The London School of Economics and Political Science

Climate Change Inundation and Atoll Island States: Implications for Human Rights, Self-Determination and Statehood

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Declaration

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Abstract

'Climate change inundation' — the process whereby climate change-related harms such as rising sea levels, higher storm surges and changing rainfall patterns interact with existing vulnerabilities like poverty, resource scarcity and inadequate infrastructure — will eventually leave low-lying coral atoll island states uninhabitable. Climate change inundation demands our attention because of the unique challenge it presents to the state, which provides the international legal personality and political infrastructure through which individual and collective human rights are protected, treaties are negotiated and so on.

While recognising the positive features of proposals for the planned migration of individual islanders, this thesis is concerned with what they fail to capture: the threat posed by climate change inundation to the collective autonomy and independence of atoll island populations. It explores this threat from the perspective of self-determination, a legal principle whose relevance in this context has been widely acknowledged but not yet explored in detail. The thesis identifies the populations of atoll island states as self-determining peoples, argues for the recognition of climate change inundation as a grave, foreseeable, external threat to their self-determination, and examines the reasons other states may have for acting (or not acting) to address this threat.

It then proposes a collective decision-making framework for atoll island peoples, drawing inspiration from the Declaration on Friendly Relations. The first option in this decision-making framework is the '[re-]establishment of a sovereign and independent State' with jurisdiction over a defined territory; the second is 'the emergence into any other political status freely determined by a people', including a so-called 'deterritorialized state'; and the third is to enter into 'free association or integration with an independent State', a choice that would protect the collective political status of a people but abandon any claim to statehood or exclusive territorial jurisdiction.

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1. Climate Change Inundation and Atoll Island States

1.1 Introduction

> 'Where will these people go if and when it becomes impossible for them to remain in their own country? … [H]ow will they retain their national identity? Is the world ready to accept the idea of a state without a territory? These are questions that the international community has only just started to consider and which now require serious attention.' *António Guterres (United Nations High Commissioner for Refugees)*[1]

> 'When you relocate and you lose your country, what happens? What's your status in the country you relocate to? Who are you? Do you have a government there? Government of what?' *Ronald Jumeau (Seychelles Ambassador to the United States and the United Nations)*[2]

'Climate change inundation' — the process whereby climate change-related harms such as rising sea levels, higher storm surges and changing rainfall patterns interact with existing vulnerabilities like poverty, isolation, resource scarcity and inadequate infrastructure — will eventually leave low-lying coral atoll island states like Kiribati, Tuvalu and the Maldives uninhabitable. The issue of climate change inundation demands our attention because of the unique challenge it presents to the state, which provides the international legal personality and political infrastructure through which individual and collective human rights are protected, treaties are negotiated and so on. Without a habitable territory or permanent population, the existence of atoll island states becomes increasingly uncertain.

This threat is fairly localised and the number of people affected relatively small.[3] As Grenadian Foreign Minister Karl Hood observes of his country's population: 'You could pick them up and fit them in the corner of a small bar in London and no one

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[1] Cited in Singh, 'Disaster Prevention Key to Stopping Climate Displacement', *UNISDR Secretariat* (19 January 2012).

[2] Interviewed by Neil Conan, 'Seychelles Sink as Climate Change Advances', *National Public Radio* (22 September 2010).

[3] The combined population of Kiribati, Tuvalu and the Maldives is just over 500,000, compared with the estimated 330 million that will be displaced if temperatures rise by 3–4ºC. Central Intelligence Agency (CIA), *World Factbook*, accessible at https://cia.gov/library/publications/the-world-factbook/index.html; UNDP, *Human Development Report 2007/2008. Fighting Climate Change: Human Solidarity in a Divided World (Summary)* (2008), at 18.

would notice'.[4] And yet, in absolute terms, it is significant, raising far-reaching questions about statehood, sovereignty, territory and belonging.[5] These questions transcend state boundaries, implicating the populations of both the atoll island states at risk and the states to which they will eventually flee.

This opening chapter provides some empirical context in which to situate the ideas that follow (section 1.2). It defines the central problem — that of 'climate change inundation' (section 1.3) — and explains why we should take the time to think through its implications (section 1.4). In doing so, it briefly introduces the central arguments of the thesis, explains the interdisciplinary perspective adopted, and indicates the contributions made to the existing literature. It concludes by outlining those issues that the thesis is concerned with, and those it sets aside (section 1.5).

1.2 The empirical context: Climate change and atoll island states

Climate change is 'unequivocal' and is happening now.[6] It is extremely likely[7] that much of the increase in global average temperature is due to anthropogenic greenhouse gas emissions, very likely that heat waves and periods of heavy rainfall will become more frequent, and virtually certain that there will be more days that are warmer and fewer days that are colder.[8] Sea levels are projected to rise by 26–82cm by the end of this century and are virtually certain to continue to rise for centuries to come.[9] Thermal expansion alone will result in a 1–3m sea level rise post-2100 and, should there be a sufficient increase in the global average temperature, the loss of the Greenland ice sheet will cause a global sea level rise of up to 7m.[10]

The impacts of climate change tend to fall unevenly across the globe. Some communities, states and regions are more exposed — and, at the same time, less able to

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[4] Hood, 'COP 17: The Awakening of the Climate Vulnerables', LSE Public Lecture (22 March 2012).

[5] Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States', *UNHCR Legal and Protection Policy Research Series* (2011), at 3.

[6] IPCC, 'Summary for Policymakers', in T. Stocker *et al*. (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the IPCC* (2013) 3, at 4.

[7] 'Virtually certain' refers to a 99–100% probability, 'extremely likely' to a 95–100% probability, 'very likely' to a 90–100% probability and 'likely' to a 66–100% probability. *Ibid*, at 4, note 2.

[8] *Ibid*, at 17, 20 and 22.

[9] *Ibid*, at 25 and 28.

[10] *Ibid*, at 28–29. See further Church *et al*., 'Sea Level Change', in Stocker *et al*. (eds), *supra* note 6, 1137, at 1169–1170 (and, regarding the Antarctic ice sheet, 1172–1176). Some suggest that mass ice-sheet loss may occur before 2100. Rignot *et al*., 'Acceleration of the Contribution of the Greenland and Antarctic Ice Sheets to Sea Level Rise', 38 *Geophysical Research Letters* (2011) L05503; Vermeer and Rahmstorf, 'Global Sea Level Linked to Global Temperature', 106 *Proceedings of the National Academy of Sciences of the USA* (2009) 21527.

adapt — to rising sea levels, higher temperatures and changing rainfall patterns than others.[11] Small island developing states (SIDS) have been identified as one of several 'hot spots'[12] where 'even small climatic changes can have catastrophic consequences for lives and livelihoods'.[13] They have been described by the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC) as 'a special case requiring the help and attention of the international community'.[14] Despite being among those least responsible for climate change — on average, SIDS contribute around 1.5% of the greenhouse gas emissions of industrialised states[15] — they are among those most likely to suffer its adverse consequences.

Of around 50 SIDS, those that are formed of low-lying coral atolls — including Tuvalu and Kiribati in the Pacific Ocean and the Maldives in the Indian Ocean — are among those most vulnerable to the adverse effects of climate change, and it is this subgroup with which the thesis is concerned. Atoll island states share a particular set of characteristics that 'enhance their vulnerability and reduce their resilience to climate variability and change', to the extent that they 'have legitimate concerns about their future'.[16] Each consists of a group of far-flung, low-lying coral atolls with an average elevation of one to two metres above sea level.[17] Each is a least developed country with a gross domestic product (GDP) per capita of as little as US$3,500,[18] limited natural

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[11] Bindoff *et al.*, 'Observations: Oceanic Climate Change and Sea Level', in M. Parry *et al.* (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the IPCC* (2007) 387, at 409; Hewitson *et al.*, 'Regional Context', in C. Field *et al.* (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the IPCC* (2014) 1133, at 1148; Nurse *et al.*, 'Small Islands', in Field *et al.* (eds), *supra* note 11, 1613, at 1619–1620; UNFCCC Secretariat, *Climate Change: Small Island Developing States* (2005), at 15.

[12] Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific', in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010) 9, at 18. See generally J. Barnett and J. Campbell, *Climate Change and Small Island States* (2010), at ch.1; J. Connell, *Islands at Risk?* (2013), at ch.7.

[13] OHCHR, *Report on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 (2009), at para.93.

[14] UNFCCC Secretariat, *supra* note 11, at 2. Compare Article 1(c)(i) of the Bali Action Plan, Decision 1/CP.13, Report of the Conference of the Parties on its Thirteenth Session, UN Doc. FCCC/CP/2007/6/Add.1 (2007).

[15] UNFCCC Secretariat, *supra* note 11, at 9. Compare Barnett and Campbell, *supra* note 12, at 10–11.

[16] Mimura *et al.*, 'Small Islands', in Parry *et al.* (eds), *supra* note 11, 687, at 690. Compare Agenda 21, adopted at the UN Conference on Environment and Development, UN Doc. A/CONF.151/26, vol. II (1992), at paras.17.123–17.126; E. Ferris, M. Cernea and D. Petz, *On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries* (2011); Nurse *et al.*, *supra* note 11, at 1635; UNFCCC Secretariat, *supra* note 11, at 14.

[17] Barnett and Adger, 'Climate Dangers and Atoll Countries', 61 *Climatic Change* (2003) 321, at 322. Kiribati is usually included in this category despite the fact that Banaba Island is not an atoll.

[18] CIA, *supra* note 3.

resources and freshwater supplies and few safeguards against global[19] and domestic socio-economic pressures.[20] They therefore tend to be heavily reliant on imported goods (including staple foods, fuel and construction materials), foreign aid and remittances.[21] They are often found in regions with more frequent and intense natural disasters,[22] and their narrow land mass means that a large proportion of housing and infrastructure is built along the coastline, leaving communities highly exposed to rising sea levels, storm surges and coastal erosion.[23] As a former Tuvaluan cabinet member explains:

> '[O]n the island where I live, Funafuti, it is possible to throw a stone from one side of the island to the other. Our islands are very low-lying. When a cyclone hits us there is no place to escape. We cannot climb any mountains or move away to take refuge. It is hard to describe the effects of a cyclonic storm surge when it washes right across our islands … The devastation is beyond description.'[24]

However, while atoll island states undoubtedly face grave climate change-related risks, their story is not simply one of vulnerability and decay.[25] Coastal ecosystems like coral reefs and mangroves are dynamic and resilient, shifting and growing in response to changing environmental conditions.[26] Likewise, island communities have proven resourceful over time, using local adaptation strategies — such as raising houses,

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[19] Examples include global financial crises, trade liberalisation, rising energy costs and foreign debt. Mimura *et al.*, *supra* note 16, at 692.

[20] Examples include rapid urbanisation, overcrowding, inadequate infrastructure and rising unemployment. On overcrowding in Malé and Funafuti, see Republic of the Maldives Ministry of Environment, Energy and Water, *National Adaptation Programme of Action* (2006), at 9 and 21–22; Tuvalu Ministry of Natural Resources, Environment, Agriculture and Lands, *National Adaptation Programme of Action* (2007), at 6 and 15. On poverty and income inequality, see *ibid*, at 692 and 707.

[21] Kiribati receives around US$5 million in remittances and 20–25% of its GDP in foreign aid each year. CIA, *supra* note 3; UNFCCC Secretariat, *supra* note 11, at 14; Republic of Kiribati, *National Adaptation Programme of Action* (2007), at 7. The Maldives imports all of its food except tuna and coconuts. Republic of the Maldives, *Submission to the OHCHR under Human Rights Council Resolution 7/23* (2008), at 34. Compare Barbados Programme of Action for the Sustainable Development of SIDS, UN Doc. A/CONF.167/9 (1994), at paras.4 and 8.

[22] Mimura *et al.*, *supra* note 16, at 693; Ferris, Cernea and Petz, *supra* note 16, at 5; Tuvalu Ministry, *supra* note 20, at 12, 23, 30 and 31.

[23] Agenda 21, *supra* note 16, at para.17.126; Mimura *et al.*, *supra* note 16, at 692 and 701; Nurse *et al.*, *supra* note 11, at 1623.

[24] Hon. Teleke P. Lauti, speaking at COP6 in 2000. Cited in UNFCCC Secretariat, *supra* note 11, at 13.

[25] For a counterpoint to the narrative of island vulnerability, see Barnett and Campbell, *supra* note 12, at 156–165; Farbotko and Lazrus, 'The First Climate Refugees? Contesting Global Narratives of Climate Change in Tuvalu', 22 *Global Environmental Change* (2012) 382; Stratford, Farbotko and Lazrus, 'Tuvalu, Sovereignty and Climate Change: Considering *Fenua*, the Archipelago and Emigration', 8 *Island Studies Journal* (2013) 67.

[26] Webb and Kench, 'The Dynamic Response of Reef Islands to Sea-Level Rise: Evidence from Multi-Decadal Analysis of Island Change in the Central Pacific', 72 *Global and Planetary Change* (2010) 234; L. Yamamoto and M. Esteban, *Atoll Island States and International Law* (2014), at 24–30.

building seawalls and improving food and water storage facilities[27] — as well as labour migration to avoid or adapt to environmental hazards.[28]

Climate change, however, interacts with and exacerbates existing socio-economic and environmental constraints and will gradually overwhelm traditional coping mechanisms.[29] While the coral reefs on which atoll islands depend are capable of adjusting to changing sea levels, they will find it difficult to cope with the combination of rising ocean temperatures, increasing acidification and higher sea levels that climate change will bring.[30] And, without substantial financial and technological assistance, large-scale adaptation projects designed to combat storm surges and coastal erosion will remain 'well beyond the financial means of most small island states'[31] and households.[32] The tetrapods recently constructed around the island of Malé in the Maldives, for example, cost US$4,000 per metre and were only possible with significant financial support from Japan.[33] Atoll islanders therefore share a 'sense that traditional ways of coping with the extreme weather events are no longer adequate because the nature of the events have changed from being manageable to being unmanageable'.[34]

The rest of this section provides a brief overview of the current and predicted impacts of climate change on the populations of atoll island states. As is already clear, these impacts are 'not unique contributors' to the vulnerability of atoll island states; instead, they interact with and exacerbate existing geographical, environmental and socio-

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[27] Barnett, 'Adapting to Climate Change in Pacific Island Countries: The Problem of Uncertainty', 29 *World Development* (2001) 977; Nurse *et al*., *supra* note 11, at 1636–1637; Republic of Kiribati, *supra* note 21, at 27–29.

[28] Barnett and Webber, 'Migration as Adaptation: Opportunities and Limits', in McAdam (ed.), *supra* note 12, 37. On island resilience and adaptation to change, see Barnett and Campbell, *supra* note 12, at ch.2.

[29] The '[e]fficacy of traditional community coping strategies is expected to be substantially reduced in the future'. IPCC, 'Summary for Policymakers', in Field *et al*. (eds), *supra* note 11, 1, at 24. Compare Mimura *et al*., *supra* note 16, at 692–693 and 707; Nurse *et al*., *supra* note 11, at 1636.

[30] Frieler *et al*., 'Limiting Global Warming to 2°C is Unlikely to Save Most Coral Reefs', 3 *Nature Climate Change* (2013) 165; Kench, Perry and Spencer, 'Coral Reefs', in O. Slaymaker, T. Spencer and C. Embleton-Hamann (eds), *Geomorphology and Global Environmental Change* (2009) 180; Nurse *et al*., *supra* note 11, at 1621 and 1628; Yamamoto and Esteban, *supra* note 26, at 35–49.

[31] Mimura *et al*., *supra* note 16, at 694 and 706.

[32] Mortreux and Barnett, 'Climate Change, Migration and Adaptation in Funafuti, Tuvalu', 19 *Global Environmental Change* (2009) 105, at 105.

[33] UNFCCC Secretariat, *supra* note 11, at 27. On a failed attempt to construct sea walls around South Tarawa, see Republic of Kiribati, *supra* note 21, at 11–12. On financial constraints on adaptation, see *ibid*, at 105; Republic of the Maldives, *supra* note 20, at 6; UNFCCC Secretariat, *Vulnerability and Adaptation to Climate Change in Small Island Developing States* (2007), at 26–27.

[34] Republic of Kiribati, *supra* note 21, at 35.

economic limitations.[35]

Water

The already limited freshwater resources of atoll island states 'are likely to be seriously compromised' by the impact of rising sea levels, coastal inundation and changing rainfall patterns.[36] In the Maldives, for example, freshwater supplies are already extremely scarce at 103m^3 per capita (well below the threshold of water scarcity at 1,700m^3) and increasingly threatened by saltwater contamination and unpredictable rainfall patterns.[37] In Kiribati, where it is estimated that only 44% of the population currently has access to adequate potable water, studies suggest that a 50cm sea level rise coupled with a 20% reduction in rainfall would reduce the size of the freshwater lens by a further 65%.[38] While Tuvalu and the Maldives have recently installed expensive desalination plants, these are plagued by operational issues and high maintenance costs and cannot provide a reliable solution.[39] A chronic shortage of fresh water is likely to be one of the earliest drivers of movement from atoll island states.

Agriculture, fishing and food

The Intergovernmental Panel on Climate Change (IPCC) predicts that it is 'very likely' that the agricultural and fishing industries on which atoll communities depend for nutrition and income[40] will be adversely affected by climate change-related impacts like rising sea levels, increasingly severe storms, saltwater contamination of soil and freshwater resources, higher sea temperatures and ocean acidification.[41] By 2007, up to 60% of Tuvalu's pulaka (taro) pits were reported to have already been destroyed by saltwater intrusion, and more frequent tropical storms are predicted to decrease subsistence crop yields by 50–60%,[42] leading to a noticeable 'decline in local food

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[35] Mimura *et al.*, *supra* note 16, at 692.

[36] *Ibid*, at 689. Compare Nurse *et al.*, *supra* note 11, at 1622–1623; UNFCCC Secretariat, *supra* note 11, at 17.

[37] UNEP, *Atlantic and Indian Ocean Environment Outlook* (2005), at 26. Cited in Republic of the Maldives, *supra* note 21, at 21.

[38] Mimura *et al.*, *supra* note 16, at 697, citing World Bank, *Cities, Seas and Storms: Managing Change in Pacific Island Economies. Vol. IV: Adapting to Climate Change* (2000).

[39] Mimura *et al.*, *supra* note 16, at 697; Republic of the Maldives, *supra* note 20, at 34.

[40] UNFCCC Secretariat, *supra* note 11, at 19–20; Republic of the Maldives, *supra* note 20, at 30; Republic of the Maldives, *supra* note 21, at 22–23 and 26–2; Republic of Kiribati, *supra* note 21, at 4 and 13–14.

[41] Mimura *et al.*, *supra* note 16, at 689; Republic of the Maldives, *supra* note 20, at 29.

[42] Tuvalu Ministry, *supra* note 20, at 21, 24, 27 and 28.

security'.[43] Elsewhere, a World Bank study estimates that a group of low-lying islands like Tarawa, in Kiribati, could see additional agricultural costs of up to US$16 million each year (equivalent to 17–18% of Kiribati's GDP at the time of the study) as a result of impacts like these.[44]

Socio-economic conditions

Their smallness, isolation and dependence on one or two industries[45] leaves atoll island economies 'generally more exposed to external shocks, such as extreme events and climate change'.[46] In fact, the IPCC predicts that 'land loss from sea-level rise … is likely to be of a magnitude that would disrupt virtually all economic and social sectors in these countries'.[47] The impact of climate change on tourism, for example — a significant source of income and employment in many atoll island states[48] — is likely to be 'largely negative'.[49] Rising sea levels and temperatures will exacerbate beach erosion and coral bleaching and coastal inundation will destroy cultural heritage sites, decreasing the value of atoll island states as tourist destinations. Water shortages and an increase in vector-borne diseases are also likely to deter tourists. Storms and sea surges may damage tourism infrastructure and disrupt transport and communication.[50]

Health

The impact of climate-sensitive diseases[51] on atoll island populations will be exacerbated by increasingly severe storms, floods, higher temperatures and a lack of

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[43] Former Tuvalu Red Cross Secretary Siuila Toloa, cited in Friends of the Earth International, *Climate Change: Voices from Communities Affected by Climate Change* (2007), at 32.

[44] World Bank, *supra* note 38. Cited in Mimura *et al.*, *supra* note 16, at 698.

[45] For example, in the Maldives, tourism and fishing account for around 37% of GDP, over 50% of government revenue and over 10% of the workforce. Republic of the Maldives, *supra* note 20, at 15 and 30; Republic of the Maldives, *supra* note 21, at 27–28; World Bank, *Maldives: Sustaining Growth and Improving the Investment Climate* (2007).

[46] Mimura *et al.*, *supra* note 16, at 701. Compare Nurse *et al.*, *supra* note 11, at 1625–1626.

[47] Nurse *et al.*, 'Small Island States', in J. McCarthy *et al.* (eds), *Climate Change 2001: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Third Assessment Report of the IPCC* (2001) 845, at 855. Compare UNFCCC Secretariat, *supra* note 11, at 17.

[48] CIA, *supra* note 3; Republic of the Maldives, *supra* note 20, at 25.

[49] Mimura *et al.*, *supra* note 16, at 689.

[50] *Ibid*, at 701–702; Republic of the Maldives, *supra* note 21, at 23 and 34–35.

[51] Including malnutrition, respiratory diseases and vector-, water- and food-borne diseases. See Ebi, Lewis and Corvalan, 'Climate Variability and Change and Their Potential Health Effects in Small Island States: Information for Adaptation Planning in the Health Sector', 114 *Environmental Health Perspectives* (2006) 1957; WHO, *Using Climate to Predict Infectious Disease Outbreaks: A Review* (2004).

fresh water,[52] along with existing factors like inadequate public health infrastructure, poor waste management and lack of access to health services.[53] According to a report by the Kiribati Ministry of Health, 'human health is the recipient of all [the] downstream effects of the impacts of climate change on other sectors'.[54] The contamination of freshwater supplies by rising sea levels and flooding is linked to an increase in diarrhoeal diseases; the adverse impacts of changing rainfall patterns and salinization on agricultural productivity will lead to greater food insecurity and malnutrition; and increasingly severe floods correlate with a higher incidence of drowning and injury.[55] In the Maldives, for example, diseases like acute gastroenteritis, dengue fever, chikungunya and scrub typhus have recently appeared, re-emerged or rapidly spread in response to changes in environmental conditions.[56]

Housing and infrastructure

In atoll island states, 'all development and settlement is essentially coastal':[57] housing, schools, utilities, hospitals, government buildings, airports and roads all lie along the coastline and are already facing the pressures of high population growth and rapid urbanisation.[58] In the event of rapid sea level rise, storm surges and coastal erosion, this leaves island communities vulnerable to evacuation, property damage, and closures that affect transport, agriculture, education and healthcare services, as well as the distribution of basic food and water supplies.[59] In Tuvalu, for example, where over 90% of housing and most of the infrastructure lies near the coast and recorded rates of sea

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[52] Mimura *et al.*, *supra* note 16, at 701. See further L. Russell, *Poverty, Climate Change and Health in Pacific Island Countries* (2009); Singh *et al.*, 'The Influence of Climate Variation and Change on Diarrhoeal Disease in the Pacific Islands', 109 *Environmental Health Perspectives* (2001) 155.

[53] WHO, 'Workshop Report', Synthesis Workshop on Climate Change and Health in Small Island States (1–4 December 2003).

[54] Republic of Kiribati Ministry of Health and Medical Services, *Contribution to NAPA Kickoff Meeting: Human and Public Health* (2004).

[55] Nurse *et al.*, *supra* note 11, at 1624–1625; Republic of Kiribati, *supra* note 21, at 15 and 19; Republic of the Maldives, *supra* note 21, at 21–22, 32–33 and 37–38.

[56] Moosa, 'Adaptation Measures for Human Health in Response to Climate Change in Maldives', 12 *Regional Health Forum* (2008) 49; Republic of the Maldives Ministry of Health, *Epidemiology and Disease Surveillance Unit of the Department of Public Health* (2008); Republic of the Maldives, *supra* note 20, at 31–32; Republic of the Maldives, *supra* note 21, at 26.

[57] Nurse *et al.*, *supra* note 11, at 1623.

[58] Mimura *et al.*, *supra* note 16, at 700–701; *ibid*. For example, in the Maldives, both international airports lie within 50m, and 47% of all houses, 90% of resort infrastructure, 70% of fisheries infrastructure, 80% of powerhouses, 90% of waste disposal sites and 75% of communications infrastructure lie within 100m of the coast. Republic of the Maldives, *supra* note 20, at 23–24; Republic of the Maldives, *supra* note 21, at 21.

[59] Mimura *et al.*, *supra* note 16, at 702–703. See also J. Hay *et al.*, *Climate Variability and Change and Sea Level Rise in the Pacific Islands Region* (2003); Republic of the Maldives, *supra* note 21, at 31–32.

level rise have been three times higher than the global average,[60] coastal erosion has been nominated as a key priority.[61] Ongoing sea level rise and coastal erosion will see some atolls abandoned altogether, which will be socially, culturally and financially disruptive and 'may be beyond what most of these atoll countries can afford'.[62]

Coastal land and resources

In fact, sea level rise — and, with it, higher storm surges and increased coastal flooding and erosion — threatens coastal infrastructure, facilities and housing on all atoll islands, thereby 'compromis[ing] the socio-economic well-being of island communities and states'.[63] In light of this threat, the 'long-term viability of some atoll states has been questioned'[64] — a question that was first raised in the IPCC's initial report over 25 years ago.[65]

Again, impacts vary between islands and regions: some atolls are likely to deteriorate while other 'morphologically resilient' atolls may remain intact.[66] Evidence suggests that inhabited islands are less likely to survive: those 'which have been subject to substantial human modification are inherently more vulnerable than those that have not'.[67] Even where inhabited islands continue to maintain their landmass, this will generally be because erosion along one part of the coastline is matched by accretion along another, causing displacement and damage to vital infrastructure.[68]

Anecdotal and scientific evidence in Tuvalu suggests that erosion is occurring at a rate

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[60] Becker *et al.*, 'Sea Level Variations at Tropical Pacific Islands Since 1950', 80–81 *Global Planetary Change* (2012) 85; Nurse *et al.*, *supra* note 11, at 1620.

[61] Tuvalu Ministry, *supra* note 20, at 12. Compare Mimura *et al.*, *supra* note 16, at 689 and 700–701.

[62] UNFCCC Secretariat, *supra* note 11, at 21.

[63] Mimura *et al.*, *supra* note 16, at 689. See also Adger *et al.*, 'Human Security', in Field *et al.* (eds), *supra* note 11, 755, at 768–770; Wong *et al.*, 'Coastal Systems and Low-Lying Areas', in Field *et al.* (eds), *supra* note 11, 361.

[64] Mimura *et al.*, *supra* note 16, at 697. Compare Nurse *et al.*, *supra* note 11, at 1618, 1620 and 1639–1640.

[65] Tegart *et al.*, 'Policymakers' Report', in W. Tegart *et al.* (eds), *Climate Change: The IPCC Impacts Assessment. Contribution of Working Group II to the First Assessment Report of the IPCC* (1990) 1, at 4.

[66] Kench, McLean and Nicholl, 'New Model of Reef-Island Evolution: Maldives, Indian Ocean', 33 *Geology* (2005) 145; Webb and Kench, *supra* note 26. On the autonomous adaptive capacity of island ecosystems, see also Mimura *et al.*, *supra* note 16, at 706.

[67] Mimura *et al.*, *supra* note 16, at 698.

[68] This is reportedly the case with the Carteret Islanders. Zukerman, 'Pacific Islands Defy Sea-Level Rise', *New Scientist* (5 June 2010). Compare Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing" States', in M. Gerrard and G. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013) 167, at 169; Tuvalu Ministry, *supra* note 20, at 19 and 29.

of around 3m per year.[69] At least one island is already said to have been submerged and the largest atoll is reported to have lost a significant part of its coastline.[70] Meanwhile, in Kiribati, there have been reports that a village on one of the outer islands has been forced to relocate due to severe coastal erosion.[71] As Kaateti Toto, Kiribati's Minister of Environment, Lands and Agriculture Development, has remarked, '[t]here's no place to run. Maybe our adaptation strategy should be to build an ark.'[72]

Toto's comment, while somewhat flippant, foreshadows the grave implications of the climate change-related impacts outlined in this section. The tangible, often irreversible impacts of climate change on health, shelter, livelihoods, infrastructure and land are 'threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island states'.[73] As acknowledged in a report by the United Nations (UN) Secretary-General, '[m]any island States face the prospect of loss of significant amounts of territory to sea-level rise and inundation, and some face the prospect of complete submersion'.[74] Displacement is likely to occur long before this happens, however, as the cumulative weight of the impacts outlined above becomes too great to bear.[75] Climate change therefore threatens not just lives and livelihoods but also the territorial integrity, sovereignty and statehood of atoll island populations.[76]

1.3 Defining 'climate change inundation'

> 'I have no doubt that at current levels of emissions of greenhouse gases … submergence is a possibility. The primary point is, however, that a long, long time before that point is reached, our reefs could be dead, our fishes fleeing, our groundwater completely salinated, our food crops depleted and our islands made

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[69] Tuvalu Ministry, *supra* note 20, at 12, 31 and 32.

[70] *Ibid*. Compare Crouch, 'Tiny Tuvalu in Save Us Plea over Rising Seas', *Sunday Mail* (5 October 2008); Lies, 'Situation in Sinking Tuvalu Scary, Says PM', *Planet Ark* (26 May 2006).

[71] Tessie Lambourne, Secretary of the Kiribati Ministry of Foreign Affairs, interviewed by Carrick, 'Climate Change: The Pacific', *ABC Radio National* (22 November 2011). Compare Republic of Kiribati, *supra* note 21, at 11.

[72] Cited in Ferris, Cernea and Petz, *supra* note 16, at 15.

[73] OHCHR, *supra* note 13, at para.40. Compare Agenda 21, *supra* note 16, at para.17.125; Kälin and Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', *UNHCR Legal and Protection Policy Research Series* (2012), at 15; Mimura *et al*., *supra* note 16, at 690; UNFCCC Secretariat, *supra* note 11, at 2.

[74] UN Secretary-General, *Climate Change and its Possible Security Implications*, UN Doc. A/64/350 (2009), at para.71.

[75] Ferris, Cernea and Petz, *supra* note 16, at 18–19; UNHCR Expert Meeting, 'Climate Change and Displacement: Summary of Deliberations' (22–25 February 2011), at para.28.

[76] Adger *et al*., *supra* note 63, at 758, 771 and 775; IPCC, *supra* note 29, at 20.

uninhabitable.' *Isaac V. Figir (Speaker of the Congress, Federated States of Micronesia)*[77]

This brings us to the concept of 'climate change inundation' that lies at the heart of this research. This thesis considers what happens when climate change-related impacts, alongside existing socio-economic and environmental constraints, leave atoll island states uninhabitable, causing their populations to uproot and move elsewhere. Climate change, in this sense, does not act in isolation but as a 'threat multiplier'[78] that interacts with and exacerbates existing pressures. While there may be 'no mono-causal relationship between climate change and displacement',[79] climate change will nevertheless act as a 'tipping point' in the gradual process by which an atoll island state's territory becomes uninhabitable, thereby triggering the movement of islanders.[80] It is this process that is referred to throughout the thesis as 'climate change inundation', a phrase that deliberately evokes a sense of being overwhelmed by, or submerged beneath, the cumulative weight of many intersecting harms.

One way of thinking about the concept of climate change inundation is through the lens of vulnerability. The IPCC defines vulnerability as 'the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change', where this is determined by (a) the extent to which it is adversely affected by climate change and (b) its capacity to adapt.[81] Climate change inundation lies at the extreme end of both of these axes of vulnerability. The concern here is not with those low-lying but prosperous states that are highly exposed to the impacts of climate change but have the capacity to adjust to or mitigate its consequences.[82] Nor is it with those vast, less prosperous states in which adaptive capacity is low but a significant proportion of the territory remains habitable.[83] Instead, it is with the particular subset of states in which

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[77] Cited in UNFCCC Secretariat, *supra* note 11, at 24.

[78] Norwegian Refugee Council, *Nansen Conference on Climate Change and Displacement in the 21st Century* (2011), at 19, at 18; Park, *supra* note 5, at 2; UNHCR, *supra* note 75, at para.2.

[79] UNHCR *et al.*, 'Forced Displacement in the Context of Climate Change: Challenges for States under International Law' (2009), at 2. Compare Barnett and Campbell, *supra* note 12, at 171–172; Hugo, *supra* note 12, at 9; Kälin and Schrepfer, *supra* note 73, at 6–7.

[80] UNHCR, *supra* note 75, at paras.2 and 28. Compare UNHCR *et al.*, *supra* note 79, at 2; Zetter, 'Protecting People Displaced by Climate Change: Some Conceptual Challenges', in McAdam (ed.), *supra* note 12, 131, at 140.

[81] White *et al.*, 'Technical Summary', in McCarthy *et al.* (eds), *supra* note 47, 20, at 21. On vulnerability, see also Barnett and Campbell, *supra* note 12, at 159–167. The latest IPCC report adopts the similar but broader concept of risk. IPCC, *supra* note 29, at 5.

[82] For example, the Netherlands. Faiola and Eilperin, 'Dutch Defence against Climate Disaster: Adapt to the Change', *Washington Post* (6 December 2009).

[83] For example, Bangladesh, Sierra Leone, South Sudan and Ethiopia. Maplecroft, 'Climate Change and Environment Risk Atlas 2015' (29 October 2014), accessible at http://maplecroft.com/portfolio/new-

exposure to the impacts of climate change is so great and adaptive capacity so limited that the permanent, cross-border displacement of entire populations is reasonably foreseeable.

Climate change inundation therefore brings together two related problems. On the one hand, the issue is not merely that climate change has serious impacts, but that these impacts are exacerbated by existing disadvantages that constrain adaptive capacity.[84] While it may be 'technically possible to adapt to several metres of sea level rise, the resources required are so unevenly distributed that in reality this risk is outside the scope of adaptation' for the populations of atoll island states,[85] whose adaptive capacity is already constrained by physical, environmental and socio-economic limitations. On the other hand, the issue is not merely that populations are unable to adapt to environmental changes, but that the effects of climate change are more severe than those previously experienced. The government of Kiribati observes that, 'over hundreds of years, communities and households in Kiribati developed great resilience in the face of climate-related hardships'. However, 'climate change will most likely exacerbate these hardships and … could overpower this "great resilience" of Kiribati'.[86]

1.4 Why should we care about climate change inundation?

While recognising that there is 'continuing uncertainty about the severity and timing of climate change impacts',[87] this thesis starts from the assumption that the point at which atoll island states will become uninhabitable is foreseeable enough that we should worry about it now. As the IPCC makes clear, '[u]ncertainty in the projections is not a sufficiently valid reason to postpone adaptation planning in small islands'.[88] There is enough certainty that sea level rise will cause enough damage to atoll island states to provide state representatives, lawyers, policymakers and academics with good reason to investigate this further.

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analysis/2014/10/29/climate-change-and-lack-food-security-multiply-risks-conflict-and-civil-unrest-32-countries-maplecroft/

[84] Barnett and Campbell, *supra* note 12, at 160; Nicholls *et al*., 'Coastal Systems and Low-Lying Areas', in Parry *et al*. (eds), *supra* note 11, 315, at 317.

[85] IPCC, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the IPCC* (2007), at 65, note 27.

[86] Republic of Kiribati, *supra* note 21, at 20.

[87] IPCC, *supra* note 29, at 9. Compare Nurse *et al*., *supra* note 11, at 1626 and 1634–1635.

[88] Nurse *et al*., *supra* note 11, at 1644.

Indeed, they are increasingly doing so, from early scoping studies[89] through to the more recent work of international lawyers,[90] philosophers,[91] geographers and migration experts.[92] Atoll island states have emphasised the threat posed by climate change to their 'very existence' for over 25 years,[93] and have recently formed a Coalition of Atoll Nations on Climate Change in order to achieve greater international negotiating power.[94] Prominent international experts and intergovernmental bodies have begun to call for action and establish multilateral partnerships to address this issue.[95] Emerging international research and advisory groups on climate change-related movement tend to have a strong focus on atoll island states.[96] The International Law Association (ILA) has also recently established a Committee on International Law

[89] For example, Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level', 17 *Ecology Law Quarterly* (1990) 621; F. Hampson, *Expanded Working Paper on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened with Extinction for Environmental Reasons*, UN Doc. E/CN.4/Sub.2/2005/28 (2005); Soons, 'The Effects of Sea Level Rise on Maritime Limits and Boundaries', 37 *Netherlands International Law Review* (1990) 207.

[90] For example, International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014), at 67. See also Burkett, 'The Nation *Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', 2 *Climate Law* (2011) 345; J. McAdam, *Climate Change, Forced Migration and International Law* (2012), at ch.5; Park, *supra* note 5; McAnaney, 'Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement', 87 *New York University Law Review* (2012) 1172; Rayfuse, *supra* note 68; Stoutenburg, 'When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States', in Gerrard and Wannier (eds), *supra* note 68, 57; Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law', 14 *Melbourne Journal of International Law* (2013) 1; Wyman, 'Sinking States', in D. Cole and E. Ostrom (eds), *Property in Land and Other Resources* (2012) 439; Yamamoto and Esteban, *supra* note 26.

[91] For example, Kolers, 'Floating Provisos and Sinking Islands', 29 *Journal of Applied Philosophy* (2012) 333; Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso', 27 *Journal of Applied Philosophy* (2010) 359; Ödalen, 'Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States', 17 *Ethics, Policy and Environment* (2014) 225; Risse, 'The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth', 23 *Ethics and International Affairs* (2009) 281.

[92] For example, Barnett and Campbell, *supra* note 12; Bedford and Bedford, 'International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu', in B. Burson (ed.), *Climate Change and Migration: South Pacific Perspectives* (2010) 89; Connell, *supra* note 12.

[93] Republic of the Maldives, *supra* note 20, at 1. Compare Holthus *et al.*, 'Vulnerability Assessment for Accelerated Sea Level Rise Case Study: Majuro Atoll, Republic of the Marshall Islands', *SPREP Reports and Studies Series* (1992); Republic of the Maldives, *supra* note 21; Office of the President of Kiribati, 'Climate Change: Relocation', accessible at www.climate.gov.ki/category/action/relocation/.

[94] ABC News, '"Our Entire Survival is at Stake": Kiribati President Anote Tong Calls for International Community to Deliver on Climate Funding Pledge' (11 July 2014).

[95] For example, an EU-funded project on Enhancing the Capacity of Pacific Island Countries to Manage the Impacts of Climate Change on Migration, led by the UNDP, ILO and UNESCAP, was established in 2013. ILO, 'Helping Pacific Islands to Manage Impacts of Climate Change on Migration' (14 November 2013). See also Guterres, cited in Singh, *supra* note 1; J. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, UN Doc. A/HRC/25/53 (2013), at para.22; S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change* (2011), at 57; UNHCR, IOM and Norwegian Refugee Council, 'Climate Change and Statelessness: An Overview' (2009).

[96] For example, Nansen Initiative, *Human Mobility, Natural Disasters and Climate Change in the Pacific* (2013); UNHCR, *supra* note 75.

and Sea Level Rise, whose mandate is to study the 'implications under international law of the partial and complete inundation of state territory'.[97]

However, the assumption that we should consider the implications of climate change inundation for atoll island states is often met with one of four main objections.

Wouldn't it be more useful to focus on mitigation and* in-situ *adaptation strategies?

First, there is the concern that, by focusing on migration or resettlement, we draw attention and resources away from mitigation and adaptation strategies that enable islanders to 'lead the kind of lives they value in the places where they belong'.[98] From this perspective, any discussion of displacement that allows wealthier states to downplay their mitigation obligations and encourages international donors to prioritise migration over local adaptation strategies is seen as detrimental.[99] While the government of Tuvalu, for example, initially explored options that would enable Tuvaluans to resettle elsewhere, it has become increasingly resistant to this idea, fearing that developed states may see it as an acceptable alternative to climate change mitigation.[100] In fact, former Tuvaluan Prime Minister Saufotu Sopoanga reportedly requested that Tuvalu's annual migration quota to New Zealand under the Pacific Access Category scheme be reduced from the proposed 300 to 75 in order to shift the focus from resettlement to sustainable local development.[101]

There are at least two responses to this objection. First, states can and do have multiple concurrent obligations under international law. In the context of climate change, it is widely accepted that affluent states have at least three sets of legal obligations: (a) to mitigate climate change by reducing greenhouse gas emissions;[102] (b) to assist poorer

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[97] ILA, 'International Law and Sea Level Rise', accessible at www.ila-hq.org/en/committees/index.cfm/cid/1043. See also Vidas, 'International Law and Sea Level Rise: The Role of the International Law Association', *Mepielan Bulletin* (18 February 2014).

[98] Adger and Barnett, 'Compensation for Climate Change Must Meet Needs', 436 *Nature* (2005) 328, at 328. Compare Barnett, 'Titanic States? Impacts and Responses to Climate Change in the Pacific Islands', 59 *Journal of International Affairs* (2005) 203; Ferris, Cernea and Petz, *supra* note 16, at 25–26; Mortreux and Barnett, *supra* note 32, at 106.

[99] Connell, 'Losing Ground? Tuvalu, the Greenhouse Effect and the Garbage Can', 44 *Asia Pacific Viewpoint* (2003) 89.

[100] McAdam and Loughry, 'We Aren't Refugees', *Inside Story* (30 June 2009); Ferris, Cernea and Petz, *supra* note 16, at 3. The Maldives is similarly reluctant to give a '"get out of jail free" card to the international community'. Marc Limon, interviewed on Carrick, 'Climate Change: Indian Ocean', *ABC Radio National* (29 November 2011).

[101] F. Gemenne and S. Shen, *Tuvalu and New Zealand: Case Study Report* (2009), at 17.

[102] Article 4(2), UNFCCC, 1771 UNTS 107, 31 ILM 849 (1992).

states by providing financial and technical support for adaptation[103] and perhaps compensation for damages incurred;[104] and (c) to ensure that the individual and collective human rights of those affected continue to be realised, both domestically and through international assistance and cooperation. Even where states do have obligations under international law to facilitate the resettlement of displaced islanders, this does not allow them to sidestep their mitigation and adaptation obligations.

Following from this first point, there is a second obvious point to note. Affluent states are far from fulfilling these mitigation and adaptation obligations. Climate change mitigation — that is, action taken to prevent 'dangerous anthropogenic interference with the climate system'[105] — is generally understood to require the global average temperature to rise by no more than 2°C above pre-industrial levels. However, existing mitigation commitments are both poorly implemented and insufficient to meet this target. According to the IPCC's latest findings, greenhouse gas emissions continue to increase rapidly despite current mitigation efforts,[106] and the emissions-reduction commitments made at the 17th Conference of the Parties (COP17) fall well below what is needed to limit a global temperature increase to 2°C,[107] particularly if we factor in the added pressure of future economic and population growth[108] and the long-term impact of existing atmospheric concentrations of carbon dioxide.[109] Thus, according to the Organisation for Economic Cooperation and Development (OECD), 'unless very rapid and costly emission reductions are realised after 2020', temperatures will exceed the 2°C mark and '[m]ore disruptive climate change is likely to be locked in'.[110]

If current mitigation efforts appear unlikely to prevent a global temperature rise of more than 2°C, one might assume that wealthier states have chosen to funnel their

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[103] Articles 4(3) and 4(4), *ibid*. Compare Article 1(c)(i), Bali Action Plan, *supra* note 14.

[104] Under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts established by COP19 in late 2013. See Millar, Gascoigne and Caldwell, 'Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process', in Gerrard and Wannier (eds), *supra* note 68, 433.

[105] Article 2, UNFCCC, *supra* note 102.

[106] IPCC, *supra* note 6, at 6–7.

[107] *Ibid*, at 13; Stavins *et al*., 'International Cooperation: Agreements and Instruments', in O. Edenhofer *et al*. (eds), *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the IPCC* (2014) 1001, at 1006.

[108] 'A world economy four times larger than today is projected to use 80% more energy in 2050.' OECD, *Environmental Outlook to 2050: The Consequences of Inaction (Highlights)* (2012), at 1. Compare IPCC, *supra* note 6, at 8–9.

[109] 'Most aspects of climate change will persist for many centuries' even if greenhouse gas emissions cease today. IPCC, *supra* note 6, at 27.

[110] OECD, *supra* note 108, at 3.

resources into adaptation funding instead. However, this does not seem to be the case. While the World Bank estimates that adaptation will cost between US$4–US$37 billion annually,[111] the adaptation funds established under the UNFCCC and Kyoto Protocol have received less than US$1.5 billion in contributions over the past decade, much of which is yet to be spent.[112] A Green Climate Fund established to distribute up to US$100 billion a year in adaptation funding is 'up but … not yet running' because states have yet to follow through on their funding commitments.[113]

In any case, for the populations of atoll island states, '[w]ithout effective climate change mitigation measures … [*in-situ*] adaptation may no longer be feasible'.[114] Even the IPCC recognises that 'rapid sea-level rise that inundates islands and coastal settlements is likely to limit adaptation possibilities, with potential options being limited to migration'.[115] Such inundation is looking increasingly likely, particularly in light of claims that the IPCC's sea level rise projections are conservative at best.[116]

Therefore, as Walter Kälin recently observed, while local adaptation strategies remain important, 'even more importantly, [we should] plan for climate change adaptation so that human mobility is factored in'.[117] The IPCC similarly encourages 'early proactive planning' for the collective resettlement of atoll island communities.[118] Atoll island states themselves recognise that the best-case scenario — one in which aggressive mitigation strategies ensure that their territory remains habitable — is looking increasingly unlikely. According to Kiribati President Anote Tong, '[w]e're not talking

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[111] Cited in N. Stern, *The Stern Review: The Economics of Climate Change* (2007), at 442. This may rise to hundreds of billions of dollars by 2030. Mimura *et al.*, 'Adaptation Planning and Implementation', in Field *et al.* (eds), *supra* note 11, 869, at 878.

[112] Heinrich Böll Stiftung and Overseas Development Institute, 'Climate Funds Update', accessible at www.climatefundsupdate.org.

[113] Christiana Figueres, cited in Secretariat of the Green Climate Fund, 'Green Climate Fund Poised for Initial Capitalisation' (9 September 2014). However, funding commitments at COP20 brought the Fund to just over US$10 billion. Secretariat of the Green Climate Fund, 'Green Climate Fund Hits USD 10 Billion Threshold' (9 December 2014).

[114] Norwegian Refugee Council, *supra* note 78, at 19. Compare Barnett and Campbell, *supra* note 12, at 110; Bedford and Bedford, *supra* note 92, at 92; J. Campbell, M. Goldsmith and K. Koshy, *Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries* (2005), at 10, note 1.

[115] Adger *et al.*, 'Assessment of Adaptation Practices, Options, Constraints and Capacity', in Parry *et al.* (eds), *supra* note 11, 717, at 733 and 736. Compare IPCC, *supra* note 29, at 9.

[116] Rignot *et al.*, *supra* note 10; Vermeer and Rahmstorf, *supra* note 10.

[117] Cited in ABC News, 'Pacific Islanders Reject "Climate Refugee" Status, Want to "Migrate with Dignity", SIDS Conference Hears' (5 September 2014).

[118] Nurse *et al.*, *supra* note 11, at 1642–1643.

about reducing carbon emissions because we're already beyond that stage. What we need is urgent action' to address the foreseeable threat of climate change inundation.[119]

This chapter has thus far observed that states have multiple obligations under international law, that wealthier states are failing to adequately fulfil their obligations of mitigation and adaptation, and that atoll island states are likely to eventually become uninhabitable. Given this, it would seem wise to consider what states' legal obligations might look like in the event that whole populations are displaced from their territory, on the understanding that this is a complementary rather than alternative area of research.

Shouldn't we be concerned with deprivation and displacement more generally?

A second concern is that, by focusing specifically on climate change inundation, we unfairly exclude others who are suffering. The scope of our inquiry should therefore expand to include all those displaced by the impacts of climate change, or by environmental degradation and disaster, or indeed by deprivation of any kind. This objection has two main strands. The first is analytical: given the relationships between climate change and (a) environmental degradation and disaster and (b) existing socio-economic, cultural and political constraints, how can we meaningfully separate climate change-related displacement from other forms of displacement?[120] The second is normative: given that climate change, environmental disasters, poverty and conflict displace countless people every year, why should we single out atoll island populations for special attention?[121]

In response to the first objection, the case of climate change inundation is one in which the causal contribution of climate change-related impacts to human displacement is reasonably clear, particularly given the effects of rising sea levels and ocean warming and acidification on the coral reefs, freshwater lenses, arable land and coastal infrastructure on which atoll island states depend. While islanders could remain in place for longer if they had sufficient resources to reduce overcrowding, store food and water and construct state-of-the-art sea defences, a link between climate change and

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[119] Cited in ABC News, *supra* note 94.

[120] For typologies of environmental and climate change-related movement, see Hugo, *supra* note 12; Kälin, 'Conceptualising Climate-Induced Displacement', in McAdam (ed.), *supra* note 12, 81, at 85–86; Kälin and Schrepfer, *supra* note 73, at 13–17.

[121] See, for example, Betts, 'Survival Migration: A New Protection Framework', 16 *Global Governance* (2010) 361.

movement will ultimately 'exist irrespective of pre-existing socio-economic or environmental conditions'.[122]

The second objection, which allows us to introduce some of the main themes of the thesis, is of more interest here. The main reason for drawing a normative distinction between climate change inundation and other drivers of displacement is the threat it poses to the territorial integrity, sovereignty and international legal personality of existing states.[123] As the impacts of climate change inundation gradually worsen — rendering their territory uninhabitable, displacing large numbers of their citizens across international borders and calling into question their autonomy and independence — the legal status of atoll island states will become increasingly uncertain. This raises at least two concerns.

The first relates to the ongoing protection of the human rights of displaced islanders. Should their state cease to exist as a matter of law, their citizenship will also cease, rendering them stateless.[124] Even if their state does retain its legal status despite a loss of habitable territory, an atoll government-in-exile will face considerable constraints on its capacity to regulate, protect and provide basic services for its citizens. In practice, its 'population would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased',[125] rendering its citizens *de facto* stateless.[126] Whether *de jure* or *de facto* stateless, an islander displaced from her home state risks being cast adrift as an 'object of international law for whom no subject of international law is responsible'. [127] Citizenship is the primary 'link between individuals and their rights, benefits and duties of international law';[128] it is, in Hannah

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[122] Zetter, *supra* note 80, at 140.

[123] Crawford and Rayfuse call this the 'statehood dilemma'. Crawford and Rayfuse, 'Climate Change and Statehood', in R. Rayfuse and S. Scott (eds), *International Law in the Era of Climate Change* (2012) 243, at 249. On the idea that loss of statehood grounds specific legal or moral duties to atoll islanders, see Byravan and Rajan, 'The Ethical Implications of Sea-Level Rise Due to Climate Change', 24 *Ethics and International Affairs* (2010) 239; Heyward and Ödalen, 'A New Nansen Passport for the Territorially Dispossessed', *University of Uppsala Department of Government Working Paper 2013:3* (2013); Wyman, 'Are We Morally Obligated to Assist Climate Change Migrants?', 7 *Law and Ethics of Human Rights* (2013) 185.

[124] Hampson, *supra* note 89, at para.17; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 1.

[125] UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 2.

[126] I.e. nationals of a state who 'are unable to benefit from the protection of that State'. Article 3(16), Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, CETS 200 (2009). It has been argued that 'persons who are stateless *de facto* should as far as possible be treated as stateless *de jure*'. Resolution No. 1, Final Act of the UN Conference on the Elimination or Reduction of Future Statelessness, UN Doc. A/CONF.9/14 (1961) 250, at 279.

[127] E. Daes, *Status of the Individual and Contemporary International Law* (1992), at 35.

[128] *Ibid*.

Arendt's terms, the 'right to have rights'.[129] Without the protection of a state, islanders face the possibility that neither their 'right' to membership in a state nor the 'rights' this entitles them to will be realised.

Chapter 3 considers one potential solution to this problem: the expansion of existing migration pathways to allow islanders to migrate and secure citizenship elsewhere. This is championed by many as a pragmatic, targeted strategy that relies on existing domestic and bilateral agreements rather than calling for the adoption of a new international legal treaty. However, alongside other weaknesses discussed in Chapter 3, it cannot address the initial objection raised above. There are currently around 10 million stateless people worldwide — why narrow our focus arbitrarily to those islanders rendered stateless by climate change inundation?

Rather than focus on the deprivation and potential statelessness of individual islanders, therefore, this thesis turns its attention to a second concern — one that is related to the first but emphasises the collective dimension of islanders' loss. In the contemporary international and political system, states are instrumentally valuable for various reasons. It is typically states that provide the legal and political infrastructure through which laws are enforced, treaties are negotiated, sovereignty is exercised over natural resources and claims are brought before international adjudicative bodies. The primary focus of this thesis, however, is the role of the state in providing the framework through which a people can exercise its capacity for legal and political autonomy and independence — a capacity captured, for the purposes of international law, under the rubric of self-determination.

While some argue that permanent resettlement within a democratic, rights-protecting state — as per the planned migration solution discussed in Chapter 3 — replaces everything of value that would be lost with the disappearance of a state's territory,[130] this thesis takes a different perspective. There is something worth preserving here that is not captured by planned migration proposals, including a set of political institutions that have been shaped over time to reflect shared values and pursue distinctive collective goals. What is at stake here is not just the individual loss of citizenship but also the collective loss of the legal and political institutions through which a people has exercised its capacity for self-determination over time. This loss cannot be remedied by

[129] H. Arendt, *The Origins of Totalitarianism* (1968).

[130] Lister, 'Climate Change Refugees', 17 *Critical Review of International Social and Political Philosophy* (2014) 618, at 626–628.

granting membership to individual islanders elsewhere (although this is certainly a useful strategy in its own right). Instead, it requires a collective response that takes into account the wishes of islanders themselves; one that relies upon the legal norm of self-determination.

Of course, by identifying the loss of statehood and self-determination as its normative issue of concern, this thesis does not fully respond to the objection raised above: atoll islanders are not the only group to face this threat. However, it does significantly narrow the field of candidates of concern to those peoples whose shared political institutions face some grave external threat, such as colonial occupation or foreign subjugation. The case of climate change inundation stands out from among these as unprecedented and therefore able to provide a unique insight into the way in which an unsettled area of law (self-determination) might be applied to emerging issues of concern (in this case, climate change inundation).

The status of self-determination as a peremptory norm of customary international law that generates obligations *erga omnes* demonstrates its normative significance for the international community as a whole. There is also a growing awareness of the significance of its potential loss in the face of climate change inundation. This has long been recognised by islanders themselves.[131] More recently, however, the Human Rights Council, the Office of the High Commissioner for Human Rights (OHCHR), the World Bank and other intergovernmental bodies have acknowledged its relevance in this context,[132] as have a growing number of lawyers and practitioners.[133] However, legal scholars have yet to assess in any detail the relevance or application of the legal norm of self-determination in this context, perhaps because it does not fit within the traditional legal narrative of self-determination as a tool of emancipation from foreign

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[131] President Anote Tong of Kiribati, cited in Blair and Beck, 'Inundation', 32 *Cultural Survival Quarterly* (2010); President Apisai Ielemia of Tuvalu, 'Statement Delivered at the High-Level Segment of the Fourteenth Session of the Conference of the Parties (COP14)' (11 December 2008); Republic of the Maldives, *supra* note 21, at 21; Republic of the Marshall Islands, *Submission to the OHCHR under Human Rights Council Resolution 7/23* (2008).

[132] Human Rights Council Res. 10/4, 25 March 2009, at preambular para.7; McInerney-Lankford, Darrow and Rajamani, *supra* note 95, at 18, 35–36; Nansen Initiative, *supra* note 96, at 20; OHCHR, *supra* note 13, at para.41; UNHCR, *supra* note 75, at paras.31–32.

[133] Hodgkinson and Young, '"In the Face of Looming Catastrophe": A Convention for Climate Change Displaced Persons', in Gerrard and Wannier (eds), *supra* note 68, 299, at 326–327; McAdam, *supra* note 90, at 36, 147–149, 157–158 and 199; Park, *supra* note 5, at 16, note 113 and 20, note 141; Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', *UNSW Faculty of Law Research Series No.9* (2009), at 8–9 and 11; Stoutenburg, *supra* note 90, at 76–77; Wong, *supra* note 90, at 45–46; Wyman, *supra* note 90, at 441.

subjugation or occupation.[134] Thus, while it is increasingly recognised that the 'biggest challenge' in this context is ensuring that atoll island populations continue to 'exist as viable communities even after the loss of most or even all of their territory', 'effective responses to this challenge do not exist'.[135]

In an attempt to address this lacuna, this thesis argues that the legal concept of self-determination should be understood in terms broad enough to apply to all peoples facing some grave external threat to their capacity for self-determination, including atoll island populations at risk of climate change inundation (Chapters 4 and 5). It proposes the recognition of a legal principle of self-determination, which requires that, wherever the collective autonomy and independence of a people faces some grave external threat, any response takes into account the 'free and genuine expression of the will of the peoples concerned'.[136] This principle is supplemented by a set of legal rules that identify those 'peoples' with a right to self-determination, including the populations of existing states.

Building on this broad theoretical foundation, Chapter 6 proposes a collective decision-making framework through which atoll island peoples can identify their preferred form of political organisation, should climate change inundation render their territory uninhabitable. This decision-making framework reflects a creative interpretation of existing legal rules and principles. It draws inspiration from the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations ('Declaration on Friendly Relations'), according to which non-self-governing peoples may choose from three options in exercising their self-determination: '[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people'.[137] Under the proposed decision-making framework, atoll island peoples would choose from a similar set of options in order to secure their ongoing self-determination.

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[134] Those who take self-determination seriously in this context tend to be philosophers, who are not bound by this legal tradition. For example, Kolers, *supra* note 91; Nine, *supra* note 91; Ödalen, *supra* note 91; Schuppert, 'Governing Climate Refugees: Self-Determination and Finding New Territory', ClimMig Conference on Human Rights, Environmental Change, Migration and Displacement (20 September 2012).

[135] Kälin and Schrepfer, *supra* note 73, at 39–40.

[136] *Western Sahara*, ICJ Reports (1975) 12, at paras.55 and 162.

[137] GA Res. 2625 (XXV), 24 October 1970.

The first option is the '[re-]establishment of a sovereign and independent State' with jurisdiction over a defined territory. An atoll island state must therefore acquire land from another state on which to resettle its population, preferably via a treaty of cession that transfers full territorial sovereignty (Chapter 6). The second option is 'the emergence into any other political status freely determined by a people'. In this case, an atoll island state could pursue an alternative form of statehood by severing its link with a defined territory and permanent population and transitioning to a so-called 'deterritorialized state' or 'state-in-exile' (Chapter 7).[138] The third option is to enter into 'free association or integration with an independent State', a choice that would protect the collective political status of a people but abandon any claim to statehood or exclusive territorial jurisdiction. An atoll island state might seek free association, federation or integration with another state, with a corresponding guarantee of political autonomy within that state (Chapter 8).

These final chapters critically assess the institution of statehood by unpacking its constitutive elements — territory, autonomy, independence and jurisdiction — and examining the role that each plays in constructing a framework that can best protect the human rights and collective autonomy of atoll island peoples. They also recognise that a people's capacity for self-determination is typically, but not necessarily, pursued through the framework of the state. While Chapters 6 and 7 take statehood as a starting assumption, Chapter 8 foregrounds future research into the question of whether or not climate change inundation calls for an alternative understanding of self-determination that is decoupled from the framework of the state.

If the self-determination of islanders is so important, shouldn't this research be conducted with or by islanders?

A third concern is that, by indulging in 'premature' speculation about the untimely demise of atoll island states, we tell a story in which islanders are the vulnerable, voiceless victims of an inevitable disaster,[139] and in which climate change is accepted uncritically as a 'profound denier of freedom of action and a source of

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[138] Burkett, *supra* note 90; Burkett, 'The Nation *Ex-Situ*', in Gerrard and Wannier (eds), *supra* note 68, 89; Crawford and Rayfuse, *supra* note 123, at 250 and 253; McAdam, *supra* note 90, at 138; Ödalen, *supra* note 91; Rayfuse, *supra* note 68, at 179–180; Stoutenburg, *supra* note 90, at 70–72 and 85–87.

[139] Barnett and Campbell, *supra* note 12, at 2 and 155; Bravo, 'Voices from the Sea Ice: The Reception of Climate Impact Narratives', 35 *Journal of Historical Geography* (2009) 256; Mortreux and Barnett, *supra* note 32, at 105–106.

disempowerment'.[140] And, in the telling and retelling,[141] this story is internalised by islanders themselves, who, believing that their land is destined to end up under water, begin to worry less about the sustainable use of resources or their own capacities for autonomy, adaptation and renewal.[142] The concern here is (at least partly) that, despite being 'ostensibly at the heart of the crisis discourse',[143] the voices of those most at risk of climate change end up being marginalised by both the relentless machinery of international negotiation and their own internalisation of the narrative of powerlessness.[144] As a result, there is 'a real danger that the migration response will be formulated by nation states and the international community' rather than by islanders themselves.[145]

This concern is relevant to this research project, which draws on extensive empirical research with and by islanders[146] but is itself largely theoretical. However, its aim is to construct a conceptual framework within which a conversation about islanders' autonomy, independence and self-determination can take place. It responds to a call from atoll island leaders for 'a greater focus on educating [their] people on what's coming and what the options are for them, which means some input into clarifying and looking at ways of providing those options'.[147] It does so by setting out a collective decision-making framework within which the 'free and genuine expression of the will' of atoll island peoples can be given meaning. It is, in this sense, a theoretical precursor to consultations with island populations. While Chapters 6, 7 and 8 provide some analysis of the legal and political viability of each option of the proposed decision-making framework, they make no attempt to proscribe or prescribe any particular

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[140] UNDP, *supra* note 3, at 31.

[141] On media references to island states as 'disappearing' or 'sinking', see Barnett and Campbell, *supra* note 12, at 168; Chambers and Chambers, 'Five Takes on Climate and Cultural Change in Tuvalu', 19 *Contemporary Pacific* (2007) 294; Farbotko, 'Tuvalu and Climate Change: Constructions of Environmental Displacement in the Sydney Morning Herald', 87 *Geografiska Annaler, Series B* (2005) 279.

[142] Barnett and Adger, *supra* note 17; Barnett and Campbell, *supra* note 12, at 170; Gemenne and Shen, *supra* note 101, at 17.

[143] Farbotko and Lazrus, *supra* note 25, at 383.

[144] However, this concern is too simplistic in its portrayal of islanders' roles in perpetuating the 'climate refugee' discourse. The former President of the Maldives, Mohamed Nasheed, used this discourse to draw the world's attention to the plight of his people. See Limon, interviewed on Carrick, *supra* note 100; BBC News, 'Maldives Cabinet Makes a Splash' (17 October 2009); Nasheed, 'Address by President Mohamed Nasheed to the UN General Assembly' (24 September 2009); Schmidle, 'Wanted: A New Home for My Country', *The New York Times* (10 May 2009).

[145] Hugo, *supra* note 12, at 31. Compare Ilan Kelman, cited in Reed, 'Understanding the Islanders: Climate Migration in Context', *Acclimatise* (1 September 2014).

[146] Indeed, 'researcher fatigue' is already an issue in Funafuti, Tuvalu. Mortreux and Barnett, *supra* note 32, at 107–108. Compare Gemenne and Shen, *supra* note 101, at 26.

[147] Cited in Wiseman, 'UN to Help Pacific Nations Build Capacity for Possible Climate Migration', *Radio New Zealand International* (14 November 2013).

outcome; after all, the principle of self-determination demands that we listen to the peoples concerned. As one Pacific island representative recently observed, 'the international community can help to provide the ingredients, but not the recipe'.[148]

By placing self-determination at the heart of its research, the thesis takes concerns about the marginalisation of islanders seriously. An emphasis on autonomy and independence allows us to move away from the popular story of islanders as 'refugees without capacity for sovereign self-determination' towards 'narratives other than those of annihilation'[149] — narratives of dynamism, resilience and mobility, in which the collective political autonomy of atoll island peoples is valued and sustained. The hope is that this thesis lays some of the groundwork for a conversation in which the 'voices of the displaced or those threatened with displacement [are] heard and taken into account', as are the voices of those who will potentially receive them.[150]

It would be useful here to make three further observations about the chosen methodology. First, taking its cue from Nansen Principle VII — which insists that, in addressing climate change-related displacement, the 'existing norms of international law should be fully utilised, and normative gaps addressed'[151] — this thesis explores ways in which the contemporary international legal framework might help or hinder the protection of atoll island populations. Rather than argue for the adoption of new legal norms,[152] it considers the extent to which existing legal rules and principles — specifically those relating to human rights and self-determination — might be modified or expanded to assist those at risk. It also applies a functional or purposive approach to international law. Where international legal rules or principles fail to fulfil their underlying purpose in the face of changing environmental conditions, the onus is on the legal community to creatively reinterpret their scope and content in order to address this failure.[153]

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[148] Cited in McAdam, 'Pacific Islanders Lead Nansen Initiative Consultation on Cross-Border Displacement from Natural Disasters and Climate Change', *Brookings: Up Front* (30 May 2013).

[149] Stratford, Farbotko and Lazrus, *supra* note 25, at 72.

[150] Nansen Principle X, Norwegian Refugee Council, *supra* note 78, at 5. On the need for consultation with relocating and receiving populations, see also Barnett and Webber, *supra* note 28, at 51 and 53; Campbell, Goldsmith and Koshy, *supra* note 114, at 6, 42 and 44; Ferris, Cernea and Petz, *supra* note 16, at 19; Hugo, *supra* note 12, at 31; McAdam, *supra* note 90, at 5 and 255; Nansen Initiative, *supra* note 96, at 5 and 20; Park, *supra* note 5, at 21; UNHCR, *supra* note 75, at para.4.

