SEA LEVEL RISE AND CLIMATE STATELESSNESS: FROM 'TOO LITTLE, TOO LATE' TO CONTEXT-BASED RELEVANCE

MICHEL ROULEAU-DICK*

Several low-lying island states currently risk the loss of their entire territory before the end of the century. Combined with the inadequacy of the existing framework of international refugee law to address the challenges faced by those displaced, this situation has made the law on statelessness an interesting candidate for securing an alternative path to obtaining a legal status in a post-relocation context. However, while several authors have examined this possibility, the majority conclude that it fails in its putative task by providing too little, and by coming into play too late to be of any significant relevance to the situation of environmentally displaced persons in low-lying island states. This article challenges this narrative by re-examining the relevance of the law on statelessness along with the context within which it might have to play a role.

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I INTRODUCTION

After decades of doubt and uncertain progress towards awareness of climate change, attitudes are starting to change. Numerous governments now acknowledge that humanity is in a state of 'climate emergency' or facing a 'climate crisis', and various actors in civil society have also changed the way they discuss climate change to reflect the urgency of acting.[1] Unfortunately, these pious declarations alone are unlikely to slow the pace of climate change, and while key in increasing pressure on governments, climate litigation is often limited by the narrow scope

* The author is a doctoral candidate at the Institute for Human Rights at Åbo Akademi University. He would like to thank Professors Elina Pirjatenniemi and Magdalena Kmak for their insightful comments, as well as the reviewers for their valuable contributions to the quality of this article. Any mistake is, of course, the author's own.

1 Damian Carrington, 'Why the Guardian Is Changing the Language It Uses about the Environment', *The Guardian* (online, 17 May 2019) <https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>.

of inadequate legal frameworks. The changes effected by climate change have steadily increased in scope and severity, with no sign of relenting.[2]

Climate change does not affect everyone equally. Citizens of low-lying island states ('LLISs') such as Tuvalu, Kiribati or the Maldives have known for some time that the existence of their country lies in the balance. Despite their infinitesimal contributions to the causal drivers of climate change, such vulnerable states are likely to be hit the hardest by the slow- and fast-onset effects of climate change. The increase in extreme weather events such as typhoons and king tides, coupled with the steady rise in sea levels, present well-documented threats to their very existence.[3]

Narratives taking for granted the loss of LLISs should be avoided, as they can undermine efforts to build local resilience and *in situ* adaptation. However, the reality of climate change is such that strategic planning is also needed to mitigate its impact on vulnerable populations, which presents a dilemma for the affected states in how they distribute their limited resources.[4] Conversely, the predicament faced by LLIS also raises several novel questions about international law, in part due to the unprecedented possibility that an existing state could physically lose its entire territory. As statehood has traditionally been rooted in territorial sovereignty (or at least a claim to it), it is unclear if a deterritorialised LLIS would be able to retain its statehood beyond the loss of its territory, or if its entire territory becomes uninhabitable. Climate change thus poses a threat both to the physical and legal existence of the most vulnerable states.

II CLIMATE STATELESSNESS

The possible physical disappearance of a state would also imply the cross-border migration of its nationals. While bilateral or multilateral agreements could secure a safe haven for the displaced populations, the lack of such a pre-emptive framework for relocation is particularly problematic in light of the lack of protection afforded by the current framework of refugee law. The definition of 'refugee' found in the 1951 *Convention Relating to the Status of Refugees* ('*1951 Convention*')[5] centres the need for protection around the notion of persecution. As migration triggered by the rise of sea levels hardly involves a discriminatory intent or persecution on the grounds defined by the *1951 Convention*, it is widely accepted that environmentally displaced persons ('EDPs') from LLISs that have been displaced exclusively due to environmental factors fall outside of the scope of international refugee law. This was examined at length in the 2014 New Zealand case of *Teitiota v Chief Executive Ministry of Business, Innovation and Employment*, in which an I-Kiribati man unsuccessfully tried to claim protection

2 A recent example being the worrying slowdown of the gulf stream: see Levke Ceasar et al, 'Current Atlantic Meridional Overturning Circulation Weakest in Last Millennium' (2021) 14(3) *Nature Geoscience* 118.

3 Curt D Storlazzi et al, 'Most Atolls Will Be Uninhabitable by the Mid-21st Century Because of Sea-Level Rise Exacerbating Wave-Driven Flooding' (2018) 4(4) *Science Advances* 1.

4 Jonathon Barnett, 'The Dilemmas of Normalising Losses from Climate Change: Towards Hope for Pacific Atoll Countries' (2017) 58(1) *Asia Pacific Viewpoint* 3.

5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 2951, 189 UNTS 37 (entered into force 22 April 1954) art 1(A) ('*1951 Convention*').

under the *1951 Convention*, an outcome in line with most academic analyses of the relevance of the *1951 Convention* for EDPs.[6]

Thus, in the absence of pre-emptive solutions to relocation, there is a risk that EDPs from LLISs would fall through the net of international protection, outside the scope of the international instruments that have hitherto protected those on the move.[7] This does not mean that refugee law bears no relevance to the migration of EDPs, as the principle of non-refoulement was recently found by the United Nations Human Rights Committee to (eventually) provide protection against forced return.[8] While undoubtedly a positive development, the principle of non-refoulement is narrow in scope and fails to offer both legal status and substantive protection to EDPs.[9]

However, a comparatively lesser-known instrument might bear some relevance for EDPs from LLISs: the 1954 *Convention Relating to the Status of Stateless Persons* ('*1954 Convention*').[10] This article will attempt to assess the relevance of the law on statelessness for the protection of cross-border, EDPs from LLIS within a hypothetical worst-case scenario. By the term 'worst-case scenario', this article aims to describe a future timeline within which pre-emptive solutions cannot be implemented and palliative solutions thus need to rely on the currently existent and applicable legal framework with minimal reliance on proactive action by other members of the international community.

Statelessness in the context of climate change could take different forms, ranging from the accrued vulnerability of already stateless populations, such as the Rohingyas, to the very literal possibility of those who may lose their country of nationality. The present analysis is concerned with the latter, based on the premise that the nationals of a state become stateless upon the extinction of their former state's statehood. In the context of LLISs, this can be translated as the

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6 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. For a discussion of the lacunae in the *1951 Convention* (n 5) with regards to EDPs from LLISs, see Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 42–48 ('Forced Migration'). See generally, António Guterres, 'Nansen Conference on Climate Change and Displacement; Statement by António Guterres, United Nations High Commissioner for Refugees' (Speech, UNHCR 6 June 2011) <https://www.unhcr.org/4def7ffb9.html>; Jenny G Stoutenburg, *Disappearing Island States in International Law* (Brill 2015) 402. This is why the use of terms such as 'climate refugees' is problematic, as it implies the existence of protection where there is little to none available, notwithstanding specific states broadening their domestic implementation of international refugee law to include EDPs.

7 This also applies to a number of domestic frameworks that explicitly or practically excluded persons displaced by natural disasters from their protection frameworks. See, eg, 'Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection — Risk to Life or Risk of Cruel and Unusual Treatment or Punishment', *Immigration and Refugee Board of Canada* (Web Page, 15 May 2002) s 3.1.4 <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/ProtectLifVie.aspx#s3>; Camilla Schloss, 'Climate Migrants — How German Courts Take the Environment into Account When Considering Non-Refoulement', *Völkerrechtsblog* (Blog Post, 3 March 2021) <https://voelkerrechtsblog.org/climate-migrants/>. Other states such as Finland and Sweden suspended or removed domestic legal provisions that could have been used by EDPs. See Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-Refoulement' (2020) 114(4) *American Journal of International Law* 708, 723.

