

Legal Consequences of the Disappearance of States as a Result of Climate Change

Resumo

Climate change has been one of the main concerns of our time. It causes global warming and sea level rise. The territory of the island states have been at the risk of being submerged due to the impacts of climate change. It is disputed that whether the island states could continue to exist as states after loss of their territory. Moreover, since climate change also causes large scale displacement, it raises the issue that whether those displaced people are refugees and how to protect their rights.

CHAPTER I. INTRODUCTION

Climate change has been one of the main concerns of modern international society and has caused a lot of problems, like the warming of the climate and sea level rise. The matter is important for the region since the endangered states are located in the Asia-Pacific region. The Intergovernmental Panel on Climate Change [hereinafter IPCC] concluded that sea level rise impacts on the low-lying pacific island atoll states of Kiribati, Tuvalu and the Marshall Islands and may pose risks to their sovereignty or existence.¹ According to some estimates, Tuvalu could disappear in the next 50 years.² Hence, the issue arises whether these island states can claim statehood if their territory submerges.

The traditional theory to define statehood is stated in the Montevideo Convention on Rights and Duties of States [hereinafter Montevideo Convention],³ which is about the creation of a new state. However, the newly emerging problem is about the disappearing territory of an existing state. Therefore, the article will look into the issue whether the traditional theory can continue to be used to explain this new, emerging problem. Therefore, this article will begin by introducing the traditional theory of statehood and examine whether a state can still claim statehood without the title of territory. Then, the article will examine whether the people who are forced to leave their homeland as a result of climate change fall within the definition of refugee and what legal instruments can be applicable to protect their rights. Possible solutions will be put forward for the legal consequences of the disappearance of states as a result of climate change.

¹ W. Neil Adger et al, Chapter 17: Assessment of Adaptation Practices, Options, Constraints and Capacity, in M.L. Parry et al, ed, *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), at 736.

² Vikram Odedra Kolmannskog, "Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration" (2008) Norwegian Refugee Council; Anwen Roberts, "Islanders without an island: What will become of Tuvalu's climate refugees?" (2007) 37 *Del Spiegel*.

³ *Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States*, 26 December 1933, 165 LNTS 19 at 25.

CHAPTER II. THE MAINTAINING OF STATEHOOD AFTER LOSS OF TERRITORY

A. THE FACTUAL CONTEXT OF CLIMATE CHANGE

Climate impacts have three primary aspects. Firstly, climate change is raising global temperature.⁴ The linear warming trend over the 50 years from 1956 to 2005 (0.1 to 0.16 degree Celsius per decade) is nearly twice that for the 100 years from 1906 to 2005.⁵ Increases in sea surface temperature of about 1 to 3 degree Celsius are projected to result in more frequent coral bleaching events and widespread mortality.⁶

Secondly, climate change is causing sea levels to rise. The average rate of global sea level rise over the 20th century was about 1.7 mm per year, and since 2003 the rate of rise has been about 2.5 mm per year.⁷ The magnitude of these sea level rises takes on great significance in light of the average elevation above sea level of several small island developing states [hereinafter the SIDS]. For instance, most of Tuvalu is just 1 meter above the high-tide mark and water already bubbles up through the porous coral during high tides, flooding the land during king tides.⁸

Thirdly, climate change has increased the frequency and intensity of extreme natural hazard events.⁹ According to the IPCC report in 2007, extreme weather events are likely to happen, such as increased incidence of extreme high sea level, the intense tropical cyclone activity, and heavy precipitation events.¹⁰

B. LOSS OF TERRITORY IS NOT EQUIVALENT TO LOSS OF STATEHOOD

1. The Territory Requirement in the Definition of Statehood

The most cited source of the necessity of the territory requirement for statehood is the customary standard reflected in the Montevideo Convention.¹¹ Article 1 of the Montevideo Convention enumerates four elements of statehood, namely 1) defined territory; 2) permanent population; 3) government; and 4) the capacity to enter into relations with other states. The criteria of the Montevideo Convention are widely quoted and many scholars have discussed statehood based upon the Montevideo Convention.¹² Therefore, the territory requirement is put forward as one of the necessary elements for statehood according to the custom as reflected in the Montevideo Convention.

⁴ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Synthesis Report: Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva, IPCC, 2008), at 65 [hereinafter IPCC, *Synthesis Report 2007*].

⁵ *Ibid* at 30.

⁶ *Ibid* at 65.

⁷ *Climate Change Science Compendium 2009: Earth's Ocean*, United Nations Environmental Programme, (2009), at 26.

⁸ Brad Crouch, "Sinking Tuvalu wants our help as ocean levels rise", *Perth Now* (3 October 2008) online: *Perth Now* <<http://www.perthnow.com.au/news/sinking-tuvalu-wants-our-help/story-e6frg12c-111117662797>>.

⁹ Jenty Kirsch-Wood, Jacob Korreborg & Anne-Marie Linde, "What Humanitarians Need To Do" (2008) 31 *Forced Migration Review* 40 at 40.

¹⁰ IPCC, *Synthesis Report 2007*, *supra* note 4, at 53.

¹¹ James Crawford, *The Creation of States in International Law*, 2th ed (New York: Oxford University Press, 2006), at 45 [Crawford, *Creation of States*]; Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents" 1999 37:2 *Colum.J. Transnat'l L.* 403 at 403.

¹² E.g. Crawford, *Creation of States*, *supra* note 11 at 45: referred to it as "the best known formulation of the basic criteria for statehood"; Rosalyn Higgins, *Problems & Process: International Law and How We Use it* (New York: Oxford University Press, 1994), at 39; Malcolm N. Shaw, *International Law*, 6th ed (New York: Cambridge University Press), at 198.