[151] Norwegian Refugee Council, *supra* note 78, at 5.

[152] As per McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is not *the* Answer', 23 *International Journal of Refugee Law* (2011) 2.

[153] Compare Caron, *supra* note 89, at 653.

Second, along with a handful of other legal scholars working in this area[154] — as well as the IPCC itself[155] — this thesis recognises that the complex and unprecedented nature of climate change inundation calls for an interdisciplinary approach. As Nansen Principle VII implies, climate change-related displacement highlights the 'normative gaps' in international law. These gaps are difficult to address if we rely solely on the resources of legal doctrine and practice. While some turn to economics, migration theory or empirical research to supplement law, this thesis turns to legal and political theory. Drawing on the work of Charles Beitz,[156] Chapter 2 develops a functional account of human rights as norms that provide states with reasons for acting to protect important human interests against foreseeable threats, both within and across state borders. This interdisciplinary account provides additional resources for determining the role, content and scope of human rights in areas in which specific legal rules have not yet emerged or crystallised. While the focus of the thesis remains primarily on the capacity of international law to respond to climate change inundation, it recognises the role that theory plays in clarifying the scope and content of international human rights law, and in rendering it 'normatively rich'.[157]

Third, while it examines the potential re-interpretation and modification of international law with respect to one case study — that of climate change inundation — the approach taken and the lessons learned throughout the thesis can be applied more widely. As Crawford suggests with regard to the law on statehood and self-determination, 'international law is enriched by connection with the complexities of individual situations'.[158] In this case, the application of the legal principle of self-determination to the issue of climate change inundation provides a unique insight into the ways in which an unsettled area of law might develop in response to new and emerging issues.

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[154] Burkett, *supra* note 90; Lister, *supra* note 130; Stoutenburg, *supra* note 90; Wyman, *supra* note 90; Wyman, *supra* note 123.

[155] In its latest report, the IPCC draws on moral and political philosophy to address questions of burden sharing, historical responsibility and risk. Kolstad *et al*., 'Social, Ethical and Economic Concepts and Methods', in Edenhofer *et al*. (eds), *supra* note 107, 207.

[156] C. Beitz, *The Idea of Human Rights* (2011).

[157] Besson, 'Human Rights: Ethical, Political … or Legal? First Steps in a Legal Theory of Human Rights', in D. Childress (ed.), *The Role of Ethics in International Law* (2012) 211, at 230.

[158] Crawford, 'Foreword', in D. French (ed.), *Statehood and Self-Determination* (2013) xv, at xv.

Why should other states care?

A fourth concern is that climate change inundation does not easily fit within the traditional model of human rights protection, in which a state is primarily responsible for the rights of its citizens. Nor does it neatly correspond with the mainstream understanding of self-determination, which envisages a relatively straightforward binary relationship between oppressor state and oppressed people. In the case of climate change inundation, there is no clear causal relationship between the actions or omissions of one state and a specific climate change impact, leading to a specific human rights violation, in another. Given this, why should other states shoulder the burdens associated with hosting or otherwise assisting displaced atoll island populations, particularly where this interferes with their own territorial integrity or their own people's self-determination?

The difficult question of identifying those with reasons for assisting displaced atoll island populations is first addressed in Chapter 2, which introduces four sets of reasons for acting that are developed further throughout the thesis. 'Reasons for acting' is used as a general term in recognition of the fact that, while some of the reasons developed throughout the thesis are formally recognised as legal obligations, others are not, although they remain grounded in existing international law. Even where they *are* recognised as legal obligations, they may not impose perfect duties on external actors. Existing legal doctrine may fail to explicitly identify those responsible for acting, clarify the actions that they are required to take or impose obligations with 'the peremptory character of a duty'.[159] Nevertheless, international human rights law provides a legal basis for (at least) defeasible — or, in Beitz's terms, *pro tanto* — reasons for taking remedial or corrective action to address failures of human rights protection, where these reasons carry considerable, though not always absolute, legal weight.

The four sets of reasons for acting developed throughout the thesis are primarily grounded in international law but also draw on insights from moral and political philosophy. This interdisciplinary approach provides a wider set of conceptual and normative resources for assessing the reasons that states may have for — or against — acting to address manifest failures of human rights protection elsewhere.

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[159] J. Raz, *The Morality of Freedom* (1986), at 183.

First, there are 'reasons of peremptory force' — general reasons arising from the fundamental importance of the interest at stake. The recognition of self-determination as a peremptory norm of general international law that gives rise to obligations *erga omnes*, for example, demonstrates its status as an 'essential principle' of international law[160] and a 'concern of all states'.[161] The threat posed by climate change inundation to the self-determination of atoll island peoples therefore generates strong normative reasons for acting that apply to the international community as a whole.

Second, 'reasons of international cooperation' are derived from obligations of international assistance and cooperation under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Charter and other legal instruments. While states have considerable discretion in deciding where to direct their assistance and cooperation, specific obligations may arise where they have previously made an explicit legal or political commitment to another state though bilateral aid or migration agreements.

Third, 'reasons of contribution' pick out those actors that have contributed to the problem of climate change inundation, using their greenhouse gas emissions per capita since 1990 as a rough proxy. These reasons do not rely on any strict causal connection between the emissions of one state and a specific climate change harm in another. Instead, they reflect the fact that a failure to adequately regulate greenhouse gas emissions generates strong reasons for acting for industrialised states, drawing on evidence from the IPCC's latest report and the principle of common but differentiated responsibilities under the UNFCCC.

Fourth, 'reasons of capacity' look forward to each state's capacity to assist atoll island populations. Where states are able to act more effectively (on the basis of proximity or cultural ties, for example) or more readily absorb the burdens of acting (on the basis of their existing natural, financial, human or technological resources), they have stronger reasons for acting.

As the thesis progresses, it becomes clear that certain states bear a greater responsibility for assisting atoll island populations than others, arising from the cumulative weight of these different reasons for acting. It also becomes clear that

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[160] *East Timor, (Portugal v. Australia)*, ICJ Reports (1995) 90, at para.29.

[161] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports (1970) 3, at para.33.

states' reasons for and against acting differ according to the option under consideration: the expansion of existing migration pathways (Chapter 3), the cession of territory (Chapter 6), the recognition of a deterritorialized atoll island state (Chapter 7) or the merger of two or more states (Chapter 8).

1.5 The scope and limits of the thesis

One of the central claims of the thesis is that the legal norm of self-determination is applicable outside of the narrow contexts in which it is traditionally thought to apply. In any situation in which a people faces some grave external threat to its autonomy and independence — including, in this case, climate change inundation — the legal principle of self-determination requires that we act with regard to the freely expressed will of the people concerned. Other states, in turn, have reasons for contributing to the people's preferred outcome, arising from their contribution to the problem, their capacity to assist, their commitment to international norms of *jus cogens* and *erga omnes* status and their general obligations of international cooperation.

This thesis focuses on those areas in which it can make an original contribution: assessing the applicability of the legal norm of self-determination to the emerging issue of climate change inundation; proposing a collective decision-making framework through which atoll island populations can have their say in determining which steps are taken in response to climate change inundation; questioning the traditional legal narrative linking statehood, self-determination and territorial sovereignty; and setting out an interdisciplinary theoretical framework for the application of an unsettled area of law to new and unprecedented challenges.

It is important, however, to be clear about the limits of the thesis. It is not concerned with climate change-related displacement in general, but with one specific instance. Its primary concern is not the impact of climate change inundation on individual human rights (although Chapters 2 and 3 use the right to health to develop the theoretical framework of the thesis), but on collective rights to self-determination. It is not concerned with statelessness or the associated loss of the 'right to have rights', but with the prevention of this loss. It is not concerned with practical questions about resettlement — relating to securing funding, finding available land, building housing and infrastructure, relocating islanders and so on — but with the legal framework within which decisions about such resettlement might occur. And finally, in proposing an alternative account of self-determination, the thesis does not seek to engage in the

ongoing debate about rights to independence and secession. For the purpose of this thesis, at least, this debate is bracketed off by defining self-determining 'peoples' as the populations of existing states.

Its aim, instead, is to direct our attention towards an issue that challenges contemporary assumptions about statehood, sovereignty and self-determination, whose ramifications are likely to extend far beyond the populations of atoll island states. As the Malé Declaration adopted by the Climate Vulnerable Forum observes, 'the fate of the most vulnerable will be the fate of the world'.[162] It is crucial here that we take advantage of the dynamic, responsive character of international law in order to ensure that it remains relevant and continues to 'make a difference'.[163] Chapter 2 begins this process by setting out an interdisciplinary theoretical framework on which the rest of the thesis builds, drawing on Charles Beitz's 'practical' account of human rights as norms that guide the behaviour of domestic and international actors.

[162] Malé Declaration of the Climate Vulnerable Forum (10 November 2009).
[163] French, 'Preface', in French (ed.), *supra* note 158, xvii, at xviii.

II. Human Rights and Climate Change Inundation

2. Climate Change Inundation and Human Rights: A Functional Account

2.1 Introduction

2.1.1 Why human rights?

The decision to approach climate change inundation from the perspective of human rights law and theory is a pragmatic one, reflecting the unique roles that human rights play in a world characterised by interdependence, inequality and upheaval.[164] First, human rights law provides a flexible, responsive framework for addressing emerging challenges like climate change inundation. While it is important that human rights standards retain their integrity and credibility, these standards must also be able to 'respond to the emergence of new threats to human dignity and well-being'.[165] By focusing on the protection of the fundamental interests of those at risk in *any* situation, international human rights law has the capacity to adapt to new threats in ways that other international legal regimes do not.[166] The Office of the UN High Commissioner for Refugees (UNHCR), for example, has made clear that those displaced by the impacts of climate change do not come under its remit, arguing instead that the international human rights regime provides a more suitable, flexible basis for addressing their protection needs.[167] The OHCHR agrees, describing the need to address climate change-related harms as 'a critical human rights concern and obligation under international law'.[168]

Second, human rights transcend national borders. While human rights law and practice traditionally emphasise the role of the domestic state in promoting and

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[164] For an alternative perspective — 'why *not* human rights?' — see Tully, 'Like Oil and Water: A Sceptical Appraisal of Climate Change and Human Rights', 15 *AILJ* (2008) 213. See also International Council on Human Rights Policy (ICHRP), *Climate Change and Human Rights: A Rough Guide* (2008), at 4 and 64; McInerney-Lankford, Darrow and Rajamani, *supra* note 95, at 39–40; McInerney-Lankford, 'Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance', in Gerrard and Wannier (eds), *supra* note 68, 195, at 231–233.

[165] Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607, at 609.

[166] Kälin and Schrepfer, *supra* note 73, at 24–44.

[167] Gorethy, 'UNHCR Backs off on Climate Refugees', *Post Courier* (8 January 2009). Compare OHCHR, *supra* note 13, at para.58. For an overview of the 'climate' or 'environmental refugee' debate, see Black, 'Environmental Refugees: Myth or Reality?', *New Issues in Refugee Research: Working Paper 34* (2001); McAdam, 'Refusing "Refuge" in the Pacific: (De)Constructing Climate-Induced Displacement in International Law', in É. Piguet, A. Pécoud and P. de Guchteneire (eds), *Migration and Climate Change* (2011) 102, at 117–119.

[168] OHCHR, *supra* note 13, at para.96 (see also para.71).

protecting the human rights of those within its territory, this 'territorial framing of rights is a paradigm under strain'.[169] On the one hand, states are not hermetically sealed but increasingly interdependent, and transnational factors like international trade agreements, joint military operations, atmospheric pollution and climate change play a significant role in the non-realisation of human rights.[170] On the other hand, there is a growing acknowledgement — or 'rediscovery'[171] — that human rights and responsibilities do not always stop at territorial borders,[172] and that international cooperation is necessary 'in promoting and encouraging respect for human rights'.[173] This extraterritorial aspect[174] is particularly crucial in the context of climate change inundation, the causes and consequences of which are not tied to any one state.

Third, rights in general — and human rights in particular — differ from values or goals insofar as they each have a right-holder, one or more duty-bearers or addressees, and a relatively well-defined scope that requires its addressees to act (or refrain from acting) in a certain way.[175] They therefore draw our attention to the actions that others are required to take to protect important human interests. Together with the extraterritorial aspect of human rights protection, this highlights the fact that states may have legal obligations or reasons for acting to address manifest failures of human rights protection — including failures arising from climate change inundation — in other states.

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[169] Langford *et al*., 'Introduction: An Emerging Field', in M. Langford *et al*. (eds), *Global Justice, State Duties* (2013) 3, at 3.

[170] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2013) 359, at 370–372; O. O'Neill, *Bounds of Justice* (2000), at 196–197; Young, 'Responsibility and Global Justice: A Social Connection Model', 23 *Social Philosophy and Policy* (2006) 102.

[171] Langford *et al*., *supra* note 169, at 8.

[172] See contributions to Langford *et al*. (eds), *supra* note 169; M. Gibney and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (2010); M. Salomon, *Global Responsibility for Human Rights* (2007); S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006).

[173] Article 1(3), Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119.

[174] This term is chosen for its widespread use in international human rights legal doctrine and practice (see Gibney, 'On Terminology: Extraterritorial Obligations', in Langford *et al*. (eds), *supra* note 169, 32, at 38–45) and is used throughout the thesis to capture the variety of ways in which human rights and associated obligations transcend political and territorial boundaries. However, it is not unproblematic, implying in certain cases that 'human rights are in principle territorial and only exceptionally apply outside a state's borders'. Langford *et al*., *supra* note 169, at 12.

[175] '[I]t is essential to a right that it is a demand upon others, however difficult it is to specify exactly which others' are required to act in which ways. H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1996), at 16.

Finally, human rights not only provide conceptual tools and legal mechanisms for grappling with the problems at hand, but also 'remind us that climate change is about suffering — about the human misery that results directly from the damage we are doing to nature'.[176] They bring the human face of climate change inundation into focus, urging us to pay particular attention to those who are already marginalised by poverty, powerlessness or environmental degradation. Human rights also require that affected populations — whether relocating or receiving — are 'informed, consulted and able to participate actively in relevant decisions and their implementation',[177] a demand that is central to the thesis from Chapter 4 onwards.

Today, it may well be a 'trite observation' to note that climate change has implications for the fulfilment of human rights.[178] However, this has not always been the case. The recognition of the OHCHR and Human Rights Council of the 'direct and indirect' impacts of climate change on a range of human rights marks a newfound boldness among states.[179] In his analysis of the Council's two resolutions on human rights and climate change,[180] Marc Limon observes a 'remarkable transformation of opinion' from one resolution to the next.[181] In 2008, many states had rejected any legal connection between human rights and climate change. By 2009, however, even developed states were prepared to recognise the 'significant threat posed by climate change to human rights'.[182]

This shift in opinion is due, in no small part, to the agitation of atoll island states, several of which have recently formed a Coalition of Atoll Island Nations on Climate Change to bolster their negotiating power.[183] In the 2007 Malé Declaration, island states called on the international community to recognise that 'climate change has clear and immediate implications for the full enjoyment of human rights'.[184] In doing so, islanders deliberately invoked the 'common language' of human rights to draw

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[176] Mary Robinson, cited in ICHRP, *supra* note 164, at iii. Compare Knox, 'Climate Change and Human Rights Law', 50 *Virginia Journal of International Law* (2009) 163, at 214.
[177] Nansen Initiative, *supra* note 96, at 5. Compare UNHCR, *supra* note 75, at para.4.
[178] McAdam, *supra* note 90, at 52.
[179] Human Rights Council Res. 10/4, *supra* note 132; OHCHR, *supra* note 13, at paras.20–41.
[180] Human Rights Council Res. 7/23, 28 March 2008; Human Rights Council Res. 10/4, *supra* note 132.
[181] Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change', 38 *Georgia Journal of International and Comparative Law* (2010) 543, at 567.
[182] See statements by the First Secretary of the Australian Permanent Mission to the UN at Geneva and the First Secretary of the Delegation of the US before the Human Rights Council, cited in *ibid*, at 569.
[183] ABC News, *supra* note 94.
[184] Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007).

attention to the impacts of climate change on their basic human interests.[185] While they initially encountered 'widespread opposition to the idea that there were any linkages whatsoever between human rights law and climate change law', atoll island states have more recently observed an emerging 'consensus on the nature and potential operationalisation of the linkage between human rights and climate change'.[186] The past few years have seen the UNFCCC explicitly acknowledge the human rights implications of climate change,[187] the Human Rights Council adopt the aforementioned resolutions and the OHCHR engage in widespread research into the impact of climate change on human rights,[188] indicating a growing recognition of the contribution of human rights theory, doctrine and practice to climate change-related issues.

2.1.2 What are human rights?

Before we can talk meaningfully about the role of human rights in the context of climate change inundation, however, we must have a clear idea of what we mean by 'human rights'. The conceptual breadth of recent work in this field reflects the multidimensional, cross-disciplinary nature of human rights. Some scholars are concerned with human rights as moral tools that protect our basic human interests in achieving wellbeing or pursuing a worthwhile life.[189] Others define human rights as political tools that place limits on state sovereignty and provide reasons for external intervention or secession.[190] Still others understand human rights as legal tools that have influenced and developed through the practice of states, international judicial and

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[185] Limon, interviewed on Carrick, *supra* note 100.

[186] Iruthisham Adam, speaking at an OHCHR Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Human Rights (23–24 February 2012). For a timeline of links between human rights and climate change, see McAdam, *supra* note 90, at 220–235; McInerney-Lankford, *supra* note 164, at 200–204.

[187] Preamble and Article 8, Cancun Agreements, Decision 1/CP.16, Report of the Conference of the Parties on its Sixteenth Session, UN Doc. FCCC/CP/2010/7/Add.1 (2010).

[188] OHCHR, *supra* note 13. See further Knox, 'Linking Human Rights and Climate Change at the United Nations', 33 *Harvard Environmental Law Review* (2009) 477. A petition before the Inter-American Commission on Human Rights has invoked international human rights law. S. Watt-Cloutier and Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights: Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (2005). The Commission chose not to hear the petition but held an oral hearing to which petitioners were invited. McInerney-Lankford, *supra* note 164, at 200.

[189] J. Griffin, *On Human Rights* (2008); J. Nickel, *Making Sense of Human Rights* (2007); Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?', 4 *Philosophy Compass* (2009) 938.

[190] Beitz, *supra* note 156; A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004); J. Rawls, *The Law of Peoples* (1999); Raz, 'Human Rights Without Foundations', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 321.

monitoring mechanisms, and non-state actors.[191] Some argue that there 'is no one truth to find';[192] others that a theory of human rights should capture all of the concept's salient dimensions — moral, political and legal.[193] This thesis cannot do justice to the diversity of ideas explored in this body of literature. Instead, it adopts the most promising theory for the purpose of understanding the content and development of international human rights law, and proceeds from there.

This thesis is concerned with the role human rights play in providing states[194] — acting alone or together through multilateral agreements or coordinating institutions — with reasons for acting to address the impacts of climate change inundation both within and across territorial borders. Drawing on Charles Beitz's 'practical' or functional account, it understands human rights as norms that provide states with reasons to address a manifest failure to protect important human interests elsewhere.[195] Beitz's account of human rights is chosen because of the attention it pays to this central function, as well as to the roles identified above: the responsive legal and conceptual framework that human rights provide, the emphasis they place on extraterritorial interaction, cooperation and responsibility, and the reasons they provide for remedial and preventive action.

Following a brief discussion of the impacts of climate change inundation on the human right to health in section 2.2, section 2.3 provides an overview of Beitz's account, which is keenly attuned to the implications of human rights protection not only for those whose rights are threatened but also for those who act to address this threat. According to Beitz, in order to be protected by a human right, an interest must (a) be recognisable as sufficiently important by most individuals, (b) face some grave, foreseeable and

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[191] P. Alston (ed.), *Non-State Actors and Human Rights* (2005); Gibney and Skogly (eds), *supra* note 172; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2010); D. Shelton and P. Carozza, *Regional Protection of Human Rights* (2013); C. Tomuschat, *Human Rights: Between Realism and Idealism* (2008).

[192] Griffin, 'Human Rights: Questions of Aim and Approach', 120 *Ethics* (2010) 741, at 751.

[193] Besson, *supra* note 157, at 215 and 211, note 1.

[194] The thesis focuses on states for several reasons. First, they are the primary right-holders and duty-bearers under international law. Second, they can act together through international organisations or multilateral agreements in a way that individuals and corporations are currently unable or unwilling to do. Third, while states do not directly cause all harmful emissions, they are responsible for regulating the greenhouse gas emitting activities of those within their jurisdiction. Fourth, emissions are more easily disaggregated at state than individual level. Fifth, states (usually) persist over time and space in a way that individuals and corporations do not. For an alternative perspective, see Caney, 'Environmental Degradation, Reparations, and the Moral Significance of History', 37 *Journal of Social Philosophy* (2006) 464, at 467–470.

[195] While human rights have other important functions (for example, protecting individuals against the abuse of state power), these are not the focus of this thesis.

remediable threat and (c) enjoy some effective means of protection that does not impose unreasonable burdens on those who act. In the event of a manifest failure to protect human rights domestically, it must also (d) be amenable to — and provide reasons for — corrective or remedial action by actors outside the state.

It is this fourth criterion that is of primary concern for this thesis. Using the example of the human right to health, section 2.3.3 introduces four sets of reasons for acting to address a manifest failure of human rights protection in another state. These are inspired by Beitz's account yet also depart from it, to the extent that they explicitly draw on international legal doctrine and practice. The first two sets (reasons of peremptory force and international cooperation) are general, applying to all or most members of the international community. They primarily provide normative weight rather than substantive content and must therefore be supplemented by additional reasons that narrow down the field of candidates who have reasons for acting. The third set (reasons of contribution) is primarily backward-looking, arising from states' contributions to the problem of climate change inundation, while the fourth set (reasons of capacity) is primarily forward-looking, addressing states' capacities to respond to this problem. While these reasons are considered in the abstract here, they reappear throughout the thesis in more concrete terms in relation to the different actions that states might take in response to climate change inundation, including modifying existing migration pathways (Chapter 3), ceding territory (Chapter 6), hosting a deterritorialized atoll island state (Chapter 7) or merging with an atoll island people (Chapter 8).

This chapter therefore outlines the legal and theoretical framework within which subsequent chapters operate. It provides a model for the creative application of a dynamic or unsettled area of law (in this case, human rights and self-determination) to an emerging and unprecedented issue (climate change inundation). While this model is primarily grounded in law, human rights theory provides additional resources for determining the role, content and scope of human rights in areas in which legal rules have not yet emerged or crystallised. This complementary relationship between law and theory is evident — but insufficiently developed[196] — in several recent papers on this issue, which invoke principles of justice, fairness and equality or draw attention to the underlying purpose and objective of legal rules and principles in their attempts to

[196] Willcox, 'Michael B. Gerrard and Gregory E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*', 25 *EJIL* (2014) 343, at 347–348.

address the problem of climate change inundation.[197]

2.2 Climate change inundation and the human right to health

While acknowledging that 'global warming will potentially have implications for the full range of human rights',[198] this chapter restricts its analysis to the human right to health,[199] one of a handful of human rights recognised by the OHCHR and Human Rights Council as facing the 'direct and indirect' impacts of climate change.[200] Both the IPCC and UNFCCC warn that climate change will have 'significant deleterious effects … on human health and welfare',[201] particularly among those who live in coastal or subsistence farming communities,[202] while the World Health Organisation (WHO) has argued that the basic determinants of health — including access to safe working conditions and adequate food, shelter, drinking water and sanitation facilities[203] — are threatened by climate change.[204]

Climate change inundation is already affecting the realisation of the human right to health in atoll island states.[205] As discussed in Chapter 1, unpredictable rainfall patterns and the saltwater contamination of the freshwater lens and agricultural land on which islanders depend will exacerbate malnutrition and diarrhoeal diseases. Increasingly severe storms and sea surges will cause injuries and hinder access to

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[197] For example, Burkett, *supra* note 90; Rayfuse, *supra* note 68; Stoutenburg, *supra* note 90; Wyman, *supra* note 90.

[198] OHCHR, *supra* note 13, at para.20. For a comprehensive summary, see Republic of the Maldives, *supra* note 21, at 18.

[199] Articles 7(b), 10(3) and 12, International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3 (1966). See also Article 5(e)(iv), Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195 (1965); Articles 12 and 14(2)(b), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13 (1979); Article 24, Convention on the Rights of the Child (CRC), 1577 UNTS 3 (1989); Articles 16(4), 22(2) and 25, Convention on the Rights of Persons with Disabilities (CRPD), A/RES/61/106 (2007); Articles 28, 43(1)(e), 45(1)(c) and 70, Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), A/RES/45/158 (1990).

[200] Others include rights to life, an adequate standard of living and self-determination. Human Rights Council Res. 10/4, *supra* note 132; OHCHR, *supra* note 13, at paras.20–41.

[201] Article 1(1), UNFCCC, *supra* note 102.

[202] Confalonieri *et al.*, 'Human Health', in Parry *et al.* (eds), *supra* note 11, 391, at 393.

[203] Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment 14 (Article 12): The Right to the Highest Attainable Standard of Health', UN Doc. E/C.12/2000/4 (2000), at paras.4 and 11–12; Committee on the Elimination of Discrimination Against Women, 'General Recommendation 24 (Article 12): Women and Health', UN Doc. A/54/38/Rev.1 (1999); P. Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc. E/CN.4/2003/58 (2003), at paras.10–36.

[204] WHO, *Protecting Human Health from Climate Change* (2009). Compare P. Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc. A/62/214 (2007), at para.102.

[205] Nurse *et al.*, *supra* note 11, at 1624–1625.

health services by destroying healthcare and transport infrastructure. Higher temperatures may also prompt an increase in food- and vector-borne diseases.

The impacts of climate change inundation also threaten the realisation of other human rights with which the right to health is 'inextricably related',[206] including rights to freedom from hunger[207] and access to a safe and adequate water supply.[208] Extreme weather events and flooding threaten the availability and distribution of food, coastal erosion, salinization and changing rainfall patterns threaten subsistence agricultural production, and changes in sea temperatures threaten local fish stocks.[209] Many atoll island states also have a limited freshwater supply, which is 'likely to be seriously compromised' by the cumulative effects of climate change inundation.[210] Extreme weather events will temporarily disrupt water supplies by damaging storage tanks or desalination plants, while sea level rise and saltwater contamination will reduce the capacity of the freshwater lens, threatening islanders' long-term access to water.[211]

Atoll island states — all of which are developing or least developed states — are required to take 'deliberate, concrete and targeted steps' towards the full realisation of the human right to health, 'even where the available resources are demonstrably inadequate' for reasons of poverty and inequality.[212] This requires them to (at least) create and maintain a basic public healthcare system and ensure equitable access to essential medicines and adequate food, water, shelter, and sanitation.[213] However, as observed in Chapter 1, island states' capacity to meet even this minimum level of provision in the face of climate change inundation is hampered by two additional constraints. First, 'the effects and risk of climate change are significantly higher in low-

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[206] CESCR, *supra* note 203, at para.3.

[207] Article 11(2), ICESCR, *supra* note 199. See also Article 24(2)(c), CRC, *supra* note 199; Articles 25(f) and 28(1), CRPD, *supra* note 199; CESCR, 'General Comment 12 (Article 11): The Right to Adequate Food', UN Doc. E/C.12/1999/5 (1999), at paras.6–13.

[208] GA Res. 64/292, 3 August 2010; Article 14(2)(h), CEDAW, *supra* note 199; Article 24(2)(c), CRC, *supra* note 199; Article 28(2)(a), CRPD, *supra* note 199; CESCR, *supra* note 203, at paras.4 and 11–12; CESCR, 'General Comment 15 (Articles 11 and 12): The Right to Water', UN Doc. E/C.12/2002/11 (2003), at paras.20–29.

[209] Mimura *et al.*, *supra* note 16, at 689; Republic of the Maldives, *supra* note 21, at 49; Tuvalu Ministry *supra* note 20, at 21, 24 and 27–28.

[210] Mimura *et al.*, *supra* note 16, at 692.

[211] Republic of the Maldives, *supra* note 21, at 55.

[212] CESCR, *supra* note 203, at paras.11 and 30. Compare OHCHR, *supra* note 13, paras.77–78. Regarding additional steps taken in response to the impacts of climate change inundation on the right to health, see Republic of the Maldives Ministry of Health, *Quality Health Care: Bridging the Gaps. Health Master Plan 2006-2015* (2006); Republic of the Maldives, *supra* note 21, at 53–54.

[213] CESCR, *supra* note 203, at para.43.

income countries',[214] particularly those with a substantial proportion of low-lying coastal territory. Second, existing disadvantages like poverty, isolation and resource scarcity place constraints on islanders' adaptive capacities. As Stephen Humphreys observes, a 'vicious circle links precarious access to natural resources, poor physical infrastructure, weak rights protections and vulnerability to climate-related harms'.[215]

As climate change inundation places 'an additional burden on the resources available to states, economic and social rights are likely to suffer'.[216] Many of the long-term measures required to adapt to rising sea levels, saltwater contamination and coastal erosion will be out of the reach of atoll island states, for whom 'the cost of adopting and implementing adaptation options is likely to be prohibitive'.[217] Nor, given their relative size and capacity, can they effectively contribute to climate change mitigation.[218] As Chapter 1 made clear, atoll island states also 'face the prospect of loss of significant amounts of territory to sea-level rise and inundation, and some face the prospect of complete submersion',[219] raising the question of whether *in-situ* adaptation is even possible in the long term. Should the territory of an atoll island state become uninhabitable, its capacity to fulfil its citizens' human right to health will be severely compromised.

Building on the example of the human right to health, the following sections of this chapter set out a functional account of human rights as legal norms that provide states with reasons to respond to a manifest failure to protect important human interests at the domestic level, including as a result of climate change inundation.

2.3 A functional account of human rights

2.3.1 The extraterritorial dimension of human rights protection

This thesis is concerned with the role that human rights play in providing states with reasons for acting to address the impacts of climate change inundation. It adopts —

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[214] OHCHR, *supra* note 13, at para.84.

[215] Humphreys, 'Introduction', in S. Humphreys (ed.), *Human Rights and Climate Change* (2010) 1, at 1–2.

[216] OHCHR, *supra* note 13, at para.75.

[217] Mimura *et al.*, *supra* note 16, at 706. Compare Nurse *et al.*, *supra* note 11, at 1638. Even where they are affordable, many adaptation strategies will redirect resources away from existing public services and infrastructure. Republic of the Maldives, *supra* note 21, at 59–60.

[218] Atoll island states 'can't develop a feedback mechanism on their own that effectively reduces the emissions that cause the problem'. Barnett and Campbell, *supra* note 12, at 109. Compare Nurse *et al.*, *supra* note 11, at 1641.

[219] UN Secretary-General, *supra* note 74, at para.71.

with some modifications — Charles Beitz's 'practical' or functional account of 'human rights as they actually operate in the world today'.[220] For Beitz, human rights are 'a distinctive class of norms' that regulate the behaviour of states and others by providing *pro tanto* reasons for remedial or preventive action at both domestic and international levels.[221] Their role is to 'protect urgent individual interests against [the] predictable dangers' (or, in Henry Shue's terms, 'standard threats')[222] that arise in a state-centric world.[223]

According to Beitz, in order to earn the protected status of a human right, a human interest must satisfy a series of normative and empirical tests that speak to both the 'demand side' (the beneficiary) and the 'supply side' (the actor(s) with reasons to respond).[224] It must (a) be recognisable as sufficiently important or urgent within a wide range of normal lives; (b) face some grave and reasonably foreseeable threat;[225] and (c) enjoy some effective, permissible means of social, political or legal protection that does not impose unreasonable burdens on those who act.[226]

Thinking back to the previous section, the human right to health satisfies each of these criteria. Its inclusion in a wide range of international legal instruments demonstrates its importance to human life across the world. An effective means of institutional protection — usually in the form of an accessible health system and basic public infrastructure — has been designed and implemented across many states.[227] And the impacts of climate change inundation pose a grave, foreseeable threat to the enjoyment of the human right to health in atoll island states.

However, as also observed above, atoll island states may themselves lack the resources to address the threat posed by climate change inundation to islanders' human rights. Beitz therefore includes an additional criterion: in the event of a manifest failure of

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[220] Beitz, *supra* note 156, at 38. On the development of international human rights law and practice, see Kälin and Künzli, *supra* note 191, at chs.1–2; Tomuschat, *supra* note 191, at chs.1–2.

[221] Beitz, *supra* note 156, at 9.

[222] Shue, *supra* note 175, at ch.1. Compare Nickel, *supra* note 189, at 70–74.

[223] Beitz, *supra* note 156, at 109. Compare J. Donnelly, *Universal Human Rights in Theory and Practice* (2013), at 86–87 and 97–99.

[224] Beitz, *supra* note 156, at 65.

[225] From a legal perspective, this criterion might be understood in terms of an obligation of due diligence requirement, which requires that the relevant actors 'knew or ought to have known at the time of the existence of a real and immediate risk' to the enjoyment of some right. *Osman v. UK*, ECHR (1998), at para.116. Compare *Corfu Channel*, ICJ Reports (1949) 4, at 18.

[226] Beitz, *supra* note 156, at 110–111. Compare Nickel's six-part schema and Raz's three-part schema for justifying specific human rights. Nickel, *supra* note 189, at ch.5; Raz, *supra* note 190, at 336.

[227] On national implementation of the human right to health, see CESCR, *supra* note 203, at paras.53–62.

human rights protection at the domestic level, an interest must (d) be amenable to — and provide reasons for — corrective or remedial action by actors outside of the state.[228]

This idea of a 'manifest failure' of human rights protection is not Beitz's but is used throughout the thesis to avoid the often futile attempt to establish intention or liability on the part of the domestic state.[229] After all, 'the applicability of extraterritorial obligations of fulfilment should not be conditioned on the reasons for non-compliance by the domestic state'.[230] The effect of an act or omission on the enjoyment of human rights is just as relevant in triggering states' extraterritorial reasons for acting as the intent behind it.[231]

This two-tiered model of human rights protection is reflected in state practice, legal doctrine and the infrastructure of the human rights system itself.[232] As is widely accepted by lawyers and theorists alike, primary responsibilities for ensuring the realisation of human rights lie with the domestic institutions of states.[233] State institutions are required to respect human rights, protect them against non-state actors within their jurisdiction and control, and ensure their fulfilment where necessary.[234] However, complementary responsibilities also fall on actors outside the state.[235] These

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[228] Beitz, *supra* note 156, at 140–141.

[229] The term comes from the 2005 World Summit Outcome document, in which the international community recognises a responsibility to take collective action 'where national authorities are *manifestly failing* to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. GA Res. 60/1, 24 October 2005, at para.139 (emphasis added).

[230] Vandenhole and Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide', in Langford *et al.* (eds), *supra* note 169, 332, at 339. On the possibility that external states may become the '*de facto* primary duty-bearers', see 339–340. Compare Wenar, 'Responsibility and Severe Poverty', in T. Pogge (ed.), *Freedom from Poverty as a Human Right* (2007) 255, at 265 and 272.

[231] Salomon, *supra* note 172, at 183. Compare Article 1, CEDAW and Article 1(1), CERD, both *supra* note 199.

[232] See Kälin and Künzli, *supra* note 191, at ch.6. One area in which domestic and extraterritorial responsibilities have been elaborated on is that of the 'responsibility to protect'. See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001); GA Res. 60/1, *supra* note 229, at paras.138–139; UN Secretary-General, *Implementing the Responsibility to Protect*, A/63/677 (2009).

[233] This is accepted even among those who advocate the recognition of 'extraterritorial' obligations. See generally Langford *et al.*, *supra* note 169, at 22–23. Compare Article 14(4), Optional Protocol to the ICESCR, UN Doc. A/RES/63/117 (2008).

[234] See generally M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), at ch.5. See also Eide, 'Universalisation of Human Rights versus Globalisation of Economic Power', in F. Coomans *et al.* (eds), *Rendering Justice to the Vulnerable* (2000) 99; Shue, *supra* note 175, at ch.2; CESCR, *supra* note 207, at para.15; CESCR, *supra* note 203, at paras.33–37. In the context of climate change inundation, see McInerney-Lankford, *supra* note 164, at 209–228.

[235] Vandenhole and Benedek describe the obligations of external states as 'complementary' rather than 'secondary', arguing that 'a state's extraterritorial obligations are always present'. Vandenhole and Benedek, *supra* note 230, at 335–336. Others divide responsibilities into 'primary' and 'secondary'. M.

external actors are required to hold each state accountable for meeting its domestic responsibilities, assist it in meeting these responsibilities where it lacks the necessary capacity or resources, and protect the human rights of its inhabitants where there is a manifest failure to do so. Thus, rather than halting at the boundaries of a community, human rights are recognised as 'appropriate objects of international action and concern'.[236]

This is particularly evident with regard to those legal norms characterised as *jus cogens* or *erga omnes*, which reach beyond territorial boundaries to address issues that are 'the concern of all States'.[237] It is also applicable in the case of human rights more generally. States parties' obligations under the International Covenant on Civil and Political Rights (ICCPR) extend to those individuals 'within its territory and subject to its jurisdiction',[238] including those 'within the power or effective control of that state party, even if not situated within [its] territory'.[239] States parties to the ICESCR, which does not include any jurisdictional limitations,[240] are also required to 'take steps, individually and through international assistance and cooperation', towards the full realisation of the rights set out in the Covenant.[241] These extraterritorial obligations are reinforced by the authoritative interpretation of human rights treaty bodies and UN Special Rapporteurs.[242]

Craven, *The International Covenant on Economic, Social and Cultural Rights* (1995), at 144; J. Ziegler, *Report of the Special Rapporteur on the Right to Food*, UN Doc. E/CN.4/2005/47 (2005), at paras.56–59.

[236] Nickel, *supra* note 189, at 13–14. On human rights as matters of international concern, see L. Henkin, *International Law: Politics, Values and Functions* (1989), at 215; H. Lauterpacht, *International Law and Hunan Rights* (1950), at 61–72.

[237] *Barcelona Traction*, *supra* note 161, at para.33.

[238] Article 2(1), International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1966).

[239] Human Rights Committee (HRC), 'General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para.10. Knox argues that the 'effective control' test is satisfied in the case of atoll island populations displaced by climate change inundation. Knox, *supra* note 176, at 201–206.

[240] '[A]bsent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect'. Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 233, at 251. Craven cites *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (1996) 595, at para.31.

[241] Article 2(1), ICESCR, *supra* note 199.

[242] CESCR, 'General Comment 3 (Article 2(1)): The Nature of States Parties' Obligations', UN Doc. E/1991/23 (1990), at paras.13–14; CESCR, *supra* note 207, at para.36; CESCR, *supra* note 203, at para.30; HRC, *supra* note 239, at para.10; P. Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc. A/HRC/7/11 (2008), at paras.59–62; Ziegler, *supra* note 235, at paras.44–59.

These complementary levels of responsibility are echoed in the context of climate change law and policy. According to the Nansen Principles on Climate Change and Displacement, 'states have a primary duty to protect their populations' through legislative and policy-based mechanisms.[243] However, '[w]hen national capacity is limited, regional frameworks and international cooperation should support action at [the] national level … [by] assisting and protecting people and communities affected by such displacement'.[244] Similarly, the OHCHR observes that, while 'individuals rely first and foremost on their own states for the protection of their human rights', '[c]limate change can only be effectively addressed through cooperation of all members of the international community'.[245]

It is this element of extraterritorial concern and responsibility — reflected in Beitz's fourth criterion — that is 'perhaps the most distinctive feature' of contemporary human rights law and practice[246] and the most significant in addressing global issues such as climate change inundation. It is therefore the primary focus of this chapter and of the thesis itself.

2.3.2 Reasons to act, not just permission to intervene

A second reason for adopting Beitz's account of human rights is his understanding of these extraterritorial reasons for acting as not just entitlements to intervene — as John Rawls and Joseph Raz have argued[247] — but also as positive demands for action. For Rawls, for example, respect for basic human rights (alongside other requirements) guarantees a society membership 'in good standing in a reasonably just Society of Peoples', free from 'justified and forceful intervention'.[248] This functional account of human rights as constraints on sovereignty is echoed in their use in justifying international humanitarian intervention,[249] which implies that, 'where human rights are concerned, state sovereignty provides no right of exclusivity'.[250]

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[243] Nansen Principle II, Norwegian Refugee Council, *supra* note 78, at 5.
[244] Nansen Principle IV, *ibid*.
[245] OHCHR, *supra* note 13, at paras.72 and 84. The OHCHR therefore makes clear that 'states' duties concerning climate change … are not limited territorially.' Knox, *supra* note 188, at 478.
[246] Beitz, *supra* note 156, at 115.
[247] See, for example, Rawls, *supra* note 190; Raz, *supra* note 190.
[248] Rawls, *supra* note 190, at 79–80.
[249] See, for example, ICISS and UN Secretary-General, both *supra* note 232.
[250] Salomon, *supra* note 172, at 70.

However, while the decision to conceptualise human rights in terms of their function is instructive, this narrow understanding of the function of human rights — as standards that define the boundary between reasonable pluralism and justified intervention — overlooks many of the roles that human rights actually play in international law and practice.[251] As Raz himself admits,[252] a failure to protect human rights may invite or demand a range of responses, depending on its nature and severity. These are not limited to coercive military intervention or economic sanctions but also include holding states to account through human rights treaty body mechanisms,[253] providing financial or technical assistance, regulating the behaviour of transnational corporations and reforming those external policies and institutions that obstruct a state's capacity to protect and fulfil the human rights of its citizens, in order to create a 'social and international order in which the rights and freedoms' set out in international human rights law can be realised.[254] Human rights are not merely concerned with coercive intervention or regulation but with motivating legal, political and social change. They 'stand for a certain ambition about how the world might be'.[255]

Moreover, in the case of climate change inundation, there is no barrier of reasonable toleration or state sovereignty to dismantle, undermining the assumptions often made in human rights theory, doctrine and practice. Developed states are not 'saviours' intervening to protect the voiceless victims of a 'savage' dictator, but are themselves responsible (at least in part) for the threat posed by climate change inundation to the populations of atoll island states.[256] The central question, therefore, is not, 'On what basis is the international community justified in intervening to rectify domestic human rights abuse?' It is, rather, 'What reasons does the international community have for proactively responding to the threat posed by climate change inundation to the human rights of atoll island populations?' As the Maldives explains in its submission to the Human Rights Council:

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[251] Beitz, *supra* note 156, at 100–102; Beitz, 'Human Rights and the Law of Peoples', in D. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (2004) 193, at 203; Griffin, *supra* note 189, at 22–24.

[252] Raz, *supra* note 190, at 328.

[253] In the context of climate change inundation, see McInerney-Lankford, *supra* note 164, at 201–202.

[254] Article 28, Universal Declaration of Human Rights (UDHR), GA Res. 217A (III), 10 December 1948.

[255] Beitz, *supra* note 156, at 40. As these examples show, 'it is simply untrue to say that [human rights] are mainly about intervention using force and coercion'. Nickel, *supra* note 189, at 101.

[256] Yamamoto and Esteban apply Mutua's allegory to the case of climate change inundation. Mutua, 'Savages, Victims and Saviours: A Metaphor of Human Rights', 42 *Harvard International Law Journal* (2001) 201; Yamamoto and Esteban, *supra* note 26, at 242–244.

> 'The conclusion that climate change undermines … human rights in the Maldives and in all other vulnerable countries around the world; and the related fact that the global character of the problem makes it impossible for individual states like the Maldives to promote and protect threatened rights on their own; in turn raises the question of what actions the international community should take to respond.'[257]

For these reasons, a broader functional account of human rights, like Beitz's, that recognises their role in creating an entitlement to intervene *and* providing reasons to act is essential.[258] Beitz, taking a 'broader protective and restorative' approach than either Rawls or Raz, understands a failure to protect human rights as not just a trigger for intervention but as 'a cause for international concern',[259] providing external states with reasons to act in a range of different ways. This broad functional account provides both a more accurate reflection of existing human rights doctrine and practice and a more useful set of tools for addressing the issue of climate change inundation.

2.3.3 Reasons for and against acting

A third reason for adopting Beitz's account lies in his insistence that we pay attention to the needs and interests of not only those whose human rights are under threat but also those who respond to this threat. This is particularly important when applying human rights law to an issue to which it has not previously been applied, thereby generating new and potentially burdensome demands on those who act. As James Nickel argues, any justification for a human right must 'look in two directions: backward to the most fundamental interests of persons as the source of claims to restraint, protection and assistance; and forward to institutions, costs and resources'.[260] In the event of a domestic failure to protect human rights from the impacts of climate change inundation, are there other states with 'sufficient reason to act', given that the measures they are required to take may be more or less burdensome?[261]

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[257] Republic of the Maldives, *supra* note 21, at 83–84.

[258] For an even stronger statement of this argument, see Buchanan, *supra* note 190, at 267.

[259] Besson, 'Human Rights *qua* Normative Practice: *Sui Generis* or Legal?', 1 *Transnational Legal Theory* (2010) 127, at 128. Compare Henkin, *supra* note 236, at 215; Lauterpacht, *supra* note 236, at 61–72.

[260] Nickel, *supra* note 189, at 68.

[261] Beitz, *supra* note 156, at 197. Compare Raz, 'Human Rights in the Emerging World Order', 1 *Transnational Legal Theory* (2010) 31, at 36.

In the event of such a failure, identifying others with reasons to act is difficult.[262] International human rights law offers no consistent method for identifying and allocating international responsibilities for responding to a manifest failure to protect human rights elsewhere.[263] Yet this is not to say that human rights cannot be action guiding.[264] Even where international law does not provide a clear basis for determining which actors have which reasons for taking which actions in all cases, this does not prove that such an allocation is unfeasible due to (for example) resource constraints, nor that specific roles for specific actors cannot be identified on the facts of a given case.[265] Indeed, we must attempt such an allocation if we are to avoid a situation in which everyone's concern becomes no one's responsibility. As David Miller points out, 'an undistributed duty … to which everybody is subject is likely to be discharged by nobody'.[266] What is required are relatively 'specific assignments of responsibility, not diffuse ones'.[267] In order to achieve this, we must begin to identify (a) reasons for acting and (b) the actors to which they apply.

Beitz's is a pluralist account: 'we have no reason,' he argues, 'to assume *ex ante* that human rights protect a single value (on the demand side) or that they count in favour of action for a single typical reason (on the supply side)'.[268] States may have legal, financial or moral reasons for acting that relate to the urgency of the interest at risk, the likelihood, nature and cause of the foreseeable threat, the cost of the actions that must be taken, their available resources or their contribution to the problem.[269] Conversely,

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[262] Beitz, *supra* note 156, at 163–167; Beitz, *supra* note 251, at 208–209.

[263] De Schutter *et al*., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', 43 *HRQ* (2012) 1084, at 1149. However, de Schutter *et al*. provide examples of burden-sharing mechanisms in other areas of international law, including Article 11(2), Kyoto Protocol to the UNFCCC, 37 ILM 22 (1998).

[264] However, see M. Cranston, *What are Human Rights?* (1973), at ch.8; O'Neill, *supra* note 170, at 101–105; O'Neill, 'The Dark Side of Human Rights', 82 *International Affairs* (2005) 427, at 428 and 430.

[265] Beitz, *supra* note 156, at 165–166.

[266] D. Miller, *National Responsibility and Global Justice* (2007), at 98–99. O'Neill puts this in stronger terms. 'We normally regard claims or entitlements that nobody is obligated to respect and honour as null or void'. O'Neill, *supra* note 264, at 430.

[267] Miller, 'Distributing Responsibilities', 9 *Journal of Political Philosophy* (2001) 453, at 457, note 5.

[268] Beitz, *supra* note 156, at 160. In defence of a pluralist account of human rights and responsibilities, see *ibid*; Nickel, *supra* note 189, at 53–54; Tasioulas, 'Taking Rights out of Human Rights', 120 *Ethics* (2010) 647, at 663–664. For similar pluralist schemas, see Beitz and Goodin, 'Introduction', in C. Beitz and R. Goodin (eds), *Global Basic Rights* (2009) 1, at 16–17; R. Goodin, *Protecting the Vulnerable* (1985), at 117–135; Salomon, *supra* note 172, at 193; Vandenhole and Benedek, *supra* note 230, at 339–346; Young, *supra* note 170, at 127–130. In the context of climate change, see Caney, 'Cosmopolitan Justice, Responsibility and Global Climate Change', *Leiden Journal of International Law* 18 (2005) 747, at 769–772; D. Moellendorf, *Cosmopolitan Justice* (2001), at 97–100; Shue, 'Global Environment and International Inequality', 75 *International Affairs* (1999) 531.

[269] Beitz, *supra* note 156, at 140 and 198; Beitz, *supra* note 251, at 208; Nickel, *supra* note 189, at ch.4; Shue, 'Mediating Duties', 98 *Ethics* (1988) 687, at 700.

states might have reasons for *not* acting to address the non-realisation of human rights where taking effective action would be unfeasible, impermissible or impose unreasonably high burdens on those they represent.[270] Scarcity of resources or conflicts between human rights, for example, may constrain the scope and nature of the actions that others are required to take. After all, 'we should not forget that for the duty-bearers too this is the only life they will live'.[271]

This section outlines the legal and moral foundations for four sets of reasons for acting that reappear throughout the thesis, using the example of the human right to health to illustrate their application. It takes inspiration yet departs from Beitz's account insofar as the reasons it identifies are primarily grounded in law, thereby eschewing Beitz's scepticism about law's deliberative and generative capacities.[272] One of the recurring claims of the thesis is that international law — particularly when understood in terms of not only strict legal rules but also broad guiding principles that seek to achieve underlying aims of fundamental importance[273] — has the capacity to evolve in response to emerging challenges. However, legal doctrine and practice often lacks clarity or specificity, particularly when it comes to identifying states' obligations to respond to manifest failures of human rights protection elsewhere. Thus, while the reasons for acting introduced below and developed throughout the thesis are grounded in law, the conceptual and analytical tools of human rights theory may provide further clarity where existing legal rules and principles are vague or ambiguous.

Reasons of peremptory force

First, all states have reasons for acting that are grounded in peremptory norms of general international law, many of which are closely tied to human rights doctrine. Certain norms — including the right to self-determination and prohibitions against aggression, slavery, genocide and racial discrimination — have been recognised both

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[270] Nickel, *supra* note 189, at 62. On the burdens that fall on the populations of responsible states, see Crawford and Watkins, 'International Responsibility' in Besson and Tasioulas (eds), *supra* note 190, 283; Miller, 'Holding Nations Responsible', 114 *Ethics* (2004) 240; Murphy, 'International Responsibility', in Besson and Tasioulas (eds), *supra* note 190, 299, at 301–303; Stilz, 'Collective Responsibility and the State', 19 *Journal of Political Philosophy* (2011) 190.

[271] Shue, *supra* note 175, at 165. Compare Pogge, 'Shue on Rights and Duties', in Beitz and Goodin (eds), *supra* note 268, 113, at 125–130.

[272] Beitz refers to law briefly and with suspicion, arguing that legal rules cannot provide adequate 'space for reasonable disagreement' about the duties that human rights impose. Beitz, *supra* note 156, at 209–210. However, see Beitz, *supra* note 251, at 193.

[273] See O. Schachter, *International Law in Theory and Practice* (1991), at 21.

as *jus cogens* or peremptory norms of international law[274] and as generating obligations *erga omnes*.[275] They are therefore 'the concern of all States' and a source of 'obligations … towards the international community as a whole', regardless of any prior legal, political or economic ties between actors.[276] This first set of reasons therefore derives from a general recognition that a grave breach of certain norms of fundamental importance[277] to the international community might 'entail different principles of responsibility' to those that would otherwise arise.[278]

However, these reasons apply only where a legal norm with *jus cogens* or *erga omnes* status is implicated and are therefore not applicable in the case of individual human rights to health or an adequate standard of living. And, while they carry substantial legal and moral weight, they fail to identify those with particular reasons for acting. Without some further consideration of other, more specific reasons for acting, it is unlikely that reasons arising from the importance of the interest alone — even where it is recognised as a legal norm with *jus cogens* or *erga omnes* status — will provide sufficient grounds for action or for identifying those who should act.

Reasons of international cooperation

The second set of reasons for acting is grounded in the obligations of international assistance and cooperation that fall on UN member states[279] and states parties to the ICESCR[280] and other relevant treaties.[281] According to the Maastricht Principles on

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[274] Articles 53 and 64, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969); ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', II *Yearbook of the ILC* (2001) 26, at 85, para.5; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at para.190.

[275] *Barcelona Traction*, *supra* note 161, at paras.33–34; *East Timor*, *supra* note 160, at para.29; *Genocide*, *supra* note 240, at para.31. On the relationship between *jus cogens* and *erga omnes* norms, see C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 139–151.

[276] *Barcelona Traction*, *supra* note 161, at para.33.

[277] According to the ICJ, a principle of law is recognised as being of *erga omnes* character in virtue of 'the importance of the rights involved'. *Ibid*, at para.33.

[278] Nollkaemper and Jacobs, *supra* note 170, at 372–373 (see also 416–417).

[279] Articles 1(3), 55 and 56, UN Charter, *supra* note 173. For the argument that Articles 55 and 56 of the Charter impose a binding legal obligation on states, see CESCR, *supra* note 242, at para.14; I. Brownlie, *Principles of Public International Law* (2008), at 296–297; Lauterpacht, *supra* note 236, at 147–148. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276*, ICJ Reports (1971) 16, at paras.129 and 131. Contrast with H. Kelsen, *The Law of the United Nations* (1950), at 99–100; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), at 212; Wolfrum, 'Article 56', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002) 941, at 942–944.

[280] Article 2(1) (see also Articles 11(1), 11(2), 15(4), 22 and 23), ICESCR, *supra* note 199. See further CESCR, *supra* note 207, at para.37; CESCR, *supra* note 203, at para.39. There are 162 states parties to the ICESCR. While the US, a major carbon emitter, has not ratified the ICESCR, it is a signatory and must therefore 'refrain from acts which would defeat the object and purpose of the Covenant'. Article 18, Vienna

Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ('Maastricht Principles'), wherever a state 'is in a position to exercise decisive influence or to take measures to realise economic, social and cultural rights extraterritorially', it is required to do so.[282] Obligations of international cooperation extend beyond the 'extraterritorial' scope of a state's jurisdiction,[283] both spatially and temporally, requiring states to take proactive steps towards the full realisation of economic, social and cultural rights internationally. For this reason, they have been described as 'obligations of a global character'.[284]

Judge Weeramantry has observed that, in recognising the right to health set out in the ICSECR, states have 'recognise[d] the right of "everyone" and not merely of their own subjects'.[285] States that are in a position to assist should, where resources are available, 'facilitate access to essential health facilities, goods and services in other countries'.[286] In addition to providing direct assistance, states should also take the right to health into consideration in drafting and implementing legal instruments, shaping the policies of international financial institutions and imposing sanctions.[287]

However, while each state party to the ICESCR is required to engage in international cooperation 'to the maximum of its available resources',[288] it remains unclear what this means in practice.[289] States also tend to have 'significant discretion' in deciding where to direct their assistance and cooperation.[290] There is no binding obligation on state A

Convention on the Law of Treaties, *supra* note 274. On international cooperation, see Langford, Coomans and Gómez Isa, 'Extraterritorial Duties in International Law', in Langford *et al*. (eds), *supra* note 169, 51; Salomon, *supra* note 172, at ch.2; Skogly, *supra* note 172, at 70–71 and 152.

[281] For example, Articles 23(4) and 28(3), CRC, *supra* note 199; Articles 22 and 28, UDHR, *supra* note 254.

[282] Principle 9(c), Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (28 September 2011).

[283] Typically understood as the sphere in which it exercises 'effective control'. See, for example, HRC, *supra* note 239, at para.10; *Nicaragua*, *supra* note 274, at paras.110–115.

[284] Principle 8(b), Maastricht Principles, *supra* note 282.

[285] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports (1996) 66, Judge Weeramantry (Diss. Op.), at 144.

[286] CESCR, *supra* note 203, at paras.39 and 45.

[287] *Ibid*, at paras.39 and 41.

[288] Article 2(1), ICESCR, *supra* note 199. Compare CESCR, *supra* note 242, at para.13.

[289] Some suggest that we might appeal to states' commitments to meeting a minimum threshold of 0.7% GNP in official development assistance. Vandenhole and Benedek, *supra* note 230, at 342–349 and 364. See also Salomon, 'Deprivation, Causation and the Law of International Cooperation', in Langford *et al*. (eds), *supra* note 169, 259, at 285–286.

[290] Khalfan, 'Division of Responsibility Amongst States', in Langford *et al*. (eds), *supra* note 169, 299, at 321–322. See also CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant', UN Doc. E/C.12/2007/1 (2007), at paras.11–12; Vandenhole and Benedek, *supra* note 230, at 346.

to provide specific assistance to state B, nor to provide assistance to *all* right-holders.[291] In a world in which deprivation and injustice are frighteningly common, states will inevitably have some freedom in deciding which harms to prioritise. Yet the idea that the requirement to cooperate internationally is 'at best, a generic one that attaches to the international community'[292] is not sufficient in this context; it cannot help us to solve the problem of allocation identified earlier. If we are to narrow down the field of candidates with reasons to act to address the harms of climate change inundation, we must look further.

Reasons of contribution

A third set of reasons derives from a state's contribution to the problem at hand.[293] Even where direct causal responsibility is not easily established, evidence of prior environmental, economic, legal or political interaction may enable us to identify those with reasons for acting in a given situation. Where states A and B establish a relationship in which B ends up significantly worse off, this may provide reasons for state A to act to address failures of human rights protection in state B.[294]

The Committee on Economic, Social and Cultural Rights (CESCR) 'recognises the formidable structural and other obstacles resulting from international and other factors … that impede the full realisation' of the human right to health in many states.[295] In identifying extraterritorial reasons for addressing a failure to protect the human right to health, we might therefore consider contributing factors like the role of state A in sustaining an international system of intellectual property rights that impacts upon the affordability of medicines for diseases of poverty in state B, or the decision of state C to impose embargoes that restrict the availability of medical supplies in state D.[296] In the

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[291] The drafting history of the ICESCR indicates that certain developed states were reluctant to recognise a legal obligation to provide financial assistance to all or any specific states. Craven, 'The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights', in M. Baderin and R. McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (2007) 71, at 77. Compare Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate as Seen Through the Lens of the Millennium Development Goals', 27 *HRQ* (2005) 755, at 777.

[292] Alston, *supra* note 291, at 777.

[293] L. May, *Shared Responsibility* (1996), at 118; Miller, *supra* note 267, at 456; Nollkaemper and Jacobs, *supra* note 170, at 394; Salomon, *supra* note 172, at 193; Salomon, *supra* note 289, at 282; Vandenhole and Benedek, *supra* note 230, at 346 and 362–363; Wenar, *supra* note 230, at 268–269; Young, *supra* note 170, at 102–103.

[294] Beitz, *supra* note 156, at 171–172; Beitz and Goodin, *supra* note 268, at 16–17. See further Pogge, 'Are We Violating the Human Rights of the World's Poor?', 14 *Yale Human Rights and Development Law Journal* (2012) 1, at 16–19; Shue, *supra* note 175, at 55.

[295] CESCR, *supra* note 203, at para.5. See further GA Res. 65/95, 10 February 2011.

[296] CESCR, *supra* note 203, at para.41.

case of climate change inundation, we might take into account each state's contribution to overall greenhouse gas emissions, noting the correlation between high atmospheric concentrations of carbon dioxide and climate change-related harms like rising sea levels, changing rainfall patterns and extreme weather events, all of which adversely affect the health and wellbeing of atoll island populations.

Reasons of capacity

However, in concentrating on the question of 'Who is responsible for bringing this bad situation about?', we fail to ask, 'Who is best placed to put it right?'[297] The fourth set of reasons therefore derives from a state's capacity to effectively respond to human rights harms elsewhere.[298] The CESCR has consistently emphasised reasons of capacity. It insists that, while all states have obligations of international cooperation, a 'special responsibility' to provide international assistance and cooperation is 'particularly incumbent on states parties and other actors in a position to assist'.[299] This responsibility depends on the 'availability of resources',[300] whether financial, technical, natural, human or information-related. This final set of reasons — alongside the reasons of contribution identified above — goes some way to explaining why it is that one particular actor should direct its resources towards one particular harm and not another.[301]

Reasons of capacity can be divided into two kinds.[302] The first has to do with one actor's capacity to respond to a situation more effectively than another actor, due to

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[297] Miller, *supra* note 267, at 460.

[298] Beitz and Goodin, *supra* note 268, at 17; May, *supra* note 293, at 118–119; Miller, *supra* note 267, at 460–462; Nollkaemper and Jacobs, *supra* note 170, at 364 and 394; Salomon, *supra* note 172, at 193 and 195; Salomon, *supra* note 289, at 282–288; Shue, *supra* note 269, at 700; Shue, *supra* note 268, at 537–539; Vandenhole and Benedek, *supra* note 230, at 339–346; Wenar, *supra* note 230, at 258. Compare the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports (2007) 43, at para.430. Here, 'the weight of justification is borne by the pressing need to relieve P, and the necessity of identifying a particular agent as having the obligation to provide the relief', rather than any causal connection. Miller, *supra* note 266, at 100.

[299] CESCR, *supra* note 203, at para.45 (see also paras.39–40). Compare CESCR, *supra* note 208, at para.38; CESCR, 'General Comment 21 (Article 15(1)(a)): The Right of Everyone to Take Part in Cultural Life', UN Doc. E/C.12/GC/21 (2009), at para.58; CESCR, 'Poverty and the International Covenant on Economic, Social and Cultural Rights', UN Doc. E/C.12/2001/10 (2001), at para.16; Principle 9(c), Maastricht Principles, *supra* note 282.

[300] CESCR, *supra* note 203, at para.39; CESCR, *supra* note 208, at para.34; CESCR, 'General Comment 19 (Article 9): The Right to Social Security', UN Doc. E/C.12/GC/19 (2008), at para.55.

[301] May, *supra* note 293, at 117.

[302] Miller, *supra* note 267, at 460–461.

(for example) its proximity to a particular harm[303] or its relative degree of influence over a particular institution.[304] In this case, the costs of acting are reduced because a state is able to act more effectively in the first place.[305] The second relates to one actor's capacity to absorb the costs of acting more easily than another because of its access to greater financial, natural or technological resources. In this case, the costs of acting are not reduced but become more reasonable when imposed on those actors that are 'able to adapt to changed circumstances without suffering serious deprivation'.[306] In the context of health, those states that have a greater degree of influence on negotiations relating to the international intellectual property rights regime or greater access to medical supplies or trained medical staff might therefore have stronger reasons for acting to address a failure to ensure access to basic healthcare in a developing state.

However, as with the other sets of reasons discussed above, reasons of capacity are often insufficient on their own to identify which states have reasons for acting. While reasons arising from a state's contribution to — or failure to prevent — a problem are overly fixated on the past, reasons from capacity do 'not take the past seriously enough'.[307] They appear to require those with readily available resources to make an open-ended commitment to assist those with fewer resources, regardless of how they came by their resources or whether or not they contributed to the inequitable distribution of resources in the first place.

Yet the pluralist account of reasons for acting proposed here means that we need not rely on reasons arising from one source alone. Instead, we can invoke whichever reason is of most relevance in a given scenario, or factor in the cumulative weight of overlapping or complementary reasons for acting. Often, states with a greater capacity to assist will have also made a significant contribution to the problem at hand. A

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[303] The capacity of a state to prevent genocide, for example, 'depends, among other things, on the geographical distance of the state concerned from the scene of the events'. *Genocide*, *supra* note 298, at para.430. See also Khalfan, *supra* note 290, at 322; Nollkaemper and Jacobs, *supra* note 170, at 417 and 426–427; Vandenhole and Benedek, *supra* note 230, at 346 and 362.

[304] Principle 31, Maastricht Principles, *supra* note 282; Khalfan, *supra* note 290, at 321; Salomon, *supra* note 172, at 195; Young, *supra* note 170, at 127.

[305] Compare Wenar's 'least cost' principle, which allocates responsibility to those who can 'most easily avert the threat'. Wenar, *supra* note 230, at 258. See also Pogge, *supra* note 271, at 127 and 129–130.

[306] Young, *supra* note 170, at 128. On the idea that we have reasons for assisting others in need only where the resulting burdens are 'reasonable', see also Beitz's reasons of 'strong beneficence' (Beitz, *supra* note 156, at 167–168) and Rawls' principle of 'mutual aid' (J. Rawls, *A Theory of Justice* (1971), at 114), among many others. On the application of this principle to the issue of climate change displacement, see Bradley, '"Migration in a Feverland": State Obligations Towards the Environmentally Displaced', 8 *Journal of International Political Theory* (2012) 147; Wyman, *supra* note 90, at 453–456.

[307] Miller, *supra* note 267, at 466.

balanced assessment of the four sets of reasons outlined in this section will allow us to begin to identify those states with reasons for taking particular steps to address climate change inundation.