8 Human Rights Committee, *Views: Communication No. 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 12 [9.11] ('*Teitiota v New Zealand*').

9 For a detailed interpretation of the Human Rights Committee's decision, see McAdam, 'Non-Refoulement' (n 7).

10 *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('*1954 Convention*').

assumption that if an LLIS were to lose its statehood, its former nationals would then qualify under the definition of stateless person found in the *1954 Convention*:

> For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.[11]

The resulting 'climate statelessness' is accepted by most scholars.[12] This conclusion is also supported by the statement of a United Nations High Commissioner for Refugees ('UNHCR') Expert Panel on the concept of a stateless person under international law:

> When applying the definition it will often be prudent to look first at the question of 'State' as further analysis of the individual's relationship with the entity under consideration is moot if that entity does not qualify as a 'State'. In situations where a State does not exist under international law, the persons are *ipso facto* considered to be stateless unless they possess another nationality.[13]

Beyond the link between statehood and statelessness however, the relevance of the latter is defined by the timeline of events relating to the former. Professor Jane McAdam, who led the discussions in the UNHCR panel mentioned above, identifies the gap between the physical disappearance of a LLIS and the recognition by the international community that the state in question has ceased to exist as one of the main obstacles to the law on statelessness playing a role in the protection of the former state's nationals.[14]

It should be noted that the present article focuses exclusively on the *1954 Convention* and intentionally avoids engaging with the possible relevance of the 1961 *Convention on the Reduction of Statelessness*.[15] While the latter certainly bears some relevance to the plight of those vulnerable to climate change, the context of this relevance is fundamentally quite different to the type of scenario in which the *1954 Convention* could come into play and to the protection it provides (ie assuming the loss of the concerned LLIS's statehood). Therefore, this choice is not motivated by a lack of relevance, but rather by the approach adopted by this piece.[16] Moreover, in the context of this article, the 'law on statelessness' refers primarily to the *1954 Convention*.

Using the law on statelessness as a protection framework for EDPs is not an unexplored option, but it has so far essentially been deemed a dead end by most

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11 ibid art 1(1).

12 Alejandra Torres Camprubí, *Statehood under Water — Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 198–200; Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 5; Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States* (Background Paper No PPLA/2011/04, Division of Internal Protection and UNHCR, May 2011); Marija Dobrić, 'Rising Statelessness Due to Disappearing Island States' (2019) 1(1) *Statelessness and Citizenship Review* 42, 52–53. Walter Kälin instead argues that the loss of nationality cannot be assumed to be automatic: Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement. Multidisciplinary Perspectives* (Oxford University Press 2010) 81, 101.

13 *Expert Meeting on the Concept of Stateless Person under International Law* (Summary Conclusions, UNHCR, 28 May 2010) 2 (emphasis in original).

14 McAdam, 'Forced Migration' (n 6) 142.

15 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 185 (entered into force 13 December 1975) ('*1961 Convention*').

16 For a broader approach to the issue of 'climate statelessness' under the two statelessness conventions, see Dobrić (n 12).

authors, and thus left potentially under-researched in this specific context.[17] The reasons for this can be summarily divided into two broad categories. First, the law on statelessness is argued to come into play too late to be of any relevance, due to the fact that a deterritorialised LLIS would likely retain its statehood long after its population has had to relocate, or its territory has been fully submerged. Second, the shortcomings of the *1954 Convention* and its implementation essentially render it useless as a protection framework.

However, while these conclusions may be warranted in the context(s) they have so far been discussed to apply in, they do not cover the full range of possible futures. This article adopts a 'worst-case scenario' approach, revisiting the conclusions previously reached on the relevance of the *1954 Convention* in this light. The article first sets the scene by outlining the idea of climate statelessness and how the concept has been discussed in literature thus far. This is followed by the introduction of a scenario-based approach, which is then used to determine the extent to which the law on statelessness could prove relevant for the displaced nationals of LLIS, and in which context. To do so, the article revisits the arguments presented earlier that have hitherto justified the relative lack of interest in the *1954 Convention's* relevance for EDPs from LLISs.

III TOO LITTLE, TOO LATE

A *Too Late*

The first conclusion reached by most authors who have discussed the relevance of the *1954 Convention* for EDPs from LLISs is that it is very unlikely that it would apply when it is needed the most, ie during or immediately after the cross-border migration of those displaced by climate change.[18] Assessing that the law on statelessness would therefore be triggered too late to have any practical relevance is directly related to how likely an LLIS is to maintain its statehood beyond the loss of its physical indicia (ie population and territory). While the possibility of deterritorialised statehood may initially seem counterintuitive if approached purely based on the 'traditional' criteria of statehood,[19] several arguments have been raised to support the possibility of a LLIS maintaining its statehood beyond the loss of its territory.

The first argument proposed is that the 'minimum threshold' account of statehood, embodied by the criteria found in art 1 of the *Montevideo Convention*

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17 Jane McAdam's assessment is that 'the statelessness treaties provide a very weak "solution" in the present context, which is already highly contingent on other factors.' McAdam, 'Forced Migration' (n 6) 139–43. Heather Alexander and Jonathan Simon conclude that the statelessness conventions 'do not provide a ready solution [to the plight of EDPs]': Heather Alexander and Jonathan Simon, 'Sinking into Statelessness' (2014) 19 *Tilburg Law Review* 20, 25. Jenny Grote Stoutenburg also posits that the loss of statehood of a LLIS would result in *de jure* statelessness for its displaced population but concludes her analysis on the relevance of the stateless status in this context by emphasising the shortcomings discussed in Part III.B. Stoutenburg (n 6), 409.

18 McAdam, 'Forced Migration' (n 6) 142.

19 These criteria are found in the 1933 *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1. They are commonly accepted to reflect international custom: see eg Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50(1) *Stanford Journal of International Law* 1, 17; McAdam, 'Forced Migration' (n 6) 128.

on the Rights and Duties of States ('*Montevideo Convention*' and '*Montevideo* criteria') should simply be sidelined. Whether it is by dismissing the relevance of the criteria altogether,[20] restricting their scope to the creation of states,[21] or deeming them inadequate,[22] most authors agree that they fail to provide clear guidance in the case of LLISs. Past cases such as fragile states,[23] or governments in exile,[24] highlight the flexibility of the criteria in practice. As a result, it is argued that it would be premature to assume that a LLIS could not exist beyond the loss of its physical components.

Furthermore, scholars rely on the existence of a strong presumption of continuity, which would guarantee that an LLIS retains its statehood long after it has lost its claim to territorial sovereignty. This principle would have a 'ratchet effect',[25] ensuring that statehood, once obtained, is not easily lost. Crawford explains it as such: 'there is a strong presumption against the extinction of States once firmly established'.[26] While the exact workings of the presumption of continuity are not always discussed, the principle is closely linked with the role assumed to be played by recognition.

Indeed, recognition is understood to be the means through which the international community would confirm (or reject) the statehood of a deterritorialised LLIS. For instance, McAdam states that the international community would defer to the concerned state's claim to continued existence in deciding whether to maintain recognition or not.[27] As long as the deterritorialised state maintains a claim to statehood, it should benefit from the continued recognition of the international community.[28]

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20 For a discussion of the minimum threshold and a potential alternative, see Susannah Willcox, 'Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood' (2016) 30 *Leiden Journal of International Law* 117.