2. The Territory Requirement is not Applicable for the Continuation of Statehood

a. The Inapplicability of the Montevideo Convention

The Montevideo Convention concerns the creation of a state, not the elements needed for the maintenance of statehood or the disappearance of a state.¹³ The creation and continuation of a state are distinct legal phenomena. There is a distinction between the creation of a new state on the one hand and the subsistence and extinction of an established state on the other.¹⁴ Actually, once an entity has acquired statehood, the rules by which the entity has acquired statehood become less important.¹⁵ Even when one or more of the elements of statehood are weakened, the standing of a state in the international system has not been questioned.¹⁶ Hence, it is possible for Somalia to continue to exist as a state without an effective government.¹⁷

b. No State has Ever Lost its Statehood in Similar Circumstances

In the past, states were regarded as having disappeared voluntarily or involuntarily. Crawford has explored and identified eight countries that came into extinction from 1945 to 2005 (Hyderabad, Somaliland, Tanganyika/Zanzibar, Republic of Vietnam, Yemen Arab Republic, German Democratic Republic, Socialist Federal Republic of Yugoslavia and Czech and Slovak Federal Republic).¹⁸ Almost all the cases of extinction were either those whose independence was not clearly established or instances of voluntary extinction (in the case of German Democratic Republic and Czechoslovakia), and no state was extinguished because of losing territory. Accordingly, state extinction due to climate change is unprecedented.

c. There is a Gap in the Law Regarding the Continuation of Statehood Raised by Climate Change

Since international law has not confronted the physical disappearance of a state, there is no existing international law which can be directly applicable to the case. The consequence of climate change is great and unprecedented. As mentioned above, international law may be geared for the analysis of the creation of states, it does not provide effective guidance when the elements required for the establishment of statehood are changed or lost after statehood is recognized.¹⁹ The loss of land creates a conundrum for international law,²⁰ as there is no coordinated legal or administrative framework that specifically aims to manage climate-related risk.²¹

d. Application of Equity *Praeter Legem* in this Case

Equity as a legal concept is a direct emanation of the idea of justice. The International Court of Justice [hereinafter ICJ] in the *North Sea Continental Shelf* case recognized that the principle of equity was part of international law.²² In this respect, exceptions are allowed

¹³ Chiara Giorgetti, *A Principled Approach to State Failure: The International Community Actions in Emergency Situations* (Leiden: Martinus Nijhoff Publishers, 2010), at 68; Thomas D. Grant, "Definition of Statehood: The Montevideo Convention and its Discontents" (1999) 37:2 Colum.J. Transnat'l L. 403 at 435.

¹⁴ James Crawford, *The Creation of States in International Law*, 1st ed (New York: Oxford University Press, 1979), at 59.

¹⁵ Higgins, *supra* note 12 at 41.

¹⁶ Giorgetti, *supra* note 13 at 67.

¹⁷ Crawford, *Creation of States*, *supra* note 11 at 91-92.

¹⁸ *Ibid* at 716.

¹⁹ Giorgetti, *supra* note 13 at 68.

²⁰ Maxine A. Burkett, "The Nation Ex-Situ" in Michael B. Gerrard & Gregory E. Wannier, eds, *Threatened Island Nations Legal Implications of Rising Seas and a Changing Climate* (New York: Cambridge University Press, 2013) 89 at 89.

²¹ Ilona Millar, Catherine Gascoigne & Elizabeth Caldwell, "Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process" in Gerrard & Wannier, *supra* note 20, 433 at 433.

²² *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)*, [1969] ICJ Rep 3 at 50.

to be made under equity, when individual circumstance calls for them. The use of equity to individualize justice in particular case has been discussed in three ways: *infra legem* (within the law), *praeter legem* (outside the law) and *contra legem* (against the law).²³

As mentioned above, there is no international law which can be applied directly to solve the problem concerning the continuation of statehood. Therefore, equity *praeter legem* can be applicable. Equity and equitable principles are very prominent in two aspects. Firstly, equity can be a basis for “individualized” justice tempering the rigors of strict law. Secondly, equity can be considerations of fairness and reasonableness.²⁴ In this case the consideration of fairness is the continuity of statehood. The SIDS contribute the least to the problem of climate change, but are the most affected by it. States who may well be among those most to blame for climate change must take the main responsibilities and the SIDS should not bear the consequence mainly induced by other developed countries or the whole world.

3. In Any Event, Application of the Territory Requirement may not Definitely Remove the Statehood of the SIDS

a. The Application of the Continuity Theory Prevents the Extinction of the SIDS

States are not static and most of the time continuity is assumed even as their governments, constitutions, territories and populations change.²⁵ A state can be said to continue to exist despite sometimes drastic changes in its governments, its territory²⁶ or its people. State continuity can be showed in two aspects. On the one hand, the SIDS preserve legal relations despite changes which occur. On the other hand, the people of the state see the state as the object of their allegiance. The will of its people is significant for the state that suffered changes.

b. Submerged Island States can be Analogous to Governments in Exile

The situation of the SIDS can be analogous to the situation of governments in exile. Governments in exile have been recognized as continuing to represent their states and maintaining far-reaching competencies, such as the power to conclude treaties and perform unilateral acts on behalf of their states, dispose of state property abroad, exercise personal jurisdiction over their nationals abroad.²⁷ For instance, in the case of the Polish government during World War —, after Germany invaded Poland the government in exile was constitutionally continuous with the pre-1939 government.²⁸ Hence, international law already recognizes that sovereignty and nation may be separated from territory. This acknowledgment of sovereignty and recognition allows a government to act as a state with regard to entering into foreign relations with other states, protecting the interests of its nationals, and exercising sovereign power over tangibles that have the character of national territory, even in the absence of territory.

²³ Oscar Schachter, *International Law in Theory and Practice* (Boston: Martinus Nijhoff Publishers, 1991) at 55.

²⁴ *Ibid.*

²⁵ Crawford, *Creation of States*, *supra* note 11 at 667; See also J.L. Brierly & H. Waldock, *The Law of Nations: an Introduction to the International Law of Peace*, 6th ed (New York: Oxford University Press, 1989), at 151: a change in the extent of a state's territory has in principle no effect on its international identity.

²⁶ Heather Alexander & Jonathan Simon, “Sinking into Statelessness” (2014) 19 *Tilburg L. Rev.* 20 at 23-25.

²⁷ Jenny Grote Stoutenburg, “When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized Island States’” in Gerrard & Wannier, *supra* note 20, 57 at 69.

²⁸ Lilian Yamamoto & Miguel Esteban, “Vanishing Island States and Sovereignty” (2010) 53:1 *Ocean and Coastal Management* 1 at 7.

4. International Recognition can Resolve Uncertainties as to Status of the SIDS

This sub-section examines that even if the continuing statehood of the SIDS within international law *de lege lata* cannot be defended, the SIDS can still be recognized as states. Before examining state practice on the matter, it is necessary to refer to the dispute between the constitutive and declaratory theory on recognition of states. According to the constitutive theory, the political act of recognition is a precondition of the existence of legal rights.²⁹ According to the declaratory theory, recognition of a new state is a political act, which is independent of the existence of the new state as a subject of international law.³⁰ Where there is dispute about the legal status of a particular entity, acts of recognition may be evidence in support of its claim that it is a state but no single act of recognition can determine this issue conclusively.³¹

State practice is not amenable completely to one explanation or the other.³² There are several unrecognized states in the international community; although objectively states, they fail to operate as states owing to the lack of recognition.³³ Nagorno Karabakh, South Ossetia and the former Tamil Eelam are all examples of such entities.³⁴ Contrariwise, there are several entities which do not meet the requirements of statehood that are recognized as states by the international community. For instance, the Free City of Danzig was created by the fact of recognition.³⁵

The conclusion is that, in principle, a state is independent of recognition, but this does not mean that recognition does not have important legal and political effect.³⁶ The recognition of an entity as a state is evidence of its status. Therefore, where recognition is general, it may be practically conclusive.

