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Jessica L. Noto
University at Buffalo School of Law (Student)

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COMMENT

Creating a Modern Atlantis: Recognizing Submerging States and Their People

JESSICA L. NOTO†

INTRODUCTION

*“Men argue, nature acts.”*¹

Low-lying islands and coastal regions throughout the world are in imminent danger of encroaching seawater because of global warming. This will inevitably result in the loss of territory, life, and, in certain cases, international recognition of entire states. In fact, as many as one billion people may be negatively impacted by rising sea levels in the coming years,² with almost two million displaced from small island nations by 2050.³ The United Nations Intergovernmental Panel on Climate Change has predicted

† J.D. Candidate, Class of 2014, SUNY Buffalo Law School. Special thanks to my 2012-13 Jessup teammates (Henry Zomerfeld, John Land, Michael Das, Esq. and Jonathan Dominik, Esq.) and coaches (Kevin Espinosa, Esq., and Michael Hecker, Esq.) for their help and guidance throughout the process; to my editor, Emily Dinsmore, for her hard work on finalizing this piece; and to my family for their unending love and support.

1. VOLTAIRE, *DICTIONNAIRE PHILOSOPHIQUE* 428 (Raymond Naves ed., Garnier Frères 1961) (1765).

2. Walter Kälin, *Conceptualizing Climate-Induced Displacement*, in *CLIMATE CHANGE AND DISPLACEMENT* 81, 81 (Jane McAdam ed., 2010).

3. ELIZABETH FERRIS ET AL., *BROOKINGS INST., ON THE FRONT LINE OF CLIMATE CHANGE AND DISPLACEMENT: LEARNING FROM AND WITH PACIFIC ISLAND COUNTRIES 19* (2011), available at http://www.brookings.edu/~media/research/files/reports/2011/9/idp%20climate%20change/09_idp_climate_change.pdf.

a minimum of a 7.1-inch rise in sea level by the end of the century.⁴

These rising sea levels will devastate small island nations. States such as Tuvalu, Fiji, and the Maldives have already been forced to seek new homelands elsewhere.⁵ Fiji is currently in negotiations to establish a lease or cessation of land from Australia, while Tuvalu has begun a mass evacuation of its people.⁶ Further, the Maldivian president has openly discussed relocating his entire state, as most of the state's 1,200 islands are merely 4.9 feet above sea level.⁷ He has also contracted with Dutch engineers to create artificial lands anchored to the seabed, which would have the capacity to float above the rising sea level.⁸ Yet, current international law does not provide jurisdictional sovereignty for artificial lands, including islands.⁹ An island built within two hundred miles of a coastal state, a zone commonly referred to as the exclusive economic zone, would be bound by the jurisdiction of that state over its initial construction and continued existence.¹⁰ Accordingly, climate change and global warming are problems that are moving to the forefront of the international community's agenda and need to be addressed to protect the citizens of the world.

While the Intergovernmental Panel on Climate Change admits that "[s]ea-level rise poses by far the greatest threat

4. *Sinking Island's Nationals Seek New Home*, CNN WORLD (Nov. 11, 2008, 8:53 PM), http://articles.cnn.com/2008-11-11/world/maldives.president_1_sea-levels-maldivian-climate-change?_s=PM:WORLD [hereinafter *Sinking*].

5. Ilan Kelman, *Island Evacuation*, FORCED MIGRATION REV., Oct. 2008, at 20, 20-21.

6. *See id.*

7. *See Sinking*, *supra* note 4.

8. Katharine Gammon, *Building Artificial Islands that Rise with the Sea*, POPULAR SCI. (Aug. 6, 2012), <http://www.popsoci.com/technology/article/2012-07/building-artificial-islands-rise-sea>.

9. U.N. Convention on the Law of the Sea art. 60(8), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood* 11 (Sydney Law Sch., Legal Studies Research Paper No. 11/59, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931466.

10. UNCLOS, *supra* note 9, art. 60(2); Rayfuse & Crawford, *supra* note 9.

to small island states relative to other countries,”¹¹ rising sea levels will not just impact those states. In Bangladesh, over one hundred million people live within a few meters of sea level.¹² If sea levels continue to rise at the current rate, these people will be without a home and will be forced to flee inland or seek sanctuary elsewhere. Certain coastal areas in Africa, Asia, Europe, and North America will lose hundreds of miles of coastline.¹³ Specifically, New Orleans will all but disappear permanently,¹⁴ which could cause widespread panic and mass evacuations. This is further evidence of the unique and devastating position many of these people face in the coming years due to climate change and rising sea levels.

As currently codified, international law is woefully insufficient to combat the growing concerns of climate change. Adopted in 1994, the United Nations Framework Convention on Climate Change (“UNFCCC”) was the first formal recognition of global climate change as a cause for concern in the international community.¹⁵ This convention, as well as its Kyoto Protocol addendum, underlies the current understanding of climate change in the international community. The UNFCCC attempts to compel the stabilization of greenhouse gases in a timeframe that will not cause permanent damage to ecosystems globally.¹⁶ The Alliance of Small Island States impacted the adoption

11. Intergovernmental Panel on Climate Change [IPCC], *Small Island States*, in CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY 843, 847 (2001), available at <http://ipcc.ch/ipccreports/tar/wg2/index.php?idp=621>.

12. David Hodgkinson et al., *The Hour When the Ship Comes in: A Convention for Persons Displaced by Climate Change*, 36 MONASH U. L. REV. 69, 69-70 (2010) (Austl.).

13. J.L. Weiss & J.T. Overpeck, *Rising Temperatures, Disappearing Coastlines*, NPR (Dec. 8, 2009, 9:59 AM) <http://www.npr.org/templates/story/story.php?storyId=121197147>.

14. *Id.*

15. United Nations Framework Convention on Climate Change, G.A. Res. 48/189, U.N. Doc. A/RES/48/189 (Jan. 20, 1994).

16. *Id.*; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).

of the UNFCCC and marked the first time that these geographically diverse island states were able to convince the United Nations that their plight was one that needed to be discussed in an open forum.¹⁷ To date, there are no other United Nations documents that address the impact of climate change on the global community as a whole, or what preventative steps should be taken to avoid the impending devastation.

The impact of global sea level rise raises two key issues. International law is currently ill-equipped to classify: (1) the disappearing states; and (2) their citizens. First, there is the issue of granting statehood recognition. Currently, there are only two theoretical frameworks for recognizing statehood: the Declarative Theory and the Constitutive Theory.¹⁸ These competing theories require very different criteria for granting statehood recognition. However, both theories concern granting a *new* state recognition rather than addressing a state *maintaining* its recognition once it has already been established. There are currently no theories that codify the requirements for maintaining statehood status. In situations where a state no longer qualifies as a state under the two current theories, either temporarily or permanently, the issue of continuing international recognition arises. Without recognition, the state could no longer act on behalf of its people in an international stage.

The loss of statehood recognition is a concern for many reasons. For example, the Statute of the International Court of Justice requires parties to be states before they can bring a claim before the court.¹⁹ If states no longer qualify under the traditional Declarative or Constitutive Theories of statehood, then they may be foreclosed from bringing claims before the International Court of Justice and other international courts. Moreover, if those people are

17. John W. Ashe et al., *The Role of the Alliance of Small Island States (AOSIS) in the Negotiation of the United Nations Framework Convention on Climate Change (UNFCCC)*, 23 NAT. RESOURCES F. 209, 209-11, 219 (1999).

18. See discussion *infra* Part I.

19. Statute of the International Court of Justice art. 34, *reprinted in* 1947 I.C.J. Acts & Docs No. 6, at 71 (June 26).

mistreated by other nations, their home state will have no means of protecting them if it loses recognition.

The second issue that arises from global sea level rise is status recognition for the affected peoples. The international community affords different levels of protection in different situations. A strict reading of the most cited, and only, United Nations document addressing refugee status does not protect persons displaced beyond their state's borders who are fleeing environmental devastation.²⁰ Even regional treaties and conventions do not specifically address this issue. The common definition of the term "refugee" includes "events seriously disturbing public order,"²¹ but no international court has interpreted environmental damage to qualify. There are circumstances in which environmentally affected people may be protected as internally displaced persons²² or as stateless²³ persons, but the most appropriate level of protection would be as a refugee.

Addressing these concerns will require expanding, and possibly overturning, current codified international law. At a minimum, it will require the international community to think about these growing concerns in a new light. At most, it will require a radical shift in the way the international community is held accountable for its actions.

20. See Protocol Relating to the Status of Refugees, Introductory Note, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

21. See, e.g., *id.*; Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa art. I.2, Sept. 10, 1969, 1001 U.N.T.S. 45; Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama art. III.3, Nov. 22, 1984, <http://www.unhcr.org/45dc19084.html> [hereinafter Cartagena Declaration].

22. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, arts. 4.2, 5.4, *adopted on* Oct. 23, 2009, 49 I.L.M. 83, 89, 90 [hereinafter Kampala Convention].

23. See Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

I. STATEHOOD RECOGNITION

Statehood recognition is viewed in the international community through two different lenses. The first is retention of statehood recognition. However, there are no formalized standards against which a state can be measured to determine whether it retains its statehood.²⁴ So, while the idea of continuity of a state would be best suited for the context of states lost to rising sea levels, it does not provide an objective measure upon which a state can be judged.

The initial recognition of states is the second lens through which statehood is viewed. This view has two primary theories: the Declarative Theory and the Constitutive Theory. Historically, there is evidence of states being recognized for the first time, whereas there is little evidence about why states have retained their statehood. Additionally, since a state has yet to lose its recognition due to rising sea levels, it is difficult to predict which method would be employed. Thus, each method must be analyzed and evaluated for appropriateness and applicability.

A. *Continuity of Statehood*

State practice indicates a continued “trend in international law suggest[ing] a strong presumption in favor of the prevention of statelessness.”²⁵ While rising sea levels may threaten to completely submerge low-lying islands and coastal regions, “there is a general presumption of continuity of statehood . . . [and] statehood is not lost automatically with the loss of habitable territory nor is it necessarily affected by population movements.”²⁶ Even

24. See discussion *infra* Part 1.C. While the Declarative and Constitutive Theories describe how new states can be *formed*, they are silent on the *retention* of statehood.

25. Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1183 (1998).

26. U.N. High Commissioner for Refugees, Summary of Deliberations on Climate Change and Displacement, ¶ 30 (Apr. 2011), <http://www.unhcr.org/4da2b5e19.pdf>.

international treaties evidence a strong preference toward the prevention of statelessness. For example, the 2006 European Convention on the Avoidance of Statelessness in Relation to State Succession provides that it is each state's responsibility to prevent international statelessness.²⁷ This obligates states in the international community to not strip a state's right to existence.²⁸

The United Nations has also been ardent in promoting the reduction of statelessness. Article 8 of the United Nations Convention on the Reduction of Statelessness provides that a state should not promote or continue a policy of depriving "a person of its nationality if such deprivation would render him stateless."²⁹ Accordingly, states may not deny a citizen his nationality unless he is able to obtain new citizenship.³⁰ The United Nations High Commissioner for Refugees has also advocated for the international community to avoid creating stateless persons.³¹ Preventing statelessness has been viewed as a monumental right similar to the right to nationality.³²

The international communities' fervent desire to prevent statelessness indicates that if a state did lose its territory to rising sea levels, the international community would not want to strip that state of its statehood, nor its peoples of their nationality. However, this idea of statehood continuity has no methods by which a state can be tested. Thus, it is far more likely the international community

27. See Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, arts. 3, 6, *opened for signature* May 19, 2006, C.E.T.S. No. 200 (entered into force Jan. 5, 2009), *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=200>.

28. *See id.*

29. Convention on the Reduction of Statelessness, *supra* note 23, art. 8, at 179.

30. *Id.* art. 7, at 178.

31. Exec. Comm. of the High Comm'r's Programme, Rep. on its 46th Sess., ¶ 20, U.N. Doc. A/AC.96/860 (Oct. 23, 1995).

32. U.N. High Comm'r for Refugees, *Climate Change and Statelessness: An Overview*, 2 (May 15, 2009), <http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf> [hereinafter *Climate Change and Statelessness*].

would look to one of the two methods used to recognize new states, even if these theories were ill-suited to application in the context of maintaining statehood recognition.

B. *Recognition of New States*

There are two active theories regarding emergence of newly recognized states. The first is the traditional and formally codified Declarative Theory. The second is the more recently developed Constitutive Theory. As neither theory has been used appropriately in the context of maintaining recognition nor granting lost recognition on their own, both theories are ill-suited to application in the context of submerging states that had previously been granted recognition. However, in combination, both theories help lay the foundation for a more appropriate test for states that are facing total environmental devastation.

1. Declarative Theory

The Declarative Theory was first codified in 1933 within the Montevideo Convention on the Rights and Duties of States (“Montevideo Convention”).³³ This theory of statehood recognition is the most widely applied, recognized, and cited source in international law for determining statehood.³⁴ The Declarative Theory proposes four factors for granting statehood recognition: a defined territory, an effective government, a permanent population, and the capacity to enter into relations with other states.³⁵ According to the International Court of Justice’s former president Rosalyn Higgins, these “component elements have always been interpreted and applied flexibly, depending on the

33. See Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT’L L. & POL’Y 209, 215-16 (2011).

34. See Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 413-14 (1999).

35. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (1933) [hereinafter Montevideo Convention].

circumstances and the context in which the claim of statehood is made.”³⁶

Application of the Declarative Theory is generally supported by state practice in instances where states are being recognized for the first time. Moreover, international, regional, and domestic bodies have consistently defined statehood using the Declarative Theory.³⁷ For example, the dissolution of the Socialist Federal Republic of Yugoslavia in 1991 led to the emergence of five successor states: Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia.³⁸ The Arbitration Commission charged with determining the status of the successor states applied the Declarative Theory when it declared the Federal Republic of Yugoslavia to be a state without regard to its status in the international community.³⁹ Moreover, this commission also set dates for recognition of all five successor states, which predated informal international recognition by months or years.⁴⁰ Bosnia-Herzegovina was accepted by both the United States and the European Community as a state even though it was only formally recognized by Bulgaria and Turkey.⁴¹ In this instance, Bosnia-Herzegovina, Croatia, and Slovenia were recognized by the United States because they met all four factors outlined in the Montevideo Convention, not because they were recognized by other states.⁴² Since the Declarative Theory is more widely acknowledged and used, it has been

36. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 39 (1994).

37. Stefan Talmon, *The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?*, 75 BRIT. Y.B. INT'L L. 101, 106-07 (2004).

38. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EURO. J. INT'L L. 36, 36 (1993).

39. *See id.* at 48-49; Talmon, *supra* note 37, at 107.

40. *See* International Conference on the Former Yugoslavia Documentation of the Arbitration Commission Under the UN/EC (Geneva) Conference: Advisory Opinion No. 11 [Dates of Succession], ¶ 10, July 16, 1993, 32 I.L.M. 1586; Talmon, *supra* note 37, at 107.

41. Rich, *supra* note 38, at 50.

42. *See id.*

improperly applied in the context of maintaining submerging states' recognition.

a. *Defined Territory*. Of the four Declarative Theory factors, a defined territory is widely considered to be the most important.⁴³ Without a defined territory, there is no place for the permanent population to reside or the effective government to control. The International Court of Justice has even recognized exercising control over territory to the exclusion of others as a necessity for statehood recognition.⁴⁴ That same court had previously held that "respect for territorial sovereignty is an essential foundation of international relations."⁴⁵ Many states agree with this principle. For example, the United States requires "effective control over a clearly defined territory" for it to consider an entity a state.⁴⁶ Additionally, distinguished scholars have long considered effective and exclusive control over land a requirement for statehood. James Crawford, a leading international law scholar, even went so far as to say that "the right to be a State is dependent . . . upon the exercise of full governmental powers with respect to some area of territory."⁴⁷

The United Nations has considered the plight of low-lying coastal regions. In doing so, the United Nations General Assembly determined that the "very existence" of these states is threatened by rising sea levels.⁴⁸ The United Nations High Commissioner for Refugees has found that

43. See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

44. See *North Sea Continental Shelf (Ger. v. Den. & Neth.)*, 1969 I.C.J. 3, ¶ 19 (Feb. 20).

45. *Corfu Channel (Gr. Brit. & N. Ir. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9).

46. U.S. Dep't of State, Press Relations Office Notice (Nov. 1, 1976), *Diplomatic Relations and Recognition*, 1976 DIGEST ch. 2, § 3, at 19-20, quoted in Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L L. 337, 337 (1977).

47. James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 111 (1977) [hereinafter Crawford, *The Criteria for Statehood*].

48. G.A. Res. 63/213, at 1-2, U.N. Doc. A/RES/63/213 (Dec. 19, 2008) [hereinafter G.A. Res. 63].

submerged states cease to exist.⁴⁹ Following this logic, states will lose their claim to statehood if territory is lost or rendered uninhabitable. Therefore, it is clear that the United Nations requires a state to maintain a defined territory for continued recognition of statehood.