21 Nathan J Ross, 'Low-Lying States, Climate-Change-Induced Relocation, and the Collective Right to Self-Determination' (PhD Thesis, Victoria University of Wellington, 2019) 161 ('Low-Lying States'); Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law — Climate Change Displacement and Sovereignty* (Springer-Verlag Berlin Heidelberg 2014) 176.

22 Jain (n 19) 29.

23 Ross, 'Low-Lying States' (n 21) 150–51; McAdam, 'Forced Migration' (n 6) 134.

24 Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2(1) *Climate Law* 345, 356; Ross, 'Low-Lying States' (n 21) 151–53; Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' (Research Paper No 2010-2, University of New South Wales Faculty of Law Legal Studies Research Paper Series, 21 January 2010) 9.

25 Willcox (n 20) 122.

26 James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 715. These words are widely cited to support the existence of the presumption of continuity. See, eg, Burkett (n 24) 354; Jacquelynn Kittel, 'The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2015) 2014 *Michigan State Law Review* 1207, 1248; Ross, 'Low-Lying States' (n 21) 154; Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 *Melbourne Journal of International Law* 346, 362; Yamamoto and Esteban, 'Atoll Island States' (n 21) 176.

27 McAdam, 'Boundaries' (n 24) 9.

28 Kälin (n 12) 101–102.

In short, the timeline supported by most authors locates the loss of statehood of a LLIS (if it ever occurs) much later than the loss of the state's physical elements.[29] McAdam summarises the situation as follows:

> In light of the presumption of continuity of statehood, such recognition [that a State has ceased to exist], if forthcoming at all, would likely occur long after the population had moved. The application of the law on statelessness may have little practical benefit such a long time after the fact.[30]

B *Too Little*

The other element that has weighed against the study of statelessness as a means of protection for EDPs from LLISs lies in its shortcomings as a protection framework. Not only would it apply long after EDPs would have had to leave their homes, but its actual added value would be so little as to be essentially worthless in practical terms.

Firstly, based on the line of arguments discussed above, it is assumed that there would be a gap between the loss of physical indicia and the loss of statehood. During this period, EDPs would not qualify for the protection of the *1954 Convention*, as they would still be considered as nationals of a state. However, while they would not qualify as de jure stateless under the *1954 Convention*, EDPs would likely find themselves outside their own state's jurisdiction and unable to avail themselves of its protection, rendering their nationality essentially ineffective.[31]

EDPs from deterritorialised LLISs would thus find themselves in the loose category of de facto stateless persons: formally nationals of a state, but unable to enjoy the different elements of nationality such as the possibility to return to their state of nationality.[32] In contrast with de jure statelessness defined under the *1954 Convention*, de facto statelessness has proven to be a contentious concept.[33] A UNHCR background paper defines de facto stateless persons as follows: 'persons

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29 Several solutions have also been envisaged to secure continued statehood beyond the loss of territory, such as Burkett's 'nation ex situ': Burkett (n 24) 346. See also Wong (n 26) 383–89; Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?' (2016) 21 *Tilburg Law Review* 72.

30 McAdam, 'Forced Migration' (n 6) 142.

31 Park (n 12) 14.

32 An interesting parallel could be drawn with persons temporarily stranded due to restrictions on travel in the context of the COVID-19 pandemic: see eg, Sandeep Singh, 'Opinion: Indian Travel Ban Leaves Kiwis Stateless', *New Zealand Herald* (online, 11 April 2021) <https://www.nzherald.co.nz/nz/opinion-indian-travel-ban-leaves-kiwis-stateless/ZNDHSAYCD53DG3UFUDVCLK455U/>. On the specific subject of the duty to readmit nationals see Heather Alexander and Jonathan Simon, 'No Port, No Passport: Why Submerged States Can Have No Nationals' (2017) 26(2) *Washington International Law Journal* 307, 316–19 ('No Port, No Passport').

33 Jason Tucker, 'Questioning De Facto Statelessness, by Looking at De Facto Citizenship' (2014) 19(1–2) *Tilburg Law Review* 276. The distinction between de jure and de facto statelessness has also been criticised as being counterproductive in most contexts by Laura van Waas and situations of de facto statelessness are explicitly not addressed by the UNHCR's handbook on statelessness: see Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 64, 80–81; Katia Bianchini, 'Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom' (2020) 32(3) *International Journal of Refugee Law* 440; *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (UNHCR 2014) 5 [7] ('*UNHCR Handbook*').

outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.[34] Consequently, de facto stateless persons find themselves sitting uneasily between the protection afforded by the *1951 Convention* (under which refugee status is determined on the basis of a facts-based assessment) and by the *1954 Convention* (under which stateless status is determined on the basis of a purely legal assessment).

Under such circumstances, the only relevance of the *1954 Convention* for de facto stateless EDPs would lie in the non-binding recommendation of the *1954 Convention*'s final declaration that state parties 'consider sympathetically the possibility of according to that person the treatment which *the Convention* accords to a stateless person'.[35] Hence, during this crucial gap in time, the law on statelessness would fail to provide any actual protection for EDPs, as they could only be described as de facto stateless and would thus fall outside of the *1954 Convention*'s scope.[36]

While the protection of stateless persons was originally intended to be included as an additional protocol to the *1951 Convention*, the *1954 Convention*'s drafters instead opted to protect stateless persons through a standalone instrument.[37] This was based on the reasoning that a separate instrument would allow states to ratify only the statelessness instrument without having to first ratify the *1951 Convention*, as would have been needed for an additional protocol.[38] This has failed to materialise and ever since, the *1954 Convention* has lagged behind the *1951 Convention* in terms of ratifications.[39]

However, the number of ratifications can be a poor indicator of practical relevance since to be of any value to stateless persons, the instrument must be implemented domestically through a statelessness determination procedure ('SDP'). In this, the law on statelessness also trails behind the *1951 Convention*. Numerous state parties lack SDPs, and even those that have established one do not always do so in full accordance with the *1954 Convention* or the guidance provided by the UNHCR in its handbook on statelessness.[40] As a result, claiming stateless status is a complex and uncertain process even in states that have implemented SDPs. In those that have not, it is often simply not a possibility.

Furthermore, these substantial lacunae are also compounded by the lack of ratifications to the *1954 Convention* in the geographical areas most relevant to the

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34 Hugh Massey, *UNHCR and De Facto Statelessness* (Background Paper No LPPR/2010/01, Division of Internal Protection and UNHCR, April 2010) 61.

35 *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, opened for signature 14 December 1950, 360 UNTS 117 (entered into force 28 July 1951) [III], quoted in Torres Camprubí (n 12) 200 (emphasis added). This approach is also emphasised in the *1961 Convention* (n 15): see Park (n 12) 14.

36 Park (n 12) 14.

37 van Waas (n 33) 68–69.

38 ibid 68.

