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A New Challenge in International Law: The Disappearance of a State's Entire Territory

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Contents

SUMMARY **1**

SAMMANFATTNING **2**

PREFACE **3**

ABBREVIATIONS **4**

1 INTRODUCTION **5**

1.1 Subject and Purpose **6**

1.2 Scope **6**

1.3 Method **6**

2 FACTS **8**

2.1 Rising Sea Levels **8**

2.2 Disappearing States **9**

2.3 Small Island Developing States **10**

2.4 Timescale **11**

2.5 Concluding Remarks **12**

3 VIABLE OPTIONS **13**

3.1 Scenario One: Individual Asylum **13**

3.2 Scenario Two: Collective Asylum **14**

3.3 Scenario Three: Land Acquisition **14**

4 APPLICABLE LAW **15**

4.1 Human Rights Law **15**

4.1.1 Special Status Rights ***17***

4.1.2 The international Bill of Human Rights ***18***

4.1.3 The UN Charter ***19***

4.1.3.1 Non-intervention 20

4.1.3.2 Classifying the Situation 20

4.1.3.3 Article 55 and Article 56 21

4.1.4 The Right to Self-determination ***22***

4.1.5 Human Rights and Environmental Law Overlap ***24***

4.2 Environmental Law **24**

4.2.1 The United Nations Framework Convention on Climate Change ***25***

4.2.2 The Bali Plan of Action ***27***
4.3 Refugee Law **27**
4.3.1 The 1951 Convention ***27***
4.3.2 Protection of the UNHCR ***28***
4.3.3 Alternative protection ***30***
4.3.3.1 The United Nations 30
4.3.3.2 The International Organization for Migration 30
4.3.4 Environmental Refugees ***31***

5 APPLYING THE LAW TO THE VIABLE OPTIONS **33**
5.1 Scenario One – Individual Asylum **33**
5.1.1 Human Rights Law ***33***
5.1.2 Environmental Law ***34***
5.1.3 Refugee Law ***35***
5.2 Scenario Two – Group Asylum **36**
5.2.1 Human Rights Law ***36***
5.2.2 Environmental Law ***37***
5.2.3 Refugee Law ***37***
5.3 Scenario Three – Land Acquisition **38**
5.3.1 Human Rights Law ***39***
5.3.2 Environmental Law ***40***
5.3.3 Refugee Law ***40***

6 CONCLUSION, PROPOSED SOLUTIONS **41**

BIBLIOGRAPHY **44**

Summary

This thesis considers the new challenges facing international law by the physical disappearance of a state's entire territory. This is an event forecasted to happen as a result of sea-level rise, affecting some of the smallest nation states in the world, primarily islands in the South Pacific. There are many perspectives from which this problem needs to be tackled. The focus of this examination is on the human rights, and their protection, of the relocating inhabitants of the disappearing states.

The role territory plays in the legal definition of a state is central, and though no examination of the legal status of disappearing states is done here, a presumption is made that without territory, a state no longer can retain the status of a state in international law. This leaves the inhabitants very vulnerable, as their primary "protector" is rendered incapable.

Three possible solutions are examined in this thesis. The first is that each inhabitant seeks asylum individually. The second is that the inhabitants seek asylum as a group, in the hope of relocating together and maintaining some of their cultural heritage and their community. The third suggestion is that the territory is either given or sold to the disappearing state. In this scenario the state gains new territory and therefore retains its status as a state.

The three scenarios are assessed in the light of existing international law, the relevant areas being environmental, human rights and refugee law. Relevant provisions from these areas of law are presented in chapter 4, and then applied to each scenario in turn in chapter 5.

The goal is to find international obligations that can serve as a basis for the guaranteed protection of the inhabitants' human rights after their state has dissolved, or alternatively that can serve as a basis for collecting financial assistance from the international community. The latter is to enable the purchase of territory and costs of relocation, which otherwise are expenses beyond the financial capacity of these small states.

It has been very clear, in the course of this thesis, that the loss of a state's entire territory is a very difficult concept to introduce into the existing system of international law. No provisions have been made with this borne in mind, and analogous application of laws is very difficult, as territory is without fail expected to be a guaranteed lynch pin of every state. The steadfast principle of state sovereignty proves to obstruct a satisfying guarantee of protection in the first two scenarios. Scenario three relies on immense good will from the international community, with little leverage from international law.

Sammanfattning

Det här examensarbetet behandlar de nya utmaningar för folkrätten som manifesterar sig i det fysiska försvinnandet av hela staters territorium. Detta förutses hända på grund av havshöjningen och kommer att berör de minsta staterna i världen, i huvudsak småöar i Södra Stilla Havet. Detta problem behöver utredas från många olika vinklar, men fokuset i detta arbete är på invånarna som tvingas fly, och skyddet av deras mänskliga rättigheter.

Territoriets roll i folkrättens definition av en stat är central. Inga diskussioner kring den legala statusen av en stat som inte har något territorium görs i detta arbete, utan det presumeras att en stat utan territorium inte längre kan klassificeras som stat. Detta innebär att invånarna får en väldigt svag ställning i folkrätt, då deras ”beskyddare” blir inkompetent.

Tre möjliga lösningar undersöks i detta arbete. Det första är att varje invånare söker asyl individuellt. Det andra är att alla invånarna söker asyl i grupp, för att flytta tillsammans och behålla kulturarvet och samhället. Det tredje scenariot är att territorium antingen ges eller säljas till den försvinnande staten. I detta alternativ behåller staten sin status som stat, då den får nytt territorium.

Dessa tre scenarion undersöks i ljuset av gällande folkrätt, de relevanta områdena är miljörätt, mänskliga rättigheter, och asylrätt. Relevant lagstiftning presenteras i kapitel 4, och tillämpas på de tre förslag i kapitel 5.

Syftet är att hitta internationella åtaganden, grundade i lag, som kan garantera fortsatt skydd för invånarnas mänskliga rättigheter efter det att deras stat har upphört. För det tredje scenariot krävs det att det finns åtaganden som kan grunda finansiella bidrag från det internationella samfundet, för att finansiera köp av territorium och kostnader för ometablerandet av staten. Dessa kostnader ligger annars långt utöver dessa små staters kapacitet.

Under detta arbetes gång, har det blivit allt tydligare att förlust av territorium är ett koncept som inte sitter bekvämt i det gällande internationella systemet. Folkrätten har inte skapats med den här situationen i åtanken, och analogiska tillämpningar är ytterst svåra då folkrätten byggs på en stark presumtion att territorium är en garanterad och permanent del av en stat. Den orubbliga principen om staternas suveränitet visar sig vara ett hinder för ett godtagbart skydd av invånarnas mänskliga rättigheter i de första två scenarion, och det tredje scenariot beror helt på en betydlig välvilja från det internationella samfundet och saknar pådrivning från folkrätt.

Preface

I would like to thank my supervisor Professor Gudmundur Alfredsson, for taking me on at such a late stage in the term, suggesting such an exciting topic, and guiding me in such a clear and encouraging manner. It is thanks to his swift responses and optimism that I have been able to graduate in the timeframe I set myself!

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Abbreviations

AOSIS	Alliance of Small Island States
AR4	IPCC 4th Assessment Report
BPoA	Barbados Plan of Action
ERC	Emergency Relief Coordinator
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-governmental Organization
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Co-operation and Development
SIDS	Small Island Developing States
UDHR	Universal Declaration of Human Rights
UNEP	United Nations Environmental Program
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

An international legal conundrum has arisen, with surprising suddenness and gravity. States are going to disappear under water.

The novelty of this problem is not as recent as it seems, as the disappearance has been predictable for some time. The states under threat are well aware of the problem. Only recently, however, the international community has begun to realise that the problematic, practical consequences of these state disappearances will require a solution within a relatively short period of time.

The rise in sea level is threatening both the existence of a number of small island states, and the inhabitability of low-lying areas within larger states. The number of problems associated with the disappearance of these habitats are numerous and serious. The immediate and obvious problem is to where the current inhabitants will be able to relocate. The myriad of accompanying problems poses both practical and abstract questions. The practical problems include issues of citizenship, maritime boundaries and rights, legal persons, international duties, economics, and much more. The abstract questions include issues of the definition of a state, the governance of a state, the definition of state disappearance and great deal more.

The problem of what will happen to the citizens of these disappearing states is of global concern. The term “environmental refugee” is being uttered increasingly frequently, as forced location due to environmental degradation becomes more and more of a stark reality. The struggle for negotiators to agree on binding treaties to curb green house gas emissions and other harmful activity is alarming, but even more worrying are the consequences of environmental degradation that we are too late to avoid. Global warming is rendering many populated parts of this earth uninhabitable. Countries located on or near the equator are drying up; other countries are drowning in the oceans. Either way, people are having to relocate and the causes are not yet recognized as grounds for asylum in international law.

There are two options for environmentally induced relocation. The first is to relocate in another part of ones own country, the second is to relocate in another state. Neither scenario is without complications. The first option would seem to be preferable; one can keep one’s nationality, one has the right to live anywhere within one’s own country, and problems associated with being granted asylum and changing culture are avoided. However, this is not always a solution. The island states that are disappearing are losing the entire territory of their state. External relocation is the only option.

The inhabitants of these states are suffering a fate that international law has not foreseen, and all that can be done at present is to stretch existing definitions to include this almost unreal situation. Common sense and

humanity will have to lead the way as the incompleteness of the international legal system becomes very apparent.

1.1 Subject and Purpose

The question of what will happen to the citizens of these states that are expected to disappear is the subject of this thesis. As identified above, there is a multitude of problematic consequences of the disappearance of a state, and each needs a specific solution. This thesis will focus on the welfare of the citizens of the states in question. Where will they go? What rights do they have? Does a need for new human rights arise from this problem? From whom can they demand their rights? What obligations does the international community have towards these citizens? Whose responsibility is it to protect their rights?

The purpose of the thesis is to find answers to the questions above which together can form a solution that is reasonable and applicable in reality. This solution must protect the rights of the citizens, maintain international security, and be the result of an examination of all aspects and possibilities.

1.2 Scope

The situation examined in this thesis will be the disappearance of an entire state's territory. To clarify, this refers to a state that has become uninhabitable; that cannot sustain human life. Complete inundation is not required. Situations of partial inundation, where internal relocation is an option, will not be discussed in this thesis, as the state itself remains intact.