A problem arises, however, when different sets of reasons point towards different actors. In the context of climate change inundation, state A might have reasons to act arising from its proximity to an atoll island state, while state B has reasons arising from its contribution to global greenhouse gas emissions. Rather than attempt to address this problem here in the abstract, it will be postponed until Chapter 3, which begins to examine states' reasons for acting to address the problem of climate change inundation. For now, it is enough to note, as Margaret Moore does, that 'this represents a different (and, it would seem, politically better) sort of problem, compared to the problem of being unable to specify anyone' with reasons for acting.[308]

2.3.4 Reasons for establishing coordinating institutions

States' reasons for acting are closely tied to the actions that they are expected to take. Relatively arduous or costly actions typically require stronger reasons for acting. In subsequent chapters, the content and strength of reasons for action are considered alongside the actions that states might take in response to climate change inundation. In the abstract, however, this process is complicated by the fact that the actions required by peremptory norms of international law or obligations of international assistance and cooperation are not clearly specified, and may differ from one actor or situation to another. This uncertainty is exacerbated by the fact that the scope and content of human rights is not static but fluctuates in response to changing social, technological, economic and environmental conditions.[309] What counts as a serious, predictable and remediable threat is likely to change over time, and with it the content of relevant human rights and associated reasons for acting.[310]

One proposal for clarifying the actions that states, organisations and others are required to take involves establishing institutions with the capacity to solve the collective action or 'many hands' problem that arises when obligations are not clearly

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[308] Moore, 'Global Justice, Climate Change and Miller's Theory of Responsibility', 11 *Critical Review of International Social and Political Philosophy* (2008) 501, at 509. A pluralist account 'ensure[s] that there is always some agent who can be assigned responsibility'. Miller, *supra* note 267, at 471.

[309] Beitz, *supra* note 156, at 31, 44 and 57–58. Compare Shue, *supra* note 175, at 33.

[310] H. Steiner, P. Alston and R. Goodman, *International Human Rights in Context* (2007), at 186. Compare Besson, *supra* note 157, at 232; Raz, *supra* note 159, at 171–186.

specified or allocated. Within the category of 'duties to protect against deprivation', Shue includes a general obligation to 'create, if they do not exist, or, if they do, to preserve effective institutions for the enjoyment of what people have rights to enjoy'.[311] In theory, these institutions mediate between human rights and corresponding duties and duty-bearers. By designing policies that protect against human rights abuses and allocating obligations for implementing these policies among specific actors, they 'transform "imperfect" duties into "perfect" ones'.[312] A similar procedural obligation is outlined in Principle 30 of the Maastricht Principles, which calls on states to 'coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights'.[313]

Until such institutions are established, however, it may fall to states, acting individually or in coalitions, to recognise their reasons for acting and decide how to act.[314] We can refer back to the reasons identified above in determining which states might play which role in addressing the implications of climate change inundation for the enjoyment of human rights in atoll island states. As the Maastricht Principles emphasise, a lack of effective coordinating institutions 'does not exonerate a state from giving effect to its separate extraterritorial obligations'.[315]

2.4 Conclusion

This chapter has laid the theoretical groundwork for the ideas to come. Drawing on, yet departing somewhat from, Beitz's functional account of human rights, it has set out four categories of reasons for acting to address the impact of climate change inundation on the human rights of atoll islanders. Chapter 3 begins to examine these reasons for acting with reference to the specific context of climate change inundation. In the event that an atoll island state fails to protect its residents' access to healthcare and the basic determinants of health from the cumulative effects of climate change

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311 Shue, *supra* note 175, at 17, 55–60 and the afterword. Compare Beitz and Goodin, *supra* note 268, at 15–17 and 21–23; Crawford, 'No Borders, No Bystanders: Developing Individual and Institutional Capacities for Global Moral Responsibility', in Beitz and Goodin (eds), *supra* note 268, 131; Moore, *supra* note 308, at 512–514; Raz, *supra* note 261, at 43; I. M. Young, *Inclusion and Democracy* (2000), at 250. In the context of climate change, see Bell, 'Does Anthropogenic Climate Change Violate Human Rights?', 14 *Critical Review of International Social and Political Philosophy* (2011) 99, at 111 and 114.

312 Beitz and Goodin, *supra* note 268, at 15. This institutional framework should 'aggregat[e] the various reasons [for acting] … into a single coherent set of policies', thereby answering the question, 'why me?' Beitz and Goodin, *supra* note 268, at 17.

313 Principle 30, Maastricht Principles, *supra* note 282. See also commentary in de Schutter *et al*., *supra* note 263, at 1149–1150.

314 Beitz, *supra* note 156, at 172–173.

315 Principle 30, Maastricht Principles, *supra* note 282.

inundation, does this provide reasons for corrective or remedial action by external actors?

The CESCR would argue that it does; after all, the ICESCR is premised on the idea that, 'in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries'.[316] This 'programme of international assistance and cooperation' will vary from one case to the next, but encompasses a range of actions that states might take to address the non-fulfilment of islanders' right to health in the context of climate change inundation. These include training local medical staff to address climate-specific diseases, installing water treatment and storage facilities, rebuilding healthcare infrastructure using flood-resistant techniques and building sea defence measures to slow down coastal erosion and loss of infrastructure and territory.

However, in the face of gradual displacement from atoll island states, other measures may also be necessary, including training and resettlement schemes that provide migrants with access to healthcare, shelter, sanitation facilities and subsistence goods in a host state. Without international assistance and expertise, it 'seems unlikely' that atoll island states 'will have the necessary resources to plan and implement resettlement plans that uphold the rights of communities'.[317] Chapter 3 assesses one possible course of action in detail, examining the reasons that states may have for expanding or modifying existing migration pathways to allow atoll islanders to migrate and secure citizenship elsewhere. It also begins to identify those states with extraterritorial reasons for acting — arising from general obligations of international assistance and cooperation as well as their particular capacity and contribution to the problem of climate change — to address the impacts of climate change inundation on the human right to health in atoll island states.

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[316] CESCR, *supra* note 203, at para.14.

[317] Ferris, 'Protection and Planned Relocations in the Context of Climate Change', *UNHCR Legal and Protection Policy Research Series* (2012), at 19.

3. Planned Migration: A Viable Solution to Climate Change Inundation?

3.1 Introduction

In the event that an atoll island state fails to protect its inhabitants' rights to adequate healthcare, food, water and sanitation from the impacts of climate change inundation, does this provide reasons for external states to take corrective or remedial action? Is the UN Deputy High Commissioner for Human Rights correct in arguing that states elsewhere have reasons to 'prevent and address some of the direst consequences that climate change may reap on human rights'?[318] This chapter argues that she is, identifying some of the reasons that states have for implementing a 'planned migration' solution to the problem of climate change inundation. This solution requires states to modify existing bilateral migration agreements to offer permanent resettlement options for atoll islanders, thereby ensuring that their human rights to health and an adequate standard of living continue to be realised once their territory becomes uninhabitable (section 3.2).

Using the schema developed in Chapter 2, sections 3.3 and 3.4 examine various reasons for — and against — adopting a planned migration approach, ranging from general reasons arising from obligations of international cooperation to more specific reasons relating to each state's relative contribution to and capacity to address the problem of climate change inundation. While different reasons point towards different actors, this problem is not insoluble. If we take into account the cumulative weight of each set of reasons for acting in the Pacific region, at least, Australia and New Zealand are clearly identifiable as having primary responsibility for implementing a planned migration strategy in response to climate change inundation (section 3.5).

The planned migration proposal is chosen here — and by many scholars and practitioners in this field — for its pragmatism and feasibility. It relies on existing domestic law and bilateral migration agreements, which can 'more swiftly and effectively provide targeted outcomes' than a new multilateral treaty.[319] Its scope is narrow and specific rather than broad and abstract, drawing on specialised bilateral and regional migration schemes rather than universal treaties addressing climate

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[318] Kyung-wha Kang, cited in MacInnis, 'Climate Change Threatens Human Rights of Millions', *Reuters* (19 February 2008).

[319] McAdam, *supra* note 90, at 211. Compare Wyman, 'The National Immigration Policy Option: Limits and Potential', in Gerrard and Wannier (eds), *supra* note 68, 337, at 338.

change-related movement more generally, and restricting its focus to the human rights of individual migrants to health, food, shelter and so on. It has also been championed by atoll island states themselves. Kiribati President Anote Tong, for example, calls for I-Kiribati to 'migrate with dignity' via preferential visa categories for skilled island migrants.[320] The planned migration proposal therefore looks both backwards (to the human rights of islanders) and forwards (to the demands placed on those who act).

However, while this planned migration approach appears to offer a plausible response to the harms of climate change inundation, it falls short of what is necessary (section 3.6). Among other shortcomings, it fails to recognise much of what is at stake in the context of climate change inundation. By focusing on individual human rights, it overlooks the threat posed to collective rights to political, legal and cultural identity, sovereignty and self-determination. In doing so, it fails to capture what is unique about the threat faced by atoll island populations: the potential loss of a self-determining community with its own constitution and social and political institutions, the capacity to pursue distinctive collective goals, and the status that comes with membership in the international community of states.

Yet this is far from being a wasted exercise. The planned migration proposal provides a relatively straightforward case study around which we can begin to flesh out the reasons for acting introduced in Chapter 2. It allows us to test the waters by identifying which actors might be required to bear which burdens — and assessing the reasonableness of these burdens — before diving into the more complex material on self-determination addressed in subsequent chapters. It also highlights some considerations that should be central to any approach to climate change inundation: the use of existing legal rules and principles; the importance of international cooperation; and the need for community participation in decisions about when, where and how to move.

3.2 The planned migration proposal

As explained in Chapter 1, this thesis starts from the assumption that the territory of atoll island states will eventually become uninhabitable, given the long-term impact of current atmospheric concentrations of carbon dioxide and the failure of states to implement effective mitigation schemes. Without adequate fresh water supplies or

[320] Office of the President of Kiribati, *supra* note 93; ABC News, *supra* note 117.

habitable land on which to build housing or health and sanitation facilities, atoll islanders will no longer be able to access even basic healthcare services and the underlying determinants of health. 'Land is, in this sense, a fundamental precursor to the enjoyment of all [human] rights.'[321] While installing desalination plants or building health facilities may enable islanders to enjoy access to basic healthcare and clean water for longer than they would otherwise,[322] these measures will eventually fall short of what is required.

Numerous proposals have been put forward to address the eventual displacement of atoll island populations.[323] While these proposals recognise that 'existing institutions do not, and indeed cannot, provide a perfectly tailored solution' to the issue of climate change inundation,[324] each offers a different response to this normative gap. Some draw on existing law, arguing for the expansion or reinterpretation of existing human rights, [325] refugee, [326] maritime [327] or climate change law. [328] Some argue for the recognition of a new international visa category or migration scheme[329] or a new set of soft law guidelines, perhaps drawing on the Guiding Principles on Internal

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[321] Republic of the Maldives, *supra* note 21, at 21.

[322] As, for example, Australia, New Zealand and Japan have done in Tuvalu and Kiribati. AusAID, 'Securing Tuvalu's Water Supply' (6 December 2012); AusAID, 'Improving Water and Sanitation Systems in Kiribati to Help Save Lives' (8 November 2012); AusAID, 'Kiribati: Health' (16 September 2013); Ministry of Foreign Affairs of Japan, 'Japan-New Zealand Aid Cooperation in Response to Severe Water Shortage in Tuvalu' (4 November 2011).

[323] The following list is indicative rather than exhaustive. For other overviews, see Cournil, 'The Protection of "Environmental Refugees" in International Law', in Piguet, Pécoud and de Guchteneire (eds), *supra* note 167, 359, at 361–363; McAnaney, *supra* note 90, at 1182–1196.

[324] Wannier and Gerrard, 'Overview', in Gerrard and Wannier (eds), *supra* note 68, 3, at 10.

[325] Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law', 31 *University of Pennsylvania Journal of International Law* (2010) 1239. On a protocol to the European Convention on Human Rights, see Council of Europe Parliamentary Assembly, *Environmentally Induced Migration and Displacement: A 21st Century Challenge* (2008), at recommendation 6.3.

[326] Höing and Razzaque, 'Unacknowledged and Unwanted? "Environmental Refugees" in Search of Legal Status', 8 *Journal of Global Ethics* (2012) 19; Lister, *supra* note 130; Söderbergh, 'Human Rights in a Warmer World: The Case of Climate Change Displacement', *Lund University Working Paper* (2011), at 35–50.

[327] Caron, *supra* note 89; Rayfuse, *supra* note 68; Soons, *supra* note 89.

[328] Biermann and Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees', 10 *Global Environmental Politics* (2010) 60; Byravan and Rajan, *supra* note 123; Gibbs and Ford, 'Should the United Nations Framework Convention on Climate Change Recognise Climate Migrants?', 7 *Environmental Research Letters* (2012) 1; UNHCR, *supra* note 75, at para.25; Williams, 'Turning the Tide: Recognising Climate Change Refugees in International Law', 30 *Law and Policy* (2008) 502. However, see Hulme, 'Commentary: Climate Refugees: Cause for a New Agreement?', 20 *Environment* (2008) 34.

[329] Heyward and Ödalen, *supra* note 123; King, 'Environmental Displacement: Coordinating Efforts to Find Solutions', 18 *Georgetown International Environmental Law Review* (2006) 543; Moberg, 'Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection', 94 *Iowa Law Review* (2009) 1107, at 1135–1136.

Displacement.[330] Others call for the adoption of a new binding legal instrument specifically designed to address this issue.[331]

An increasingly vocal group of scholars, policymakers and state representatives calls for the recognition of islanders as resilient actors rather than passive victims, and of planned migration from atoll island states as a 'rational adaptation strategy to climate change processes'.[332] They argue that states and other members of the international community should 'proactively anticipate and plan for migration as part of their adaptation strategies'.[333] Indeed, in 2010, states parties to the UNFCCC were urged to 'enhance action on adaptation' by undertaking '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation'.[334] A year later, the Global Migration Group called on states to 'revisit their immigration policies … and consider opening new opportunities for legal migration'.[335] And, in late 2013, the International Labour Organisation (ILO), UN Development Programme (UNDP) and UN Economic and Social Commission for the Asia-Pacific (UNESCAP) launched a joint initiative to prepare Pacific islanders for the possibility of migrating in response to climate change inundation.[336]

Within this discourse of 'migration as adaptation', one set of proposals envisages the modification and expansion of existing migration pathways to allow for the permanent

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[330] Guterres, 'Statement by the UNHCR', Nansen Conference on Climate Change and Displacement in the 21st Century (5–7 June 2011); Kälin and Schrepfer, *supra* note 73, at 71–72; McAdam, *supra* note 90, at 250–262; UNHCR, *supra* note 75, at paras.12–13; Yamamoto and Esteban, *supra* note 26, at 245 and 251–254; Zetter, *supra* note 80, at 149.

[331] Docherty and Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees', 33 *Harvard Environmental Law Review* (2009) 349; Hodgkinson and Young, *supra* note 133; CRIDEAU and CRDP, 'Draft Convention on the International Status of Environmentally-Displaced Persons', 4 *Revue Européene de Droit de l'Environnement* (2008) 375. But see McAdam, *supra* note 152; Solomon and Warner, 'Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks', in Gerrard and Wannier (eds), *supra* note 68, 243, at 272–275.

[332] UNHCR, *supra* note 75, at 2 and paras.25, 31 and 39–40. Compare Adger *et al*., *supra* note 63, at 770–771; Barnett and Chamberlain, 'Migration as Climate Change Adaptation: Implications for the Pacific', in Burson (ed.), *supra* note 92, 51; Barnett and Webber, *supra* note 28; O. Brown, *Migration and Climate Change* (2008), at 38; Campbell, Goldsmith and Koshy, *supra* note 114; Ferris, *supra* note 317, at 7; Ferris, Cernea and Petz, *supra* note 16, at 31; Hugo, *supra* note 12, at 33–34; Kälin and Schrepfer, *supra* note 73, at 20 and 60–61; McAdam, *supra* note 90, at 1, 10–13, 201–203 and 253; Norwegian Refugee Council, *supra* note 78, at 19; Park, *supra* note 5, at 21; Solomon and Warner, *supra* note 331, at 244–248 and 279–288; Yamamoto and Esteban, *supra* note 26, at 84–87.

[333] Norwegian Refugee Council, *supra* note 78, at 19.

[334] Article 14(f), Cancun Agreements, *supra* note 187.

[335] Jose Riera (Senior Advisor, UNHCR), speaking at OHCHR Seminar, *supra* note 186.

[336] Wiseman, *supra* note 147.

resettlement of islanders displaced by climate change inundation.[337] The model set out here draws primarily on Katrina Wyman's recent account.[338] Perhaps taking her cue from the Nansen Principles — according to which the 'existing norms of international law should be fully utilised' in responding to climate change-related displacement[339] — Wyman examines the potential for existing migration law to accommodate climate change-related movement, using current legal frameworks and empirical evidence to identify 'likely destination countries' for island migrants.[340]

For Wyman, destination countries are initially selected on the basis of (a) existing migration pathways from atoll island states, which could be modified if necessary. These might take the form of traditional migration schemes or ad hoc domestic mechanisms that provide some form of temporary humanitarian status to those fleeing disaster.[341] They must also (b) have the capacity to admit a sufficient number of islanders, although no one state need absorb all migrants at once. Migration may be staggered over time and shared between host countries.[342] And they must (c) facilitate permanent resettlement, where this may require establishing new visa categories, modifying bilateral migration schemes, or providing pathways to permanent residence for those who have already migrated.[343] Of concern here are those who will be permanently displaced by climate change inundation,[344] for whom 'it would be preferable to circumvent the political charade of temporary protection and instead

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[337] Bedford and Bedford, *supra* note 92; Dema, 'Sea Level Rise and the Freely Associated States: Addressing Environmental Migration under the Compacts of Free Association', 37 *Columbia Journal of Environmental Law* (2012) 177; S. Martin, *Climate Change and International Migration* (2010), at 8–10; McAdam, *supra* note 90, at chs.4 and 7; McAnaney, *supra* note 90, at 1203–1204; Nansen Initiative, *supra* note 96, at 7; Solomon and Warner, *supra* note 331, at 276–278; UNHCR, *supra* note 75, at paras.17–18; Wyett, 'Escaping a Rising Tide: Sea Level Rise and Migration in Kiribati', 1 *Asia and the Pacific Policy Studies* (2013) 171; Wyman, *supra* note 319; Yamamoto and Esteban, *supra* note 26, at 249–251. Compare François Crépeau, Special Rapporteur on the Human Rights of Migrants, cited in UN News Service, 'Should International Refugee Law Accommodate Climate Change?' (3 July 2014).

[338] Wyman, *supra* note 319.

[339] Nansen Principle VII, Norwegian Refugee Council, *supra* note 78, at 5. Compare UNHCR, *supra* note 75, at para.6.

[340] Wyman, *supra* note 319, at 338–350.

[341] *Ibid*, at 344–345. See also Feller, 'The Refugee Convention at 60: Still Fit for Its Purpose?', Refugees and the Refugee Convention 60 Years On: Protection and Identity (2 May 2011); Kälin and Schrepfer, *supra* note 73, at 45–46; McAdam, *supra* note 90, at ch.4; Solomon and Warner, *supra* note 331, at 276–278; UNHCR *et al.*, *supra* note 79, at 11–13.

[342] Wyman, *supra* note 319, at 345–346.

[343] Solomon and Warner, *supra* note 331, at 276–278; UNHCR, *supra* note 75, at paras.17–18; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 2–3.

[344] For typologies of permanent and other forms of climate change-related displacement, see Hugo, *supra* note 12; Kälin and Schrepfer, *supra* note 73, at 13–17; F. Renaud *et al.*, *Control, Adapt or Flee: How to Face Environmental Migration* (2007), at 29–32; Solomon and Warner, *supra* note 331, at 247–249.

develop policies that can facilitate more permanent movement'.[345] Finally, host states should also (d) guarantee migrants access to healthcare, education and social services[346] and (e) ensure that migration pathways are embedded in a durable legal framework capable of resisting changes in popular opinion.[347]

In addition to its pragmatism, this approach is also chosen for its capacity to respond to the demands of atoll island states.[348] In 2007, the Pacific Conference of Churches called for 'a regional immigration policy giving citizens of countries most affected by climate change … rights to resettlement in other Pacific island nations'.[349] More recently, at the first regional consultation of the Nansen Initiative on climate change-related displacement, island participants urged states to 'review their admission and immigration policies to enable voluntary migration at an early stage'.[350]

The government of Kiribati is perhaps the most vocal advocate of a planned migration approach, and is developing a transitional 'merits-based' migration strategy for its citizens that will ensure 'migration with dignity'.[351] The government aims to position I-Kiribati as skilled migrants who can fill labour market gaps in the Asia-Pacific region,[352] and is seeking preferential visa categories for islanders who want to become

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[345] McAdam, *supra* note 90, at 118. McAdam and others argue for temporary migration alongside permanent resettlement, where the former grants migrants some autonomy over when to move, encourages the flow of remittances, alleviates pressure on overcrowded resources in atoll island states, and provides time for host communities to adjust to new members. Bedford and Bedford, *supra* note 92, at 125; McAdam, *supra* note 167, at 126; McAdam, *supra* note 90, at 203–205; Park, *supra* note 5, at 21; Wyman, *supra* note 319, at 345, 348, 361–362.

[346] Barnett and Webber, *supra* note 28, at 46; McAdam, *supra* note 90, at 202; Park, *supra* note 5, at 19. This is, however, a very minimal threshold. Other factors such as collective identity and autonomy are discussed in later chapters.

[347] For example, a bilateral agreement such as the Compact of Free Association between the US and the Republic of the Marshall Islands (although this is open to unilateral modification or termination by the US). Dema, *supra* note 337, at 186–189 and 199–201; Wyman, *supra* note 319, at 348–350.

[348] It also builds on a history of labour migration in the Pacific. R. Bedford, *New Hebridean Mobility: A Study of Circular Migration* (1973); Campbell, 'Climate Induced Community Relocation in the Pacific: The Meaning and Importance of Land', in McAdam (ed.), *supra* note 12, 57, at 63–78; Shen and Gemenne, 'Contrasted Views on Environmental Change and Migration: The Case of Tuvaluan Migration to New Zealand', 49 *International Migration* (2011) 224, at 228–230.

[349] Pacific Conference of Churches, 'Statement from the 9th Assembly of the Pacific Conference of Churches on Climate Change' (9 September 2007).

[350] McAdam, *supra* note 148.

[351] McAdam *supra* note 90, at 202; ABC News, *supra* note 117; Office of the President of Kiribati, *supra* note 93. Compare the proposal put forward by Bangladeshi MP Saber Chowdery, interviewed on Carrick, *supra* note 100.

[352] Lambourne, interviewed on Carrick, *supra* note 71. Recent training and migration schemes include the Kiribati Australia Nursing Initiative and the New Zealand-backed Marine Training School. See Australian Department of Foreign Affairs and Trade, 'Kiribati Australia Nursing Initiative', accessible at http://aid.dfat.gov.au/Publications/Pages/kiribati-australia-nursing-initiative-independent-report.aspx; Bedford and Bedford, *supra* note 92, at 95–96.

active, valued members of a new community.[353] This emphasis on dignity reflects the importance of recognising and maintaining islanders' autonomy in the face of climate change inundation. 'I prefer to leave now', says one Tuvaluan migrant, 'before I have no choice'.[354]

From a human rights perspective, a planned migration solution also facilitates access to the resources that underpin islanders' enjoyment of the right to health. First, migrants gain access to a host state in which they enjoy a permanent legal status and associated socio-economic entitlements, including access to healthcare, sanitation, and adequate food and drinking water. Second, by sending remittances home, migrants provide financial support for local adaptation initiatives that can, for example, improve water storage capacity or maintain healthcare facilities. Third, migrants ease the pressures associated with overcrowding, facilitating a more sustainable use of resources and infrastructure by those who remain. From the demand side of human rights protection, at least, migration should therefore be reconceptualised as 'part of the solution rather than an inherent problem'.[355]

3.3 Reasons for acting to support planned migration

The functional account of human rights set out in Chapter 2 directs our attention not only to the threat posed by climate change inundation to the human rights of atoll islanders, but also to the reasons that others have for and against acting to address this threat. This section examines the reasons that states might have for implementing a planned migration strategy to ensure that the human rights of atoll islanders are protected from the threat of climate change inundation. As explained earlier, this strategy is chosen for its pragmatic approach to human rights protection. It recognises the urgent interests at stake but also caps the costs imposed upon those who assist displaced islanders by requiring them to act only within existing legal frameworks and only in response to severe threats to individual human rights. As recognised by participants in a recent expert roundtable discussion, 'the needs and interests of host communities need to be respected and carefully balanced in this process'.[356]

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[353] Aedy, 'Do Climate Refugees Exist?', *ABC Radio National Life Matters* (27 July 2011); Loughry and McAdam, 'Kiribati: Relocation and Adaptation', 31 *Forced Migration Review* (2008) 51.
[354] Shen and Gemenne, *supra* note 348, at 234.
[355] Farbotko and Lazrus, *supra* note 25, at 283.
[356] UNHCR, *supra* note 75, at para.32.

Building on the schema introduced in Chapter 2, this section considers three sets of reasons for acting to implement a planned migration approach.[357] These include general reasons arising from legal obligations of international assistance and cooperation as well as specific reasons arising from states' contributions to the problem and capacity to expand or modify existing migration pathways. The fourth set of reasons for acting outlined in Chapter 2 — i.e. those arising from peremptory legal norms that generate obligations *erga omnes* — do not arise in the case of human rights to health or an adequate standard of living. The aim here is not to provide an exhaustive account of all relevant factors, nor to repeat the legal sources for these reasons set out in the previous chapter, but to offer an initial indication of how the functional account of human rights developed in Chapter 2 might be fleshed out in practice.

Reasons of international cooperation

As discussed in Chapter 2, states have reasons to seek and provide international assistance and cooperation in ensuring the full realisation of human rights. This is particularly relevant in the context of transnational issues like climate change, whose causes and consequences transcend state boundaries. As the IPCC insists in its latest report, '[i]nternational cooperation is necessary to significantly mitigate climate change'.[358] Where there is a manifest failure to protect human rights from the impacts of climate change inundation at the domestic level, other states may therefore have reasons to act arising from their general obligations of international cooperation.

These reasons are two-fold. The obligation to take steps 'to the maximum of its available resources' [359] requires developing states, where necessary, to seek international assistance and cooperation.[360] Atoll island states have been at pains to demonstrate their inability to respond to the threat of climate change inundation alone,

[357] Compare Byravan and Rajan, *supra* note 123, at 253–254.

[358] Stavins *et al*., *supra* note 107, at 1008. Compare IPCC, 'Summary for Policymakers', in Edenhofer *et al*. (eds), *supra* note 107, 1, at 5; OHCHR, *supra* note 13, at paras.69–74. According to Knox, 'international cooperation must take the primary, rather than the secondary, role'. Knox, *supra* note 176, at 213 (see generally 212–218).

[359] Article 2(1), ICESCR, *supra* note 199.

[360] CESCR, *supra* note 242, at para.13; Principle 34, Maastricht Principles, *supra* note 282; OHCHR, *supra* note 13, at para.85.

and have been vocal in calling for support from the international community.[361] A corresponding responsibility to cooperate to ensure the full realisation of economic, social and cultural rights is 'particularly incumbent' on those states that are in a position to assist.[362] While some developed states insist that human rights protection in the context of climate change remains the 'primary responsibility of states' acting within their own borders,[363] others recognise that 'international cooperation and solidarity should be enhanced in order to minimise the effects of climate change on the full enjoyment of human rights'.[364]

These obligations are echoed in the principle of common but differentiated responsibilities under the UNFCCC, according to which developed states parties are required to assist developing states parties to meet the costs of adaptation.[365] As the OHCHR points out, international human rights law and the UNFCCC complement each other: both emphasise that 'international cooperation is not only expedient but also a human rights obligation'.[366] Its importance is reiterated in the context of climate change displacement: international cooperation is referred to in two out of 10 Nansen Principles[367] and forms a 'core pillar' of the Nansen Initiative on Disaster-Induced Cross-Border Displacement, whose recommendations will be published in 2015.[368]

However, the content of this obligation remains somewhat vague. International human rights law provides little guidance in identifying which states have particular reasons to cooperate to address the impacts of climate change inundation on the enjoyment of human rights. In fact, as observed in Chapter 2, states appear to have considerable discretion in deciding where to direct their support. There is, however, an exception to this rule: where one state has made an explicit legal or political commitment to another state through domestic development policies, aid agreements or, in this case, bilateral

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[361] See, for example, Sattar, 'Statement on Behalf of Twelve Small Island Developing States to the Panel on Human Rights and Climate Change', 11th Session of the Human Rights Council (15 June 2009); Republic of the Maldives, *supra* note 21, at 70 and 78.

[362] CESCR, *supra* note 242, at para.14.

[363] See the statements of the Canadian and German representatives before the Human Rights Council cited in Limon, *supra* note 181, at 562–563 and 574.

[364] See the statements of the Slovenian, New Zealand and Monacan representatives before the Human Rights Council, cited in *ibid*, at 580–581.

[365] Article 3(1), UNFCCC, *supra* note 102. Compare Article 1(c)(i), Bali Action Plan, *supra* note 14.

[366] OHCHR, *supra* note 13, at para.99.

[367] Nansen Principles I and IV, Norwegian Refugee Council, *supra* note 78, at 5.

[368] Nansen Initiative, 'Frequently Asked Questions', accessible at http://62.50.76.173/faqs. Compare Riera, *supra* note 335; UNHCR, *supra* note 75, at paras.42–43.

migration agreements, this may provide the basis for a specific obligation of international cooperation.[369]

In arguing for a planned migration approach, Wyman begins by identifying those states with existing migration pathways for atoll island states that could be modified to accommodate more migrants and incorporate permanent as well as temporary migration.[370] New Zealand, for example, has established the Pacific Access Category (PAC) scheme, which grants up to 75 citizens from Tuvalu and Kiribati permanent residence each year.[371] While Australia does not currently offer permanent migration pathways for islanders, it does grant temporary work permits to Tuvaluans and I-Kiribati under the Seasonal Work Program.[372] This provides a first indication of those states with reasons for responding to a manifest failure to protect human rights in the face of climate change inundation in the Pacific region.[373] However, other, more specific reasons for acting will help us to clarify and flesh out this initial account.

Reasons of contribution

No attempt is made here to establish direct causation of, or legal responsibility for, the harms of climate change inundation.[374] Legally, the process of establishing state responsibility for a wrongful act is highly complex, particularly in multilateral, transnational contexts.[375] And, while '[e]stablishing responsibility through causality is

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[369] Vandenhole and Benedek, *supra* note 230, 332, at 346 and 362. The aim here is not to disincentivise such commitments. Reasons arising from formal commitments of international cooperation and assistance will be weighed against other reasons for acting — including reasons of contribution and capacity — to ascertain which states have the strongest overall reasons for acting. Existing commitments will also be taken into account in future deliberations about which states have reasons for acting. A state that has already accepted a significant number of atoll islanders may have less capacity and therefore less reason to act in the future.

[370] Wyman, *supra* note 319, at 339.

[371] Immigration New Zealand, 'Pacific Access Category' (2013), accessible at www.immigration.govt.nz/migrant/stream/live/pacificaccess/. McAdam notes that New Zealand has 'long had special concessionary schemes for citizenship or permanent residence' for Pacific islanders, ostensibly to promote economic development in the region. McAdam, *supra* note 90, at 205. See detailed history in R. Appleyard and C. Stahl, *South Pacific Migration: New Zealand Experience and Implications for Australia* (1995).

[372] Australian Department of Immigration and Border Protection, 'Special Program Visa (subclass 416) for the Seasonal Worker Program', accessible at www.immi.gov.au/Visas/Pages/416-SWP.aspx.

[373] As there are currently no formal migration pathways for citizens of the Maldives, the rest of this chapter focuses on Kiribati and Tuvalu.

[374] For an introduction to the literature on moral and legal responsibility for climate change, see, for example, Caney, *supra* note 268; R. Lord *et al*. (eds), *Climate Change Liability: Transnational Law and Practice* (2011); Shue, *supra* note 268; S. Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (2008), at ch.5; R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (2005).

[375] J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 204–205; Skogly, 'Causality and Extraterritorial Human Rights Obligations', in Langford *et al*. (eds), *supra* note 169, 233.

truly a difficult task',[376] this task becomes even more complex in the context of climate change, where the attribution of legal responsibility requires that a causal connection be drawn between the greenhouse gas emissions of one state and a specific climate change impact in another,[377] and where 'determining whether a specific, single extreme event is due to a specific cause, such as increasing greenhouse gases, is difficult, if not impossible'.[378] In any case, as Chapter 1 explained, islanders are unlikely to be displaced by one climate event. Instead, as the UN High Commissioner for Refugees observes, 'an accumulation of factors leads to a tipping point at which people's lives and livelihoods come under such serious threat that they have no choice but to leave their homes.'[379] In light of these factors, even atoll island states themselves avoid calling for admissions of liability, 'seeing the "blame game" as futile and unproductive'.[380]

However, this does not preclude us from talking about responsibility or reasons for acting. After all, responsibility is a many-headed beast[381] and 'need not be limited to the establishment of a direct causal relationship' between act or omission and harm.[382] 'Being directly the cause of a result may be paradigmatic for being responsible for it, but it is not,' May argues, 'a necessary condition for being responsible for it'.[383]

In the context of climate change inundation, there are two claims that can be made with certainty. First, climate change is attributable to the activities of people like us. The rising sea levels, higher storm surges and changing rainfall patterns associated with climate change inundation are not 'unaccountable natural disasters' but evidence of 'systemic processes' to which we are contributing.[384] As the IPCC has concluded, 'it

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[376] Skogly, *supra* note 375, at 258.

[377] On the difficulties of establishing a causal link between climate change and movement — including attributing (a) environmental harms to the process of climate change, (b) harmful greenhouse gas emissions to any one state and (c) decisions to move to climate change-related impacts— see Kälin and Schrepfer, *supra* note 73, at 6–10; McAdam, *supra* note 90, at 23–24; OHCHR, *supra* note 13, at para.70; Wyman, 'Responses to Climate Migration', 37 *Harvard Environmental Law Review* (2013) 167, at 193–194.

[378] Hegerl *et al*., 'Understanding and Attributing Climate Change', in S. Solomon *et al*. (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the IPCC* (2007) 665, at 696. 'Climate change' does not refer to a single event but to statistical changes in the 'average of many weather events over a span of years'. D. Huber and J. Gulledge, *Extreme Weather and Climate Change: Understanding the Link and Managing the Risk* (2011), at 2.

[379] Guterres, *supra* note 330, at 2.

[380] McAdam *supra* note 90, at 201.

[381] For Hart's well-known discussion, see H. L. A. Hart, *Punishment and Responsibility* (1968), at 210–237.

[382] Salomon, *supra* note 172, at 186.

[383] May, *supra* note 293, at 52.

[384] Kolers, *supra* note 91, at 334. Compare Wyman, *supra* note 123, at 193–197.

is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century'.[385] States' relative 'emissions can [therefore] help determine … responsibility for climate change'.[386] This line of argument is echoed in the principle of common but differentiated responsibilities, which highlights states' 'different contributions' to climate change and environmental degradation.[387] Second, in the case of atoll island states — unlike that of environmentally driven movement more generally[388] — most decisions to move will be clearly attributable to these climate change-related impacts.[389] A correlation between high levels of greenhouse gas emissions and a general pattern of events leading to climate change inundation is therefore identifiable, even if a clear causal chain between the emissions of one state and a particular climate change harm in another is not.[390]

While it may be difficult to disentangle the relative contributions of states to the problem of climate change, it is not impossible.[391] As recognised in the Preamble to the UNFCCC, 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries'.[392] As a rough proxy, therefore, we might look to the lists of Annex I and II parties set out in the UNFCCC, which account for around 20% of the world's population and 46.4% of the world's greenhouse gas emissions.[393] These states could be said to have reasons for acting that arise in proportion to their contribution to the problem, perhaps measured in terms of their

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[385] IPCC, *supra* note 6, at 17.

[386] Kolstad *et al*., *supra* note 155, at 215. Compare Fleurbaey *et al*., 'Sustainable Development and Equity', in Edenhofer *et al*. (eds), *supra* note 107, 283, at 318.

[387] Principle 7, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/6/Rev.1 (1992); Article 3(1), UNFCCC, *supra* note 102. Compare with the 'polluter pays' principle found in regional and international environmental law, including Principle 16 of the Rio Declaration; Council Directive 2004/35/EC, OJ 2004 L 143/56.

[388] Foresight, *Migration and Global Environmental Change* (2011), at 43.

[389] Zetter, *supra* note 80, at 140.

[390] Compare Caney's distinction between 'micro' and 'macro' versions of the polluter pays principle, where the latter requires merely an indirect link between a group of high-emitting states and an increase in climate change-related harms. Caney, *supra* note 268, at 753–754.

[391] On some of the difficulties, see Banuri *et al*., 'Setting the Stage: Climate Change and Sustainable Development', in McCarthy *et al*. (eds), *supra* note 47, 74, at 90 (Box 1.1). See also Höhne *et al*., 'Contributions of Individual Countries' Emissions to Climate Change and Their Uncertainty', 106 *Climatic Change* (2011) 359.

[392] UNFCCC, *supra* note 102.

[393] Rogner *et al*., 'Introduction', in B. Metz *et al*. (eds), *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the IPCC* (2007) 96, at 106. Compare M. Ammer *et al*., *Time to Act: How the EU Can Lead on Climate Change and Migration* (2014), at 26 and 38; IPCC, *supra* note 85, at 37–39.

greenhouse gas emissions per capita from a certain date onwards.[394] Australia and New Zealand — identified earlier as having entered into bilateral migration agreements with Tuvalu and Kiribati — are both Annex I and Annex II parties to the UNFCCC. As Annex II parties, they have obligations to 'take the lead in combating climate change and the adverse effects thereof' and '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'.[395]

We need not look beyond the Pacific region for a case in which states have recognised reasons for acting arising from their contribution to environmental degradation elsewhere. Since the mid-20th century, the Nauruan people have faced potential displacement as a result of the environmental devastation and economic instability caused by decades of phosphate mining.[396] The Nauruans are said to have a 'strong moral and legal claim' against Australia, New Zealand and the UK arising, at least in part, from their contribution to this degradation under the auspices of the British Phosphate Commission.[397] In 1962, former Australian Prime Minister Robert Menzies recognised that Australia, New Zealand and the UK have a 'clear obligation … to provide a satisfactory future for the Nauruans' arising from their past and present interaction.[398] While this case is one in which there is a clear pre-existing colonial and economic relationship between a handful of states,[399] it nevertheless indicates that, where states have contributed to environmental degradation elsewhere, they have reasons for assisting those displaced as a result.

Taken alone, however, reasons arising from the greenhouse gas emissions of industrialised states — particularly given that only a small proportion of these can be

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[394] From a legal perspective, only a certain proportion of past emissions can be taken into account in allocating responsibility: (a) those whose consequences are reasonably foreseeable (usually understood as those emitted after 1990), and (b) those that violate legal standards under the UNFCCC and associated protocols. See, for example, Kälin and Schrepfer, *supra* note 73, at 8–10; Kolstad *et al.*, *supra* note 155, at 218–219; Werksman, 'Could a Small Island State Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice', in Gerrard and Wannier (eds), *supra* note 68, 409. From a moral perspective, see also Bradley, *supra* note 306, at 153–154; Caney, *supra* note 268, at 761–762; Wyman, *supra* note 123, at 196–197.

[395] Articles 3(1), 4(3) and 4(4), UNFCCC, *supra* note 102. See also Fleurbaey *et al.*, *supra* note 386, at 317. In the context of climate change inundation, compare Wyett, *supra* note 337, at 178.

[396] Anghie, '"The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case', 34 *Harvard International Law Journal* (1993) 445; Tabucanon and Opeskin, 'The Resettlement of Nauruans in Australia: An Early Case of Failed Environmental Migration', 46 *Journal of Pacific History* (2011) 337; C. Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (1992).

[397] Tabucanon and Opeskin, *supra* note 396, at 354–355.

[398] Cited in *ibid*, at 355.

[399] Not all states 'have the benefit of these connections'. *Ibid*, at 355.

taken into account in allocating reasons for acting[400] — may not be strong enough to require high-emitting states to shoulder all the burdens of climate change inundation, leaving us with a potential gap between past emissions and future harms.[401] They also fail to tell us which states, if any, have the capacity to act effectively and 'at a reasonable cost' to themselves and their populations.[402]

Reasons of capacity

This leads us to a third set of reasons: those relating to the capacity to act effectively and to absorb the burdens associated with acting. Unlike reasons of contribution, these reasons are neutral with respect to the causes of climate change.[403] Rather than looking backwards to a state's greenhouse gas emissions, they look forward to its capacity to assist atoll islanders.[404] The CESCR and UNFCCC both insist that those states 'in a position to assist' — or with the relevant 'capabilities' to act — have a particular responsibility to do so and should therefore 'take the lead in combating climate change and the adverse effects thereof'.[405] As with reasons of contribution, reasons of capacity also find support in the principle of common but differentiated responsibilities, which takes into account the differing 'technologies and financial resources [states] command'.[406]

But how are we to identify those states 'in a position to assist'? Chapter 2 introduced two types of reasons of capacity. The first relates to one actor's capacity to respond to a particular harm more effectively than another, thus reducing the costs of acting; the second to one actor's capacity to absorb the costs of acting more readily than another, thus rendering those costs more reasonable.

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[400] See references *supra* note 394.

[401] Caney, *supra* note 268, at 761–762; Wyman, *supra* note 90, at 460.

[402] Kolstad *et al.*, *supra* note 155, at 218. On these and other objections to relying solely on reasons of contribution, see also Caney, *supra* note 268; Caney, *supra* note 194.

[403] Caney, *supra* note 268, at 768.

[404] On the need to take into account both contribution and capacity-related reasons for acting, see *ibid*, at 763; Mayer, 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework', 22 *Colorado Journal of International Environmental Law and Policy* (2011) 357, at 412.

[405] CESCR, *supra* note 203, at para.45 (see also paras.39–40); Article 3(1), UNFCCC, *supra* note 102. Compare Kolstad *et al.*, *supra* note 155, at 217–218; Fleurbaey *et al.*, *supra* note 386, at 319; Principles 9(c) and 31, Maastricht Principles, *supra* note 282.

[406] Principle 7, Rio Declaration, *supra* note 387.

Included in the first category are reasons of proximity.[407] Shorter distances and existing regional networks of assistance and cooperation can facilitate the movement of people, thereby reducing the costs of migration, which will 'rise exponentially with increasing distance from the original home of the community'.[408] A recent report observes that 'countries neighbouring [atoll island states] in danger', particularly Australia and New Zealand, 'are often called to provide assistance when disasters strike'.[409] These states have particular obligations to atoll island populations arising from 'proximity and neighbourhood', which apply 'over and above the obligations that might exist in a total global context'.[410] In fact, in 2008, the former Australian government recognised 'a shared interest in the prosperity, growth and stability of the Pacific region', arguing that Australia has both 'the capacity to assist' and 'a responsibility to do so'.[411]

Similar reasons also arise from cultural or family ties. States with substantial atoll island populations are likely to absorb migration flows from these islands more effectively, as islanders make use of existing cultural infrastructure and draw on family and community networks to find accommodation, secure employment offers and learn the language.[412] New Zealand, for example, has 'unique Polynesian cultural connections',[413] including one of the largest Tuvaluan communities outside Tuvalu.[414] Of a number of Tuvaluan migrants interviewed in New Zealand, 72% already had family members living in New Zealand.[415] New Zealand is also supportive of existing

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[407] Docherty and Giannini, *supra* note 331, at 358; Hodgkinson and Young, *supra* note 133, at 325.

[408] Ferris, Cernea and Petz, *supra* note 16, at 19.

[409] G. Kostakos *et al*., *Climate Security and Justice for Small Island Developing States* (2014), at 12.

[410] Bedford, interviewed on Carrick, *supra* note 71. Compare Bedford and Bedford, *supra* note 92, at 94–95; L. Collett, *A Fair-Weather Friend? Australia's Relationship with a Climate-Changed Pacific* (2009), at vii. On the 'principle of good-neighbourliness', see Article 74, UN Charter, *supra* note 173. In the context of climate change inundation, see ABC News, 'Marshall Islands Calls on Australia to Rethink Climate Change Stance' (4 September 2014); Crépeau, cited in UN News Service, *supra* note 337; McAnaney, *supra* note 90, at 1198.

[411] McMullan, 'Australia's Policies in the Melanesia and Wider Pacific Islands Region, Including the Pacific Partnerships for Development' (27 March 2008). In 2005, the Australian Labor Party (ALP) put forward a proposal for a Pacific Community along the lines of the EU, including a common market and currency, parliament, court and human rights commission, and a visa scheme for 10,000 Pacific islanders. B. Sercombe, *Towards a Pacific Community* (2005); B. Sercombe and A. Albanese, *Our Drowning Neighbours: Labor's Policy Discussion Paper on Climate Change in the Pacific* (2006).

[412] Kostakos *et al*., *supra* note 409, at 12; Park, *supra* note 5, at 22. States with island populations may also have other reasons for accepting migrants (including family reunification). Heyward and Ödalen, *supra* note 123, at 13.

[413] Shen and Gemenne, *supra* note 348, at 225 and 230.

[414] The 2013 Census places the figure at 3,537, with numbers growing fast. Statistics New Zealand, *2013 Census: Ethnic Group Profile: Tuvaluan* (2013), at 1.

[415] Shen and Gemenne, *supra* note 348, at 237.

Tuvaluan communities, subsidising cultural events and bilingual education.[416] New Zealand may therefore have specific reasons for acting to assist Tuvaluan migrants because it can do so more effectively than other states.

The second set of capacity-related reasons speaks to the reasonableness of the burdens imposed on those who act, where these burdens will fall more easily on actors with greater resources.[417] Wyman suggests three criteria for assessing the capacity of potential destination countries to absorb new migrants: population density (which indicates the availability of land), GDP (which indicates total wealth) and GDP per capita (which indicates average wealth).[418] On the basis of these three criteria, the US, Canada and Australia hold the strongest reasons for acting, while New Zealand, with its smaller national economy, is 17th in the list.[419] New Zealand may therefore have stronger reasons arising from its capacity to act effectively (measured in terms of its proximity and cultural ties) but less weighty reasons arising from its capacity to absorb the burdens associated with acting. The US, on the other hand, may have stronger reasons for acting arising from its capacity to absorb these burdens but less weighty reasons arising from its ability to act effectively (based on its relative physical and cultural distance from Pacific atoll island states).

In the case of Nauru, discussed above, the Australian, New Zealand and British governments acknowledged that their reasons for assisting Nauruans arose not only from their contribution to the destruction of Nauruan territory but also from their capacity to rehabilitate the island or to resettle its occupants elsewhere.[420] Australia's proposal to establish an autonomous Nauruan community on Curtis Island, for example, demonstrates that it has the capacity and resources to assist at least some atoll islanders displaced by environmental degradation.[421]

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[416] Gemenne and Shen, *supra* note 101, at 21.

[417] As with progressive taxation, 'the more one can afford to contribute, the more one should'. Fleurbaey *et al*., *supra* note 386, at 319. On an 'ability to pay' principle in the context of climate change, see Caney, *supra* note 268, at 769–770.

[418] Wyman, *supra* note 90, at 461–463. Compare Risse, *supra* note 91.

[419] Wyman, *supra* note 90, at 461–462. On the capacity of Australia and New Zealand to receive island migrants, see also Wyett, *supra* note 337, at 177–180.

[420] Tabucanon and Opeskin, *supra* note 396, at 354–355.

[421] *Ibid*, at 346–347.

3.4 Reasons against acting

Where the expansion or modification of existing migration pathways would impose unreasonable burdens on their governments or citizens, states may also have legitimate reasons against acting. One set of reasons relates to the socio-economic costs associated with the resettlement of atoll islanders, particularly where the enjoyment of human rights is at stake.[422] Where actions taken to address the non-fulfilment of islanders' human rights end up depriving other individuals of their human rights — for example, if a sudden mass influx of islanders overwhelms the capacity of a host state to ensure the availability of adequate clean water, sanitation or healthcare — this may count as a reason against acting.[423]

These reasons might be relevant in the case of poorer neighbouring states like Fiji, East Timor or Papua New Guinea, where existing resources and infrastructure are already overburdened and public order is relatively fragile. However, in the case of affluent multicultural states like Australia and New Zealand, the socio-economic burdens imposed by atoll island migrants are likely to be minimal and unlikely to interfere with the enjoyment of the host population's human rights or threaten public order.

The combined population of Kiribati and Tuvalu, for example, is around 115,000[424] or just over half the annual intake of permanent residents in Australia and New Zealand.[425] Particularly if it was staggered over decades, the financial burden imposed by incoming atoll islanders should therefore be a 'manageable proposition'.[426] It would not be weighty enough to deny existing residents access to accommodation, healthcare,

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[422] On the potential impact on the human rights of host communities, see Gromilova, 'Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach', 10 *Utrecht Law Review* (2014) 74.

[423] Johnson, 'Governing Climate Displacement: The Ethics and Politics of Human Resettlement', 21 *Environmental Politics* (2012) 308, at 322. For a similar reason against acting in the context of international refugee law, see Article 3(2), Declaration on Territorial Asylum, GA Res. 2312 (XXII), 14 December 1967; Article 32, Convention Relating to the Status of Refugees, 189 UNTS 150 (1951). See discussion in R. Jennings and A. Watts, *Oppenheim's International Law* (2008), at 891–892.

[424] As of July 2014, the population of Tuvalu is estimated at 10,782 and Kiribati at 104,488. CIA, *supra* note 3.

[425] In 2011, Australia accepted 127,460 permanent residents and New Zealand accepted 84,000. Australian Department of Immigration and Border Protection, *Fact Sheet 2: Key Facts about Immigration* (2013); Labour and Immigration Research Centre, *Permanent and Long Term Migration: The Big Picture* (2012), at 3. For detailed migration scenarios, see Bedford and Bedford, *supra* note 92, at 114–122; Wyett, *supra* note 337.

[426] Wyman, *supra* note 319, at 341. Compare Crépeau, cited in UN News Service, *supra* note 337; Kostakos *et al*., *supra* note 409, at 8; Wyman, *supra* note 123, at 208. Even those who adopt a security perspective agree. Maas and Carius, 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond', in J. Scheffran *et al*. (eds), *Climate Change, Human Security and Violent Conflict* (2012) 651, at 656.

employment, education or other basic goods and services, or to change their spending habits or lifestyle choices. Nor would it require host states to adopt wide-ranging immigration laws, establish new systems of governance or commit to a policy of open borders. It is plausible, then, to assume that this burden would not be seen as unreasonable by those who would bear it.[427] As Bedford observes, 'there's absolutely no way Australia and New Zealand will have great difficulty accommodating the numbers that will be involved'.[428]

A second set of reasons against acting arises from the political or cultural costs that host communities may bear should a large number of island migrants be admitted, including the dilution of a particular way of life or the weakening of protections for collective identity.[429] Should these costs be considered unreasonable by those expected to bear them, states may have reasons for refusing to accommodate atoll island migrants, regardless of the severity of the threat they face. However, this reason against acting is relevant only where a potential host state has a way of life within which migrants have little or no place. As Michael Blake argues, where migrants are 'part and parcel of the life we actually share', as is the case in multicultural states like Australia and New Zealand — and the number of additional migrants is not unreasonable, as discussed above — this makes it difficult 'to coherently use that very way of life as justification for their exclusion'.[430]

One further point of clarification is useful here. States are typically understood to have obligations to respect, protect and fulfil human rights, both domestically and abroad.[431] Obligations to respect and protect are generally seen as implementable quickly and without great cost; obligations to fulfil as costly, progressive and 'subsidiary'.[432]

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[427] However, if immigration quotas are not increased but simply re-allocated to atoll islanders, a significant burden will be placed on potential migrants from other states whose immigration quotas are restricted. This is particularly problematic where these migrants are also fleeing vulnerability or harm. See, for example, Betts, *supra* note 121. This objection does not apply to the collective resettlement options considered in Chapter 6 onwards, which do not rely on existing migration quotas.

[428] Bedford, interviewed on Carrick, *supra* note 71. Bedford and Bedford argue that New Zealand could absorb all of the Tuvaluan population without significantly changing its immigration policy. Bedford and Bedford, *supra* note 92, at 115 and 127.

[429] On the role of states' rights to border control in protecting collective identity, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983), at 31–63. On the burdens that large migration flows might impose on receiving states, see Miller, 'Border Regimes and Human Rights', 7 *Law and Ethics of Human Rights* (2013) 1, at 7.

[430] Blake, 'Immigration, Causality and Complicity', in S. Ben-Porath and R. Smith (eds), *Varieties of Sovereignty and Citizenship* (2013) 111, at 122. Blake is talking about undocumented migrants, but the argument is applicable here. Compare Heyward and Ödalen, *supra* note 123, at 17.

[431] See generally Sepúlveda, *supra* note 234, at ch.5.

[432] Langford *et al*., *supra* note 169, at 19; Vandenhole and Benedek, *supra* note 230, at 336–338.

However, here, as in Chapter 2, the traditional assumptions of human rights doctrine and theory are undermined. In the context of climate change inundation, meeting an extraterritorial obligation to *respect* human rights — that is, committing to effective climate change mitigation by restricting energy use and switching to non-polluting renewable energy sources — will require a significant investment from every member of the international community. In many cases, extraterritorial obligations to *fulfil* — by, for example, expanding existing migration pathways in order to accommodate those who are permanently displaced — will be less financially costly to meet (in the short term, at least).[433]

The point here is not to advocate this kind of cost-benefit analysis, which fails to take into account either the social, cultural and environmental costs incurred by a global strategy of migration and adaptation, or the legal and moral reasons that states have for acting to address climate change inundation. The aim instead is to undermine the common assumption that obligations to fulfil human rights elsewhere are too costly and should therefore be understood as less imperative. If industrialised states are reluctant to commit to effective mitigation strategies because of the financial burdens involved, then, by their own reasoning, they should prioritise those less costly adaptation strategies — including assisting atoll island populations displaced by climate change inundation — that ensure the ongoing realisation of the human rights of individuals elsewhere in the face of climate change-related harms.

3.5 Which actors have reasons for acting?

This section considers whether it is possible to identify one or more states with reasons for acting to address the threat posed by climate change inundation to islanders' human rights. Here, we must address the fact that different sets of reasons for acting may apply to different actors.[434] On the one hand, affluent Annex II states with existing atoll island populations — including Canada, the US, the UK, France and Germany[435] — may have reasons for acting that arise from their contribution to the problem of climate change and their capacity to act effectively. However, these states have not

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[433] See Brian Fisher, former Executive Director of the Australian Bureau of Agricultural and Resource Economics, who argued for the resettlement of island populations on the basis of a cost-benefit analysis. Cited in Bita, 'Island Evacuation a Greenhouse Solution', *The Weekend Australian* (8–9 June 1996).

[434] Compare Caney, *supra* note 194, at 472.

[435] R. Bedford and G. Hugo, *Population Movement in the Pacific* (2012), at vii–viii and 63–64. All of these appear in the top 11 states in Wyman's capacity-based list. Wyman, *supra* note 90, at 461. This list is indicative, not exhaustive.

established formal migration pathways from Kiribati or Tuvalu, nor do they share the same reasons of proximity as countries in the Asia-Pacific region.

On the other hand, neighbouring states may have reasons for acting arising from proximity and, in some cases, cultural ties, but are also some of the poorest and most war-torn states in the world. Fiji, for example, has formally committed to resettling islanders fleeing climate change inundation, citing reasons of neighbourliness,[436] and already has a large Melanesian population. However, Fiji is also a developing state whose capacity to respond effectively to the displacement of atoll islanders is hampered by its political and socio-economic circumstances, and — like other developing neighbours including Nauru, East Timor, Papua New Guinea and Sri Lanka — should not be expected to shoulder the burden of resettling displaced atoll islanders on the basis of proximity alone.[437]

While there is no fixed rule about which reasons for acting take priority in this pluralist account, it is important to attempt to balance all available reasons in order to identify those actors with the strongest reasons for acting in a given situation.[438] Where several sets of reasons point towards the same actor(s), their cumulative strength may indicate that these actor(s) hold primary responsibility for addressing the situation at hand. However, where other actors also have one or more reasons for acting, this may indicate a secondary — rather than a competing — responsibility to support those with primary responsibility by, for example, contributing financial or other resources.

If we retain our focus on Kiribati and Tuvalu, each of the four sets of reasons points towards (a) the developed states of the Pacific region, Australia and New Zealand. These states have reasons for acting arising from obligations of international cooperation, both in general and, where the legal commitments set out in existing

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[436] See Fijian President Ratu Epelia Nailatikau, cited in Weiss, 'The Making of a Climate Refugee', *Foreign Policy* (28 January 2015). See also Bedford, interviewed on Carrick, *supra* note 71; Bedford and Bedford, *supra* note 92, at 90–95. Kiribati has already bought 6,000 acres of land in Fiji (although this is primarily for agriculture rather than collective resettlement). Fiji World News, 'Kiribati Purchases 6,000 Acres of Land in Vanua Levu' (8 July 2013); Lagan, 'Kiribati: A Nation Going Under', *The Global Mail* (15 April 2013). Kiribati has also had a positive response from the government of East Timor. McAdam, *supra* note 90, at 116–117.

[437] Bradley, *supra* note 306, at 152–153; Gibney, 'Asylum and the Principle of Proximity', 3 *Ethics, Place and Environment* (2000) 313, at 315–316; Oliver, 'A New Challenge to International Law: The Disappearance of the Entire Territory of a State', 16 *International Journal of Minority and Group Rights* (2009) 209, at 241.

[438] Miller, *supra* note 267, at 469–471. However, Caney suggests that reasons of contribution should take priority over reasons of capacity. Caney, *supra* note 268, at 769–770; Caney, 'Human Rights, Responsibilities, and Climate Change', in Beitz and Goodin (eds), *supra* note 268, 227, at 241. However, see Caney, *supra* note 194, at 472.

bilateral migration agreements are taken into account, in particular. As Annex I and II states parties to the UNFCCC, they also have reasons arising from their contribution to — and failure to regulate — the greenhouse gas emissions that exacerbate climate change inundation. And they have reasons arising from their capacity to act, understood in terms of their ability to act effectively (on the basis of their proximity and cultural ties to Tuvalu and Kiribati) and to absorb the burdens of acting (on the basis of their available land, infrastructure and financial resources). The cumulative weight of these reasons suggests that Australia and New Zealand can and should bear primary responsibility for assisting atoll islanders in the Pacific region, at least.

Thus far, neither state has made a formal commitment to resettle atoll islanders. Instead, both have adopted a 'wait and see' approach.[439] 'Should the worst happen, I guess we'd send a boat to get them', suggests one New Zealand official. 'It's clear that we won't let them drown.'[440] While Australia's position has also been somewhat ambivalent,[441] its decision to join the steering group behind the Nansen Initiative on climate change displacement indicates an ongoing interest in this area.[442]

However, the reasons for acting discussed above also point to (b) more distant affluent states like Canada, the US, Germany, France and the UK (on the basis of reasons arising from their contribution to the problem of climate change inundation, their existing cultural ties to atoll island states and their access to resources) and (c) less affluent neighbouring states like Fiji, Papua New Guinea or East Timor (on the basis of reasons arising from proximity and cultural ties). These states might be seen as holding secondary responsibility for addressing the harms of climate change inundation by, for example, providing financial resources (in the case of (b)) or hosting islanders on a short-term basis while a more permanent solution is finalised (in the case of (c)). What may initially appear to be contradictory or conflicting reasons for acting may therefore simply require different sets of actors to contribute different but complementary skills or resources to support the process of collective resettlement.

This speaks to the importance of cooperation and burden-sharing, initially discussed in Chapter 2. The duty to cooperate requires that burdens are shared between those

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[439] Gemenne and Shen, *supra* note 101, at 28.

[440] Don Will (NZ Aid), cited in *ibid*, at 21.

[441] Collett, *supra* note 410.

[442] McAdam, 'Australia Joins Climate Displacement Group', *SBS News* (26 April 2013). Compare Government of Australia, *Submission to the OHCHR under Human Rights Council Resolution 7/23* (2008), at 1.

actors that have both reason and resources to act, ensuring that the burden does not weigh too heavily on any one actor. Even where states do not offer permanent residence to island migrants, they may nevertheless have reasons for contributing financial, technological, human or other resources to support the migration and resettlement process.

In the context of climate change inundation, international experts advocate the development of regional 'burden- and responsibility-sharing arrangements'[443] that would coordinate the resettlement of atoll islanders, taking into account reasons arising from capacity, proximity, contribution to the problem and so on. These arrangements could be coordinated by an intergovernmental organisation with expertise and a mandate in this area.[444] It has been suggested that the UNHCR, International Organisation for Migration (IOM) or ILO might be well placed to facilitate the negotiation and expansion of bilateral and regional migration programmes.[445] In fact, the UNHCR has already made it clear that it 'would be pleased to support efforts by States to devise appropriate solutions for potentially affected populations'.[446] Another option would be to establish a regional framework for coordinating cross-border migration. The Australian Labor Party, for example, envisaged an 'international coalition' of Pacific Rim countries 'to accept climate change refugees when a country becomes uninhabitable because of rising sea levels'.[447]

3.6 Learning from the planned migration proposal

Having used planned migration as an initial case study for examining the reasons that states may have for, and against, acting to assist displaced atoll islanders, this final section considers several objections to this approach,[448] before concluding with some of

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[443] UNHCR, *supra* note 75, at paras.16 and 42–43. Compare McAdam, *supra* note 90, at 236 and 254; Nowak, 'Welcome Address', ClimMig Conference on Human Rights, Environmental Change, Migration and Displacement (20 September 2012); Zetter, *supra* note 80, at 149. On burden-sharing in the context of climate change more generally, see Fleurbaey *et al*., *supra* note 386, at 294–295 and 317–319.

[444] McAdam, *supra* note 90, at ch.8.

[445] Park, *supra* note 5, at 24; UNHCR, *supra* note 75, at paras.34–38; Wiseman, *supra* note 147. Others suggest that the UNDP and World Bank might play a role. Biermann and Boas, 'Protecting Climate Refugees: The Case for a Global Protocol', *Environment* (2008) 8.

[446] UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 3.

[447] Sercombe and Albanese, *supra* note 411, at 3.

[448] Other objections not addressed here include the fact that state practice in this area is 'inconsistent and unpredictable' in terms of which legal status is granted to migrants, which may lead to a 'considerable erosion' of their rights. McAdam, *supra* note 90, at 10; Park, *supra* note 5, at 14. Another is the fact that many islanders do not see migration as an adaptation measure but as a last resort. Mortreux and Barnett, *supra* note 32, at 110–111. Barnett and Webber admit that, where islanders are 'to some degree forced to move' by climate-related changes, migration should *not* be seen as an adaptation strategy but as an impact

its strengths. First, any solution that relies on re-purposing existing migration channels — and is therefore premised on the idea of migration as a discretionary privilege granted to the able-bodied and meritorious rather than as a right for all — cannot adequately protect all those affected by climate change inundation. By leaving intact the immigration requirements imposed by potential host states, it excludes the most vulnerable and marginalised: those who are poor, elderly, unwell, disabled or unskilled, or do not meet the requirements of 'good character'.[449] However, human rights protection should not be premised on a person's good behaviour, employability, wealth or virtue.

Those who advocate a planned migration approach often recognise its potential to exclude the most vulnerable but appear willing to accept this outcome. Wyman, for example, admits that 'many Pacific islanders lack the skills necessary to migrate as skilled labour',[450] yet incentivises the expansion of existing migration pathways by suggesting that islanders can fill labour shortages caused by an ageing population[451] — a line of reasoning that only exacerbates the exclusion of those who are unable to work. Others acknowledge that 'those who are unable to leave may be particularly vulnerable' yet fail to explain how a planned migration approach can, in the long term, 'support both those who leave' and those who are unable to.[452] While a planned migration approach may protect the human rights of some, it may also increase the vulnerability of others, thereby becoming migration as maladaptation rather than adaptation.[453]

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of climate change. Barnett and Webber, *supra* note 28, at 50. Compare Biermann and Boas, *supra* note 328, at 78; Kälin and Schrepfer, *supra* note 73, at 20. Another relates to islanders' lack of autonomy: they may have some choice over when to move but little choice about where. Heyward and Ödalen, *supra* note 123, at 10.

[449] To qualify for the PAC scheme, migrants must be aged 18–45, have an acceptable offer of employment, be of 'good character' and meet minimum language, income and health requirements. Immigration New Zealand, *supra* note 371. Similar requirements apply under the Australian Seasonal Worker Program. Australian Department of Immigration and Citizenship, *supra* note 372. Islanders have reported difficulties in paying the application fee and securing a suitable job offer. Bedford and Bedford, *supra* note 92, at 107 and 126; McAdam, *supra* note 167, at 123. See also Brown, *supra* note 332, at 40; Ferris, *supra* note 317, at 7–8; Kälin and Schrepfer, *supra* note 73, at 20.

[450] Wyman, *supra* note 319, at 346. Wyman considers modifying PAC to make it easier to secure a job offer but does not address issues of ill health, disability, age, and so on. Wyman, *supra* note 319, at 353–354.

[451] *Ibid*, at 362–363.

[452] UNHCR, *supra* note 75, at para.40. On the idea of 'trapped populations', see Black and Collyer, 'Populations "Trapped" at Times of Crisis', 45 *Forced Migration Review* (2014) 52; Foresight, *supra* note 388, at 13–14. Nansen Principle X insists on the importance of not 'neglecting those who may choose to remain', but does not mention those who are unable to leave. Norwegian Refugee Council, *supra* note 78, at 5. See also Barnett and Webber, *supra* note 28, at 38, 41 and 50; Bradley, *supra* note 306, at 148; Ferris, Cernea and Petz, *supra* note 16, at 17; Martin, *supra* note 337, at 12; McAdam, *supra* note 90, at 37.