39 As of 2021, there are 95 states party to the *1954 Convention* (n 10), versus 146 for the *1951 Convention* (n 5): see '2. Convention Relating to the Status of Refugees', *United Nations Treaty Collections* (Web Page, 19 March 2021) <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en>; '3. Convention Relating to the Status of Stateless Persons', *United Nations Treaty Collections* (Web Page, 19 March 2021) <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en> ('Signatories of the *1954 Convention*')

40 *UNHCR Handbook* (n 33) [57]–[124]. On national implementation of statelessness determination procedures, see, eg, Bianchini, 'Identifying the Stateless' (n 33) 440. For country-specific information in Europe, see 'Countries', *Statelessness Index* (Web Page, 22 March 2021) <https://index.statelessness.eu/countries>.

protection of EDPs from LLISs in the Pacific region. Currently, only Australia and Fiji have ratified the *1954 Convention*. The former lacks a SDP that would enact its protection for stateless persons within its jurisdiction,[41] and no information is available on whether or not Fiji even has a SDP. As for the Maldives, neither of its two closest neighbours India and Sri Lanka have ratified the *1954 Convention*.[42]

Substantively, the *1954 Convention* lacks an obligation to provide citizenship to those who qualify for its protection.[43] Although the right to a nationality is found in art 15 of the *Universal Declaration of Human Rights*,[44] no corresponding obligation exists for states to grant nationality, an absence also observed in the 1966 *International Covenant on Civil and Political Rights*,[45] as well as in other human rights treaties.[46] Additionally, the *1954 Convention* provides relatively little added value in the context of the general framework of human rights protection, as its general provisions, while not irrelevant, are also mostly found in other international norms.[47] To add to the weaknesses of the *1954 Convention*, the UNHCR's mandate on statelessness and, consequently, the *1954 Convention*'s implementation, is comparatively weaker than its supervisory responsibility under the *1951 Convention*.[48] Under art 35 of the *1951 Convention*, state parties are required to cooperate with the UNHCR in the exercise of its responsibilities, while the UNHCR's mandate on statelessness is rooted in the UN General Assembly Resolution 50/152 of 21 December 1995.[49] In practice, this has not proven to be a

41 Michelle Foster, Jane McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure' (2016) 40(2) *Melbourne University Law Review* 401, 445–54; *Statelessness in Australia* (Report, Refugee Council of Australia, 7 January 2019) 14.

42 Stoutenburg (n 6) 409.

43 van Waas (n 33) 66.

44 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

45 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3).

46 Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 11, 14–15, 26.

47 Katia Bianchini, *Protecting Stateless Persons — The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 99–100. For an in-depth discussion of the substantive relevance of the *1954 Convention*, see van Waas' excellent opus: Laura van Waas, *Nationality Matters — Statelessness under International Law* (Intersentia 2008). See also, Edwards and van Waas (n 12).

48 Despite sharing much of their contents, the *1954 Convention* (n 15) does not have a similar provision to *1951 Convention* (n 5) art 35, which enshrines the duty to cooperate with the United Nations High Commissioner for Refugees ('UNHCR') in the text of the treaty. See Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019) 46–47.

49 *Resolution Adopted by the General Assembly on the Report of the Third Committee (A/50/632)*, UNGA, UN Doc A/RES/50/152 (9 February 1996), citing *Report of the Third Committee*, UNGA, UN Doc A/50/PV.97 (21 December 1995). See also 'Mandate of the High Commissioner for Refugees and His Office' (Executive Summary, UNHCR) <https://www.unhcr.org/publications/legal/5a1b53607/executive-summary-of-the-mandate-of-the-high-commissioner-for-refugees.html>; 'UNHCR's Mandate for Refugees, Stateless Persons and IDPs', *United Nations High Commissioner for Refugees* (Web Page) <https://emergency.unhcr.org/entry/55600/unhcrs-mandate-for-refugees-stateless-persons-and-idps>. See also Matthew Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28(1) *International Journal of Refugee* Law 7.

problem for the UNHCR in engaging with state parties,[50] but it is nevertheless relevant to any discussion on the implementation of the *1954 Convention*.

In summary, even if EDPs from LLISs were to qualify as stateless under the *1954 Convention* upon the de jure extinction of their state of nationality, they would be (1) unlikely to be able to avail themselves of the protection provided by the *1954 Convention*; and (2) even if they were, it is doubtful whether the protection would add anything worthwhile to that already provided by other international instruments. As a result, it is safe to say that the law on statelessness does not provide a 'solution' to protect EDPs from LLISs. This is the conclusion reached by most scholars who have discussed the issue thus far: 'the Statelessness Conventions do not provide a ready solution to their plight'.[51] McAdam frames the issue as such: 'Accordingly, the statelessness treaties provide a very weak "solution" in the present context, which is already contingent on other factors'.[52] While a fairly clear rebuttal to any attempt at framing statelessness as a possible 'solution', McAdam's statement nevertheless leaves open the possibility that in some scenario(s), the law on statelessness could still play a role in the protection of EDPs.

IV WORST-CASE SCENARIO

Legal research, particularly that concerned with international law, is ill-equipped to project itself into the future. The sheer scope of possibilities deals a severe blow to any claim of certainty a fortiori once one takes into account the political nature of some of the deciding factors to be considered in order to reach any conclusion.

Rather than to elaborate a complex analysis and present it as 'the future', it may thus be more practical to adopt a context-based approach to assess the multiplicity of legal futures. In doing so, one can hope to better identify the implicit assumptions necessary to prioritise one conclusion over another. Beyond the methodological value of this approach, it also benefits the overall value of the analysis it produces by ensuring that the preconditions for its relevance are discussed.

This article is not an attempt to create a mutually exclusive alternative to previous research on the relevance of the law on statelessness in the context of climate change. Other analyses discussed are all likely to have added value to the common understanding of the future(s) LLISs may face. Instead of presenting a single timeline that relies upon a specific chain of events and legal interpretations as 'the' future, this article approaches legal analysis of the future as part of a broad spectrum consisting of multiple, possible parallel futures, with the eventual aim of discussing 'a' future. One could imagine this spectrum to range from 'optimistic' futures to more 'pessimistic' ones. At one end of the spectrum is a reversal in current environmental trends and the withdrawal of current threats to the existence

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50 Mark Manly, 'UNHCR's Mandate and Activities to Address Statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 88, 91.

51 Alexander and Simon, 'Sinking into Statelessness' (n 17) 25.

52 McAdam, 'Forced Migration' (n 6) 142. McAdam had earlier stated that 'the instruments' tight juridical focus leaves little scope for arguing for a broader interpretation that would encompass people whose State disappears': see Jane McAdam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' (Research Paper No. 08/121, The University of Sydney, Sydney Law School, October 2008) 9.

of LLISs. At the other end of the spectrum is a faster-than-expected rise in sea levels and an unfavourable international geopolitical context. This is not a likeliness assessment; all efforts should be directed towards bolstering local resilience and building durable solutions that both minimise harm to local populations and sustain their agency. However, even if all efforts are invested in the 'positive' end of the spectrum of futures, the sheer amount of uncertainty involved, and the highly political dimension of certain key elements (such as recognition) highlight the need for the type of approach described by former I-Kiribati president Anote Tong: 'I'd rather plan for the worst and hope for the best'.[53] For a state, this may involve complex trade-offs in the allocation of resources, but in terms of legal research, this could provide an opportunity to create better legal forecasts, which in turn could help with a state's allocation of its resources.

The use of a spectrum to conceptualise possible futures also reflects the uniqueness of the challenges faced by the different states threatened by climate change. There can be no single solution based on a 'one size fits all' approach.[54] Discussing different solutions in the context of various possible futures has the benefit of allowing reasoning that would not be possible without allowing for several discussions to occur in parallel.

In keeping with this approach, the current article aims to revisit the assessment of the law on statelessness outlined in the previous section, this time in the context of a hypothetical 'worst-case scenario'. The bases of the analysis do not change, but the context within which the relevance of the law on statelessness is assessed does. Such context can be briefly summarised by the premise: 'what if almost everything that can go wrong does?' In practice, this is assumed to mean that the loss of a LLIS's entire territory would result in the loss of its statehood earlier than otherwise expected under the narrative presented in Part III(A) and that a number of EDPs would find themselves excluded from most legal frameworks traditionally protecting those on the move. Against this backdrop, what would then be the added value of the law on statelessness for EDPs from LLISs?