The solutions that will be examined are presented in chapter 3. Other models such as mergers, association of states, protectorate states or similar alternatives will not be examined in this thesis.

The thesis cannot cover issues beyond the rights of the citizens and obligations of the global community towards them. A consideration of the point in time at which a state can be defined as non-existent may be required to determine when obligations and rights arise. The focus will be on private persons, legal persons will not be included. The international obligations or duties a disappearing state is subject to will not be covered, nor will the question of national debt, maritime rights, or governance. Many more issues will be uncovered and highlighted, but set aside due to limited space.

1.3 Method

There is limited material on this particular subject. The vast majority of information on the issue concerns adaptation and mitigation. The question of evacuation and relocation is being handled by the UN Human Rights

Council, but from the perspective of the rights of indigenous people.[1] The governments of the disappearing states themselves are addressing the problem, but there is seemingly little attention being given to the situation by the academic world.

My method will be to first identify the problem; the predictions and their grounds, the attitudes and the current discussions taking place. I will then propose solutions that would appear viable at this stage of the thesis. Then I will gather all applicable law from the relevant areas of law, including environmental, human rights and refugee law. I will then apply this collection of legal instruments to the proposed solutions, seeking to identify regulations that are a help or a hindrance and any issues that lack regulation. The conclusion will assess the proposed solutions in a legal context. It will assess the protection provided by international law as it stands today, whether it is adequate, and how to tackle the issues that cannot be resolved with current legislation.

[1] F. Hampson, Expanded Working Paper on the Human Rights Situation of Indigenous Peoples in States ad Other Territories Threatened With Extinction for Environmental Reasons, 2005

2 Facts

2.1 Rising Sea Levels

The warming of the climate is now unequivocal. Rising sea levels are inevitable and consistent with this warming[2]. The Intergovernmental Panel on Climate Change (IPCC) published their fourth Climate Change assessment report (AR4) in February 2007. The majority of the facts below are gathered from this report.

I will not go into the detailed scientific evidence of the causes; it will suffice to state that the AR4 concludes with very high confidence (greater than 90% probability) that global warming is due to increased anthropogenic green house gas emissions,[3] and it is very likely that anthropogenic activity has contributed to sea level rise.[4] The average rate of sea-level rise has increased since 1961 at an average rate of 1.8 mm per year, and since 1993 at 3.1 mm per year.[5] Effects of sea level rise include loss of coastal wetlands and mangroves, and more significantly, damage caused by coastal flooding.[6]

Increased incidents of extreme high sea level[7] threaten land-use relocation and exacerbate the potential need to relocate populations and infrastructures. Increase in tropical cyclone activity would have similar consequences.

In IPCC's AR4, the suggested adaptation strategies for these problems are inter alia seawalls and storm surge barriers, land acquisition and creation of marshlands/wetland as buffer against sea level rise and flooding, and relocation. It is unclear what is meant by land acquisition, and relocation is clearly included as a viable option. Considering no further discussion on relocation is presented in the report I assume it to refer to actions taken within a state's territory. Land acquisition is an interesting suggestion, but no further discussion is presented on this either. Neither term is explained in the report's glossary.

Hindrances to the implementation of these suggested strategies are identified, one being unavailability of relocation space. This is the essential problem that will give rise to the need for evacuation of entire nations, and

[2] IPCC, Climate Change 2007: Synthesis Report. A Summary for Policy Makers, 2007, p. 2.
[3] Ibid., p. 5.
[4] IPCC, Climate Change 2007; A Synthesis Report, 2007, p. 40.
[5] IPCC, Climate Change 2007: Synthesis Report. A Summary for Policy Makers, 2007, p. 2.
[6] IPCC, Climate Change 2007; A Synthesis Report, 2007, p. 33.
[7] "Extreme high sea level depends on average sea level and on regional weather systems. It is defined as the highest 1% of hourly values of observed sea level at a station for a given reference period." IPCC AR4-SPM, 2007, p. 2.

that is handled in this thesis. Both relocation and land acquisition will be discussed further as possible solutions to forced displacement due to inundation.

Concrete predictions of sea level rise and inundation are not available, and there are uncertainties associated with every method of predicting such changes. The AR4 stresses repeatedly that predictions may be well under actual sea level rise as contributions from possible melting of Greenland and Antarctic ice sheets has not been fully included in the projections.[8] Rise in sea level in the near future is very difficult to mitigate due to the knock on effects of global warming and the time lag between emissions and sea level rise.

To conclude, sea level is predicted to continue rising for centuries even if green house gas emissions were to be stabilized now.[9] This fact, together with the averaged predictions, renders further discussions about the likelihood of island state disappearance and severe coastal inundation futile. It is merely a matter of time.

The two risk zones are small islands and deltas. The following sections present the outlook for small island states, and include a brief account of the current international discussions and attitudes around the subject.

2.2 Disappearing States

The states that risk disappearing in their entirety are small island states. There is widespread awareness among these islands of the crisis ahead, and discussions on the environmental threats are taking place within the framework of sustainable development for small island developing states (SIDS).

The predicted outlook for small islands by the IPCC 4th assessment report is as follows:[10]

- Sea level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities.
- Deterioration in coastal conditions, for example through erosion of beaches and coral bleaching, is expected to affect local resources.
- By mid-century, climate change is expected to reduce water resources in many small islands, e.g. in the Caribbean and

[8] IPCC, Climate Change 2007: Synthesis Report. A Summary for Policy Makers, 2007, p. 19.
[9] Ibid., p. 20.
[10] IPCC, Climate Change 2007; A Synthesis Report, 2007, p. 52.

Pacific, to the point where they become insufficient to meet demand during low-rainfall periods.

- With higher temperatures, increased invasion by non-native species is expected to occur, particularly on mid- and high-latitude islands.

As can be seen above, it is not only rise in sea level that threatens the inhabitability of island states. There is a collection of other environmental factors that are likely to result in these states becoming uninhabitable before they are inundated by rising sea levels.[11] To illustrate, the Maldives would disappear completely if the sea level were to rise by 1 metre,[12] but the islands will be unable to sustain human life long before total inundation.

2.3 Small Island Developing States

The Small Island Developing Countries (SIDS) are a group of islands and low-lying coastal countries who cooperate in the form of a coalition; the Alliance of Small Island States (AOSIS – an ad hoc lobby and negotiating voice for inter alia SIDS within the UN system). The first Global Conference on Sustainable Development of Small Island Developing States took place in April 1996 in Barbados, where the Barbados Plan of Action (BPoA) was adopted. In 2005, the international community convened in Mauritius to further the discussions, and the Mauritius Strategy[13] for the further implementation of the Plan of Action was adopted. These two instruments, though focusing on sustainable development, include the main body of dialogue and negotiations that have taken place on the environmental threats facing this group of states.

The Mauritius Strategy acknowledges in paragraph 16 the threat posed to SIDS by rising sea levels, stating “long-term effects of climate change may threaten the very existence of some small island developing States”. A statement made by Kofi Annan[14] at the Mauritius meeting in 2005 acknowledges that the very existence of some states is in jeopardy. In the report from the same meeting, a summary of panel discussions concerning environmental vulnerability includes recognition of the problems concerning population relocation within states of a very small area, but leaving the island state is still seen as an option not an inevitability.[15] In a message to these panel discussions, the president of the Maldives laments the consequences of the then recent tsunami, but highlights the even bleaker

[11] Barnett, J. and Adger, N, ‘Climate Dangers and Atoll Countries’, 2003, 61(3): 321-337.
[12] United Nations, Vulnerability and Adaptation to Climate Change in Small Island Developing States, 2007, p. 17.
[13] The Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, 2005
[14] Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of SIDS, 2005, p. 73.
[15] Ibid., p. 78.

future when the whole population will become environmental refugees due to rise in sea-level.[16]

This illustrates that there is an awareness of the threats of climate change, but the bulk of the documents demonstrate that there is still little emphasis placed on the potential disappearance of states. The focus lies on sustainable development, mitigation and adaptation and a presumption seems to exist that actual disappearance is an unlikely scenario. As of yet, the issue of state disappearance and subsequent need for relocation has not been considered in detail. I am therefore treading on relatively new ground in this thesis.

2.4 Timescale

A statement made by the IPCC in its AR4 presents a prediction (of very high confidence) that by 2080, annual flooding is expected to affect many millions more people than today because of sea level rise. Most likely to be effected are low-lying megadeltas in Asia and Africa, and low-lying islands are "especially vulnerable".[17]

It is impossible to predict which year or decade inundation or uninhabitability will occur. The timescale of deterioration of the inhabitability of small island states is discussed in detail by Barnet in the article Climate Dangers and Atoll Countries.[18] There is a myriad of socio-economic factors, quite apart from the environmental influences, that create a complex situation for the states under threat. These include international investment and foreign aid, and how activity in these sectors (and others) is influenced by the "life-expectancy" of the states. IPCC's working group II state that socio-economic development strongly influences human vulnerability to climate change and sea level rise.[19]

To look at the legal issue at hand, it is interesting to consider at what point in time a state no longer is a state. This question requires both practical and theoretical discussion. The state will become uninhabitable before the territory is fully immersed under water, but is the term "state" bound to the territory or to the citizens and governing bodies? The question of what happens to the state, as an entity, is beyond the scope of this thesis, but the question of who bears the responsibility for the rights of the citizen and from which point in time is relevant here. It would seem logical that it is the point in time at which the land becomes uninhabitable and the state loses its capacity to protect its citizens that is crucial for this thesis. The legal situation under scrutiny is triggered when the territory no longer can sustain human life. However, their must be provisions for the rights of these citizens in place before the crucial time. The international community must

[16] Ibid., p. 81.
[17] IPCC, Climate Change 2007; A Synthesis Report, 2007, p. 48.
[18] Barnett, J. and Adger, N. 'Climate Dangers and Atoll Countries', 2003, 61(3): 321-337.
[19] IPCC, Climate Change 2007: Impacts, Adaptation and Vulnerability, IPCC Fourth Assessment Report, Contribution of Working Group II, 2007, p. 331.

be prepared and responsibility must be allocated so that the human rights of the citizens of the disappearing state are guarded at all times. This discussion must be had, and preparations must be made even before absolute certainty can be proven of state disappearance.