C. CRITICAL ANALYSIS OF THE POSSIBLE OPTIONS OF OBTAINING TERRITORY

The previous section argues that the SIDS may retain statehood notwithstanding the loss of territory. However, it raises the question of the deterritorialized state. From a legal perspective, the acquisition of title to and sovereignty over new territory by purchase or treaty of cession undoubtedly represents the most straightforward and appealing solution.³⁷ There is no doubt that, like the Alaska purchase, sovereignty over the ceded land would transfer in its entirety to the disappearing state, this section thus would not have more discussion of obtaining new territory by purchasing and cession. Instead, this section focuses on two more controversial possibilities of continued existence for a state that has lost its territory: obtaining leased territory and constructing artificial islands.

²⁹ Ian Brownlie, *Principles of Public International Law*, 6th ed (New York: Oxford University Press, 2003), at 87-88 [Brownlie, *International Law*].

³⁰ Crawford, *Creation of States*, *supra* note 11 at 22.

³¹ Colin Warbrick, "States and Recognition in International Law" in Malcolm D. Evans, ed, *International Law*, 6th ed (New York: Oxford University Press, 2006) 217 at 258.

³² *Ibid.*

³³ Nina Caspersen, *Unrecognized States: the Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2012), at 12.

³⁴ Abhimanyu George Jain, "The 21st Century Atlantis: The International Law of Statehood and Climate Change - Induced Loss of Territory" (2014) 50 *Stan.J. Int'l L.* 1 at 44.

³⁵ Crawford, *Creation of States*, *supra* note 11 at 239-240.

³⁶ *Ibid* at 27.

³⁷ Rosemary Rayfuse, "International Law and Disappearing State—Maritime Zones and the Criteria for Statehood" (2011) 41:6 *Env'tl Pol'y & L* 281 at 284 [Rayfuse, "Maritime Zones"].

1. The Continuation of Statehood by Lease Agreement

a. Can a Sovereign State Exist on a Leased Territory

The core issue of the question whether a sovereign state can exist on a leased territory is whether a sovereign state can exist without the title to territory. Actually, title to territory is not necessary for states to maintain their statehood. This argument does not mean that territory is not important and necessary. It is true that in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a state.³⁸ However, the case of the SIDS which reside on a leased territory is completely different from the entity that exists without any physical basis. In this respect, I argue that the SIDS can maintain their statehood, as they have the physical basis — the leased territory — to house their population and governments.

With regard to the requirement of territory, it is fulfilled as long as states can locate on some land of the earth, without having the ownership of the land. For this view, we can refer to the argument Jessup made on behalf of the United States for Israel's admission to the UN:

The reason for the rule that one of the necessary attributes of a state is that it shall possess territory is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its government exercises authority.³⁹

Furthermore, in the *Island of Palmas case*, the International Arbitral Tribunal [hereinafter IAT] also referred to “a portion of the surface of the globe” as a necessary legal condition.⁴⁰ Since the SIDS have some portion of the earth's surface – the leased territory – to house their people and exercise authority, they thus obviously can continue to exist as states on the leased territory.

Actually, territorial sovereignty instead of title is more significant evidence for the existence of statehood. The IAT pointed out in the *Island of Palmas case* that, “the continuous and peaceful display of territorial sovereignty is as good as a title”.⁴¹ Accordingly, it is the existence of territorial control and sovereignty over the leased territory, instead of title to territory that we should place more weight on.

b. Lease Agreement may not be Permanent

A permanent lease agreement can be analogous to cession of territory, which is not the concern of this article. I will mainly focus on the lease agreement which is not permanent, since it may give an inaccurate impression of unstable statehood. First of all, states may have a very brief existence, provided that they have independent governments with respect to a certain area and population. For instance, Zanzibar was a state from December 1963 to April 1964, when it merged in the new state of Tanzania.⁴²

³⁸ Brownlie, *International Law*, *supra* note 29 at 70.

³⁹ UNSCOR, 3d Year, 383th Mtg, UN Doc S/PV. 383 (1948).

⁴⁰ *Island of Palmas (Netherlands. v. U.S.)*, Int' Arb. Awards 838 (1928).

⁴¹ *Ibid* at 839.

⁴² Crawford, *Creation of States*, *supra* note 11 at 90.

c. The Continuation of Statehood of the SIDS with Restrictive Sovereign Rights over the Leased Territory

It is possible for one state to lease territory from another, while 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.⁴³ Nevertheless, the cases of protectorates in history have proven that two states can share the sovereign powers and it would not have an effect on their statehood. Under the Treaty of Fez 1912, France undertook to exercise certain sovereign powers and all of the international relations of Morocco, but nonetheless, the ICJ considered that Morocco remained a sovereign state in international law.⁴⁴ Cyprus was in 1878 placed under the “occupation and administration” of Great Britain.⁴⁵ However, the Anglo-Turkish Mixed Arbitral Tribunal held in the case of *Parounak v Turkish Government* that Cyprus was “a state or territory under the protection” of Great Britain within the meaning of Article 64(2) of the Treaty of Lausanne.⁴⁶ Under both cases, Morocco and Cyprus had always been considered as states. It is not the case that there is no threshold beyond which concomitant conditions will call statehood into question, but this threshold is definitely very high.⁴⁷ In short, the SIDS could definitely maintain statehood with restrictive sovereign rights over the leased territory.

Furthermore, in the case of a lease, temporary sovereignty is exercised by the lessee state.⁴⁸ We can trace this back to many cases concerning leased territory, which comes under the sovereignty of the lessee state during the lease period.⁴⁹ Take Macao as an example. In 1887, the Qing government signed the Sino-Portuguese Treaty of Amity and Commerce, which declared that Portugal kept the right of “perpetual occupation and government of Macao”. Only in 1999, the Chinese government finally assumed formal sovereignty over Macao. In brief, a lessee state exercises temporary sovereignty over the leased territory.

2. Can Artificial Island be Considered Territory of State

Land preservation and reclamation is currently the most usual technique against sea level rise. The use of artificial islands is a popular method for land preservation and reclamation.⁵⁰ One of the Maldives’s most significant recent projects was the completion of an artificial island called Hulhumale within waters under its sovereign control.⁵¹ In the long term, it is hoped that “the island will be transformed into a progressive world class city where 60,000 people will live, work and raise their families.”⁵² Therefore, this may be a possible solution for obtaining replacement territory for the SIDS.