To address this concern, states may have to resort to preemptively leasing or purchasing land from other states so as not to disappear off the map entirely. Historically, states are not voluntarily willing to cede territory. Therefore, it is more likely that states will be forced to lease new homelands. However, a tenant state is necessarily reliant on a landlord state to maintain its territory.⁵⁰ For example, if the landlord state breaks the lease, the tenant will have no territory and its people would be rendered *de facto* stateless. Thus, the tenant state cannot be said to have exclusive control over the leased territory. Leases, by their very nature, indicate a temporary solution for loss of territory, rather than a permanent one.⁵¹ As this would be a first for the international community, it remains to be seen whether leased land would actually satisfy the territory requirement.

However, allowing use of temporary locations as defined territory, for the purposes of statehood under the Declarative Theory, undermines the requirement's significance. In his defense of Israel's statehood before the United Nations Security Council, Phillip C. Jessup indicated the defined territory factor is satisfied only when there is "some portion of the earth's surface which [the state's] people inhabit and over which [the state's] Government exercises authority."⁵² Allowing a state to retain its statehood, even upon a state's forced relocation of its people after multiple lease expirations, undermines the intentions of the defined territory requirement for

49. See *Climate Change and Statelessness*, *supra* note 32, at 2.

50. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 110-11 (7th ed. 2008). Brownlie notes that these arrangements necessarily depend on "precise terms of the grant," but that there is "a presumption that the grantor retains residual sovereignty." *Id.*

51. See *Climate Change and Statelessness*, *supra* note 32, at 2.

52. U.N. SCOR, 3d Sess., 383d mtg. at 4, U.N. Doc. S/PV.383 (Dec. 2, 1948).

statehood. Thus, to maintain the integrity of the territorial requirement of statehood, the defined territory requirement of the Declarative Theory necessitates a *permanent* homeland for states whose territory has been rendered completely uninhabitable because of rising sea levels.

b. *Effective Government.* A state having complete sovereignty and not having to rely on another state is the central purpose of recognition. One of the essential requirements for independence is an effective government.⁵³ James Crawford even went so far as to say that “[t]he requirement that a putative [s]tate have an effective government might be regarded as central to its claim for statehood.”⁵⁴ Thus, the inherent ability of a state to create and use laws to govern its own territory is fundamental to those principles of independence, and by association, statehood.⁵⁵ Ownership of property is one way to ensure the ability of a state to have exclusive control over its own territory.

However, an effective government is not purely derived from mere ownership of property. Rather, an effective government is satisfied by maintaining specific control over the territory of which it controls: “[t]erritorial sovereignty is not ownership of but governing power with respect to territory.”⁵⁶ A government must be able to exercise control over its territory and be “capable of establishing and maintaining a legal order throughout the territory of the prospective [s]tate.”⁵⁷ Inherent in dictating the laws of a territory is maintaining territorial jurisdiction, so a state is able to adjudicate violators of the controlling state’s domestic laws. In contemplating the concept of a leased state, scholars have noted that territorial jurisdiction is only lost if it is expressly waived by the landlord state.⁵⁸ Thus, it

53. See Crawford, *The Criteria for Statehood*, *supra* note 47, at 116.

54. *Id.*

55. See *id.* at 116-19.

56. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 56 (2d ed. 2006).

57. DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 63 (2002).

58. See BROWNLIE, *supra* note 50, at 110-11.

is possible for a leased state to maintain territorial jurisdiction over a territory, and subsequently, an effective government over that territory. However, pure ownership of a territory, with complete sovereignty over its people and its laws, still would clearly satisfy the effective government requirement.

Historically, even when a state with little or no governmental control over its community applied for statehood, it has been granted. For example, the Republic of Congo was first accepted into the United Nations in 1960, even when it did not have an effective government.⁵⁹ During this time, there was a divide in the Republic of the Congo as to which of two governmental factors should retain control of the territory. Additionally, it was plagued by a number of cessionary movements.⁶⁰ In fact, the Republic of Congo was so volatile that United Nations forces had to intervene to prevent a civil war.⁶¹ James Crawford even said, in respect to the Republic of the Congo, that a “less . . . effective government would be hard to imagine”⁶² because of the extent to which the government was in turmoil. While it is true that mere acceptance into the United Nations in 1960 alone does not signify the Republic of the Congo’s statehood,⁶³ despite all of the internal governmental control issues and concerns, it was still considered a state during this time.

Entering into a contract, treaty, or agreement with another state necessarily relinquishes some of that state’s rights. However, in cases where a state has ceded some of its rights to another state, that has not prevented, or revoked, its statehood. Currently, the United States has three free associated states: the Marshall Islands, the

59. CRAWFORD, *supra* note 56, at 57.

60. *Id.* at 56.

61. *Id.* at 57.

62. *Id.* at 57.

63. As the United Nations notes on its website, it “does not possess any authority to recognize either a State or a Government.” *About UN Membership*, UNITED NATIONS, <http://www.un.org/en/members/about.shtml> (last visited Mar. 17, 2014).

Federated States of Micronesia, and Palau. All three of these states are members of the United Nations and are considered sovereign.⁶⁴ Moreover, these states have retained full statehood status since gaining independence. However, the defense of all three of these states is governed by United States laws, treaties, and custom.⁶⁵ Additionally, the citizens of these states are able to enter the United States, take up residency, and work without any of the bureaucracy that other non-citizens would be forced to endure before being allowed to take any of those actions.⁶⁶ In this case, these citizens are able to have the full rights and protections of a United States citizen without having United States citizenship. In another case, the state of Andorra is partially governed by France.⁶⁷ Andorra has two princes that reign over its people; however only one of them is elected by the people and the other is appointed by France.⁶⁸ Yet, Andorra remains a state.⁶⁹ Furthermore, the Philippines retained its statehood even while it was a protectorate of the United States.⁷⁰ Thus, this factor for statehood recognition is also interpreted very loosely by the international community.

c. *Permanent Population.* The effective control of a permanently defined territory is meaningless if there is no

64. Bureau of E. Asian & Pac. Affairs, *U.S. Relations with Marshall Island*, U.S. DEP'T OF STATE (Feb. 4, 2014), <http://www.state.gov/r/pa/ei/bgn/26551.htm> [hereinafter *Marshall Islands*]; Bureau of E. Asian & Pac. Affairs, *U.S. Relations with the Federated States of Micronesia*, U.S. DEP'T OF STATE (Feb. 3, 2014), <http://www.state.gov/r/pa/ei/bgn/1839.htm> [hereinafter *Micronesia*]; Bureau of E. Asian & Pac. Affairs, *U.S. Relations with Palau*, U.S. DEP'T OF STATE (Feb. 4, 2014), <http://www.state.gov/r/pa/ei/bgn/1840.htm> [hereinafter *Palau*].

65. *Marshall Islands*, *supra* note 64; *Micronesia*, *supra* note 64; *Palau*, *supra* note 64.

66. *Marshall Islands*, *supra* note 64; *Micronesia*, *supra* note 64; *Palau*, *supra* note 64.

67. Bureau of European and Eurasian Affairs, *U.S. Relations with Andorra*, U.S. DEP'T OF STATE (Sept. 13, 2013), <http://www.state.gov/r/pa/ei/bgn/3164.htm>.

68. *Id.*

69. *Id.*

70. Bureau of E. Asian & Pac. Affairs, *U.S. Relations with the Philippines*, U.S. DEP'T OF STATE (Jan. 31, 2014), <http://www.state.gov/r/pa/ei/bgn/26551.htm>.

permanent population to govern and protect. For “[i]f [s]tates are territorial entities, they are also aggregates of individuals. A permanent population is thus necessary for statehood.”⁷¹ A dispersed population is still permanent as “[t]here are already a large number of Pacific countries with very large populations *outside* their territory and this does not affect their ability to continue to function as States.”⁷²

While at first it might seem that this factor is narrow, it too is broadly defined. The International Court of Justice held in the *Western Sahara* advisory opinion that a permanent population does not need to be stationary or at rest for a minimum amount of time.⁷³ In its holding, the court found that a transitory or dispersed population is still considered permanent.⁷⁴ State practice also indicates that a permanent population has no size requirement. As one law review article indicates, “infinitesimal smallness has never been seen as a reason to deny self-determination to a population.”⁷⁵ For instance, Kiribati Island is a small state that contains less than 100,000 citizens,⁷⁶ but it still has full member status at the United Nations.⁷⁷ Another example is Tuvalu, which is the world’s smallest state as it has a population of only approximately 10,000.⁷⁸ Despite its size, Tuvalu is still recognized and uniformly accepted as a state⁷⁹ and member of the United Nations.⁸⁰ Thus, there are

71. Crawford, *The Criteria for Statehood*, *supra* note 47, at 114.

72. JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 131-32 (2012).

73. *See* *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 39, at ¶ 81 (Oct. 16).