2.5 Concluding Remarks

The facts and discussions above lead to the conclusion that at some point in the future, large populations will be displaced and entire states will be compelled to evacuate their territory. It is impossible to predict concrete projections within definite timescales, but considering the USA's reluctance to bind itself to the Kyoto Protocol, and the difficulties other cooperating states are having meeting their emission reduction targets, even a stabilisation of global warming is unlikely. There are enough grounds to support the prediction of state disappearance to justify the discussion in this thesis.

Small islands are specifically distinguished as highly vulnerable by the IPCC and are considered recurring hotspots of risk. The discussions, even in the IPCC reports, concentrate on adaptation and mitigation. Adaptation in the form of migration is not ruled out, but the legal difficulties are not highlighted. The following chapter will present the applicable law, and identify the problems that remain unsolved by current legislation.

3 Viable Options

Where does the responsibility to guard the human rights of the displaced citizens lie? The citizens cannot reasonably demand their rights from their own state. The legal status of the state itself is unclear once it has suffered the disappearance of its territory, and the means the state has to protect its citizens rights may well be severely compromised by this. In terms of basic human rights, each state has a responsibility towards every single individual, not only its own citizens. States are bound both by conventions and by customary law to respect the human rights of every human being. So the receiving state in particular, and all the other states generally, would appear to have some kind of responsibility, active or passive, to protect these individuals' human rights.

It would seem reasonable that the global community would have a shared responsibility to ensure that the protection of human rights is not jeopardised by forced displacement due to environmental degradation, and that states can be taken to task if they act in a way that gives rise to violation. This responsibility needs a basis in legal rules, and this will be investigated in this thesis.

So what can the global community do for citizens who become stateless due to environmental degradation? Who will bear the responsibility in theory and in practice? There is a strong logic behind the argument that the citizens should relocate somewhere as close to their original habitat as possible, which means that the countries closest to the island states are the most appropriate receivers of the displaced citizens. This creates an uneven distribution of responsibility, but may serve as the solution that maintains the highest level of protection for human rights. This will be examined further.

There are three different scenarios for the relocation of the citizens in question. These are presented briefly here.

3.1 Scenario One: Individual Asylum

The first scenario is that each citizen seeks asylum individually; the population scatters, the global community shares the responsibility evenly across the board. This may be a solution that infringes a number of human rights, but that faces least resistance from the global community. No single receiving state faces a more significant compromise than another. It may require the adjustment of refugee law and the accepted grounds for asylum, but each state would, in principle even if not in reality, be responsible for the relocation of a small number of people, and more importantly, no more than another state. In reality, these displaced people would presumably be most likely to seek relocation in bordering or nearby countries, so it is

unlikely that the displaced population would scatter evenly across the globe. This scenario would result in the splitting of communities and possibly even families. It would severely reduce the possibility of preserving the displaced nation's culture and heritage, and it would practically preclude the possibility of continued existence of the state. It would seem at this point a relatively undesirable solution to the problem. I will call this scenario one.

3.2 Scenario Two: Collective Asylum

The second scenario is that the displaced nation seeks asylum as a group, in order to maintain inter alia their community and culture. This scenario presupposes that one state is prepared to receive an entire nation of asylum seekers, and that grounds for asylum are adjusted as above to include displacement due to environmental degradation. The questions that arise here include how the relocated nation would integrate into the receiving state; would they retain their original citizenship? Would their government cease to exist? Would they have the same status as individual asylum seekers? Would they be compelled to integrate or would they be allowed to essentially transfer their culture and community to the receiving state's territory? A right to group asylum would need to be established to ensure that the nation could stay together, as the receiving state is at present obliged to grant asylum according to each individual person's circumstances. This scenario may be satisfactory to the global community as a whole, but those states that are likely to be receiving states may not consider it acceptable. Responsibility is again not distributed evenly across the board, and it would once again be the bordering or nearby countries that would be the likely targets. In reality, this scenario may not be so different from the first. I will call this scenario two.

3.3 Scenario Three: Land Acquisition

The third scenario is that the disappearing state is either given territory, or is given the opportunity to buy new territory. This scenario would appear rather radical. A state's territory is an integral part of the state and the concept of giving, or buying and selling territory seems at first glance relatively alien. Giving/selling territory could well be considered a threat to international security. There are many problems that spring to mind; would the territory be uninhabited from the start? If not, would the original inhabitants have to be evacuated? Which state would be prepared to give away/sell land? How would purchase of territory be financed? This scenario, apart from its complications, seems to be the most attractive option for the displaced citizens. They would retain their state, their government and their community. This scenario would at first glance protect most human rights very well, but may place some at risk. It would also be the best option for the preservation of their culture and heritage. I will call this scenario three.

4 Applicable Law

For each of the scenarios presented above, there are legal barriers in contemporary international law. However, there may well be elements in the present international legal system which can serve as facilitators for implementing these scenarios as well. Relevant provisions that can serve as a basis for international action to assist disappearing states will be presented in this chapter. The areas where there is a need for adjustment of international legislation or where gaps appear will be discussed in the conclusion (see chapter 6).

As mentioned, the goal is to find existing provisions, and if necessary propose new, in international law that will guard these people's rights and welfare. The areas of applicable law will include environmental law, refugee law and human rights law.

4.1 Human Rights Law

International law has a very strongly established body of regulation protecting human rights. It is important that the available mechanisms be used to their full capacity in solving this difficult problem. Their capacity may even need to be stretched beyond what it was originally intended to be, and beyond the current comfort zone of the international community. Many of the individuals' human rights will automatically be infringed by the disappearance of their state, and this is not preventable. The perpetrator in these instances is not a legal subject that can be compelled to abide by the rules. The predicted rise in sea level is as good as beyond our control.

So can international law provide these individuals with any kind of security in terms of the continued protection of their human rights? Can a basis for international action be found in international human rights law? It may become apparent that the principle of state sovereignty, although recently increasingly impinged by concern for human rights, still hinders the continued protection of the human rights of the individuals in question.

All human beings have human rights, but the degree of protection available decides which rights are claimable. The rights of a national of any state are more wide-ranging than those with refugee, alien or stateless person status. States have an obligation to protect the human rights of their citizens and of refugees and aliens who are within their territorial jurisdiction. However, does a state have any active obligations towards aliens who have no association or link whatsoever to that state? There is of course no consent to violate the human rights of aliens who have no connection to the state, but whether there exists an obligation to actively protect their rights is disputable. A certain duty could be argued to exist with regard to humanitarian intervention, but again the severe violation of human rights would be required in order for this situation to justify such intervention.

What is more, the practicality of humanitarian intervention is highly dubious. Neither a duty nor a right based on humanitarian intervention would appear to exist in this situation.

It is clear that inhabitants of a state whose legal status becomes ambiguous due to loss of territory, risk becoming stateless. Nationality is the “only link between individuals and their rights, benefits and duties of international law” and therefore a stateless human being is an “object of international law for whom no subject of international law is responsible”.[20] The rights a person “has” are meaningless if there is no body responsible for (and capable of) protecting them when they are violated or under threat. It is important to ensure therefore that the inhabitants of disappearing states do not become stateless; the alternatives are that they either gain a new nationality or maintain their original nationality. The latter option is only relevant if their original nationality can continue to be connected to a functioning state in the legal meaning of the word. The former option is reliant on the granting of nationality, which is a matter for the sovereign state, not the international community.

If it is presumed that their state of origin dissolves, then their original nationality becomes useless. They will be stateless aliens if they do not gain nationality or refugee status. To be an alien in the receiving state means that the receiving state has the power to expel them. Expulsion presupposes the human right to return to one’s home state in international law,[21] but this right will become obsolete when the territory of the home state itself disappears/becomes uninhabitable. The very special circumstances here mean that expulsion would put these persons and their human rights at a very high risk. The status therefore, of the former inhabitants of disappearing states in the receiving state cannot be that of aliens, as they must not be subject to possible expulsion. They need to become nationals or refugees (who are protected by the principle of non-refoulement) in the receiving state. According to international law as it stands today, it lies within a state’s domestic power to bestow nationality upon a person and to decide upon asylum. There are no mechanisms in international law that can compromise these rules, as they are protected by the principle of non-intervention in domestic matters.[22]

Moreover, no state is obliged to admit into its territory anyone other than its own nationals. This basic sovereign right, together with the full discretion as to nationality and asylum, creates a difficult barrier for the guarantee of full protection for the human rights of the individuals concerned.

It therefore follows that, once the individuals concerned have managed to enter the receiving state, they may well be considered to be stateless and/or aliens, residing unlawfully in the receiving state. In customary international law, there is a so-called minimum standard that applies to the protection and

[20] E. Daes, Status of the Individual and Contemporary International Law, 1992, p. 35.
[21] UDHR Article 13(2)
[22] UN Charter Article 2 (7)

treatment of aliens.[23] The obligations a state has towards an alien within its territory are however neither absolute nor qualified;[24] it is only bound to provide protection of the law and to observe the above mentioned minimum standard. For whole states' populations to lose legal standing to such an extent that they can only be classed as aliens, wherever they are, does not provide them with adequate protection.

Many of the inhabitants will lose the protection of their human rights entirely when their state loses its territory. This will need to be under close scrutiny and supervision in order to reinstate these rights within the new territory and possibly under a different authority. This is said under the presumption that the citizens will be able to effectively demand the rights in question from the new authority or the international community, as opposed to their state. It is arguably unreasonable to demand that their state, which is losing one of the basic legal requirements to even be classified as a state, has the responsibility to protect its inhabitants' rights. On the other hand, it can be argued that it is the responsibility of that state to make sure that pre-emptive provisions are in place for their inhabitants before the state becomes uninhabitable. The state's own responsibilities are not included in this thesis, as space does not allow.

Either way, with regard to the ambiguity of the legal status of the disappearing states, it would seem essential that the international community takes collective action to secure the undisturbed and continual existence and protection of these threatened human rights. As mentioned above, the unclear legal status of a state without territory creates an entire legal conundrum in itself, and its continued competence as an actor or human rights protector in the international arena cannot be presumed in this instance. A legal basis for this collective action has yet to be found.

Quite what form this collective action would take is debatable. Practically speaking, there is little the international community can do collectively. If a basis for international action can be found within human rights law, what "appropriate action" actually entails still needs to be defined. The likelihood is that the responsibility to protect the human rights of the individuals will simply pass on to the receiving state, and their status (and therefore level of protection) within that state will be subject to the exclusive powers of state sovereignty.