⁴³ Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012), at 147 [McAdam, *Forced Migration*].

⁴⁴ *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, [1952] ICJ Rep 176 at 185.

⁴⁵ Crawford, *Creation of States*, *supra* note 11 at 288.

⁴⁶ *Ibid.*

⁴⁷ Jain, *supra* note 34 at 48.

⁴⁸ I.A. Shearer, *Starke’s International law*, 11th ed (London: Butterworths, 1994), at 145.

⁴⁹ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), at 39.

⁵⁰ Tsaltas et al, “Artificial Islands and Structures as a Means of Safeguarding State Sovereignty against Sea Level Rise - A Law of the Sea Perspective” [unpublished, archived at: <http://www.gmat.unsw.edu.au/ablos/ABLOS-10Folder/S2P3-P.pdf>], at 4.

⁵¹ Michael Gagain, “Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldies’ Statehood and Maritime Claims through the ‘Constitution of the Oceans’” (2012) 23:1 Colo.J.Int’t Envtl. L.&Pol’y 77 at 82.

⁵² “Invitation for Expressions of Interest for the Lease and Development of a Marina Inclusive of Hotel in Hulhumale Lagoon” (2009) [unpublished, archived at: <http://www.investmaldives.org/mediacenter/documents/EOI.HDC.Marina.pdf>].

The key point is whether the SIDS may continue to exist if their territory is solely made up of an artificial island. First of all, we shall see that the United Nations Convention on the Law of the Sea [hereinafter LOSC] requires that an island is naturally formed of land,⁵³ which excludes an artificial island from the definition of an island. It emphasizes that “Artificial islands, installations and structures do not possess the status of islands”.⁵⁴ Artificial islands cannot bear maritime zones.⁵⁵ Furthermore, in a case of *In re Duchy of Sealand*, the court held that “territory must consist in a natural segment of the earth”.⁵⁶ However, the decision in *In re Duchy of Sealand* is put forward in the context of the creation of a new state, not the continuity of an existing state.

Although an artificial island does not fit into the legal definition of an island according to LOSC, a coastal state has the right to construct them within its maritime zones.⁵⁷ A state can exercise sovereignty over the artificial islands within its territorial sea.⁵⁸ As in the case of Singapore and Indonesia, the two countries have reached an agreement that Singapore’s reclamation of its baseline would not be a factor in the boundary negotiation with Indonesia.⁵⁹ It can be inferred that artificial islands can be constructed by the SIDS, as long as which are within existing territorial waters or do not create new maritime entitlements.

In the context of sea level rise, artificial islands may prove very useful to serve as habitats for nationals and as a symbol of sovereignty.⁶⁰ Some legal commentators have proposed expanding the LOSC to allow building artificial islands to replace the lost territory of the SIDS, ultimately in the form of a legal framework to allow the SIDS to maintain their sovereignty.⁶¹ Because of its importance, the LOSC needs to remain a living instrument, fully adjusted to emerging needs and conditions, and would be ready to deal with emerging new trends.⁶² A formulated working definition might take into consideration what physical characteristics the artificial island might need to be considered a defined territory for the purpose of maintaining statehood.⁶³ The construction of such an artificial island will be advocated by the SIDS as a solution to otherwise potentially losing statehood as the sea levels continue to rise. However, neither the revision of the LOSC or the recognition of artificial islands has obtained the consensus of the international community to give effect to artificial islands.

⁵³ *United Nation Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 396, Article. 121(1) [LOSC].

⁵⁴ *Ibid*, Article. 60(8).

⁵⁵ LOSC, *supra* note 53 at Article. 60(8).

⁵⁶ *In re Duchy of Sealand*, Federal Republic of Germany, Administrative Court of Cologne (1978).

⁵⁷ LOSC, *supra* note 53 at Article. 60(1).

⁵⁸ LOSC, *supra* note 53 at Article. 60(1); *See also* N. Papadakis, *The International Legal Regime of Artificial Islands* (Leyden: Sijthoff, 1977), at 78.

⁵⁹ Joint Press Statement by the Governments of the Republic of Indonesia and the Republic of Singapore on the Third Meeting of the Technical Discussions on Maritime Boundaries, 28-29 March 2007, online: <http://www.mfa.gov.sg/content/mfa/overseasmission/jakarta/press_statements_speeches_archives/2007/200703/press_200703_04.html>.

⁶⁰ Tsaltas, *supra* note 50 at 5-6.

⁶¹ Gagain, *supra* note 51 at 107; *Ibid* at 3; mentioning the deployment of artificial island can be a part of a future adaptation strategy; Papadakis, *supra* note 58 at 37, 104-108: proposing that a type of artificial island called “Sea-Cities” should be entitled to a territorial sea belt.

⁶² Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Boston: Martinus Nijhoff, 2007), at 59.

⁶³ Gagain, *supra* note 51 at 115

D. POSSIBLE SOLUTIONS FOR THE ISSUE OF STATEHOOD

1. The Options of Obtaining Ceded and Leased Territory

One option to prevent statelessness would be for other states to cede territory to the SIDS for their continued existence.⁶⁴ Sovereignty over the ceded land would transfer in its entirety to the disappearing state which would then relocate its population to the new territorial location.⁶⁵ In such a situation, other states would have to agree that it is the same state establishing itself in a new territory. The population could maintain its nationality and would not be rendered stateless. The continued existence of the state would be secured in accordance with traditional rules of international law.⁶⁶

As discussed above, the SIDS can be recognized as states over the leased territory, therefore another option would be for other states to lease territory to the SIDS for the emergency situation. Then the SIDS can have a temporary physical basis to reside the population and get more time to find a new homeland. Under this circumstance, other states may consider it as a transitional period and agree that it is the same state. Once they get new territory, they will again become a traditional state. There is precedence for such an option: in the late nineteenth century, many Icelanders left Iceland for environmental and social reasons. They entered into an agreement with the Canadian Government and were given land in which they could form a provisional Government, and were given both Canadian and Icelandic citizenship. Eventually, the settlement was fully integrated into Canada.⁶⁷ This example shows that there are international mechanisms by which those displaced can be protected and accommodated.⁶⁸

2. The Possibilities of Federation, Incorporation and Self-Governing Alternative

Other possibilities are federation and incorporation. Soons proposes that the SIDS and another neighboring state may merge into a new state.⁶⁹ Alternatively, the same results can be achieved by letting the SIDS join another state.⁷⁰ Only the latter state will continue to exist, but it will include the remaining maritime territory of the SIDS.⁷¹ This is the basis on which the Keeling Islands joined Australia.⁷² Similar to the option of federation, Jane McAdam suggests to move away from fully-fledged statehood to a self-governing alternative, which means being in free association with another state.⁷³ He found the rationale behind this alternative is to respect the individuality and the cultural characteristics of the territory and its people and give the associated territory the right to determine its internal constitution without outside

⁶⁴ A.H.A. Soons, "The Effects of a Rising Sea Level on Maritime Limits and Boundaries" (1990) 37:2 Netherlands International Law Review 207 at 230.