74. *Id.* (finding the tribes of the Western Sahara to be permanent due to their social and politically organization, even though they were nomadic).

75. Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT’L L. & POL. 331, 383 (1976).

76. GOV’T OF KIRIBATI, NATIONAL ADAPTATION PROGRAM OF ACTION 1 (2007), <http://unfccc.int/resource/docs/napa/kir01.pdf>.

77. MEMBER STATES OF THE UNITED NATIONS, <https://www.un.org/en/members/index.shtml> (last visited Feb 15, 2014) [hereinafter MEMBER STATES].

78. GOV’T OF TUVALU, TUVALU’S NATIONAL ADAPTATION PROGRAMME OF ACTION 6 (2007), <http://www.sids2014.org/content/documents/162NAPA.pdf>.

79. *Id.*

no location or size requirements necessary to satisfy the permanent population factor under the Declarative Theory. While population remains a necessary factor, it too has been broadly construed.

d. *Entering into International Relations.* The final factor, the capacity to enter into relations with other states, must be viewed through the lenses of both sovereignty and independence.⁸¹ Merely having the capacity to execute an agreement with a foreign state does not satisfy this requirement of statehood, unless that agreement is one of independence.⁸² The *Island of Palmas* arbitration defined the ideas of sovereignty and independence as a state's ability to exercise its functions within its own territory to the exclusion of other states.⁸³

This factor also requires states to be able to initiate negotiations (not just agree to proposals with other states) since the “*capacity to enter into the full range of international relations . . . is independent of its recognition by other States and of its exercise by the entity concerned.*”⁸⁴ This ability “depends partly on the power of internal government of a territory”⁸⁵ to dialogue with the international community.

Under the Declarative Theory, a defined territory, effective government, permanent population, and the capacity to enter into relations with other states are necessary factors used to determine statehood. Grants of statehood recognition are not easily satisfied by these four requirements, despite the factors' flexibility in application. Moreover, as the most widely applied, recognized, and acknowledged theory of statehood, the Declarative Theory might be the method employed if a state were to ever succumb to the threats of sea level rise and had yet to locate

80. MEMBER STATES, *supra* note 77.

81. *Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

82. Crawford, *The Criteria for Statehood*, *supra* note 47, at 119.

83. *Island of Palmas*, 2 R.I.A.A. at 838.

84. CRAWFORD, *supra* note 56, at 61.

85. *Id.* at 62.

a new and permanent homeland for its people. However, this is not the only theory of statehood. The Constitutive Theory is another method by which statehood could be granted and it can be viewed as an expansion of the capacity to enter into relations with other states factor of the Declarative Theory to the exclusion of the other factors.

2. Constitutive Theory

Under the Constitutive Theory, statehood can be achieved only when other states recognize the entity which seeks to become a state. As the noted international scholar Stefan Talmon explains, “only recognition makes a State a State, and thus a subject of international law. . . . [a] state is, and becomes, an International Person through recognition only and exclusively.”⁸⁶ Having the capacity to enter into international relations with other states indicates recognition because “states cannot exist in a vacuum, and if no other state wishes to engage in international relations with a particular entity, that entity will never become a fully sovereign partner on the international scene.”⁸⁷ Therefore, a state exists when other international bodies recognize its existence.⁸⁸ Under this theory, “it is the acquiescence or resistance of the international community—whether or not guided by normative considerations such as the integrity of the peace and security scheme—that determines whether these events are permitted to affect a state’s legal status.”⁸⁹

However, merely being granted statehood status by the United Nations does not indicate, in a practical sense, that

86. Talmon, *supra* note 37, at 102 (quoting 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 125 (8th ed. 1955)).

87. Sterio, *supra* note 33, at 216.

88. See Brad R. Roth, *The Entity that Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 107 (2009).

89. *Id.* at 106; see also JORRI DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD 138-39 (1996) (discussing how the recent admission of microstates to the United Nations demonstrates continued constitutive effects).

a state has been granted statehood. The United Nations even indicates that grants of statehood by that organization do not necessarily indicate when an entity has become a state.⁹⁰ Moreover, countries do not lose membership from falling into arrears.⁹¹ This is evidenced by the fact that as of 2013, roughly twenty-five percent of United Nations member states have failed to pay their membership dues in full, but retain their position in the General Assembly.⁹²

C. *These Theories Are Ill-Suited for this Context*

1. The Declarative Theory is Not Applicable

The Montevideo Convention does not indicate how a state can *maintain* its statehood once it is obtained, but instead, merely defines the basic factors⁹³ that should be included for a state to be initially granted recognition: “[t]o be sure, the Montevideo Convention was concerned with whether an entity *became* a state, not with how an entity might cease to be a state.”⁹⁴ Indeed, Article 6 of the Montevideo Convention itself makes clear that “[r]ecognition is unconditional and irrevocable.”⁹⁵ While it is true that the Montevideo Convention is only one codification of the Declarative Theory, which existed before the convention, the creators of the convention expressly acknowledge the lack of appropriate application in this type of a context where a state wants to remain a state.

90. See U.N. Charter art. 4; *About UN Membership*, UNITED NATIONS, <http://www.un.org/en/members/about.shtml> (last visited Mar. 17, 2014).

91. U.N. Charter art. 19 (noting a member may still vote despite outstanding dues if there is a reasonable explanation for nonpayment).

92. Committee on Contributions, Contributions Received for 2014 for the United Nations Regular Budget, <http://www.un.org/en/ga/contributions/honourroll.shtml> (last visited on Feb. 5, 2014); see also Barbara Crossette, *Even Its Allies Castigate U.S. Over Failure to Pay U.N. Dues*, N.Y. TIMES, Oct. 3, 1995, at A3 (discussing the one billion dollars the U.S. owed in U.N. membership fees).

93. CRAWFORD, *supra* note 56, at 45-46.

94. Grant, *supra* note 34, at 435.

95. Montevideo Convention, *supra* note 35, at art. 6.

Moreover, satisfying the Declarative Theory factors do not guarantee statehood, as it is inconsistently applied. Meeting these factors does not necessitate recognition, as it only “reflects political convenience more than it embodies doctrinal coherence.”⁹⁶ For example, “[i]f statehood were an ‘objective’ matter and recognition merely ‘declaratory,’ the case for Taiwan’s statehood would be overwhelming.”⁹⁷ Taiwan meets all four factors of the Declarative Theory: it has a defined territory, diplomatic relations with other states, a permanent population of nearly 25 million citizens, and held a seat at the United Nations for over two decades.⁹⁸ However, the international community refuses to acknowledge Taiwan as a state for political reasons. Acknowledging Taiwan would question China’s claim to Taiwan’s territory, and because of this political pressure, rather than an actual reason based on one of the four factors provided in the Declarative Theory, the international community refuses to grant Taiwan statehood status.⁹⁹ States “are obligated to take care not to act in ways that contradict the central government’s claim of sovereignty over the territory in question.”¹⁰⁰ However, in the case of Taiwan, the international community has failed to recognize its claim for sovereignty over its territory.¹⁰¹

Moreover, according to the Montevideo Convention, an entity must “occupy a clearly defined territory” to be recognized as a state.¹⁰² However, when this factor is practically applied, it indicates that territory is not “necessary to statehood, at least after statehood has been firmly established.”¹⁰³ This is because it “appears to be the case that once an entity has established itself in

96. Roth, *supra* note 88, at 94.

97. *Id.* at 93-94,98.

98. *Id.*

99. *Id.* at 103.

100. *Id.* at 111.

101. *Id.* at 103.

102. Grant, *supra* note 34, at 414; see Montevideo Convention, *supra* note 35, at art. 1.

103. Grant, *supra* note 34, at 435.

international society as a state, it does not lose statehood by losing its territory.¹⁰⁴ For example, the Polish, Yugoslav, Czechoslovak, and Baltic States all retained statehood recognition despite losing territorial power.¹⁰⁵ Further, shifting borders have never been viewed as a bar to statehood recognition, as “there is . . . no rule that the land frontiers of a state must be fully delimited and defined.”¹⁰⁶ For example, Israel’s borders have been in dispute since its inception, but it remains a recognized state in the international community.¹⁰⁷

Like the requirement for a defined territory, the effective government requirement is not equitably applied. As previously mentioned, the United States has three freely associated states: Palau, the Marshall Islands, and the Federated States of Micronesia.¹⁰⁸ All three of these states are recognized internationally as sovereign states, and they even hold seats at the United Nations.¹⁰⁹ However, all three of these states have derogated certain rights to the United States, namely defense.¹¹⁰ These states have also derogated some of their rights to immigration as United States citizens and citizens of these states can enter each other’s territory with a lower standard than that of other nations.¹¹¹ Thus, the necessity for a state’s government to have full and effective control over its territory is not necessary for statehood to be maintained.