4.1.1 Special Status Rights

There are some human rights that are particularly strongly anchored in international law. These have such status that an international obligation to observe them can be seen to exist.

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[23] E. Daes, Status of the Individual and Contemporary International Law, 1992, p. 36.
[24] Ibid.

Non-derogable human rights are defined as being rights that may not be derogated from "even in times of war or other public emergency threatening the nation". The non-derogability of a right suggests it to be part of jus cogens.[25] International law has tried to close the gap into which human rights can fall if the state is under threat. A state of "public emergency" is defined as "an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population…and constitutes a threat to the organized life of the community of which the state is composed".[26] The present situation must undoubtedly fall within this definition. The rights that class as non-derogable vary between international instruments. But those that are commonly seen as non-derogable are inter alia the right to life, the prohibition of slavery and torture, the freedom of thought and religion.

Jus Cogens rules are peremptory norms of general international law.[27] The precise scope of this category of rules is much disputed, but a few are generally accepted as having obtained this status. These are the prohibition of the use of force, of genocide, of slavery, of gross violations to the right of people to self-determination and of racial discrimination.[28] The case of disappearing states does not threaten genocide, slavery, use of force or racial discrimination, so that which is of interest here is the right to self-determination, see section 4.1.4 for further discussion.

Human rights that possess status as customary international law are inter alia the right to protection from torture, slavery, genocide and the principle of non-discrimination. Erga omnes obligations encompass much the same range.

This strong body (albeit with very fluid perimeters) of basic rights/obligations that are set in stone by way of jus cogens, non-derogability, customary law and erga omnes, may or may not be of relevance purely because they concern rights that may not be under threat in this situation. As mentioned above, the right to self-determination may be of use, and the principle of non-discrimination is sure to be relevant in cases of populations moving to new territories and new states.

4.1.2 The international Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional

[25] M. Shaw, International Law, 2003, p. 256.
[26] S. R. Chowdhury, Rule of Law in a State of Emergency, 1989, p. 11.
or Paris Minimum Standards of Human Rights Norms in a State of Emergency by the ILA
[27] 1969 Vienna Convention on the Law of Treaties Article 53.
[28] P. Malanczuk, Akehurst's Modern Introduction to International Law, 1997, p. 58; I. Brownlie, Principles of Public International Law, 2003, p. 489; M. Shaw, International Law, 2006, p. 116-117.

Protocols. The declaration has a morally binding effect on the global community as a whole, and some provisions have become binding as customary international law.[29] The covenants are only legally binding to those states that have ratified them, as they are multilateral treaties.

However, the same barrier of the principle of sovereignty presents itself here. These well-established instruments in international law do not provide an individual with a protection that is strong enough to break the barrier of sovereignty. The duties that the states have bound themselves to observe in the treaties above do not in any way compel them to admit foreigners into their territory, or bestow their nationality upon them. One state's obligations according to these instruments cannot prompt action by that state that would interfere in another state's domestic affairs. The receiving state will of course be bound by all the obligations it has undertaken according to these treaties, but these are all subject to the individuals' status, difficulties with which have been discussed above.

No international duty as such can be grounded on this body of instruments.

4.1.3 The UN Charter

The UN Charter is based upon a global goal for international peace and security. The preamble to the UN Charter reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Although the prime objective of the Charter was the maintenance of international peace and security,[30] human rights are mentioned frequently in the Charter, and interestingly, equality between large and small states is also reaffirmed. Although the latter in no way constitutes an obligation of any kind, it is worth remembering in the context of this thesis. Other words in the preamble that are worth noting is the reference made to good neighbourliness, a principle that would certainly facilitate the solution of this problem, though little attention is given to it by Simma's commentary to the UN Charter[31].

In Article 1 of the UN Charter, purposes of the UN are given to be inter alia to adjust situations that might lead to a breach of the peace, to respect the principle of equal rights and self-determination, and to promote respect for human rights and fundamental freedoms.

As can be seen simply from the preamble and the first article of the charter, the UN would appear to provide a very appropriate mechanism that has both the mandate and the competence to solve this problem.

The question of how the situation of state disappearance would be classed is of relevance as different levels of threat activate different articles in the

[29] P. Malanczuk, Akehurst's Modern Introduction to International Law, 1997, p. 213.
[30] Ibid., p. 220.
[31] B Simma, The Charter of the United Nations, A commentary, 2002

Charter and thereby different competencies of the General Assembly and Security Council. See section 4.1.3.2 for further discussion.

4.1.3.1 Non-intervention

Article 2 (7) of the UN Charter contains a vital principle of international law; that of non-intervention. The UN is not authorised to intervene in matters that fall within a state's domestic jurisdiction. It could, by some, be argued that this situation is ultimately a problem of national law, falling either within the jurisdiction of the disappearing state, or of the state to which the inhabitants flee. However, in view of the fact that more than one state is involved, and that large numbers of people are crossing international frontiers, the international character of the situation is strongly evident. Furthermore, the situation has a clear element of refugee law and human rights law. I would argue that international law is highly relevant here, where the very legal existence of the domestic jurisdiction of the disappearing countries is under threat. What is more, the handling by the UN of severe violations of human rights is generally accepted to be an exception to the principle of non-intervention into a state's domestic matters[32]. The principle of non-intervention cannot obstruct possible action by the UN in this situation.

4.1.3.2 Classifying the Situation

According to article 14 of the UN Charter, the General Assembly may "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations". If this situation of disappearing territory can constitute a situation as defined above, then the General Assembly has the competence to issue recommendations. These are however not legally binding,[33] and may or may not contribute effectively to the protection of the inhabitants' human rights. The General Assembly cannot "request" member states to act with the help of a recommendation according to article 14.[34] Article 14 is not appropriate where action is necessary for the maintenance of international peace and security.

According to Article 34 of the UN Charter, the Security Council shall investigate a situation "which might lead to international friction or give rise to a dispute" and determine whether its continuance is "likely to endanger the maintenance of international peace and security". The Security Council can undertake pacific settlement of such situations according to chapter VI of the UN Charter. At present the situation in question involves no dispute; there is no internal disturbance in the states in question, so there is no apparent risk for war with a third state or civil war. According to Simma, "any situation" as stated in article 34 encompasses a particular situation that

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[32] P. Malanczuk, Akehurst's Modern Introduction to International Law, 1997, p. 220.
[33] B Simma, The Charter of the United Nations, A commentary, 2002, p. 322.
[34] Ibid., p. 322.

might lead to international friction or give rise to a dispute.[35] Although it is not easy to draw parallels with past situations, as nothing quite like this has happened before, it can with some confidence be argued that this situation might lead to international friction as and when the nation who loses its territory moves into another state's territory. However, it is ultimately a matter to be decided by the Security Council. If the case is to be classed as endangering the maintenance of international peace and security (and therefore as a "situation of like nature" according to article 36(1)) then the Security Council may issue recommendations according to Article 36, 37 and 38. Again, this sort of recommendation is not binding upon states and may have limited effect in the protection of the inhabitants' human rights.

According to Article 39 of the UN Charter, the Security Council shall determine "the existence of any threat to the peace"**.** The Security Council is to enjoy great freedom in deciding what shall constitute a threat.[36] If the situation can be classed as a threat to international peace and security, the Security Council can recommend appropriate procedures (Art 40)) and even decide what measures shall be taken to maintain or restore international peace and security (Art 41 and 42). The recommendations according to article 40 are generally considered binding[37], as are the decisions according to Art 41[38].[39] It may also be noted that Article 39 empowers, but does not oblige, the Security Council to act.[40] Therefore, there is no guarantee that this existing mechanism to assist the nations under threat would be utilized.

An assessment of how the disappearance of a state's territory would be classified will not be done here. The object of this section is purely to illustrate the mechanisms available within the UN. Nor is it clear what these mechanisms could achieve and what measures would be taken, this will be discussed further in chapter 5.

4.1.3.3 Article 55 and Article 56

Article 55 states that the UN shall promote "...universal respect for, and observance of, human rights and fundamental freedoms for all..." and Article 56 states that "All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". According to Akehurst, these provisions confer "no international rights on the individuals, only benefits" due to the vagueness of the language.[41] States have discretion as to what they consider to be appropriate "joint or separate action", and they are not under any *obligation* to carry out measures "in cooperation with the

[35] B Simma, The Charter of the United Nations, A commentary, 2002, p. 600.
[36] Ibid., p. 719.
[37] Ibid., p. 734.
[38] Ibid., p. 739.
[39] The question whether article 42 decisions are binding is complicated by the fact that the measures are to be carried out by the Security Council itself, pursuant to agreements according to article 43, which have not yet been concluded.
[40] B Simma, The Charter of the United Nations, A commentary, 2002, p. 719.
[41] P. Malanczuk, Akehurst's Modern Introduction to International Law, 1997, p. 212.

Organization".[42] This is mainly a result of its referral to article 55, which does not contain obligations, only "purposes" for which to strive. There can however be argued to exist a substantive (as opposed to procedural) obligation in article 56 with respect to article 55 (c). This is because part (c) contains a "fixed and directly executable legal obligation"[43] in the "universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language or religion." Therefore, this can be seen as a basis for international action to promote the protection of the human rights of the individuals concerned.

Article 56 has been referred to in UN General Assembly resolutions in the past[44] but it is appearing less and less often. UN General Assembly resolutions have tended to refer more frequently to the UDHR instead of article 56, as a basis of obligations undertaken by states. The legal obligation purported by article 56 of the UN Charter has been opposed by a number of states.[45] Hence, the value of Articles 55 and 56 of the UN Charter are questionable, but can be argued to be a basis of international action for the protection of the human rights of the individuals concerned.

4.1.4 The Right to Self-determination

The right to self-determination is mainly applicable to the phenomenon of colonization, and those peoples that have not yet become self-governing. In the situation of disappearing states, the states are already self-governing and now their right to self-determination is under threat by the disappearance of their territory. Despite the different circumstances, the right to self-determination could be considered highly relevant in this situation.

The right to self-determination requires the existence of territory. Therefore, it can be deduced that the disappearance of a state's territory severely threatens that state's ability to be self-governing. With the right to self-determination being so strongly established in international law, it would seem unreasonable for a nation that has enjoyed well-established self-determination for many years to be obliged to lose this right. Can the right to self-determination simply vanish and must the authority of another state be accepted in its place?