⁶⁵ Rayfuse, "Maritime Zones", *supra* note 37 at 284.

⁶⁶ Emily Crawford & Rosemary Rayfuse, "Climate Change and Statehood" in Rosemary Rayfuse & Shirley V.Scott, eds, *International Law in the Era of Climate Change* (Edward Elgar Publishing Ltd, 2012) 243 at 249.

⁶⁷ *Climate change and Its Possible Security Implications-Report of the Secretary General*, UNGAOR, 64th Sess, UN Doc A/64/350, (2009) [A/64/350].

⁶⁸ *Ibid.*

⁶⁹ Soons, *supra* note 64 at 230.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Jane McAdam, "'Disappearing States', Statelessness and the Boundaries of International Law" in Jane McAdam, ed, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 105 at 127 [McAdam, "Disappearing States"].

⁷³ *Ibid* at 126.

interference, while certain functions like defense are carried out by another state.⁷⁴ Association is one of the more significant possibilities of self-government especially for the SIDS that are too small to be economically and politically viable standing alone.⁷⁵ Association is also familiar in the Pacific context, for instance the relationship of Niue vis-a-vis New Zealand.⁷⁶

CHAPTER III. CLIMATE CHANGE INDUCED DISPLACEMENT

A. CLIMATE CHANGE CAUSES LARGE SCALE DISPLACEMENT

There is growing awareness that there is a clear link between the effect of climate change and displacement: rising sea levels will potentially force people to leave their homelands.⁷⁷ For instance, a one meter rise in sea level would force 300,000 Maldivians to flee to India or Sri Lanka.⁷⁸ Facing the threat of sea level rise, the entire populations of the SIDS such as the Maldives, Tuvalu, Kiribati and the Marshall Islands may in future be obliged to leave their own country as a result of climate change.⁷⁹ The government of Tuvalu has already begun negotiating migration rights to New Zealand in the event of serious climate change impacts.⁸⁰ A resettlement program has 75 of Tuvalu's 11,000 inhabitants being annually relocated to New Zealand.⁸¹

B. CRITICAL EXAMINATION OF THE CONCEPT OF REFUGEE

Since climate change is not considered to amount to persecution; even if it is regarded as persecution, it is not for a reason stated in the Convention; or because their home country cannot be recognized as a persecutor.⁸² Therefore, those displaced people are not refugees.

C. THE TERMINOLOGY USED TO DESCRIBE PEOPLE DISPLACED AS A RESULT OF CLIMATE CHANGE

There is a lively debate in the scholarly literature about the precise terminology that ought to be used to describe those who move as a consequence of climate change.⁸³ The terminologies used are various, such as environmental refugees, climate refugees, environmental migrants and environmentally displaced people. The used terminology is relevant for the status of those displaced people in international law. As analyzed above, people displaced as a result of climate change are not refugees. Hence, this section will further explore what their status is in international law.

⁷⁴ *Ibid.*

⁷⁵ Crawford, *Creation of States*, *supra* note 11 at 626.

⁷⁶ McAdam, "Disappearing States", *supra* note 72 at 127.

⁷⁷ Roger Zetter, "Protecting People Displaced by Climate Change: Some Conceptual Challenges" in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford [England]; Portland, Ore: Hart, 2010(2012 printing)) 81 at 131 [Zetter, "Climate Change"]; *Forced Displacement in the Context of Climate Change: Challenges for States under International Law*, UNHCR, Submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (2009), at 2 [*Forced Displacement, UNHCR*]; Jon Barnett, "Security and Climate Change" (2003) 13 *Global Environmental Change* 7 at 8.

⁷⁸ Molly Conisbee & Andrew Simms, "Environmental Refugees: The Case for Recognition" (2003) at 17-18.

⁷⁹ *Climate Change and Statelessness: An Overview*, UNHCR, 2009, at 1.

⁸⁰ Jon Barnett & W. Neil Adger, "Climate Dangers and Atoll Countries" (2003) 61:3 *Climate Change* 321 at 329.

⁸¹ Piers Moore Ede, "Come Hell or High Water: Rising Sea Levels and Extreme Flooding Threaten to Make the South Pacific's Tuvalu the First Victim of Global Warming" (2003) 1 *Alternative Journal* 8 at 8.

⁸² Jane McAdam & Ben Saul, "Displacement with Dignity: International Law and Policy Responses to Climate Change, Migration and Security in Bangladesh" (2010) 53 *German Yearbook of International Law*, 233 [McAdam & Saul, "Dignity"].

⁸³ Michele Klein Soloman & Koko Warner, "Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks" in Gerrard & Wannier, *supra* note 20, 243 at 254.

1. Whether Those Displaced Can be Characterized as Environmental Refugee

The idea of an “ecological refugee” was first mentioned in 1948.⁸⁴ Its more recent and first official publication was a UN Environmental Program Report in 1985 by El-Hinnawi.⁸⁵ El-Hinnawi defined environmental refugees as people who migrate from their traditional habitat, temporarily or permanently, because of a marked environmental disruption which seriously affected the quality of their life.⁸⁶ There are also some other scholars who use the term environmental refugee.⁸⁷ Those who favor the use of the term “environmental refugee” argue essentially by analogy that those who flee for climate change reasons do so in circumstances of such overwhelming distress as to be equal to persecution.⁸⁸ Master argues that the rationale of the repeating use of the term environmental refugee is that if the moral expression environmental refugee is brought into currency, public opinion will associate the plight of persons displaced as a result of climate change with those of traditional refugees and support will follow for granting them refugee status through a change in the legal definition.⁸⁹

However, the use of the term “environmental refugees” is controversial. A number of commentators and organizations have rejected to use the term environmental refugee.⁹⁰ Some refuse to use the term environmental refugee because its use “would not only dilute the refugee concept but would do nothing to clarify questions of institutional responsibility in relation to prevention and response.”⁹¹ The term environmental refugees could potentially undermine adherence to the existing refugee definition.⁹² The International Organization for Migration [hereinafter IOM], the United Nations High Commissioner for Refugees [hereinafter UNHCR], and the Refugee Policy Group had the same concerns and opted not to use the term environmental refugee in their 1996 symposium proceedings relating to the link between environmental factors and population movements.⁹³

2. It is More Appropriate to Characterize People Displaced Due to Climate Change as Environmentally Displaced People

Instead of using the term environmental refugee, the IOM and UNHCR adopted the phrase “environmentally displaced persons”, defined as “Persons who are displaced within their

⁸⁴ Étienne Piguet, Antoine Pécoud & Paul de Guchteneire, *Migration and Climate Change* (Cambridge; New York: Cambridge University Press, 2011) at 227.