V STATELESSNESS IN CONTEXT

A *Too Late?*

The importance of statehood cannot be understated when it comes to determining which protection would be available to EDPs from LLISs:

> [W]hat is certain is that the fate of the State of origin is the key to the determination of the legal status that the displaced population may uphold: the total de-population of a State leads to its loss of statehood, which in turn results in rendering its population stateless.[55]

As discussed in Part III(A), most scholars agree that the loss of an LLIS's statehood would happen only some time after it loses its territory, if at all. According to this narrative, the length of the gap between the displacement of an

53 Kenneth R Weiss, 'Before We Drown We May Die of Thirst' (2015) 526(7575) *Nature* 624, 626.

54 This is one of the potential problems with creating a 'climate refugee' treaty: see generally McAdam, 'Forced Migration' (n 6) 186–211.

55 Torres Camprubí (n 12) 203.

LLIS's population and the loss of that state's statehood would effectively render useless the law on statelessness, since EDPs would only qualify for the legal protection of the statelessness regime long after they had been displaced. While this premise is mostly taken for granted, some scholars have also raised doubts concerning the bases of this assumption.

1 *Statehood*

While a scenario-based approach lowers the threshold needed for an outcome to be worth discussing from 'likely' to 'plausible', the current state of legal research on the statehood question is insufficient to allow us to actually delineate this threshold with sufficient certainty as to remove it from the equation. Examining critically the arguments brought forward in Part III(A) in support of continued statehood beyond deterritorialisation will allow for a better understanding of the uncertainty involved, and the corollary need to investigate alternative scenarios. The highly political nature of statehood and the substantial unpredictability that this implies mean that it may be premature to assume that the claim to deterritorialised statehood of a LLIS would not face any opposition or legal challenges, particularly in light of the legal arguments that can be brought to bear against those in favour of continued statehood.

The first argument raised in the mainstream narrative of deterritorialised statehood concerns the irrelevance, inadequacy or sheer obsolescence of the traditional account of statehood, embodied by the criteria found in art 1 of the *Montevideo Convention*. Indeed, demonstrating the lacunae of the *Montevideo Convention*'s definition of statehood is not a particularly challenging endeavour. However, two elements seem to have been either overlooked or downplayed hitherto. First, the status of the *Montevideo* criteria. While Thomas D Grant argues that the *Montevideo Convention* itself was at best 'soft law',[56] it is commonly accepted as reflective of international custom.[57] Thus, it would seem premature to dismiss altogether the criteria it sets without engaging with their content and application in state practice.

Second, while the *Montevideo Convention*'s criteria can be described as a 'minimum threshold' of statehood,[58] it remains unclear where exactly this threshold lies. The criteria it sets out have been thoroughly discussed, as have their respective implications for the future of LLISs. However, little attention has been given to their relative weight in the context of the broader relevance and status of the *Montevideo Convention*'s definition. Practically, this means that the different arguments weighing against a stricter application of the traditional account of statehood to the future of LLISs have been rooted in dismissing the criteria collectively rather than on a more detailed scrutiny of their specific individual weight and significance. Namely, this has resulted in the need for a territory and a population being dismissed based on, among other arguments, the considerable flexibility of state practice on the need for a government.[59]

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56 Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 403, 456.

57 Jain (n 19) 17; McAdam, 'Forced Migration' (n 6) 128.

58 Willcox (n 20) 3.

59 The precedent set by state practice on fragile states such as Congo in 1960 and Somalia in the 1990s and early 2000s is often invoked to illustrate this point: see, eg, Kittel (n 26) 1226–27; Willcox (n 20) 7; Ross, 'Low-Lying States' (n 21) 150–51.

As is often the case, this is also a matter of interpretation. Past examples of governments in exile have been characterised as setting a precedent for continued statehood despite the lack of a territory and population. [60] However, this overlooks the *exiled* nature of a government in exile: the Dutch government in exile in London during the Second World War did not claim to exist in abstraction from its occupied territory and population, but rather on their behalf.[61] There can be no government without a state.[62] Furthermore, governments in exile are established and recognised based on the illegality of the occupation they are a victim of;[63] their existence can thus be construed as a corollary of a breach of a *jus cogens* norm, where accepting the extinction of the illegally invaded state would give legal value to an illegal act.[64] As a result, framing state practice on the matter as a precedent for the assertion that a lack of territory or population does not affect statehood does not accurately reflect the reality and legal foundations of the existence of governments in exile. Consequently, while the ineffectiveness or absence of a government has been shown not to affect the statehood of an existing state in state practice, it seems a stretch to argue that a government could exist as a state without a territory and a population, particularly in the absence of clear state practice to suggest so.[65]

The fact that the definition of statehood found in the *Montevideo Convention* fails at providing a useful tool to clarify limit cases does not automatically mean that it can be dismissed as a whole. Instead, a closer look at the threshold it sets, in light of its application in state practice, highlights the potential problems it might present to a LLIS attempting to claim deterritorialised statehood.

Another argument that is commonly used to attempt to dissipate the uncertainty around the possibility of continued, deterritorialised statehood is the existence of a strong presumption of continuity. As discussed in Part III(A), this presumption is interpreted to act as a sort of 'ratchet', preventing existing states from going extinct once they have been created. A closer examination of the principle reveals that its scope could stop short of overriding the legal consequences of the disappearance of a LLIS's physical indicia.[66] Indeed, rather than being concerned mainly with status (ie statehood), as assumed by those who frame the presumption

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60 Burkett (n 24) 356; Ross, 'Low-Lying States' (n 21) 151–53; McAdam, 'Boundaries' (n 24) 9.

61 Stoutenburg (n 6) 285.

62 Stefan Talmon, 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Stefan Talmon and Guy S Goodwin-Gill (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) 499, 501.

63 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press Oxford 1998) 219.

64 The existence and recognition of a government in exile as a result of an illegal invasion can be explained as the principle of *ex injuria non oritur* ('illegal acts do not create law') overriding its alternative principle of *ex factis jus oritur* ('facts create law'). This approach was adopted by the United States in relation the Baltic states: see, eg, Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers 2005) 27–28; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz 1954) 399.

65 Bilkova emphasises this point, noting that claiming that the relevance of territory has changed is 'not the same as demonstrating that territory has lost all its relevance': Veronika Bilkova, 'A State Without Territory?' in Martin Kujier and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016* (Springer 2017) 19, 38.

66 This is mentioned or hinted at by a few authors: see Alexander and Simon, 'Sinking into Statelessness' (n 17) 25; Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1–2) *Climate Law* 70, 82; Bilkova (n 65) 38.

of continuity as a 'ratchet effect', the principle can also be interpreted in the context of the dichotomy between the law of continuity and the law of state succession. This narrower understanding of continuity (ie that State A is the *same* entity that existed before Province X seceded from State A) instead centres its relevance on a dynamic assessment of identity. Thus framed, the presumption of continuity is restricted to a presumption against the creation of a new state where one already exists, essentially irrelevant to matters of statehood per se. Here, the unprecedented nature of the challenges faced by LLISs means that it remains unclear how the international community would understand the role and scope given to the presumption of continuity. Practically, whether the international community understands a 'ratchet effect' to be at work or not is likely to play a central role in confirming or disconfirming an LLIS's claim to deterritorialised statehood. Until then, a definitive answer remains out of reach.