If on the contrary the state has a right to continued self-determination, some problems would arise in scenarios one and two. This will be discussed in chapter 5 but it can already be highlighted that one of the principles of territorial sovereignty is that "the right to self-determination must not involve changes in international frontiers except where the states agree

[42] B Simma, The Charter of the United Nations, A commentary, 2002, p. 942.
[43] Ibid., p. 943.
[44] UNGA Res. 1316 (XIII), Dec. 12, 1958; UNGA Res. 2152 (XXI), Nov. 17, 1966; UNGA Res. 55/101, Mar. 2, 2001
[45] B Simma, The Charter of the United Nations, A commentary, 2002, p. 944.

otherwise."[46] Furthermore, the right to self-determination "cannot be utilized as a tool for the dismantling of sovereign states".[47] So whether a nation that is losing its territory can use its claim to the right to self-determination in order to acquire territory within another state's territory is highly dubious, and it may prove very difficult to ensure the disappearing states' continued enjoyment of this right. The content of the right does not provide for the acquiescence of territory, firstly because territory is a pre-requisite for the right to self-determination to exist and secondly because the right does not allow for actions that will threaten the friendly relations between nations.[48]

The essential problem that the right to self-determination addresses is the "treatment of minorities and their inalienable rights if their interests have been disregarded".[49] The right to self-determination is found in article 1 of both of the Human Rights Covenants of the United Nations. According to Simma the guarantee in the second sentence of article 1 can only refer to whole peoples of an established state and is therefore superfluous, as a threat to an established state's right to self-determination can only arise through unlawful intervention of a third state. So the protection afforded by the Human Rights Covenants is for the self-determination of Sovereign States, which, although dismissed by Simma, is exactly the protection needed here. However, this solution is met with the same problems as mentioned above; the right to self-determination cannot be used to back a claim to the acquisition of territory.

Simma writes that "if a nation…has organized a State, it is then entitled to maintain and defend that status. Thus the right to self-determination may be invoked against all efforts by foreign powers to impose their jurisdiction upon that State against its will."[50] This suggests that a state that has established self-governance can do everything necessary to maintain its status of self-determination. However, the threat of physically disappearing territory has not been considered here, and it is not easy to draw an analogous application to the above, as to maintain and defend their right to self-determination would require unlawful action within another state's territory.

The question of self-determination of states whose territory is disappearing is closely connected to the question of what happens to the legal status of the state, which is outside the scope of this thesis. Whether the right, as a collective human right, can be referred to as a basis for global action depends on what practical measures can be taken to provide the states in question with new territory. The right to self-determination will have to rely on the acquisition of territory (as in scenario 3), rather than the acquisition

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[46] M. Shaw, International Law, 2006, p. 271.
[47] Ibid.
[48] B Simma, The Charter of the United Nations, A commentary, 2002, p. 44.
[49] Ibid., p. 54.
[50] Ibid., p. 56.

of territory relying on the right to self-determination. The discussions around self-determination will vary greatly for each of the scenarios.

As stated above, the right to self-determination is a jus cogens rule.[51] Classification of a rule as jus cogens produces the effect of the rule being erga omnes. This means that the attempt by a State to unlawfully prevent the bearer of this right from exercising it would be illegal. No other state is entitled to resist the claim to self-determination as long as the nation concerned has not voluntarily waived their right. So does this constitute a global responsibility to guarantee that the states in question are not prevented from exercising their right to self-determination? This again reaches the limits of the right itself; it may not be used as a tool to disturb sovereign states and without the acquisition of territory, the guaranteed continued exercise of the right to self-determination will be very difficult, if not impossible. For the observance of the right to self-determination as a jus cogens rule, it may suffice that states do not actively prevent a state from exercising its right to self-determination, and this would then become relevant in scenarios 2 and 3.

4.1.5 Human Rights and Environmental Law Overlap

The international community is examining the possibility of the existence, or acknowledgement, of various environmental rights, like the right to a healthy and clean environment. These rights are of little relevance in this discussion as they are not firmly established and thereby not international obligations of a nature that can prompt or be a basis for international action. These possible environmental rights fall under the collection of human rights that are threatened by the disappearance of the state, and serve at best to lend weight to the arguments for granting refugee status.

4.2 Environmental Law

Obligations in the area of international environmental law are in place to protect the environment. They are designed to benefit and protect the planet, albeit from an anthropocentric starting point. In order for these obligations to constitute a basis for a global duty to aid disappearing states, one would have to go down the rout of state responsibility. Here, one could identify the states that have caused global warming, find them responsible for the disappearance of states, and claim reparation in a form suitable for the inhabitants who are losing their territory. However, this is not so simple. State responsibility requires the breach of an international obligation, and global warming has not come about as a result of a breach of international obligations. Although the topic is on the international agenda, liability for

[51] B Simma, The Charter of the United Nations, A commentary, 2002, p. 62.

causing global warming is not a realistic solution yet, and is unlikely to become one in time for it to be of assistance to disappearing states. The subject of state responsibility constitutes a very complex debate in itself and does not lie within the scope of this thesis.

The aim of this chapter is to find provisions in international law that can be referred to in order to assist those human beings who are adversely affected by environmental degradation. The prevention of environmental harm, though no less important, belongs in a different discussion. The provisions within international environmental law that may serve as a basis for international action to assist disappearing states and their inhabitants are few. Reference to a global responsibility to protect the environment *and those adversely affected* by environmental degradation can however be found in the United Nations Framework Convention on Climate Change (UNFCCC).

4.2.1 The United Nations Framework Convention on Climate Change

The United Nations Framework Convention on Climate Change notes in its preamble the "possible adverse effects of sea level rise on islands and coastal areas" and recognizes that these areas, among others, are particularly vulnerable to the adverse effects of climate change.

Article 1 of the convention defines adverse effects as "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare." The disappearance of land constitutes quite clearly a change in the physical environment which has significant deleterious effects on human welfare.

Article 4 contains the commitments undertaken by the parties. Article 4(8) states that in the implementation of these commitments, the parties shall give full consideration to what actions are necessary under the convention to meet the specific needs and concerns of certain vulnerable land-types, as listed, that have arisen as a result of the adverse effects of climate change. Among these land-types are small island countries. So it can be established that state parties have undertaken a certain obligation to take action to aid small island countries that are suffering from adverse effects of climate change.

The content of these obligations is decided by the foregoing commitments in Article 4. Much of the substance in the article is aimed at mitigating climate change, but a few measures focus on adaptation. Part 1(e) can be highlighted. All parties shall

> Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans

> for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods;

The provision can quite clearly be used as a basis for action on the part of state parties. The obligation to cooperate in preparing for the adaptation to the impacts of climate change can however not be stretched to encompass action that is beyond the general scope of the convention.

Article 4 (4) states that “the developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects”. This provision is of a purely financial nature and its application in scenario 3 may be to stretch the accepted scope of the obligation beyond the parties’ intent.

These provisions must be seen in the light of the objective of the convention. Article 2 defines the objective as being the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”. It is important not to interpret the obligations in the treaty too broadly when considering them as a basis for international action. The parties are only bound by that to which they have given their consent. The objective, as seen above, is not primarily the adaptation to the adverse effects of climate change. However, when interpreting the scope of the commitments in Article 4, it must be remembered that the reason loss of territory is not taken into account as a particular adverse effect is because it was not predicted to be a concrete problem at the time when this convention was adopted. It may be legitimate, and in fact imperative, to apply these provisions in a way that includes loss of territory as an adverse effect, and thus base appropriate adaptation action on obligations thereby.

There is not a lack of international awareness and discussion of the need to adapt to climate change, but there seems to be a general understanding that this should consist of, for example, transfer of technology, support programs, policy reform and other on-site changes. There is very little acknowledgement of the sort of adaptation that will need to take place on a more long term basis, for problems concerning the relocation of populations. There are countless documents in the wake of the UNFCCC emphasizing the need for adaptation,[52] but the subject of population displacement is often skirted. The provisions in the UNFCCC presented above for cooperation in preparing for adaptation may or may not be able to provide a basis for such action that is required in this situation. Further discussion will take place in chapter 5.

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[52] To mention a few, Buenos Aires programme of work on adaptation and response measures, Decision 1/CP.10; Five-year programme of work of the Subsidiary Body for Scientific and Technological Advice on impacts, vulnerability and adaptation to climate change, Decision -/CP.11, The Marrakesh Accords,

4.2.2 The Bali Plan of Action

The United Nations Climate Change Conference in Bali 2007 produced a Plan of Action to pave the way for work on a new set of binding obligations. The Plan of Action emphasizes the urgent need for further mitigation and adaptation measures, especially for those countries particularly vulnerable to the adverse effects of climate change – explicitly including small island developing States.[53] The Plan of Action contains no binding obligations, but demonstrates a strong awareness of the urgency of the situation. Again, the examples of adaptation measures presented are vulnerability assessments, risk management and risk reduction strategies, economic diversification and disaster reduction strategies. The measures do not include provisions for the adaptation to the loss of territory.

4.3 Refugee Law

According to article 14 (1) of the UDHR, everyone has the right to seek and enjoy asylum in other countries. However, this is only the right to asylum from persecution, and despite the wording, the right to actually enjoy asylum is subject to the granting of asylum by the receiving state. The fact that refugee status has such strong roots in persecution presents considerable limitations to the assistance refugee law can be of in this situation. Another drawback with refugee law is the ultimate goal of repatriation, which is not going to be an option in this situation. Instead, this relocation will have to be seen as permanent and be administered with this outlook.

4.3.1 The 1951 Convention

A definition of the term "refugee" can be found in article 1 of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention). Article 1.A.2 states that the term refugee shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, unwilling to return to it." So the basic criteria are a well-founded fear of persecution and a lack of protection.

A lack of protection is not contended here. The states that are disappearing are losing their capacity as protector, and their inhabitants will neither be able to avail themselves of protection of the country of their nationality nor be able to return to that country. A lack of protection exists.

[53] Bali Action Plan (Decision -/CP.13) part 1(c)

The criterion of persecution is however not fulfilled so simply here. The reason these individuals are fleeing their country is that it is becoming uninhabitable due to environmental degradation. They will not physically be able to live there. There is however no element of persecution in this situation.