⁸⁵ Jane McAdam, “Climate Change Displacement and International Law: Complementary Protection Standards” (2011) UNHCR Legal and Protection Policy Research Series, at 5 [McAdam, “Climate Change Displacement”].

⁸⁶ Essam El-Hinnawi, *Environmental Refugees* (United Nations Environmental Programme, 1985) at 5.

⁸⁷ Astri Suhrke & Annamaria Visentin, “The Environmental Refugee: A New Approach” (1991) 1(2) Ecodecision 73; Norman Myers, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Climate Inst., 1995) at 18; Frank Biermann & Ingrid Boas, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” (2010) 10:1 Global Environmental Politics 60 at 66.

⁸⁸ Soloman & Warner, *supra* note 83 at 255.

⁸⁹ Suzette Brooks Masters, “Environmentally Induced Migration: Beyond a Culture of Reaction” (1999) 14 Geo. Immigr. L.J. 855 at 866.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 867; See also Aurelie Lopez, “The Protection of Environmentally-Displaced Persons in International Law” (2007) 37 Env'tl. L. 365 at 368.

⁹² Soloman & Warner, *supra* note 83 at 258; Oli Brown, “Climate Change and Forced Migration: Observations, Protections and Implications” (2007) Human Development Report Office Occasional Paper, United Nations Development Program, at 7; Fabrice Renaud et al., “Control, Adapt or Flee: How to Face Environmental Migration” (2007) UN Univ Inst. For Env't & Human Sec., InterSecTions No.5/2007, at 34, online:<<https://www.ehs.unu.edu/file/get/3973>>.

⁹³ Masters, *supra* note 89 at 867; Frank Biermann & Ingrid Boas, “Protecting Climate Refugees: The Case for a Global Protocol” (2009) no.509 Current 21 at 23 [Biermann & Boas, “Climate Refugees”].

country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one.”⁹⁴ The term environmentally displaced persons was also adopted by United Nations Millennium Declaration [hereinafter Millennium Declaration], as it called for the attention of international community to strengthen international cooperation and coordination of humanitarian assistance to all refugees and displaced persons.⁹⁵ Opposite views put forward that there is little benefit in according people affected by environmental factors the status of displaced persons,⁹⁶ because displaced persons do not form a juridical category under existing international law.⁹⁷ It only serves as a descriptive term, not as a status that confers obligations on states.⁹⁸ However, as analyzed above, since those displaced persons are not refugees, the term environmental refugee should not be used to describe those persons. The use of a terminology will have potential impact in the mind of ordinary people. Although environmentally displaced people do not form a juridical category currently, scholarly written and international organizations are seeking adaptation of international law to protect this category of people. Hence, the term environmentally displaced people is more appropriate.

D. EXISTING LEGAL INSTRUMENTS RELATED TO THE PROTECTION OF THE ENVIRONMENTALLY DISPLACED PEOPLE

1. The Environmentally Displaced People are Protected by International Human Rights Law

Although environmentally displaced persons fall outside the definition of refugee, this does not mean that they have no right to protection. International human rights law sets out minimum standards of treatment that states must afford to individuals within their territory or jurisdiction.⁹⁹ Moreover, the human rights law complements the Refugee Convention, since it expanded countries’ protection obligations beyond the refugee category to include people at risk of arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.¹⁰⁰ The state of destination has the duty to extend to them all human rights under international law, regardless of their motive for flight or their immigration status.¹⁰¹

2. The Environmentally Displaced People are Protected by the Non-refoulement Principle

Article 33 of the Refugee Convention obligates states not to deport a refugee “to frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁰² The evolving interpretation promoted by the international bodies and cases show that the non-refoulement

⁹⁴ *Environmentally-Induced Population Displacements and Environmental Impacts Resulting from Mass Migrations*, International Symposium, 21-24 April 1996, Geneva: International Organization for Migration with UNHCR and Refugee Policy Group, at 9.

⁹⁵ *United Nations Millennium Declaration*, UN Doc A/RES/55/2, (2000), at Part VI (26) [Millennium Declaration].

⁹⁶ David Keane, “The Environmental Causes and Consequences of Migration: A Search for the Meaning of ‘Environmental Refugees’” (2004) 16:2 Geo. Int’l Envtl.L. Rev. 209 at 217.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ McAdam, *Forced Migration*, *supra* note 43 at 54.

¹⁰⁰ McAdam, “Climate Change Displacement”, *supra* note 85 at 17.

¹⁰¹ Alice Edwards, “Climate Change and International Refugee Law” in Rayfuse & Scott, *supra* note 66, 58 at 79 [Edwards, “Climate Change”].

¹⁰² *Convention relating to the Status of Refugees*, 14 December 1951, 189 UNTS 137, at Article. 33.

principle has been part of customary international law.¹⁰³ For instance, the Human Rights Committee [hereinafter HRC] has interpreted Article 7 of the International Covenant on Civil and Political Rights [hereinafter ICCPR] to forbid refoulement of persons to places where they would be at risk of torture or cruel, inhuman or degrading treatment and punishment.¹⁰⁴ Article 3 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms restates the principle again.¹⁰⁵

The non-refoulement protection is relevant in situations of climate change related displacement. Environmentally displaced people can find protection by the non-refoulement principle. For instance, in a situation of extreme natural disasters, where the life of affected individuals might be threatened or where individuals would risk suffering from inhumane or degrading conditions due to environmental events, the non-refoulement principle could be a potentially useful tool to protect them from being returned to the country they fled from.¹⁰⁶

3. State Practice Relating to Temporary Protection

Apart from protection on human rights grounds, another potentially useful instrument is temporary protection. Temporary protection is one measure used to provide protection and assistance to those affected by environmental disasters.¹⁰⁷ A number of countries have mechanisms for providing temporary protection to people displaced by environmental disasters, such as temporary protection in the European Union.¹⁰⁸ In 2001, the Council of the European Union adopted a directive, which gives temporary protection to displaced persons from third countries who cannot return to their country of origin.¹⁰⁹ According to act 244 of Immigration and Nationality Act of the United States, the Attorney General may grant an alien temporary protected status in the United States and shall not remove the alien from the United States during the period when the Attorney General finds that there has been an earthquake, flood, drought or other environmental disaster in the state resulting in a substantial disruption of living conditions in the area affected.¹¹⁰ With regard to the Swedish Aliens Act 2005, it provides that a person in need of protection is an alien who is outside the country of the alien's nationality because he or she is unable to return to the country of origin because of an environmental disaster.¹¹¹ There are similar legislations and regulations in Finland,¹¹² Denmark,¹¹³ and Switzerland.¹¹⁴ Following the Haiti earthquake in 2010, it was applied to Haitians residing in the United States, giving them protection from deportation for 18 months and the right