The manner itself through which other states may need to express their respective opinions is also particularly challenging to assess as part of a legal analysis. Recognition by other states remains tantalisingly out of reach for those in search of a solid normative framework regulating accession to, and arguably loss of, statehood. Beyond the classical constitutive and declarative approaches, it remains particularly challenging to draw a line or draft a required number of acts of recognition that accommodates both the geopolitical realities and the normative framework that surrounds statehood.

In the context of LLISs, it has been assumed that no other state would want to be the first to 'derecognise' a deterritorialised LLIS.[67] McAdam further explains that for acts of 'derecognition' to bear legal weight, their cumulative weight should signify a general acceptance by the international community that the state in question has ceased to exist.[68] This assumption, while sensible, remains at the level of political analysis. McAdam stops short of formulating an obligation to maintain recognition, and thus any claim that other states would not dare 'un-recognise' an LLIS is a political assessment, not a legal one. State practice in the case of Kosovo further highlights the fact that recognition is a matter left to the discretion of other states. As Tatjana Papić emphasises:

> There is no duty to recognize an entity fulfilling statehood requirements; for example, Iraq does not have to recognize Israel, and vice versa. This is an issue entirely left to states' discretion. States should, likewise, be free to revoke recognition, as they were free to afford it in the first place. To think otherwise would presuppose that an act of recognition is a legal transaction, which it is not.[69]

The relevance of recognition also has to be considered together with its relative weight in assessing statehood. For instance, dismissing the need for physical indicia (ie territory, population) would result in making recognition effectively the sole constitutive element of statehood, an assumption that may not only face the usual criticism addressed at the constitutive doctrine of recognition, but also risks overstretching the (admittedly vague) boundaries of statehood.[70] This simply highlights some of the risks involved in relying, directly or indirectly, on recognition as a definitive marker of statehood.

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67 Kälin (n 12) 102. See also McAdam, 'Forced Migration' (n 6) 137.

68 Crawford (n 26) 704, quoted in McAdam, 'Forced Migration' (n 6) 138.

69 Tatjana Papić, 'De-Recognition of States: The Case of Kosovo' (2021) 53 (Winter) *Cornell International Law Journal* 683, 728–29.

70 Alexander and Simon, 'Sinking into Statelessness' (n 17) 24.

Pragmatically, Walter Kälin might be right in assuming that no other state would want to be the first to un-recognise an LLIS. However, within a worst-case scenario, the possibility remains that other states may not be stopped by ethical or moral reasons and may contest the statehood of a deterritorialised LLIS. While this is clearly not a desirable future, it remains a possible one. This could take different forms. McAdam sets the threshold relatively high for the loss of statehood to be completed by requiring widespread, general acceptance of the loss of statehood, but this would be preceded by a period of divided recognition, during which some states might maintain their recognition, while others remove it. Since, in the absence of physical indicia, a deterritorialised LLIS's statehood would almost exclusively rely on recognition by other states, this would put the concerned LLIS in a particularly precarious position.

For the purpose of assessing statelessness, this could mean that:

> [w]here only certain States would cease recognition, given that nationality would be dependent on the recognition by a particular State, individuals would be left in a situation whereby they could be considered stateless in relation to some States but not others.[71]

Indeed, this risk is compounded by the possibility that state officials tasked with evaluating an applicant's qualification for stateless status could follow their respective 'State's official stance on an entity's legal personality and make decisions influenced by politics'.[72]

The key takeaway from the present section is that any claim to provide a clear legal timeline for the future of LLISs rests upon an assessment of political realities that remain out of reach for purely legal forecasts.[73] For the purpose of determining the relevance of the law on statelessness for EDPs from LLISs, this means that in a worst-case scenario, an LLIS could lose its statehood earlier than otherwise forecast, and consequently mean that its displaced nationals would qualify for stateless status. Hence, it may be premature to dismiss the *1954 Convention* purely on the basis that it would apply long after EDPs had left their country. While it is likely that there would be a gap between the cross-border migration of EDPs and the loss of a LLIS's statehood, the length of this gap could be shorter than previously thought. However, while this means that in the context of a worst-case scenario the law on statelessness could apply to EDPs, it does not remedy the *1954 Convention*'s shortcomings as a protection framework.

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71 Park (n 12) 14–15.

72 *UNHCR Handbook* (n 33) [20], quoted in Bianchini, 'Protecting Stateless Persons' (n 47) 85.

73 Indeed, examining the geopolitical context relating to the future statehood of LLISs would require a deeper analysis of the dynamics at play. So far, the moral arguments in favour of maintained recognition have been key to claiming that no other state would contest the continued statehood of a deterritorialised LLIS. However, other factors may prompt members of the international community to withdraw their recognition. For instance, Ross mentions access to the rich exclusive economic zones of many LLISs, or their votes in multilateral fora as possible grounds for de-recognition: see Ross, 'Low-Lying States' (n 21) 162. Papić highlights the limitations of international law in addressing highly political situations: viewing state recognition as revocable recognises the limits of international law in managing controversial social realities, such as contested statehood. Namely, in such situations, it cannot be expected that international law will step in, translate political controversies into legal questions and somehow magically solve them: Papić (n 69) 729.

B *Too Little?*

The possible relevance of the *1954 Convention* has not only been downplayed due to how late it has been assumed to apply to EDPs, but also by how little it provides.[74] The low number of ratifications and lack of domestic implementation through the necessary SDPs mean that availing oneself of stateless status is a complex endeavour, even in states where such a determination procedure exists. This would obviously not be affected by whichever stance the international community adopts on the statehood of potential deterritorialised LLISs. It remains, however, context dependent.

Pre-emptive solutions such as bilateral or multilateral agreements, or a new international convention on climate displacement are ultimately all reliant on several premises, one of which is the willingness of at least one other member of the international community to commit to the protection of those who are displaced.[75] Were this not to be the case, there is currently very little in terms of legal frameworks to provide any level of protection to potential EDPs from LLISs. While human rights protection theoretically applies to everyone within the jurisdiction of a state, without a legal status to enable those rights, it can be exceedingly difficult for people to benefit from this protection and access the legal remedies needed to enforce it.[76]

As things stand, it is generally agreed that EDPs from LLISs would eventually find themselves in a 'legal limbo' if their state of nationality were to find itself in the impossibility of providing protection and basic services.[77] In summary, their nationality would become ineffective due to the effects of climate change, rendering them de facto stateless.[78] Namely, 'persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'[79] and thus left out of the protection afforded both by the *1951 Convention* and that offered by the *1954 Convention*. Hence, were EDPs from LLISs to find themselves de facto stateless, they could benefit only from general human rights norms and principles that have gained customary status such as the principle of non-refoulement.[80] In the absence of a legal status, it may be a challenge to benefit from the protection of human rights, as Agnieszka Kubal

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74 For an overview of the few elements of substantive protection provided by the *1954 Convention* (n 15) and some of the latter's shortcomings on the matter, see Dobrić (n 12) 58–60.

75 Lilian Yamamoto and Miguel Esteban, 'Migration as an Adaptation Strategy for Atoll Island States' (2017) 55(April) *International Migration* 144.

76 Dobrić (n 12) 43. Currently, the only binding international treaty to explicitly address climate change displacement is the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, opened for signature 23 October 2009 (entered into force 6 December 2012).

77 Yamamoto and Esteban, 'Migration as an Adaptation Strategy' (n 75) 155.

78 Park (n 12) 14; Torres Camprubí (n 12) 200–01; Alexander and Simon, 'No Port, No Passport' (n 32). Stoutenburg disagrees with this assessment, on the dual basis that an EDP's nationality would not be rendered ineffective through the actions of either the state or the national, as has been implied in the concept of de facto statelessness hitherto, and that it is doubtful whether EDPs would find themselves removed from the protection of their state of nationality: see Stoutenburg (n 6) 423–24.