[453] 'Maladaptation' refers to 'an adaptation that does not succeed in reducing vulnerability but increases it

The UNHCR suggests a solution to this dilemma: 'a waiver may be required for formal [immigration] requirements … which might be difficult to fulfil for affected populations'.[454] However, this solution takes us away from a traditional migration pathways approach, which is premised on the idea that states have the right to control their borders — a right that is subject to few exceptions.[455]

This points to a second problem with a planned migration approach. Particularly strong reasons are required to override the priority granted to states' rights of territorial sovereignty and border control. 'A state normally has the right to refuse entry into its territory to any alien,' Jennings and Watts observe, even if she is 'in practice unable to go to any other country'.[456] In the absence of the significant legal weight attached to reasons arising from *jus cogens* and *erga omnes* norms of international law, do the reasons of international cooperation, contribution and capacity discussed above carry sufficient weight to override what is traditionally considered 'a matter of national sovereignty, to be determined according to national priorities and criteria'?[457] And, even where this test is satisfied, why should islanders take priority over those who are fleeing other forms of deprivation or environmental degradation?[458] It appears that, on its own, the planned migration proposal may not provide strong enough reasons for expanding existing migration pathways, nor for assisting atoll islanders at the expense of those displaced by other factors.

This brings us to a third and related flaw — one that is particularly important from the perspective of this thesis. In their efforts to address the challenges faced by those displaced by climate change-related harms — including uncertainty, loss of home, shelter and livelihood, and a lack of legal rights and correlative obligations — planned migration proposals lose sight of the unique set of problems faced by atoll islanders. While they are indeed facing the devastating impacts of climate change inundation on

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instead'. McCarthy *et al*. (eds), *supra* note 47, at 990. Compare Barnett and O'Neill, 'Maladaptation', 20 *Global Environmental Change* (2011) 211, at 211. On the potential for migration to become maladaptation, see Adger *et al*., *supra* note 63, at 767–768; Noble *et al*., 'Adaptation Needs and Options', in Field *et al*., *supra* note 11, 833, at 858.

[454] UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 3. Compare Heyward and Ödalen's proposal for a Nansen Passport for the Territorially Dispossessed. Heyward and Ödalen, *supra* note 123. See also Park, *supra* note 5, at 19.

[455] Including refugees, stateless persons and those entitled to complementary protection. On the barriers erected by states, see, for example, Blitz, 'Statelessness and Environmental-Induced Displacement: Future Scenarios of Deterritorialization, Rescue and Recovery Examined', 6 *Mobilities* (2011) 433, at 436; Guterres, *supra* note 330; OHCHR, *supra* note 13, at para.58; UNHCR, *supra* note 75, at para.39.

[456] Jennings and Watts, *supra* note 423, at 891.

[457] Solomon and Warner, *supra* note 331, 243, at 249.

[458] An objection discussed in Chapter 1. See also Betts, *supra* note 121.

their individual human rights to life, health, education and an adequate standard of living, atoll islanders also face an unprecedented threat to the territory of their state and the subsequent loss of collective rights to political autonomy, sovereignty and self-determination.

While some hold that permanent resettlement within a democratic, rights-protecting state replaces everything of value that would be lost with the disappearance of a state's territory,[459] this overlooks the fact that 'islanders have lost something of value in the loss of their unique self-determining status, even if they are granted immigration into a state that treats them justly'.[460] Self-determination is not an individual right to political participation but a collective right of peoples to autonomy and independence, as indicated by its *sui generis* status in the ICCPR[461] and the jurisprudence of the Human Rights Committee.[462] And, in the case of climate change inundation, there is something worth preserving that is not captured by planned migration proposals: a constitution and set of political institutions that have been shaped over time to reflect shared values and pursue distinctive collective goals; a unique political entity recognised as a member of the international community; and the capacity to be self-determining *as* Tuvaluans or *as* I-Kiribati, rather than as the newest members of the democratic state of New Zealand.[463]

In Avery Kolers' words:

> 'When the state as a whole disappears, the individual's political identity, political community, status in that community, currency, civil-society institutions, and perhaps even her language of political participation and culture disappear as well. In short, the entire structure of the self-determining life of a political community,

[459] Lister, *supra* note 130, at 627. See also, more generally, Buchanan, *supra* note 190; T. Meisels, *Territorial Rights* (2009).

[460] Nine, *supra* note 91, at 363.

[461] Self-determination appears in Article 1, while rights to political participation are set out in Article 25. ICCPR, *supra* note 238.

[462] The Committee has declined to hear communications regarding the violation of the right to self-determination on the grounds that the Optional Protocol to the ICCPR 'provides a procedure under which individuals can claim that their *individual* rights have been violated', thereby implying that self-determination is not an individual right. *E. P. et al. v Colombia*, Communication No.318/1988, UN Doc. CCPR/C/39/D/318/1988 (1990), at para.8.2 (emphasis added). Compare *Ominayak and the Lubicon Lake Band v Canada*, Communication No.167/1984, UN Doc. CCPR/C/38/D/167/1984 (1990), at paras.3.13–3.15 and 13.3.

[463] Nine, *supra* note 91, at 366–367. On the importance of a political identity tied to 'specific constitutional traditions or to particular institutions', see Banai, 'Political Self-Determination and Global Egalitarianism: Towards an Intermediate Position', 39 *Social Theory and Practice* (2013) 45, at 53 (also 50 and 59).

> including not just its distinctive goals but also its distinctive ways of pursuing universal goals … are washed away.'[464]

Even those who advocate a planned migration approach acknowledge — albeit in passing — that '[a]ny relocation plans need to ensure the enjoyment of the full range of relevant rights', including the right to self-determination.[465] Jane McAdam, discussing the legal migration pathway available to Marshall Islanders under the Compact of Free Association with the US, insists that, on its own, 'the option to move does not resolve underlying and fundamental questions relating to identity, culture and self-determination'.[466] Wyman herself recognises that, without adequate consideration of these fundamental questions of collective identity and self-determination, a planned migration proposal remains a 'second-best response'.[467]

In fact, without some prior measures in place, a planned migration approach may undermine the self-determination of an atoll island population by gradually eroding the legal status of its state. As individuals migrate, secure citizenship and form attachments elsewhere, there 'will be a slow process of whole nations dying in the social sense in addition to the geographical sense'.[468] '[I]f you're scattering your people in different parts of the globe,' asks Kiribati President Anote Tong, 'how do you retain national unity?'[469]

However, at least three elements of the planned migration approach are valuable and are retained throughout the thesis. First, the use of existing legal rules and principles. Rather than diverting valuable resources towards the negotiation, ratification and implementation of a new international legal treaty, attention is best focused on the

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[464] Kolers, *supra* note 91, at 334.

[465] UNHCR, *supra* note 75, at paras.31–32. Compare *ibid*, at 333–334; Bradley, *supra* note 306, at 157, note 1; Campbell, *supra* note 348, at 67 and 78; Ferris, Cernea and Petz, *supra* note 16, at 32; Guterres, *supra* note 330; Heyward and Ödalen, *supra* note 123, at 1–2 and 9; Hodgkinson and Young, *supra* note 133, at 326–328; Hampson, *supra* note 89, at para.17; Holthus *et al*., *supra* note 93, at 83; Kelman, 'Island Evacuation', 31 *Forced Migration Review* (2008) 20, at 20; Mayer, *supra* note 404, at 391–393; McAdam, *supra* note 167, at 106 and 117; OHCHR, *supra* note 13, at paras.39–41; Ödalen, *supra* note 91; Oliver, *supra* note 437, at 237 and 241; Park, *supra* note 5, at 20, esp. note 141; Republic of the Maldives, *supra* note 21, at 7–8, 39–41, 74–75; Republic of the Marshall Islands, *supra* note 131; Sercombe and Albanese, *supra* note 411, at 3 and 11; Vidas, *supra* note 97; Wong, *supra* note 90, at 45.

[466] 'It is therefore important not to view policy options that allow for migration or relocation as complete "solutions".' McAdam, *supra* note 90, at 36 (see also 51, 157, 199 and 255).

[467] Wyman, *supra* note 90, at 441.

[468] Kälin, cited in Morris, 'What Happens When Your Country Drowns?', *Mother Jones* (2009). See also Campbell, *supra* note 348, at 67 and 78; Campbell, Goldsmith and Koshy, *supra* note 114, at 28; Mayer, *supra* note 404, at 391–392; Gemenne and Shen, *supra* note 101, at 17; McAdam, *supra* note 90, at 159; Stoutenburg, *supra* note 90, at 68.

[469] Cited in McAdam, *supra* note 90, at 153.

ways in which existing law might be repurposed to address the challenge of climate change inundation. Second, the need for international cooperation and assistance. Climate change inundation is a global problem requiring solutions that transcend political and territorial boundaries. And third, the idea of movement as driven and defined by islanders, which underpins the discourse of migration as adaptation. This emphasis on the wishes of atoll island populations is central to the remainder of this thesis, which understands the right to self-determination in terms of the 'the need to pay regard to the freely expressed will of peoples'.[470]

The following chapters lay the groundwork for an alternative or complementary proposal:[471] the planned resettlement of atoll island populations.[472] This retains the positive features of the proposal for planned migration — its emphasis on community consultation, participation and decision-making about when, where and how to move, its incorporation of local forms of knowledge and local patterns of movement, its rejection of the 'refugee' label, and its resistance to proposals for a new multilateral treaty — but seeks to address its shortcomings. Crucially, it takes into account the unique challenges faced by the inhabitants of atoll island states: loss of cultural identity, political autonomy, territorial sovereignty and statehood. It does so by considering the role of self-determination in responding to climate change inundation, a right whose legal implications in this context have not yet been explored in detail elsewhere.

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[470] *Western Sahara*, *supra* note 136, at para.32.

[471] Bedford and Bedford call for a 'mix of strategies', including both individual migration and collective resettlement. Bedford and Bedford, *supra* note 92, at 93 (see also 126). See also references *supra* note 345.

[472] See, for example, Campbell, Goldsmith and Koshy, *supra* note 114; Gromilova, *supra* note 422.

III. Self-Determination and Climate Change Inundation

4. Two Accounts of Self-Determination

4.1 Introduction

The preceding chapters identified some of the current and predicted impacts of climate change on the inhabitants of low-lying atoll island states. Chapter 1 defined 'climate change inundation' as a process in which climate change-related impacts exacerbate existing socio-economic and political vulnerabilities. The cumulative effect of these factors threatens to undermine the habitability of islanders' territory and, as a consequence, the legal, political and cultural foundations of their state. Chapter 2 developed a functional account of human rights as norms that provide states with reasons to take action to address a manifest failure to protect fundamental human interests elsewhere, while Chapter 3 examined the reasons that states might have for implementing the popular planned migration proposal. However, while this proposal provides a useful case study for identifying those states with reasons for acting to address climate change inundation, it fails to protect islanders' political autonomy or independence in the event of the loss of their state. In light of this lacuna, Chapters 4 and 5 shift their focus from the protection of individual human rights to the realisation of collective rights — in particular, the right of peoples to self-determination.

Some might wonder about the value of focusing on a right that has been described as 'entirely indefinable' and 'intractable as a legal principle';[473] a right that prompted former US Secretary of State Robert Lansing to exclaim, 'What a calamity that the phrase was ever uttered! What misery it will cause!'[474] Yet, despite its shortcomings, it is important not to underestimate the historical relevance or future significance of self-determination.

Looking back, self-determination played a pivotal role in 'contribut[ing] to the emergence of new trends in the world community', including the shift towards a '"UN Charter model" of international relations', in which states are — in theory at least — increasingly held accountable to both their citizens and the international community.[475] Looking forward, self-determination remains crucial in situations in which a threat to

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[473] J. Verzijl, *International Law in Historical Perspective* (1968), at 321 and 323.
[474] R. Lansing, *The Peace Negotiations: A Personal Narrative* (1921), at 97.
[475] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), at 325.

collective identity and autonomy – such as climate change inundation – is so grave that claimants' demands cannot be addressed by recourse to individual human rights alone. As a claim to the protection of fundamental collective interests, self-determination adds significant value to the individual human rights regime, which might otherwise be 'greatly impoverished' and 'ill-equipped to deal with some of the major challenges that are certain to confront it in the years ahead'.[476]

One of the main tasks of this thesis is to explore the potential of the legal norm of self-determination to evolve in response to grave challenges such as climate change inundation. This requires us to develop a broader, more responsive account of self-determination that moves beyond the narrow context in which it has so far been applied in law, while retaining its underlying purpose: to take into account the freely expressed wishes of a people in responding to some grave threat to its collective autonomy. It also requires us to pursue a consistent normative understanding of self-determination that clarifies the interests at stake and the most appropriate mechanisms for their protection. After all, without some 'conceptual foundations or solid precedents' on which to ground its development, self-determination may attract ever more rhetorical appeals while 'becom[ing] ever less relevant in practice'.[477]

This chapter provides the legal and conceptual tools for this process of expansion and consolidation. It begins by examining the development of self-determination as a legal and normative principle and assessing some of its strengths and limitations (section 4.2). Having established that the dominant 'categorisation' account of self-determination is unable to account for its wide-ranging, mutable nature (section 4.3), it offers an alternative purposive account of self-determination as both a basic guiding principle and a set of specific legal rules (section 4.4). Where the principle sets out the purpose of self-determination (to ensure that a people's wishes are respected wherever its 'destiny' or autonomy is at risk) (section 4.6), the rules identify its subject (the peoples that hold a right to self-determination). For the purposes of this thesis, 'peoples' are understood as the populations of existing states, whose members share a history of participation under common political institutions (section 4.5). This definition builds on legal precedent but also seeks to explain the significance of the unique self-determining status of each people.

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[476] Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights* (2001) 259, at 292.
[477] *Ibid*, at 291–292.

Chapter 5 then returns to the issue of climate change inundation. It considers whether the populations of atoll island states might be recognised as peoples with a right to self-determination and, if so, which states have reasons for acting to address the threat posed by climate change inundation to their capacity for self-determination. Chapters 4 and 5 therefore lay the groundwork for what follows in the final part of the thesis (which examines the potential scope and content of a right to self-determination of in the face of climate change inundation) by establishing that the emergence of such a right is both possible and foreseeable.

4.2 Self-determination in international law

From its early origins in the philosophy of Locke[478] and the political exhortations of the French and American Revolutions,[479] the idea of self-determination has become firmly entrenched in the popular imagination. Even its most vehement critics recognise its intuitive moral and political appeal.[480] Yet, as a legal concept, it remains somewhat ambiguous, malleable, perhaps even 'radically uncertain and obscure'.[481] While its application in the context of decolonisation is largely accepted as *lex lata* (a precisely determined, formally settled principle of international law), its application in the post-colonial era remains, in the eyes of many, *lex obscura* (contentious and conceptually incomplete).[482]

Nevertheless, there is widespread agreement that self-determination remains a functioning legal concept. In comparison with other collective human rights to development, peace or a healthy environment, it is relatively well established, with a

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[478] J. Locke, *Two Treatises of Government*, P. Laslett (ed.) (1967).

[479] See, for example, Cassese, *supra* note 475, at 11.

[480] 'Even if, as a *legal* right, "self-determination" cannot really swim, as a *moral* right or *political* desideratum, it will not, and in the opinion of most people should not, sink.' M. Pomerance, *Self-Determination in Law and Practice* (1982), at 73. Compare Fitzmaurice, 'The Future of Public International Law and the International Legal System in the Circumstances of Today', in *Livre du Centenaire de l'Institut de Droit International 1873-1973* (1973) 196, at 233; R. Jennings, *The Acquisition of Territory in International Law* (1963), at 79. Even those who question the normative significance of political boundaries recognise the relevance of self-determination or political autonomy. See, for example, C. Beitz, *Political Theory and International Relations* (1999), at 104; S. Caney, *Justice Beyond Borders* (2005), at 173; Moellendorf, *supra* note 268, at 128–148; Young, *supra* note 311, at 237.

[481] Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in Alston (ed.), *supra* note 476, 7, at 10.

[482] Irving, 'Self-Determination and Colonial Enclaves: The Success of Singapore and the Failure of Theory', 12 *Singapore Yearbook of International Law* (2008) 97, at 97. Irving cites *ibid*, at 38.

clear legal history and substantive legal content. Despite its detractors,[483] self-determination commands significant academic[484] and jurisprudential support as a fundamental principle of international law.[485] Its dynamic, responsive nature is well suited to a global context characterised by rapid environmental, social and political change. As Crawford observes, 'the continuing vitality and potential for expansion of the principle of self-determination … should not be underestimated'.[486] Indeed, self-determination has already achieved several milestones in international law, including a significant redistribution of political power and the widespread recognition of collective rights to identity and autonomy. In doing so, it has 'introduced a highly dynamic factor of change that deeply undermine[s] the status quo'.[487]

Before exploring the potential of self-determination to evolve in response to the threat posed by climate change inundation, a brief history will provide a clearer understanding of its current legal content.[488] Self-determination re-emerged in the early 20th century from two different ideological perspectives: Lenin championed self-determination as a form of emancipation from oppression,[489] and Woodrow Wilson argued for the right to self-government and popular sovereignty.[490] While there was some recognition of self-determination as a political principle during the League of Nations era,[491] it was not until 1945 that it found formal recognition as one of the UN's

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[483] Examples include Fitzmaurice, *supra* note 480; Blum, 'Reflections on the Changing Concept of Self-Determination', 10 *Israel Law Review* (1975) 509; Emerson, 'Self-Determination', 65 *AJIL* (1971) 459; Verzijl, *supra* note 473, at 323–324.

[484] See, for example, J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 646–647; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1964), at 90–106; Jennings and Watts, *supra* note 423, at 712–715; Oeter, 'Self-Determination', in B. Simma *et al*. (eds), *The Charter of the United Nations: A Commentary* (2012) 313, at 315; A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (1973), at 25–27; Thürer and Burri, 'Self-Determination', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008), at paras.26–32.

[485] *Namibia*, *supra* note 279, at paras.52–53; *Western Sahara*, *supra* note 136, at paras.54–59; *East Timor*, *supra* note 160, at para.29.

[486] Crawford, *supra* note 481, at 65.

[487] Cassese, *supra* note 475, at 316.

[488] For one of many historical overviews, see Thürer and Burri, *supra* note 484, at paras.1–11.

[489] Lenin, 'The Socialist Revolution and the Right of Nations to Self-Determination', in G. Hanna (ed.), *Collected Works, Volume 22* (1964) 143. See further Cassese, *supra* note 475, at 14–19.

[490] W. Wilson, *President Wilson's Fourteen Points (*18 January 1918); W. Wilson, *President Wilson's Address to Congress: Analysing German and Austrian Peace Utterances* (11 February 1918). See generally Cassese, *supra* note 475, at 19–23.

[491] International Committee of Jurists, 'Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question', *Official Journal of the League of Nations*, Special Supplement 3 (1920), at 5. See further Cassese, *supra* note 475, at 25–34; Crawford, *supra* note 481, at 13–15.

central tenets,[492] becoming 'a legally binding norm for all member states'.[493] Although at this stage self-determination remained a relatively general guiding principle rather than a clearly defined right,[494] its inclusion in the Charter marked an important step towards its recognition as a binding rule of international law.

In the second half of the 20th century, recognition of self-determination as a right of peoples became more widespread. While this was initially limited to the context of decolonisation,[495] by 1970, self-determination had been prominently enshrined as a legal right of 'all peoples' in common Article 1 of the two international human rights covenants[496] and the Declaration on Friendly Relations.[497] More recently, the adoption of the Helsinki Final Act [498] and Vienna Declaration, [499] alongside authoritative commentary from the Human Rights Committee[500] and state representatives,[501] has reinforced the claim that 'self-determination is articulated as a right, and that it is of general application'. [502] Indeed, self-determination continues to evolve to address additional threats to the autonomy of peoples. In the past decade or two, it has been applied in the context of non-colonial foreign occupation,[503] indigenous rights[504] and the dissolution of states,[505] none of which fit neatly within the mould of 'saltwater' colonialism.

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[492] Article 1(2) (see also Article 55 and Chapters XI–XIII), UN Charter, *supra* note 173.

[493] Oeter, *supra* note 484, at 316.

[494] *Ibid*, at 319.

[495] GA Res. 1514 (XV), 14 December 1960; GA Res. 1541 (XV), 15 December 1960.

[496] Article 1, ICCPR (*supra* note 238) and ICESCR (*supra* note 199).

[497] GA Res. 2625 (XXV), *supra* note 137.

[498] Article VIII, Chapter I, Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act), 14 ILM 1292 (1975).

[499] Article 2, Chapter I, Vienna Declaration and Programme of Action, A/Conf.157/23 (1993).

[500] Describing self-determination as an 'inalienable right of all peoples'. HRC, 'General Comment 12 (Article 1): The Right to Self-Determination of Peoples', UN Doc. HRI/GEN/1/Rev.6 (1984), at para.2.

[501] For example, the Netherlands, France and Germany have insisted on the universal nature of self-determination as a right of all peoples. HRC, 'Reservations, Declarations, Notifications and Objectives Relating to the ICCPR and the Optional Protocols Thereto', UN Doc. CCPR/C/2/Rev.4 (1994).

[502] Crawford, *supra* note 481, at 31–32.

[503] Including the Palestinian people in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories ('Israeli Wall')*, ICJ Reports (2004) 136, at paras.118 and 123. Compare GA Res. 68/154, 18 December 2013.

[504] Articles 3–4, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UN Doc. A/RES/61/295 (2007).

[505] For example, in the case of the former Socialist Federal Republic of Yugoslavia and USSR. See discussion in Craven, 'Statehood, Self-Determination and Recognition', in M. Evans (ed.), *International Law* (2010) 203, at 234–235.

Today, the legal principle of self-determination is typically understood as two-faceted.[506] Internal self-determination requires that a people be governed by a political institution that represents each of its members, regardless of their racial or national origin.[507] Peoples are entitled, through this representative institution, to 'pursue freely their economic, social and cultural development without outside interference'.[508] External self-determination entitles peoples 'to determine freely their political status and their place in the international community', free from foreign subjugation, domination or exploitation.[509] They may do this by means of '[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people'.[510]

Self-determination is widely recognised as a *jus cogens* norm of customary international law,[511] which, in its external dimension at least, places extraterritorial obligations on states.[512] The Human Rights Committee, for example, has explicitly recognised that Article 1(3) of the ICCPR 'imposes specific obligations on States parties, not only in relation to their own peoples, but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination'.[513] These obligations include both a negative duty to 'respect' the right to external self-determination and a positive duty to 'promote' its realisation,[514] where

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[506] Cassese attributes the distinction between 'internal' and 'external' self-determination to Wengler, 'Le Droit Á La Libre Disposition Des Peuples Comme Principe De Droit International,' 10 *Revue Hellenique de Droit International* (1957) 26, at 27. For a critique of this dichotomy, see Summers, 'The Internal and External Aspects of Self-Determination Reconsidered', in French (ed.), *supra* note 158, 229.

[507] Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation 21: Right to Self-Determination', UN Doc. A/48/18 (1996), at para.4. See also the 'safeguard clause' in GA Res. 2625 (XXV), *supra* note 137.

[508] CERD, *supra* note 507, at para.4. Compare *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para.126.

[509] CERD, *supra* note 507, at para.4. Compare Article 1, GA Res. 1514 (XV), *supra* note 495; Principle 5, GA Res. 2625 (XXV), *supra* note 137; Article 5, GA Res. 60/1, *supra* note 229.

[510] Per GA Res. 2625 (XXV), *supra* note 137.

[511] ILC, *supra* note 274, at 85, para.5. See also discussion in Cassese, *supra* note 475, at 140; Crawford, *supra* note 484, at 596; H. G. Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980), at 11–13; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988), at 357–424; Jennings and Watts, *supra* note 423, at 8; Oeter, *supra* note 484, at 316; D. Raic, *Statehood and the Law of Self-Determination* (2002), at 218–219; M. Shaw, *Title to Territory in Africa* (1986), at 91. For those who deny that self-determination has *jus cogens* status, see Arangio-Ruiz, 'Human Rights and Non-Intervention in the Helsinki Final Act', 157 *Collected Courses of the Hague Academy of International Law* (1977) 195, at 231; B. Driessen, *A Concept of Nation in International Law* (1992), at 60–61; Pomerance, *supra* note 480, at 70–72.

[512] See, for example, Espiell, 'Introduction: Community Oriented Rights', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 1167.

[513] HRC, *supra* note 500, at para.6. See, similarly, Cassese, *supra* note 475, at 144.

[514] HRC, *supra* note 500, at para.6; GA Res. 2625 (XXV), *supra* note 137.

the latter may require states to take diplomatic or other non-military measures against those who violate a people's right to self-determination.[515] Indeed, the International Court of Justice (ICJ) has observed that self-determination is of *erga omnes* character,[516] acknowledging its significance as one of the 'essential principle[s]'[517] or 'basic tenets of modern international law'.[518] As an *erga omnes* norm, self-determination is recognised as 'the concern of all States' and a source of 'obligations … towards the international community as a whole'.[519]

In its internal dimension, self-determination also enjoys a unique relationship with the human rights regime more generally. The Human Rights Committee has emphasised that the 'right of self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of human rights'.[520] Its prominent inclusion 'apart from and before all of the other rights' in each Covenant[521] implies a relationship of reciprocity between self-determination and human rights, such that 'rights of individuals and rights of peoples buttress and sustain each other'.[522] As Chapter 3 concluded, therefore, it is not enough to explore the implications of climate change inundation for individual human rights; the significance of the loss of territory for the self-determination of populations at risk must also be recognised and addressed.

As this brief overview indicates, self-determination is significant because of its legal weight and its dynamic, malleable character. Over its short lifespan, it has been applied not just in the context of decolonisation but also, more recently, in the areas of foreign occupation and indigenous peoples' rights, suggesting its continuing expansion in response to social and geopolitical circumstances. While it has a core area

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[515] Including withholding aid or legal recognition from a state that impedes the exercise of a people's right to self-determination. See *Israeli Wall*, *supra* note 503, at paras.159–160; Cassese, *supra* note 475, at 155–158; Schachter, *supra* note 273, at 184–201; S. Joseph, J. Schultz and M. Castan, *The ICCPR: Cases, Materials and Commentary* (2005), at 106.

[516] *East Timor*, *supra* note 160, at para.29; *Israeli Wall*, *supra* note 503, at paras.88, 155–156.

[517] *East Timor*, *supra* note 160, at para.29.

[518] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1984) 169, Diss. Op. Schwebel, at 198. Compare *Barcelona Traction*, *supra* note 167, at para.33.

[519] *Barcelona Traction*, *supra* note 161, at para.33.

[520] HRC, *supra* note 500, at para.1. See also CERD, *supra* note 507, at para.3.

[521] HRC, *supra* note 500, at para.1.

[522] Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 101, at 137. On the interrelationship between human rights and self-determination, see also Cassese, *supra* note 475, at 52–54 and 337; CERD, *supra* note 507, at para.3; Hannum, 'Self-Determination as a Human Right', in R. Claude and B. Weston (eds), *Human Rights in the World Community: Issues and Action* (1992) 175; *ibid*, at para.1; Joseph, Schultz and Castan, *supra* note 515, at 99.

of application, it also has a fluidity that enables it to continue to fulfil its purpose — i.e. recognising and offering protection for the collective autonomy of peoples — in the face of new or newly recognised threats. In order to better understand the capacity of self-determination to evolve to address unprecedented threats like that of climate change inundation, we therefore need a theory of self-determination that is broad, forward-looking, context-sensitive and conceptually coherent.

4.3 The dominant legal account

However, if the narrative of self-determination outlined so far has been one of progressive development, the mainstream legal account of self-determination is often one of reluctant conservatism. The fear is that, if left unchecked, a far-reaching right to self-determination will 'breed discontent, disorder and rebellion',[523] ushering in an era of violent regression in which smaller, less sustainable majorities oppress ever more marginalised minorities.[524] In response to this concern, international law is said to have created a patchwork of rights to self-determination by identifying a series of distinct legal categories to which the rules of self-determination apply. While recent attempts have been made to reconstruct self-determination in the context of a right to democracy,[525] women's rights,[526] indigenous rights[527] and minority rights,[528] it is — in its external form, at least — predominantly understood as a right associated with the foreign occupation or oppression of a people,[529] of which colonialism is a paradigmatic example.[530]

Some argue that the right to external self-determination should extend no further than

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[523] Lansing, *supra* note 474, at 96.

[524] Oeter, *supra* note 484, at 326–328; UN Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peace-Making and Peace-Keeping*, UN Doc. A/47/277-S/24111 (1992), at para.17; Verzijl, *supra* note 473, at 335. On the potential 'demonstration' effect of self-determination, see Moore, 'Introduction: The Self-Determination Principle and the Ethics of Secession', in M. Moore (ed.), *National Self-Determination and Secession* (1998) 1.

[525] For example, Thornberry, *supra* note 522; Franck, 'The Emerging Right to Democratic Governance' 86 *AJIL* (1992) 46.

[526] For example, H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000), at 151–164 and 231–244.

[527] For example, S. J. Anaya, *Indigenous Peoples in International Law* (2004).

[528] For example, Thornberry, 'Images of Autonomy and Individual and Collective Rights on International Instruments on the Rights of Minorities', in M. Suksi (ed.), *Autonomy: Applications and Implications* (1998) 97.

[529] GA Res. 2625 (XXV), *supra* note 137; Group of 77, 'Declaration of the South Summit and Havana Programme of Action', UN Doc. A/55/74 (2000); GA Res. 55/2, 8 September 2000; GA Res. 60/1, *supra* note 229.

[530] Per GA Res. 1514 (XV), *supra* note 495.

the borders of the colonial territory,[531] a position that the early jurisprudence of the ICJ seems to affirm.[532] According to this line of argument, any attempt to apply the right to self-determination beyond the context in which it was first applied serves only to undermine its legal coherence and normative force.

Today, however, there is a consensus that the legal right to self-determination is applicable beyond the context of decolonisation.[533] Recent scholarship points to the normative arbitrariness of restricting a broadly defined right to self-determination to cases of saltwater decolonisation. After all, '[w]hy should the populations of overseas colonies be the only groups entitled to choose their political status?'[534] There is significant agreement that, while its exact content remains unclear, self-determination 'is not confined to a right to be enjoyed by formerly colonised peoples', nor is it 'a right to be enjoyed once only and then lost'.[535] Instead, it has been recognised as a right of 'general and permanent' character,[536] a claim that still holds true today.

Following the recognition of a right to self-determination for 'all peoples' in common article 1 of the two human rights Covenants, the General Assembly adopted the Declaration on Friendly Relations and other resolutions that expand the legal norm of self-determination to encompass non-colonial and indigenous peoples.[537] More recently, the ICJ has cast off its earlier reluctance and recognised the right of the

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[531] For example, Castellino, 'Order and Justice: National Minorities and the Right to Secession', 6 *International Journal of Minority and Group Rights* (1999) 389; T. Franck *et al*., 'The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty', in A. Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (2000) 241; M. Halperin, D. Scheffer and P. Small, *Self-Determination in the New World Order* (1992), at 16–25, 53; Quane, 'The United Nations and the Evolving Right to Self-Determination', 47 *ICLQ* (1998) 537, at 571.

[532] Crawford, 'The General Assembly, the International Court and Self-Determination', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 585, at 598–601. Crawford cites *Northern Cameroons (Cameroon v. United Kingdom)*, ICJ Reports (1963) 15; *Nicaragua*, *supra* note 274.

[533] Arangio-Ruiz, *supra* note 511, at 225–227; Cassese, *supra* note 475, at 90–100 and 159; Crawford, *supra* note 481, at 31–32; Oeter, *supra* note 484, at 322; Thornberry, *supra* note 522, at 119. Elsewhere, Crawford describes decolonisation as the 'first generation' of self-determination. Crawford, *supra* note 158, at xv.

[534] K. Knop, *Diversity and Self-Determination in International Law* (2002), at 68. Compare Anaya, *supra* note 527, at 100; Buchanan, *supra* note 190, at 339; A. Cristescu, *The Right to Self-Determination* (1981), at 39; Craven, *supra* note 505, at 232–233; J. Duursma, *Fragmentation and the International Relations of Micro-States* (1996), at 38; Falk, 'The Right of Self-Determination under International Law: The Coherence of Doctrine Versus the Incoherence of Experience', in W. Danspeckgruber (ed.), *The Self-Determination of Peoples* (2002) 33, at 34.

[535] UNESCO, 'Statement to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities', UN Doc. E/CN.4/Sub.2/1992/6 (1992), at para.3(b).

[536] Cristescu, *supra* note 534, at 22.

[537] For example, GA Res. 2625 (XXV), *supra* note 137; GA Res. 3236 (XXIX), 22 November 1974; GA Res. 31/34, 30 November 1976; UNDRIP, *supra* note 504.

Palestinian people to self-determination.[538] The International Law Commission (ILC) has also described the principle of self-determination as being 'of universal application', arguing that, by 'not tying it exclusively to colonial contexts, it could be applied much more widely'.[539] Similarly, the Human Rights Committee stipulates that the right to self-determination set out in Article 1 of the ICCPR 'applies to all peoples and not merely to colonised peoples'.[540] '[I]t is too late', Falk concludes, 'to put the genie of self-determination back in its colonialist bottle … too large a meaning has been invested in the language of self-determination'.[541]

Nevertheless, this consensus only takes us so far. If we cannot narrow the scope of self-determination by tying it to the context of decolonisation, then how are we to address the question of limits? According to the dominant legal account of self-determination, there is no 'one size fits all' definition of the peoples that hold a right to self-determination. Instead, we must look to legal doctrine to identify the categories in which it applies. Beyond that of colonialism, there are two further categories in which the right is said to apply. A right of external self-determination is thought to apply in the context of the alien domination, subjugation or exploitation of the people of a state,[542] while a right of internal self-determination is thought to apply where an ethnic minority is denied fair access to the political institutions of the state in which it resides.[543]

Despite some uncertainty about the exact scope of each category that it identifies, this 'categorisation' approach[544] does place some constraints on the right to self-determination, and thus provides one answer to the question of limits raised by

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[538] *Israeli Wall*, *supra* note 503, at para.118.

[539] ILC, 'Draft Code of Crimes Against the Peace and Security of Mankind', II *Yearbook of the ILC* (1988) 55, at 64, para.266.

[540] HRC, 'Concluding Observations of the Human Rights Committee: Azerbaijan', UN Doc. CCPR/C/79/Add.38 (1994), at section 4. For states' emphasis on the universal application of self-determination, see also HRC, *supra* note 500; Duursma, *supra* note 534, at 21–23.

[541] Falk, *supra* note 534, at 38.

[542] GA Res. 2625 (XXV), *supra* note 137; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports (2010) 403, at para.79; sources *supra* note 529.

[543] As per the so-called 'safeguard clause' in GA Res. 2625 (XXV), *supra* note 137, which identifies states that are 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour' as those that are 'conducting themselves in compliance with the principle of the equal rights and self-determination of peoples'. See also Cassese, *supra* note 475, at 101–114.

[544] This term is adopted from Knop, *supra* note 534, at 50–65. Anaya labels this the 'restrictive approach'. Anaya, *supra* note 527, at 100. For other proponents of the restrictive or categorisation approach, see Doehring, 'Self-Determination', in Simma (ed.), *supra* note 279, 47, at 63–64; R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 115–116; Oeter, *supra* note 484, at 321.

Lansing, Verzijl and others. However, this answer fails to deliver the certainty it promises. While it insists that we look to existing legal doctrine to determine which peoples facing which grave external threats enjoy a right to self-determination, there is no such concisely delimited legal definition of the peoples that hold a right to self-determination. Even proponents of the categorisation approach disagree on the categories in which the legal rules apply. The deliberately vague language of legal provisions relating to self-determination, together with the expansion of its scope to include non-colonial and indigenous peoples, demonstrate the 'impossibility of pinning down the acceptable limits of a plausible legal claim' to self-determination.[545] This is not to say that the categories of right-holders identified by this approach are false or unhelpful; however, taken alone, they fail to provide an adequate account of self-determination as a broad, flexible legal concept.

The categorisation approach also struggles to provide any indication of the direction in which self-determination might evolve in response to future threats. Without some further reference to its underlying purpose or aim, it is unable to explain why the scope of self-determination has expanded to include non-colonial peoples facing foreign oppression, or indigenous peoples seeking greater recognition of their autonomy. Nor can it explain the work that self-determination does once it has been applied to these novel situations, particularly where these situations do not map neatly onto the 'blueprint' of saltwater decolonisation.

Climate change inundation, for example, raises unprecedented challenges in fulfilling the right to self-determination. It is not the outcome of a simple binary relationship between oppressor and oppressed states but, rather, a multilateral, causally complex situation in which the international community as a whole is both responsible for, and subject to, the harms of climate change. It involves a gradual, almost imperceptible journey towards future displacement rather than a history of sudden, typically violent, invasion and oppression. And, perhaps most importantly, the struggle at hand is one in which the vehicle for self-determination — the territorial state — faces an existential threat. Climate change inundation therefore requires us to rethink our legal understanding of self-determination as an exclusive, territorially bounded, one-off right to freedom from violent oppression.

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[545] Falk, *supra* note 534, at 46.

The following sections of this chapter begin to develop an alternative account of self-determination; one that does not cling to an 'always fragile, somewhat arbitrary, doctrinal clarity'[546] but is contextual and responsive to changing environmental, social and political demands.[547] The aim of this approach is to provide a coherent account of the ways in which self-determination might evolve in response to grave new threats to the autonomy of a people, with regard to basic principles of international law and the 'exigencies of contemporary life'.[548]

4.4 An alternative account of self-determination: Principle and rules

This alternative account of self-determination builds on the work of those, like Cassese, who adopt an 'open-textured'[549] account of self-determination as both a basic principle of international law and a set of specific legal rules. While there is little consensus on the criteria for identifying such principles of international law,[550] there is widespread agreement that they include the principle of self-determination.[551] In *East Timor*, for example, the ICJ recognised self-determination as 'one of the essential principles of contemporary international law',[552] echoing its recognition as one of 'the basic principles of international law' in the Declaration on Friendly Relations.[553] This recognition of self-determination as one of the 'basic' or 'essential' principles of international law indicates its status as a widely applicable legal norm of fundamental importance to the international community.[554]

Basic principles of this sort, Cassese argues, are of use in 'those areas where deep political and ideological disagreements prevail, but which need, however, some sort of

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[546] *Ibid*, at 34.

[547] Compare Higgins, *supra* note 544, at 4.

[548] *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174, Ind. Op. Alvarez, at 190.

[549] H. L. A. Hart, *The Concept of Law* (1994), at 123. See also Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', 28 *HRQ* (2006) 186; Schachter, *supra* note 273, at 20.

[550] Alongside self-determination, Cassese also includes the sovereign equality of states, prohibition of the threat or use of force, peaceful settlement of disputes, non-intervention in the affairs of states, respect for human rights, international cooperation and good faith. A. Cassese, *International Law in a Divided World* (1986), at 126–163. Note that Cassese himself does not use the term 'basic principle', preferring 'general' or 'fundamental principle'.

[551] See sources *supra* notes 484–485.

[552] *East Timor*, *supra* note 160, at para.29. For further discussion of the ICJ's work in identifying self-determination as an 'open-textured principle', see Klabbers, *supra* note 549, at 199 and 195–196.

[553] GA Res. 2625 (XXV), *supra* note 137.

[554] Indeed, Cassese's category of basic principles overlaps with those of *jus cogens* and *erga omnes* norms of international law. Cassese, *supra* note 550, at 158.

legal regulation'.[555] This arguably applies in the case of climate change inundation, which represents a complex and unprecedented challenge to the territory and self-determination of a people but falls outside the scope of existing international legal rules.

But what is the content and function of this principle? For Cassese, it provides a 'basic, overarching guideline' that identifies 'the essence of self-determination'.[556] When 'confronted with problems concerning the destiny of a people', it 'sets out a general and fundamental standard of behaviour' for all members of the international community:[557] they must act with regard to the 'free and genuine expression of the will of the peoples concerned'.[558]

Cassese draws inspiration from the ICJ's decision in *Western Sahara*, in which it identified 'the very essence of the principle of self-determination':[559] 'the need to pay regard to the freely expressed will of peoples'.[560] Other sources echo this formulation, emphasising the importance of taking into account the preferences of a self-determining people when making decisions about fundamental matters such as the position of territorial boundaries or the design of political institutions. The Atlantic Charter of 1941, for example, calls for the prohibition of 'territorial changes that do not accord with the freely expressed wishes of the peoples concerned', as well as respect for 'the right of all peoples to choose the form of government under which they will live'.[561] While the UN Charter does not explicitly refer to self-determination in Chapter XII, it insists on the 'progressive development [of trust territories] towards self-government or independence as may be appropriate to … the freely expressed wishes of the peoples concerned'.[562] The General Assembly has also adopted a series of resolutions which make clear that, while the outcome or 'mode' of self-determination

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[555] Cassese, *supra* note 475, at 319–320. In the context of decolonisation, compare *Western Sahara*, *supra* note 136, Sep. Op. Petrén, at 110.

[556] Cassese, *supra* note 475, at 319.

[557] *Ibid*, at 128–129. Compare Cassese, *supra* note 550, at 126.

[558] *Western Sahara*, *supra* note 136, at paras.55 and 162. See also Jennings and Watts, *supra* note 423, at 288.

[559] Cassese, 'The International Court of Justice and the Right of Peoples to Self-Determination', in Lowe and Fitzmaurice (eds), *supra* note 532, 351, at 358. Compare Crawford, *supra* note 484, at 647.

[560] *Western Sahara*, *supra* note 136, at para.32. Judge Vereschetin has argued elsewhere that the right of the Timorese to self-determination, 'by definition, requires that the wishes of the people concerned at least be ascertained and taken into account by the Court'. *East Timor*, *supra* note 160, Sep. Op. Vereschetin, at 135.

[561] Principles 2 and 3 of the Declaration of Principles (Atlantic Charter), 204 LNTS 381 (1941); reaffirmed in the Joint Declaration of the United Nations on Cooperation for Victory (1 January 1942).

[562] Article 76(b), UN Charter, *supra* note 173. See also Article 73.

may vary, the method by which it is applied — 'a free and voluntary choice by the peoples of the territory concerned' — should not.[563]

In addition to this basic principle, there is a set of treaty and customary rules, which specify — though not exhaustively — the contexts in which the principle is to be applied. Where the principle sets out the purpose of self-determination (to protect the 'destiny' of a people by respecting its freely expressed choice of political organisation), the rules specify its subject (the people that holds a right to self-determination) and content (the possible outcomes of this right).[564] Thus, given the scarcity of clear legal rules identifying right-holders, the principle of self-determination 'applies as of right … only to a restricted category of cases'.[565] As discussed earlier with regard to the categorisation approach, these include the populations of trust, mandate, non-self-governing and foreign-occupied territories, as well as racial minorities within a state that lack access to its political institutions.[566]

Where the rules provide specific legal content, the principle offers context-sensitive guidance that remains open to interpretation. Ideally, rules and principle therefore complement each other.[567] Legal principles are 'applicable to an indeterminate series of events that extend outward from a "core meaning"', which is given shape by the specific legal rules.[568] In cases where the legal rules are 'unclear or ambiguous' or do not yet apply — including, for example, the cession of territory[569] or the problem of climate change inundation — the principle clarifies the application of the legal norm of self-determination. This multilayered account provides space for flexible modes of

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[563] GA Res. 2625 (XXV), *supra* note 137; GA Res. 1541 (XV), *supra* note 495, at Principles VII–IX. Note, however, the Court's ambiguous observation that '[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the people, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory'. *Western Sahara*, *supra* note 136, at para.59. See discussion in Knop, *supra* note 534, at 164.

[564] Cassese, *supra* note 475, at 129 and 320; J. Crawford, *The Creation of States in International Law* (2006), at 124–125; Higgins, *supra* note 484, at 104.

[565] Crawford, *supra* note 484, at 149. See also Crawford, *supra* note 564, at 127.

[566] Cassese, *supra* note 475, at 130–131; Crawford, *supra* note 564, at 126–127.

[567] On the relationship between principles and rules, see, for example, Hart, *supra* note 549, at 127–131. In the case of self-determination, see French, *supra* note 163, at xvii–xviii.

[568] Schachter, 'The Relation of Law, Politics and Action in the United Nations', 109 *Hague Recueil* (1963) 169, at 191–192. Compare Schachter, *supra* note 273, at 20. Hart describes this relationship in terms of a 'core of certainty and a penumbra of doubt'. Hart, *supra* note 549, at 123. Compare Crawford, *supra* note 564, at 124.

[569] Cassese, *supra* note 475, at 132–133. Another example might be Crawford's proposed category of peoples subject to *carence de souveraineté*. Crawford, *supra* note 564, at 111, 126 and 142. See also Cassese, *supra* note 550, at 126; Thürer and Burri, *supra* note 484, at paras.28–32.

reasoning that draw on both legal doctrine and political, moral, social and other considerations.[570]

In the case of self-determination, this purposive approach is preferable to the categorisation approach outlined above. First, it provides a consistent normative account of self-determination with explanatory power. Unlike the mainstream legal approach, which identifies the categories in which self-determination applies and the mechanisms through which it should be realised on the basis of legal precedent rather than any underlying purpose or objective, the basic principle clarifies when and how self-determination should apply. In any situation in which the 'destiny' of a people is at stake, we must act with regard to the 'free and genuine expression of the will of the peoples concerned', where this includes but is not limited to the situations identified by the categorisation approach. It is precisely because of the ambiguity that surrounds the legal concept of self-determination that this purposive approach, which relies on the underlying purpose set out in the basic principle of self-determination to guide its application in emerging contexts, is useful and relevant.

Second, as a result, it guides the application of a right to self-determination beyond the limited contexts in which it is typically applied, making space for the development of a concept that more accurately reflects emerging threats to self-determination. Rather than remaining tied to the context of decolonisation or foreign occupation, the legal principle of self-determination applies whenever the 'destiny' of a people faces some grave threat. As Alston argues, an approach to self-determination that focuses solely on foreign oppression and occupation fails 'to give an accurate representation of the threats that exist to the enjoyment of the right to self-determination'.[571]

Third, and relatedly, it is instrumentally valuable to the extent that it applies to any situation in which the autonomy of a people faces some grave external threat, including that of climate change inundation. At the time of the ICJ's decision in *Western Sahara*, there was no 'sufficiently developed body of rules and practice to cover all the situations which may give rise to problems' of self-determination.[572] Arguably, this holds true today, particularly in the case of climate change inundation, which poses a clear threat to the 'destiny' of atoll island peoples by undermining their claims

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[570] Knop, *supra* note 534, at 43. See further Falk, *supra* note 534; Higgins, *supra* note 544, at 2–12.

[571] Alston, *supra* note 476, at 272.

[572] *Western Sahara*, *supra* note 136, Sep. Op. Petrén, at 110. Judge Petrén was referring specifically to the 'law of decolonisation' but the same diagnosis applies to self-determination more generally.

to territorial sovereignty and political autonomy but does not sit comfortably within the categories of alien domination or foreign occupation. The broader principle of self-determination can, however, guide behaviour in situations that fall outside of these narrow categories.

4.5 The determining self

This chapter tells a tale of two theories: the first, a doctrinal account of self-determination as a fixed set of rules or categories, and the second, a broader, theoretically grounded account of self-determination as an 'open-textured', context-sensitive body of law. Where the former finds it difficult to account for the ambiguous, mutable nature of self-determination, the latter leaves 'more room for its interpretation to evolve'.[573] However, those who prioritise purpose or function over categorisation inevitably struggle with the question of limits raised earlier in this chapter. By insisting that a legal principle of self-determination must apply in *all* situations in which the 'destiny' or autonomy of a people is at stake, the purposive account raises the spectre of widespread secession and fragmentation.

However, the basic principle of self-determination identified above need not open a Pandora's box of unilateral claims to secession. Much of the fear associated with a broader application of the right to self-determination stems from a failure to adequately specify the right-holders or content of the right. By constructing a relatively narrow understanding of 'peoples', this section addresses the question of limits by placing at least one constraint on the right to self-determination.

The first task in identifying a right-holder is to distinguish between 'people' and 'state', and clarify the relation in which each stands to the principle of self-determination. There is sufficient doctrinal evidence to indicate that self-determination is 'a right of peoples and not of governments'.[574] This reflects the fact that part of the significance of the doctrine of self-determination is its willingness to recognise a role for collective entities other than the state within international law. Any theory that subsumes the

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[573] Knop, *supra* note 534, at 32.

[574] As observed by the UK before the Third Committee of the General Assembly. Cited in Crawford, *supra* note 481, at 29. See, for example, Article 1(2), UN Charter, *supra* note 173; Article 1(1), ICCPR (*supra* note 238) and ICESCR (*supra* note 199); Articles 19 and 20, African Charter on Human and Peoples' Rights (Banjul Charter), OAU Doc. CAB/LEG/67/3 Rev. 5 (1982); GA Res. 2625 (XXV), *supra* note 137; Article VIII, Chapter I, Helsinki Final Act, *supra* note 498; Article 2, Chapter I, Vienna Declaration, *supra* note 499. '"[P]eoples" refers to groups of human beings who may, or may not, comprise states or nations'. Report of Committee I/1, CO/156, XVII UNCIO (1945), at 658. Cited in Duursma, *supra* note 534, at 14.

right of a self-determining group wholly within the structure of the state is unable to explain the paradigm case of self-determination (that is, the right to self-determination held by a non-self-governing population within a colonial state), nor the normative value of self-determination as a human right.

Instead, the state must be understood as 'the plenipotentiary or international dimension of peoples'.[575] It facilitates the realisation of a right to self-determination by providing the political infrastructure and international legal personality through which the members of a people may claim and exercise their collective right, but it does not hold the right itself. The state is, therefore, a means to an end, not an end in itself.[576] In the context of climate change inundation, this distinction between state and people is significant. If a right to self-determination is to endure in the absence of a defined territory, an effective government and perhaps even a state, there must be some identifiable people to which the right can be ascribed. This becomes particularly important in Chapter 8, which considers the possibility that an atoll island people might continue to exercise its capacity for self-determination while, at the same time, relinquishing its claim to statehood.

How, then, do we define 'peoples'? Cassese's own account is not particularly helpful. In addition to those groups that are the subject of a clear legal rule of self-determination,[577] Cassese defines peoples as 'conglomerates of individuals whose wishes and aspirations must be taken into account and given as much legal force as possible'.[578] Reading between the lines, Cassese implies that those 'conglomerates of individuals' must be 'collectively organised', whether as a state or non-state entity,[579] but fails to elaborate. Further development of the concept of peoples is therefore required.

One option is to comb through international law for a definition of the 'peoples' that hold a right to self-determination. However, thus far, 'no permanent, universally

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[575] Obiora, 'Beyond the Rhetoric of a Right to Development', 18 *Law and Policy* (1996) 355, at 370. Compare Mbaye, 'Introduction: Human Rights and the Rights of Peoples', in Bedjaoui (ed.), *supra* note 512, 1041, at 1049. Obiora and Mbaye are concerned with the right to development but their comments are relevant to other collective rights, including that of self-determination. See also Salomon, *supra* note 172, at 113–119.

[576] '[T]he state is created for individuals rather than vice versa.' A. Buchanan, *The Heart of Human Rights* (2013), at 102.

[577] Cassese, *supra* note 559, at 352.

[578] *Ibid*, at 361.

[579] See Cassese's discussion of the Court's reasoning in *Western Sahara*. *Ibid*.

acceptable list of criteria for a "people" exists'.[580] The closest attempt is that made by an International Meeting of Experts convened by UNESCO in 1989. In order to be identified as a people, they argued, a group must share some form of collective identity (a common history, race or ethnicity, language, culture, religion, ideology, attachment to land or economic life); meet some minimum population requirement; hold some collective will or consciousness as a people; and share institutions that express some form of collective identity.[581] However, this definition becomes unwieldy in practice. Its vague formulation could apply to groups that we would intuitively exclude from any discussion of self-determination (Liverpool Football Club fans or members of the British National Party, for example). It is also unhelpful in determining whether or not borderline groups count as peoples with legitimate claims to self-determination. It therefore does little to answer the question of limits raised above.

A second option is the categorisation approach discussed earlier. On this account, 'peoples' are defined according to widely recognised legal rules of self-determination, which thus far apply to (a) the populations of trust or non-self-governing territories, (b) populations that are subject to foreign occupation or subjugation, and (c) racial minority groups that are denied fair access to political institutions. 'Peoples' are therefore those groups facing one of a handful of threats identified in international law as warranting the protection of a right to self-determination. However, without some coherent account of the underlying objective of self-determination (as discussed further in section 4.6), it is unclear what it is about these particular threats that deserves such protection. For the purposes of this thesis, at least — which seeks to understand the ways in which the principle of self-determination might apply in unprecedented situations like that of climate change inundation — this account is unsatisfactory.

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[580] Joseph, Schultz and Castan, *supra* note 515, at 100–101. See discussion in Duursma, *supra* note 534, at 30–33.

[581] UNESCO, 'International Meeting of Experts on Further Study of the Concept of the Rights of Peoples', UN Doc. SHS89/CONF.602/7 (1989), at paras.22–23. Compare the definition proposed in *Greco-Bulgarian 'Communities'*, 1930 PCIJ Series B, No.17, at para.30. These definitions combine both objective or ascriptive and subjective criteria. For ascriptivist or nationalist accounts of self-determination, see, for example, Barry, 'Self-Government Revisited', in D. Miller and L. Siedentop (eds), *The Nature of Political Theory* (1985) 156; Margalit and Raz, 'National Self-Determination', 87 *Journal of Philosophy* (1990) 439; D. Miller, *On Nationality* (1995); M. Moore, *The Ethics of Nationalism* (2001); Y. Tamir, *Liberal Nationalism* (1993). For subjective or democratic accounts, see Franck, *supra* note 525; Mill, 'Considerations on Representative Government', in J. S. Mill, *On Liberty and Other Essays* (1991) 205; Philpott, 'In Defence of Self-Determination', 105 *Ethics* (1995) 352; Renan, 'What is a Nation?', in H. Bhabba (ed.), *Nation and Narration* (1990) 8; Turp, 'Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection', in S. Hartt *et al*. (eds), *Tangled Web: Legal Aspects of Deconfederation* (1992) 99.

Instead, this thesis understands 'peoples' as the populations of existing states.[582] This definition is narrower and more conceptually precise than the UNESCO definition, yet broader and more normatively coherent than the categorisation approach. At the same time, it answers the question of limits raised above. It draws on legal scholarship[583] but also offers a normatively richer explanation for the significance of state populations in the context of self-determination.

More specifically, this thesis defines a 'people' as a collective entity constituted by a history of mutual cooperation in the shared political institutions of a state, drawing on Anna Stilz's Kantian account of territorial rights. According to Stilz, over time, an 'initially unconnected group of citizens may be made into a "people" by cooperating together in [the] shared institutions' that constitute the government of a state.[584] This account finds support in legal doctrine and practice. In *Western Sahara*, for example, the ICJ identified cooperation within 'common institutions or organs' as a determining factor in deciding whether or not questions of sovereignty and self-determination are relevant in a given situation.[585]

However, according to Stilz, not just any state counts. A state must meet certain criteria, including maintaining an effective system of law that 'rules in the name of the people' and is 'responsive to the[ir] values'; acting in the interests of its citizens; protecting basic rights; and having a legitimate claim to occupy its territory.[586] Nor does any form of participation count. The members of a people should engage in

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[582] This does not rule out the extension of this definition to non-state groups that participate in shared governing institutions that do not correspond with those of a state government. It is important that a comprehensive account of self-determination includes entities other than those that correspond directly to existing states, in order to address the unjust annexation of non-state groups, and to avoid privileging Western notions of statehood and sovereignty. Compare Anaya, *supra* note 527, at 100–101; Banai, 'The Territorial Rights of Legitimate States: A Pluralist Interpretation', 6 *International Theory* (2014) 140, at 145–146. Moore provides a similar account to the one stated here but argues that non-state groups satisfying certain conditions should also be recognised as self-determining peoples. Moore, 'The Territorial Dimension of Self-Determination', in Moore (ed.), *supra* note 524, 134. However, this question is set aside for the future development of a broader account of self-determination.

[583] On the recognition of the whole populations of states as 'peoples', see Cassese, *supra* note 475, at 59–61; Crawford, *supra* note 564, at 126–127; Doehring, *supra* note 544, at 63–64; Duursma, *supra* note 534, at 22–26 and 36–38; Hannikainen, 'Self-Determination and Autonomy in International Law', in Suksi (ed.), *supra* note 528, 79, at 84; Higgins, *supra* note 544, at 12–25; Jennings and Watts, *supra* note 423, at 121; Oeter, *supra* note 484, at 327; Quane, *supra* note 531, at 571; Thürer and Burri, *supra* note 484, at para.17.

[584] Stilz, 'Nations, States and Territories', 3 *Ethics* (2011) 572, at 579–580. Compare Jennings and Watts, who describe the emergence of 'a community organised as a political unit (polis)'. Jennings and Watts, *supra* note 423, at 122.

[585] *Western Sahara*, *supra* note 136, at 55, para.149. See also discussion in Duursma, *supra* note 534, at 75.

[586] Stilz, *supra* note 584, at 578, 587–589. For Stilz, a state need not be democratic, provided that it is responsive to the wishes and values of its people. Compare Beitz, *supra* note 156, at 181–186; Cohen, 'Is there a Human Right to Democracy?', in C. Synowich (ed.), *The Egalitarian Conscience* (2006) 226, at 233–234.

shaping and sustaining their common institutions of statehood (for example, by paying taxes or obeying laws), and in producing the laws they are bound by (for example, by voting, forming political associations, engaging in public deliberation, or joining social movements).[587] Similarly, the Administrative Court of Cologne has defined a population as not merely an association for tax or commercial purposes but a dynamic, flourishing community with shared institutions and a common life or 'destiny'.[588]

This history of cooperation in shared political institutions is important for at least two reasons. First, it demonstrates that a people 'can sustain a political authority in common', thereby satisfying what Stilz calls the 'political capacity condition'.[589] It has the institutional knowledge, political and legal capacity, and collective will to establish and maintain common institutions of government. Second, it demonstrates that a people has developed a 'valuable political relationship', thereby satisfying what Stilz calls the 'political history condition'.[590] This political relationship requires those inside the group 'to sustain and value their association' and those outside the group 'to refrain from dissolving it'.[591]

But here a question arises. How can we define peoples as the populations of states and yet argue that only certain states count for the purposes of defining a people? Are the populations of totalitarian regimes like North Korea or Saudi Arabia — in which widespread participation in the design of laws and institutions is arguably impossible — to be excluded from the category of right-holders? One response would be to argue that the populations of truly authoritarian regimes should *not* be recognised as self-determining peoples, having not had the opportunity to participate in shaping any shared political goals or institutions. In the event of the loss of an effective government, territory or statehood, perhaps the population of North Korea should be given the chance to start again, rather than to rebuild their existing political institutions.[592]

Another response would be to adopt a modified version of Stilz's account that leaves space for 'provisional' peoples: the populations of totalitarian regimes that live under

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[587] Stilz, *supra* note 584, at 592. See also Stilz, 'Why Does the State Matter Morally?', in Ben-Porath and Smith (eds), *supra* note 430, 244, at 259–261.
[588] *In re Duchy of Sealand*, 80 *ILR* 683 (1989), at 686–688.
[589] Stilz, *supra* note 584, at 591 and 594. Compare Duursma, *supra* note 534, at 76.
[590] Stilz, *supra* note 584, at 592. Compare Moore, 'Which People and What Land? Territorial Right-Holders and Attachment to Territory', 6 *International Theory* (2014) 121, at 127–128 and 130–132.
[591] Stilz, *supra* note 584, at 592.
[592] Stilz appears happy to bite this bullet. Stilz, *supra* note 587, at 262, note 32.

and sustain — but do not yet participate in shaping — shared political institutions. Such peoples might be thought to share valuable political bonds — of solidarity or resistance, perhaps — arising from their history of survival under common institutions of government, even if these institutions do not currently reflect their shared values and interests. Such 'provisional' peoples may have a capacity for collective autonomy that lies dormant — or 'in abeyance'[593] — which they may exercise in future under an alternative political system. While Stilz may not endorse such a modification,[594] she does recognise that 'people share political bonds even when their history is undemocratic'.[595]

With this slight adjustment, Stilz's account is worth drawing on for its role in clarifying the ways in which the members of a people demonstrate a collective interest in, and capacity for, autonomy and independence. Peoples with a history of cooperation under common political institutions have, in Cassese's terms, a collective 'destiny' as a people, which they have constructed and continue to shape by participating in the shared political institutions of their state. It is this destiny — the ways in which the members of a people come together in common institutions, free from undue external interference, to form and pursue their own ideas about what makes life worth living — that is to be respected by paying attention to the 'freely expressed wishes' of a people. And it is this destiny that the planned migration proposal discussed in Chapter 3 fails to acknowledge or protect.

But what relevance does this account have if, as in situations of foreign occupation or subjugation — or climate change inundation — a people's government and state face some grave external threat? Stilz argues that, if a state is annexed or dissolved, its people may continue to hold a 'residual' right to self-determination for a certain time. As Stilz argues, a 'people's history of political cooperation through their state creates morally salient bonds between them that will persist even when their state temporarily falls away'.[596] Moreover, these bonds justify a people's right to a unique self-

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[593] A term that has been applied to the sovereignty of non-self-governing peoples. See, for example, Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', 7 *Wisconsin International Law Journal* (1988) 53; *International Status of South West Africa*, ICJ Reports (1950) 128, Sep. Op. McNair, at 150.

[594] See discussion of Somalia in Stilz, *supra* note 584, at 598.

[595] Stilz, *supra* note 587, at 260. On her recognition of non-democratic states as 'reforming', see also Stilz, 'Why Do States have Territorial Rights?', 1 *International Theory* (2009) 185, at 209; Stilz, *supra* note 584, at 588.

[596] Stilz, *supra* note 584, at 591.

determining status, which underpins a claim 'not just to any legitimate institutions, but to the ones they have created together through their political history'.[597]

This understanding of the 'peoples' that hold a right to self-determination is significant for the purposes of this thesis for three reasons. First, drawing on legal precedent, it offers a conceptually coherent answer to the question of limits: the right of self-determination is restricted to those peoples who have emerged through participation in the shared political institutions of a state.[598]

Second, it explains why the planned migration solution discussed in Chapter 3 is inadequate: it disregards the value of the shared 'destiny' of a self-determining people. While Tuvaluan migrants granted citizenship in New Zealand may secure protection for their basic individual human rights within a new state, they have lost something fundamentally valuable: respect for their shared interests as members of an autonomous, independent Tuvaluan people. What is important here is the idea of attachment to a particular people, not just membership in any self-determining community. As Moore argues, '"peoplehood" does not simply involve creating rules of justice, but doing so with particular others, with whom there is an ongoing commitment and a shared collective identity'.[599]

And third, it explains why a people whose state is threatened by the loss of its habitable territory or the dispersal of its population continues to hold a 'residual' right to self-determination. On the basis of this residual right, and in the absence of its original territory, it is entitled to reconstitute its shared political institutions elsewhere. It is the task of Chapters 6, 7 and 8 to examine where, when and how it might do so — and, in doing so, to provide a legal and conceptual framework within which an atoll island people whose state is threatened by climate change inundation can freely express its wishes concerning its continued existence as a people.

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[597] *Ibid*, at 595. Compare Banai, *supra* note 463, at 50, 53 and 59.

[598] It also allows room for the recognition of non-state 'peoples' if the theory were to be expanded through future research (see *supra* note 582).

[599] Moore, 'Theories of Territory and the Attachment Problem', LSE Political Theory Workshop (6 February 2014). See also Moore, *supra* note 590, at 128–129. Craven captures a similar distinction, in the context of statehood, between state personality (i.e. the attributes or competences that all states have in common) and state identity (i.e. the particular features that differentiate one state from another), where the latter points to a 'sense of "self", "singularity", and "community"'. Craven, 'The Problem of State Succession and the Identity of States under International Law', 9 *EJIL* (1998) 142, at 160 and 162.

4.6 The aims of self-determination

According to the purposive account proposed above, the principle of self-determination requires that, in any situation in which the 'destiny of a people' is at stake, we act with regard to the 'free and genuine expression of the will of the peoples concerned', while the rules of self-determination identify those peoples that qualify as right-holders. On this account, the primary aim or purpose of self-determination is to protect the 'destiny' of a people by recognising its freely chosen form of political organisation.[600] Given that Cassese himself fails to provide a detailed explanation of this aim, this section develops it further, laying the groundwork for subsequent chapters.

International law suggests several potential aims for the principle of self-determination. Without going into a full refutation of these alternative aims, this section briefly indicates why each is inadequate as the primary purpose of self-determination (although they may nevertheless be recognised as secondary or derivative aims), before moving on to discuss the meaning of the 'destiny' of a people.

First, at the height of decolonisation, self-determination was often referred to as a means of 'bring[ing] a speedy end to colonialism'.[601] However, as previously argued, any attempt to narrow the principle of self-determination to the context of decolonisation is both normatively arbitrary and a poor reflection of international law as it currently stands. While the aim of the specific rule of self-determination that identifies trust, mandate and non-self-governing territories as right-holding peoples may well be to end colonial oppression, the aim of the broader principle of self-determination cannot be reduced to such a narrow scope.

Second, as a guiding principle of the UN, self-determination is associated with the maintenance of international peace, stability and security. Article 1(2) of the Charter identifies 'respect for the principle of equal rights and self-determination of peoples' as one of a range of 'appropriate measures to strengthen universal peace',[602] while the Declaration on Friendly Relations requires states to foster self-determination in order

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[600] On the underlying 'aims' or 'purposes' that legal rules and principles are intended to realise, see Schachter, *supra* note 273, at 21. Cassese refers to the 'essence' rather than the aim of self-determination. Cassese, *supra* note 475, at 319.

[601] GA Res. 1541 (XV), *supra* note 495. Compare GA Res. 2625 (XXV), *supra* note 137; *Western Sahara*, *supra* note 136, at para.31.