104. *Id.*

105. *Id.*

106. North Sea Continental Shelf, (Ger./Den. v. Ger./Neth.) 1969 I.C.J. 3 (Feb. 20).

107. S.C. Res. 1397, U.N. Doc. S/RES/1397 (Mar. 12, 2002). Other states have faced similar concerns, yet they have been recognized as well. *See* S.C. Res. 1583, U.N. Doc. S/RES/1583 (Jan. 28, 2005) (Leb.); JEFFREY L. DUNOFF, ET. AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 115 (3d ed. 2010) (Fin.).

108. *Marshall Islands*, *supra* note 64; *Micronesia*, *supra* note 64; *Palau*, *supra* note 64.

109. MEMBER STATES, *supra* note 77.

110. *Marshall Islands*, *supra* note 64; *Micronesia*, *supra* note 64; *Palau*, *supra* note 64.

111. *Marshall Islands*, *supra* note 64; *Micronesia*, *supra* note 64; *Palau*, *supra* note 64.

The Declarative Theory is clearly ill-suited for application in the context of rising sea levels. One of the main concerns of the low-lying islands and coastal regions is a loss of territory. However, this theory is inconsistently applied in general, especially with respect to whether a defined territory is actually a necessity to be considered a state. Moreover, the case of Taiwan indicates that this theory can be easily swayed by political pressures. This means that it may not be the most objective test. Thus, the Declarative Theory should not be the method applied to states which are addressing the retention of statehood recognition.

2. The Constitutive Theory Also Should Not Be Applied Alone

The Constitutive Theory holds that recognition is the only and exclusive means to statehood, which is a “matter within states’ discretion.”¹¹² This theory of statehood is a minority position that is not supported by state practice, and only by a small number of scholars.¹¹³ In fact, it has never been formally applied by an international court or organization when dealing with the issues of statehood recognition. The prevailing view is that “recognition is merely acknowledgement of the existing statehood status.”¹¹⁴ Moreover, according to the Declarative Theory, even “the act of recognition does not confer status.”¹¹⁵

Recent history has shown that the Constitutive Theory is not supported by state practice. Again, Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia were all recognized by the Arbitration Commission tasked with determining their recognition status, and by civilized nations, before they were ever

112. Talmon, *supra* note 33, at 102 (quoting 1 L. OPPENHEIM, INTERNATIONAL LAW 125, ¶ 71 (8th ed. 1955)).

113. *Id.* at 105.

114. William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L.J. 115, 118 (2009).

115. *Id.*

recognized internationally.¹¹⁶ Thus, while this theory is recognized by scholars it has never been formally applied, which impacts its credibility as a viable method for application in this or any other context. Moreover, when it has been discussed, it has only been as a method by which new states are recognized in the international community.

D. *What Should Be Applied?*

Currently, it is very difficult to predict what the international community will deem is the most appropriate test when determining continuity of statehood. However, the most logical conclusion would combine the strengths of these two theories. While at first glance it may appear as though the capacity to enter into relations with other states is equivalent to the international recognition of states by the community, those two points are distinct. Further, the international community should use the foundations of the four Declarative Theory factors and expand them to include the Constitutive Theory as the fifth, and most important, of those factors. Upon combination, the four factors of the Declarative Theory should be applied very loosely, with the requirement of a defined territory used as more of a suggestion rather than a requirement.

One of the major strengths of the Declarative Theory, as codified in the Montevideo Convention, is that it provides an objective method by which to measure recognition, whereas one of the major weaknesses of the Constitutive Theory is that there is no way to know when a state has been recognized. By enveloping the Constitutive Theory into the Declarative Theory, the importance of recognition can be emphasized into more tangible factors.

The capacity to enter into relations with other states is distinct from being recognized internationally. Cyprus is a prime example of the distinction between these two criteria. Cyprus is a territory that meets all of the Declarative Theory requirements, even the capacity to enter into relations with other states, but is not itself considered a state. There is clearly defined territory on Greece which is

116. Talmon, *supra* note 37, at 106-07.

recognized as Cyprus.¹¹⁷ There is a population on that territory that has been able to successfully enter into contracts with other territories. Cyprus also has an effective government that protects the territory and its people. However, Cyprus has not been recognized as a state by the international community for political reasons.¹¹⁸ Thus, it is made clear through the examples of Cyprus and Taiwan¹¹⁹ that meeting the capacity to enter into relations with other states factor of the Declarative Theory is not the same as being recognized internationally. If this element was added to the Declarative Theory, then it would add more validity and credibility to that theory because it would provide a reason as to why these two territories are not currently recognized as states.

By adding this additional factor to the Declarative Theory, a mere loss of defined territory would not necessarily preclude states that may temporarily have no homeland because their states have been permanently submerged by the rising sea levels.

Combining these two theories would not only highlight each theory's strength, but also minimize the weaknesses. For example, one of the weaknesses of the Constitutive Theory is that it is necessarily reliant on the whims and wills of states to determine how and in what manner a territory becomes a state. However, as an addition to the Declarative Theory, this would no longer be an issue because the other four factors of that theory would temper that weakness. Further, the Declarative Theory is weak because it has very little state practice and few signatories,

117. Cyprus remains a popular tourist destination, as is shown by the plethora of resources available for those who wish to visit. *See, e.g., Introducing Cyprus*, LONELY PLANET, <http://www.lonelyplanet.com/cyprus> (last visited Apr. 1, 2014).

118. While Cyprus is a member of the United Nations, Organization for Security and Cooperation in Europe, International Monetary Fund, World Bank, and World Trade Organization, “[t]he United States does not recognize [Cyprus’s statehood], nor does any country other than Turkey.” Bureau of European and Eurasian Affairs, *U.S. Relations with Cyprus*, U.S. DEP’T OF STATE (Feb. 27, 2014), <http://www.state.gov/r/pa/ei/bgn/5376.htm>.

119. *See Roth, supra* note 88, at 96-99 (arguing Taiwan meets all four factors of the traditional Declarative Theory but is still not recognized as a state).

and it is sometimes criticized for this weakness. However, the addition of the Constitutive Theory would help to alleviate some of those concerns, as the Constitutive Theory is not codified in a single document and is evidenced by many examples of state practice. Forcing the governing bodies to look at not only how the territory is viewed in the community as a whole, but also by more tangible standards, combines the flexible strength of the Constitutive Theory with the objective qualities of the Declarative Theory.

Thus, the strongest and most applicable method for statehood recognition in the context of lost territory due to rising sea levels would be to combine the two most popular theories.

II. STATUS CLASSIFICATION OF INDIVIDUALS

Statehood classification is not the only status classification that will impact states and their people when affected by rising sea levels. The way in which international law and custom classifies and, subsequently treats, these people is also of great import. There are currently many different classifications that could be bestowed on the displaced people of these states.

If the states are fortunate enough to not be rendered completely uninhabitable, then it is possible that the displaced people could be given Internally Displaced Person status.¹²⁰ However, in the case of rising sea levels impacting small island nations, this classification is unlikely.

Other classification options for displaced persons include: refugee as defined within the traditional 1951 Refugee Convention; refugee as expanded by state practice to include environmental refugees; or possibly even stateless persons. The most reasonable of these categories for use in this context would be that of environmental refugee. However, as this is not currently a legitimate or legal category in international law on its own, the refugee definition needs to be expanded from the 1951 Convention.

120. See Kampala Convention, *supra* note 22 (defining internally displaced persons).

First, these people could potentially satisfy the definition of refugee under the traditional convention. Historically, under the Refugee Convention of 1951, a refugee is one who has a: “well-founded fear of being persecuted for reasons of . . . membership [in] a particular social group, . . . is outside the country of his nationality[,] and is unable to avail himself of the protection of that country,” or if he does not have a nationality or is unable to return to that country.¹²¹ Persecution is defined as “the infliction of harm or suffering by government,”¹²² and a social group is one whose members share some common experience.¹²³

To be a refugee under the Refugee Convention, an individual must have a reasonable fear of persecution by his or her government based on one of five defining characteristics: race; religion; nationality; membership of a particular social group; or political opinion.¹²⁴ Persecution is a “principal element” required to classify an individual as a refugee and is “interpreted strictly to mean an act of government against individuals.”¹²⁵ State practice and application of this definition demonstrates that the reasonable fear of persecution must be attributable to a particular state’s action, traditionally, of that refugee’s own government.