79 Massey (n 34) 61.

80 Climate change was accepted by the Human Rights Committee as possibly triggering the prohibition against refoulement if conditions in an EDP's state of origin were sufficiently dire: *Teitiota v New Zealand* (n 8) 5 [9.11].

notes: 'people with ineffective nationality quite often find themselves locked in a complex legal limbo'.[81]

The threshold against which the protection afforded by the *1954 Convention* should be assessed is thus a low one. In the absence of any pre-emptive agreement or solution, EDPs would eventually need to find a safe haven beyond the borders of their state of origin. Once this becomes uninhabitable, it is likely that they would find themselves unable to avail themselves of the protection of their country of nationality and would thus become de facto stateless. This situation could last until an EDP gains another nationality, or until their state of nationality is accepted as having lost its statehood. In this context, the relevance of the protection afforded by the *1954 Convention* should thus be determined in relation to that available to de facto stateless persons.

Therefore, the very existence of a legal framework could offer valuable help to EDPs seeking a legal status. While the *1954 Convention* trails behind the *1951 Convention* in many ways, stateless status is nevertheless well defined in international law, and under different regional and domestic jurisdictions.[82] The shortcomings of the law on statelessness identified in Part III(B) would likely still undermine its implementation and universality, but were it possible, EDPs who were able to avail themselves of the protection afforded by the *1954 Convention* would still likely fare better than those remaining de facto stateless.

As several states face an existential threat because of climate change, there is a distinct possibility that different states may experience different fates or different timelines, both environmentally and legally. The coexistence of different timelines would mean that de facto and de jure EDPs could find themselves within the same jurisdiction but with differing status and levels of protection, assuming their state of residence was party to the *1954 Convention* and that the latter's protection was enacted through an SDP. In such a context, the protection afforded to de jure stateless EDPs could also benefit de facto stateless EDPs. In the context of post-Soviet statelessness, for instance, legal advances benefitting de jure stateless persons have been observed to be a 'catalyst leading to legally productive changes for other noncitizens — or de facto stateless persons — in precarious legal situations'.[83]

Indeed, even if no EDPs from LLISs were to qualify as stateless persons under the *1954 Convention*, the latter could still provide helpful guidance for receiving states. Since the UNHCR had its mandate on statelessness confirmed and strengthened in 1995, there has been a positive trend towards better protection for stateless persons and increased protection against the emergence of statelessness.[84] Although it still lacks widespread ratification, several states have become parties to it in recent years, the latest being Iceland on 21 January 2021.[85] From only 55 state parties in 2003, this number has almost grown twofold since, currently numbering 95 (as of 2021).[86] This may be attributed to the UNHCR's renewed efforts to raise awareness to the problem of statelessness and the

81 Agnieszka Kubal, 'Can Statelessness Be Legally Productive? The Struggle for the Rights of Noncitizens in Russia' (2020) 24(2) *Citizenship Studies* 193, 197. See also Dobrić (n 12) 59.
82 Kubal (n 81) 197.
83 ibid 203.
84 Foster and Lambert (n 48) 47–49.
85 'Signatories of the *1954 Convention*' (n 39).
86 ibid.

challenges faced by stateless persons, notably through its #IBelong Campaign.[87] In parallel to the UNHCR's efforts, the increased interest in statelessness in the literature has also most likely contributed to a better understanding of the phenomenon.

Again, this is not to say that statelessness offers a ready solution to the protection of EDPs from LLISs. The present analysis remains anchored in a worst-case scenario, and even then, the relevance of the law on statelessness is largely contingent on external factors, mostly relating to the statehood of the relevant LLIS. Beyond these clear limitations, it remains that the law on statelessness may eventually have a legally productive role to play in the protection of those displaced by rising seas.

As set in Part IV, the assessment of the relevance of the law on stateless for EDPs is closely linked to the context in which it is assumed to take place and the alternatives available in such context. Consistent with the scenario-based approach adopted by this article, two scenarios are presented in Figure One below. The first one is the 'standard' scenario, a loose aggregate of what could be described as the 'mainstream' legal forecast of the future of LLISs. This scenario follows the assessment of future statehood found in the literature cited in Part III(A), which posits the existence of a substantial gap between the loss of physical indicia and the loss of statehood.

The second scenario is the 'worst-case scenario' discussed in the present article. The underlying assumptions to the worst-case scenario timeline are that sustained recognition would not be possible to secure following the loss of an LLIS's territory, and that statehood would be interpreted in its narrower meaning. In contrast, the 'standard' scenario relies on the international community maintaining its recognition of the deterritorialised LLIS, at least for some time after the loss of its physical indicia. This, of course, remains a relatively narrow understanding of a worst-case scenario, purely concerned with the legal dimension of the challenges faced by LLISs and their nationals. As a result, other factors such as faster or slower effects of climate change are not considered. Common to both, however, is the assumption that no other solution could, or would be implemented to provide the concerned EDPs with an alternative framework for protection.

The key difference between the two scenarios, from the perspective of protection, is the length of the assumed period of de facto statelessness before EDPs qualify for the stateless status provided by the *1954 Convention*. Were its statehood to be maintained beyond the loss of physical indicia, the displaced nationals of an LLIS would find themselves outside the scope of the protection afforded by the law on statelessness. Alternatively, if an LLIS lost its statehood, the state's former nationals would fall within the scope of the *1954 Convention*.

87 '#IBelong Campaign', *United Nations High Commissioner for Refugees* (Web Page, 2021) <https://www.unhcr.org/ibelong/>.

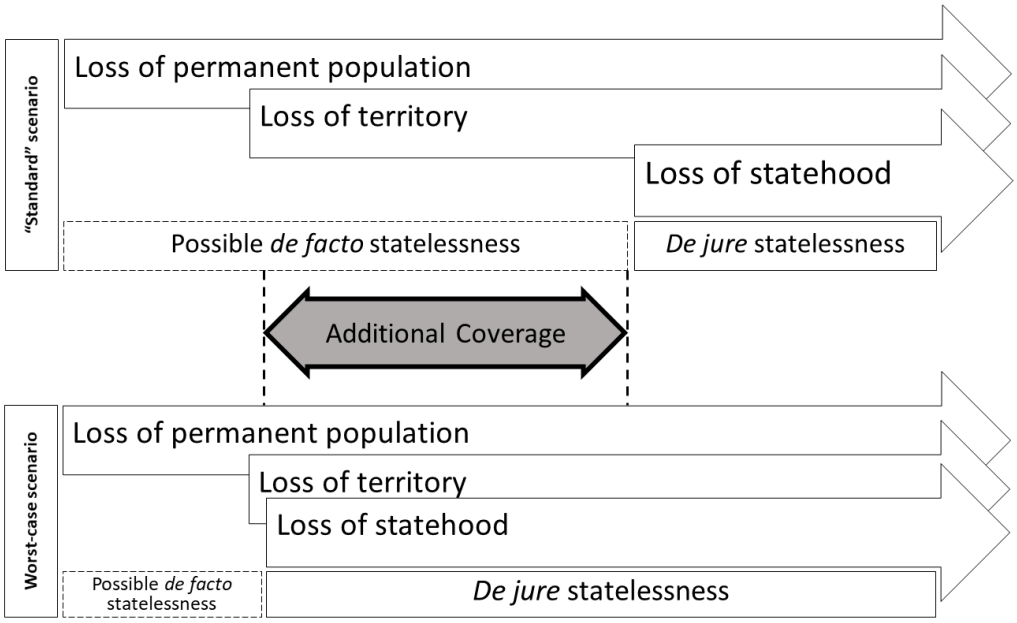

Figure One: Comparative visualisation of the relative relevance of the law on statelessness in two scenarios.