[602] See also Article 55, UN Charter, *supra* note 173.

to 'promote friendly relations and cooperation among states'.[603] Former Special Rapporteur Aureliu Cristescu concludes that self-determination is 'the most important of the principles of international law concerning friendly relations and cooperation among states'.[604]

While this reading of self-determination is broader in scope than the first, it too proves inadequate. First, it relies on an empirical claim that is difficult to prove. Self-determining peoples may indeed be less likely to disturb international peace and security, but this is not obviously true.[605] Second, even if it were true, this would only be in virtue of the role of self-determination in protecting some more fundamental human interest worth fighting for in the first place. By respecting and protecting this fundamental interest, we remove peoples' reasons for disrupting friendly relations between (or within) states and disincentivise those who would violently suppress such peoples, thereby securing international peace and security indirectly, if at all. And third, in promoting the more general aim of international peace and security, this reading is — like the planned migration approach discussed in Chapter 3 — unable to explain the value of a particular claim to self-determination. It cares only about the capacity for self-determination of peoples in general, not the capacity for self-determination of the I-Kiribati or Tuvaluan people in particular. For these reasons, peace and security, like decolonisation, may be a useful secondary aim of the principle of self-determination but cannot be its primary purpose.[606]

Third, some understand self-determination as a means of achieving corrective justice, typically in the event of the wrongful acquisition of territory. On this account, 'the right to self-determination can be seen as restoring power or territory to the rightful sovereign, just as private law requires the restoration of wrongfully taken property to

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[603] GA Res. 2625 (XXV), *supra* note 137.

[604] Cristescu, *supra* note 534, at 25. Compare L. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978); R. Müllerson, *International Law, Rights and Politics* (1994), at 72; Oeter, *supra* note 484, at 315–316; Thürer and Burri, *supra* note 484, at para.45.

[605] The people of Saudi Arabia, referred to above, arguably do not enjoy a right to (internal) self-determination but neither do they engage in international conflict.

[606] It is problematic for another reason as well. In a non-ideal world in which there is no coherent legal framework for adjudicating or enforcing rights of self-determination, the notion of effectiveness determines which groups are recognised as international legal actors *and* the value of self-determination is only recognised when there is a threat to international peace and security, groups seeking self-determination are left with little option other than to threaten or resort to force.

its owner'.[607] However, this proposed aim is also inadequate on several counts. In a world that has 'always involved the movement of peoples and the corresponding displacement of others',[608] it struggles to provide a satisfactory account of how far back we must go in identifying the 'injustice' that is to be rectified, and how much weight is to be given to the status quo. It fails to account for peoples that find themselves in conflict over the same territory, peoples that have never had access to a defined territory, or peoples whose territory has become uninhabitable, for whom there can be no restitution (and hence no self-determination). It also assumes that the principle of territorial integrity necessarily trumps — even subsumes — that of self-determination.[609] And, taken on its own terms, it cannot explain what it is about territory that is necessary for a people to be self-determining. Instead, it must resort to an additional story about the role that territory plays in protecting some collective interest of fundamental importance to a people.

Fourth, others suggest that self-determination has a corrective or remedial function of a different kind: responding to grave violations of the human rights of the members of a distinct group, particularly those relating to political participation.[610] Remedial secession is often proposed as a solution to this widespread violation of human rights.[611] In this case, however, the self-determination of a people becomes a means to an end rather than an end in itself. The primary aim here is to protect individual human rights to political participation, freedom of association, belief and expression, and so on, and the recognition of a minority group as an independent, self-determining entity is one means of achieving this where all others have failed. However, those who understand self-determination as valuable primarily because it protects the members

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[607] Knop, *supra* note 534, at 69. See, for example, Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation', 16 *Yale Journal of International Law* (1991) 177; Buchanan, *supra* note 190, at 355–357.

[608] Jennings and Watts, *supra* note 423, at 687, note 4.

[609] This conflict between self-determination and territorial integrity is far from being easily resolved, contrary to Brilmayer's argument, and will be returned to in Chapter 6.

[610] For example, the concurring opinion of Judge Wildhaber, joined by Judge Ryssdal in *Loizidou v Turkey*, 40/1993/435/514, ECHR (1997). Compare the so-called 'safeguard clause' in GA Res. 2625 (XXV), *supra* note 137; Article 2, Chapter I, Vienna Declaration, *supra* note 499; CERD, *supra* note 507, at para.6. See further discussion in Duursma, *supra* note 534, at 75–76 and 92–93.

[611] For example, Buchanan's 'Remedial Right Only' theory of secession. Buchanan, *supra* note 190, at ch.8. See also Doehring, *supra* note 544, at 64–69; A. Eide, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities* (1993), at 16–19; Schachter, 'Sovereignty: Then and Now', in R. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1993) 671, at 684. For an alternative perspective, see Del Mar, 'The Myth of Remedial Secession', in French (ed.), *supra* note 158, 79. For those who understand self-determination in terms of individual human rights (especially rights to political participation), see also Franck, *supra* note 525; McCorquodale, 'Self-Determination: A Human Rights Approach', 43 *ICLQ* (1994) 857.

of a group from danger or political oppression tend to overlook the significance of a unique self-determining status. As Chapter 3 concluded, a people's right to self-determination holds some value of its own that is not reducible to an individual's 'right to have rights' in any rights-protecting state. The principle of self-determination does not merely protect the right to participate in *any* political institutions, but also the right to participate in those institutions that are shaped by and valuable to the members of a people.

Thus far, this section has examined — and found wanting — four alternative aims for the principle of self-determination. These proposals are unable to explain what it is about a unique right to self-determination that is of fundamental importance to a people, without reference to some other, more basic aim or purpose. Self-determination may indeed be valuable as a means of facilitating decolonisation, ensuring international peace and stability, correcting past injustices or protecting vulnerable minorities from oppression, but these cannot be understood as its primary aim.

This leads us back to Cassese's account of self-determination, which requires us to act with regard to the 'free and genuine expression of the will of the peoples concerned' in any situation in which the 'destiny' of a people is at stake. As noted earlier, this account finds support in numerous sources of international law. In the same breath with which they identify one of the aims of self-determination as bringing colonialism to a 'speedy end', for example, both General Assembly resolutions insist that international actors must have 'due regard to the freely expressed will of the peoples concerned'.[612]

It is unclear, however, what Cassese means by the 'destiny' of a people. Perhaps he refers to the Administrative Court of Cologne's claim that the state has a duty to uphold a 'form of communal life in the sense of sharing a common destiny'.[613] Perhaps he invokes Judge Dillard's well-known assertion that '[i]t is for the people to determine the destiny of the territory, and not the territory the destiny of the people'.[614] The term 'destiny' has also been invoked by the Nauruan people in the face of forced displacement from their territory as a result of the environmental degradation wrought

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[612] GA Res. 1541 (XV), *supra* note 495; GA Res. 2625 (XXV), *supra* note 137.
[613] *In re Duchy of Sealand*, *supra* note 588, at 687.
[614] *Western Sahara*, *supra* note 136, Sep. Op. Dillard, at 122.

by decades of phosphate mining. 'No matter how small they were and how unimportant they may be to others,' the Nauruans sought 'to preserve themselves as a distinct people and nation. They wanted to shape their own destiny.'[615]

But what does the term 'destiny' capture? The widespread emphasis on the 'freely expressed will' of a people and its capacity to 'freely determine' its 'political status' and 'economic, social and cultural development'[616] indicates that there is something fundamentally valuable about a people's capacity to create and maintain its own political, legal and socio-economic institutions, free from undue external interference. In order to be self-determining, therefore, it seems that a people must enjoy 'independent and determinate political control over some important aspects of its members' common life'.[617] With respect to these aspects, 'it must wield political power in its own right, rather than merely power delegated by a higher political unit and subject to being overridden or revoked by the latter'.[618]

In other words, a self-determining people must enjoy, to a certain degree, both autonomy (the capacity to make, legislate and enforce its own laws) and independence (freedom from undue external control over its autonomy).[619] These carve out a space in which a group of individuals can identify and cultivate the 'common interests' and 'communal life' that are necessary 'for the recognition of a "people" within the meaning of international law'.[620]

This thesis therefore understands self-determination as a basic principle of international law whose underlying purpose is to protect peoples' collective interests in autonomy and independence against grave external threats over which they have little control, although other derivative aims — decolonisation, peace and stability, restitution for past wrongs and so on — might also be realised in the process. Unlike nationalist or ascriptive theories of self-determination, then, the account of self-determination that this thesis develops is grounded in the value of autonomy: the way in which individuals, and the communities they constitute, form and pursue their own

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615 According to a report by the UN Trusteeship Council. Cited in Weeramantry, *supra* note 396, at 287. Anaya also refers to the right to 'control their own destinies' in his work on indigenous self-determination. Anaya, *supra* note 527, at 98.

616 Article 1, ICCPR (*supra* note 238) and ICESCR (*supra* note 199).

617 Nine, *supra* note 91, at 363.

618 Buchanan, *supra* note 190, at 333.

619 On autonomy, see the contributions to Suksi (ed.), *supra* note 528. On independence (in the context of statehood), see Crawford, *supra* note 564, at 62–88; Jennings and Watts, *supra* note 423, at 338–482.

620 *In re Duchy of Sealand*, *supra* note 588, at 687–688.

ideas about what is valuable.[621] Each member of a people has an interest in the collective good of self-determination — in living in an autonomous, independent community in which she shapes the laws she is bound by and participates in common political, social and cultural institutions — arising from her membership of that people.[622]

This understanding of self-determination does not specify the policies, laws or institutions required for a people to enjoy autonomy and independence — that is, to be self-determining. It leaves open the types of institutions through which a people exercises control, the practices and institutions over which it has control, and the extent of its control over these.[623] This deliberately broad, flexible framework leaves sufficient space to explore, in Chapters 6, 7 and 8, the different modes through which the self-determination of the peoples of atoll island states might best be protected. In particular, unlike other political accounts of self-determination,[624] it leaves open the question of whether a self-determining people necessarily requires independent statehood or exclusive jurisdiction over a particular territory.

4.7 Conclusion

This chapter has set out the bones of an alternative account of self-determination: one that understands the principle of self-determination as a broad, context-sensitive source of guidance for the application of associated legal rules. It has identified the underlying purpose of self-determination (respect for the 'destiny' or autonomy of peoples, as freely expressed through their choice of political organisation), as well as the peoples that hold a right to self-determination (the populations of existing states, who collectively sustain and shape the political institutions of their state). Self-determination, on this account, ensures that all peoples 'are able to be secure in the

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[621] For other political accounts of autonomy or self-determination, see, for example, Banai, *supra* note 463; C. Wellman, *A Theory of Secession: The Case for Political Self-Determination* (2005); Waldron, 'Moral Autonomy and Personal Autonomy', in J. Christman and J. Anderson (eds), *Autonomy and the Challenges to Liberalism* (2005) 307.

[622] On the idea that collective legal rights protect some interest held by the members of a group in virtue of their membership in that group, see, for example, Beitz, *supra* note 156, at 112–113; Raz, *supra* note 159, at 207–209; Waldron, 'Two Conceptions of Self-Determination', in Besson and Tasioulas (eds), *supra* note 190, 397, at 408.

[623] Buchanan, *supra* note 190, at 333.

[624] Examples include Banai, *supra* note 463; Moore, *supra* note 590, at 131; Stilz, *supra* note 584, at 591.

knowledge that their interests, opinions and desires for actions are taken into account'[625] whenever they face some grave external threat to their collective autonomy.

This purposive account of self-determination is preferable to the mainstream categorisation approach, both in general and in the specific context of climate change inundation. It provides a consistent normative account that explains when, how and why self-determination should apply. It is therefore better able to guide us in applying an often ambiguous or unsettled area of law to problems in the world today. As a consequence, it is also instrumentally valuable in addressing emerging threats to the autonomy or 'destiny' of a people, including that of climate change inundation.

Chapter 5 further develops this theoretical account of self-determination by applying it to the specific case of climate change inundation. In doing so, it answers key questions about its application in concrete circumstances. On what grounds might we identify the populations of atoll island states as peoples with a right to self-determination? Is the principle of self-determination broad enough to recognise climate change inundation as a grave, foreseeable threat to the autonomy of a people? If so, what reasons might other states have for acting to protect or promote the self-determination of atoll island peoples in the face of climate change inundation? This lays the groundwork for Part IV of the thesis, which considers the ways in which an atoll island people might exercise its right to self-determination in the face of climate change inundation.

[625] Young, 'Two Concepts of Self-Determination', in S. May, T. Modood and J. Squires (eds), *Ethnicity, Nationalism and Minority Rights* (2004) 176, at 185.

5. Climate Change Inundation and Self-Determination

5.1 Introduction

The international law of self-determination remains unsettled. Setting out its opinion on the right of the Serbian populations in Croatia and Bosnia-Herzegovina to self-determination, the Arbitration Commission established by the Conference of Yugoslavia observed that 'international law as it currently stands does not spell out all the consequences of the right to self-determination'.[626] Nor has this changed since the Commission was established in the early 1990s. Questions about the normative value that is protected by self-determination, the identity of the determining self and the threats against which it is to be protected have yet to be definitively answered.

One of the aims of this thesis is to develop a broader account of self-determination with the normative and conceptual resources to begin to address these questions. When it first emerged as a guiding principle of the international community in the UN Charter, it was generally agreed that self-determination lacked the specificity or content of a legal norm; instead, 'it primarily possesse[d] a very strong moral and political force'.[627] Since 1945, the law of self-determination has developed specific legal content, which capitalises on its earlier moral potency. It is important, however, not to lose sight of this normative potential, as the mainstream 'categorisation' approach threatens to do. Instead, as the purposive account proposed in Chapter 4 recognises, the basic principle of self-determination provides flexible guidance for the interpretation and application of the law in alternative and unprecedented cases, acting as a 'template for the translation of moral or political arguments into international law'.[628]

The previous chapter examined two ways in which the legal concept of self-determination might be supplemented by moral reasoning: in terms of (a) the underlying aim of self-determination (to pay due regard to the freely expressed wishes of the people in any situation in which its 'destiny' or autonomy is at stake), and (b) the identity of the self-determining 'peoples' (in this case, the populations of states that participate in, and sustain, shared institutions of government).[629] This chapter

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[626] Conference of Yugoslavia Arbitration Commission, 'Opinion No.2', 31 ILM 1497 (1992), at 1498.
[627] Thürer and Burri, *supra* note 484, at para.8.
[628] Knop, *supra* note 534, at 24.
[629] Compare *ibid*.

considers how these two strands of reasoning might facilitate the expansion of the legal principle of self-determination to encompass the populations of atoll island states. If climate change inundation interferes with the 'destiny' or autonomy of atoll island peoples, to what extent can they claim to have a say in what happens next? Can the principle of self-determination ensure that legal solutions 'tak[e] account of the desires of affected communities' in determining when, where and how to move?[630]

This chapter is a stepping-stone between the functional account of human rights developed in Chapters 2 and 3, the purposive account of self-determination set out in Chapter 4 and the exploration of a potential right to self-determination for atoll island peoples in Chapters 6, 7 and 8. Section 5.2 considers several reasons for recognising the populations of atoll island states as peoples with a right to self-determination. Section 5.3 identifies climate change inundation as a grave external threat to the autonomy or 'destiny' of atoll island peoples. Section 5.4 examines the ways in which a legal rule to this effect might emerge and solidify, drawing on an emerging body of expert evidence and state practice. Finally, building on the functional account of human rights developed in Chapters 2 and 3, section 5.5 considers the reasons that states might have for acting to address the impact of climate change inundation on the self-determination of atoll island peoples. This lays the groundwork for a substantive analysis of the actions that these states might be required to take in subsequent chapters.

5.2 Recognising atoll island 'peoples'

The first task of this chapter is to examine the grounds on which the populations of atoll island states at risk of climate change inundation might be recognised as peoples with a right to self-determination. As explained earlier, this thesis adopts a pluralist approach, drawing on the cumulative weight of multiple overlapping reasons to bolster its arguments. In this pluralist spirit, this section considers four potential grounds for the recognition of atoll island populations as self-determining peoples. The first three grounds are inadequate in isolation but nevertheless add to the balance of arguments in favour of recognition. The fourth and most significant draws on the account set out in Chapter 4, which defined self-determining peoples as the populations of existing states with a history of cooperation under shared political institutions.

[630] McAdam, *supra* note 90, at 5.

First, those states with which this thesis is concerned — Tuvalu, Kiribati, and the Maldives — have previously been identified as non-self-governing peoples with a right to self-determination.[631] The Maldives was a British protectorate (from 1887) and protected state (from 1948), while Tuvalu and Kiribati together formed the British colony of the Gilbert and Ellice Islands (from 1916).[632]

The populations of mandate, trust and non-self-governing territories are almost universally acknowledged as peoples with a right to self-determination. They are 'the firm ground on which the right to self-determination was applied'.[633] While the UN Charter does not explicitly refer to the principle of self-determination in Chapters XI and XII on trust and non-self-governing territories, the ICJ has argued that 'the subsequent development of international law in regard to non-self-governing territories … made the principle of self-determination applicable to all of them'.[634] According to the mainstream categorisation account discussed in Chapter 4, the peoples of Tuvalu, Kiribati and the Maldives therefore held a legal right to self-determination: the right to determine their collective 'destiny' by having a say in establishing their own political institutions. Between 1965 and 1979, each chose to exercise this right to self-determination by achieving independence.[635]

It would seem somewhat contradictory to accept this, however, while denying that the fundamental interest this right originally protected — the 'destiny' or autonomy of a people — is no longer deserving of the same legal protection now or in the future. In fact, there is substantial legal evidence to support the claim that self-determination is not a fleeting act but a right of 'general and permanent character'.[636] The language and preparatory work of Article 1 of the two human rights covenants, for example, indicates the broad temporal scope of the right to self-determination. The phrase '*all*

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631 See UN, 'Trust and Non-Self-Governing Territories (1945-1999)', accessible at www.un.org/en/decolonization/nonselfgov.shtml. While the Maldives is not included on this list, its status as a British protectorate and protected state also precluded it from attaining a 'full measure of self-government' prior to 1965.

632 On the political history of these states, see further I. Campbell, *A History of the Pacific Islands* (1989); S. Fischer, *A History of the Pacific Islands* (2002); K. Howe, R. Kiste and B. Lala, *Tides of History: The Pacific Islands in the Twentieth Century* (1994); H. Metz, *Maldives: A Country Study* (1994); U. Phadnis and E. Luithui, *Maldives: Winds of Change in an Atoll State* (1985).

633 Thürer and Burri, *supra* note 484, at para.34.

634 *Namibia*, *supra* note 279, at para.52–53. The ICJ is referring to General Assembly resolutions concerning the application of a right of self-determination in the context of decolonisation, including GA Res. 1514 (XV), *supra* note 495; GA Res. 1541 (XV), *supra* note 495; GA Res. 2625 (XXV), *supra* note 137.

635 The Maldives gained independence from the UK on 26 July 1965, Tuvalu on 1 October 1978 and Kiribati on 12 July 1979.

636 Cristescu, *supra* note 534, at 22.

peoples have the right of self-determination'[637] — echoed in the Helsinki Final Act's insistence that 'all peoples *always have* the right' to self-determination[638] — indicates not only the universal application of the right but also its duration over time. The word 'have' was chosen to 'emphasise the fact that the right referred to is a permanent one'.[639] As the UK has observed, '[s]elf-determination is not a single event, but a continuous process'.[640]

There is therefore considerable evidence to suggest — for those peoples that have previously exercised a right to self-determination, at least — that 'self-determination is a continuing, and not a once-and-for-all right'.[641] Having exercised their right to 'constitutive' self-determination, the peoples of Kiribati, Tuvalu and the Maldives do not forfeit their status as right-holders but continue to hold an 'ongoing' right as self-determining peoples.[642] From the perspective of the mainstream categorisation account of self-determination, these peoples therefore have a right to self-determination that has not been exhausted but 'continues to be vested in the people'.[643] This right entitles them to sustain the institutions of government they established as part of their constitutive act of self-determination.

This first ground for recognising atoll island populations as self-determining peoples is useful insofar as it reminds us that self-determination is not a one-off but a continuing right. The value of collective autonomy does not diminish simply because a people has, in this case, established itself as an independent state. And, by drawing on legal doctrine and practice that decisively identifies non-self-governing populations as peoples with a right to self-determination, it may also convince proponents of the categorisation approach that a right to self-determination does indeed apply in the context of climate change inundation, thereby gaining wider support for the arguments developed in subsequent chapters.

However, it also highlights the normative arbitrariness of the categorisation account of self-determination. Why should the populations of former non-self-governing

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637 Article 1(1), ICCPR (*supra* note 238) and ICESCR (*supra* note 199) (emphasis added).

638 Article VIII, Chapter I, Helsinki Final Act, *supra* note 498 (emphasis added). Compare Duursma, *supra* note 534, at 36; Malanczuk, *supra* note 279, at 335.

639 According to the Chairman of the Working Party of the Third Committee, cited in UN Doc. A/C.3/SR.668, at para.3 and Cassese, *supra* note 475, at 54.

640 Cited in Crawford, *supra* note 481, at 29.

641 Crawford, *supra* note 564, at 126.

642 Anaya, *supra* note 527, at 105.

643 Thürer and Burri, *supra* note 484, at para.22.

territories — and not those of the Netherlands, Belgium, Vietnam, or other low-lying states that have not previously been colonised — be the only groups to hold a right to self-determination in the face of climate change inundation? Some broader account of the grounds on which atoll island populations might be recognised as peoples with a right to self-determination is therefore needed; one that better reflects the law as it currently stands.[644]

Second, as Chapter 4 observed, the populations of atoll island states might be identified as peoples on the basis of common ascriptive characteristics like race, language, culture, religion or attachment to land.[645] Atoll island populations meet many of these ascriptive criteria. The constitution of the Maldives, for example, sets out a centralised system of government based on a common religious foundation (the teachings of Islam and Shari'ah law), while the emergence of Tuvalu and Kiribati as two separate states from the one colony is attributed to tensions between their different ethnic populations, one predominantly Polynesian and the other Micronesian. Often, islanders also express an attachment to land that is tied to their shared cultural identity. When asked what they would miss most if they were forced to leave their island, for example, many Tuvaluans nominated 'a distinct identity, a feeling of belonging … lifestyle, family connections, and culture, all of which seemed to be irrevocably tied to place'.[646]

Again, however, while this ascriptive account may support the recognition of atoll island populations as peoples with a right to self-determination, it is inadequate in isolation.[647] It finds it difficult to account for those heterogeneous populations whose right to maintain independent institutions of government is taken for granted (including Canada, Australia and the US), or those multiracial non-self-governing populations granted a right to self-determination on the basis of colonial borders rather than shared cultural, linguistic or ethnic characteristics. Nor can it explain why some homogeneous groups are entitled to create and sustain independent political institutions and others are not.

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[644] That is, as a body of law that is inclusive of entities other than the populations of non-self-governing, trust or mandate territories. See the application of self-determination outside of the context of decolonisation in GA Res. 2625 (XXV), *supra* note 137; Article 1, ICCPR (*supra* note 238) and ICESCR (*supra* note 199); *Israeli Wall*, *supra* note 503, at para.118.

[645] See, for example, the definitions provided in UNESCO, *supra* note 581, at paras.22–23; *Greco-Bulgarian 'Communities'*, *supra* note 581, at para.30. Compare Brownlie, 'The Rights of Peoples in Modern International Law', in J. Crawford (ed.), *The Rights of Peoples* (1988) 1, at 5.

[646] Mortreux and Barnett, *supra* note 32, at 110.

[647] See Buchanan, *supra* note 190, at 384–393.

Third, the populations of atoll island states might be recognised as peoples with a right to self-determination on the basis that they have claimed recognition as peoples with a right to self-determination, regardless of whether or not they share any ascriptive characteristics. According to a subjective account of self-determination, the self is 'constituted primarily by the aspirations and efforts of a people to achieve self-determination'.[648] Again, the populations of atoll island states qualify as peoples with a right to self-determination. Each has expressed a claim to self-determination in the face of climate change inundation through its elected representatives. The Maldives has, for example, made explicit the links between climate change, loss of territory, and the realisation of rights to self-determination and sovereignty over natural resources.[649] And, speaking before the General Assembly, former Tuvaluan Prime Minister Apisai Ielemia observed that, '[t]he survival and security, along with fundamental human rights, and the cultural identity of our entire nation is under threat'.[650] 'We want to survive as a people and as a nation', he argues. 'And we will survive: it is our fundamental right.'[651]

The persistent claims made to self-determination by atoll island populations demonstrate that, for those whose interests in autonomy and independence are at stake, self-determination is indeed 'a value worth preserving'.[652] However, while this approach emphasises the capacity and willingness of populations to communicate their wishes *as* peoples, any account that recognises 'peoples' on the basis of subjective claims alone is at risk of substituting legal reasoning and (relative) political stability for normative incoherence and potential chaos, 'rais[ing] the spectre of uncontrollable secession' unmediated by legal principles or rules.[653]

While recognising the valuable insights and cumulative weight of these three accounts of the determining self, this thesis ultimately understands self-determining peoples as the populations of existing states with a history of collective cooperation in shared

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[648] Berman, *supra* note 593, at 90.

[649] Republic of the Maldives, *supra* note 21, at 21.

[650] Ielemia, speaking at the 63rd Session of the UN General Assembly (26 September 2008), accessible at www.un.org/en/ga/63/generaldebate/tuvalu.shtml.

[651] Ielemia, *supra* note 131. On similar claims made by the leaders of Kiribati and the Marshall Islands, see also Blair and Beck, *supra* note 131; Republic of the Marshall Islands, *supra* note 131.

[652] In response to Ödalen's concern that it 'might be seen as a controversial assumption that self-determination is a value worth preserving' in this context. Ödalen, *supra* note 91, at 225, note 3.

[653] Berman, *supra* note 593, at 92. Also see Buchanan, *supra* note 190, at 373–379.

political institutions.[654] The populations of the Maldives, Kiribati and Tuvalu share not only a common cultural life, language, ethnicity, attachment to land, colonial history and collective identification as a people, but also a history of participation in the political institutions of their state. Each is a republic or parliamentary democracy with universal adult suffrage and equal rights to political participation for all members of its population. The citizens of each population vote in regular elections, participate in referendums to determine the shape of their governing institutions,[655] join social movements[656] and form political parties or interest groups.[657] While the Maldives in particular has had a chequered political history, its constitution has recently been revised to more accurately reflect the wishes and demands of its population.[658]

The citizens of the Maldives, Tuvalu and Kiribati are thus engaged in producing the laws they are bound by and sustaining their common political institutions. Each population therefore satisfies both the political capacity and political history requirements outlined in Chapter 4: each has the knowledge and skills to establish and maintain legitimate institutions of government and each represents a valuable political association that is sustained by members and respected by non-members.[659] Each therefore has a collective autonomy or 'destiny' that it continues to shape and sustain by participating in the common political institutions of its state. As the populations of existing states with a history of cooperation under shared political institutions, as well as former non-self-governing territories, communities with common ascriptive characteristics, and self-identifying peoples, the populations of Kiribati, Tuvalu and the Maldives should therefore be recognised as peoples with a right to self-determination.

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[654] As noted in Chapter 4, while this thesis does not rule out the expansion of this definition to include those non-state groups that participate in shared political institutions of different types that do not correspond with those of a state government, this question is set aside for future research into a broader account of self-determination.

[655] In 1974, for example, 92% of the population of what is now Tuvalu voted to separate from Kiribati (then the Gilbert Islands) and form an independent colony. In 1968, around 93% of Maldivians voted to abolish the existing Sultanate and establish a Republic. See sources *supra* note 632.

[656] For example, the popular civic movement led by the Maldivian Democratic Party from 2003, which saw the legalisation of political parties and the ratification of a new constitution.

[657] Tuvalu and Kiribati do not have formally organised political parties but informal political factions or interest groups. See CIA, *supra* note 3.

[658] A new constitution was ratified on 7 August 2008, which calls for direct, multi-party elections for the President and members of the Majlis (parliament). However, in 2012, the Maldives' first democratically elected President was removed in an alleged coup. For a brief overview, see BBC News, 'Maldives Profile: Timeline', accessible at www.bbc.co.uk/news/world-south-asia-12653969

[659] Per Stilz, *supra* note 584, at 592.

5.3 Climate change inundation: A threat to self-determination

Having argued for the recognition of atoll island populations as peoples with a right to self-determination, there is another obstacle to address. According to the functional account proposed in Chapter 2, one of the primary roles of human rights is to 'elevate certain threats to urgent interests to a level of international concern'[660] by providing states with reasons to respond to the impact of these threats on the enjoyment of human rights at the domestic level. The question of which threats attain this status is a 'largely empirical' one, the answer to which may change over time in response to emerging socio-economic, geopolitical or environmental conditions.[661] An open-textured approach — like the purposive account of self-determination proposed in Chapter 4 — allows space for legal rules and principles to emerge and evolve in response to new threats.[662] However, in virtue of its flexible, responsive nature, it provides no definitive answer to the question of which threats trigger an international response.

According to the categorisation approach identified in the previous chapter, there is one non-colonial threat that triggers a right to external self-determination: the foreign domination, subjugation or exploitation of a people.[663] However, any attempt to reconceptualise climate change inundation as a form of alien domination or exploitation is both unhelpful and unnecessary. On the one hand, as discussed in Chapter 4, climate change inundation does not involve a straightforward binary relationship between oppressed people and oppressor state but a complex, multilateral, multi-causal web of past events and future harms. On the other hand, as emphasised in the preceding section, all peoples of existing states always have a right to self-determination. 'No preceding alien subjugation, domination, exploitation or other form of oppression is required.'[664]

Chapter 4, drawing on Cassese's emphasis on the 'destiny of a people',[665] defined the primary aim of self-determination as the protection of a people's collective interests in autonomy (the capacity to create, legislate and enforce its own laws) and independence

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[660] Beitz, *supra* note 156, at 189.
[661] Shue, *supra* note 175, at 32–33. In the context of climate change, see Bell, *supra* note 311, at 111 and 113.
[662] Hart, *supra* note 549, at 128–130.
[663] See, for example, GA Res. 2625 (XXV), *supra* note 137.
[664] Duursma, *supra* note 534, at 36 (see also 22–26).
[665] Cassese, *supra* note 475, at 129.

(freedom from undue external control over its autonomy) against grave external threats over which it has little control.[666] Building on this account, this section argues for the recognition of climate change inundation as a grave, unprecedented and foreseeable external threat to the self-determination of atoll island peoples.

This idea of a grave external threat is reflected in the widespread emphasis on the role of self-determination in protecting peoples against external interference.[667] Crawford, for example, argues that, outside of the context of decolonisation, self-determination is 'primarily a process by which the peoples of the various states determine their future through constitutional processes without external interference'.[668] The Atlantic Charter insists that 'sovereign rights and self-government [be] restored to those who have been forcibly deprived of them' by some external power.[669] The Helsinki Final Act insists that all peoples have the right 'to determine, when and as they wish, their internal and external political status, without external interference'.[670] And, according to the Committee on the Elimination of Racial Discrimination, peoples are entitled to 'pursue freely their economic, social and cultural development without outside interference'.[671]

While many of these sources have in mind the type of 'interference' envisaged by proponents of the categorisation approach — that is, the domination or subjugation of a people by another state — this narrow understanding of the external threats that exist to a people's autonomy is inadequate in the face of rapidly changing environmental, socio-economic, geopolitical and other factors. To focus solely on foreign domination is to fail 'to give an accurate representation of the threats that exist to the enjoyment of the right to self-determination'.[672]

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[666] On the role of the underlying aim of a legal principle in determining whether or not a particular case is relevantly similar to the core or ideal case, see Hart, *supra* note 549, at 127–130.

[667] Self-determination is often cited alongside principles designed to protect states from external interference, including those relating to the equality of states, non-interference and territorial integrity. See, for example, Crawford, 'State Practice and International Law in Relation to Unilateral Secession (Expert Report for Canadian Federal Government)', in Bayefsky (ed.), *supra* note 531, 31, at paras.61 and 71; Thürer and Burri, *supra* note 484, at para.17.

[668] Crawford, *supra* note 667, at para.60. Elsewhere, Crawford notes that, '[w]here a self-determination unit is a state, the principle of self-determination is represented by the rule against intervention in the internal affairs of that state, and in particular the choice of the form of government of the state'. Crawford, *supra* note 564, at 128. Compare Doehring, *supra* note 544, at 57.

[669] Principle 3, Atlantic Charter, *supra* note 561.

[670] Article VIII, Chapter I, Helsinki Final Act, *supra* note 498.

[671] CERD, *supra* note 507, at para.4. See also *Reference re Secession of Quebec*, *supra* note 508, at para.126.

[672] Alston, *supra* note 476, at 272.

Interestingly, while its decisions are often cited in support of the narrow categorisation account, the jurisprudence of the ICJ on obligations *erga omnes* points to a broader understanding of the threats that exist to a people's self-determination. In *Barcelona Traction*, the Court indicated that principles of law — including that of self-determination[673] — are recognised as being of *erga omnes* character in virtue of 'the importance of the rights involved',[674] not the way in which those rights are threatened or breached. And, in *East Timor*, the Court specifically emphasised the importance of the *right* to self-determination, rather than the nature of any potential threats.[675] This indicates that it is the importance of the right (and the interests it protects) rather than the way in which it is breached that is significant, at least for the purposes of engaging the interests of the international community. According to Tams, 'an obligation thus acquires *erga omnes* status because it protects important rights, not because — or if — it is violated in a particularly serious way'[676] — or, indeed, in any particular way at all. In other words, if the populations of atoll island states are recognised as peoples with a right to self-determination, then it is the mere fact that this right is threatened that counts, not the fact that it is threatened in some specific way.[677]

However, what the categorisation account *does* capture successfully is the idea that, for something to count as a threat to a people's self-determination, it must have some source that is external to and outside of the control of that people, and it must fundamentally interfere with its capacity for autonomy — variously understood in terms of its constitutional processes (Crawford), its capacity for self-government (Atlantic Charter), its internal and external political status (Helsinki Final Act), or its economic, social and cultural development (Committee on the Elimination of Racial Discrimination). This thesis therefore proposes a broader, more responsive understanding of the potential threats a self-determining people might face. In order to qualify as a threat to a people's right to self-determination, something must represent (a) a grave, foreseeable, external threat[678] (b) over which a people has little control to (c)

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673 *East Timor*, *supra* note 160, at para.29; *Israeli Wall*, *supra* note 503, at paras.88 and 155–156.

674 *Barcelona Traction*, *supra* note 161, at para.33. For an alternative account of *erga omnes* norms as those that are non-bilateral or non-reciprocal, see Tams, *supra* note 275, at 129–135.

675 *East Timor*, *supra* note 160, at para.29.

676 Tams, *supra* note 275, at 137. But see, for example, Oellers-Frahm, 'Comment: The *Erga Omnes* Applicability of Human Rights', 30 *Archiv des Völkerrechts* (1992) 28, at 35.

677 Beitz makes a similar point with regard to the human rights of women. Beitz, *supra* note 156, at 189–192.

678 On the requirement of foreseeability, see *ibid*, at 109 and 139; Shue, *supra* note 175, at ch.1. From a legal perspective, this might be understood in terms of the due diligence requirement that the relevant actors

the 'destiny' or autonomy of that people. (As argued in Chapter 2, in the event of a manifest failure of protection domestically, it must also be (d) amenable to some form of political or legal protection at the international level.[679] This fourth criterion will be addressed in Chapters 6, 7 and 8.)

Climate change inundation clearly satisfies these first three criteria. First, as Chapter 1 made clear, a substantial body of evidence indicates that the eventual inundation of coral atolls is cause for significant alarm. Atoll island states have themselves drawn international attention to their plight for over two decades,[680] joined more recently by a growing body of international experts, including the IPCC itself.[681] While the threat posed by climate change inundation to the self-determination of island peoples may be unprecedented, it is both grave and reasonably foreseeable. Second, climate change is a complex global process whose causes lie beyond the reach of developing atoll island states, which contribute, on average, just 1.5% of the greenhouse gas emissions of industrialised states, yet are 'likely to suffer most from its adverse effects'.[682] And third, the cumulative impacts of climate change are 'threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island states'.[683] Without a habitable territory within which it can establish and maintain autonomous political institutions, the ongoing self-determination of an atoll island people becomes increasingly uncertain.

If we accept that the underlying aim of the principle of self-determination is to protect the 'destiny' or autonomy of a people from grave external threats over which it has little control, and we seek to give meaning to this purpose, then we must also recognise climate change inundation as one of these threats.[684] If the legal norm of self-determination cannot evolve to address emerging threats to the autonomy of a people that fulfil these criteria, then it will fail to fulfil its primary purpose. The alternative to

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'knew or ought to have known at the time of the existence of a real and immediate risk' to the enjoyment of some right. *Osman v. UK*, *supra* note 225, at para.116.

679 Beitz, *supra* note 156, at 139–141.

680 See, for example, the speech made by the former President of the Maldives, Maumoon Abdul Gayyoom, at the Small States Conference on Sea Level Rise in Malé in 1989. Cited in Republic of the Maldives, *supra* note 20, at 1.

681 See, for example, Adger *et al*., *supra* note 115, at 733; ILA, *supra* note 97; Nansen Initiative, *supra* note 96, at 20; Nurse *et al*., *supra* note 11, at 1618, 1620 and 1639–1640; OHCHR, *supra* note 13, at para.40.

682 UNFCCC Secretariat, *supra* note 11, at 2 and 9.

683 OHCHR, *supra* note 13, at para.40.

684 As, for example, Hestetune does: 'the involuntary extinction of a state almost certainly profoundly interferes with the right of a people to self-determination'. Hestetune, 'The Invading Waters: Climate Change Dispossession, State Extinction, and International Law', California Western School of Law (2010), at 57.

this open-textured approach, Hart argues, is a kind of formalism that removes uncertainty at the expense of flexibility and responsiveness, leaving us with a fixed set of legal rules that may struggle to give effect to the underlying aim of self-determination in the face of changing environmental conditions.[685]

5.4 The emergence of a new legal rule identifying atoll island populations as peoples with a right of self-determination

So far, this chapter has made two claims about the application of self-determination to the context of climate change inundation: first, that the populations of atoll island states should be recognised as self-determining peoples; and second, that climate change inundation should be recognised as a grave external threat to the autonomy and independence — and, therefore, the self-determination — of these peoples. The principle of self-determination identified in Chapter 4 provides guidance as to how the self-determination of atoll island peoples might best be protected in the context of climate change inundation. Recognising that the 'destiny' or autonomy of a people is at stake, we should act with regard to the freely expressed wishes of that people.

However, in the absence of a clear rule specifying the application of self-determination in this area, atoll island peoples may be left with no clear justiciable right to self-determination.[686] After all, as Crawford reminds us, if self-determination is primarily understood as a legal principle, then it 'applies as a matter of right only after the unit of self-determination has been determined' by applying the relevant legal rules.[687] This section therefore examines whether and how a legal rule identifying the populations of atoll island states as peoples with a right to self-determination might emerge, drawing

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[685] Hart, *supra* note 549, at 129–130.

[686] On concerns about the justiciability of the right to self-determination more generally, see Cassese, *supra* note 475, at 142–143. In the context of internal self-determination, the Human Rights Committee has been reluctant to elaborate on or consider communications regarding the right of self-determination. See, for example, *Kitok v Sweden*, Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985 (1988), at para.6.3; *Ominayak*, *supra* note 462, at paras.3.13–3.15 and 13.3; *Marshall v Canada*, Communication No. 205/1986, UN Doc. CCPR/C/43/D/205/1986 (1991), at para.5.1. See also discussion in Scheinin, 'The Right to Self-Determination Under the Covenant on Civil and Political Rights', in P. Aikio and M. Scheinin (eds), *Operationalising the Right of Indigenous Peoples to Self-Determination* (2000) 179. The CESCR's approach remains to be seen following the entry into force of the Optional Protocol to the ICESCR in May 2013. In the case of external self-determination, mechanisms of complaint are limited to the ICJ and inter-state complaints procedure provided for under Article 41 of the ICCPR (*supra* note 238), both of which are available only to states.

[687] Crawford, *supra* note 564, at 127.

on evidence from state representatives, intergovernmental organisations, academics and legal experts.[688]

The two main forums in which legal norms of self-determination have developed are the ICJ and the General Assembly (though other ad hoc and regional forums have also contributed to its content).[689] The ICJ has made a notable contribution to the development of the legal content, scope and function of self-determination, including it among those legal norms that give rise to obligations *erga omnes*,[690] recognising non-colonial groups as peoples with a right to self-determination,[691] and acknowledging the relevance of self-determination in cases in which all parties agree that it is an 'appropriate solution'.[692] However, it can only elaborate upon the cases brought before it,[693] and can only exercise jurisdiction in contentious proceedings with the consent of all parties[694] (even in the case of a breach of a legal norm of *erga omnes* character like self-determination).[695] And only states can be parties[696] or interveners[697] in a contentious case,[698] thereby potentially excluding those peoples whose state faces some grave existential threat 'from participating directly in the adjudication of their right to self-determination'.[699]

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[688] On the emergence of a new legal framework more generally, see Mayer, *supra* note 404, at 400–415.

[689] See, for example, Conference on Security and Cooperation in Europe, Charter of Paris for a New Europe (1990); Conference of Yugoslavia Arbitration Commission, *supra* note 626; Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000). See also treaty body commentary including CERD, *supra* note 507; HRC, *supra* note 500.

[690] *East Timor supra* note 160, at para.29; *Israeli Wall*, *supra* note 503, at paras.88 and 155–156.

[691] For example, *Israeli Wall*, *supra* note 503, at para.118.

[692] Crawford, *supra* note 564, at 127. For example, in *East Timor* the Court took into account the parties' agreement that 'East Timor remains a non-self-governing territory and its people has the right to self-determination'. *East Timor*, *supra* note 160, at paras.31 and 37.

[693] With the exception of isolated dicta like that concerning obligations *erga omnes* in *Barcelona Traction*, *supra* note 161, at paras.33–34.

[694] Article 36, Statute of the International Court of Justice, 33 UNTS 993 (1945).

[695] Having established that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things'. *East Timor*, *supra* note 160, at para.29.

[696] Article 34(1), ICJ Statute, *supra* note 694.

[697] Articles 62–63, *ibid*.

[698] Although the Court may receive information from 'international organisations'. Article 34(2), *ibid*.

[699] Knop, *supra* note 534, at 193. But Crawford argues that 'there is no difficulty in principle with a legal system vesting in third parties the right to bring proceedings to vindicate the rights of another, especially where those rights cannot be asserted directly by the other'. Crawford, 'The Rights of Peoples: Some Conclusions', in Crawford (ed.), *supra* note 645, 159, at 164. In the *South West Africa* cases, for example, Ethiopia and Liberia took up the cause of the Namibian people's right to self-determination. *South West Africa (Liberia v. South Africa and Ethiopia v. South Africa)*, ICJ Reports (1966) 6. See also Shelton, 'The Participation of Non-Governmental Organisations in International Judicial Proceedings', 88 *AJIL* (1994) 611.

In any case, given the difficulty of identifying a causal link between the actions of one state and the threat that climate change poses to human rights in another state (as discussed in Chapter 3), it is difficult to see how — and against which states — proceedings might be brought.[700] It is also questionable whether the ICJ does (or should) have the capacity to rule on the continuation or extinction of an atoll island state facing climate change inundation.[701] And finally, as the reasons for acting discussed below make clear, a contentious case may target — and potentially alienate — those states with the strongest reasons for acting: often, 'the states "responsible" for the island state's plight are also the ones that can most assist it'.[702]

The General Assembly, on the other hand, has a broader remit than the ICJ, and has adopted numerous resolutions regarding the right to self-determination since the mid-20th century.[703] While its role is not generally one of law-making — with few exceptions, its resolutions are recommendatory rather than binding — it nevertheless provides a forum for state practice and the elaboration of law.[704] In fact, the ICJ explicitly relies on the 'subsequent development of international law' through the application of legal norms by political bodies like the General Assembly.[705] In *Western Sahara*, for example, the Court held that, in relation to a given territory, the legal content of self-determination is to be found, where possible, in 'the different ways in which the General Assembly resolutions … dealt with' the territory concerned.[706]

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[700] Another option would be to request an Advisory Opinion from the ICJ. See, for example, Werksman, *supra* note 394, at 428–429. In 2011, Palau proposed that the General Assembly request an Advisory Opinion on states' legal responsibilities relating to the cross-border harms caused by greenhouse gas emissions within their jurisdiction. No such request has yet been made, apparently because of a lack of consensus about the appropriate wording. See further R. Bavishi and S. Barakat, *Procedural Issues Related to the ICJ's Advisory Jurisdiction* (2012); Boom, 'See You in Court: The Rising Tide of International Climate Litigation', *The Conversation* (28 September 2011); Korman and Barcia, 'Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion', 37 *Yale Journal of International Law* (2012) 35.

[701] In the context of climate change inundation, see Wong, *supra* note 90, at 44. See also, more generally, Klabbers, *supra* note 549, at 191.

[702] Wong, *supra* note 90, at 44.

[703] The most significant include GA Res. 1514 (XV), *supra* note 495; GA Res. 1541 (XV), *supra* note 495; GA Res. 2625 (XXV), *supra* note 137. See also those recognising the right to self-determination of non-colonial and indigenous populations, including GA Res. 3236 (XXIX), *supra* note 537; GA Res. 31/34, *supra* note 537; UNDRIP, *supra* note 504. On the role of the General Assembly in disputes regarding territory and self-determination, see further Jennings, *supra* note 480, at 79–87.

[704] See, for example, *Fisheries Jurisdiction (United Kingdom v. Iceland)*, ICJ Reports (1974) 3, at para.58. 'State practice is just as much state practice when it occurs in the context of the General Assembly as in bilateral forms.' Crawford, *supra* note 564, at 114. See further Jennings, *supra* note 480, at 83–86; Schachter, 'United Nations Law', 88 *AJIL* (1994) 1, at 3; Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', 12 *AYIL* (1988) 92; Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)', 58 *BYIL* (1987) 39.

[705] *Namibia*, *supra* note 279, at para.52. In doing so, Cassese argues, '[t]he Court authoritatively confirmed this legal evolution by endorsement with its formal seal'. Cassese, *supra* note 559, at 354.

[706] *Western Sahara*, *supra* note 136, at para.60 (see also paras.59 and 71).

Crawford argues that the Court has played a 'secondary' or 'administrative' part — rather than the role of 'lead agency' — in the context of self-determination, often supporting its interpretation and implementation by the General Assembly.[707]

Could the General Assembly thus provide an initial forum for the recognition of a legal rule specifying a right to self-determination for the peoples of atoll island states at risk of climate change inundation? Could it use its recommendatory capacity to encourage states to act?[708] Given sufficient state pressure, it may follow its adoption of earlier resolutions — including those recognising the 'possible security implications' of climate change,[709] the particular vulnerability of small island developing states to the 'serious risks and challenges' posed by climate change[710] and the right to self-determination of non-colonial peoples[711] — by adopting a further resolution on self-determination and climate change inundation.[712]

While there may not yet be sufficient state pressure to achieve such an outcome, the increasingly widespread recognition of the relevance of self-determination in the context of climate change inundation indicates a significant level of support. In 2008, the Human Rights Council adopted Resolution 7/23, which calls on the OHCHR to examine the relationship between human rights and climate change.[713] The subsequent report explicitly recognises climate change inundation as a threat to the self-determination of the populations of atoll island states.[714] Following its publication, the Human Rights Council adopted Resolution 10/4,[715] which is notable for its boldness in acknowledging that climate change has a range of 'direct and indirect' implications for the enjoyment of human rights, including the right to self-determination.[716]

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[707] Crawford, *supra* note 532, at 592. Compare Klabbers, *supra* note 549, at 205.

[708] Article 14, UN Charter, *supra* note 173.

[709] GA Res. 63/281, 11 June 2009.

[710] GA Res. 63/32, 3 April 2009, at para.9.

[711] For example, GA Res. 2625 (XXV), *supra* note 137; GA Res. 3236 (XXIX), *supra* note 537; GA Res. 31/34, *supra* note 537; UNDRIP, *supra* note 504.

[712] On the relative merits and weaknesses of a soft law approach, see Kälin and Schrepfer, *supra* note 73, at 69–72; Mayer, *supra* note 404, at 408–409; McAdam, *supra* note 90, at 238–239. For a recent critical perspective on the role of the General Assembly (alongside the Security Council and ICJ) in the context of self-determination, see Almqvist, 'The Politics of Recognition: The Question about the Final Status of Kosovo', in French (ed.), *supra* note 158, 165.

[713] Human Rights Council Res. 7/23, *supra* note 180.

[714] OHCHR, *supra* note 13, at para.41.

[715] Human Rights Council Res. 10/4, *supra* note 132.

[716] *Ibid*, at preambular para.7. See discussion in Limon, *supra* note 181; McAdam, *supra* note 90, at 222.

Resolution 10/4 marked a turning point in the recognition of the implications of climate change inundation for self-determination. In 2011, the World Bank published a report recognising the threat posed by climate change inundation to the self-determination and 'very existence' of atoll island peoples.[717] That same year, at a round-table meeting convened by the UNHCR, a group of international legal experts, intergovernmental organisations, and state representatives met to discuss the relationship between climate change and displacement. 'Any relocation plans', they concluded, 'need to ensure the enjoyment of the full range of relevant rights', including rights 'to life, dignity, liberty, security, and self-determination'.[718] And, in 2014, the ILA established a Committee on International Law and Sea Level Rise to study the 'implications under international law of the partial and complete inundation of state territory',[719] including the question of whether atoll island peoples have 'a right to resettle as a community' or, indeed, a right to self-determination.[720]

In academia, there has been a growing shift towards the recognition of the importance of both individual and collective human rights in this context, led by political theorists.[721] Although reluctant to examine its implications in detail, legal scholars are also beginning to acknowledge the relevance of self-determination to the issue of climate change inundation. Katrina Wyman, for example, admits that, without some protection of the right to self-determination, 'the recognition of an individual right to resettle would be a second-best response'.[722] David Hodgkinson, in his body of work advocating the adoption of a new treaty for persons displaced by climate change, argues for the use of self-determination as a 'guiding principle that could inform resettlement'.[723] Maxine Burkett, Jane McAdam, Rosemary Rayfuse and others have

[717] McInerney-Lankford, Darrow and Rajamani, *supra* note 95, at 18 (see also 35–36).

[718] UNHCR, *supra* note 75, at para.32 (see also para.31). A full list of participants is accessible at www.unhcr.org/4da2b5899.html. Compare Nansen Initiative, *supra* note 96, at 20.

[719] ILA, *supra* note 97.

[720] Vidas, *supra* note 97. Compare Asia Pacific Forum of National Human Rights Institutions, *Human Rights and the Environment: Final Report and Recommendations* (2007), at 12; FIELD, *Submission to the OHCHR under Human Rights Council Resolution 7/23* (2008), at 1–2; Nansen Initiative, *supra* note 96, at 20.

[721] Kolers, *supra* note 91; Nine, *supra* note 91; Ödalen, *supra* note 91; Schuppert, *supra* note 134. Other theorists refer to but do not examine self-determination or collective resettlement in detail, including Bradley, *supra* note 306, at 157, fn.1; Risse, *supra* note 91.

[722] Wyman, *supra* note 90, at 441.

[723] Hodgkinson and Young, *supra* note 133, at 326.

also begun to make reference to the relevance of self-determination in assessing the options available to atoll island populations.[724]

Intriguingly — unlike an earlier version of this chapter in which self-determination is mentioned only as a passing footnote[725] — McAdam's updated chapter on 'disappearing states' examines the relevance of the legal norm of self-determination for the populations of atoll island states,[726] indicating a newfound recognition of self-determination as one of the 'underlying and fundamental questions' that arise in this context.[727] Yet McAdam, like the OHCHR, Wyman, Rayfuse, Burkett, Hodgkinson and others, does not herself provide a detailed analysis of the application of self-determination to the issue of climate change inundation, choosing merely to indicate that this is a fruitful avenue of research.

In response to this growing pressure from international organisations, state representatives and legal scholars, a legal rule identifying the populations of atoll island states as peoples with a right to self-determination may therefore be recognised. In the interests of exploring the scope and content of this emerging right, the rest of the thesis proceeds on an 'as if' basis. That is, it examines the method by which atoll islanders might continue to exercise their right to self-determination, the possible modes or outcomes of this right and the reasons that other states might have for supporting these outcomes, *as if* atoll island populations were already recognised as peoples with a right to self-determination in international law.

5.5 Reasons for protecting the self-determination of atoll island peoples

As Raz observes, we may know that a right exists and we may understand the interests it protects without knowing precisely which actors are required to ensure its realisation or which actions they are expected to take.[728] This is particularly relevant

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[724] Burkett, *supra* note 90, at 363 and 366; McAdam, *supra* note 90, at 36, 147–149 and 157–158; Rayfuse, *supra* note 133, at 8–9 and 11. See also Gromilova, *supra* note 422, at 87; Hestetune, *supra* note 684, at 49–58; Kälin and Schrepfer, *supra* note 73, at 39–40; Knox, *supra* note 176, at 188, 192 and 194; R. Lefeber, *Global Warming: An Inconvenient Responsibility* (2009); Mayer, *supra* note 404, at 391–393; McInerney-Lankford, *supra* note 164, at 199; Oliver, *supra* note 437, at 223–224; Park, *supra* note 5, at 16, note 113 and 20, note 141; Söderbergh, *supra* note 326, at 15–16 and 26; Stahl, 'Unprotected Ground: The Plight of Vanishing Nations', 23 *New York International Law Review* (2010) 1, at 31 and 50; Stoutenburg, *supra* note 90, at 76–77; Wong, *supra* note 90, at 45–46; Yamamoto and Esteban, *supra* note 26, at 180–182.

[725] McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law', in McAdam (ed.), *supra* note 12, 105.

[726] McAdam, *supra* note 90, at ch.5.

[727] *Ibid*, at 36.

[728] Raz, *supra* note 159, at 184–186.

where the right in question faces some unprecedented threat that does not conform to previously observed patterns. So far, Chapters 4 and 5 have identified the underlying aim of self-determination and identified atoll island populations as peoples with a potential right to self-determination. However, they have not yet fully established the implications of this right for the actions of others. As Raz suggests, 'it is reflection on the right …, its point and the reasons for it, which helps, together with other premises, to establish such implications'.[729]

According to the functional account set out in Chapter 2, human rights provide states with reasons to respond to a manifest failure to protect important human interests against a grave, foreseeable threat elsewhere. Building on this, Chapter 3 identified some of the reasons that states might have for implementing a planned migration response to the threat posed by climate change inundation to the individual human rights of atoll islanders. However, as Chapter 3 concluded, an individual rights-based approach is insufficient. It fails to address what has been described as the 'biggest challenge' in this context: 'how to ensure that populations of affected small island states can continue to retain their identities as communities … even after the loss of most or even all of their territory'.[730]

This section revisits the reasons for acting identified in Chapters 2 and 3, asking which states have which reasons for responding to the threat posed by climate change inundation to the self-determination of atoll island peoples. While Chapters 4 and 5 have so far established that all states are required to take the freely expressed wishes of a people into consideration in deciding which steps to take in any situation in which its collective autonomy is at stake, more work is needed to determine the implications of this in the context of climate change inundation. If states are required to act with regard to the freely expressed wishes of a displaced atoll island people as a matter of right, what does this require of them in practice? The reasons discussed below and in subsequent chapters relate to the steps that states might take in implementing various solutions to the problem of climate change inundation.

In order to avoid repeating material covered elsewhere in the thesis, this section addresses only those reasons that are directly applicable to the threat posed by climate change inundation to islanders' self-determination, and only in relation to those states

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[729] *Ibid,* at 185.

[730] Kälin and Schrepfer, *supra* note 73, at 39–40.

identified as having primary or secondary responsibility in Chapter 3 (including Australia, New Zealand, Fiji, the UK, the US, Canada, Germany and France). This provides the basis for a more detailed analysis of the reasons that states have for (and against) implementing specific solutions in Chapters 6, 7 and 8.

Reasons of peremptory force

The first set of reasons arises from the importance of the right at stake and its peremptory legal force. Self-determination is recognised as a *jus cogens* or peremptory norm of customary international law[731] and as a source of obligations *erga omnes*.[732] It is, in other words, 'the concern of all States' and a source of 'obligations … towards the international community as a whole'.[733] As observed earlier, the ICJ has stipulated that obligations *erga omnes* are triggered by 'the importance of the rights involved',[734] a point reinforced by its recognition that obligations *erga omnes* derive from the 'essential principle[s]'[735] or 'basic tenets of modern international law'.[736] More specifically, it is those legal norms 'concerning the basic rights of the human person' that qualify as *erga omnes*.[737] And, as a *jus cogens* norm of international law, self-determination is recognised as one of those 'substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values'.[738]

It is this aspect of self-determination — its fundamental importance to the protection of basic human values; the survival of states; perhaps even 'the very basis of the still fragile international community'[739] — that triggers the interests of the international community more broadly. As a peremptory norm of general international law and source of obligations *erga omnes*, self-determination is therefore associated with weightier reasons for acting than those identified in Chapters 2 and 3 with respect to

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[731] ILC, *supra* note 274, at 85, para.5. See also references *supra* note 511.

[732] For example, *East Timor*, *supra* note 160, at para.29; *Israeli Wall*, *supra* note 503, at paras.88, 155–156. The ILC has held that, while 'all *jus cogens* norms were by definition *erga omnes*, not all *erga omnes* norms were necessarily imperative'. ILC, 'Report of the Commission to the General Assembly on the Work of its Fiftieth Session', II *Yearbook of the ILC* (1998) 1, at 69, para.279. See further Tams, *supra* note 275, at 149–152.

[733] *Barcelona Traction*, *supra* note 161, at para.33. The ICJ holds that obligations *erga omnes* are 'not territorially limited'. *Genocide*, *supra* note 240, at para.31. See further Tams, *supra* note 275, at 111–112.

[734] *Barcelona Traction*, *supra* note 161, at para.33.

[735] *East Timor*, *supra* note 160, at para.29.

[736] *Nicaragua*, *supra* note 518, Diss. Op. Schwebel, at 198.

[737] Alongside obligations relating to 'the outlawing of acts of aggression, and of genocide'. *Barcelona Traction*, *supra* note 161, at para.34.

[738] ILC, *supra* note 274, at 112, para.3.

[739] Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) 425, at 427.

the impacts of climate change inundation on individual rights to health and an adequate standard of living. It is precisely in virtue of its fundamental importance that, 'insofar as climate change poses a threat to the right of peoples to self-determination, states have a duty to take positive action, individually and jointly, to address and avert this threat'.[740]

It remains unclear, however, which steps states are required to take in response to such a threat. While a breach of an obligation *erga omnes* entitles any state to (for example) take countermeasures[741] or institute proceedings before the ICJ,[742] the difficulties associated with identifying those states that are legally responsible for the specific harms of climate change inundation mean that these approaches are unlikely to be successful. In *Israeli Wall*, however, the ICJ provides the basis for a more general set of reasons for taking positive action.[743] Here, the Court cites the Declaration on Friendly Relations, according to which '[e]very state has the duty to promote, through joint and separate action', the self-determination of peoples.[744] In this particular case, states are required not only to refrain from recognising or supporting the 'illegal situation' arising from the construction of the wall, but also to 'see to it that any impediment … to the exercise by the Palestinian people of its right to self-determination is brought to an end'.[745] All states would therefore appear to have reasons for taking positive steps, through 'joint and separate action' (perhaps through some collective institution established under the auspices of the UN),[746] to promote the right to self-determination where it faces some grave external threat.

There is also some disagreement about whether *jus cogens* and *erga omnes* status extends to the basic principle of self-determination — including its application in the context of climate change inundation — or merely to the specific legal rules identified by the categorisation approach outlined in Chapter 4.[747] According to former Special Rapporteur Andrés Rigo Sureda, the peremptory status of self-determination applies

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[740] OHCHR, *supra* note 13, at para.41.
[741] See Tams, *supra* note 275, at ch.6.
[742] *Ibid*, at ch.5.
[743] *Israeli Wall*, *supra* note 503, at para.156.
[744] GA Res. 2625 (XXV), *supra* note 137.
[745] *Israeli Wall*, *supra* note 503, at para.159.
[746] *ibid*.
[747] See, for example, discussion in Crawford, *supra* note 484, at 596; Espiell, 'Self-Determination and Jus Cogens', in A. Cassese (ed.), *United Nations. Fundamental Rights* (1979) 167; Espiell, *supra* note 511, at 11–13; Hannikainen, *supra* note 511, at 357–424; Shaw, *supra* note 511, at 91.

only to its application in the context of decolonisation.[748] For Cassese, however, 'the whole cluster of legal standards' should be regarded as *jus cogens*.[749] Others equivocate: the ILC, for example, refers to both the 'principle' and the 'right' of self-determination as a *jus cogens* norm,[750] while Crawford describes self-determination as a peremptory norm '*at least* in its application to colonial countries and peoples under alien domination', implying that its peremptory status might well extend further.[751]

Duursma offers one solution to this disagreement — a solution that also provides some indication of which steps states are required to take in response to climate change inundation. She argues that self-determination is recognised as a *jus cogens* norm only where it does not conflict with the territorial integrity of an existing state.[752] 'If the right of self-determination is used to disrupt the territorial integrity of a state', she argues, 'it will not have the status of *jus cogens*, but that of an ordinary norm of international law' from which states can derogate, if they wish.[753] The implications of this will become clearer in subsequent chapters, which discuss several options for preserving the collective autonomy of atoll island peoples. Where a people's preferred solution risks interfering with the territorial integrity of state A — for example, the cession of territory (Chapter 6) — the reasons that state A has for implementing this solution may not carry the weight of a peremptory norm of international law. State A may therefore have stronger reasons for implementing alternative solutions that do not disrupt its territorial integrity — for example, the recognition of a 'deterritorialized' state (Chapter 7) or the merger of two states (Chapter 8) — where these reasons *do* carry the significant weight associated with a peremptory legal norm.

Reasons of international cooperation

A second set of reasons, arising from the obligations of international assistance and cooperation imposed on states by the UN Charter and ICESCR, are particularly relevant in the context of climate change, which 'can only be effectively addressed

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[748] Rigo Sureda, *supra* note 484, at 353.
[749] Cassese, *supra* note 475, at 140.
[750] ILC, 'Law of Treaties', II *Yearbook of the ILC* (1963) 188, at 199; ILC, *supra* note 274, at 85, para.5.
[751] Crawford, *supra* note 484, at 596 (emphasis added). Compare Espiell, *supra* note 511, at 10.
[752] Duursma, *supra* note 534, at 103.
[753] *Ibid*. Various legal instruments insist that a people's self-determination must not 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'. GA Res. 2625 (XXV), *supra* note 137; GA Res. 1514 (XV), *supra* note 495, at para.6.

through cooperation of all members of the international community'.[754] Experts at a UNHCR round-table meeting have, for example, called for 'collaborative approaches … based on principles of international cooperation and burden- and responsibility-sharing' to address climate change-related displacement.[755]

In the case of self-determination, these reasons of international cooperation are reinforced by the Declaration on Friendly Relations, which calls on all states to promote the principle of self-determination 'through joint and separate action'.[756] In fact, the right to self-determination appears to be free from any jurisdictional limitation.[757] Common Article 1 of the human rights covenants is unencumbered by any jurisdictional clause,[758] and the Human Rights Committee has made it clear that Article 1(3) 'imposes specific obligations on states parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination'.[759] Indeed, where the self-determining people is the population of a state, its right to self-determination must give rise to reasons for acting on the part of other states in order for it to be meaningful.[760] 'It is abundantly clear', Langford argues, 'that these rights [to self-determination] are against the world'.[761]

However, like the reasons of peremptory force identified above, reasons of international cooperation add legal weight to the requirement on states to act but are general in nature, allowing states considerable discretion in deciding where to direct their resources. One exception to this rule arises where state A has made some prior legal or political commitment to state B, which provides the basis for a specific obligation of international cooperation between the two. Here, as suggested in Chapter 3, we might single out Australia and New Zealand (which have established bilateral migration agreements with Tuvalu and Kiribati) or Fiji (which has formally committed to resettling Tuvaluans and I-Kiribati in the face of climate change inundation) as

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[754] OHCHR, *supra* note 13, at para.84.

[755] UNHCR, *supra* note 75, at para.43. Compare McAdam, *supra* note 152, at 22; McAdam, *supra* note 90, at 260.

[756] GA Res. 2625 (XXV), *supra* note 137.

[757] Knox, *supra* note 176, at 205.

[758] The ICSECR (*supra* note 207) has no jurisdictional clause. In the ICCPR (*supra* note 238), Article 1 is included prior to the jurisdictional clause set out in Article 2.

[759] HRC, *supra* note 500, at para.6.

[760] Knox, *supra* note 176, at 205.

[761] Langford, 'A Sort of Homecoming: The Right to Housing', in Gibney and Skogly (eds), *supra* note 172, 166, at 169.

having particular reasons for cooperating in response to the threat posed by climate change inundation to the self-determination of atoll island peoples.

Obligations of international cooperation may also require these and other states to coordinate with each other in responding to the threat posed by climate change inundation to the self-determination of atoll islanders, perhaps through some institutional framework with the capacity to address the ambiguities of self-determination.[762] In addition to the institutional actors identified in Chapter 3 — including the UNHCR and IOM — a concern with the right to self-determination indicates that UN institutions like the General Assembly might also have a role to play.[763]

Reasons of contribution

A third set of reasons derives from any acts or omissions of a state that 'bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory'.[764] Those Annex II states with particularly high greenhouse gas emissions per capita since the 1990s — including Australia (26.65 tonnes per capita in 2011), Canada (24.67), the US (19.69) and New Zealand (11.97)[765] — may therefore have stronger reasons for acting to address the impact of climate change inundation on the self-determination of atoll island peoples. However, while these reasons add legal weight to the requirement on high-emitting states to act, they tell us little about their capacity to do so or the actions they are required to take.