121. Convention and Protocol Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

122. *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009) (quoting *Al Khalili v. Holder*, 557 F.3d 429, 437 (6th Cir. 2009) (internal quotation marks omitted)).

123. *Denissenko v. Haskett*, (Unreported, Federal Court of Australia, 26 May 1996) (Austl.); Recent Development, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*—*Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 922 (1987).

124. Refugee Convention, *supra* note 121, art. 1.

125. Jessica B. Cooper, Comment, *Environmental Refugees*, 6 N.Y.U. ENVTL. L. J. 480, 482 (1998).

Excessive carbon emissions from well-developed states are the chief cause of sea level rise.¹²⁶ Under a very restrictive plain reading of this convention, it would be very difficult for a state to prove that there was a single government act against individuals with respect to the issue of climate change. This is particularly true because the worst carbon emitters are well-developed states, such as the United States, China, and India. Thus, it would be nearly impossible for people from underdeveloped small island states to demonstrate any reasonable fear of persecution from their own government. Moreover, it would also be difficult, if not impossible, to attribute specific climate change events that negatively impacted a state to another nation's actions directly. Carbon emissions have no "tagging" type qualities that would allow tracing back to a state of origin. Therefore, under a strict interpretation of the traditional definition of refugee, the analysis might necessarily stop before determining if these people would meet any of the five factors to attain such a status.

One possible way to overcome the failures in the traditional definition is to expand the requirement from persecution by the government of a refugee's nationality to governments on a more global scale. Despite knowing of the harmful negative affect it has on other states globally, many governments continue to fund projects that increase carbon emissions. These states do nothing to stop the harmful emissions that its industry produces, and are knowingly causing the environmental degradation that is permanently destroying entire regions of the world.¹²⁷ It is possible to view the people displaced by global warming as fitting the persecution requirement if it is expanded to include those people who are being persecuted not by one specific government, but rather, by many on a global scale. If it is determined that persecution by the world's governments is an acceptable way to view this requirement, then these environmental migrants might fit at least one of the criteria

126. See Report of Intergovernmental Panel on Climate Change: Climate Change 2007 Synthesis Report (2007), http://ipcc.ch/publications_and_data/ar4/syr/en/main.html (last visited Feb. 15, 2014).

127. See *id.* (describing the effects of climate change on coastal regions).

necessary for achieving a refugee status under the traditional formulation of refugee in the 1951 Refugee Convention.

Formulating the governmental persecution requirement in this way also helps alleviate the concern about fearing return to the state of their persecution. If it is found that a refugee's home government does not need to be the persecuting entity, these displaced persons would be able to return to their home country without first losing their refugee status protection. This would allow more people to be helped, and treated, in a way that is more appropriate to their situation. By allowing this expanded interpretation of the government requirement, these people would still have the requisite fear necessary to be a refugee. However, this fear would not be directed at their home country, which in turn, would not bar them the opportunity to return to it if it resurfaced or was again rendered habitable.

Next, the people displaced by the negative effects of climate change may also fit the social group criteria for recognition as a refugee under the traditional definition. These people are suffering the harm of being temporarily or permanently displaced because of their membership in two distinct social groups: (1) the group of people with insufficient political power to protect their environment from the predations of other governments; and possibly (2) the group of small island nations who are particularly susceptible to the dangers of sea level rise. Thus, these environmental migrants would, and should, be viewed as refugees under a plain reading of the 1951 Convention.

Even if the international community does not find qualifying these people as refugees under the traditional definition persuasive, state practice has expanded that traditional definition of refugee. The expanded definition includes those who flee their homeland as a result of events seriously disturbing the public order,¹²⁸ especially when they fear for their life.¹²⁹ Specifically, the Organization of African

128. Cartagena Declaration, *supra* note 21, at art. III.3.

129. Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, ¶ 2 Sept. 10, 1969, 1001 U.N.T.S. 45.

Unity (“OAU”) expanded the definition of refugee out of necessity due to the mass diaspora of the African peoples because of famine, drought, war, and instability of the governments.¹³⁰ The 1969 OAU Convention included an addition for classifying refugees as also applying to “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing the public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence”¹³¹ Additionally, the Cartagena Declaration addresses the refugee crisis in Central America and also includes the expansion of the refugee definition to the events that seriously disrupt the public order.¹³²

Both of these conventions have specifically made mention of frequent natural disasters causing the expansion of their respective regional conventions and treaties to include those persons displaced by those disasters. Again, states have expanded the definition to include those fleeing natural disasters¹³³ as nearly a billion people may soon be displaced by the negative effects of climate change.¹³⁴ Persons displaced by climate change may find themselves deprived of a home, and subjected to deprivations of their nationality¹³⁵ and basic human rights.¹³⁶ They may not only fear returning home, but may be unable to, and therefore

130. *Id.*

131. *Id.*

132. Cartagena Declaration, *supra* note 21, at art. III, ¶ 3.

133. Kampala Convention, *supra* note 22.

134. Walter Kalin, *Conceptualizing Climate Change Induced Displacement*, in CLIMATE CHANGE & DISPLACEMENT 81 (Jane McAdam ed., 2010); Comm’n of the Eur. Cmtys., Green Paper from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: Adapting to Climate Change in Europe, Options for EU Action, COM (2007) 354 final (June 29, 2007), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0354:EN:NOT>.

135. See discussion *supra* Part I. (arguing for statehood).

136. See discussion *infra* Part III. (arguing that human rights obligations should extend to the environmentally affected).

deserve heightened protections as refugees.¹³⁷ Natural disasters clearly satisfy the necessary requirement of an event that “seriously disturbs the public order.” Thus, those who fear for their lives and are now displaced, and even possibly those who have been rendered stateless, would satisfy the expanded definitions found in the OAU Convention or the Cartagena Declaration. Accordingly, these people are refugees under the modern definitions because the natural disaster that overtook their territory threatened their life, and they fled due to that disaster.¹³⁸

State practice further demonstrates that those fleeing environmental disasters should be afforded heightened protections. The United Nations Office for the Coordination of Humanitarian Affairs contends that those displaced by natural disasters are entitled to heightened protections because they are “among the most vulnerable of the human family.”¹³⁹ The Operational Guidelines on Human Rights and Natural Disasters outlines protections for environmental migrants.¹⁴⁰ Both the International Organization for Migration and the European Union grant heightened protections for environmental refugees.¹⁴¹

Moreover, if these inundated states lose statehood, then the displaced people will have been rendered *de facto* stateless¹⁴² as they necessarily would lack a nationality, and

137. Roger Zetter, *Protecting People Displaced by Climate Change: Some Conceptual Challenges*, in CLIMATE CHANGE AND DISPLACEMENT 131, 131 (Jane McAdam ed., 2010).

138. See discussion *supra* Part II.

139. U.N. Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

140. BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, BROOKINGS INST., HUMAN RIGHTS AND NATURAL DISASTERS: OPERATIONAL GUIDELINES AND FIELD MANUAL ON HUMAN RIGHTS PROTECTION IN SITUATIONS OF NATURAL DISASTER pt. II, at 17-18 (2008), available at http://www.brookings.edu/~media/research/files/reports/2008/5/spring%20natural%20disasters/Spring_natural_disasters.

141. Int'l Org. for Migration, *Migration and the Environment*, MC/INF/288 (Nov. 1, 2007); see Council Directive 2001/55 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons art. 2, 2001 O.J. (L 212).

142. See discussion *supra* Part I.B.1.a.

would be unable to return to their previous country, rendering them refugees by the Refugee Convention's plain meaning.¹⁴³ Thus, it is very important that states be afforded some type of recognition, even in the event of a loss of a large quantity of territory.¹⁴⁴ Without this recognition, surrounding states will be inundated with people who have no nationality. This indicates that these people are, and should be, viewed as stateless under a plain reading of the Refugee Convention, even if they might otherwise qualify for additional protection under a different convention.¹⁴⁵

Additionally, some select individual states have also enacted statutes to provide additional protections. The United States grants such individuals "Temporary Protected Status."¹⁴⁶ The United States recently granted this status to those displaced by the earthquake in Haiti.¹⁴⁷ Similarly, Sweden and Finland have enacted statutes affording temporary protection to those fleeing natural disasters.¹⁴⁸ However, at this current time it is neither obligatory nor mandatory to provide these temporary protective measures. But, as there is no set minimum limitation on the number of states required to create state practice, there may enough evidence to support an argument that it is current state practice to provide such statuses to those affected by natural disasters.

It is true, however, that an environmental refugee is not a status recognized by international law,¹⁴⁹ and where such

143. Refugee Convention, *supra* note 121, at art. 1.A.2.

144. *See* discussion *supra* Part I.B.1.a.