¹⁰³ *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* (2012) FACV No.15 of 2011, Court of Final Appeal of the Hong Kong Special Administrative Region, para 22; Frances Nicholson et al, *Refugee Protection in International Law* (Cambridge, UK: Cambridge University Press, 2003) at 178; Guy S. Goodwin-Gill, "Non-refoulement and the New Asylum Seekers" (1985) 26 Va. J. Int'l L. 897 at 902.

¹⁰⁴ HRC, General Comment 20, UN Doc.HRI/HEN/1/Rev.a (1992), at para. 9.

¹⁰⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 221 (1950), Article. 3.

¹⁰⁶ Soloman & Warner, *supra* note 83 at 260; Edwards, "Climate Change", *supra* note 101 at 70.

¹⁰⁷ Soloman & Warner, *supra* note 83 at 276.

¹⁰⁸ McAdam, *Forced Migration*, *supra* note 43 at 100.

¹⁰⁹ EC, *Council Directive 2001/55/EC OF 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, [2001] OJ, L212/12.

¹¹⁰ USA, Immigration and National Act, 2010, act 244.

¹¹¹ Swedish, Aliens Act, 2005, Ch 4 sec 2.,

¹¹² Finland, Aliens Act, 2004, sec 109.

¹¹³ Morten Kjaerum, "Opinion: Temporary Protection in Europe in the 1990s" (1994) 6 Int'l J. Refugee L. 444 at 449.

¹¹⁴ Walter Kälin, "Conceptualizing Climate-Induced Displacement" in Jane McAdam, ed, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010) 81 at 85.

to work.¹¹⁵ In the 1990s, Caribbean countries provided temporary asylum to Montserratians fleeing volcanic eruptions.¹¹⁶

Furthermore, article 26 of the Millennium Declaration states that, member states will assist and protect the populations that suffer the consequences of natural disasters, so that they can resume normal life as soon as possible, and to help all refugees and displaced people to return voluntarily to their homes in safety and dignity.¹¹⁷ Although the Millennium Declaration is just a resolution adopted by the General Assembly and it is not binding, it shows *opinio juris* that people who suffered from natural disasters have to be protected and assisted. Therefore, the *opinio juris* showed in the Millennium Declaration and general practice mention above may be seen as evidence of nascent customary international law to provide temporary protection to those displaced people.

E. OPTIONS OF ADAPTION OF INTERNATIONAL LAW TO PROTECT ENVIRONMENTALLY DISPLACED PEOPLE

Although environmentally displaced people are protected by international human rights law and the non-refoulement principle, current international law does not require states to provide asylum to them.¹¹⁸ Unlike refugees who receive specific protection, environmentally displaced people are largely voiceless. They have no status or specific protection under international law and no single international agency is responsible for their welfare.¹¹⁹ Therefore, there have been multiple calls for states to afford protection and assistance to environmentally displaced people pursuant to existing international refugee law.¹²⁰ Suggestions from scholarly writings include developing a more comprehensive, functional legal instrument and extending the Refugee Convention to embrace this newly termed category,¹²¹ both of which will be analyzed below.

1. Examination of Developing a New Legal Instrument

Some scholars support the establishing of a new legal instrument, because they find that the concept of persecution is still too limited to appropriately address the problem of environmental displacement.¹²² The definition of refugee is too restrictive to apply generally to environmentally displaced people.¹²³ Those displaced people do not fall within the definition of refugee, hence, it is ill suited to address the contemporary challenge of environmental displaced people.¹²⁴ Since there is a need to empower the relevant entities in the UN system and other organizations to provide assistance to environmentally displaced people, this can best be achieved if there is an international instrument in place recognizing this people.¹²⁵

¹¹⁵ Julia Preston, "Haitians Illegally in U.S. Given Protected Status" *The New York Times* (January 15, 2010) online:<http://www.nytimes.com/2010/01/16/world/americas/16immig.html?_r=0>.

¹¹⁶ McAdam, "Climate Change Displacement", *supra* note 85 at 41.

¹¹⁷ *Millennium Declaration*, *supra* note 95 at Article. 26.

¹¹⁸ *Report of the Office of the UNHCR for Human Rights on the Relationship between Climate Change and Human Rights*, UNGAOR, 10th Sess, UN Doc A/HRC/10/61, (2009) at para 58.

¹¹⁹ "Human Tide: The Real Migration Crisis" (2008) OALster at 2.

¹²⁰ Soloman & Warner, *supra* note 83 at 254.

¹²¹ Kolmannskog, *supra* note 2 at 31.

¹²² Edith Lafontaine, *The Need for a New Instrument to Deal with "Environmental Refugees"* (Master Thesis, University of Oslo, 2007) [unpublished], at 50, online:<<http://www.duo.uio.no/publ/jus/2007/65668/Thesis.pdf>>.

¹²³ *Ibid.*

¹²⁴ Angela Williams, "Turning the Tide: Recognizing Climate Change Refugees in International Law" (2008) 4 *Law & Policy* 502 at 510; *Ibid.*

¹²⁵ Renaud, *supra* note 92.