Reasons of capacity

We must therefore also consider a fourth set of reasons arising from states' capacity to act. Attention must be given not only to the prior actions of states, but also their 'available resources', their 'economic, technical and technological capacities' and their

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[762] Rigo Sureda, *supra* note 484, at 28 and 101.

[763] See, for example, *Israeli Wall*, *supra* note 503, at para.160.

[764] Principle 9(b), Maastricht Principles, *supra* note 282. See also Principle 13. The Maastricht Principles are primarily concerned with economic, social and cultural rights but also refer to the right to self-determination.

[765] Non-Annex I or II states with significantly high per capita greenhouse gas emissions include Kuwait (62.62), Brunei (59.26), Belize (45.00) and Qatar (43.72). World Resources Institute, 'CAIT 2.0: WRI's Climate Data Explorer', accessible at http://cait2.wri.org.

'influence in international decision-making processes'.[766] Such reasons of capacity speak to the reasonableness (or otherwise) of the burdens imposed on those who act.

The type of capacity that is relevant here will depend on the type of action that states are required to take. If states are required to recognise and accommodate alternative state-like entities — perhaps a 'deterritorialized' or federal state — then factors like the capacity to influence international negotiation and decision-making processes will be important. If they are required to provide space for the collective resettlement of atoll island peoples, a key criterion will be the capacity of a state to absorb new residents, perhaps assessed in terms of the availability of habitable land.[767] The idea that those with greater resources — in this case, habitable land — may have reasons for acting where others do not has precedence in the work of classical legal theorists. Grotius, for example, suggests that states have reasons for providing land to 'strangers' only where there is some 'waste or barren Land' available.[768] Availability of land cannot be the sole criterion, however, as some states have vast tracts of land but limited infrastructure or economic resources, while others have little land but substantial natural, financial or technological resources.[769] We might therefore look to other criteria relating to a state's wealth or the quality of life of its citizens,[770] as well as its geographic proximity to an atoll island people.

Reasons against taking action

Questions of capacity can also be reframed as questions about the burdens that one actor can be expected to bear in order to assist others. A state may have reasons for *not* acting where this would impose 'unacceptably high costs' on its own citizens.[771] Chapter 3 identified several potential impacts of a 'planned migration' solution, including the socio-economic costs of absorbing the populations of atoll island states, the legal and political costs of modifying existing migration legislation, and the risk that a sudden influx of islanders may undermine the collective autonomy or shared way of life of the population of a host state. While all of these concerns remain relevant

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[766] Principle 31, Maastricht Principles, *supra* note 282. See also Principles 9(c) and 33.
[767] Wyman, *supra* note 90, at 461.
[768] H. Grotius, *The Rights of War and Peace* (2005 [1625]), at §II.2.17. Compare S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1934 [1688]), at §3.3.10. Both cited in *ibid*, at 447.
[769] Wyman, *supra* note 90, at 461.
[770] Wyman suggests that we look to population density, GDP and GDP per capita. *Ibid*, at 461–463. Compare Bradley, *supra* note 306, at 155–156.
[771] Nickel, *supra* note 189, at 62. Compare Beitz, *supra* note 156, at 167–168.

where the issue at stake is the collective right to self-determination rather than the individual right to health, the last is of particular relevance. Where the capacity to control the flow of people across its borders is thought to be central to the collective autonomy and self-determination of the people of a state, this may provide it with good reasons for limiting the number of islanders it assists.[772]

Here, we encounter an issue that is explored further in subsequent chapters. The political autonomy, independence and self-determination of atoll island peoples are threatened by the impacts of climate change inundation. However, given the lack of available, habitable territory in today's world, islanders will find it difficult to resettle elsewhere as a self-determining people. In their search for new territory, atoll island peoples will inevitably encounter other peoples exercising their own rights to self-determination and territorial integrity, where these rights provide strong reasons *against* assisting islanders by ceding territory or hosting a deterritorialized state. A paradox therefore emerges. It is precisely because self-determination, independence and territorial integrity are seen as such important values across the international community that islanders will find it difficult to obtain new territory on which to resettle as independent, self-determining peoples. The reasons against acting arising from this conflict between competing claims to self-determination are discussed further in Chapters 6, 7 and 8.

5.6 Conclusion

Chapters 4 and 5 have provided detailed arguments for the recognition of a right to self-determination for atoll island peoples and identified possible reasons for acting to protect this right in the face of climate change inundation. In doing so, they have built on the tentative steps of those who acknowledge the relevance of self-determination in this context but shy away from arguing for the recognition of a legal right to self-determination for atoll island peoples or assessing the reasons that others might have for protecting or promoting this right.[773] They have also acknowledged, but departed from, those who recognise the importance of self-determination or statehood but fail to

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[772] For example, for Walzer, '[a]dmission and exclusion are at the core of communal independence. They suggest the meaning of self-determination.' Walzer, *supra* note 429, at 62. From a legal perspective, Solomon and Warner observe that '[s]tates continue to regard the admission of foreign nationals to their territories as a matter of national sovereignty, to be determined according to national priorities and criteria'. Solomon and Warner, *supra* note 331, at 249. Compare Kälin and Schrepfer, *supra* note 73, at 67.

[773] Including Hestetune, *supra* note 684, at 57; Knox, *supra* note 176, at 210; Wyman, *supra* note 90, at 441; Wyman, *supra* note 123, at 190, note 16; Wong, *supra* note 90, at 45–46.

recognise the value of the particular political institutions and collective goals shaped by the peoples of Tuvalu, Kiribati and the Maldives over time.[774]

Chapter 4 identified a basic principle of self-determination whose underlying aim is to provide space for the collective autonomy or 'destiny' of a people in any situation in which it faces some grave external threat. It also defined 'peoples' as the populations of existing states with a shared history of cooperation under the institutions of government that they have helped to sustain and shape. Chapter 5, building on this theoretical account, identified atoll island populations as self-determining peoples and identified climate change inundation as a grave external threat to the self-determination of these peoples. It also examined several reasons for — and against — acting to address the threat posed by climate change inundation to the self-determination of atoll island peoples, which will be explored in more detail in subsequent chapters.

However, many questions remain unanswered. Even if the populations of atoll island states are recognised as having a legal right to self-determination, it is unclear what this entitles them to. The final chapters of the thesis seek to address these questions by elaborating on the scope and content of a right to self-determination in the context of climate change inundation. Chapter 6 sets out a collective decision-making framework through which atoll island peoples can express their preferred response to climate change inundation. Chapters 6, 7 and 8 flesh out this decision-making framework, assessing the extent to which each of its three options — finding new territory elsewhere on which to resettle, transitioning to a deterritorialized state or joining in free association or federation with another state — can protect the collective autonomy and independence of an atoll island people, and identifying the reasons that other states might have for (or against) supporting their implementation.

[774] Including Lister, *supra* note 130; Wyman, *supra* note 123.

IV. A Right of Self-Determination for Atoll Island Peoples

6. Self-Determination, Statehood and Territory

6.1 Introduction

The focus of this final part of the thesis is on the planned resettlement of atoll island peoples. Such collective resettlement involves the 'permanent (or long-term) movement of a community (or a significant part of it) from one location to another, in which important characteristics of the original community, including its … legal and political systems … are retained'.[775] Collective resettlement is not an alternative but a complement to other solutions, including planned migration (for those who wish to migrate earlier, temporarily or elsewhere) and *in-situ* adaptation (for those who wish to remain as long as possible).[776] Richard and Charlotte Bedford, for example, call for a 'mix of strategies', including both individual migration and planned collective resettlement.[777]

Planned resettlement is far from ideal, from the perspective of both atoll island and host populations — in fact, for many, it is their 'least preferred option'.[778] And, as history tells us, collective resettlement — particularly across international borders — is fraught with complications.[779] 'The longer the distance of the move', Barnett and Campbell warn, the higher the costs and 'the greater … the chances of failure'.[780] Nevertheless, many islanders recognise that resettlement may be 'inevitable as a last resort' and perhaps even 'preferable to holding off until the full effects of climate change [come] to bear on them'.[781]

While the possibility of becoming stateless, landless and homeless — of being cast adrift in the world — is brought into sharp relief by climate change inundation, it is not a new experience for island communities. 'For centuries', McAdam observes, 'islanders

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[775] Campbell, *supra* note 348, at 58–59. On the distinction between collective resettlement and migration, see Campbell, Goldsmith and Koshy, *supra* note 114, at 12; McAdam, *supra* note 90, at 138.

[776] After all, some 'may have important reasons to prefer to be immigrants'. Nine, *supra* note 91, at 372, note 34.

[777] Bedford and Bedford, *supra* note 92, at 93 (see also 126). Compare McAdam, *supra* note 90, at 247–248.

[778] Nansen Initiative, *supra* note 96, at 14.

[779] Campbell, Goldsmith and Koshy, *supra* note 114, at 41. Compare Blitz, *supra* note 455, at 444–446; Ferris, *supra* note 317, at 15–18; *ibid*, at 14–15 and 20.

[780] Barnett and Campbell, *supra* note 12, at 173. Compare Bedford and Bedford, *supra* note 92, at 126; Campbell, Goldsmith and Koshy, *supra* note 114, at 4; Ferris, Cernea and Petz, *supra* note 16, at 19.

[781] Ferris, Cernea and Petz, *supra* note 16, at 20. Compare Nansen Initiative, *supra* note 96, at 19–20; McAdam, *supra* note 148.

have moved in response to changing environmental, political or social conditions'.[782] In 1945, for example, the inhabitants of Banaba Island (now part of Kiribati) were resettled on Rabi Island (Fiji) to escape the environmental degradation caused by the mining operations of the British Phosphate Commission.[783] The extent to which the Banabans consented to this resettlement remains unclear. While some were keen to move in search of arable land and an adequate freshwater supply, many voiced concerns about loss of sovereignty over Banaba.[784] Official records reveal that the colonial authorities decided to move the population to Rabi 'whether they were agreeable or not'.[785] In any case, 'the founding myth of Rabi' is primarily one of loss: 'loss of control over their own territory and resources', over 'land, rights, sovereignty and power — the power to shape one's destiny'.[786] 'At its heart', McAdam argues, 'it is about the loss of self-determination'.[787]

In any situation involving the collective resettlement of a population, questions of autonomy, sovereignty and self-determination should therefore be addressed. After all, 'sovereignty, self-determination, cultural identity and territorial rights are of primary concern' not just to the Banabans but also to atoll island peoples today.[788] However, the case of climate change inundation is more complex than this example suggests. The Banaban resettlement occurred within the administrative framework of British colonial rule and did not face the obstacles of border control, state sovereignty and territorial integrity that any contemporary process of collective resettlement will face.[789] These obstacles speak to the dominance of the state in the international sphere and the legal principles of sovereign equality, territorial integrity, political unity and non-intervention that preserve its status.[790] International law works to create and sustain a

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[782] McAdam, 'Caught Between Two Homelands', *Inside Story* (13 March 2013). See further Bedford, *supra* note 348; Campbell, *supra* note 348, at 63–65; Campbell, Goldsmith and Koshy, *supra* note 114, at 20–25 and 37–38; J. Connell (ed.), *Migration and Development in the South Pacific* (2000); Fischer, *supra* note 632; M. Lieber (ed.), *Exiles and Migrants in Oceania* (1977); McAdam, *supra* note 90, at 143.

[783] See further Bedford and Bedford, *supra* note 92, at 90–91; Campbell, *supra* note 348, at 71–78; McAdam, *supra* note 782; Ferris, Cernea and Petz, *supra* note 16, at 26; M. Silverman, *Disconcerting Issue: Meaning and Struggle in a Resettled Pacific Community* (1971).

[784] Campbell, *supra* note 348, at 74; McAdam, *supra* note 782; Silverman, *supra* note 783, at 148.

[785] Cited in McAdam, *supra* note 782.

[786] *Ibid*.

[787] *Ibid*.

[788] J. Campbell and O. Warrick, *Climate Change and Migration Issues in the Pacific* (2014), at 10. Compare UNHCR, *Planned Relocations, Disasters and Climate Change* (2014), at 17, para.47.

[789] Campbell, *supra* note 348, at 77; Campbell, Goldsmith and Koshy, *supra* note 114, at 35; McAdam, *supra* note 90, at 143; Silverman, *supra* note 783, at 2–4.

[790] On the dominance of the state, see A. Cassese, *International Law* (2005), at 71; Craven, *supra* note 505, at 203; Crawford, *supra* note 484, at 115–116; Grant, 'Defining Statehood: The Montevideo Convention and its

state system that operates as a 'radical monopoly';[791] a system in which (in theory at least) states alone exercise territorial jurisdiction, and all land is under the jurisdiction of some state, and in which the state is 'the principal maker and subject of international law'.[792] To the exclusion of other entities, states provide the legal and political infrastructure through which laws are enforced, treaties are negotiated, UN membership is exercised and individual and collective human rights are protected. As Crawford observes, 'it still makes a great difference whether an entity is a state or not'.[793]

Yet climate change inundation threatens the territory, autonomy, independence — and, therefore, statehood — of atoll islanders. Here, statehood becomes both the solution and the problem. In a world in which land is a finite resource[794] and there is little or no territory left unclaimed by states,[795] 'the legal (and sometimes physical) barriers to entry imposed by states today considerably restrict freedom of movement'.[796] This is true enough with regard to individual migration but is even more apposite when it is the population of a state that must resettle elsewhere. Atoll island populations face a future in which their territory becomes increasingly uninhabitable, their statehood increasingly uncertain and their escape route blocked by the intransigence of other states. In order to justify the continuing monopoly of states, it would seem that the onus is on international law to find some way of resolving this dilemma.[797]

Discontents', 37 *Columbia Journal of Transnational Law* (1999) 403, at 407–408; Jennings and Watts, *supra* note 423, at 16; Knop, 'Statehood: Territory, People, Government', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 95, at 95. For a more critical account of the state in international law, see, for example, A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); M. Koskenniemi, *From Apology to Utopia* (2006); G. Simpson, *Great Powers and Outlaw States* (2004).

[791] Kolers, *supra* note 91, at 334. Kolers cites Simmons, 'On the Territorial Rights of States', 11 *Philosophical Issues* (2001) 300, at 304. On the state system as a monopoly, see also Crawford, 'Sovereignty as a Legal Value', in Crawford and Koskenniemi (eds), *supra* note 790, 117, at 121. A handful of exceptions to this monopoly are discussed in Chapter 7.

[792] Lachs, 'The Development and General Trends of International Law in Our Time', 169 *Recueil des Cours* (1980) 32, at 32.

[793] Crawford, *supra* note 564, at 31. Compare Craven, *supra* note 505, at 220.

[794] But see Avery Kolers' 'positive sum' account of territory. Kolers, *supra* note 91.

[795] Aside from some uninhabitable rocks and a small portion of Antarctica where sovereignty cannot be claimed under the 1959 Antarctic Treaty. Crawford, *supra* note 484, at 220 and 241–242.

[796] McAdam, *supra* note 90, at 13.

[797] Given this monopoly, 'it is illogical that international law should permit a condition of statelessness'. Jennings and Watts, *supra* note 423, at 887. From a philosophical perspective, 'the moral legitimacy of the state system depends on the provision of some safe state membership to everyone'. Carens, 'States and Refugees: A Normative Analysis', in H. Adelman (ed.), *Refugee Policy: Canada and the United States* (1991) 18, at 21 (see also 21–25). Compare Wyman, *supra* note 123, at 202–208.

In a recent interview about a new joint initiative with the ILO and UNDP to prepare Pacific island populations for climate change-related movement, the head of UNESCAP explained that Pacific leaders have called for 'a greater focus on educating [their] people on what's coming and what the options are for them, which means some input into clarifying and looking at ways of providing those options'.[798] The final chapters of this thesis aim to do precisely that: to offer 'some input into clarifying and looking at ways of providing those options'. The intention is neither to proscribe nor prescribe any solutions; after all, the principle of self-determination demands that we listen to the peoples concerned. Instead, it is to set out a possible decision-making framework within which the 'free and genuine expression of the will'[799] of atoll island peoples can be given meaning.

The decision-making framework proposed here is not reflected in hard law;[800] nor does it propose the recognition of new legal norms.[801] Instead, it reflects a creative interpretation of existing legal rules and principles, guided by the normative account of self-determination discussed in Chapters 4 and 5. As recognised at an Expert Meeting convened by the UNHCR, climate change inundation 'is unprecedented and may necessitate [the] progressive development of international law to deal with the preservation of the identity of the communities affected'.[802] This final part of the thesis is an exercise in imagining what this progressive development might look like, grounded in the international legal norm of self-determination. As explained in Chapter 5, it proceeds on an 'as if' basis, examining the means by which atoll island peoples might continue to exercise their right to self-determination as if they were already recognised as right-holders in international law.

This chapter introduces the structure for the final part of the thesis, proposing a collective decision-making framework for atoll island peoples threatened by climate change inundation that draws inspiration from the General Assembly's Declaration on Friendly Relations (section 6.2). The remainder of the chapter examines option one of

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[798] Cited in Wiseman, *supra* note 147. Compare Campbell, Goldsmith and Koshy, *supra* note 114, at 10; Kälin and Schrepfer, *supra* note 73, at 62; Park, *supra* note 5, at 21.

[799] *Western Sahara*, *supra* note 136, at paras.55 and 162.

[800] Compare Vandenhole and Benedek, *supra* note 230, at 342. After all, 'existing [legal] institutions … cannot provide a perfectly tailored solution' to the problem of climate change inundation. Wannier and Gerrard, *supra* note 324, at 10.

[801] For objections to doing so, see McAdam, *supra* note 152.

[802] UNHCR Expert Meeting, 'The Concept of Stateless Persons under International Law: Summary Conclusions' (27–28 May 2010), at para.I.C.27. Compare ILA, *supra* note 97; McAdam, *supra* note 90, at 7.

this decision-making framework: finding new territory on which an atoll island people can re-establish itself as a 'sovereign and independent state'. While territory might be necessary for statehood and self-determination in a general sense, section 6.3 argues that it is attachment to a specific people and its shared governing institutions — rather than attachment to a particular territory — that should be preserved here. This paves the way for a discussion of the reasons that other states have for and against ceding territory to an atoll island people fleeing climate change inundation (section 6.4). The chapter concludes by suggesting that the account of territory, statehood and self-determination set out thus far is somewhat simplistic. Options two and three of the proposed decision-making framework — considered in Chapters 7 and 8 — provide room for more creative solutions to climate change inundation that detach self-determination from territory and/or statehood.

6.2 A collective decision-making framework

In light of high-level calls for a 'global guiding framework' for cross-border climate change-related displacement,[803] this section proposes a collective decision-making framework that provides atoll island peoples with a set of options to choose from in responding to climate change inundation.[804] Chapters 6, 7 and 8 examine these options in more detail, constructing a moral, political and legal account of the strengths and weaknesses of each. In doing so, they provide some content for the right of atoll island peoples to self-determination, understood as the right to have their wishes heard and taken seriously in determining the steps that are taken in response to climate change inundation.

This decision-making framework draws inspiration from the Declaration on Friendly Relations, which sets out various principles of international law, including that of self-determination.[805] According to the Declaration, non-self-governing peoples have three options in exercising what James Anaya calls 'constitutive' self-determination:[806] '[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely

[803] Guterres, *supra* note 330. Compare Nansen Principle IX, Norwegian Refugee Council, *supra* note 78, at 5; UNHCR, *supra* note 75, at 1 and para.12.
[804] On the need for guiding frameworks to address self-determination, see also Hodgkinson and Young, *supra* note 133, at 326–327; Kälin and Schrepfer, *supra* note 73, at 39–40; McAdam, *supra* note 90, at 199 and 255; OHCHR, *supra* note 13, at para.41; Vidas, *supra* note 97; Wong, *supra* note 90, at 45.
[805] GA Res. 2625 (XXV), *supra* note 137. See also Principle VI, GA Res. 1541 (XV), *supra* note 495; *Western Sahara*, *supra* note 136, at para.57.
[806] Anaya, *supra* note 527, at 104–105.

determined by a people'.[807] Extrapolating from this, this thesis proposes that atoll island peoples be granted a similar set of options in continuing to exercise their 'ongoing' self-determination in the face of climate change inundation.[808]

The first option — and the subject of this chapter — is the creation (or, in this case, the re-establishment) 'of a sovereign and independent State' with jurisdiction over a defined territory. In choosing this option, an atoll island state must acquire land from another state on which to resettle its population, preferably via a treaty of cession that transfers full territorial sovereignty from one state to another. From the perspective of ideal legal theory, this option is the most straightforward. The territory of the state at risk would change, but its population, government and sovereignty would, in theory at least, remain intact. In a less-than-ideal world, of course, states will have strong reasons both for and against ceding territory, as discussed in section 6.4 below.

A second option, discussed in Chapter 7, is 'the emergence into any other political status freely determined by a people'. In this case, an atoll island state could pursue an alternative form of statehood, perhaps by severing its link with a defined territory and permanent population. It might, for example, transition to a so-called 'deterritorialized state',[809] establish a permanent government in exile, or maintain a small outpost on its remaining territory from which to govern its dispersed citizens. These options may allow an atoll island state to retain its international legal status while abandoning any exclusive rights to territory. However, they also require a creative reinterpretation of existing legal doctrine and practice on the nature and recognition of states; one that leans heavily on what Chapter 7 describes as the 'ratchet effect' of statehood.

The third option, considered in Chapter 8, is to enter into 'free association or integration with an independent State', a choice that would preserve the collective political status of a people but abandon any claim to statehood or exclusive territorial jurisdiction. An atoll island people might seek free association, federation or integration with another state, with a corresponding guarantee of political autonomy within that state.

While each atoll island state emphasises the importance of collective identity, autonomy and sovereignty, they each propose different solutions. The Tuvaluan

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[807] GA Res. 2625 (XXV), *supra* note 137.
[808] Anaya, *supra* note 527, at 105.
[809] Burkett, *supra* note 90.

government, for example, insists on retaining its sovereign status within its own territory,[810] while the former President of the Maldives initially announced high-profile plans to purchase a new 'homeland' within which to resettle the Maldivian population.[811] Acknowledging this diversity, the IPCC admits to having 'low confidence in the success of wholesale transfer of adaptation … options when the local lenses through which they are viewed differ from one island state to the next'.[812] This diversity of opinion is reflected in — indeed encouraged by — the decision-making framework proposed here. The principle of self-determination does not prescribe one fixed outcome; instead, it calls for the recognition of the freely expressed will of the peoples concerned.[813] As one Pacific island representative observed at a recent consultation on climate change displacement, 'the international community can help to provide the ingredients, but not the recipe'.[814]

In emphasising this process of collective decision-making, we move away from the story of displaced islanders as 'refugees without capacity for sovereign self-determination' towards the stories told by islanders themselves based on 'narratives other than those of annihilation'[815] — narratives of dynamism, mobility and autonomy. However, this sense of autonomy and control over the process of resettlement is important not only for those who move but also for those who will receive atoll island populations.[816] As Beitz reminds us, when assessing the protection of human rights against new and emerging threats, it is important to consider not only the interests of those at risk but also the burdens imposed on those who act.

This decision-making framework therefore raises significant questions and problems, which will need to be addressed in more detail. Which, if any, of these solutions can adequately protect the collective autonomy of island peoples? Is territory necessary for statehood or self-determination? And, crucially, what reasons do other states have for and against contributing to each of these solutions?

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[810] Aedy, *supra* note 353; Mortreux and Barnett, *supra* note 32, at 111.

[811] Ramesh, 'Paradise Almost Lost: Maldives Seek to Buy a New Homeland', *The Guardian* (10 November 2008); Schmidle, *supra* note 144.

[812] Nurse *et al*., *supra* note 11, at 1616.

[813] Contrast with Kälin and Schrepfer's claim that this diversity of opinion means that it is not yet possible to put forward solutions for the resettlement of islanders, implying that some universal solution must first be identified. Kälin and Schrepfer, *supra* note 73, at 62.

[814] Cited in McAdam, *supra* note 148.

[815] Stratford, Farbotko and Lazrus, *supra* note 25, at 72.

[816] UNHCR, *supra* note 788, at 17, para.47.

6.3 Self-determination, statehood and territory

The remainder of this chapter considers the first option in the decision-making framework outlined above: finding new territory over which atoll island states can exercise territorial sovereignty. Section 6.4 examines the mechanics of this process, as well as the reasons that other states might have for — and against — contributing to its implementation. First, however, this section explores the dominant legal narrative that links people, state and territory in a 'paradigmatic' relationship towards which self-determination aims.

Legally and politically, independent statehood has long been seen as not only the 'central organising idea'[817] of the international system but also the pinnacle of self-determination. As Nathaniel Berman points out, UN practice indicates a 'strong presumption that independence is the preferred result once a legitimate claim [to self-determination] has been established'.[818] Others understand self-determination as 'a principle concerned with the right to be a state'.[819] Statehood, after all, provides the armour that shields a people from external interference, and the mouthpiece through which it speaks internationally.[820]

According to the standard narrative of international law, however, states require a 'defined territory':[821] a parcel of land within which they can exercise their 'supreme, and normally exclusive, authority', subject only to the obligations imposed by international law.[822] The same story that places states at the heart of international law therefore also ties statehood firmly to territory. '[O]ne cannot', Philip Jessup has argued, 'contemplate a state as a kind of disembodied spirit … there must be some

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[817] Knop, *supra* note 790, at 95.

[818] Berman, *supra* note 593, at 69 (see also 55). Compare H. Hannum, *Autonomy, Sovereignty and Self-Determination* (1996), at 39; Klabbers, *supra* note 549, at 192.

[819] Crawford, *supra* note 564, at 107; Crawford, *supra* note 484, at 141. From a philosophical perspective, compare Copp, 'Democracy and Communal Self-Determination', in R. McKim and J. McMahan (eds), *The Morality of Nationalism* (1997) 277, at 278; Walzer, 'The Moral Standing of States', 9 *Philosophy and Public Affairs* (1980) 209, at 210.

[820] Knop, *supra* note 790, at 95.

[821] Article 1, Montevideo Convention on the Rights and Duties of States, 165 LNTS 19 (1933).

[822] Jennings and Watts, *supra* note 423, at 563. On sovereignty as 'exclusive authority over territory', see Crawford, *supra* note 791, at 131; Lachs, *supra* note 792, at 36; V. Lowe, *International Law* (2007), at 138; C. de Visscher, *Theory and Reality in Public International Law* (1957), at 197.

portion of the earth's surface which its people inhabit and over which its government exercises authority'.[823]

This idea of states as territorial creatures plays several roles in international law. First, it demarcates the boundaries within which states exercise jurisdiction.[824] While a state may exercise personal jurisdiction over its citizens while they are abroad — it may, for example, tax their foreign income or try them *in absentia* — it can enforce these decisions only within its own territory.[825] Second, it allows us to map out a relatively stable set of boundaries between peoples, creating a 'jigsaw puzzle of solid colour pieces fitting neatly together'.[826] One state assumes legal responsibility for each jigsaw piece, enforcing laws within its boundaries and accepting binding international legal obligations without. The stability and integrity of these territorial pieces is bolstered by those 'basic principles of international law' that protect the sovereign equality, political independence and territorial integrity of each state.[827] This stability, in turn, is thought to underpin international peace and security.[828] Third, it carves out a space — a 'sphere of self-government'[829] — in which the members of a self-determining people can shape and sustain legal and political institutions that reflect their own ideas about what is valuable, free from the undue interference of others.[830] Territory, in this sense, provides

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[823] Official Records of the 383rd Meeting of the UN Security Council, UN Doc. S/PV.383 (2 December 1948), at 11. Cited in Crawford, *supra* note 564, at 44. Compare Conference of Yugoslavia Arbitration Commission, 'Opinion No.1', 31 ILM 1494 (1992), at 1495; Fitzmaurice, 'Law of Treaties', II *Yearbook of the ILC* (1956) 104, at 107; Jennings, *supra* note 480, at 7; Jennings and Watts, *supra* note 423, at 563; H. Lauterpacht, *Recognition in International Law* (1947), at 30; Malanczuk, *supra* note 279, at 75; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the US* (1987), at §201; S. Sharma, *Territorial Acquisition, Disputes and International Law* (1997), at 2; Shaw, *supra* note 511, at 1. On the development of the idea of states as territorial entities in international law, see Khan, 'Territory and Boundaries', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 225.

[824] 'Territoriality is the primary basis for jurisdiction.' Jennings and Watts, *supra* note 423, at 458. Compare Crawford, *supra* note 791, at 131; Lachs, *supra* note 792, at 36; Lowe, *supra* note 822, at 138; de Visscher, *supra* note 822, at 197.

[825] That is, against any assets within its territory, or against the citizen once he or she returns. Jennings and Watts, *supra* note 423, at 462–463.

[826] Knop, *supra* note 790, at 95. Compare Berman, *supra* note 593, at 53.

[827] GA Res. 2625 (XXV), *supra* note 137; GA Res. 3281 (XXIX), 12 December 1974; Article 2(4), UN Charter, *supra* note 173. '[B]etween independent states, respect for territorial sovereignty is an essential foundation of international relations.' *Corfu Channel*, *supra* note 225, at 35.

[828] Brownlie, 'Rebirth of Statehood', in M. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997) 5, at 6; Jennings, *supra* note 480, at 70.

[829] Banai, *supra* note 463, at 49. Moore describes territory as a 'locus of self-determination'. Moore, *supra* note 599.

[830] Sharma, *supra* note 823, at 4.

'the physical basis that ensures that people can live together as organised communities'[831] with a capacity for autonomy and independence.

Those who theorise about territorial rights are often concerned with the 'attachment problem',[832] going beyond the legal principle of territorial integrity to consider whether there is something that attaches specific states or peoples to specific parcels of land in a normatively significant way.[833] Perhaps, however, it is not attachment to territory that is important, but attachment to people.[834] The purpose of self-determination, as defined in Chapters 4 and 5, is to direct our attention towards the collective autonomy and independence of a people, its history of cooperation in shaping and sustaining shared political institutions, and its freely expressed wishes in any situation in which these come under threat. These are, in Kolers' terms, juridical rather than terrestrial aims — they speak to the shape of political institutions, the content of the law, the protection of human rights and so on, rather than to practices of cultivation and systems of land tenure.[835] While 'legal jurisdiction over land is useful and perhaps indispensable' for the achievement of these aims, they 'can, in principle, be achieved anywhere'.[836]

This alternative emphasis on people rather than territory is supported not only by necessity — after all, if atoll island peoples are to continue to exercise their collective autonomy and independence, self-determination must be understood as detachable from the specific territory that a people inhabits — but also by legal practice. In *Western Sahara*, for example, the Court found that 'legal ties' of sovereignty 'are normally established in relation to people', not (only) in relation to territory.[837] 'If states are

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[831] Stoutenburg, *supra* note 90, at 61. Compare Crawford, *supra* note 791, at 128; Crawford, *supra* note 484, at 204.

[832] Moore, *supra* note 599; Moore, *supra* note 590. See also Kolers, 'Attachment to Territory: Status or Achievement?', 42 *Canadian Journal of Philosophy* (2012) 101.

[833] From a legal perspective, see, for example, Duursma, *supra* note 534, at 80; Sharma, *supra* note 823, at 4. From a nationalist perspective, see Miller, *supra* note 581; Miller, *supra* note 266, at ch.8; Meisels, 'Liberal Nationalism and Territorial Rights', 20 *Journal of Applied Philosophy* (2003) 31. From a Lockean perspective, see Nine, 'A Lockean Theory of Territory', 56 *Political Studies* (2008) 148; Simmons, *supra* note 791. From a Kantian perspective, see Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism has to Say', in A. Buchanan and M. Moore (eds), *States, Nations and Borders* (2003) 231; Stilz, *supra* note 584.

[834] Moore herself suggests that our primary attachments are to 'our projects and to the people who share the space with us, to our family and friends and the community which forms the background context in which we live our lives'. Moore, 'Place-Related Attachments and Global Distributive Justice', 9 *Journal of Global Ethics* (2013) 215, at 217. See also Nine, *supra* note 91, at 362–363 and 376.

[835] Kolers, *supra* note 832, at 119.

[836] *Ibid*.

[837] *Western Sahara*, *supra* note 136, at para.85. Compare *Kosovo*, *supra* note 542, Sep. Op. Cançado Trindade, at 553, para.77.

territorial entities', Crawford observes, 'then they are also aggregates of individuals',[838] a point reinforced by the Montevideo Convention, which lists a 'permanent population' as its first criterion of statehood.[839]

This emphasis on the people of a state is also supported by evidence that attachments between people and land are robust but not static. History teaches us that there is no permanent, unproblematic connection between territory, community and identity: ties to land may be severed in one place and recreated elsewhere, and often hold different meanings for different people. There is, for example, a growing lack of awareness among younger Banabans about the story of relocation from Banaba to Rabi, suggesting that its 'poignancy … fades with time'.[840] And Reverend Sumalie of the Tuvaluan Church explains that, in New Zealand, where a significant proportion of Tuvaluans have already migrated, '[w]e teach the Sunday School children the language, to make sure that our culture, our language, our identity as Tuvaluan [remains], even if Tuvalu disappears in 50 years … we want to maintain our identity as Tuvaluans, wherever we travel.'[841]

Finally, this emphasis is echoed in the account of the self-determining people developed throughout the thesis. Chapter 4 defined a people as the population of a state with a history of cooperation in shared political institutions. What is valuable here is the relationship — or 'morally salient bond'[842] — between the members of a people and their specific governing institutions that arises out of this history, rather than the physical space that this people occupies.

What is called into question here is not the territorial nature of self-determination or statehood but the claim that self-determining peoples are necessarily tied to one territory in particular. This means that the collective resettlement of a state's population to a new territory need not entail the loss of its international legal status or personality. In fact, experts in this field have been at pains to emphasise the continuity of states under international law, arguing that 'the notion and language that such states will "disappear" (i.e., lose their international legal personality) or "sink" ought to be

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[838] Crawford, *supra* note 564, at 52.
[839] Article 1, Montevideo Convention, *supra* note 821.
[840] McAdam, *supra* note 782.
[841] Interviewed in Panos Pictures, *Tuvalu: Islands on the Frontline of Climate Change* (2009).
[842] Stilz, *supra* note 584, at 591. 'Respecting a people's self-determination is a way of honouring this relationship.' Stilz, *supra* note 587, at 262.

avoided'.[843] As is discussed further in Chapter 7, states are resilient. 'A state remains one and the same International Person', Lauterpacht has argued, 'in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory'.[844]

Atoll islanders have also emphasised the importance of retaining their statehood, sovereignty and self-determination during the process of collective resettlement. For many, independence is a recent achievement and one that is unlikely to be surrendered gladly.[845] The Foreign Minister of the Marshall Islands has explained that, for the Marshallese, 'the wholesale abandonment of their nationhood is no more acceptable to them than it would be to any member state of the UN'.[846] The Marshallese government therefore insists that 'a guarantee of sovereignty would be necessary before they would wilfully relocate to a foreign nation'.[847]

Other atoll island states have proposed finding new territory on which to resettle as sovereign states. While Kiribati actively promotes a policy of individual 'migration with dignity', its government has also recently purchased 6,000 acres of land in Fiji.[848] 'We would hope not to put everyone on [this] one piece of land', President Anote Tong explains, 'but if it became absolutely necessary, yes, we could do it'.[849] And, as Michael Gerrard observes, if 'Fiji were to cede the land … and say it's no longer within their jurisdiction', then it could become 'the new Kiribati'.[850] Tuvalu has also put forward a proposal to resettle the population of Tuvalu in Australia as a 'state within a state'.[851] Under this proposal, Tuvaluans would retain their citizenship, UN membership and economic exclusion zone, in the hope of eventually returning to their homeland.

However, as is the case with secessionist minority groups, such claims to self-determination inevitably intersect with the sovereignty, territorial integrity and

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[843] UNHCR, *supra* note 75, at 2 and para.30. Compare McAdam, *supra* note 90, at 120.

[844] H. Lauterpacht, *Oppenheim's International Law* (1955), at 153. This position is still authoritative. See, for example, Crawford, *supra* note 564, at 700.

[845] McAdam, *supra* note 90, at 156.

[846] John Silk, Foreign Minister of the Marshall Islands, cited in Columbia Law School, 'Consolidated Notes', Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate (23–25 May 2011).

[847] Holthus *et al*., *supra* note 93, at 73. Compare Nauru's insistence on recognition as an independent state after resettling in Australia. Tabucanon and Opeskin, *supra* note 396, at 347.

[848] Fiji World News, *supra* note 436; Lagan, *supra* note 436.

[849] Cited in Dizard, 'Plagued by Sea-Level Rise, Kiribati Buys Land in Fiji', *Al-Jazeera* (1 July 2014). On Tong's recent emphasis on community resettlement, see ABC News, *supra* note 117.

[850] Cited in Ward, 'Planning to Sink: What Happens if Kiribati Drowns?', *PBS Newshour* (27 July 2014).

[851] Boom and Lederwasch, 'Human Rights or Climate Wrongs: Is Tuvalu the Canary in the Coal Mine?', *The Conversation* (18 October 2011); Crouch, *supra* note 70; McAdam, *supra* note 90, at 144–145.

political unity of existing states. Cassese goes so far as to describe self-determination as 'radically at odds' with state sovereignty, where the former tends to challenge the status quo set by the latter.[852] The difference here is that atoll island peoples are already recognised as the populations of states: their plight simultaneously challenges and seeks to maintain the status quo.

Atoll island states themselves recognise this difficulty. They typically refer to purchasing land rather than ceding territory, thereby leaving the sovereignty and territorial integrity of host states intact.[853] But is collective resettlement to land purchased within the territory of another state a solution that can adequately protect the self-determination and statehood of atoll island peoples? The answer is no: sovereignty over territory is not straightforwardly analogous to ownership of land or property; it 'is not ownership of but governing power with respect to territory'.[854] In purchasing land, states engage in a private property transaction, which does not transfer sovereignty over land, grant the freedom to exercise extensive autonomy within its borders, or even guarantee individual rights to immigration, citizenship or the goods these entail.[855] Only by securing lawful title to territory elsewhere can an atoll island state continue to exercise territorial sovereignty over the land on which its people lives.

How might this be possible? One proposal involves constructing artificial islands on which an atoll island population could resettle.[856] Several thousand Maldivians have already relocated to the artificial island of Hulhumalé, which has been built to house up to 150,000 people by piling sand and crushed coral onto a naturally occurring reef.[857] Hulhumalé has been described as a 'modern Noah's Ark' — a means of ensuring that the Maldives maintains its status as a state with sovereignty over its population and territory even as climate change inundation renders its original

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[852] Cassese, *supra* note 475, at 333–335. Compare Berman, *supra* note 593, at 53; Sharma, *supra* note 823, at 8–10, 212 and 219–223.

[853] See, for example, the Maldives' plans to purchase a new 'homeland'. Ramesh, *supra* note 811; Schmidle, *supra* note 144.

[854] Crawford, *supra* note 564, at 56 (see also 717). Compare Crawford, *supra* note 484, at 204; Jennings, *supra* note 480, at 2–3.

[855] See discussion in McAdam, *supra* note 90, at 147–149.

[856] See Yamamoto and Esteban, *supra* note 26, at 159–170.

[857] Barta, 'Apathy Sinks Maldives Island', *The Australian* (12 January 2008); Gagain, 'Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the "Constitution of the Ocean"', 23 *Colorado Journal of International Environmental Law and Policy* (2012) 77; Joffe-Walt, 'Future of the Maldives Emerges from the Waves', *Sunday Telegraph* (22 August 2004).

territory uninhabitable.[858] However, with sea levels rising, Hulhumalé is predicted to 'buy the islanders perhaps another 50 years' survival time', at best.[859] Even if it were technologically possible to build fully sustainable islands, this solution would be out of the financial reach of most atoll island states.[860] It is also doubtful whether an artificial island built upon a reef like Hulhumalé — let alone an artificial installation like the 'floating islands' proposed by Japan[861] — would count for the purposes of territory under international law.[862]

6.4 Reasons for and against ceding territory

Another solution — one considered briefly by many but in detail by none[863] — requires the formal transfer of territory to an atoll island state via a treaty of cession, with the agreement of the international community that it constitutes the same state in a new location.[864] Cession is recognised as one of a handful of traditional modes of territorial acquisition, alongside effective occupation, prescription, subjugation and accretion.[865] It involves the transfer of territorial sovereignty from one state to another, by means of a bilateral treaty.[866] The treaty must make clear that the intention is to cede sovereignty over territory;[867] the transfer of (even exclusive) governmental authority is not

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[858] Barta, *supra* note 857; Gagain, *supra* note 857, at 82.

[859] Joffe-Walt, *supra* note 857.

[860] Even the relatively low-tech Hulhumalé has cost over US$60 million so far. *Ibid.* This is roughly one and a half times the GDP of Tuvalu. CIA, *supra* note 3.

[861] Discussed in Carrick, *supra* note 71.

[862] Article 60(8), UN Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, 21 ILM 1261 (1982). See also *In re. Duchy of Sealand*, *supra* note 588, at 685, and discussion in Rayfuse, *supra* note 68, at 175–176; Schofield and Freestone, 'Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise', in Gerrard and Wannier (eds), *supra* note 68, 141, at 157. However, see Stoutenburg, *supra* note 90, at 62–63.

[863] Bradley, *supra* note 306, at 151; Burkett, *supra* note 90, at 355, note 53; Campbell, *supra* note 348, at 67; Crawford and Rayfuse, *supra* note 123, at 249–250; Mayer, *supra* note 404, at 392; Oliver, *supra* note 437, at 214 and 238–239; Park, *supra* note 5, at 18–19; Rayfuse, 'International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma', *UNSW Faculty of Law Research Series No.52* (2010), at 8–9; Rayfuse, *supra* note 68, at 178; Soons, *supra* note 89, at 230; Stoutenburg, *supra* note 90, at 61; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 2–3; Wong, *supra* note 90, at 38–39. For exceptions to this, see Kolers, *supra* note 91; McAdam, *supra* note 90, at 147–149; Nine, *supra* note 91, at 360. While Yamamoto and Esteban also discuss it in some detail, they repeatedly conflate purchase with cession of territory. Yamamoto and Esteban, *supra* note 26, at 180–198.

[864] Park, *supra* note 5, at 18; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 2.

[865] Most of which are no longer considered lawful. Crawford, *supra* note 484, at 220–236; Jennings, *supra* note 480, at chs.1–2; Jennings and Watts, *supra* note 423, at 679–708; Sharma, *supra* note 823, at ch.2.

[866] Crawford, *supra* note 484, at 226–227; Dörr, 'Cession', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2006); Jennings, *supra* note 480, at 6 and 16–18; Jennings and Watts, *supra* note 423, at 679–686; Sharma, *supra* note 823, at 136–141.

[867] By referring to cession 'in perpetuity' or 'in perpetual sovereignty'. *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports (1960) 6, at 38.

sufficient.[868] Cession may occur by way of a gift or 'gratuitous transfer', in which one state voluntarily (or otherwise) gives a portion of its territory to another; the sale of a portion of territory from one state to another; or a 'mutual transfer', in which one portion of territory is exchanged for another.[869] Without any territory to trade and relatively little money to spend, atoll island states will need to rely on the gratuitous cession of territory from another state.[870]

Legal scholars roundly applaud this option, describing it as 'the most straightforward and appealing solution'.[871] Following the conclusion of a treaty of cession, there is 'nothing in international law that would prevent the reconstitution of a state such as Kiribati or Tuvalu within an existing state'.[872] Yet these same scholars are also briefly and unanimously dismissive of it, typically on the grounds of a lack of political will. Rayfuse, for example, observes that the 'political, social and economic ramifications of ceding valued and/or inhabited territory may simply exceed the capacities — and courage — of existing governments',[873] while McAdam suggests that 'the political likelihood of this happening is remote'.[874]

However, while the obstacle of political will is undoubtedly a significant one,[875] their reluctance to consider states' reasons for or against ceding territory makes for somewhat uninteresting analysis. By examining moral and legal reasons for and against ceding territory, this section offers an insight into not only the possibility of the cession of territory, but also the feasibility of alternative solutions. If states have good reasons for refusing to cede territory to an atoll island people — perhaps because it interferes unjustly with their territorial integrity or the self-determination of their people — does this mean that they have stronger reasons for ensuring the ongoing

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[868] Jennings and Watts, *supra* note 423, at 680.

[869] *Ibid*, at 679–682; Verzijl, *supra* note 473, at 366–378; Sharma, *supra* note 823, at 137–138. The first type generally occurs under compulsion via a peace treaty, although the transfer of Venice from Austria to France then France to Italy in 1866 is an exception. Examples of cession by sale include the transfer of Alaska by Russia to the US for $7,200,000 in 1867, and of the Philippines by Spain to the US for $20,000,000 in 1898.

[870] Unless some international fund is established to contribute to the purchase of territory. See, for example, Biermann and Boas, *supra* note 328; Hodgkinson and Young, *supra* note 133, at 317–319; Mayer, *supra* note 404, at 413; Oliver, *supra* note 437, at 238–240.

[871] Rayfuse, *supra* note 68, at 178. Compare Oliver, *supra* note 437, at 214 and 242; Wong, *supra* note 90, at 38.

[872] McAdam, *supra* note 90, at 147.

[873] Rayfuse, *supra* note 68, at 178. Compare Crawford and Rayfuse, *supra* note 123, at 249–250.

[874] McAdam, *supra* note 90, at 147. Compare Bradley, *supra* note 306, at 151; Campbell, *supra* note 348, at 67; Wong, *supra* note 90, at 38; Yamamoto and Esteban, *supra* note 26, at 188–190 and 195–195.

[875] See further Kälin and Schrepfer, *supra* note 73, at 68–69; McAdam, *supra* note 90, at 197–199; McAnaney, *supra* note 90, at 1201–1204; Wyman, *supra* note 319, at 365–367.

recognition of atoll island states as 'deterritorialized' entities (Chapter 7) or agreeing to merge with an atoll island state in federation or free association (Chapter 8)?

Responding to the cynicism of others, this section begins with reasons against acting, before moving on to consider whether the reasons for acting outlined in previous chapters provide a convincing response.

6.4.1 Reasons against acting

Alongside other guiding principles of international law,[876] self-determination 'can be fundamental to the law of territorial acquisition'.[877] Indeed, 'there can be no doubt that so lively a legal principle has a part to play in the determination of territorial sovereignty'.[878] But what role does or should it play in the context of climate change inundation?

Here, the question of the relationship between self-determination and territorial integrity arises again — a question to which international law provides an ambiguous answer.[879] Is self-determination, as Cassese suggests, a precocious upstart whose aim is to challenge the status quo protected by the latter? Or is it a tool of the establishment; a right granted only to 'historically pre-constituted political entities with a specific territory',[880] which must be exercised 'consistently with the maintenance of the territorial integrity of states'?[881] Unlike the secessionist groups around which this case law has developed, atoll island peoples are themselves 'historically pre-constituted political entities with a specific territory' — and yet, in the face of climate change inundation, they may seek territory elsewhere within which to reconstitute themselves as territorially sovereign entities.

Today, however, there is little or no territory that is left unclaimed by states, and international law provides strong protections for the sovereignty, territorial integrity

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[876] Including *uti possidetis*, equity, contiguity and historical continuity. Crawford, *supra* note 484, at 237–240; Jennings, *supra* note 480, at 74–78; Jennings and Watts, *supra* note 423, at 716; Sharma, *supra* note 823, at ch.2.

[877] Sharma, *supra* note 823, at 213 (see also 166–167 and 221–249).

[878] Jennings and Watts, *supra* note 423, at 713.

[879] For one notable attempt to answer this question in the case of decolonisation, see Berman, *supra* note 593.

[880] Oeter, *supra* note 484, at 326.

[881] *Reference re Secession of Quebec*, *supra* note 508, at paras.122 and 126. Compare Conference of Yugoslavia Arbitration Commission, *supra* note 626.

and political unity of these states.[882] In seeking new territory within which the people of an atoll island state can re-establish itself as a self-determining community, therefore, we inevitably encounter other peoples exercising their own rights to self-determination and territorial integrity. However, this perversely reaffirms the claim made in Chapters 4 and 5: that the right to self-determination protects a human interest that is widely recognised as important, and should therefore be taken into account in addressing the problem of climate change inundation. A paradox thus emerges: it is precisely *because* self-determination is seen as such an important value (and is so closely tied to territory and statehood) that islanders will find it difficult to obtain new territory within which to resettle as self-determining peoples. As Pomerance observes, claims to self-determination are typically put forward 'in opposition to other self-determination claims, and not to non-self-determination, or anti-self-determination, claims'.[883]

A similar point was made earlier with respect to the 'radical monopoly' of the state system. In order to retain access to the benefits of statehood, atoll island peoples must continue to be recognised as states, where this is thought to require sovereignty over territory — yet their path is blocked by the monopoly that states hold over the earth's surface.[884] Again, it is precisely *because* statehood is seen as such an important status (and is so closely tied to territorial sovereignty) that states arguably have strong reasons against ceding territory to atoll island peoples. Statehood thus becomes both the telos of self-determination and 'concomitantly a constraint thereon'.[885]

One reason against ceding territory to an atoll island people therefore arises from the territorial integrity and political unity of existing states. Principles of sovereignty and territorial integrity are thought to underpin peace and stability both within and

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[882] GA Res. 1514 (XV), *supra* note 495, at paras.4, 6 and 7; GA Res. 2625 (XXV), *supra* note 137; GA Res. 3281 (XXIX), *supra* note 827, at ch.1; Article 2(4), UN Charter, *supra* note 173. The 'inviolability of a state's territory is now … firmly and peremptorily established'. Jennings and Watts, *supra* note 423, at 416. Compare Hannum, 'Self-Determination in the Twenty-First Century', in E. Babbit and H. Hannum (eds), *Negotiating Self-Determination* (2006) 61, at 76. The permanence of existing territorial boundaries is reinforced by the principle of *uti possidetis*. See *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports (1986) 554, at paras.23–24; Conference of Yugoslavia Arbitration Commission, *supra* note 626.

[883] Pomerance, *supra* note 480, at 73. Compare Hannum, *supra* note 818, at 31; Klabbers, *supra* note 549, at 188–190.

[884] The 'self-determination of any group whose territory is destroyed, or made unusable … is threatened with extinction because of the group's lack of access to the territories of others'. Nine, *supra* note 91, at 366.

[885] French, 'Introduction', in French (ed.), *supra* note 158, 1, at 5.

between states,[886] and are thus of 'paramount importance'.[887] From this perspective, the suggestion that a state might have reasons for ceding territory to an atoll island people challenges the values at the heart of both statehood and international peace and security. The right to self-determination, McAdam concludes, 'does not operate so as to give the inhabitants of these states a right to claim land in other states'.[888]

The difficulty with making this argument, however, is that the first stone has already been cast. As island leaders have been at pains to emphasise — and as the IPCC has recognised in its latest report[889] — climate change inundation already threatens the 'sovereignty', 'security and territorial integrity' of atoll island states.[890] The cession of territory to an atoll island state might therefore be understood as an attempt to protect, rather than subvert, principles of territorial integrity and state sovereignty and, as a consequence, international peace and security. If the question here is how the principles of sovereignty and territorial integrity should be interpreted and implemented in order to best protect the peace and stability of the international community, then the answer is far from obvious. At the very least, the assumption that the territorial boundaries of existing states must be maintained at all costs cannot be made unproblematically.

A second reason against acting also derives from the sovereignty of potential host states, but relates to the lived experience of citizens and their institutions, rather than the state as embodied in abstract legal principles. This is the concern that the admission of islanders may undermine the collective autonomy or shared way of life of the people of a host state. The capacity to make decisions about who can enter and remain within the borders of a state is typically understood as one facet of the sovereignty and autonomy of a self-determining people.[891] Without it, Walzer argues, 'there could not be communities of character, stable, ongoing associations of men and women with

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[886] Sharma, *supra* note 823, at 5. On the UN's preference for maintaining stable territorial boundaries, see, for example, Rigo Sureda, *supra* note 484, at 216–217.

[887] Cassese, *supra* note 475, at 122. Compare Crawford, 'Democracy and the Body of International Law', in G. Fox and B. Roth (eds), *Democratic Governance and International Law* (2000) 91, at 95–98.

[888] McAdam, *supra* note 725, at 122, note 103. Compare McAdam, *supra* note 90, at 147; Oliver, *supra* note 437, at 239; Wyman, *supra* note 123, at 209.

[889] Atoll island states are 'experiencing major challenges to their territorial integrity' and 'sovereignty'. Adger *et al*., *supra* note 63, at 758, 771 and 775. Compare IPCC, *supra* note 29, at 20.

[890] See comments made by delegates from the Marshall Islands, Micronesia, Nauru and Palau during the 63rd Session of the General Assembly, UN Doc. A/63/PV.9 (25 September 2008). Cited in McAdam, *supra* note 90, at 122–123. Compare Republic of the Marshall Islands, *supra* note 131.

[891] Kälin and Schrepfer, *supra* note 73, at 67; Solomon and Warner, *supra* note 331, at 249.

some special commitment to one another and some sense of their common life'.[892] Again, we encounter competing claims to self-determination: one seeking refuge within another state; the other seeking protection against such intrusion.

In the case of an atoll island people seeking sovereignty over new territory, however — unlike the solutions discussed elsewhere in this thesis, including planned migration (Chapter 3), deterritorialized statehood (Chapter 7) and free association or integration (Chapter 8) — there would be no dilution of the autonomy or shared way of life of a receiving people. Islanders would move to a parcel of land carved out from the host state's territory and ceded to them, allowing the host people to sustain its collective autonomy within its remaining territory. Curiously, Walzer himself makes this point, using the example of a 'White Australia' faced with swarms of desperate refugees. Members of White Australia could 'yield land for the sake of homogeneity, or they could give up homogeneity (agree to the creation of a multiracial society) for the sake of the land'.[893] While the cession of territory may otherwise require stronger reasons for acting than the other solutions discussed in this thesis — primarily because it challenges the territorial integrity of the host state — on this count, it may in fact place less of a burden on receiving populations and therefore require less weighty reasons for acting.

A third set of reasons against ceding territory arises where this would impose unreasonable costs on the population of a host state.[894] If the cession of territory would compromise the ability of a host state to protect the human rights of its citizens — for example, by removing access to valuable infrastructure, agricultural land or natural resources, or increasing the risk of 'overcrowding, exploitation and unsafe living conditions'[895] — it may have good reasons against doing so.

Yet the costs of ceding territory to an atoll island people would not be great, and certainly not significant enough to interfere with the human rights of the current residents of Australia or New Zealand. Even when compared with the relatively small landmass of New Zealand (267,710 square kilometres), Tuvalu (26 square kilometres), Kiribati (811 square kilometres) and the Maldives (298 square kilometres) have a

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[892] Walzer, *supra* note 429, at 62.

[893] *Ibid*, at 47. Bradley points out the racist connotations of such a policy. Bradley, *supra* note 306, at 151. See also A. Kolers, *Land, Conflict and Justice* (2009), at 147–150.

[894] On the duty to address climate change-related harms only where the costs of acting are not unreasonable, see Kolstad *et al*., *supra* note 155, at 218.

[895] Johnson, *supra* note 423, at 322.

negligible landmass, much of which remains uninhabited.[896] Even if Australia were to cede territory to all three states, this would amount to far less than 1% of its land.[897] While this loss of territory would affect only a handful of states,[898] the burdens imposed on those states may be offset by certain financial or legal concessions, including greater flexibility in meeting other climate change-related obligations.[899] The financial costs associated with identifying land, consulting with affected communities, transporting islanders and building housing and infrastructure could also be shared among other actors — particularly those states that have reasons for acting but do not themselves cede territory — via a new or existing international funding scheme.[900] And, provided that island states' maritime zones are maintained,[901] the income from these assets could also contribute to 'the relocation and continued livelihood of the displaced population'.[902]

Thus, if distributed equitably among the taxpayers of the host state and other contributing states, the costs associated with the cession of territory should not deprive receiving populations of access to the goods and services associated with the enjoyment of human rights. Nor would they be required to adopt new immigration laws, modify their governing institutions or accept the dilution of their collective autonomy or shared way of life. It is also important to remember that, as observed in Chapter 2, supporting the collective resettlement of atoll island peoples — even where this involves ceding territory — will, in many cases, be less financially costly than committing to timely and effective mitigation strategies, at least in the short term. The collective resettlement of atoll island states to new territory therefore appears possible 'without serious sacrifice of our own ends'.[903]

However, the burdens associated with the cession of territory are likely to be distributed inequitably, not only between states (as discussed above), but also between

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[896] For example, only around 200 of the Maldives' 1,190 islands are inhabited. CIA, *supra* note 3.
[897] Covering 7,741,220 square kilometres. *Ibid*.
[898] Lister, *supra* note 130, at 628.
[899] Heyward and Ödalen, *supra* note 123, at 17–18 and 21; Mayer, *supra* note 404, at 404.
[900] Biermann and Boas, *supra* note 328, at 76; McAdam, *supra* note 90, at 253–254 and 259–260; Talakai, 'Climate Conversations: Small Island States Need Action on Climate Loss and Damage', *Thomson Reuters Foundation* (30 August 2012); Yamamoto and Esteban, *supra* note 26, at 165–171. See also sources *supra* note 870.
[901] Caron, *supra* note 89; Rayfuse, *supra* note 68; Soons, *supra* note 89; Yamamoto and Esteban, *supra* note 26, at ch.5.
[902] Rayfuse, *supra* note 133, at 11.
[903] Nagel, 'The Problem of Global Justice', 33 *Philosophy and Public Affairs* (2005) 113, at 131.

individuals. While every attempt should be made to identify territory that is both uninhabited and habitable,[904] this may not always be possible. Where it is not, special consideration must be given to those living within the boundaries of the territory that is to be ceded.[905] Any treaty of cession will need to clarify their legal status if they choose to remain, and compensate for the considerable disruption to their lives that leaving — even voluntarily — will entail. After all, the right to occupy a certain place without fear of displacement underpins most of the goods we pursue in life, including our livelihood, property, cultural values, spiritual beliefs and relationships.[906]

Yet it is important to recall that these burdens of upheaval and dislocation will fall heavily on both sides — indeed, with few exceptions, the threat posed by climate change inundation to the lives, livelihoods, sovereignty and self-determination of atoll island peoples far outweighs the burden that their resettlement would impose on host states and their citizens.[907] The problem lies in how best to minimise these burdens. One way of doing so is to ensure that both relocating and receiving populations are 'informed, consulted and able to participate actively in relevant decisions and their implementation',[908] a requirement echoed in Article 6 of the UNFCCC.[909]

While this requires that the wishes of atoll island peoples be heard and taken into account in determining whether and where new territory is sought, it also requires that members of the receiving population participate in decisions about which territory is to be ceded — provided that it meets certain criteria relating to size, habitability, access to land and maritime resources and so on.[910] While a state's territory was, historically, seen as its 'realty', free to be sold, leased, inherited, conquered or bequeathed 'with

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[904] Kolers, *supra* note 832, at 115–116; Kolers, *supra* note 91, at 334–335 and 340; Nine, *supra* note 91, at 371–372.

[905] Lister, *supra* note 130, at 628; Lister, 'Self-Determination, Dissent, and the Problem of Population Transfers', in F. Teson (ed.), *The Problem of Self-Determination* (forthcoming); Yamamoto and Esteban, *supra* note 26, at 195.

[906] Campbell, *supra* note 348, at 64; Moore, *supra* note 834, at 217–219; Stilz, *supra* note 584, at 582–585.

[907] Ferris, *supra* note 317, at 15–18; Heyward and Ödalen, *supra* note 123, at 16.

[908] Nansen Initiative, *supra* note 96, at 5. On the need for long-term planning and consultation, see Barnett and Campbell, supra note 12, at 173; Campbell, *supra* note 348, at 78; Campbell, Goldsmith and Koshy, *supra* note 114, at 6, 34 and 43–44; Ferris, *supra* note 317, at 10 and 20; Ferris, Cernea and Petz, *supra* note 16, at 32; Park, *supra* note 5, at 20-21; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95 at 3.

[909] UNFCCC, *supra* note 102. Compare Articles 1, 3 and 6, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447 (1999); Principle 10, Rio Declaration, *supra* note 387.

[910] Nine, *supra* note 91, at 370–372. Compare Simmons, 'Historical Rights and Fair Shares', 14 *Law and Philosophy* (1995) 149, at 168.

little or no regard for the wishes of the inhabitants',[911] the principle of self-determination has more recently played a role in deciding 'whether territory should be conveyed at all, and to whom'.[912] Today, the cession of territory requires at least the 'full consent of the governments concerned'[913] as well as, in certain states, the consent of the population.[914]

In both cases, a plebiscite or referendum is the best tool for formalising this process.[915] During the decolonisation period, these were typically used to determine a people's 'free and voluntary choice', often with UN supervision.[916] In 1963, Jennings suggested that the plebiscite 'still has a part to play' in resolving questions of territory and self-determination, and — as a device for determining the 'freely expressed wishes' of both relocating and host peoples — this arguably still holds true.[917] While the relevant population for the purposes of any referendum would be the population of the state as a whole — after all, the 'peoples' with which we are concerned are the populations of existing states — the wishes of any inhabitants of the land that is to be ceded might be granted additional weight in light of the heavier burdens they are expected to carry.

6.4.2 Reasons for acting

Having discussed — and, to some extent, addressed — three sets of reasons that states may have *against* ceding territory to atoll island peoples, we turn now to the reasons they may have *for* doing so. According to the account of self-determination developed so far, states have an obligation to take seriously the free and genuine expression of the will of atoll island peoples in deciding how to respond to climate change inundation. However, in the event that islanders wish to reconstitute themselves as a state elsewhere, must the cession of territory be 'entirely reliant on goodwill and

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911 Crawford, *supra* note 484, at 216.

912 Jennings, *supra* note 480, at 69 and 79. Compare Sharma, *supra* note 823, at 166–167; Jennings and Watts, *supra* note 423, at 684 and 716.

913 G. Schwarzenberger, *International Law* (1957), at 303. Cited in Sharma, *supra* note 823, at 136.

914 Jennings and Watts, *supra* note 423, at 680. See further Crawford, *supra* note 484, at 243; Jennings, *supra* note 480, at 6 and 17–18; Jennings and Watts, *supra* note 423, at 684; Oliver, *supra* note 437, at 238. Compare Principle 2, Atlantic Charter, *supra* note 561.

915 Crawford, *supra* note 484, at 245–248. For a case in which cession was subject to a plebiscite, see *German Interests in Polish Upper Silesia*, 1926 PCIJ Series A, No.7. For the possibility of cession by the people of a territory, see *Sammut v. Strickland*, [1938] AC 678. Recent examples of plebiscites include East Timor and South Sudan. See Crawford, *supra* note 484, at 243.

916 Principle IX(b), GA Res. 1541 (XV), *supra* note 495; *Western Sahara*, *supra* note 136, at paras.57–58. On the means of exercising a right of self-determination, see Jennings and Watts, *supra* note 423, at 288 and 713–715; Rigo Sureda, *supra* note 484, at 294–324.

917 Jennings, *supra* note 480, at 78–79. Compare Jennings and Watts, *supra* note 423, at 684.

humanitarian generosity',[918] or do states have other reasons for ceding — or otherwise supporting the transfer of — territory?[919]

In the interests of not repeating the detailed material on reasons for acting set out in previous chapters, this chapter focuses on those states identified in Chapter 3 as having the strongest reasons for acting to assist those fleeing climate change inundation in the Pacific region: Australia and New Zealand. While other states were also identified as having reasons for providing financial or technological support (including more distant affluent states, such as Canada, Germany, France, the US and the UK), or temporarily hosting islanders while a more permanent solution can be found (including less affluent neighbouring states, such as Fiji or Papua New Guinea), the cumulative weight of the reasons for acting held by Australia and New Zealand suggests that they are the most likely candidates for ceding territory to atoll island peoples, at least in the Pacific region.

Reasons of peremptory force

As explained in Chapters 4 and 5, self-determination is recognised as a *jus cogens* norm of customary international law and a source of obligations *erga omnes*, reflecting its fundamental importance in international law. It therefore provides states with significant legal reasons for assisting atoll island peoples threatened by climate change inundation. In fact, 'insofar as climate change poses a threat to the right of peoples to self-determination, states have a duty to take positive action, individually and jointly, to address and avert this threat'.[920]

However, as suggested in Chapter 5, the legal weight associated with reasons for assisting atoll island peoples may vary depending on the type of action required. According to Duursma, in any situation in which it disrupts the territorial integrity of an existing state, self-determination will normally 'not have the status of *jus cogens*, but that of an ordinary norm of international law' from which states can derogate[921] —

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[918] Oliver, *supra* note 437, at 238.

[919] For an argument in the affirmative, see Nine, *supra* note 91, at 360–363; Nine, *supra* note 833, at 163–164. Nine argues that a Lockean proviso is 'triggered when the self-determination of a group is threatened because of the territorial dispositions of other groups'. Nine, *supra* note 91, at 363.

[920] OHCHR, *supra* note 13, at para.41.