145. *See infra* note 129 and accompanying text (discussing Stateless Persons Convention).

146. 8 U.S.C. 1254(a)(1)(A) (2012).

147. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, TEMPORARY PROTECTED STATUS EXTENDED FOR HAITIANS (Oct. 1, 2012) *available at* <http://www.uscis.gov/news/temporary-protected-status-extended-haitians>.

148. Aliens Act §109 (Act No. 301/2004) (Fin.), *available at* <http://www.finlex.fi/en/laki/kaanokset/2004/en20040301.pdf>; Roberta Cohen and Megan Bradley, *Disasters and Displacement: Gaps in Protection*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 95, 110-11 (2010).

149. ROGER ZETTER, REFUGEE STUDIES CENTRE, PROTECTING ENVIRONMENTALLY DISPLACED PEOPLE: DEVELOPING THE CAPACITY OF LEGAL AND NORMATIVE

a status has been discussed, there is no commonly accepted definition of the term. The United Nations Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”) states that the traditional definition “rules out . . . victims of . . . natural disaster . . . [from attaining refugee status], unless they also have well-founded fear of persecution for one of . . . [the criteria in the Refugee Convention].”¹⁵⁰ Further, the United Nations High Commissioner for Refugees and the Refugee Convention (the international convention that directly addresses this issue) do not recognize the status of environmental refugee.¹⁵¹ Thus, an argument could be made that environmental refugee is not a status officially recognized by international law, and as such, should not be one afforded to victims of natural disasters who do not otherwise qualify under the traditional refugee definition. However, while the expanded definition of a refugee may not rise to the level of custom, it has been implemented in enough states globally to be considered state practice.¹⁵² As the International Court of Justice utilizes state practice as a method by which it renders its decisions,¹⁵³ it is a persuasive argument that the environmental refugee classification can and should be applied by the international community.

FRAMEWORKS 16 (2011); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 363 (2009).

150. U.N. Human Rights Comm’n [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 39, U.N. Doc. HCR/IP/4?Eng/REV.1 (Jan. 1992).

151. See *supra* text accompanying notes 122-26.

152. See *supra* text accompanying notes 139-41. Several states, including Australia and New Zealand have started to accept environmental refugees. See Eun Jung Cahill Che, *Tuvalu: First Casualty of Climate Change*, JAPAN TIMES, Aug. 26, 2001, <http://www.japantimes.co.jp/opinion/2001/08/26/commentary/tuvalu-first-casualty-of-climate-change> (“The Tuvaluan people need to build new lives in a new land. Australia and New Zealand have begun to take in environmental refugees, but they will have to adjust to the cultures that will surround them.”).

153. Statute of the International Court of Justice art. 38.1.b.

The third and final classification for the environmentally affected is that of stateless persons. To qualify for protection under Article 1(1) of the Convention Relating to the Protection of Stateless Persons, a person must no longer be “considered as a national by any [s]tate under the operation of its law.”¹⁵⁴ Under this convention, states must grant those stateless persons the “same treatment as is accorded to aliens.”¹⁵⁵

There are two types of statelessness: *de jure* and *de facto*.¹⁵⁶ In defining these terms, the United Nation’s High Commissioner for Refugees has determined that “refugees who do not have a nationality at all are ‘de jure stateless,’ whereas refugees who do have a nationality are ‘de facto stateless.’”¹⁵⁷ Thus, in the case of nationals displaced by climate change, *de facto* stateless is the only applicable category. If these people have been rendered *de facto* stateless, in that a state has lost its claim to statehood recognition and is no longer a state, then the state lacks standing in the International Court of Justice and cannot bring any claims with respect to its displaced citizens.¹⁵⁸ This could also potentially create many problems if these people are not afforded the appropriate treatment.¹⁵⁹ If these people are precluded from asserting claims in the international courts and their state no longer exists, they could be precluded from receiving any type of relief from the justice system. Moreover, if these people suffer human rights abuses it would be impossible to tell if they would be able to have their voices heard in any international forum,

154. United Nations Convention Relating to the Status of Stateless Persons art. 1.1, Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

155. *Id.* art. 7, at 138.

156. BROWNLIE, *supra* note 50, at 418.

157. Hugh Massey, U.N. High Comm’r for Refugees, Div. of Int’l Prot., *UNHCR and De Facto Statelessness*, at i, LPPR/2010/01 (Apr. 2010).

158. *See supra* text accompanying note 19 (arguing the International Court of Justice lacks jurisdiction if a state loses its recognition).

159. *See* discussion *infra* Part III.

as only states are allowed to be parties within the United Nations.¹⁶⁰

Despite the many and varied categories that these people could satisfy, it is possible that these displaced persons will be denied refugee status, or any other of the potential protected statuses, based on the circumstances of their arrival into their new homelands. If foreign governments arbitrarily brand them as criminals for violating domestic immigration laws, or do not provide them any additional protections,¹⁶¹ this would violate many states' treaty obligations under the Refugee Convention.¹⁶² It would also violate state practice.

Thus, the most logical classification for these people to receive would be that of environmental refugee. Though it is not a status that is codified in any current international laws, it is strongly encouraged by many scholars. But even if the international community does not find this category classification persuasive, these people could possibly still qualify as traditional refugees or stateless persons.

III. TREATMENT OF THE AFFECTED PEOPLE

Some of the protected status classifications discussed above afford the affected people additional protections. Regardless of the status these people are afforded, all people have certain non-derogable rights.¹⁶³ Those rights include the right to: (1) be free from cruel, inhuman or degrading treatment;¹⁶⁴ (2) be free from arbitrary arrest, detention, or exile;¹⁶⁵ and (3) leave any country and to return to their own country.¹⁶⁶ Article 4 of the International Covenant on Civil

160. U.N. Charter art. 4, para. 1 ("Membership in the United Nations is open to . . . states . . .").

161. See discussion *infra* Part III.

162. Refugee Convention, *supra* note 121.

163. Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. Doc. A/RES/217(iii) (Dec. 10, 1948) [hereinafter UDHR].

164. *Id.* art. 5.

165. *Id.* art. 9.

166. *Id.* art. 13.2.

and Political Rights (“ICCPR”) permits derogation from certain human rights for reasons of national security.¹⁶⁷ As noted by the International Commission of Jurists, “[a]ny specific derogation measures taken pursuant to ICCPR article 4 . . . must be necessary and proportionate to real and demonstrable threats . . . that give rise to the emergency situation.”¹⁶⁸

Cruel, inhuman, and degrading treatment includes: (1) subjecting persons to severe mental pain and suffering;¹⁶⁹ (2) keeping prisoners in overcrowded facilities;¹⁷⁰ (3) denying them adequate food and water;¹⁷¹ and (4) failing to provide adequate medical services.¹⁷² In *Massiotti v. Uruguay*, a political prisoner was kept in an overcrowded and unsanitary prison, and given inadequate food.¹⁷³ The Human Rights Committee found that such conditions violated “articles 7 and 10(1) [of the ICCPR], because the conditions of . . . imprisonment amounted to inhuman treatment.”¹⁷⁴ Similarly, in *Williams v. Jamaica*, an inmate with documented mental health issues, who did not receive adequate medical care, was subjected to inhuman treatment

167. International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993) (reasoning that due to an influx of Haitians, the temporary facilities at Guantanamo Bay were full and could house no more people. As a result, the U.S. could no longer “protect [its] borders and offer the Haitians [housing]”) (emphasis in original).

168. INT’L COMM’N OF JURISTS [ICJ], ICJ SUBMISSION TO THE WORKING GROUP ON ARBITRARY DETENTION 14(2012), available at <http://icj:wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Submission-working-Group-detention-analysis-brief-2012.pdf>.

169. Preparatory Comm’n for the Int’l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, art. 7(1)(e), (k), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

170. *Massiotti v. Uru.*, No. R.6/25, U.N. GAOR, Human Rights Comm., 37th Sess., Supp. No. 40, U.N. Doc. A/37/40, ¶¶1.2-1.3, at 187-88 (1982).

171. *Id.* at 188, 191; *Mika Miha v. Eq. Guinea*, U.N. Human Rights Comm., Commc’n No 414/1990, ¶¶ 2.4-2.5, 6.4, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

172. *Williams v. Jam.*, U.N. Human Rights Comm., Commc’n No. 609/1995, ¶¶ 3.1-3.4, 6.3-6.5, U.N. Doc. CCPR/C/61/D/609/1995 (1997).

173. *Massiotti*, U.N. Doc. No. A/37/40, ¶¶ 1.2-1.3, 11, at 187-88, 191.