So to conclude, the people of the disappearing states will not be given refugee status in the receiving state based upon the 1951 Convention.

4.3.2 Protection of the UNHCR

The United Nations High Commissioner for Refugees (UNHCR) is the principle UN agency concerned with refugees, and is the representative of the international community[54] in this matter. It was created by the UN General Assembly in 1950, with the view to providing "international protection" and seeking "permanent solutions to the problem of refugees".[55] The Statute of the UNHCR states that the work shall as a rule relate to groups and categories of refugees. The definition of a refuge entitled to the protection from the UNHCR is much the same as the definition in the 1951 Convention. This definition is of universal application;[56] persecution is again a criteria.

However, already in 1957, the General Assembly authorised the UNHCR to assist refugees who did not fulfil the criteria of the refugee definition. Their status was considered to be of such concern to the international community that protection was warranted.[57] In this case, the High Commissioner received express authorization to provide these groups with assistance. The extension of the UNHCR's competence to include assistance to refugees who do not fall under the "immediate competence"[58] of the UN was authorized by the General Assembly with increasing frequency in the following years. As well as a broadening of the UNHCR's competence, there was a slight relaxation of the individual determination rule due to the sheer size of the problem in the 1960s. The "group approach" concentrated on the fact that the primary problem was a lack of protection from their government.[59] The concept of "displaced persons" became a key concern of the UNHCR in the 1970s. However, the term generally referred to internal displacement of people due to civil war or insurgency. To summarize, the competence of the UNHCR has grown to encompass more generally "persons of concern" to UNHCR, also known as humanitarian refugees. Goodwill-Gill and McAdam consider that the criteria for what constitutes persons of concern to the UNHCR could be as general as the lack of

[54] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 1.
[55] Ibid., p. 20.
[56] Ibid., p. 21.
[57] Ibid., p. 24.
[58] see UNGA res 1499 (XV), 5 Dec. 1960
[59] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 26.

protection,[60] as confirmed by UNHCR and international agency practice. This lack of protection has a relatively clear meaning, and it is incontestable in this situation that the inhabitants in question are losing the protection of their state. Even the lack of the right to return to one's country, which has arisen in the past,[61] is in itself seen as a factor that justifies protection of the UNHCR. Again, the right to return is totally lacking in this situation.

Considering the discretion the General Assembly has in authorizing the UNHCR to assist various groups in particular situations, and given the relatively generous application of the term "of concern", it would seem appropriate that the inhabitants of states whose territory is disappearing due to the rise in sea levels are provided with protection and assistance by the UNHCR.

However, there is one distinguishing factor that is a requirement for refugee status generally, and that all these groups that fell within the UNHCR's extended competence had in common. This factor is that they had crossed an international frontier; they were outside their country of nationality. The UNHCR's mandate is only for those who have crossed international frontiers, so entitlement to protection is only activated at this point; there is no "pre-emptive" protection available. It is not possible to secure them refugee status in a receiving state in preparation for their imminent flight. This is clearly a method of concentrating on assisting those who are in flight and who have no current country of residence, as they are the most vulnerable. It would however seem unreasonable to observe this requirement strictly in the present situation as there is no uncertainty regarding whether they will, at some point in time, cross an international frontier. Their vulnerability is quite apparent, but it is the General Assembly who would establish whether authorization of UNHCR assistance is called for. If they are not regarded as being entitled to preparatory assistance while they still reside in their country of nationality, the assistance of the UNHCR should at least be granted as soon as they cross an international frontier. This could avoid the risk of them settling in a state unlawfully, as they must lawfully be able to reside *somewhere* when their own state becomes uninhabitable.

One risk that is highlighted by Goodwin-Gill and McAdam is that the protection afforded to those who fall outside the accepted definition of refugee but within the extended competence of the UNHCR may be limited to a lesser degree of protection. This again compromises the continued protection of these individuals' human rights.

[60] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 30.
[61] Ibid., p. 31.

4.3.3 Alternative protection

4.3.3.1 The United Nations

The UN Office for the Coordination of Humanitarian Affairs (OCHA), established in 1998 as a replacement of the Department of Humanitarian Affairs, has a mandate including the coordination of UN's humanitarian response programmes.[62] Work is coordinated by the Emergency Relief Coordinator (ERC) and consists inter alia of handling requests for emergency assistance from states. The OCHA mission statement[63] is

> to mobilise and coordinate effective and principled humanitarian action in partnership with national and international actors in order to:
> - alleviate human suffering in disasters and emergencies
> - advocate for the rights of people in need
> - promote preparedness and prevention
> - facilitate sustainable solutions.

The problem of disappearing states would reasonably be classed as a subject of the mission stated above. The ERC is to organize needs assessment missions, and work with major humanitarian actors such as the Red Cross and other NGOs as well as operational agencies that deliver assistance.[64] The states in question could make a request to the OCHA for assistance in this case of disaster and emergency.

Work within the UN in the area of humanitarian aid involves many UN agencies.[65] In 2005, a report by the Secretary General on strengthening the coordination of UN emergency humanitarian assistance introduced a method of identifying "significant capacity gaps" and recognized that the UN must be able to fill protection gaps in humanitarian emergencies.[66] Consequently, it can be concluded that aid and assistance can be expected from the UN in terms of humanitarian relief, but there may be limits to what can be done without encroaching on the receiving states' sovereignty. Material assistance in terms of shelter and food is only of temporary interest, while the legal problems of citizenship and legal status are of a more pressing and long term nature.

4.3.3.2 The International Organization for Migration

The International Organization for Migration (IOM) is an inter-governmental organization whose purpose, inter alia, is to make "arrangements for the organized transfer of migrants, for whom existing

[62] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 439.
[63] www.ochaonline.un.org
[64] www.ochaonline.un.org
[65] For example UNICEF, FAO, WFP and WHO
[66] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 440.

facilities are inadequate...”.[67] The IOM works with migration on a global scale and focuses on pre-departure assistance, re-installation and issues regarding labour.[68] In this instance, it is the pre-departure assistance and the re-installation that would be valuable to inhabitants of disappearing states. The IOM can provide material help, and also facilitate cooperation between states. Their mandate is broad enough to include those with “ambiguous status”[69]which suggest that inhabitants of disappearing states could be afforded protection by this organization.

4.3.4 Environmental Refugees

The Organisation for Economic Co-operation and Development (OECD) defines an environmental refugee as “a person displaced owing to environmental causes, notably land loss and degradation, and natural disaster”[70]. However, the term environmental refugee is not in any way a globally recognised and defined term, nor does it have a foothold in international legislation. It was firmly established as a concept in 1985 in a publication by the United Nations Environmental Programme (UNEP)[71] but has still not been incorporated into international law. In this publication, environmental refugees were defined as “those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life”[72]. There are strong arguments both for and against the use of the term, although it is recognized that in general terms, environmental degradation influences migration very strongly. The arguments for the use of the term are simply that it represents a group of people that need protection, and that as yet fall outside the definition of a refugee. It advocates the extension of the term refugee to include those who are forced to relocate due to environmental degradation as opposed to persecution.[73]

Those who disagree with the concept consider it to be a method for creating a class of refugees that are not entitled to asylum, employed by the North in order to restrict the incoming flow of refugees.[74] The idea behind the term is of course to broaden the term to include migrants fleeing environmental degradation, but since it has no connection to a right to asylum in international law, it can instead be used to the opposite effect. Another criticism of the term is that it is misleading.[75] The term suggests that migration is caused by environmental degradation, when in fact

[67] www.iom.int
[68] G. S. Goodwin-Gill and J. McAdam, The Refugee in International Law, 2007, p. 443.
[69] Ibid., p. 443n.
[70] http://stats.oecd.org/glossary/detail.asp?ID=839 OECD glossary online. 080408 kl 12:27
[71] El-Hinnawi, Environmental Refugees, 1985,
[72] Ibid., p. 4.
[73] R. Black, Environmental Refugees; Myth or Reality, 2001, p. 11.
[74] Ibid.
[75] Ibid., and S.Castles, Environmental Change and forced migration: making sense of the debate, 2002, p. 5.

environmental degradation is only one of many factors. The link between environmental degradation and migration is dependent on a realm of other factors of an economic, social and political nature. Restricting the term to suggest that the environmental degradation is the only reason behind the displacement of people is to overlook a large proportion of the initial problem. A strong sceptic of the term, Professor Richard Black, considered the case of sea level rise as a cause of migration. He acknowledged the displacement caused by flooding and inundation, but points out that there are "many potential responses to increased flooding, of which migration is only one."[76] It is quite clear that in the situation of island states becoming permanently inundated, migration is the single viable response. What is more, in this case it can be argued that environmental degradation is the principle (perhaps only) reason for relocation. So if the term environmental refugee is seen in its, as argued above, too simplistic sense, including only those fleeing as a direct result of the environment, and overlooking other reasons for relocating, it would still include those displaced by the disappearance of their entire territory. Although political, social and economic factors *resulting from* the disappearance of territory contribute to the migration, it cannot be said that these factors contribute to the migration *together with* the environmental factor.

So to conclude, the criticized term "environmental refugee" is considered too simplistic, and unhelpful as a means of protecting refugees fleeing environmental degradation. As Black argues, the basis for a claim to international protection for an environmental refugee needs to be clarified.[77] However, despite this uncertainty as to who is classed as an environmental refugee, inhabitants of disappearing states are sure to fall within its definition. As yet, this is however of no assistance, as there is no international law defining the term or the protection thereto. The issue is very much on the international agenda however, as the link between environmental degradation and displacement of people becomes increasingly direct.

[76] R. Black, Environmental Refugees; Myth or Reality, 2001, p. 8.
[77] Ibid., p. 14.

5 Applying the Law to the Viable Options

The legal feasibility of the three scenarios will be assessed in this chapter. The law highlighted in the previous chapter will be applied to each of the three hypothetical situations that were presented in chapter three. The support and protection available to the displaced persons will be central to the discussions.

5.1 Scenario One – Individual Asylum

The status of the individual in international law is in a stage of development. Originally, only states were considered actors in international law but with the advance of human rights, the individual has gained a stronger position. However, the still significant weakness of the individual in international law sets considerable limits on what they can claim, beyond human rights. As Shaw writes, "the claim of an individual against a foreign state, for example, becomes subsumed under that of his national state."[78] Where is the individual to turn if its national state is rendered incapable by environmental degradation?