[921] Duursma, *supra* note 534, at 103. On the idea that self-determination should not 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states', see GA Res. 2625 (XXV), *supra* note 137; GA Res. 1514 (XV), *supra* note 495; Article 46(1), UNDRIP, *supra* note 504. However, Judge Dillard has argued that it is 'unlikely' that 'a principle of territorial integrity overriding

although Duursma admits that, in certain cases, 'the right of self-determination offsets the inviolability of the territorial integrity' of an existing state.[922] Where a solution conflicts with the territorial integrity of existing states, the reasons that states have for implementing this solution may therefore not carry the full weight of a peremptory legal norm. That is, while states may decide to cede territory to an atoll island state in recognition of their reasons for acting more generally, they may not be required to do so as a matter of peremptory international law. However, states that choose not to cede territory will therefore have stronger reasons for acting to assist atoll island peoples in a way that does not interfere with their territorial integrity — perhaps by hosting a deterritorialized island state (Chapter 7) or joining with an atoll island state in free association or federation (Chapter 8).

Reasons of international cooperation

The need for 'joint and separate action' to address climate change inundation is emphasised by calls for international cooperation and burden sharing in the UN Charter, international human rights law and, more recently, in the context of climate change.[923] In its report on the relationship between human rights and climate change, for example, the OHCHR describes international cooperation as 'not only expedient but a human rights obligation'.[924] Like reasons arising from *jus cogens* and *erga omnes* norms, these reasons are general in nature, applying not just to Australia and New Zealand, but to most, if not all, members of the international community. However, earlier chapters identified an exception to this rule. Where one state has made a prior legal or political commitment to another — as with the existing migration pathways established between New Zealand, Australia, Tuvalu and Kiribati[925] — this underpins a specific obligation of international cooperation between them. Australia and New Zealand have also indicated their support for island peoples facing climate change inundation. Australia, for example, has made clear that it 'is particularly concerned

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the right of the people to self-determination' could be established. *Western Sahara*, *supra* note 136, Sep. Op. Dillard, at 120, note 1. Judge de Castro similarly found that any historical legal ties with the territory 'cannot stand in the way of the application of the principle of self-determination'. *Western Sahara*, *supra* note 136, Sep. Op. de Castro, at 171. Compare Sharma, *supra* note 823, at 313.

[922] Duursma, *supra* note 534, at 80.

[923] OHCHR, *supra* note 13, at para.84; Republic of the Maldives, *supra* note 21, at 8 and 76–78; UNHCR, *supra* note 75, at para.43.

[924] OHCHR, *supra* note 13, at para.99.

[925] Australian Department of Foreign Affairs and Trade, *supra* note 352; Australian Department of Immigration and Citizenship, *supra* note 372; Immigration New Zealand, *supra* note 371.

with the effect of climate change on low-lying small island states' and is 'taking a leadership role in addressing climate change issues within the Asia-Pacific region'.[926]

Building on states' procedural obligation to 'coordinate with each other'[927] to ensure that the burdens of acting to assist atoll island peoples are shared between them, these more specific reasons of international cooperation might also provide the basis for a regional burden-sharing arrangement, in which different states play different roles, depending on their resources and capacity. As Richard and Charlotte Bedford have argued, 'it is incumbent on the governments of New Zealand and Australia, the two most developed Pacific Islands forum countries, to work in collaboration with other Pacific states, including Fiji, to develop a coherent regional strategy' to facilitate the collective resettlement of atoll island populations.[928]

Reasons of contribution

With consistently high greenhouse gas emissions per capita, Australia and New Zealand, along with other high-emitting states, also have specific reasons for acting arising from their contribution to the problem of climate change inundation.[929] As Annex I and II states parties to the UNFCCC, they are required to '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'.[930] Where *in situ* adaptation becomes impossible due to the cumulative effects of climate change inundation, this assistance will need to take other forms — including, perhaps, the cession of territory to atoll island peoples seeking to re-establish themselves elsewhere.

Reasons of capacity

In terms of their capacity to act more effectively than others, Australia and New Zealand both recognise that they have particular obligations to the populations of Tuvalu and Kiribati arising from 'proximity and neighbourhood', which apply 'over and above the obligations that might exist in a total global context'.[931] Moreover, in

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[926] Government of Australia, *supra* note 442.

[927] Principle 30, Maastricht Principles, *supra* note 282. See also commentary in de Schutter *et al*., *supra* note 263, at 1149–1150.

[928] Bedford and Bedford, *supra* note 92, at 128. Compare Kostakos *et al*., *supra* note 409, at 12.

[929] Wyman, *supra* note 319, at 363; Yamamoto and Esteban, *supra* note 26, at 210.

[930] Article 4(4), UNFCCC, *supra* note 102.

[931] Bedford, interviewed on Carrick, *supra* note 71. Compare Bedford and Bedford, *supra* note 92, at 94–95; Collett, *supra* note 410, at vii; Kostakos *et al*., *supra* note 409, at 12.

terms of their capacity to absorb the costs of acting more easily, Australia and New Zealand have both a high GDP per capita and a small population relative to their landmass, with large, sparsely populated regions.[932] As observed in the previous section, even if Australia were to cede territory to Kiribati, Tuvalu and the Maldives, this would represent a negligible fraction of its total area.

During lengthy negotiations over the collective resettlement of the Nauruan people, the Australian government identified Curtis Island — with sufficient space, arable soil and access to employment opportunities on the mainland — as a possible location for a self-governing Nauruan community. It was willing to purchase the land from its existing owners, build housing and infrastructure and grant the Nauruan people freehold title over the island.[933] While the solution on offer was one of integration rather than the cession of territory to an independent state, this example nevertheless demonstrates Australia's capacity to provide a discrete piece of territory within which a displaced island people could resettle.

Finally, it is worth reiterating the somewhat counterintuitive point made earlier about the burdens imposed by this particular solution. On the one hand, the cession of territory may require stronger reasons for acting because of the challenge it presents to the territorial integrity of existing states. On the other hand, it may require less weighty reasons for acting precisely because it requires that host states cede territory to, rather than absorb the populations of, atoll island states. Where a host state is concerned about the potential constraints imposed on the collective autonomy of its own people, this solution allows it to carve off a small parcel of land while preserving the legal, social and political institutions that its people has shaped and sustained over time. The burdens imposed upon it may in fact be more reasonable where it is required to cede territory to an island state rather than to accommodate a deterritorialized state or autonomous island people within its borders.

In sum, Australia and New Zealand have reasons for ceding territory arising from obligations of international cooperation (particularly where existing migration agreements are taken into account); from their contribution to the greenhouse gas emissions that cause climate change inundation; and from their capacity to act,

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[932] Australia has around three people per square kilometre and New Zealand around 15. World Atlas, 'Countries of the World by Highest Population Density', accessible at www.worldatlas.com/aatlas/populations/ctydensityh.htm These criteria are found in Wyman, *supra* note 90, at 461–463.

[933] Tabucanon and Opeskin, *supra* note 396, at 346–347.

understood in terms of their ability to act effectively (on the basis of their proximity and cultural ties to Tuvalu and Kiribati) and to absorb the burdens of acting (on the basis of their available land and relative affluence). The cumulative weight of these reasons suggests that these states can, and should, bear primary responsibility for acting to address the harms of climate change inundation in the Asia-Pacific region. Whether these outweigh the reasons against ceding territory identified above is a question that this thesis cannot definitively answer; at best, it can attempt to clarify the scope and content of these reasons, leaving the final decision to atoll island peoples, prospective host states, and other legal and political actors.

6.5 Conclusion

This chapter has laid the groundwork for the final part of the thesis by proposing a collective decision-making framework through which atoll island peoples can identify their preferred response to climate change inundation. It has also examined the reasons that states may have for and against implementing the first option in this framework: the transfer of territory to an atoll island people via a treaty of cession.

Yet the narrative set out in this chapter — of the international legal system as a fixed 'jigsaw puzzle of solid colour pieces fitting neatly together', in which the relationship between state, territory and people is clearly delineated — is somewhat problematic. As the issue of climate change inundation makes painfully obvious, the pieces often do not fit neatly together to produce a coherent map: the reality is, in fact, 'messier, overlapping, with gaps here and there'.[934] We therefore need to think more creatively about territory, about the relationship between territory, state and self-determining people, and about the nature of self-determination as a 'plethora of possible solutions', rather than a 'rigid absolute right' to sovereignty and independence within a defined territory.[935]

This is where alternative solutions, such as the second and third options in the proposed decision-making framework, become relevant. Can an atoll island state preserve its existing territory by shoring up whatever land is left to create enough space to house a small outpost population? Can it borrow a portion of someone else's territory from which to govern in exile, perhaps indefinitely? Can it share territory, for

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[934] Knop, *supra* note 790, at 95.
[935] Pomerance, *supra* note 480, at 74.

example via some kind of merger, federation or intrastate autonomy agreement? Or, can it do away with territory altogether, by calling on the international community to recognise a new category of 'deterritorialized' state? And do these solutions require us to rethink the dominant legal understanding of statehood, in order to ensure that atoll island peoples retain their capacity for collective autonomy and independence in the face of climate change inundation, and to better reflect the demands of a world in which territory and other resources are becoming ever scarcer?

7. Self-Determination and 'Deterritorialized' Statehood

7.1 Introduction

As observed in Chapter 6, contemporary international law works to sustain a state system that operates, with a handful of exceptions, as a 'radical monopoly'.[936] This system is one in which states exercise territorial jurisdiction, negotiate treaties, bring complaints before the ICJ, exercise sovereignty over natural resources and maritime zones and provide the legal and political infrastructure within which individual and collective human rights are protected. 'Evidently', Nico Schrijver observes, 'being (or having) a state still matters'.[937]

Again, as with Chapter 6, this chapter takes statehood as its starting point, acknowledging the centrality of states within the international community and the 'strong preference' for independent statehood as the goal of self-determination.[938] However, unlike Chapter 6, it moves away from the simplistic narrative connecting state, territory and people in favour of an alternative account of statehood and self-determination that abandons any essential ties to territory. While state sovereignty may indeed be the 'standard operating assumption' of the international legal order,[939] this need not entail an unwavering commitment to one model of statehood.

This chapter examines the second option in the decision-making framework proposed in Chapter 6: the 'emergence into any other political status freely determined by a people'.[940] The category of 'any other political status', a 'slight but significant' addition to the list of options set out in the Declaration on Friendly Relations, leaves space for 'unusual constitutional or other arrangements'.[941] It is underdeveloped in international law, but is understood here as an alternative form of statehood in which the ties between state, population and territory are severed. As its territory gradually becomes uninhabitable and its citizens move elsewhere, an atoll island state might, for example, maintain a small outpost population on its remaining territory to act as a 'legal anchor' for its dispersed citizens, establish a permanent government-in-exile, or transition to a

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[936] Kolers, *supra* note 91, at 334.

[937] Schrijver, 'The Changing Nature of State Sovereignty', 70 *BYIL* (2000) 65, at 66. Compare Crawford, *supra* note 564, at 31.

[938] Berman, *supra* note 593, at 55.

[939] Crawford, *supra* note 791, at 132.

[940] GA Res. 2625 (XXV), *supra* note 137.

[941] Hannum, *supra* note 818, at 41. It does not appear in the earlier GA Res. 1541, *supra* note 495.

'deterritorialized state'. This second option therefore moves away from the traditional concept of the state as a territorially defined entity, towards an alternative account of the state as embodied in its citizens. 'If states are territorial entities,' Crawford observes, 'then they are also aggregates of individuals'[942] — and it is these groups to whom self-determination matters.

Transitioning to a 'deterritorialized' status may allow an atoll island state to remain a sovereign state with international legal personality. However, it also requires a creative re-interpretation of existing legal doctrine and practice on the nature and recognition of states. According to the oft-cited definition set out in the Montevideo Convention, a state must have a permanent population living in a defined territory with an effective government and the capacity to enter into relations with others of its kind.[943] However, while this constitutes an apparently straightforward 'minimum threshold' for statehood, this threshold becomes problematic at the margins of statehood, where difficult questions arise about the scope and content of the category of states. This is particularly relevant in the case of climate change inundation. In decoupling statehood from territory, the proposals considered in this chapter fail to meet the minimum threshold established by the Montevideo Convention. If we are to assess whether the legal status of atoll island states can be preserved, even after their territory becomes uninhabitable, we must therefore find some way of understanding statehood that accommodates entities that do not pass this threshold.

One task of this chapter is, therefore, to suggest an alternative account of statehood — one that relies on a series of overlapping similarities between states, rather than a clear binary distinction between state and non-state. While this account is not without problems, it provides the conceptual space in which to assess whether or not an atoll island state can and should remain a state and, therefore, unlike the minimum threshold account, offers a starting point for further discussion.

A second task is to assess whether the alternative forms of statehood considered here can adequately protect the autonomy, independence and self-determination of atoll island peoples, without placing an unreasonable burden on states elsewhere. Do host states have sufficient reason to recognise and accommodate the sovereignty of deterritorialized atoll island states? If, instead, they are prepared to grant

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[942] Crawford, *supra* note 564, at 52.

[943] Article 1, Montevideo Convention, *supra* note 821.

deterritorialized states only a limited subset of jurisdictional competences, what space does this leave for self-determination?

This chapter begins by critiquing the widely adopted 'minimum threshold' account of statehood — according to which all states meet each of the criteria set out in the Montevideo Convention — both in general (section 7.2) and in the specific context of climate change inundation (section 7.3). An alternative account of statehood is proposed, drawing on Wittgenstein's idea of 'family resemblances' (section 7.4). This alternative account views the criteria of statehood as a set of overlapping similarities or relationships between state-like entities, rather than as a fixed minimum threshold, and provides the conceptual space within which to assess alternative forms of statehood in which sovereignty and self-determination are detached from territory (section 7.5). Returning to the central themes of the thesis, the final sections consider whether or not a deterritorialized state can adequately protect the autonomy, independence and self-determination of atoll island peoples (section 7.6), and examine the reasons that other states might have for (or against) recognising or hosting a deterritorialized state (section 7.7).

7.2 The 'minimum threshold' account of statehood

International law envisages the extinction of a state, through succession, in terms of either merger with or absorption by another state, or voluntary or involuntary dissolution, followed by the emergence of one or more successor states.[944] In each case, the territory of one state is taken over by another.[945] The case of climate change inundation is, however, 'markedly distinct'.[946] A loss of habitable territory is not recognised as a cause of state extinction in international law,[947] yet appears to rule out the possibility of state succession as traditionally understood.

Given that the existing law on state succession can tell us little about the extinction of states as a result of the destruction of territory, perhaps we must instead identify what makes — and, by analogy, *un*makes — a state. The criteria for statehood set out in

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[944] M. Shaw, *International Law* (2008), at 208; Crawford, *supra* note 564, at 700-724; Lauterpacht, *supra* note 844, at 206–207.

[945] Per Article 2(1)(b), Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3 (1978); Article 2(1)(a), Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/CONF.117/14 (1983).

[946] McAdam, *supra* note 725, at 106.

[947] Although it is mentioned briefly in Craven, *supra* note 599, at 159; L. Oppenheim, *International Law: A Treatise* (1905), at 117–118; Shaw, *supra* note 944, at 208, note 52.

international law apply to the emergence rather than the extinction of states. However, in the absence of explicit legal rules regarding state extinction in this case, these criteria 'should presumably govern not merely the legal "creation" of states, but also their "extinction"'[948] — while bearing in mind that any application of the law to the issue of climate change inundation is necessarily speculative.

While statehood has 'long been the central organising idea in the international system',[949] a universally accepted definition has proved elusive. Article 1 of the Montevideo Convention sets out the most widely used definition, in which all states have a defined territory, a permanent population, an effective government and the capacity to enter into relations with other states.[950] According to this story, 'territory, people and government coincide in the state to produce international law's map of the world as a jigsaw puzzle of solid colour pieces fitting neatly together',[951] where each piece passes the threshold set by the Montevideo criteria.

The attractions of this minimum threshold account of statehood are apparent. A clear and concise definition of statehood implies certainty and predictability, thereby strengthening the rule of law.[952] If statehood is a 'legal status attaching to a certain state of affairs',[953] then the Montevideo criteria provide a clear explanation of what this state of affairs entails. They 'operate as threshold evaluations' that determine which entities are included within the category of states, and which are excluded.[954]

The application of this threshold in practice, however, is far from straightforward. The criteria it relies on are neither necessary nor sufficient for statehood.[955] First, the final

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[948] Craven, *supra* note 599, at 159. For Marek, for example, independence is 'indispensable to the continued existence of a state … With its loss, it becomes extinct.' K. Marek, *Identity and Continuity of States in International Law* (1968), at 188. Compare Grant, *supra* note 790, at 435; Wong, *supra* note 90, at 22. However, see McAdam, *supra* note 90, at 127.

[949] Knop, *supra* note 790, at 95.

[950] Article 1, Montevideo Convention, *supra* note 821. Similar definitions are found in Conference of Yugoslavia Arbitration Commission, *supra* note 823, at 1495; *Deutsche Continental Gas-Gesellschaft v Polish State*, 5 AD 11 (1929), at 13; Fitzmaurice, *supra* note 823, at 107, para.4; American Law Institute, *supra* note 823, at §201. On the legal concept of statehood, see also Crawford, *supra* note 564; Crawford, *supra* note 484, at chs.4–6; Grant, *supra* note 790; Jennings and Watts, *supra* note 423, at chs.2–4; Malanczuk, *supra* note 279, at chs.5 and 10. On the more recent idea of statehood as conditional or 'earned', see, for example, Williams, Scharf and Hooper, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', 31 *Denver Journal of International Law and Policy* (2002) 349; Buchanan, *supra* note 190.

[951] Knop, *supra* note 790, at 95.

[952] Grant, *supra* note 790, at 451 and 454–455.

[953] Crawford, *supra* note 564, at 5.

[954] Craven, *supra* note 599, at 159.

[955] Crawford, *supra* note 484, at 128; Grant, *supra* note 790, at 434–451.

criterion — the capacity to enter into relations with other states — is more accurately conceived of as an outcome rather than a requirement of statehood, depending, as it does, on the recognition of other states.[956] The criterion of independence is often proposed in lieu of this capacity: 'the right to exercise [within a given territory], to the exclusion of any other state, the functions of a state'.[957]

Second, states have emerged despite the absence of one or more criteria. Croatia and Bosnia-Herzegovina emerged, despite lacking effective control over some of their territory,[958] while Burundi, Rwanda and others were recognised as states prior to establishing an effective government.[959] Several micro-states have also emerged despite ongoing debate about whether or not they pass the threshold for statehood. The Vatican City is the smallest of these, with a territory of 0.44 square kilometres and a population of around 842.[960] It is also unique insofar as residence permits are typically granted on the basis of employment with the Holy See and can be revoked at any time. Duursma concludes that its residents cannot constitute a permanent population within the meaning of the Montevideo Convention because they lack any common history or stable attachment to a state or territory.[961] Nevertheless, the Vatican City is generally accepted as a state.[962]

Third — and most importantly, for the subject of this thesis — even if we accept that all four criteria are necessary for a state to begin its existence, the absence of any of them does not necessarily mean its end.[963] Once established, states resist extinction, whether their own or that of other states,[964] often regardless of 'substantial changes in territory,

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[956] Craven, *supra* note 505, at 220; Crawford, *supra* note 564, at 61; Malanczuk, *supra* note 279, at 79.

[957] *Island of Palmas*, 2 RIAA (1928) 829, at 838. Other proposed criteria include self-determination, democratic legitimacy, minority rights protection, legality and self-sufficiency. Craven, *supra* note 505, at 220–221; Crawford, *supra* note 484, at 134–136; Grant, *supra* note 790, at 437–452; Österdahl, 'Relatively Failed: Troubled Statehood and International Law', 14 *Finnish Yearbook of International Law* (2003) 49, at 50–51.

[958] Craven, *supra* note 505, at 228; Shaw, *supra* note 944, at 201.

[959] Crawford, *supra* note 484, at 129; Higgins, *supra* note 544, at 40.

[960] As of July 2014. CIA, *supra* note 3. See also Acquaviva, 'Subjects of International Law: A Power-Based Analysis', 38 *Vanderbilt Journal of Transnational Law* (2005) 345, at 353–357; Duursma, *supra* note 534, at ch.8; Jennings and Watts, *supra* note 423, at 325–329.

[961] Duursma, *supra* note 534, at 412. Compare Jennings and Watts, *supra* note 423, at 327.

[962] The Vatican City is also unique, however, in terms of its relationship with the powerful Holy See. Duursma, *supra* note 534, at 416–417.

[963] UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 1.

[964] Crawford, *supra* note 564, at 715; Mushkat, 'Hong Kong and Succession of Treaties', 46 *ICLQ* (1997) 181, at 183–187; Schachter, 'State Succession: The Once and Future Law', 33 *Virginia Journal of International Law* (1993) 253, at 258–260.

population or government, or even, in some cases, by a combination of all three'.[965] This implies a kind of 'ratchet effect',[966] whereby the status of statehood, once achieved, is difficult to lose. Kreijen suggests that states 'may have a complicated birth, but they do not die easily',[967] while Lowe goes so far as to argue that the 'road to statehood is a one-way street'.[968]

The strength of this presumption against extinction or 'ratchet effect' was apparent during the ILC's debate on the draft Declaration on the Rights and Duties of States in 1949. ILC members discussed whether or not to include a first Article stating that '[e]ach state has the right to exist and to preserve its existence'.[969] While some members described this right as 'a mainspring for other rights to be declared', others felt that it would be 'tautological to say that an existing state has the right to exist; that right is in a sense a postulate or a presupposition underlying the whole draft'.[970] Whether as an explicit 'mainspring for other rights' or an implicit 'presupposition underlying' those rights, the message is clear: the right to continue to exist as a state is seen as fundamental to the international legal order of states.

This ratchet effect is said to underpin the stability and order of the international legal system by ensuring that international legal, political and financial obligations continue to be met,[971] but derives strength from other motivations as well. It may, for example, reflect an unwillingness to intervene in the domestic affairs of a state by recognising its dissolution.[972] It may reflect a reluctance to recognise that a state is struggling, thereby incurring some obligation to provide assistance.[973] Or, in the context of climate change inundation, it may reflect a reluctance to 'tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion' from the international community.[974] Participants in a recent UNHCR

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[965] Crawford, *supra* note 564, at 700. Compare W. Hall, *A Treatise on International Law* (1924), at 21; Jennings and Watts, *supra* note 423, at 204–205; Lauterpacht, *supra* note 844, at 153.
[966] Thanks to Delphine Dogot for suggesting this term.
[967] G. Kreijen, *State Failure, Sovereignty and Effectiveness* (2004), at 37.
[968] Lowe, *supra* note 822, at 165. But Marek argues that '[t]here is a beginning and end to the state, as to everything else'. Marek, *supra* note 948, at 5–6.
[969] ILC, 'Draft Declaration on the Rights and Duties of States: General Debate', 1 *Yearbook of the ILC* (1949) 61, at 259, para.26.
[970] *Ibid*.
[971] See, for example, Craven, *supra* note 599, at 159; Marek, *supra* note 948, at 24.
[972] Thürer, 'The "Failed State" and International Law', 81 *International Review of the Red Cross* (1999) 731, at 737.
[973] Österdahl, *supra* note 957, at 63–64.
[974] Kälin, *supra* note 120, at 102. Compare Wong, *supra* note 90, at 20.

round-table meeting similarly insisted that 'the legal presumption of continuity of statehood needs to be emphasised and the notion … that [island] states will "disappear" (i.e., lose their international legal personality) or "sink" ought to be avoided'.[975]

We need not wait for climate change to ravage low-lying island states to find examples of states that continue to exist, despite failing to satisfy at least one of the four criteria of statehood. Governments operating in exile, for example, continue to be recognised as the representatives of existing states, despite lacking effective control over a permanent population living in a defined territory.[976] The continued recognition of so-called 'failed states', such as Cambodia, Somalia and the Congo, during prolonged periods of crisis, indicates that the criteria of an effective government and independence — and perhaps also control over a defined territory and permanent population — may also be waived for the purposes of ongoing statehood.[977] Despite failing to meet one or more of the Montevideo criteria, these 'fictitious' states typically retain their status.[978] They remain members of international organisations, their diplomatic relations remain (largely) intact, and the treaties they have previously concluded remain in force.

As these examples demonstrate, 'a state may not fully meet all the conditions of statehood, or its status may otherwise be in some way anomalous, but still merit general recognition'.[979] It therefore appears that the traditional account of statehood, according to which all states must pass the minimum legal threshold by meeting each of the necessary criteria, is misleading at best.

7.3 Climate change inundation and the minimum threshold account

This section applies the minimum threshold account to atoll island states at risk of climate change inundation. It becomes clear that identifying the point at which these states will fail to meet each of the proposed criteria for statehood — and therefore fail to pass the minimum threshold set by the Montevideo Convention — is difficult, if not

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[975] UNHCR, *supra* note 75, at para.2 (see also para.30).

[976] See generally Crawford, *supra* note 564, at 688–695; S. Talmon, *Recognition of Governments in International Law* (1998), at ch.3 onwards.

[977] See generally Helman and Ratner, 'Saving Failed States', 89 *Foreign Policy* (1992–1993) 3; Kreijen, *supra* note 967; Österdahl, *supra* note 957; Thürer, *supra* note 972.

[978] Duursma, *supra* note 534, at 118; Grant, *supra* note 790, at 435; Higgins, *supra* note 544, at 40; Thürer, *supra* note 972, at 752.

[979] Jennings and Watts, *supra* note 423, at 131–132.

impossible, providing us with additional incentive to identify an alternative account of statehood.

7.3.1 Territory

A defined territory is seen as integral to statehood. Statehood, Jennings argued in 1963, 'is inseparable from the notion of state territory',[980] and this view is still commonly held today. The principle of territorial control is closely tied to principles of effective government and independence. As Crawford observes, 'the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory';[981] thus, the concept of a state is 'rooted in the concept of control of territory'.[982]

Nevertheless, the threshold test for determining what counts as a 'defined territory' is set fairly low. A state is not required to meet any minimum territorial requirement, nor does its territory need to have precisely defined boundaries[983] or be contiguous; in fact, 'little bits of state can be enclaved within other States'.[984] While a state's territory is usually a naturally occurring surface of the earth, artificially reclaimed land may also count,[985] as may uninhabitable islets, reefs and rocks.[986] As the Vatican City and other micro-states demonstrate, a state's territory can be nominal at best. In fact, cases in which a state persists despite the belligerent occupation of its territory suggest that '[t]erritory is not necessary to statehood, at least after statehood has been firmly established'.[987]

As a criterion of statehood, therefore, territory appears 'simultaneously indispensable' and impossible to define.[988] How much territory must an atoll island state lose, then, before it no longer qualifies as a state? International maritime law suggests that only

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[980] Jennings, *supra* note 480, at 7.

[981] Crawford, *supra* note 564, at 46.

[982] Lowe, *supra* note 822, at 138. Compare Malanczuk, *supra* note 279, at 75; Sharma, *supra* note 823, at 2; Shaw, *supra* note 944, at 199 and 960.

[983] Per *Deutsche Continental Gas-Gesellschaft*, *supra* note 950, at 15. Compare *North Sea Continental Shelf*, ICJ Reports (1969) 3, at 33.

[984] Crawford, *supra* note 564, at 47. Crawford cites *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports (1959) 209, at 212–213 and 229; *Right of Passage*, *supra* note 867, at 27.

[985] *In re. Duchy of Sealand*, *supra* note 588, at 684–685. Artificial islands do not count, per Articles 60(1) and (8), UNCLOS, *supra* note 862.

[986] Per Article 121(3) UNCLOS, *supra* note 862.

[987] Grant, *supra* note 790, at 435. Compare I. Shearer, *Starke's International Law* (1994), at 85.

[988] Craven, *supra* note 505, at 224.

once its territory is completely submerged or reduced to a low-tide elevation will a state no longer satisfy the territory criterion.[989] Until this occurs, 'territory which was once connected to land and then submerged by the sea can continue to be regarded as a connected part of state territory'.[990] As discussed in Chapter 1, however, atoll island states will become largely uninhabitable long before the last of their land is submerged, due to the saltwater contamination of soil and water, unpredictable rainfall patterns, higher storm surges and so on. We must therefore look to some other criterion of statehood to identify the point at which they will cease to exist.

7.3.2 Population

The loss of a permanent population may 'provide the first signal that an entity no longer displays the full indicia of statehood'.[991] However, the population criterion, like that of territory, has no explicit minimum threshold. Tuvalu, with a population of just over 10,000, is already one of the world's smallest states,[992] and it is unclear how many citizens would need to leave before it fails to meet the population requirement. The 48 inhabitants of Pitcairn Island have been recognised as holding a right to self-determination and independence,[993] implying that the minimum population threshold, if there is one, is minimal at best.

Ideally, a state's 'population should inhabit the territory and be under the control of the government' of that state.[994] Yet, in practice, large numbers of islanders are nomadic or live abroad without jeopardising the legal status of their state.[995] However, without a sufficiently large permanent population, land cannot serve the functional role of territory: it no longer provides 'the physical basis that ensures that people can live together as organised communities'.[996]

The question then becomes whether a state fails to meet the population criterion if all but a tiny fraction of its population lives elsewhere. The government of Kiribati has

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[989] Per *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports (2001) 40, at para.206.
[990] *In re. Duchy of Sealand*, *supra* note 588, at 686.
[991] McAdam, *supra* note 90, at 124.
[992] Behind the Vatican City (842) and Nauru (9,488). CIA, *supra* note 3. See also Shaw, *supra* note 944, at 199.
[993] GA Res. 2869 (XXVI), 20 December 1971.
[994] Park, *supra* note 5, at 7.
[995] For example, around 57% of Samoans and 46% of Tongans live outside of their country of origin. C. Stahl and R. Appleyard, *Migration and Development in the Pacific Islands* (2007), at 7.
[996] Stoutenburg, *supra* note 90, at 61. Compare Sharma, *supra* note 823, at 4.

been advised that, even if most of its population resettles elsewhere, '[i]f we maintain our islands, get some people to live there, and be able to issue passports, we'll still be able to remain a state'.[997] However, while the Administrative Court of Cologne admitted that the 106 persons claiming to be nationals of the 'Principality of Sealand' could in theory constitute a population (given that 'size [is] irrelevant'), it held that they must also form a dynamic, cohesive, stable community.[998] 'An association whose common purpose covered merely commercial and tax affairs was insufficient.'[999] This suggests that, even if there is no minimum quantitative requirement built into the population criterion, there may be a qualitative threshold that atoll island states will eventually struggle to meet.

7.3.3 Effective government and independence

The two remaining criteria, an effective government and independence, are closely interlinked. For Crawford, 'government is treated as the exercise of authority with respect to persons and property within the territory of the State; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other States'.[1000] In order to count as effective, a state's government must have the capacity to maintain authority within its borders and fulfil its obligations under international law.[1001] In order to count as independent, a state must be (relatively) free from the authority of any other state.[1002]

However, in certain cases — including those of 'failed' statehood discussed above — an effective government may be 'unnecessary … to support statehood'.[1003] An atoll island state might therefore continue to be recognised as a state despite a 'very extensive loss of actual authority'[1004] or even the temporary absence of an effective government or formal independence.[1005] Indeed, in the absence of any competing claim to statehood — as is the case with atoll island states facing climate change inundation

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[997] Lambourne, interviewed on Carrick, *supra* note 71.
[998] *In re. Duchy of Sealand*, *supra* note 588, at 686.
[999] *Ibid*.
[1000] Crawford, *supra* note 564, at 55.
[1001] Stoutenburg, *supra* note 90, at 66.
[1002] *Island of Palmas*, *supra* note 957, at 838. However, a state's independence is not necessarily compromised by the smallness of its territory or population, or by its political or economic cooperation with other states. Duursma, *supra* note 534, at 125–126.
[1003] Crawford, *supra* note 484, at 129. Craven describes effectiveness as a 'moveable feast'. Craven, *supra* note 505, at 226.
[1004] Crawford, *supra* note 564, at 63 and 89. See also Thürer, *supra* note 972, at 752.
[1005] Shaw, *supra* note 944, at 203–204. See examples cited in Park, *supra* note 5, at 6–7.

— '[i]n many instances the claim to continuity made by the State concerned will be determinative; other States will be content to defer to the position taken'.[1006] Regardless of whether it is understood as constitutive or declaratory,[1007] recognition will therefore play an important role in determining whether — and to what extent — atoll island states continue to enjoy the rights and competences of statehood. Where states are reluctant to withdraw recognition, an atoll island state is more likely to retain its status as a state despite the loss of its habitable territory, permanent population, effective government or capacity for independence.[1008]

While this section has raised more questions than it has answered, one clear message that emerges from a closer examination of the criteria of statehood in the context of climate change inundation is that there is no clearly identifiable minimum threshold of statehood in international law. On closer inspection, each criterion of statehood lacks a clear scope and limits[1009] and each is faced with counterexamples. Despite its apparent clarity, the mainstream account — according to which the status of statehood is allocated to any and all entities that meet a clearly defined set of minimum criteria — is therefore unconvincing.[1010] Perhaps, rather than its accuracy, its popularity simply reflects 'the lack of a better model'.[1011] But what if a better model could be identified? The following section proposes an alternative account of statehood as a category of state-like entities that share a series of overlapping similarities or relationships, rather than a fixed set of characteristics.

7.4 Pursuing a 'family resemblance' account of statehood

In *Philosophical Investigations*, Ludwig Wittgenstein examines many of the ways in which language is, or might be, used.[1012] One of his aims is to discover how all of these

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[1006] Crawford, *supra* note 564, at 668. However, these conclusions were reached in the context of state succession rather than climate change inundation. Stoutenburg, 'Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*', 22 *EJIL* (2011) 1196, at 1199.

[1007] On recognition, see generally Berman, *supra* note 593, at 81–84; Craven, *supra* note 505, at 240–246; Crawford, *supra* note 484, at 143–165; Duursma, *supra* note 534, at 110–115; Jennings and Watts, *supra* note 423, at 127–203; Talmon, *supra* note 976.

[1008] On the role of recognition in remedying a failure to meet the criteria of statehood, see Duursma, *supra* note 534, at 430; Grant, *supra* note 790, at 447. On recognition in the context of climate change inundation, see Kälin and Schrepfer, *supra* note 73, at 39; McAdam, *supra* note 90, at 137–138; Park, *supra* note 5, at 14; Rayfuse, *supra* note 68, at 177; Stoutenburg, *supra* note 90; Wong, *supra* note 90, at 35–38 and 45.

[1009] '[C]ommon objective operational criteria for the elements of the definition' of statehood are lacking. G. von Glahn and J. Taulbee, *Law Among Nations* (2013), at 148.

[1010] Compare Craven, *supra* note 505, at 221; Österdahl, *supra* note 957, at 87.

[1011] Grant, *supra* note 790, at 414.

[1012] L. Wittgenstein, *Philosophical Investigations* (1953).

different uses are related to each other. What is the common feature that makes them all types of the thing that we call 'language'? It appears that there isn't one.[1013] Nevertheless, they are connected by an overlapping set of similarities or relationships, in virtue of which we group them together in the category of language.

Wittgenstein explains this by analogy with games.[1014] While those things that fall into the category of games do not share some unique set of properties, we nevertheless recognise them as games. Solitaire and poker involve playing cards. Poker and high jump involve many players competing against each other. High jump and football take place in a stadium. Football and tennis are ball games. Many games involve winning and losing, but so too do elections and auctions. '[W]e recognise poker or monopoly as games, not because of the presence of some defining characteristic common to all games, but because they share some (though not all) features with other games, which in turn share some (though not all) features with still other games.'[1015]

Wittgenstein describes this in terms of 'a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail'.[1016] This network, he suggests, is best captured by the idea of 'family resemblances', 'for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way'.[1017]

The question here is whether the concept of statehood could also be thought of in terms of family resemblances.[1018] According to this alternative account, statehood would be understood not in terms of a common set of characteristics shared by all

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[1013] Other than the fact that all language is *used* as language. For Wittgenstein's emphasis on the role of use in determing meaning, see *ibid*, at §43.

[1014] *Ibid*, at §§66–71.

[1015] Beardsmore, 'The Theory of Family Resemblances', 15 *Philosophical Investigations* (1992) 131, at 132.

[1016] Wittgenstein, *supra* note 1012, at §66.

[1017] *Ibid*, at §67.

[1018] This has not been proposed by legal scholars elsewhere, although certain accounts of statehood as a continuum of state-like entities come close. See, for example, Österdahl, *supra* note 957. In the context of climate change inundation, compare Yamamoto and Esteban, *supra* note 26, at 211. Elsewhere, Mark Beissinger argues that the concept of 'empire' should be understood in terms of a 'Wittgensteinian "family resemblance"'. Beissinger, 'Soviet Empire as "Family Resemblance"', 65 *Slavic Review* (2006) 294, at 303. Duncan Bell suggests that 'it is possible to identify a family resemblance in the preconditions considered essential for successful statehood', but does not elaborate. Bell, 'The Victorian Idea of the Global State', in D. Bell (ed.), *Victorian Visions of Global Order* (2007) 159, at 162. Yael Tamir observes that 'all members within the category "nation" … show some family resemblance', but does not cite Wittgenstein or stay true to his account. Tamir, *supra* note 581, at 65. James Tully applies Wittgenstein's family resemblance model to political concepts, including cultures and constitutions. J. Tully, *Strange Multiplicity* (1995), at 112–113 and 120–122.

states — as per the minimum threshold account — but in terms of a series of overlapping similarities. Norway (1940–1945)[1019] and the Vatican City, for example, both have some capacity for independence. The Vatican City and Somalia both have a defined territory. Somalia and Cuba both have a permanent population. Cuba and Australia both have an effective government. While there is no one common set of characteristics shared by all these states, they are nevertheless connected by a series of overlapping similarities or family resemblances.

Here, an attempt is made to reclaim the concept of statehood from the difficulties and counterexamples identified earlier. Rather than abandoning statehood as a victim of 'conceptual stretching',[1020] it might be better understood as a 'broad family of objects that have altered considerably in form and meaning … rather than as a singular phenomenon'.[1021] The category of things that we call 'states' is identifiable not by some fixed set of characteristics but by an overlapping series of family resemblances that continue to evolve across time and space, shaped by processes of industrialisation, decolonisation, urbanisation, globalisation, migration and, now, climate change.

In fact, Crawford observes that the rules of statehood have been 'kept so uncertain or open to manipulation as not to provide any standards at all', allowing the concept of statehood to remain flexible enough to incorporate unorthodox entities that do not meet all of the criteria.[1022] A more open and flexible account of statehood might therefore more accurately reflect state practice and more effectively respond to the changing legal, political, cultural and environmental demands of the world today. A similar approach is reflected in the work of the ILC, which — with shades of Wittgenstein — concluded that 'no useful purpose would be served by an effort to define the term "state"', being content to use it 'in the sense commonly accepted in international practice'.[1023]

[1019] During World War Two, the Norwegian government operated in exile and the state of Norway therefore lacked effective control or jurisdiction over its territory, calling into question its capacity to satisfy the criterion of a defined territory.

[1020] I.e. 'the distortion that occurs when one takes a concept developed for one set of cases and applies it to additional cases for which the category is no longer appropriate in its original form'. Beissinger, *supra* note 1018, at 297.

[1021] *Ibid*.

[1022] Crawford, *supra* note 564, at 45.

[1023] ILC, *supra* note 969, at 259, para.26. Compare Wittgenstein, *supra* note 1012, at §43. Shearer argues that, '[o]f the term "state" no exact definition is possible'. Shearer, *supra* note 987, at 85. Compare Grant, *supra* note 790, at 408; Higgins, *supra* note 544, at 39; Knop, *supra* note 790, at 107.

There are, however, many problems to be addressed in developing a family resemblance account of statehood more fully. Can it avoid being overly vague or ambiguous? Can it exclude those entities that share some state-like characteristics but are not states? Can it fulfil the functions that a legal definition of statehood is thought, or ought, to fulfil? One response to some of these problems might be to combine the minimum threshold and family resemblance accounts to create a two-pronged approach, where the former applies to the establishment of states and the latter to their ongoing existence. According to this approach, even if the criteria governing the emergence of states are 'logically the same' as those governing their extinction, their application is different.[1024] Once an entity has passed the minimum threshold of statehood, the ratchet effect identified earlier may prevent it from falling back below this threshold, even if it no longer satisfies one or more criteria,[1025] providing that it continues to share certain characteristics with other states. A 'failed state', for example, could continue to exist as a state as long as it sustains a reasonably stable population within reasonably well-defined borders, despite no longer having an effective government,[1026] while the reverse might hold for an atoll island state threatened by climate change inundation.

7.5 Climate change inundation and the family resemblance account

As we saw earlier, identifying the point at which atoll island states will fail to meet the minimum threshold for statehood is difficult. From the perspective of a family resemblance account of statehood, however, this is not necessary. On this account, in order to continue to qualify as a state, an atoll island state would need to continue to share one or more similarities with other state-like entities.

In recent work, legal scholars have suggested various ways in which atoll island states might retain their status as states in the face of climate change inundation.[1027] While each theorist explicitly or implicitly adopts the traditional minimum threshold account of statehood, the conclusions they reach often lead them in the direction of a more flexible family resemblance-type account. Jenny Grote Stoutenburg, for example, sets out to identify 'the thresholds at which the loss of personal and territorial effectiveness

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[1024] Craven, *supra* note 505, at 159.

[1025] Compare Österdahl, *supra* note 957, at 60.

[1026] *Ibid*, at 60–61.

[1027] For example, Burkett, *supra* note 90; McAdam, *supra* note 90, at ch.5; Rayfuse, *supra* note 68; Schofield and Freestone, *supra* note 862; Stoutenburg, *supra* note 90.

would presumably occur'.[1028] However, her analysis does not lead her to conclude that all criteria must be satisfied, but that the cumulative weight of two or three criteria may be sufficient to ensure the ongoing recognition of an atoll island state in the face of climate change inundation. In what follows, several of these proposals are examined from the perspective of a family resemblance account of statehood.

7.5.1 Preserving territory on which to maintain a 'population nucleus'

An atoll island state might ensure that some of its original territory remains habitable by means of 'hard' or 'soft' defence measures like building sea walls or encouraging natural coastal ecosystems.[1029] It could then maintain a 'population nucleus' on this remaining territory: a small permanent population that provides a 'legal anchor' to the wider diaspora.[1030] The President of Kiribati, for example, has suggested relocating his government to Banaba Island, the country's highest landmass, in order to maintain a symbolic presence on the territory of Kiribati for as long as possible. 'I dream that some of us would stay. If we had enough resources, we could build up one of these islands to a height a few metres above sea level to render it a place where we could survive.'[1031]

However, setting aside the difficulty and expense of maintaining enough habitable territory to support the social and physical infrastructure a community requires,[1032] there is the question of whether or not this community will continue to qualify as a 'permanent population' for the purposes of statehood. In order to do so, it must form a vibrant, cohesive, stable community that can be governed effectively over time, not merely an association for commercial or administrative purposes.[1033] The capacity of an atoll island state to meet this requirement is uncertain. Its population will diminish as fresh water becomes scarcer, coastlines erode, its infrastructure is destroyed and its citizens gradually emigrate, which in turn may 'start to erode longer-term claims to

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[1028] Stoutenburg, *supra* note 90, at 57.

[1029] Schofield and Freestone, *supra* note 862, at 152–156; Yamamoto and Esteban, *supra* note 26, at 87–97. Where the aim is to preserve a natural island through artificial means, this is thought not to constitute an artificial island. Freestone, 'International Law and Sea Level Rise', in R. Churchill and D. Freestone (eds), *International Law and Global Climate Change* (1991) 109, at 113; Soons, *supra* note 89, at 222–223; *ibid*, at 62–63.

[1030] Stoutenburg, *supra* note 90, at 65. Compare Kälin, *supra* note 120, at 90–91 and 102.

[1031] Cited in McAdam, *supra* note 90, at 137.

[1032] Connell, 'Population Resettlement in the Pacific: Lessons from a Hazardous History?', 43 *Australian Geographer* (2012) 127, at 137; Yamamoto and Esteban, *supra* note 26, at 155–156.

[1033] *In re. Duchy of Sealand*, *supra* note 588, at 686.

continued sovereignty and statehood'.[1034] In the event that it eventually lacks a permanent population and defined territory, an atoll island state will need to rely on other state-like characteristics to maintain its status as a state.[1035]

While the minimum threshold account of statehood is unable to accommodate this situation, a family resemblance approach takes into account the fact that an atoll island state might continue to share similar properties with some states (an effective government and independence), even if it eventually does not share certain properties with others (a permanent population living in a defined territory).

7.5.2 A government-in-exile

Providing that it can find a willing host, an atoll island state might continue to fulfil the criteria of effective government and independence by establishing a government-in-exile. While its powers would be circumscribed by the territorial sovereignty of the state within which it operates,[1036] an island government-in-exile could continue to perform certain functions of statehood, including maintaining formal diplomatic relations, concluding treaties, participating in international fora, exercising jurisdiction over its nationals abroad, providing consular services and issuing passports.[1037] The successful operation of governments-in-exile suggests that 'the existence of territory, while essential to the original constitution of that entity as a state, is not integral to the exercise of certain governmental functions'.[1038]

Yet governments-in-exile have thus far operated on the basis that their exile is temporary, and their recognition is premised on the existence of a permanent population and defined territory to which they will eventually return.[1039] Even where an atoll island state can maintain a population nucleus on its remaining territory, 'the momentum would not be toward an eventual return home, but toward permanent diaspora'.[1040] As islanders gradually resettle and perhaps gain citizenship elsewhere,

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[1034] McAdam, *supra* note 90, at 159.
[1035] Stoutenburg, *supra* note 90, at 68; Yamamoto and Esteban, *supra* note 26, at 176.
[1036] Per *Allied Forces (Czechoslovak)* (1941–42), 10 AD No. 31, 123, at 124.
[1037] Stoutenburg, *supra* note 90, at 69; Talmon, *supra* note 976, at chs.4–6.
[1038] McAdam, *supra* note 90, at 135.
[1039] Maas and Carius, *supra* note 426, at 659; Park, *supra* note 5, at 6–7; Talmon, *supra* note 976, at 136; UNHCR, IOM and Norwegian Refugee Council, *supra* note 95, at 1–2; Wong, *supra* note 90, at 21–22; Yamamoto and Esteban, *supra* note 26, at 208–209.
[1040] Stoutenburg, *supra* note 90, at 69.

the role of the government-in-exile will diminish over time, undermining an atoll island state's claim to effective governance and independence.[1041]

Again, the traditional minimum threshold account of statehood cannot take us this far: it is unable to account for a government-in-exile in the first place. However, a family resemblance account may also exclude an atoll island state at this point. Without a clearly defined territory, permanent population or effective government in the long term, the number of similarities or 'family resemblances' that an atoll island state shares with other state-like entities begins to diminish, calling into question its continued recognition as a state.

7.5.3 'Deterritorialized' statehood

It has been suggested that an atoll island state might continue to exist as a 'deterritorialized' state or 'state-in-exile' even once it lacks a permanent population residing in a defined territory.[1042] Maxine Burkett, for example, proposes the recognition of a 'nation *ex-situ*': a sovereign entity with an elected government that exercises 'long-distance' authority over its citizens even as they scatter across the world.[1043] A deterritorialized state, Burkett argues, offers a 'means of conserving the existing state and holding the resources and well-being of its citizens — in new and disparate locations — in the care of an entity acting in the best interests of its people'.[1044] It would continue to participate in intergovernmental organisations, provide diplomatic protection and consular services, resolve disputes and protect (some of) the rights of its citizens.[1045] Where provision is made for regular elections, its citizens, like other diaspora populations, would continue to vote for political representatives.[1046]

[1041] McAdam, *supra* note 90, at 136–137.

[1042] Burkett, *supra* note 90; Crawford and Rayfuse, *supra* note 123, at 250 and 253; *ibid*, at 138; Ödalen, *supra* note 91; Rayfuse, *supra* note 68, at 179–180; Rayfuse, *supra* note 133, at 11–12; Stoutenburg, *supra* note 90, at 70–72 and 85–87; Stratford, Farbotko and Lazrus, *supra* note 25, at 70 and 77–79. Other possibilities include the creation of a trusteeship, an international administration, or even a private corporation or non-governmental organisation to secure the ongoing status of an atoll island state. On the first two proposals, see Burkett, *supra* note 90, at 363–367; Wong, *supra* note 90, at 41–42.

[1043] Burkett, *supra* note 90.

[1044] *Ibid*, at 346. Compare Rayfuse, *supra* note 133, at 11.

[1045] Burkett, *supra* note 90, at 363 onwards.

[1046] On diaspora voting, see, for example, A. Sundberg, *The History and Politics of Diaspora Voting in Home Elections* (2007). On the idea of the diaspora as the 'present-tense experience of the deterritorialized nation', see Burkett, *supra* note 90, at 359.

A deterritorialized state would, therefore, look much like a government-in-exile, with the additional benefit of a permanent legal status that would ensure its ongoing recognition as a state, despite the gradual relocation of its citizens elsewhere.[1047] By preserving a 'vital political and cultural nucleus' that persists over time, it may also help to 'ease the rootlessness' its scattered population face, allowing islanders to sustain a sense of identity arising from their common membership in a deterritorialized state.[1048] And, provided that the deterritorialized state continues to exercise jurisdiction over its maritime zones — and these zones can be preserved by, for example, building lighthouses on outlying islands or freezing maritime baselines or boundaries in law[1049] — the revenue they generate may also help to maintain social, political and legal institutions for the benefit of its dispersed citizens.[1050]

Although a deterritorialized state might preserve some territory on which a 'population nucleus' could remain, this is not a prerequisite for its continuing statehood under this proposal. 'International law would be flexible enough to provide for the continued existence of such states as non-territorial entities'[1051] — particularly if a family resemblance account of statehood is adopted. What is crucial here is that the deterritorialized state continues to govern effectively and retain its independence. Provided that recognition is not withdrawn following the loss of its habitable territory and permanent population, it 'could continue to interact as part of the community of nations'.[1052]

[1047] Burkett, *supra* note 90, at 367–369.

[1048] *Ibid*, at 363 onwards.

[1049] Caron, *supra* note 89, at 641–651; Rayfuse, *supra* note 68, at 181–190; Schofield and Freestone, *supra* note 862, at 158–163; Soons, *supra* note 89; Stoutenburg, 'Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise', 26 *International Journal of Maritime and Coastal Law* (2011) 263; Yamamoto and Esteban, *supra* note 26, at ch.5. In the case of Kiribati, see Lambourne, interviewed on Carrick, *supra* note 71.

[1050] Rayfuse, *supra* note 133, at 11; Soons, *supra* note 89, at 230, note 90. However, on the expense of preserving and managing maritime zones, see Caron, *supra* note 89, at 639–640; Powers and Stucko, 'Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels', in Gerrard and Wannier (eds), *supra* note 68, 123, at 134–135; Rayfuse, *supra* note 133, at 12–13.

[1051] Kälin and Schrepfer, *supra* note 73, at 39.

[1052] McAdam, *supra* note 90, at 138. However, in decoupling statehood from territory, perhaps we leave the values of the international community vulnerable to abuse at the hands of deterritorialized states, which would continue to enjoy diplomatic immunity but would be free from the kinds of coercive intervention that a territory makes possible (blockades, sanctions, military intervention, and so on). This raises broader questions about the effective enforcement of international legal obligations in a world characterised by political, economic and military interdependence, inter- and intra-state allegiances, extraterritorial human rights abuse, and so on.

However, while a state's independence can be qualified without its statehood being called into question,[1053] it is thought unlikely that a state can retain its independence if its government and citizens permanently reside on the territory of another state.[1054] While a deterritorialized state would have a formally recognised legal status, it would remain dependent on the consent of the host state(s) within which its citizens reside and is therefore likely to face many of the constraints imposed on a government-in-exile.[1055] Therefore, even if we adopt a family resemblance approach to statehood, the question of whether or not a state can continue to exist as such without a defined territory arises.

7.6 Decoupling statehood from territory: What place for self-determination?

During the 1950s and 1960s, the government of Nauru, a small Pacific island ravaged by phosphate mining, engaged in negotiations with Australia about resettling its citizens on new territory within Australian borders.[1056] While the negotiations were ultimately unsuccessful, they offer an insight into the hopes and concerns of both an island people facing collective displacement and a potential host state. Much of the debate focused on issues of sovereignty and independence. The Nauruan government rejected a proposal for the gradual migration of Nauruans to Australia, fearful that this would result in the 'disintegration of Nauruan society'.[1057] As an alternative to this 'diaspora model', it called for the collective resettlement of the Nauruan people and their recognition as an independent sovereign entity.[1058] 'Your terms insisted on our becoming Australians with all that citizenship entails', a Nauruan official explained, 'whereas we wish to remain a Nauruan people in the fullest sense of the term.'[1059]

Island leaders have voiced similar concerns in the face of climate change inundation. Marshall Island representatives, for example, have indicated that 'a guarantee of sovereignty would be necessary before they would wilfully relocate to a foreign

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[1053] *S. S. Wimbledon*, 1923 PCIJ Series A, No.1, at 25. For example, its defence, external relations, judicial system or monetary policy may be overseen by another state. On the independence of micro-states, see Duursma, *supra* note 534, at chs.4–8; Wong, *supra* note 90, at 29–31.

[1054] Grant, *supra* note 790, at 439–440; Wong, *supra* note 90, at 26–28, 31 and 40–41.

[1055] Park, *supra* note 5, at 7 and 13–14.

[1056] See generally Tabucanon and Opeskin, *supra* note 396; Weeramantry, *supra* note 396.

[1057] Statement by Hammer DeRoburt, Head Chief, Nauru Local Government Council. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Reports (1990), Memorial of the Republic of Nauru, at 255, para.18.

[1058] Tabucanon and Opeskin, *supra* note 396, at 355.

[1059] Cited in Weeramantry, *supra* note 396, at 294.

nation'.[1060] Even where islanders do not call for the cession of new territory, securing citizenship in a new state is not seen as sufficient. Without some formal recognition of their ongoing statehood — perhaps via the 'deterritorialized' statehood model discussed above — islanders' concerns about independence, sovereignty and self-determination remain unassuaged.

However, where the preferred solution is one in which statehood and self-determination are decoupled from territory, the question then arises: can an atoll island people remain a 'people in the fullest sense of the term' without a territory of its own? As argued in Chapter 6, it is attachment to a people and a common set of governing institutions that is important for collective self-determination, rather than attachment to a particular territory. But can self-determination persist without *any* territory?[1061] '[O]ne cannot contemplate a state as a kind of disembodied spirit', Philip Jessup argued before the Security Council in 1948.[1062] Perhaps, however, the embodiment of the state need not be territorial — it could, instead, be 'the people of the state seen as a collective'.[1063] Perhaps, as Judge Cançado Trindade has suggested, international legal doctrine, in its obsession with territorial integrity, has become 'oblivious of the most precious constitutive element of statehood: human beings, the "population" or the "people"'.[1064]

This section considers whether or not territory is necessary for the existence of a state and the self-determination of its people. Chapter 6 identified three functions of state territory: to demarcate the boundaries of state sovereignty; to underpin the stability and security of the international legal regime; and to provide a physical space within which peoples can exercise their autonomy, independence and self-determination. Given that it is the third function with which this thesis is primarily concerned, this section will consider the first two briefly before considering the third in more detail.

First, while a state's sovereignty may be roughly demarcated by its territorial boundaries, these are not watertight. The assumption that each state is sovereign within neatly defined territorial boundaries is just that — an assumption — and

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[1060] Holthus *et al.*, *supra* note 93, at 73.
[1061] On decoupling self-determination from territory, see, for example, Young, *supra* note 311, at 261.
[1062] Cited in Crawford, *supra* note 564, at 44.
[1063] *Ibid*, at 717.
[1064] *Kosovo*, *supra* note 542, Sep. Op. Cançado Trindade, at 553, para.77. Compare Vidas, *supra* note 97.

certainly 'not a rule, still less a peremptory norm'.[1065] On the one hand, as discussed earlier, a state need not have precisely defined territorial boundaries. In fact, states comfortably exist despite ongoing territorial disputes, even where these produce grey areas in which jurisdiction may be overlapping or unclear.[1066] On the other hand, even where its territorial borders are clearly delineated, a state's sovereignty within those borders is not absolute, but is constrained by international legal obligations, including peremptory norms of customary international law[1067] and bilateral or multilateral agreements that delegate certain capacities to other states or intergovernmental organisations.[1068] In the case of condominia, territorial sovereignty may also be shared between two or more states.[1069]

'[I]nternational law's map of the world as a jigsaw puzzle of solid colour pieces fitting neatly together' has therefore failed to materialise.[1070] Like the minimum threshold account of statehood, the narrative that links state, territory and people attempts to hide the complex, often fragmented or overlapping character of sovereignty behind a façade of clarity and consistency. In certain cases and to a certain extent, territory does indeed carve out a space in which a state is sovereign; however, exclusive sovereignty over a clearly defined territory is neither necessary nor sufficient for the existence of an independent state or a self-determining people.

Second, a commitment to states as clearly defined territorial entities is thought to contribute to the stability of the international legal order. For Jennings, for example, 'the stability of territorial boundaries must always be the ultimate aim'.[1071] Yet security and stability are not always best served by a rigid commitment to the territorial status quo. Jennings himself admits that 'the map of the world is constantly changing', requiring us to 'devise legal regimes sufficiently flexible' to adjust to new legal, political, social — and, today, environmental — demands.[1072] 'A law which, within narrow limits, seems to sanction only the maintenance of the status quo, is not likely to

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[1065] Crawford, *supra* note 484, at 245.

[1066] On disputed frontiers, see, for example, D. Hall, *Land* (2013), at ch.3.

[1067] Jennings and Watts, *supra* note 423, at 390–393.

[1068] In the case of micro-states, see Duursma, *supra* note 534, at chs.4–8.

[1069] Bantz, 'The International Legal Status of Condominia', 12 *Florida Journal of International Law* (1998) 77; Crawford, *supra* note 484, at 203 and 209; Jennings and Watts, *supra* note 423, at 565–567. For other 'exceptional situations' that 'cannot be forced into the sovereignty straitjacket', see Crawford, *supra* note 484, at 249–252.

[1070] Knop, *supra* note 790, at 95. Compare Hall, *supra* note 1066, at 50.

[1071] Jennings, *supra* note 480, at 70.

[1072] *Ibid*.

survive without serious modification in a still rapidly developing society of states.'[1073] Jennings was writing at the height of decolonisation, but this is also true of a world in which the impact of climate change on the stability and security of the international legal order will only be exacerbated by law's failure to adapt. Law's role is not to protect the status quo at all costs but to 'provide a peaceful alternative for the adoption of modifications'[1074] — including, perhaps, the model of deterritorialized statehood discussed above — which may foster, rather than undermine, international stability.

Third, states are thought to carve out a space in which the members of a self-determining people can shape and sustain their own legal and political institutions, free from undue external interference. On this view, territory grounds jurisdiction and therefore represents 'the physical basis'[1075] or 'locus' of self-determination:[1076] a space in which peoples can exercise their collective autonomy and independence. Without a habitable territory, an atoll island people will be forced into permanent exile, where its capacity for self-determination may be gradually undermined and its statehood called into question. '[O]nly if displaced nations get new territory', Schuppert argues, 'will they be able to actually exercise their right to self-determination.'[1077]

Can the population of an atoll island state continue to exist as a self-determining people without a territory of its own? On the one hand, a deterritorialized state is likely to retain many of the competences it had previously exercised, including the capacity to issue passports, adopt legislation, exercise personal sovereignty over its citizens, engage in formal diplomatic relations, negotiate and conclude certain treaties and participate in international organisations. Like governments-in-exile, it may continue to be recognised as a sovereign state 'with sovereign powers in respect of [its] own people and citizens', wherever they are.[1078] To a greater or lesser extent, it will therefore continue to protect its citizens' rights, represent their interests in the international sphere, govern certain aspects of their behaviour and maintain the institutions that

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[1073] *Ibid*.

[1074] Duursma, *supra* note 534, at 109.

[1075] Stoutenburg, *supra* note 90, at 61. See also Crawford, *supra* note 791, at 128; Crawford, *supra* note 484, at 204; Wong, *supra* note 90, at 20.

[1076] Moore, *supra* note 599.

[1077] Schuppert, *supra* note 134, at 17. However, Nine equivocates about whether territory is necessary for self-determination. Nine, *supra* note 91, at 363. And, for Ödalen, securing sovereignty over new territory 'is but one, very radical, way of institutionalising a group's right to self-determination'. Ödalen, *supra* note 91, at 230.

[1078] Herbert Morrison, former British Secretary of State for the Home Department, cited in Talmon, *supra* note 976, at 232, note 135. Compare Jennings and Watts, *supra* note 423, at 328.

they have helped to shape and sustain over generations. In doing so, it will help to sustain an island people's capacity for autonomy and effective government, and to preserve the attachments that have formed throughout its history of cooperation under shared political institutions.

On the other hand, a deterritorialized state will no longer have many of the competences typically associated with independent statehood. It will not have the capacity to control the movement of goods and people or accept binding international legal obligations with respect to a given portion of the earth (although it may continue to accept and fulfil non-territorial obligations). It may not have its own currency, military, police force or independent judicial system. Its capacity to enforce its legislation or to tax its citizens' income or property will be highly circumscribed. And, crucially, whatever competences it does retain, it will exercise these only with the consent of the host state(s) in which its government and people reside. While it may therefore retain some capacity for effective government, it is unlikely to remain independent in the sense currently accepted in international law.

However, neither statehood nor self-determination is an all-or-nothing concept. As the family resemblance account makes clear, states are not identifiable by one set of criteria that is common to all and only states, but by a series of overlapping resemblances between states. And, as the collective decision-making framework proposed in Chapter 6 makes clear, peoples may choose from a range of possible modes of self-determination, including independent statehood, free association or integration with another state, or 'any other political status'. In each case, the emphasis is on a family of state-like entities or modes of self-determination rather than one fixed model of either.

It might therefore be helpful to understand the model of deterritorialized statehood as encompassing a range of options, some of which provide the deterritorialized state with more competences — and thus offer its people greater room in which to exercise their autonomy and self-determination — while others provide less.[1079] It would then be up to island and host states to agree on an appropriate model, subject to 'iterative processes of evaluation and amendment' in consultation with their governments and citizens.[1080]

[1079] On sovereignty and self-determination as a continuum rather than a fixed concept, see also Nine, *supra* note 91, at 372; Ödalen, *supra* note 91, at 226.

[1080] Burkett, *supra* note 90, at 366.

At the minimal end of this continuum, islanders will be dispersed across multiple host states and the bundle of jurisdictional competences that their state enjoys will be limited at best.[1081] It is likely to retain its legislative jurisdiction (its authority to regulate its citizens and their property) but forfeit its enforcement jurisdiction (its authority to enforce its legislation by executive or judicial action).[1082] While it may therefore remain able to legislate with regard to the property, income or conduct of its citizens, the effect of this legislation will depend on the willingness — or otherwise — of other states to enforce it. In this case, while a deterritorialized people will retain some capacity for self-government, its autonomy will inevitably be constrained by its inability to enforce and adjudicate its own legal rules, particularly where its citizens are scattered across multiple host states whose territorial sovereignty takes precedence over its personal sovereignty.

At the maximal end of the scale, islanders will be collectively resettled within one host state, where their state will exercise a more extensive bundle of competences, including both legislative and enforcement jurisdiction. While it is unusual for a host state to grant a government within its territory such extensive powers, it is not without precedent. Under the Allied Powers (Maritime Courts) Act of 1941, for example, the British government permitted the Allied governments-in-exile to establish maritime courts within its jurisdiction, subject to certain conditions.[1083] According to the then British Attorney General, these governments-in-exile are 'recognised by us as sovereign governments' and '[w]e are enabling them to administer in our territory their laws before courts just the same way as they would have administered them in their own territories'.[1084] Such 'relaxations of [the] territorial authority' of the host state indicate that 'there is intrinsically no such degree of rigidity in the concept of territorial authority as to rule out reasonable adaptations thereof to exceptional circumstances'.[1085]

At the far end of the continuum, a deterritorialized state might even be granted an extended lease or *de facto* sovereignty over a portion of land on which its citizens can

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[1081] See generally Talmon, *supra* note 976, at ch.5.

[1082] '[T]he first and foremost restriction imposed by international law upon a state is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state'. *S. S. Lotus*, 1927 PCIJ Series A, No.10, at 18.

[1083] Talmon, *supra* note 976, at 217–218 and 240–241.

[1084] Cited in *ibid*, at 218.

[1085] Jennings and Watts, *supra* note 423, at 461.

rebuild their lives.[1086] While the territorial sovereign would retain 'residual' or *de jure* sovereignty, the deterritorialized state will have the capacity to exercise full governmental authority over this territory for a set period or in perpetuity.[1087]

While the self-determination of a deterritorialized island people may be 'unavoidably circumscribed' in law,[1088] this need not prevent its members exercising a significant degree of self-determination in practice. Only where a host state actively exerts substantial control over a deterritorialized state, overruling its decisions 'on a wide range of matters and doing so systematically and on a continuing basis', will it lack independence.[1089]

7.7 Reasons for and against accommodating a deterritorialized state

The extent to which an atoll island people wishing to transition to a deterritorialized state will retain some capacity for autonomy and independence will depend on where it sits along the continuum identified above. This, in turn, is influenced by the reasons that host states have for — or against — accommodating newly deterritorialized states.