174. *Id.* ¶13, at 191.

and not treated with “respect for the inherent dignity of his person,” in contravention of articles 7 and 10(1) of the ICCPR.¹⁷⁵ Finally, it was found in *Mika Miha v. Equatorial Guinea* that a prisoner deprived of food and water, and denied medical attention, was subjected to cruel and inhuman treatment in violation of the same articles.¹⁷⁶

The Universal Declaration of Human Rights and the ICCPR both forbid arbitrary detention.¹⁷⁷ Detention is arbitrary if it is without grounds or lawful procedure.¹⁷⁸ Lawful procedure includes the right to: (1) an effective remedy;¹⁷⁹ (2) a fair and public hearing in the determination of rights and obligations of any criminal charge;¹⁸⁰ and (3) the presumption of innocence until proven guilty.¹⁸¹ No state may detain an alien without grounds,¹⁸² or arrest an alien without notice of the reasons for the arrest and the charges against him or her.¹⁸³

Regardless of the grounds for their detention, detained persons have the right to have their cases heard at trial.¹⁸⁴ The ICCPR requires individuals charged with crimes be afforded certain rights, including: (1) a presumption of innocence;¹⁸⁵ (2) adequate time and facilities for the preparation of a defense;¹⁸⁶ (3) the right to be tried without

175. *Williams*, U.N. Doc. CCPR/C/61/D/609/1995, ¶ 6.5.

176. *Mika Miha*, U.N. Doc. CCPR/C/51/D/414/1990, ¶ 6.4.

177. UDHR, *supra* note 163, art. 9; ICCPR, *supra* note 167, art. 9.1.

178. ICCPR, *supra* note 167, art. 9.1.

179. UDHR, *supra* note 163, art. 8.

180. *Id.* art. 10.

181. *Id.* art. 11.1.

182. ICCPR, *supra* note 167, art. 9.1.

183. *Id.* art. 9.2.

184. *Id.* arts. 9.3-9.4; Human Rights Comm., 82nd Sess., Concluding Observations: Morocco, U.N. Doc. CCPR/CO/82/MAR, ¶ 15 (Dec. 1, 2004) [hereinafter Concluding Observations: Morocco]; *Zadyvdas v. Davis*, 533 U.S. 678, 690 (2001); *Sextus v. Trin. & Tobago*, U.N. Human Rights Comm., Commc'n No. 818/1998, ¶¶ 7.2-7.3, U.N. Doc. CCPR/C/72/D/818/1998 (2001).

185. ICCPR, *supra* note 167, art. 14.2.

186. *Id.* art. 14.3.b.

undue delay;¹⁸⁷ and (4) the right to examine the witnesses.¹⁸⁸ The Human Rights Committee noted that even forty-eight hours is too long a delay to before bringing an accused party before a judge.¹⁸⁹ Additionally, a twenty-two month detention before trial, absent extreme circumstance, is undue delay.¹⁹⁰

The ICCPR requires access to an effective remedy before the law.¹⁹¹ To be effective, the authority must be competent to hear the case and to provide judicial remedy.¹⁹² Moreover, a state may not detain aliens prior to expulsion without appropriate process of law, even in the case of illegal entry.¹⁹³ States are required to notify detained aliens of the grounds for detention and expulsion if applicable, and must properly treat those individuals during their detention.¹⁹⁴ In the *Ahmadou* case, the failure to notify an alien of the grounds for his 66-day detention was held to violate the ICCPR.¹⁹⁵ This Court held that an alien's human rights are violated when he is held or expelled without notice; especially when mistreated in detention.¹⁹⁶ These people are entitled to deferential status, whether refugee or otherwise, because they fled a natural disaster which posed a threat to their life and welfare.

No person shall be arbitrarily denied the right to enter his or her own country.¹⁹⁷ This right is broad, and turns on

187. *Id.* art. 14.3.c.

188. *Id.* art. 14.3.e.

189. Concluding Observations: Morocco, *supra* note 184, ¶15.

190. *Sextus v. Trin. & Tobago*, U.N. Doc. CCPR/C/72/D/818/1998, ¶ 7.2.

191. ICCPR, *supra* note 167, art. 2.3.

192. *Id.*

193. *Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo)*, 2010 I.C.J. 639, ¶ 77 (Nov. 30).

194. *See id.* ¶¶ 84, 87.

195. 2010 I.C.J. ¶¶ 59, 84.

196. *Id.* ¶¶ 84-87.

197. ICCPR, *supra* note 167, art. 12.4; UDHR, *supra* note 163, art. 13.2.

the individual's definition of his or her own country.¹⁹⁸ It includes those seeking to acquire nationality.¹⁹⁹ The requirement applies to all state action; states must work to ensure even their lawful actions do not contravene it.²⁰⁰

Additionally, the Convention Against Torture has now risen to the level of customary international law as it has eighty one signatories and over one hundred and fifty parties.²⁰¹ Thus, even if states are not a party to the Convention Against Torture they are still forced to comply with its codified principles.²⁰²

Thus, there are a plethora of protections provided for affected people regardless of their status classification. However, the best and most applicable treatment would be that of a refugee. But, even without those additional protections, displaced persons are afforded the right to life, liberty, and legal remedy. While these protections are barely adequate, they do provide some reassurance to the people who may or may not become victims twice: first of the environmental disasters, but second, by the international community whose failure to take the necessary steps to protect and classify them rendered them stateless and homeless. The international community has failed to recognize and appropriately remedy the current inadequacies in its laws with respect to displaced persons. Even in situations where people are afforded protections the laws are slow to adjust to the needs of the times and the bureaucracy is unnecessarily difficult. By allowing for an expansion of the refugee definition, other states would be compelled to act where they might otherwise be reluctant to

198. Office of the High Comm'r for Human Rights, 67th Sess., CCPR General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add.9, ¶ 20, (Nov. 2, 1999).

199. *Id.*

200. *Id.* ¶ 21.

201. *Treaty Collection*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en%20-%20Participants (last visited Apr. 5, 2014).

202. See Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331 (noting that rules in a treaty can become binding on third parties through international custom).

help these people. Furthermore, instead of forcing integration, these states might also be more willing to cede or lease land to the states in need.

CONCLUSION

In conclusion, status classification is an important, and often overlooked, issue in international law. In an attempt to streamline and simplify classification efforts, legal scholars have overlooked certain scenarios that, while previously seeming unlikely, have presented themselves through climate change. By properly classifying states, the international community can necessarily ensure the continuation of an entire people and prevent their extinction. The international community is woefully unprepared, as is evidenced by the current formulations of the requisite conventions, declarations, and treaties for the mass influx of persons displaced by climate change. At present, there is no mechanism by which these people can be protected or classified and their states objectively measured. By integrating the Constitutive Theory into the Declarative Theory as a fifth factor for determining statehood, the international community could highlight each theory's strengths and minimize the weaknesses. Further, following this method would protect persons from being rendered stateless.

Likewise, by adopting the environmental refugee concept on a grander scale, displaced persons would be accorded additional protections that might otherwise be denied them. These additional protections would allow for them to resettle in new locations, or, if their states of origin were ever to remerge, be allowed to return home. This would also allow these people to have a remedy before the law.

Overall, the international community and individual states are not taking responsibility for their actions. States such as the United States have such large and expansive territories that even if they lose miles of coastline, the majority of their people will not be displaced. More to the point, even those people who are displaced will have adequate territory within the United States upon which to resettle. However, most states which will be the most

harmfully impacted by the negative effects of climate change and global warming will not be so fortunate. Some small island states are already seeking out new homeland in anticipation of the devastation of their territory. These small island states might be rendered permanently submerged due to the rising sea levels. Accordingly, those citizens will be forced to relocate to new territory. Most of these people will probably be forced into living in territories with distinctive cultures and environments with which these people are unfamiliar. This may lead to further emotional trauma and discomfort among the people.

Currently, there are no treaties or requirements for large developed states with extensive carbon emissions to comply with the needs of their small island brethren thousands of miles away. Since the harm is so far removed, it is very difficult for many to visualize or understand the impact excessive carbon emissions will have on these states and their people. However, it is important for each state to recognize the impact it has on the international community.

The effects of climate change are so drastic that not only have they rendered the current laws governing statehood inadequate; they also require a completely radicalized view of how the global community understands statehood. Due to globalization, the actions of one state have infinitely more pressing ramifications than in times past. Even if the laws are changed to address the concerns of recognizing statehood and nationality, these modifications are only temporary solutions. No matter how the laws are changed, unless a powerful regulating and enforcing body is developed to compel compliance, these states and their peoples will be subjected to the whims of states gracious enough to volunteer to help them. In a global community, states are no longer able to solely protect their own self-interest; rather, the moral responsibility to aid states threatened with extinction must be transformed into a legal obligation to act.