The reasoning at the core of this article highlights the need for a better understanding of the role of a deterritorialised state for its nationals.[88] Ultimately, the benefits of statehood should be carefully weighed against its potential downsides. Indeed, while nationals of a deterritorialised LLIS are generally assumed to fall within the loose category of de facto stateless persons, this assumes a failure by the deterritorialised state to provide effectiveness to their nationality, or the impossibility of doing so. Consequently, the technical challenges faced by a deterritorialised state might eventually become the decisive factor in assessing the relevance of both statehood and the *1954 Convention* for the purpose of the protection of EDPs.

Alternatively, while statehood still holds an unparalleled position in international law and politics, other forms of international legal personality could allow an LLIS to maintain most of its relevant activities without needing to maintain a possibly contested claim to statehood. Example of sui generis entities such as the Holy See or the Sovereign Military Order of Malta, for instance, have been mentioned as relevant for the future of LLISs.[89] However, this is a separate

88 For instance, Alexander and Simon conclude that

> continuing to formally recognise submerged states seems desirable because it appears to prevent displaced islanders from losing their cultural identity and legal rights, but in reality we will be creating an empty fiction that may impede a long-term solution.

Alexander and Simon, 'Sinking into Statelessness' (n 17) 25.

89 See, eg, Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer 2017) 101, 125; Burkett (n 24) 356–57; Torres Camprubí (n 12) 110–14.

discussion, one that also needs to be context sensitive and nuanced by the protection needs of the displaced nationals of LLISs.

C *Context-Based Relevance*

What emerges from the present analysis is that while the protection provided by the *1954 Convention* stops short of providing an adequate framework to bridge the current gap in the protection of EDPs from LLISs, it could nevertheless prove to be a valuable tool in certain scenarios. The nature of such scenarios, ie the fact that the relatively weak protection and limited scope of the law on statelessness would be relevant only in the absence of better options, has meant that, thus far, little attention has been devoted to assessing its relevance in the context of climate-induced migration.

Approaching the future through a spectrum of scenarios does not imply an assessment of desirability. Conversely, the present article does include a discussion on the future statehood of possible deterritorialised LLISs, but with the purpose of nuancing what has become a widely accepted conclusion, and one that may also prove to be premature not with regards to its forecast but to the certainty with which it presents this forecast. Abstract discussions on the possibility of deterritorialised statehood are fascinating and open a new perspective on several core issues of public international law. However, statehood remains a slippery concept for legal scholars, and presenting any conclusion as definitive, even implicitly, risks overlooking the numerous contingencies inherent to such a politically charged topic.

The present analysis aims to add to the scope of scenarios and corresponding solutions that collectively constitute the future of states threatened by climate change. Admittedly, it describes a poor solution in most futures. However, the present article demonstrates that the *1954 Convention* may nevertheless have a role to play in the protection of the rights of environmentally displaced persons from LLISs. With its minimal reliance on proactive action by the international community, the *1954 Convention* could provide a useful starting point upon which to build better solutions, or a possible source of protection for EDPs who find themselves within the jurisdiction of state parties to the *1954 Convention*.

A clear limitation of this analysis is its mostly theoretical nature. Practical access to the protection afforded by the *1954 Convention* remains challenging, and hypothetical EDPs intending to avail themselves of the latter would likely face substantial obstacles, possibly due to the ambiguity of their state of origin's status. Indeed, the clarity of the statehood, or lack thereof, of their state of origin would likely influence the success of their claim to stateless status.[90] Here, country-specific analyses could yield more practically relevant results. However, for this to be possible, the relevance (albeit highly context-reliant) of the law on statelessness needs to be acknowledged.

VI CONCLUSION

Climate statelessness is not a new subject of interest for scholars interested in the challenges faced by LLISs. However, most inquiries on the matter do not

90 Stoutenburg (n 6) 407. Bianchini also emphasises that the high complexity of certain cases can negatively influence the outcome of the statelessness determination process in the context of the United Kingdom: Bianchini, 'Identifying the Stateless' (n 33) 456.

investigate the possible added value of the law on statelessness, particularly the *1954 Convention*, instead dismissing it for being ill-adapted to the task and for its applicability being contingent to the concerned LLIS losing its statehood shortly after becoming deterritorialised, an unlikely occurrence according to the dominant narrative. As a result, the assumed lack of relevance of the *1954 Convention* rests upon the idea that it is effectively 'too little, too late'.

The present article aims to nuance this conclusion and introduce a context-sensitive approach to the relevance of the law on statelessness for EDPs from LLISs. In doing so, the current analysis is thus not aiming to provide a unique, better legal forecast but instead, to contribute to the better understanding of the various possible futures facing LLISs, and the solutions available in each respective future scenario. More precisely, the present article adopts a 'worst-case scenario' approach to evaluating the relevance of the law on stateless for EDPs from LLISs. Inherent to this hypothetical worst-case scenario is the assumption that preferred pre-emptive or palliative solutions such as bilateral or multilateral agreements could not be enacted, as they rely on the good will of other states, a currency that cannot be taken for granted, or relied upon in legal terms.

A critical analysis of the arguments brought forward in the current literature also reveals that the statehood of a LLIS deprived of its territory and population cannot necessarily be relied upon, warranting the need for alternative solutions. As statehood would essentially be in the hands of the international community and rest upon the cumulative weight of what are ultimately political decisions, it may be premature to take deterritorialised statehood as a given. Were other states to interpret the boundaries of statehood restrictively, the protection afforded by the *1954 Convention* would be triggered, providing a potentially valuable framework for EDPs to secure a legal status.

Conversely, the added value of the legal framework on the protection of stateless persons may reside in the comparative situation of EDPs who would find themselves de facto stateless upon their cross-border migration, due to the continued existence of their state but ineffectiveness of their nationality. While afflicted by several shortcomings, the *1954 Convention* nevertheless provides an established framework which could benefit EDPs in their host country. Furthermore, even for EDPs who would find themselves with an ineffective nationality, the protection afforded by the 1954 Convention could still provide valuable guidance for the receiving country. Increased visibility of the phenomenon of statelessness and positive trends towards ratification and implementation of the *1954 Convention* could also positively benefit EDPs from LLISs if all other solutions were to fail.

Ultimately, the added value of the *1954 Convention* for EDPs would also depend on the benefits derived from their link with their respective deterritorialised LLISs. Exactly how much a deterritorialised state could do for its stranded nationals remains to be seen, but in the absence of precedents or binding frameworks, it may be useful to adopt a 'hope for the best, plan for the worst' approach. Reality is likely to prove much murkier than any neat legal forecast, which inevitably ends up relying on simplified scenarios. For instance, divided recognition could mean that the statehood of a deterritorialised LLIS regresses into the grey purgatory of quasi-states. Alternatively, it cannot be excluded that a LLIS could continue to exist as a sui generis entity, possessing international legal personality but falling short of detaining full statehood.

As all these options remain in the spectrum of possible futures, the current window of opportunity available for planning needs to be used to provide both legal forecasts of how the future may look like, but also a variety of legal solutions to the spread of legal problems that may eventually be faced by both LLISs and their nationals. Neglecting to examine every possible solution, whether pre-emptive or palliative in nature, is a luxury we cannot afford.