5.1.1 Human Rights Law

The individual's human rights have strong protection in international law, in the form of numerous binding treaties often signed by the majority of states or in the form of special status rights as highlighted above. What is clear now is that these individuals, in this situation of forced relocation, are risking a considerable downgrading of the protection of their human rights. Human rights law guarantees human beings basic rights, of varying scope depending on their status. As seen below, refugee law cannot guarantee these individuals refugee status. The state to which they flee has the authority to give them nationality or refugee status. On the other hand, the state has equal authority to class them as aliens, in which case their human rights will only have minimum protection.

Seen simply, the receiving state is bound by all its various international human rights obligations to afford protection to the individual, according to the status they have been given by that state. Human rights law therefore can guarantee varying degrees of protection to an individual that is fleeing disappearing territory. The question now is whether there are any provisions in human rights law that provide grounds for a collective international duty to cooperate in ensuring that these individuals receive "adequate" protection. The goal ought to be that they can continue to enjoy all the rights

[78] M. Shaw, International Law, 2006, p. 232.

they have had within their own state. "Adequate" protection may in fact not ensure continued enjoyment of all rights. The risk is that these individuals fall from being nationals of stable sovereign states, to becoming stateless aliens in foreign states; this cannot be regarded as a situation in which they receive adequate protection.

What would a collective international duty entail? For this scenario, it is the receiving state that has a responsibility towards a person within their territory. For the international community to have any opportunity of involving itself in the welfare of people within a certain state's territory would require activity in the UN. As concluded above, human rights issues can constitute an exception to the principle on non-intervention. Both the General Assembly and the Security Council (though not simultaneously) could make recommendations or possibly even take measures in this instance. Recommendations risk having limited effect as they are not binding, but they could put pressure on receiving states to receive individuals seeking relocation from disappearing territory, or afford them adequate protection. The recommendations could encourage states to grant nationality or refugee status to these individuals. Measures according to chapter VII of the charter, if considered appropriate by the Security Council, would have a binding effect. Suggested measures are interruption of economic relations, communication and diplomatic relations (article 41) or the use of armed forces in demonstrations, blockades or other operations (article 42). Quite what these measures could achieve is questionable. It is possible that such means could put pressure on states, to the same end as, but possibly more effectively than, the recommendations. It would not seem realistic that such measures would be adopted to compel a state to grant nationality or even refugee status to aliens. Referral to the pledge in article 56 could possibly lead to international cooperation, but member states are reluctant to regard this article as an undertaking of any obligation. Again, there appears to be a limit to what the international community, as such, can do to protect individuals fleeing a disappearing territory.

The concept of self-determination becomes irrelevant in this scenario. The state dissolves and each individual seeks a new nationality.

To conclude, the efficacy of human rights law is dependent on a body capable of providing protection. The continued and uninterrupted protection of individuals' human rights is at a high risk in this scenario. There is little the international community can do to ensure the granting of citizenship or refugee status in any particular receiving state. With neither their old nationality nor a new nationality, the individuals' human rights will definitely have a lesser degree of protection.

5.1.2 Environmental Law

Environmental law, as concluded above, is primarily focused on the protection of the environment. The provisions that imply an obligation to

assist those adversely affected by environmental degradation are those that are relevant. These individuals are undeniably affected by the adverse effects of climate change.

The provisions highlighted above in the UNFCCC are of limited value here. Parties' cooperation in adapting to the impacts of climate change is aimed at coastal management, water resources and agriculture, and the protection and rehabilitation of areas affected. The adaptation to the physical impacts on the territory of small island states that are risking full inundation is not a feasible or physically realistic solution. The provision is not aimed at protecting individuals who are fleeing land made uninhabitable by the impacts of climate change.

Being parties that are particularly vulnerable to the adverse effects of climate change, island states that are risking inundation are to be given particular consideration. There are financial undertakings in both article 4(4) and 4(8). The assistance shall be directed at the costs of adaptation. It is however almost certainly impossible for individuals to claim financial aid with these articles as a basis. Their costs for adaptation will undoubtedly be high, but this convention applies between state parties and there are no procedural mechanisms available for individuals to employ. Whether before inundation, the state can claim financial aid that it then distributes to the inhabitants is another matter, but whether this would be seen as costs of adaptation in the meaning of the convention is somewhat doubtful.

5.1.3 Refugee Law

The established mechanisms for protecting refugees in international law are of little use to an individual fleeing critical environmental degradation. The 1951 Convention, as concluded above, cannot include these persons into the refugee definition.

Assistance from the UNHCR, the OCHA and the IMO can arguably be expected. Their mandates or missions are more flexible, and the scope of their assistance is decided more by common sense than by strict definitions.

The UNHCR is restricted by the apparent requirement that those entitled to assistance have to have crossed an international frontier. However, there would appear to be no reason why the UN General Assembly cannot use its authority to disregard this limitation in this instance. A clear exception to the rule can be made when the crossing of a frontier is imminent and absolutely certain. The UNHCR focuses on lack of protection when identifying persons of concern, and this should suffice in order to include the individuals in question here.

The OCHA provides emergency relief. Their mission (see chapter 4.3.3.1) appears to provide very appropriate assistance in this particular situation, but the provisions are not of a legal nature. The proposed aid is for the most part of a practical nature, which is of course highly relevant, but will not

necessarily affect the individuals' international status or their ability to claim rights. The IOM provides organized transfer of people seeking refuge, and pre-departure assistance. Again, no legal obligations back the provisions, but assistance can be of value in terms of communicating with possible receiving states and paving the way for their relocation.

For an individual fleeing their country as a result of critical environmental degradation, refugee law in itself is of little use, but the above mentioned international bodies can provide a degree of assistance. These bodies can also represent an individual in negotiations between states and act as an advocate for their protection. They have no power to encroach upon national sovereignty, but can put pressure on states to cooperate, and see to it that the individual's basic needs are covered. With no basis in law, the granting of assistance is purely at the discretion of the bodies in question. This cannot be regarded as adequate protection for these individuals, only as a minimum safety net.

5.2 Scenario Two – Group Asylum

Groups without a particular legal personality, such as a state, or an international organisation, have a rather loose standing in international law. They do not have the competence to act in the international arena and cannot "communicate" or interact with states or international organizations in the way that these entities can with each other[79]. It is even questionable as to whether they have as strong a standing as the individual.

Whether this group can continue to be seen as a state is an interesting point of debate. The state's governing body will of course have to relocate as well, and whether it will continue to exercise authority over the group in the new territory (without "owning" the territory as in scenario 3) could be controversial. The receiving state would with all certainty not accept this and the relocated governing body would be subject to the receiving state's authority. This scenario results in the group no longer being a state, as the basic requirement of territory is not fulfilled. The likely conclusion will be that they will simply be seen as a group of individuals, and their previous governing body will be dissolved. The debate as to the legal status of the disappearing state is, as stated above, beyond the scope of this thesis, and for this scenario, the group will not be seen as a state.

5.2.1 Human Rights Law

As the following chapters will confirm, this scenario does not differ greatly from the first in terms of legal protection. The fact that individuals relocate as a group as opposed to independently may simply mean that states are even more reluctant to receive them. It involves the inflow of a large number of asylum seekers, which is not welcomed by many states, and it is more likely to threaten or disturb national security. The protection of human

[79] M. Shaw, International Law, 2006, p. 175.

rights will largely depend on what status the individuals in the group are granted by the receiving state, and this brings one back to the discussion of individual relocation in chapter 5.1.1. The fact that the individuals are in a group may have little influence on their human rights from a legal perspective. A group may have better chances of demanding protection through political pressure, by way of demonstrations or making themselves heard internationally.

The concept of self-determination is worth noting in this scenario. The right to self-determination as it stands today would not be claimable by a relocated group as is the case here. Self-determination is dependent on territory. The relocated group will be on territory that is owned by a sovereign state and it cannot be seen as territory on which a new group of people can claim self-determination. However, being a jus cogens rule, it is illegal to actively prevent a people from exercising their right to self-determination. Would it be illegal for the receiving state to prevent the group from exercising its right to self-determination? The answer would most likely be no; the requirement of possessing territory is not fulfilled here. The sovereignty of the receiving states is stronger than the newcomers' claim to their right to self-determination. As stated above, self-determination "cannot be utilized as a tool for the dismantling of sovereign states". For this group of individuals to be able to exercise their right to self-determination, they need to acquire territory. This leads to scenario three.

5.2.2 Environmental Law

As above, the population of the states risking inundation is without doubt affected by the adverse impacts of climate change. The problems facing group asylum seekers, when claiming assistance with environmental law as a basis, are much the same as in scenario one. There are no mechanisms to enable groups to claim financial or any other assistance according to the UNFCCC.

5.2.3 Refugee Law

Relocation as a group is likely to meet more resistance from the receiving state than individual asylum seekers. International assistance for a group of refugees fleeing environmental degradation is equally as sparse as that for individuals. It may however be easier for the group to gain the attention of the above-mentioned international bodies, and therefore obtain assistance. What is more, the mandates for the UNHCR, the OCHA and the IOM are possibly more focused on groups than on individuals, though they do not explicitly exclude individuals. The application of the mandates and the protection available is, however, the same as it would be for individuals (see chapter 5.1.3).

5.3 Scenario Three – Land Acquisition

The idea of territory being given to or sold to the disappearing state conjures up a vast array of complications, questions and possible solutions. This is the most difficult to implement of the solutions, and yet it is the most preferable solution from the perspective of the disappearing state and its inhabitants. With the legal status of the state intact, the inhabitants will enjoy continued and uninterrupted protection of their human rights. The question here is whether any of the applicable law above can serve as a legal basis for, or at least facilitate, the implementation of this solution.

The inviolability of territory is anchored in legal rules and the fundamental concepts of sovereignty and jurisdiction rest upon this fundamental principle of international law. Territory has a central role in the international legal system.[80] There are no means in international law to compel a state to sell or give away territory, so any land acquisition would have to come about with consent from the selling/giving state, and by constitutional means. The question of course is which state would be prepared to sell/give territory. This is not a question that can be considered within the scope of this thesis. The recognition of the relocated state will not be discussed either, as the presumption will be that the state retains its legal status and that therefore no conditions for the establishment of a new state will be imposed.

