometimes continue to recognise statehood even when its criteria ‘are only marginally (if at all) complied with’: Crawford, above n 6, 223. This is the case with the State of the Vatican City. The strength and influence of its government, the Holy See, compensates for its very small territory and lack of a permanent population, in the same way that in certain ‘failed States’, the existence of territory and people compensate for the virtual absence of a government: Crawford, above n 6, 223. The question is whether, in the absence of a permanent population within a diminishing territory, other States would be prepared to continue to recognise Tuvalu and Kiribati as on-going States or not.

¹⁴⁹ As Weis, above n 86, 136 notes: ‘In the case of universal succession, the predecessor State is extinguished and its nationality ceases to exist. All persons who were nationals of the predecessor State cease to be such.’

¹⁵⁰ 1954 Convention, art 32.

migration seems to be the option that will offer individuals and households the most choice about when to move, and which will afford them the opportunity to establish ‘pockets’ of their communities abroad which others can join over time. It also enables potential host States to better plan for inward-movement and develop culturally-sensitive policies towards those migrants, rather than trying to spontaneously accommodate people who do not easily fit existing legal categories.