During its negotiations with Nauru, the Australian government proposed the collective resettlement of the Nauruan people on Curtis Island, where they could establish a self-governing Nauruan Council under Australian jurisdiction.[1090] Here, the Nauruan people 'should be enabled to manage their own local administration and to make domestic laws or regulations applicable to their own community'.[1091] However, this was not a satisfactory solution for the Nauruans, who 'wanted to shape their own destiny'[1092] and, fearful of the implications of Australia's assimilationist policies, saw recognition as a separate sovereignty entity as the only means of doing so. At this point, the negotiations reached a stalemate. As the then Australian Prime Minister Robert Menzies explained to the Premier of Queensland in 1962, '[n]o Australian government would be likely to agree to the establishment of a separate Nauruan

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[1086] Yamamoto and Esteban, *supra* note 26, at 200–201 (and see their hybrid 'Vatican solution' at 205–206).
[1087] See examples in Crawford, *supra* note 484, at 207–209; Jennings and Watts, *supra* note 423, at 568–569; von Glahn and Taulbee, *supra* note 1009, at 157–158.
[1088] Ödalen, *supra* note 91, at 233.
[1089] Crawford, *supra* note 484, at 130.
[1090] Tabucanon and Opeskin, *supra* note 396, at 346–347.
[1091] Weeramantry, *supra* note 396, at 292.
[1092] According to a UN Trusteeship Council Report, cited in *ibid*, at 287.

community as an enclave within the borders of Australia'.[1093] But what reasons did Australia have for refusing to accommodate a Nauruan state within its borders? And how might these reasons vary depending on the scope of autonomy granted to the incoming state?

7.7.1 Reasons against acting

In the case of deterritorialized statehood — unlike the cession of territory considered in Chapter 6 — the territorial integrity of existing states goes unchallenged. Host states are not required to relinquish sovereignty over their own territory but to recognise the limited jurisdiction of another state within their territorial borders. Those states that do not host the government or citizens of a deterritorialized state are required to continue to recognise it as a state (by, for example, maintaining formal diplomatic relations or observing existing bilateral treaties)[1094] and, in some cases, to provide financial or in-kind support for the resettlement of its citizens and institutions.

However, the task of hosting a deterritorialized island state generates its own set of reasons against acting. First, as with the planned migration proposal discussed in Chapter 3, a state may have reasons against accommodating a deterritorialized state arising from concerns about the dilution of the autonomy or shared way of life of its own people. A sudden influx of islanders with their own customs, values and rules may be interpreted as a threat to the existing social, legal and political institutions of the host state.[1095] However, as observed in earlier chapters, atoll island populations are relatively small and therefore unlikely to overwhelm the existing institutions of a host state. And, unlike the planned migration scenario, the members of a deterritorialized state will retain at least some of their own legal and political institutions, thereby lessening their impact on the political culture of a host state. In fact, if a deterritorialized state is granted greater independence and autonomy — including legislative jurisdiction plus some enforcement or judicial jurisdiction — this may impose certain constraints on a host state's sovereignty but will also minimise the extent to which islanders must be accommodated within the existing institutions of a host state, thereby insulating its shared way of life.

[1093] Cited in Tabucanon and Opeskin, *supra* note 396, at 345.

[1094] A deterritorialized state need not be recognised by *all* states in order to continue to enjoy many of the competences of statehood, but will have the capacity to exercise its jurisdiction only within those states that do recognise it. Talmon, *supra* note 976, at 120–125 and 207–209.

[1095] Stratford, Farbotko and Lazrus, *supra* note 25, at 75.

Second, a state may have reasons against hosting a deterritorialized island state where this would impose unreasonably high costs on its own citizens, perhaps in terms of a tax increase, higher unemployment rates or overcrowded schools, hospitals and other public services. Again, however, the number of displaced islanders — and the financial costs associated with their resettlement — is likely to be minimal, particularly if those states that do not host deterritorialized populations contribute financial, technical or human resources. When the Australian government offered to fund the resettlement of the Nauruan population to Curtis Island in the 1960s — including purchasing land, building housing, utilities and infrastructure, and establishing a Nauruan Council — it estimated the cost at US$22.4 million, or around AU$224 million in today's currency.[1096] This equates to around 4% of Australia's current immigration budget.[1097] And, as above, the financial costs of hosting a deterritorialized state may also decrease as it is granted more autonomy and independence. If islanders are able to establish and maintain their own judicial system, for example, the costs of expanding or modifying a host state's existing judicial institutions will be minimised.

A third reason against acting was identified by the Australian government during its negotiations with Nauru. Australia cited 'security concerns' relating to the existence of a separate sovereign entity within its territory and proposed, instead, that the Nauruan people establish itself as a self-governing community.[1098] Nauru, in response, identified 'ways and means whereby the future may be safeguarded as perfectly as possible to our mutual interest',[1099] including inviting the Australian government to establish an office responsible for monitoring Nauru's compliance with the proposed Treaty of Friendship between Australia and Nauru, and proposing that any violation of the treaty would render Nauru's sovereignty null and void.[1100]

These negotiations, while ultimately unsuccessful, reflect the need for an iterative process of deliberation between island and host communities, with the aim of assuaging the concerns identified here. All parties must work together to agree on the location of a deterritorialized state and its citizens, and the scope and content of the bundle of competences it will exercise. Where will its government reside? Will

[1096] Tabucanon and Opeskin, *supra* note 396, at 346–347.

[1097] The Department of Immigration and Border Protection has a budget of AU$5.9 billion for 2014–2015. Commonwealth of Australia, *Portfolio Budget Statements 2014-15. Budget Related Paper No.1.11: Immigration and Border Protection Portfolio* (2013), at 6.

[1098] Tabucanon and Opeskin, *supra* note 396, at 345.

[1099] Weeramantry, *supra* note 396, at 294.

[1100] Tabucanon and Opeskin, *supra* note 396, at 348.

islanders be resettled together or dispersed across several states? If the former, how can the burdens imposed on the host state be more equitably distributed between other actors? If the latter, will all of the host states consent to the same bundle of competences? To what extent will the deterritorialized state have the capacity to enforce its legislation, within both the state in which its government is based and the state(s) in which its citizens live?

Where these concerns cannot be addressed and a state has strong reasons against hosting a deterritorialized state, it may therefore have stronger reasons for supporting an alternative option. A state that prioritises territorial sovereignty over an exclusive political identity will have stronger reasons for hosting a deterritorialized state or joining with an island state in federation or free association (as discussed in Chapter 8), while a state that wishes to preserve its political and cultural integrity from outside interference will have stronger reasons for ceding territory to a displaced atoll island state (as proposed in Chapter 6).[1101] Australia's willingness to propose alternative solutions during its negotiations with Nauru indicates an awareness that, while it may have particular reasons against hosting the state of Nauru within its borders, its general reasons for acting to assist the Nauruan people persist.

7.7.2 Reasons for acting

Again, this section considers only those reasons for acting that are specific to the solution at hand, with the assumption that other reasons for acting identified in Chapters 2, 3, 5 and 6 — including reasons of international cooperation and contribution — apply where relevant and need not be restated here.

In Chapter 6, we saw that states may be unwilling to cede territory to an atoll island state where this interferes with their own territorial integrity and self-determination. While self-determination is widely recognised as a *jus cogens* or peremptory norm of customary international law[1102] and a source of obligations *erga omnes*,[1103] this is thought to extend only to those situations in which it does not disrupt the territorial integrity of existing states.[1104] However, in this case, deterritorialized statehood does not threaten the territorial integrity of existing states, and an atoll island people's claim

[1101] As per Walzer's 'White Australia' example, cited in Chapter 6. Walzer, *supra* note 429, at 47.

[1102] ILC, *supra* note 274, at 85, para.5. See also sources cited *supra* note 511.

[1103] *East Timor*, *supra* note 160, at para.29; *Israeli Wall*, *supra* note 503, at paras.88 and 155–156.

[1104] I.e. in the case of peoples under colonial or foreign domination, or the peoples of existing states. Duursma, *supra* note 534, at 103.

to self-determination may therefore retain its peremptory status. Thus, where states choose not to cede territory, they may have particularly strong reasons for acting to assist atoll island peoples by hosting a deterritorialized state — or by agreeing to merge with an atoll island state (Chapter 8) — arising from the peremptory nature of self-determination.

Certain states may also have reasons arising from their capacity to act. The relative ease with which a state can accommodate an atoll island people will depend on the amount of available, habitable land it has. As observed in Chapter 6, Australia and New Zealand have both a high GDP and a small population relative to their landmass, with large, sparsely populated regions and numerous offshore islands.[1105] And, as noted earlier, the costs involved will be relatively minimal, particularly if distributed among all those with reasons for acting. While Australia and New Zealand were identified in Chapter 3 as having primary responsibility — and therefore particularly strong reasons for hosting a deterritorialized island state — other, more distant, affluent states may also have reasons for providing financial, logistical, technical or other support, depending on the model of deterritorialized statehood adopted.

The members of a deterritorialized state will either resettle collectively in one area or disperse across several states. In the first scenario, islanders' housing, infrastructure and political, legal and social institutions will be concentrated in one location, thereby lowering the costs associated with construction, maintenance, transport and communication. However, while this will minimise the overall cost of resettlement, it will unduly burden the host state[1106] and — unless a suitable portion of habitable, uninhabited land can be found — those currently living in the area in which islanders are to resettle. In the second scenario, the costs will be distributed across several states. Given that this scenario involves greater distances and dislocation, this will increase the overall cost but distribute this cost across several actors, thereby minimising the burdens imposed on each actor. In both cases, those states that have reasons for acting but do not host a deterritorialized state or its citizens can also shoulder some of the

[1105] Australia has around three people per square kilometre and New Zealand has around 15. World Atlas, *supra* note 932.
[1106] Lister, *supra* note 130, at 628.

financial burdens via a new or existing international funding scheme or loss and damage mechanism.[1107]

In any case, either scenario will be significantly less costly, in the short term at least, than committing to mitigation and adaptation strategies that enable islanders to stay where they are. Where states are unable to agree on or meet timely and effective mitigation targets, and they have the capacity to assist those in distress as a result, then this generates strong reasons for doing so. And, where they are unwilling to cede territory, the peremptory character of self-determination demands that they take some other action to protect the self-determining status of atoll island peoples — whether by accommodating a deterritorialized state within their borders or joining in free association or federation with an atoll island state.

7.8 Conclusion

While international law is often thought to rely on certainty and stability, one of its central concepts — that of statehood — lacks a clear, reliable definition. By raising difficult questions about the ongoing existence of states whose territory is rendered uninhabitable, climate change inundation prompts us to re-examine the legal concept of statehood, challenging us to clarify what we mean when we use the term 'state'.

That international law — and, in this case, the legal concept of statehood — will need to be flexible and inventive in adapting to the 'post-territorial' problem of climate change is nothing new.[1108] In 2011, for example, the UN High Commissioner for Refugees, Antonio Guterres, called for 'innovative legal frameworks for statehood to preserve [the] national identity' of atoll island peoples.[1109] It is in this spirit that this chapter has examined the most legally problematic of the three options set out in the collective decision-making framework proposed in Chapter 6.

However, the idea of a state without a defined territory of its own challenges the mainstream legal understanding of statehood, sovereignty and self-determination. It remains unclear whether island and host states could agree on a model of deterritorialized statehood that provides adequate protection for the autonomy and independence of a displaced atoll island people, particularly within an international

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[1107] Biermann and Boas, *supra* note 328, at 76; McAdam, *supra* note 90, at 253–254 and 259–260; Talakai, *supra* note 900; Yamamoto and Esteban, *supra* note 26, at 165–171.
[1108] John Knox, speaking at OHCHR Seminar, *supra* note 186.
[1109] Guterres, *supra* note 330.

legal framework premised on territorial sovereignty. As Young observes, 'states organised according to currently accepted principles of sovereignty … find it difficult or impossible to accommodate' claims to self-determination made by those who do not have jurisdiction over a defined territory.[1110]

A people's chosen mode of self-determination 'should be based on a general conviction that the particular solution selected is the one that will yield the greatest advance in terms of human rights and minimum order for all those concerned'.[1111] Perhaps, however, the first two options in the decision-making framework proposed in Chapter 6 – — maintaining a 'sovereign and independent State' or emerging into 'any other political status freely determined by a people', understood here in terms of deterritorialized statehood — cling too tightly to statehood to achieve these aims. The third option — entering into 'free association or integration with an independent State' — allows us to explore a relational, overlapping concept of self-determination that shies away from the rigid boundaries of either statehood or territory. This final option may therefore provide a more flexible, responsive solution to the problem of climate change inundation; one whose focus lies on the people at the heart of the debate.

[1110] Young, *supra* note 311, at 255.

[1111] Reisman, 'Communities in Transition: Autonomy, Self-Government and Independence (Panel Discussion)', 87 *ASIL Proceedings* (1993) 248, at 249.

8. Self-Determination and the Retreat from Statehood

8.1 Introduction

This final chapter of the thesis has two functions. The first is to examine the third option of the collective decision-making framework proposed in Chapter 6: to enter into 'free association or integration with an independent State'.[1112] The question here is whether or not some non-state arrangement can 'substitute wholly or partially' for the framework of statehood and the rights and competences attached to it.[1113] Can a people persist as a self-determining entity without the formal legal independence or exclusive territorial jurisdiction typically associated with statehood? This third option is considered in the final chapter because it is perhaps the most complex of the three options set out in the proposed decision-making framework, raising numerous questions and possibilities. This chapter therefore offers a springboard for further research into the ways in which statehood, self-determination and international law may adapt to the challenges posed by climate change inundation.

Despite its contingency, the territorial state has come to dominate our understanding of the world today. 'In some ways, it is hard to think what the alternative might be.'[1114] Chapter 6 — which examined the possibility of re-establishing an independent state on new territory elsewhere — stayed faithful to this mainstream legal narrative, in which a self-determining people normally requires both statehood and territory. Chapter 7 took a detour from this narrative, suggesting that statehood might be decoupled from territory while still protecting the self-determination of a people to a greater or lesser extent. This final chapter moves still further away, assessing the extent to which an atoll island people might sustain its capacity for collective political autonomy with neither exclusive territorial jurisdiction nor statehood.

If the state is understood as instrumentally valuable in protecting the human rights of its citizens — including their collective capacity for self-determination — yet fails to fulfil this role in certain cases, this may prompt a shift towards 'a political order that is less state centred and more centred on people'.[1115] After all, as argued in Chapters 6

[1112] GA Res. 2625 (XXV), *supra* note 137.
[1113] Alfredsson, 'Indigenous Peoples and Autonomy', in Suksi (ed.), *supra* note 528, 125, at 135.
[1114] Craven, *supra* note 505, at 204.
[1115] Anaya, *supra* note 527, at 156.

and 7, 'the state is not an aim in itself'[1116] but a means to an end — in this case, the effective protection of the individual and collective human rights of its population.[1117] This shift requires us to modify the account of self-determination set out in previous chapters, which emphasised both autonomy and independence, where the latter was thought to require that atoll island peoples retain their statehood in order to remain self-determining. Yet this emphasis on formal legal independence offers little room for discussion about the ways in which self-determining peoples interact with and impact upon others within and across borders— a process exemplified by the issue of climate change inundation.

Drawing inspiration from Iris Marion Young's relational account of self-determination, this concluding chapter therefore develops a more nuanced understanding of self-determination grounded in reciprocity and interdependence rather than a rigid emphasis on exclusivity and independence (section 8.2). Once a people has emerged through a history of participation in the governing institutions of its state, Young's account urges us to pay attention to the ways in which it interacts with — rather than distances itself from — others. According to Young, self-determining peoples should not seek to remain siloed within impermeable territorial and political boundaries but to engage in an ongoing process of negotiation and consultation to ensure that each does not arbitrarily interfere with — or 'dominate' — the interests and values of others.[1118]

Rather than commit to one fixed model of political autonomy and independence — as embodied in the state — this chapter looks to 'the myriad of alternatives, complexities, competing demands, and just "different shades"' that characterise the exercise of self-determination today.[1119] A brief empirical survey identifies various non-state models of political autonomy, identity and interaction, including indigenous and other examples of intrastate autonomy, federal states and entities in free association (section 8.3). These models are assessed according to the extent to which each is able to protect the collective autonomy and international legal status of peoples, where the former is understood in terms of their capacity to govern themselves in areas of importance to their members and the latter in terms of their capacity to interact with other members of the international community, within certain parameters. Section 8.4 then considers

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[1116] Ustor, 'Independence and Interdependence', in A. Grahl-Madsen and J. Toman (eds), *The Spirit of Uppsala* (1984) 52, at 54.
[1117] Compare Anaya, *supra* note 527, at 7–8; Craven, *supra* note 505, at 247–248.
[1118] Young, *supra* note 625, at 184–185.
[1119] French, *supra* note 885, at 4. French cites Knop, *supra* note 790, at 107.

some of the reasons that other states might have for and against integrating or joining with an island people in free association or federation.

The second function of this chapter is to draw the thesis to a close by revisiting some of its main arguments. Section 8.5 provides an overview of some of the key points of interest or realisations that have emerged, sometimes unexpectedly, from the research and have shaped the thesis as a whole. Section 8.6 concludes by highlighting several avenues for further research into statehood, self-determination and climate change inundation. While these do not exhaust the possibilities for future research, they provide an indication of the empirical and theoretical directions in which the thesis might lead.

8.2 Self-determination as reciprocity and interdependence

Chapters 6 and 7 identified an apparent paradox at the heart of self-determination and statehood, particularly where these are thought to require formal legal independence and exclusive jurisdiction over territory. In a world in which territory is a finite resource, the more emphasis that is placed on the relationship between legal independence, territorial sovereignty and self-determination, the more difficult it becomes for new — or, in this case, shifting — claims to self-determination and statehood to be recognised. Even where a state recognises the validity and urgency of an island people's claim to self-determination, this does not exempt it from protecting the self-determination of its own people from unreasonable intervention.

However, this paradox arises only where self-determination requires that peoples exist as legally independent entities within precisely defined political and territorial boundaries. On this account, each self-determining people must be 'altogether independent of the will of other[s]',[1120] free from any external interference within its defined territory. Voices from indigenous and minority rights movements, cosmopolitan philosophy, feminist theory and elsewhere remind us, however, that to deny the relational, reciprocal nature of self-determination is to ignore its defining feature — for what is the aim of self-determination if not to craft one's own identity in a world of different others? Speaking before the UN Working Group on Indigenous Peoples' Rights, Craig Scott observes:

[1120] Christian Wolff, cited in A. Thomas and A. J. Thomas, *Non Intervention: The Law and its Import in the Americas* (1956), at 5.

> '[P]eoples, no less than individuals, exist and thrive only in dialogue with each other … We need to begin to think of self-determination in terms of peoples existing in relationship with each other. It is the process of negotiating the nature of such relationships which is part of, indeed at the very core of, what it means to be a self-determining people.'[1121]

The emphasis here is on self-determination as reciprocity rather than exclusivity. From this perspective, the paradox identified above is not a paradox at all but a defining characteristic of a pluralist world. After all, 'if my feelings of communal identity, and aspirations to have political institutions expressive of that identity are important to me and justify my claims to self-determination, they might be important to others' as well.[1122] To understand self-determination as reciprocal is to require that peoples 'do not claim for themselves something that they are not willing to grant for others'.[1123]

Young's account of self-determination emphasises its reciprocal and relational rather than exclusive nature. Like Scott, Young observes that peoples, like individuals, are engaged in complex webs of action and interaction, with the result that 'it is difficult for a people to be independent in the sense that they require nothing from outsiders and their activity has no effect on others'.[1124] This is not a fact that many would deny, when pressed. Even those who understand sovereignty in terms of formal legal independence or freedom from 'subjection to any other authority'[1125] recognise that relationships between members of the international community are more accurately characterised by inter- rather than independence.[1126]

Drawing on feminist and neo-republican theory, Young understands self-determination not in terms of freedom from *any* external interference but in terms of freedom from domination — the possibility that others might arbitrarily interfere with a people's sphere of autonomy without taking into account the consequences for that

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[1121] Scott, 'Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea', 18 *HRQ* (1996) 814, at 819.
[1122] Moore, *supra* note 582, at 151. Banai reaches a similar conclusion by relying on Rawls' first principle of justice. Banai, *supra* note 463.
[1123] Banai, *supra* note 463, at 61.
[1124] Young, *supra* note 625, at 185. Compare Anaya's account of indigenous self-determination in a world of 'multiple and overlapping spheres of human association and political ordering' rather than 'narrowly defined, mutually exclusive "peoples"'. Anaya, *supra* note 527, at 102–103.
[1125] Jennings and Watts, *supra* note 423, at 382.
[1126] *Ibid*, at 125.

people.[1127] On this account, an atoll island people that transitions to a self-governing entity within another state should enjoy access to 'their own governance institutions through which they decide on their own goals and interpret their way of life', free from any arbitrary constraints imposed by the state within which its members live.[1128] However, Young's relational account also presupposes that peoples interact with, and impact upon, others, particularly where they coexist within the borders of a state. Peoples that share land, resources and socio-economic, legal or political institutions should 'acknowledge the legitimate interests of others as well as promote their own', not only in resolving shared problems but also in deciding how best to pursue their own values and goals.[1129] 'Self-determination', as Scott observes, 'necessarily involves engagement with and responsibility to others'.[1130]

Young's ideas — particularly her emphasis on autonomy, reciprocity and interdependence rather than formal legal independence — are used to modify the account of self-determination developed throughout the thesis by shifting its emphasis from independent statehood to alternative non-state institutional models like federation, free association or intrastate autonomy. Chapter 4 argued that, while a history of cooperation under state-like institutions of government may be necessary for the emergence of a self-determining people,[1131] its capacity for self-determination may persist even after the framework of statehood falls away.[1132] Alongside the examples of free association, federation and indigenous or minority rights-based models of self-government discussed below in section 8.3, Young's account provides additional theoretical resources for thinking about the ways in which it might do so.

The remainder of this section examines autonomy and international legal status — both of which are central to the exercise of self-determination — in more detail, assessing the extent to which each can be retained in the absence of independent statehood. Section 8.3 adds empirical substance to this account by identifying various

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[1127] Young, *supra* note 625, at 184–185; Young, *supra* note 311, at ch.7. Young draws on Pettit's neo-republican account, among others. P. Pettit, *Republicanism* (1997). Compare Moore, *supra* note 590, at 133.

[1128] Young, *supra* note 625, at 187.

[1129] *Ibid*. Compare Young, *supra* note 311, at 259–260. Similar ideas have developed in the context of minority and indigenous rights (discussed further in section 8.3 of this chapter). For a brief overview, see, for example, A. Eide and E. Daes, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/2000/10.

[1130] Scott, *supra* note 1121, at 819. Compare Summers, *supra* note 506, at 232.

[1131] Compare Stilz, *supra* note 584, at 579–580.

[1132] *Ibid*, at 591.

non-state entities that exercise more or less autonomy and enjoy a greater or lesser degree of international legal status.

Autonomy, defined in previous chapters as a people's capacity to make and enforce its own laws and practices through its own legal and political institutions, is not generally thought to require formal legal independence or statehood but, rather, 'independence of action on the internal or domestic level'.[1133] As the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) makes clear, a people's right to self-determination entails 'the right to autonomy or self-government in matters relating to their internal and local affairs'.[1134] According to a reciprocal account of self-determination, a people's capacity for autonomy requires an ongoing conversation between that people and the state within which its members reside about matters of shared interest, as well as a space in which it can develop and sustain its own institutions of government and 'negotiate freely [its] political status',[1135] 'free of external domination'.[1136]

'International legal status' is used here as an umbrella term for the capacity to accept international legal obligations and engage with states, organisations, adjudicative bodies and other actors in the international sphere, a capacity often referred to in terms of 'international legal personality' or 'sovereignty'. While this capacity is thought to be closely linked with statehood,[1137] neither sovereignty nor international legal personality are confined to states alone. Many non-state entities enjoy what Stephen Krasner calls 'international legal sovereignty' (recognition of their capacity to engage with states, conclude treaties, belong to international organisations and so on) without necessarily enjoying 'Westphalian sovereignty' (formal legal independence and freedom from external interference in their legal and political institutions).[1138] In *Western Sahara*, for example, the ICJ accepted that a non-state entity with 'common institutions or organs' of government to which its members are answerable could, in

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[1133] Heintze, 'On the Legal Understanding of Autonomy', in Suksi (ed.), *supra* note 528, 7, at 8. Compare Hannum and Lillich, 'The Concept of Autonomy in International Law', 74 *AJIL* (1980) 858, at 869. While some equate autonomy with internal self-determination (for example, Brownlie, *supra* note 645, at 6; Eide, 'The Universal Declaration in Time and Space', in J. Berting *et al.* (eds), *Human Rights in a Pluralistic World* (1990) 15, at 25), the former term is used here for its emphasis on the maintenance of a people's unique set of common governing institutions rather than (merely) the participation of its members in the governing institutions of a state.

[1134] Article 4, UNDRIP, *supra* note 504.

[1135] Daes, 'An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations', 21 *Cambridge Review of International Affairs* (2008) 7, at 23.

[1136] Moore, *supra* note 590, at 133. Compare Sharma, *supra* note 823, at 240.

[1137] See, for example, *Island of Palmas*, *supra* note 957, at 838–839; Hannum, *supra* note 818, at 15.

[1138] S. Krasner, *Sovereignty: Organised Hypocrisy* (2001), at ch.1.

principle, enjoy 'some form of sovereignty',[1139] despite its lack of formal legal independence. Others agree but frame this capacity in terms of international legal personality. 'To the extent that bodies other than states directly possess some rights, powers and duties in international law', Jennings and Watts argue, 'they can be regarded as subjects of international law, possessing international legal personality'.[1140]

India and the Philippines, for example, were founding members of the UN prior to achieving formal legal independence.[1141] Hong Kong has joined various international organisations, including the World Trade Organisation, despite its status as a former British colony and now a Special Administrative Region of China. The Sovereign Military Order of Malta engages in diplomatic relations and concludes international treaties with states despite not exercising control over any territory. And, as discussed further in section 8.3, the member states of certain federations have some capacity to conclude international treaties, as do former non-self-governing territories in free association with another state.

Like autonomy, international legal status is therefore attributable to a range of liminal or 'anomalous' entities [1142] that enjoy certain rights and competences under international law, despite the fact that they are not recognised as — and do not claim to be — legally independent states.[1143] An atoll island people that chooses integration or free association with another state may therefore, to a greater or lesser extent, retain its capacity for self-government and its voice in the international community — and, therefore, its capacity for self-determination both within and outside the borders of its host state.[1144]

Drawing on this account, the following section proposes an understanding of self-determination as a continuum along the two axes identified here: autonomy and

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[1139] *Western Sahara*, *supra* note 136, at para.149.

[1140] Jennings and Watts, *supra* note 423, at 16.

[1141] The examples in this paragraph, and others, can be found in Crawford, *supra* note 484, at 116–125; von Glahn and Taulbee, *supra* note 1009, at 154–157; Hannum, *supra* note 818, at 14–19; Krasner, *supra* note 1138, at 15–16 and 24.

[1142] Crawford, *supra* note 484, at 116 and 124.

[1143] *Ibid*, at 116–125; Jennings and Watts, *supra* note 423, at 330–331. For the ICJ's observation that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights', see *Reparations*, *supra* note 548, at 178.

[1144] On the idea that external self-determination is not necessarily limited to states with formal legal independence, see Summers, *supra* note 506, at 248–249.

international legal status.[1145] It identifies possible institutional arrangements at various points along this continuum and examines the extent to which each might allow a displaced atoll island people to remain an autonomous entity with some international legal personality.

8.3 Non-state solutions: Preserving autonomy and international legal status

The previous section proposed a flexible account of self-determination as 'a plethora of possible solutions' negotiated by interdependent actors rather than 'a rigid absolute right' to formal legal independence and statehood.[1146] But, were atoll island peoples to choose a non-state solution, what would be lost with the retreat from statehood? As Chapters 6 and 7 made clear, statehood is traditionally associated with a range of benefits, rights and competences and is therefore seen as 'a ticket of general admission to the international arena',[1147] as well as a useful shield against outside intervention.

Perhaps for these reasons, free association and integration are 'often perceived as somehow lesser solutions' in UN and state practice.[1148] Even those working closely on autonomy and self-government see it as a second-best option; as 'one step below full self-determination' or independent statehood.[1149] Rather than empowering peoples to exercise their capacity for self-determination, perhaps these non-state models entail a loss of 'independent power, authority and authenticity'.[1150]

Island peoples may themselves be reluctant to accept a loss of statehood, particularly where their independence has only recently been achieved.[1151] During lengthy negotiations over resettlement in Australia, for example, Nauru (although not a state at the time) rejected several proposals from the Australian government on the basis that

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[1145] Compare the Liechtenstein Draft Convention on Self-Determination, which envisages a continuum of self-administration from cultural autonomy and self-government through to full political independence. Watts, 'The Liechtenstein Draft Convention on Self-Determination through Self-Administration: A Commentary', in Danspeckgruber (ed.), *supra* note 534, 365. See also Moore, *supra* note 599; Nine, *supra* note 91, at 372; Ödalen, *supra* note 91, at 226; Young, *supra* note 311, at 253–254. On the idea that international legal personality comes in degrees, see Jennings and Watts, *supra* note 423, at 330–331.

[1146] Pomerance, *supra* note 480, at 74. Compare Hannum, 'Rethinking Self-Determination', 34 *Virginia Journal of International Law* (1993) 1, at 64–66.

[1147] M. Fowler and J. Bunck, *Law, Power and the Sovereign State* (1995), at 12. Compare Crawford, *supra* note 484, at 115–116 and 126.

[1148] Klabbers, *supra* note 549, at 192. Compare Berman, *supra* note 593, at 55 and 69; Hannikainen, *supra* note 583, at 81.

[1149] Hurst Hannum, speaking at the Nordic Human Rights Symposium at the Åbo Akademi Institute for Human Rights (19 October 1996). Cited in Hannikainen, *supra* note 583, at 86.

[1150] Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1, at 70.

[1151] McAdam, *supra* note 90, at 156.

these offered inadequate protection for Nauruan identity, sovereignty and self-determination.[1152] Instead of 'participat[ing] in what was essentially their own disappearance',[1153] the Nauruans insisted on recognition as a sovereign entity engaged in a treaty of friendship with Australia, where the latter would exercise control over defence, quarantine, foreign affairs and civil aviation, leaving Nauru otherwise free to exercise its autonomy and independence free from the threat of assimilation within a larger state.[1154]

However, this thesis assumes that island peoples are entitled to freely express their preferences, even where these do not conform to the expectations of others or to the traditional model of independent statehood. In exercising their right to self-determination through the decision-making framework proposed in Chapter 6, some island peoples may prefer a non-state solution. McAdam, drawing on interviews with residents and officials, suggests that islanders' primary concerns lie with 'the maintenance of community and culture, rather than "the state" per se'.[1155] Similarly, indigenous peoples often seek to exercise their right to self-determination as 'distinct political entities with which other political entities, such as states, must negotiate agreements and over which they cannot simply impose their will and their law', without seeking statehood.[1156]

Where a non-state framework is better able to protect collective identity and autonomy than a conventional or deterritorialized state, this may therefore be an island people's preferred choice — for the time being, at least. As the General Assembly has made clear, the right to self-determination is not a one-off decision. Peoples who choose free association or integration retain 'the freedom to modify the status of that territory through the expression of their will' in the future.[1157]

[1152] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, ICJ Pleadings (1991), Vol. II, at paras.18 and 20. See further *ibid*, at 149–153; Tabucanon and Opeskin, *supra* note 396, at 346–347; Weeramantry, *supra* note 396, at 292.

[1153] Anghie, *supra* note 396, at 501.

[1154] Tabucanon and Opeskin, *supra* note 396, at 347.

[1155] McAdam, *supra* note 90, at 156.

[1156] Young, *supra* note 625, at 180. Compare H. Diez Palanco, *Indigenous Peoples in Latin America: The Quest for Self-Determination* (1997), esp. at ch.2; Sharma, *supra* note 823, at 240–241; Young, *supra* note 311, at 255–256. However, this may simply reflect an awareness of states' reluctance to recognise a right to external self-determination or secession for indigenous groups, as discussed in section 8.4.1 of this chapter.

[1157] Principle VII(a), GA Res. 1541 (XV), *supra* note 495. Compare Article 6, GA Res. 2064 (XX), 16 December 1965. However, in the case of climate change inundation, this is complicated by the fact that atoll island peoples will not have a pre-existing territory of their own whose status they can modify, raising the spectre of secession from a future host state. Stahl, *supra* note 724, at 31.

But, in choosing free association or integration within another state, might atoll island peoples in fact be 'participating in their own disappearance'? While it is difficult to address this question in the abstract, evidence suggests that this need not be the case. In fact, the non-state frameworks discussed below may in fact reflect a more suitable means of institutionalising self-determination — understood in terms of reciprocity and interdependence rather than exclusivity and independence — than the rigid formality of independent statehood, which insists, against all evidence to the contrary, that states (and the peoples they represent) remain isolated within clear territorial and political boundaries.

A brief survey of empirical examples will help to flesh out the continuum of non-state self-determination proposed in the previous section. Depending on where the chosen institutional framework sits on each axis of this continuum, an island people will have more or less autonomy (including the capacity to design, adopt and enforce policies and legislation or to exercise personal or territorial jurisdiction) and a greater or lesser degree of international legal status (including the capacity to maintain diplomatic relations, to negotiate and conclude treaties or to participate in international organisations).

Free association

Peoples in free association with an independent state are self-governing entities within the territorial jurisdiction of that state.[1158] Examples include the former British Protectorates of the Cook Islands and Niue, both in free association with New Zealand,[1159] and Palau, the Marshall Islands and Micronesia, formerly part of the Trust Territory of the Pacific Islands and now in free association with the US.[1160]

While the status of associated peoples varies depending on the particular arrangements in each case,[1161] the framework of free association sits furthest along the

[1158] See generally Hannum, *supra* note 818, at 384–389; Jennings and Watts, *supra* note 423, at 280. In the context of climate change inundation, see McAdam, *supra* note 90, at 153–158; Wong, *supra* note 90, at 38; Yamamoto and Esteban, *supra* note 26, at 201.

[1159] GA Res. 2064 (XX), *supra* note 1157; GA Res. 3285 (XXIX), 13 December 1974.

[1160] Under Compacts of Free Association. See further Dema, *supra* note 337; Keitner and Reisman, 'Free Association: The United States Experience', 39 *Texas International Law Journal* (2003) 1.

[1161] On the differing approaches of the Cook Islands and Niue, for example, see McAdam, *supra* note 90, at 154–156.

two axes of the continuum of self-determination identified earlier.[1162] Associated peoples enjoy a wide sphere of autonomy, including 'the right to determine [their] internal constitution without outside interference'. [1163] They typically 'possess unlimited legislative competence over [their] own affairs',[1164] including the capacity to establish and maintain democratic governing institutions and judicial systems with wide-ranging jurisdiction.[1165] The Niue Assembly, for example, retains the capacity to 'make laws for the peace, order and good government of Niue', including 'the power to repeal or revoke or amend or modify or extend, in relation to Niue, any law in force in Niue',[1166] including the Constitution itself.[1167]

Peoples in free association also enjoy a 'separate international status'[1168] with extensive rights and privileges.[1169] In their 2001 Joint Centenary Declaration, the Cook Islands and New Zealand are described as 'equal states independent in the conduct of their own affairs', and the Cook Islands' capacity to enter into international treaties, maintain diplomatic relations and accept responsibility under international law is emphasised.[1170] The Cook Islands is also a member of various international bodies, including the Food and Agriculture Organisation (FAO), WHO and the Asian Development Bank (ADB). Although the principal state typically retains control over citizenship, immigration, foreign affairs and defence, it must consult with the associated people in exercising this power.

However, peoples in free association tend to be attached to a defined territory over which their government retains some jurisdiction, if not full territorial sovereignty. In the case of climate change inundation, any remaining atoll island territory will presumably come under the jurisdiction of the state with which a people is associated.[1171] Yet where this territory is largely uninhabitable, islanders will need to resettle within the existing territory of the principal state. As noted in previous

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[1162] Crawford describes it as 'one of the more significant possibilities of self-government'. Crawford, *supra* note 564, at 626.
[1163] Principle VII(b), GA Res. 1541 (XV), *supra* note 495.
[1164] Hannum, *supra* note 818, at 388.
[1165] The High Court of Niue has 'all such jurisdiction (both civil and criminal) as may be necessary to administer the law in force in Niue'. Article 37(2), Niue Constitution Act (29 August 1974).
[1166] Article 28, *ibid*.
[1167] Article 35, *ibid*.
[1168] Crawford, *supra* note 564, at 494.
[1169] Hannum, *supra* note 818, at 17; von Glahn and Taulbee, *supra* note 1009, at 154–155.
[1170] Preamble and Clauses 4, 5 and 6, Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand (11 June 2001).
[1171] Stoutenburg, *supra* note 90, at 61.

chapters, Australia's proposal to establish a self-governing Nauruan community on Curtis Island indicates that a receiving state may have reasons for granting a territory-less island people certain jurisdictional rights over some of its territory.[1172] Where this is not the case, however, some form of deterritorialized free association will need to be negotiated between island and host peoples, which may have implications for islanders' autonomy and international legal status.

Federalism

The second non-state option explicitly referred to in the Declaration on Friendly Relations is that of integration with an independent state[1173] — as, for example, the Cocos (Keeling) Islands has chosen.[1174] Integration 'should be on the basis of complete equality' between receiving and relocating peoples: 'both should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government'.[1175]

One framework through which this equality might be realised is that of federalism,[1176] a union or 'association of different, overlapping and interacting communities'[1177] that enjoy formal legal equality within an overarching federal structure.[1178] The member states of federal entities participate in both 'self-rule' (within autonomous legal and political institutions) and 'shared rule' (via representation in the central organs of the federal government),[1179] and engage in an ongoing process of negotiation and

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[1172] Compare Yamamoto and Esteban, *supra* note 26, at 178.

[1173] See generally Angelo, 'To be or not to be … Integrated, That is the Problem of Islands', 2 *Revue Juridique Polynesienne* (2002) 87.

[1174] GA Res. 39/30, 5 December 1984.

[1175] Principle VIII, GA Res. 1541 (XV), *supra* note 495.

[1176] On a federal solution to climate change inundation, see, for example, Caron, *supra* note 89, at 650; McAdam, *supra* note 90, at 156; Rayfuse, *supra* note 68, at 178; Yamamoto and Esteban, *supra* note 26, at 199–202.

[1177] Tully, 'Federations, Communities and their Transformations: An Essay in Revision', in A. Lecours and G. Nootens (eds), *Dominant Nationalism, Dominant Ethnicity* (2009) 195, at 195. For a more orthodox definition, see Rudolf, 'Federal States', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2012), at para.1.

[1178] As distinct from decentralisation within a unitary state. Hernandez, 'Federated Entities in International Law: Disaggregating the Federal State?', in French (ed.), *supra* note 158, 491, at 493; Rudolf, *supra* note 1177, at para.3.

[1179] D. Elazar, *Exploring Federalism* (1987), at 12. Others describe this in terms of the division of sovereignty between member and federal states. Jennings and Watts, *supra* note 423, at 571.

contestation about the appropriate balance between them.[1180] Federalism — even more so than the asymmetrical model of free association — might therefore be seen as the institutionalisation of the idea of self-determination as reciprocity and interdependence, founded as it is on the interrelationship between different but formally equal peoples whose shared and conflicting interests must continually be renegotiated.

Where free association sits at the maximal end of both axes of autonomy and international legal status, federation offers substantial opportunities for the former but less scope for the latter. Federal member states enjoy significant autonomy, including the 'authority to decide … the law of the region differently and separately from the state or federal legislation governing the rest of the country'[1181] in certain areas (including education, health, culture, language, economic development, trade, social affairs and the use of land and natural resources), as well as capacities for adjudication and law enforcement.[1182] In most cases, the federal administration 'is confined to matters of national importance' (including foreign affairs, immigration and customs) and federal courts act only as 'supreme courts of last resort'.[1183] Member states are, therefore, 'totally independent as far as *their* competence reaches'.[1184]

Their international legal status tends to be more limited, however, with the federal state taking primary responsibility for diplomatic relations, treaty negotiation and ratification and participation in international organisations.[1185] Yet, subject to federal approval, member states may be able to engage in international cooperation or conclude treaties with foreign actors on matters within their competence.[1186] To this

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[1180] Duchacek describes this process in terms of 'cultivating jurisdictional diversity'. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in H. Michelmann and P. Soldatos (eds), *Federalism and International Relations* (1990) 1, at 4.

[1181] Harhoff, 'Institutions of Autonomy', 55 *Nordic Journal of International Law* (1986) 31, at 31.

[1182] See generally Heintze, *supra* note 1133, at 24–27.

[1183] Rudolf, *supra* note 1177, at para.9.

[1184] Jennings and Watts, *supra* note 423, at 249 (emphasis in original).

[1185] 'The federal state shall constitute a sole person in the eyes of international law.' Article 2, Montevideo Convention, *supra* note 821. Compare Fitzmaurice, 'Third Report on the Law of Treaties', II *Yearbook of the ILC* (1958) 20, at 24; Malanczuk, *supra* note 279, at 81.

[1186] On the treaty-making capacity of the member states of the Federal Republic of Germany, Austria, Switzerland and others, see Crawford, *supra* note 484, at 117; Hannum, *supra* note 818, at ch.16; Hernandez, *supra* note 1178, at 501–508; Jennings and Watts, *supra* note 423, at 249–252; Rudolf, *supra* note 1177, at paras.12, 18–21 and 35.

extent, they may be 'recognised as subject[s] of international law'[1187] with the capacity to 'assert their distinctiveness internationally'.[1188] While the individual members of each constituent people are citizens of the federal state, they may also hold dual citizenship within both federal and member states.[1189]

Once again, however — with the exception of *sui generis* states like Belgium, which has both territorial and linguistic federal structures[1190] — federalism traditionally requires territorial jurisdiction.[1191] As the Nauruan example suggests, a receiving state may carve out a portion of its territory on which a displaced island people can re-establish itself as a self-determining member state of the larger federal entity. Where this is not possible, however, an alternative non-territorial federal solution will need to be identified.

Other non-territorial autonomy arrangements

Integration does not necessarily entail federation or jurisdiction over a defined territory. Island and host peoples may prefer some alternative non-territorial intrastate autonomy arrangement like those adopted by certain indigenous peoples and minority groups. While some insist that sovereignty over territory is essential for the ongoing self-determination of atoll island peoples,[1192] evidence suggests that it is neither necessary nor sufficient, particularly where self-determination is detached from statehood. Even those who emphasise the importance of territorial jurisdiction for the pursuit of collective autonomy and self-determination admit that 'there is some possibility of non-territorial self-determination for dispersed groups'.[1193]

[1187] Rudolf, *supra* note 1177, at para.16. Other non-state, non-federal entities — including Taiwan, Hong Kong, the Åland Islands, the Faroe Islands and Greenland — also have some international legal status. See generally Hannum, *supra* note 818, at chs.7–17.

[1188] Hernandez, *supra* note 1178, at 508.

[1189] Although it is generally the former that counts from the perspective of international law. Rudolf, *supra* note 1177, at para.8.

[1190] See, for example, Hannum, *supra* note 818, at 408–412.

[1191] On the idea of federalism as a territorial concept, see, for example, Heintze, *supra* note 1133, at 24; Kimminich, 'A "Federal" Right of Self-Determination?', in Tomuschat (ed.), *supra* note 522, 83, at 98; Rudolf, *supra* note 1177, at para.5. In the context of climate change inundation, see Park, *supra* note 5, at 18, note 132.

[1192] For example, Nine, *supra* note 91, at 363; Schuppert, *supra* note 134, at 17. For those who define self-determination in terms of territory, see Banai, *supra* note 463, at 49; Brilmayer, *supra* note 607; Oeter, *supra* note 484, at 326.

[1193] Moore, *supra* note 590, at 131. Compare Nine, who equivocates about whether territory is in fact necessary for islanders' self-determination. Nine, *supra* note 91, at 363 and 366.

Young's relational account, introduced above, allows us to move away from a rigid commitment to exclusive jurisdiction over territory, while acknowledging that access to land and resources remains important for individual and collective wellbeing. Given that territory is a finite resource — as highlighted by the problem of climate change inundation — tying self-determination to territorial sovereignty risks arbitrarily denying certain peoples the capacity for autonomy and self-determination. Instead, Young suggests that, so long as peoples recognise and allow for the legitimate interests of those they interact with, 'jurisdiction can be spatially overlapping or shared, or even lack spatial reference entirely'.[1194] Such arrangements will require ongoing consultation and negotiation between island and receiving peoples to ensure that each is free from the arbitrary interference of others.

Autonomy need not apply territorially. Where the members of a people are dispersed across one or more states, its sphere of autonomy may be personal or functional rather than territorial[1195] — as is the case, for example, with the Saami of Norway, Finland and Sweden.[1196] Its members may continue to elect representatives to local and national governing bodies and to sustain shared institutions with the capacity to legislate and adjudicate on certain matters, collect personal taxes and implement policies relating to language, education, religion, media and issues of cultural importance.[1197] However, without territorial jurisdiction — and the capacity for enforcement and control with which it is typically associated — the extent to which an island people can continue to govern itself effectively in those areas that matter to it becomes uncertain.

At the minimal end of the axis of international legal status, an atoll island people may be absorbed into a receiving state and become 'totally extinct as an international person'.[1198] Yet, even as a non-state entity without territorial jurisdiction, an island people may continue to engage internationally. The Sovereign Order of Malta enjoys significant international legal status despite having no control over territory,[1199] while the French, Flemish and German-speaking communities of Belgium retain the capacity

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[1194] Young, *supra* note 311, at 261. Compare Klabbers, *supra* note 549, at 202; Kolers, *supra* note 91, at 340–342; Kolers, *supra* note 832, at 117–118.

[1195] For a four-part typology of autonomy, see Heintze, *supra* note 1133, at 18–24. On autonomy and jurisdiction generally, see Jennings and Watts, *supra* note 423, at 382–385, 391–407 and 456–463. On non-territorial autonomy, see Coakley, 'Approaches to the Resolution of Conflict: The Strategy of Non-Territorial Autonomy', 15 *International Political Science Review* (1994) 297.

[1196] See, for example, Hannum, *supra* note 818, at 247–262.

[1197] For a list of desirable capacities, see Hannikainen, *supra* note 583, at 90–94.

[1198] Jennings and Watts, *supra* note 423, at 210.

[1199] *Ibid*, at 125; von Glahn and Taulbee, *supra* note 1009, at 154.

to engage in international cooperation and conclude treaties on matters within their sphere of autonomy.[1200] Indigenous peoples also have 'the right to maintain and develop contacts, relations and cooperation … [with] other peoples across borders'.[1201] Without any jurisdiction over territory, however, an atoll island people will be unable to negotiate or conclude treaties that apply territorially. With rare exceptions, non-state, non-territorial arrangements will therefore lie at the minimal end of both axes of autonomy and international legal status.

8.4 Implementing a non-state model of self-determination

8.4.1 Reasons against acting

As with the deterritorialized statehood proposal discussed in Chapter 7, the options considered here — free association, federation or some other form of non-territorial intrastate autonomy — do not challenge the territorial integrity of existing states. However, unlike deterritorialized statehood, these options do not require a receiving state to recognise the existence of an independent state within its territory either. The ongoing debate about indigenous rights to self-determination indicates that states' concerns about their own independence, territorial integrity and political unity are assuaged where peoples within their borders are able to exercise autonomy and enjoy some international legal status without also achieving formal legal independence and statehood.[1202] Speaking before the Commission on Human Rights' Working Group on the Draft Declaration on the Rights of Indigenous Peoples, the Canadian government explained that it 'accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states'.[1203]

One of the primary reasons against ceding territory to or hosting a displaced atoll island state — that is, the protection of the receiving state's territorial integrity and political unity — is therefore inapplicable in the case of free association or integration.

[1200] Hernandez, *supra* note 1178, at 505.

[1201] Article 36(1), UNDRIP, *supra* note 504. Compare Article 19 of the Draft Saami Convention. Åhrén, Scheinin and Henriksen, 'The Nordic Saami Convention: International Human Rights, Self-Determination and Other Central Provisions', 3 *Gáldu Čála* (2007) 1, at 101.

[1202] Alfredsson, *supra* note 1113, at 132; Anaya, *supra* note 527, at 111–113; ILA, *Rights of Indigenous Peoples: Interim Report of the Hague Conference* (2010), at 9–10.

[1203] The US and Australian governments have made similar statements. All cited in Anaya, *supra* note 527, at 111–112. Hence Article 3 of the UNDRIP (*supra* note 504) is circumscribed by Article 46(1).

However, other reasons against acting may still arise. While these reasons have already been addressed in earlier chapters,[1204] one is worth revisiting in some detail here.

A state may have reasons against joining in free association or integration with an island people where it believes that an influx of islanders will threaten the autonomous institutions or shared way of life of its own people. Yet, as observed in previous chapters, atoll island peoples are relatively small and therefore unlikely to adversely affect a host state's legal, political or cultural institutions. And, where this issue is of particular concern, a potential host state may voice its preference for free association or federation (rather than a more fluid, overlapping model of intrastate autonomy in which islanders are dispersed across its territory), which may better insulate its existing institutions against unwanted expansion or modification.

However, as we near the conclusion of the thesis, it becomes clear that these responses, while relevant, fail to address a more fundamental misconception. According to the reciprocal account of self-determination developed earlier in this chapter, *any* attempt to exercise self-determination necessarily involves negotiating relationships with interdependent others, both within and across state borders. As is true of much of the current debate around self-determination — and, indeed, of this thesis itself — this is often concealed behind the façade of exclusive independence typically associated with self-determination and statehood. What is important from the perspective of this reciprocal account, however, is not that peoples continue to exist alone within clearly defined legal and territorial boundaries, but that peoples engage in an ongoing process of negotiation and consultation about how best to pursue their own values and interests without adversely impacting upon — or, in Young's terms, arbitrarily interfering with or dominating — others.

This process is not one that suddenly becomes necessary when an island people collectively resettles within the borders of another state. It has been necessary all along. Climate change inundation is but one striking example of the ways in which self-determining peoples arbitrarily — or at least negligently — interfere with the autonomy, integrity and self-determination of others elsewhere. To argue that states have reasons against merging with an atoll island people arising from their desire to protect their own autonomous institutions from unwanted interference is to

[1204] See especially sections 6.4.1 (Chapter 6) and 7.7.1 (Chapter 7) on 'Reasons against acting'.

conveniently overlook the fact that such interference is a pervasive feature of the international community.

However, in a debate characterised by an almost unwavering commitment to exclusivity and independence, this process of negotiation will be made easier where an atoll island people chooses to relinquish its claim to independent statehood. Until the parameters of the conversation change — an issue that the final section of this chapter returns to — it is enough to recognise, for now, that states will have less weighty reasons against merging with a displaced island people where this does not require them to accommodate a separate state within their existing territorial borders.

8.4.2 Reasons for acting

Again, as in previous chapters, this section considers only those reasons for acting that are specific to the solution at hand, with the assumption that the general reasons for acting identified earlier — including reasons of international cooperation, contribution and capacity — apply where relevant and need not be restated here.

As observed throughout the thesis, self-determination is widely recognised as a *jus cogens* or peremptory norm of customary international law and a source of obligations *erga omnes* — at least to the extent that it does not disrupt the territorial integrity of existing states.[1205] Given that the options of free association and integration discussed here threaten neither the territorial integrity nor political unity of the receiving state, the claim to self-determination made by atoll island peoples who choose one of these options presumably retains its peremptory status.[1206] Where a state has concerns relating to the cession of territory or the recognition of a separate state within its borders — such as those expressed by Australia in its negotiations with Nauru[1207] — it may therefore have stronger reasons for supporting a non-state solution like free association or federation, arising from the legal weight attached to the peremptory norm of self-determination.

As discussed in previous chapters, those states that can act more effectively and absorb the burdens of acting more readily — on the basis of their proximity and cultural ties to affected atoll island states, or their relatively high GDP and low population density

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[1205] See Duursma, *supra* note 534, at 77–109.
[1206] *Ibid*, at 82.
[1207] Tabucanon and Opeskin, *supra* note 396, at 345.

— may also have reasons arising from their capacity to act. In addition to the weighty reasons for acting arising from their historical relationship with Nauru, for example, the Australian, New Zealand and British governments also acknowledged reasons for acting to assist the Nauruans arising from their capacity to rehabilitate the island or to resettle its occupants elsewhere.[1208] Australia's proposal to purchase land and establish an autonomous Nauruan community on Curtis Island — chosen for its size, arable land, and proximity to employment opportunities on the mainland[1209] — indicates both its capacity and its willingness to act.

Where an atoll island people chooses integration with another state, the latter will undoubtedly shoulder some burdens as a result, including assuming responsibility for any debts, granting citizenship to islanders and modifying existing institutions, laws and policies where necessary.[1210] However, these burdens will be offset to some extent by the rights it accrues, including jurisdiction over a former island state's potentially lucrative exclusive economic zone (EEZ) and other maritime zones.[1211]

The aim of this and previous sections on reasons for and against acting to assist atoll island peoples threatened by climate change inundation is not to draw any conclusions about which of the three proposed options — finding new territory, transitioning to a deterritorialized state or joining in free association or integration with another state — is most likely to succeed or can most adequately protect islanders' self-determination. Instead, as explained in Chapter 1, the aim is to outline a legal and theoretical framework within which a conversation about the future of atoll island peoples can take place. By examining some of the theoretical, legal and empirical implications of these solutions and assessing the reasons that other states may have for and against contributing to their implementation, the hope is that islanders — in consultation with host states — can make a free, meaningful and informed decision about their ongoing status as self-determining peoples.

This brings us back to some of the central questions of the thesis. Is the legal principle of self-determination applicable outside of the narrow contexts in which it is

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[1208] *Ibid*, at 354–355.

[1209] *Ibid*, at 346–347.

[1210] On the succession of states and the transfer of rights and duties, see Jennings and Watts, *supra* note 423, at 208–219.

[1211] Compare Caron, *supra* note 89, at 650; Rayfuse, *supra* note 133, at 8–9; Soons, *supra* note 89, at 230; Yamamoto and Esteban, *supra* note 26, at 195 and 200. In the case of a federation, the receiving state and relocating people must decide who exercises these rights internally. *Ibid*, at 214; Rudolf, *supra* note 1177, at para.6.

traditionally applied? If so, what role can it play in ensuring that the collective autonomy or 'destiny' of a people can be protected against a grave external threat like that of climate change inundation? What is the role of law, theory and practice in providing a framework within which a meaningful conversation about the future of island peoples can take place? And how does this framework itself shape the terms of the conversation? As the thesis draws to a close, the final two sections of this chapter return to these questions, revisiting some of the answers that have been reached and identifying avenues for future research.

8.5 What has emerged from the research?

This penultimate section looks back over the thesis to see what has been achieved, while the next and final section looks forward to what is yet to come. This overview is framed around those points of interest that have emerged somewhat unexpectedly from the research and have in turn shaped the path of the thesis.

The first of these appeared in Chapter 2. According to one widely held view, a manifest failure of human rights protection at the domestic level provides states elsewhere with an entitlement to intervene to remedy this failure. This entitlement temporarily transcends the barriers to intervention imposed by the sovereignty and territorial integrity of states. However, in certain cases, such a failure may also provide states with positive reasons — including legal obligations arising from treaty and customary international law — for taking remedial or corrective action. In Mutua's words, these states are no longer merely 'saviours' who intervene to protect the human rights of 'victims' elsewhere.[1212] They also have reasons for acting arising from their own contribution to the problem and capacity to act.

Climate change inundation — defined in Chapter 1 as the process whereby climate change-related harms interact with existing vulnerabilities and will eventually leave low-lying coral atoll island states uninhabitable — is one of these cases. Any human rights-based analysis of climate change inundation therefore requires a theory that is conceptually broad enough to understand human rights (in their international dimension, at least) in terms of not only entitlements to intervene but also positive reasons for action. It is for this reason that Charles Beitz's functional account of human rights was adopted as the basis of the thesis's theoretical framework. Drawing on

[1212] Mutua, *supra* note 256.

(though departing somewhat from) Beitz's account, Chapter 2 identified four broad sets of reasons for acting to address climate change inundation, arising from peremptory norms of customary international law, legal obligations of international cooperation, states' own contributions to climate change inundation and states' capacity to address its harms. These reasons for acting reappeared in Chapters 3, 5, 6, 7 and 8, becoming more specific through their application to each potential response to climate change inundation.

A second realisation that shaped the thesis emerged in Chapter 3. Many understand the value of self-determination in terms of individual membership in a democratic state in which citizens are free from discrimination and have an equal opportunity to vote and participate in common institutions of government. However, through an analysis of the proposed 'planned migration' response to climate change inundation, it became clear that individual migration to a democratic host state cannot replace everything of value that is lost when a state's territory becomes uninhabitable. Self-determination is valuable not merely as a generic right to membership in any democratic, rights-protecting state but as a unique claim to the specific constitution and political institutions that reflect the particular values and interests of a people.

This realisation fed into Chapters 4 and 5, which argued for a broad, responsive account of self-determination as both a basic guiding principle and a set of fixed legal rules. Instead of confining self-determination to those peoples identified by an existing legal rule (including those under colonial or other forms of foreign occupation or subjugation), Chapter 4 identified self-determining peoples as the populations of existing states with a history of cooperation under shared institutions of government. It is this common history that provides a people with both the motive and capacity to sustain those shared institutions of government through which it exercises both autonomy and independence. And it is the capacity to sustain these specific institutions that is important for the ongoing self-determination of a people.

Building on this account, Chapter 5 argued for the recognition of climate change inundation as a grave external threat to the self-determination of atoll island peoples. This laid the groundwork for the collective decision-making framework outlined in Chapter 6, which identified three potential options for atoll island peoples: obtaining new territory through a treaty of cession (Chapter 6); transitioning to a deterritorialized

state or state-in-exile (Chapter 7); or joining within another state through free association or integration (Chapter 8).

Several further realisations emerged in relation to the reasons that states have for (and against) implementing each of these options. A first general point relates to the fact that taking positive steps to protect island peoples' capacity for autonomy and independence (by ceding territory, hosting a deterritorialized state, joining in free association or federation or contributing financial or technological resources) is likely to be significantly less costly, in the short term at least, than refraining from interfering with these capacities in the first place (by committing to effective mitigation and adaptation strategies that enable islanders to remain where they are). And, where states are unable to agree on or meet timely mitigation targets and have the capacity to assist those harmed by their failure to do so, this generates strong reasons for providing such assistance.

A second point relates to the often surprising implications of a host state's priorities for the reasons it has for or against implementing each proposed solution. Imagine that state A is one of a handful of states with primary responsibility for addressing the harms of climate change inundation. Chapter 6 observed that, where state A is concerned with protecting the identity, autonomy and shared way of life of its own people from a sudden influx of newcomers, it will have stronger reasons for ceding territory to an atoll island state, thereby insulating its people and existing legal, political and socio-economic institutions from unwanted interference. However, where state A's primary concern is protecting its territorial integrity rather than shielding the collective identity of its people from an influx of islanders, it will have stronger reasons for hosting a deterritorialized state or joining in free association or federation with an atoll island people, thereby leaving its territory intact.

Similarly, where state A agrees to host a deterritorialized state or merge with an atoll island people but is particularly concerned about protecting its existing institutions against modification or expansion, it will have stronger reasons for granting an atoll island state or people greater independence and autonomy. By allowing islanders to maintain their own legal and political institutions within a wide sphere of autonomy, state A will minimise the financial, legal and political burdens associated with adapting its own institutions to incorporate atoll islanders. However, where state A is concerned instead with ensuring that it retains full jurisdictional authority over its own

territory, it will have stronger reasons for encouraging atoll islanders to participate within its own legal and political institutions.

Chapters 7 and 8 moved away from the mainstream legal narrative of statehood and self-determination, in which both are thought to require a permanent population living in a defined territory under an effective government. This is reflected in two final points of interest, which also have implications for further research beyond this thesis. The first relates to the 'minimum threshold' account of statehood set out in Article 1 of the Montevideo Convention. While this account is widely accepted in international legal doctrine and practice, it proves unsatisfactory, both in general and in the specific context of climate change inundation. This realisation led to the development of an alternative 'family resemblance' account of statehood in Chapter 7, according to which those entities that belong to the category of states are not defined by some fixed set of necessary criteria but by an overlapping series of similarities. Just as there is no one fixed model of self-determination — as demonstrated by the options set out in the Declaration on Friendly Relations and elsewhere — perhaps there is also no one fixed model of statehood.

The final point of interest emerged earlier in this final chapter and also challenged received legal wisdom about the relationship between self-determination, statehood and clearly defined political and territorial boundaries. Climate change inundation draws our attention to what should already be clear: self-determining peoples do not exist in isolation from one another but in a web of more or less unequal relationships in which the actions of one impact upon many others. Despite the emphasis of the UN and others on formal legal independence and statehood as the pinnacle of self-determination, this realisation suggests that self-determination may be better served by an emphasis on interdependence and reciprocity, both within and across existing territorial borders. The final section of this chapter concludes the thesis by identifying avenues of further research relating to some of these issues.

8.6 What is yet to come?

This thesis has made several original contributions to the fields of international law, self-determination and statehood, as well as to the growing debate around climate change inundation. Among other achievements, it has provided an alternative interdisciplinary account of self-determination that moves beyond the narrow contexts in which it is traditionally thought to apply, argued for the recognition of atoll island

populations as peoples with a right to self-determination in the face of climate change inundation and proposed a collective decision-making framework through which they can freely express their wishes regarding their future self-determining status. There remains, however, substantial room for further thought and analysis.

This thesis has operated largely within the parameters set by mainstream legal theory, doctrine and practice, in the hope of gaining recognition and support from as wide a range of readers as possible. Yet the final two chapters have begun to challenge some of these parameters by suggesting an alternative understanding of statehood based on Wittgenstein's idea of family resemblances, and by reconceptualising self-determination in terms of reciprocity and interdependence. In doing so, they have laid the groundwork for more radical questions and proposals to emerge. This concluding section identifies four potential areas of future research.

First, as explained in Chapter 1, one of the main aims of this thesis is to outline a framework within which atoll island peoples can discuss and express their preferred response to climate change inundation. An essential area of further research therefore involves building on the legal and theoretical tools provided in this thesis to create a practical model for consulting directly with atoll island peoples, as well as with those who will potentially receive them. This requires long-term planning. Even before resettlement begins, the process of researching available options, negotiating within and across states, engaging in local consultations at origin and destination sites, finding adequate financial support and coming to a decision will take many years.[1213] A lengthy lead-in time is therefore necessary in order to 'ensure a viable solution well before the actual disappearance of the state'.[1214]

A second line of research concerns the reasons for acting identified throughout the thesis. Several questions need to be addressed in more detail before we can provide a complete account of which states have reasons for acting and which costs they are required to bear. How are the four sets of reasons to be weighed against each other, particularly where they point to different actors or require different kinds of action? How great a burden is each actor required to bear and how should this be assessed? What happens if one or more states fail to follow through on their reasons for acting?

[1213] See, for example, Barnett and Campbell, *supra* note 12, at 173; Campbell, *supra* note 348, at 78; Campbell, Goldsmith and Koshy, *supra* note 114, at 6, 34 and 43–44; McAdam, *supra* note 90, at 248; Nansen Initiative, *supra* note 96, at 21; Park, *supra* note 5, at 20–21.

[1214] Solomon and Warner, *supra* note 331, at 295.

Should we extend our analysis to actors other than states, particularly given the vast inequalities between individuals, cities and regions within states? And how might this pluralist schema of reasons for acting apply beyond the problem of climate change inundation?

Third, while the account of self-determination proposed in Chapters 4 and 5 is sufficient for the purposes of this thesis, it remains open to further development. In particular, it would benefit from a broader definition of the peoples that hold a right to self-determination. While 'peoples' were defined in Chapter 4 as the populations of existing states with a history of cooperation under common institutions of government, this definition was chosen as a means of addressing the case study at hand while bracketing off wide-ranging debates around secession. With further research, however, this definition could be extended to include non-state groups that participate in shared governing institutions of whatever sort, including indigenous, nomadic and minority peoples. It is important that a comprehensive definition of 'peoples' includes entities other than those that correspond directly to existing states, in order to address the impacts of unjust annexation — or climate change inundation — on non-state groups, and to construct an account of self-determination that does not privilege Western notions of statehood, sovereignty and autonomy. This is particularly important where self-determination is understood in terms of reciprocity and interdependence rather than formal legal independence, as proposed in this final chapter.

A fourth and related avenue of research involves pursuing a more flexible account of the relationship between people, land, territory and state, prompted by a shift away from the relative environmental stability of the Holocene age — which underpins many of the presuppositions of international law, including the stability of territorial boundaries — towards the instability and uncertainty of the Anthropocene age.[1215] This may require a pluralistic account of sovereignty, self-determination and statehood, in which each is understood as a continuum of entities that share an overlapping series of family resemblances, rather than as a fixed category of identical actors. While Chapters 7 and 8 have moved in this direction, there is still substantial work to be done in unpacking each of these constituent elements — people, self-determination, sovereignty, statehood, territory and land — and exploring the relationships between them. Inspiration might be drawn from alternative legal and political frameworks of

[1215] Vidas, *supra* note 97.

interaction and negotiation both above and below the state level, as well as Pacific islanders' alternative understandings of land.[1216]

This speaks to a broader point about the role of international law in a world of rapidly changing and often challenging socio-economic, geopolitical and environmental conditions. If international law — in this case, the international legal rules and principles relating to the recognition and protection of human rights and self-determination — is to continue to fulfil its purpose in the face of these changing conditions, it must remain flexible and responsive. As David Caron observes, 'inasmuch as nature declines to negotiate, it is we and our laws which must adapt'.[1217] The ideas proposed here in relation to climate change inundation represent a small fraction of the changes required to address the upheavals that our planet — and the social, political, legal, geological and biological systems that depend upon it — is unlikely to avoid in the decades to come.

[1216] Islanders often 'recognised a clear centre but their relationship to the land became increasingly vague with distance from it'. Campbell, *supra* note 348, at 62. On similar medieval conceptions of territorial jurisdiction as ambiguous or overlapping, see Hall, *supra* note 1066, at 26–27.

[1217] Caron, *supra* note 89, at 653.

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