There have been various proposals for a new legal instrument to address the issue of environmental displacement in scholarly literature, including through a protocol to the Refugee Convention, a protocol to the UNFCCC, or a stand-alone treaty.¹²⁶ For instance, Biermann and Boas propose an independent legal regime created under a Protocol on the Recognition, Protection, and Resettlement of Climate Refugees to the UNFCCC.¹²⁷ Docherty and Giannini propose a new legal instrument to confront the issue of environmental displacement.¹²⁸ A research group in France has drafted a convention on the international status of environmentally displaced persons, named Draft Convention on the International Status of Environmentally-Displaced Persons [hereinafter draft convention].¹²⁹ The objective of the draft convention is to establish a legal framework that guarantees the rights of environmentally displaced persons and to organize their reception and return.¹³⁰

2. Expansion of the Definition of Refugee

Also many advocates have argued for an expansion in the definition of refugee to bring those displaced persons within the ambit of the Refugee Convention through amendment.¹³¹ Delegates at the Maldives meeting in 2006 proposed an amendment to the Refugee Convention to include climate refugees.¹³² For instance, Keane argues that it is possible to expand the definition of refugee along human rights lines.¹³³ The five freedoms (race, religion, nationality, membership of a social group and political opinion) contained in the definition are rights set forth in the Universal Declaration of Human rights.¹³⁴ The Refugee Convention also recognizes the right to seek safety which is contained in Article 14(1) of the Universal Declaration.¹³⁵ The definition of refugee would be extended in line with international human rights law to solve the problem of environmentally displaced people.¹³⁶

The UNHCR has been urged by environmental refugee advocates to extend their protection to include those people.¹³⁷ In fact, the definition of refugee has been expanded in practice through the effort of the UNHCR, by preparing a UN convention on territorial asylum, the establishment of regional refugee protection and the practice of states.¹³⁸ Early in 1957, the General Assembly first authorized the UNHCR to assist people who did not come fully within the statutory definition, if “the problem is such as to be of concern to the international community”.¹³⁹ While these developments do not constitute formal amendments of the definition of refugee, they are nonetheless indicative of a widening of the circumstances in

¹²⁶ McAdam & Saul, “Dignity”, *supra* note 82; Lafontaine, *supra* note 122 at 50-51; Michel Prieur, “Draft Convention on the International Status of Environmentally-Displaced Persons” (2010) 4243 Urb. Law. 247; David Hodgkinson et al, “‘The Hour When the Ship Comes in’: A Convention for Persons Displaced by Climate Change” (2010) 36:1 Monash UL Rev 69 at 69.

¹²⁷ Biermann & Boas, “Climate Refugees”, *supra* note 93 at 12.

¹²⁸ Bonnie Docherty & Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees” (2009) 33:2 Harv Envtl L Rev 349 at 350.

¹²⁹ *Draft Convention on the International Status of Environmentally-Displaced Persons* (Second Version) (May 2010).

¹³⁰ *Ibid* at Article. 1.

¹³¹ Masters, *supra* note 89 at 866; Keane, *supra* note 96 at 215; Alexander Betts, “Survival Migration: A New Protection Framework” (2010) 16 Global Governance 361; Jessica B. Cooper, “Environmental Refugees: Meeting the Requirement of the Refugee Definition” (1998) 6 N.Y.U. Envtl. L.J. 480 at 494; *Forced Displacement, UNHCR, supra* note 77 at 10; Solomon & Warner, *supra* note 83 at 257.

¹³² Biermann & Boas, “Climate Refugees”, *supra* note 93 at 11.

¹³³ Keane, *supra* note 96 at 215.

¹³⁴ *Ibid*.

¹³⁵ *Universal Declaration of Human Rights*, GA Res 217A (), UNGAOR, 3rd Sess., UN Doc A/810, (1948), at Article. 14(1).

¹³⁶ Keane, *supra* note 96 at 215.

¹³⁷ Renaud, *supra* note 92.

¹³⁸ James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 6; Robinson, *supra* note 239 at 11.

¹³⁹ *Chinese Refugees in Hong Kong*, GA Res 1167(XII), (1957).

which persons are in need of international protection.¹⁴⁰ The UNHCR has been authorized to aid involuntary migrants, including the victims of both man-made and natural disasters.¹⁴¹

3. Establishing a Framework Similar With the Guiding Principles on Internal Displacement

The refugee instrument mentioned above applies to people who have crossed an international border.¹⁴² By contrast, the 1988 Guiding Principles on Internal Displacement¹⁴³ [hereinafter Guiding Principles] set out principles of protection for certain forced migrants who are internally displaced.¹⁴⁴ Hodgkinson and Young further propose a Convention that incorporates a mechanism for the provision of aid and assistance to internal displaced people [hereinafter IDP].¹⁴⁵ One idea that has particular currency is the development of a set of Guiding Principles around environmentally displaced people, based on the positive experience with the Guiding Principles.¹⁴⁶ At the international level the Guiding Principles have received wide endorsement, notably by the General Assembly,¹⁴⁷ the Human Rights Council,¹⁴⁸ and the 2005 World Summit.¹⁴⁹ These endorsements have established the Guiding Principles as an important framework for the protection of IDP. There are some indications that the Guiding Principles are emerging as customary law, providing a binding interpretation of the international legal norms upon which they are based.¹⁵⁰ Some countries, such as Colombia have incorporated substantial parts of the Guiding Principles into domestic law.¹⁵¹ The National Policy on Displacement of Iraq declares that the Guiding Principles have become part of international law and the Government of Germany has taken the position that Guiding Principles can by now be considered to be international customary international law.¹⁵² In Africa there is now a regional treaty for the protection of IDP.¹⁵³ Thus, it may be a useful tool to develop a framework similar with the Guiding Principles.

In my opinion, I prefer to expand the existing definition of refugee to include those displaced people. Since most of the countries lack the will to establish a new legal instrument and the need to protect those displaced people is significant and necessary, expanding the existing definition will be a more convenient and faster way to solve the issue. Although the definition of refugee is originated from the political motive, it should be developed to adapt to the newly emerging problem.

Key Words: Climate Change; Statehood; Refugee; Environmentally Displaced People; Solution.

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¹⁴⁰ Hathaway, *supra* note 138 at 11.

¹⁴¹ *Ibid* at 13.

¹⁴² Zetter, "Climate Change", *supra* note 77 at 133.

¹⁴³ *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (1998).

¹⁴⁴ Zetter, "Climate Change", *supra* note 77 at 133.

¹⁴⁵ David Hodgkinson & Lucy Young, "In the Face of Looming Catastrophe: A Convention for Climate-Change-Displaced Persons" in Gerrard & Wannier, *supra* note 20, 299 at 320.

¹⁴⁶ Soloman & Warner, *supra* note 83 at 297.

¹⁴⁷ *Protection of and Assistance to Internally Displaced Persons*, GA Res 62/153, UNGAOR, 62d Sess, UN Doc A/RES/62/153 (2008).

¹⁴⁸ *Mandate of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, HRC, A/HRC/RES/6/32 (2007).

¹⁴⁹ *2005 World Summit Outcome*, GA Res 60/1, UNGAOR, 60d Sess, UN Doc A/RES/60/1 (2005) at 29.

¹⁵⁰ *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, UNGAOR, 13th Sess, UN Doc A/HRC/13/21 (2010) at 5 [A/HRC/13/21].

¹⁵¹ McAdam & Saul, "Dignity", *supra* note 82.

¹⁵² A/HRC/13/21, *supra* note 150 at 5.

¹⁵³ McAdam & Saul, "Dignity", *supra* note 82.