The UN's "capacity to convey title" is doubtful[81] and the resolution containing the partition plan for Palestine cannot be used as a precursor for action in this situation. The resolution was "probably *ultra vires*"[82] and has not proved to be a successful solution. The UN can however act as a "referee" in negotiations and serve as a platform for international cooperation.

The acquisition of territory in the form of a gift is entirely reliant on good will and humanitarian generosity on the part of the giving state. Nothing in international law can influence the giving state's decision or impose any sort of obligation. States are unlikely to impose political pressure on one another to donate territory, as territorial sovereignty is so prevailing. Furthermore it possibly would possibly seem unlikely that territory would be donated without some conditions or compensation attached. There are examples of territory being ceded in the form of a gift in the past; Venice was ceded by Austria to France, and then by France to Italy in 1866. Examples of territory cession in the form of voluntary merging are many[83] but the latter option involves the merging of two territories, where the "given" territory is "merged" into the receiving state. This is not an option where territory is disappearing.

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[80] M. Shaw, International Law, 2006, p. 410.
[81] I. Brownlie, Principles of Public International Law, 2003, p. 163.
[82] Ibid., p. 164.
[83] R. Jennings and A.Watts, Oppenheim's International Law, 1992, p. 681.

The purchase of territory is not unheard of in the history of international law. Russia sold Alaska in 1867 and Denmark sold territories in the West Indies in 1916,[84] both to the USA. In 1899 Spain sold the Caroline Islands to Germany. There are many more examples.[85] The purchase of Alaska was based on an offer from Russia, and was in the interests of both parties. It included a treaty of cession and a check for $7.2 million.[86] The most recent example of purchase of territory (mentioned in Oppenheim's international law) is however from 1916. The international arena and value of territory has probably undergone considerable changes in the last century.

Given, therefore, that the purchase of territory is an entirely legitimate means of land acquisition, and that finding a seller is beyond the scope of this thesis, the only problem that remains is the financial means.

What this chapter is considering is the provisions in international law that can provide a basis for financial claims and collection of funds.

5.3.1 Human Rights Law

This scenario involves the continuation of the state. This in itself guarantees both continued self-determination and continued protection of the inhabitants' human rights. So how can human rights law facilitate the realization of this scenario?

As stated above, the UN is unlikely to have the capacity to convey title, and any recommendations or enforcement measures are unlikely to be adopted with this intention. What is more, the right to self-determination cannot be used as a tool to acquire territory. State sovereignty is immune from such far-reaching interference in international law.

Whether human rights law can be referred to as grounds for financial aid for the purchase of territory is debatable. A certain element of persuasion lies in the fact that this solution ensures continued protection of human rights, but this is certainly no legal basis for collecting funds from states. It could possibly be argued that the observance of certain human rights is an erga omnes obligation and that states have a responsibility towards the global community to ensure that these rights are not violated. To fulfil this obligation, states must therefore provide enough financial assistance to enable purchase of territory, as this is the only way to ensure protection of these rights. Accordingly, this could only apply if the protection of erga omnes rights is dependent on the acquisition of territory. The sort of rights that are of an erga omnes character are however rights that any receiving state would also be obliged to observe and that are not in fact at risk if the disappearing state itself cannot relocate. The global community will not breach their erga omnes obligations by failing to provide financial assistance.

[84] I. Shaw, International Law, 2006, p. 422.
[85] R. Jennings and A.Watts, Oppenheim's International Law, 1992, p. 682.
[86] www.ourdocuments.gov http://www.ourdocuments.gov/doc.php?flash=true&doc=41

Articles 55 and 56 could possibly serve as a basis for coordinated action on the part of the international community, but as mentioned above, these articles are very much dependent on what the states themselves consider appropriate action.

The collection of financial aid from states that have adequate resources cannot easily rest on a legal obligation based on human rights law.

5.3.2 Environmental Law

The obligations found in the UNFCCC are undertaken in relation to states, so as the disappearing states' legal status remains intact in this scenario, the provisions are more relevant. The possible value of these provisions lies in the financial assistance in Art 4(4). This would need to be claimed by the state prior to its disappearance, in order to be able to use the resources for the purchase of territory. As highlighted, the financial provisions in Art 4(4) are intended for meeting costs of adaptation. If the purchase of territory can be seen as an adaptation mechanism, (which in literal terms it could be) then this provision could in theory be referred to here in order to collect funds. Purchase of territory involves very large costs, and financial aid according to the UNFCCC could only constitute a minor contribution.

The adaptation mechanisms suggested are limited to land use and on site measures. Whether the scope of the obligations can be stretched to include adaptation in the form of the relocation of an entire state is dubious. However, once again this situation requires the analogous application to provisions that were not designed to apply to such an event.

5.3.3 Refugee Law

In the case of the disappearing states obtaining territory from another state, the whole issue of asylum is avoided, and refugee law becomes irrelevant. There are no provisions in international refugee law that can provide legal grounds for the acquisition of territory. A rather far-fetched possibility may be to suggest that a state can make financial contributions in order to escape the responsibility of providing refuge for these individuals. It may appeal to states that realistically "risk" an influx of such asylum seekers, due to their geographical proximity to the disappearing states. The displaced individuals will however most likely seek asylum in a small number of states as close to their origin as possible, so the majority of the world's states will not be affected by the displacement and will therefore benefit nothing from contributing financially. What is more, this is by no means a financial claim anchored in law.

6 Conclusion, Proposed Solutions

It is clear from the previous chapters that international law is not ready for the disappearance of states' territory. Even stretching an analogous application of existing provisions is of little worth. State sovereignty is a very strong principle in international law and throws up a barrier at almost every turn. The "best" solution will be the one that can guarantee maximum protection for the displaced inhabitants, but the slowly grinding cogs of international law may hinder its realisation.

Both scenario one and two are unattractive. International law cannot guarantee any thorough protection of these individuals or groups. The principle of state sovereignty is threatened by human rights, but when examined, the nature of this new situation proves to be simply too different from what has arisen in the past. The disappearance of an entire state's territory removes some basic safety nets whose evaporation has not been foreseen. These safety nets are two; firstly, the right to return to one's own country legitimises expulsion of aliens; secondly, the right to nationality prohibits the removal of nationality by a state. In this case, the right to return to one's own country is simply non-existent, and the removal of nationality will happen automatically due to the basic legal definition of a state no longer being applicable.

The displaced inhabitants are subject to the receiving state's sovereignty in scenario one and two. Their status is decided by the receiving state and the protection of their human rights is the responsibility of the receiving state. Protection from international bodies such as the OCHA, IOM or UNHCR is very important and should not be underrated simply because it is not law that is binding upon states. Interference from the UN could be of value to put pressure on the receiving state to observe its obligations towards the relocated persons. The UN can even encourage the receiving states to act beyond their obligations but this has no binding effect on the states. Legal obligations that can guarantee adequate protection do not exist.

What is more, the realization of scenario one and two is in no way guaranteed to be problem-free. The very first hurdle to be overcome is that no state is obliged to allow non-nationals into their territory. Hence, the first problem to be solved is how to ensure that the inhabitants can legally relocate *somewhere*. International law has no provisions that can encroach on this aspect of the principle of state sovereignty.

So there are a number of significant consequences of state-disappearance that pose serious problems to the solutions in scenario one and two. An exception to the sovereign state's right to refuse a non-national entry into its territory must be made. The right to return to ones own country must be

replaced by a right to stay in the receiving state. The right to a nationality must be made to include a right to obtain a new nationality. These are alterations of very strongly established international rules. The process of changing international law is not a fast one, and states are very reluctant to accept any further encroachment on their sovereignty. To make exceptions to these rules for this exceptional situation, although clearly severely called for, is unfortunately not easy to do.

Scenario three avoids all of these obstacles above; the inhabitants still have a country and a nationality. There is little doubt as to whether or not this is the optimal solution to this problem in terms of protection, but is there in fact any realistic chance that this solution can be realised? The question of which state is prepared to sell or give away territory is beyond this thesis, but two comments can be made on the issue. Firstly, there are few significant benefits to be gained from selling/giving away territory so the motivation to do this is very weak. Secondly, it may not be appropriate for these states to move to a state with a very contrasting culture, society, and climate, so the suitable selling states are limited in number.

The question of how scenario three would be realized from a purely financial perspective is no less simple. As can be seen from chapter 5.3, little help can be found in the law presented in chapter 4. Contribution for adaptation costs can possibly be claimed through the UNFCCC. A fund set up to collect funds towards the purchase of new territory for disappearing island states would be an appropriate start. The obvious body to manage such an activity would be the UN, and reference to article 55 and 56 could possibly put pressure onto states to contribute. The concept of state responsibility and due compensation, excluded from the scope of this thesis, springs to mind as a mechanism with potential, but is not yet a reality. Not only the willingness to sell/give away territory relies on good will of states, but it would seem to be the case that financial contribution also relies on good will. Whether the good will among states is sufficient to enable the realisation of the optimum solution is a question that cannot be answered here, but it cannot be denied that the outlook is bleak.

Quite apart from the difficulties in realising scenario three, the apparently ideal solution is not without further complications. Even if adequate funds were to be collected, and territory purchased, the relocation of a state is an immense undertaking. Some complications were highlighted in chapter 3.3, but the risk for hostility between the peoples, despite the purchase being carried out with consent, should not be underestimated. Although it is small states and small populations that are needing to relocate, the cost of purchasing territory would probably very high. What is more, the cost for the building the recreation of a state, its community and its infrastructure are also likely to be very high. These costs are extremely high in proportion to the size and financial capacity of the states in question.

To conclude, there is no clear-cut solution to this problem. None of the scenarios assessed in this thesis provide a solution that can be implemented

relatively easily, *and* that guarantees adequate legal protection for the inhabitants that will be forced to relocate.

Scenario three may appear preferable, but requires a major transaction, and its realisation is at the mercy of single sovereign states. The global community has little obligation to actively provide assistance, but at any rate, assistance from the global community is too vague a concept, that trips up on the persistent obstacle of state sovereignty. States are afraid that the growing cracks in the principle of state sovereignty will eventually jeopardise the stability of international law. The attitude in the international arena is not far from "each to one's own". This same approach that has landed these states in crisis may well deny them the rescue they need.

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