Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise

CATHERINE BLANCHARD

Abstract

The threat of the permanent physical disappearance of the territory of states no longer belongs to the mythical realm, and the situation is particularly imminent for small island developing states. While most international legal scholarship has so far focused on issues stemming from territorial disappearance, this article goes one step further. It questions the appropriateness of the classical notion of the territorial state — a socio-cultural and politico-legal entity evolving on a defined territorial area — as the basis for an international legal system faced with new realities created by climate change, sea-level rise, and globalization. After examining the current rules on statehood within the context of the physical disappearance of states' territories and looking into the solutions suggested in the legal literature to address territorial loss, this article assesses a new way of understanding

Résumé

La disparition permanente du territoire des États est désormais une menace bien réelle, tout particulièrement pour les petits États insulaires en développement. Jusqu'à présent, la doctrine a surtout porté sur des questions découlant de la disparition territoriale, mais le présent article pousse la réflexion encore plus loin. Il remet en question la pertinence de la notion classique de l'État territorial — une entité socio-culturelle et politico-juridique évoluant sur un territoire défini — comme fondement du système juridique international à l'heure des nouvelles réalités causées par les changements climatiques, la hausse du niveau de la mer et la mondialisation. Après avoir présenté la notion actuelle d'État dans le contexte de la disparition physique de territoires ainsi que les solutions préconisées dans la littérature juridique pour lutter contre les effets de la disparition territoriale, nous explorerons une

Catherine Blanchard, LLL and Bachelor of Social Science Honours, DVM, University of Ottawa; JD, Dalhousie University; LLM, Utrecht University; PhD Candidate, Utrecht University. The author would like to thank Professor Alfred Soons for his valuable comments and discussion as well as Harm Dotinga. The author also thanks the members of the editorial board of *The Canadian Yearbook of International Law* for their help in revising the final version of this article.

Vol. 53 [2015], doi:10.1017/cyl.2016.4
© The Canadian Yearbook of International Law / Annuaire canadien de droit international 2016

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

statehood by exploring theoretical lenses through which a new model of statehood could be contemplated.

Keywords: Statehood; territory; sea-level rise; new model of statehood; legitimacy of international law.

nouvelle notion d'État grâce à des concepts théoriques qui permettraient d'envisager un nouveau modèle étatique.

Mots-clés: État; territoire; hausse du niveau de la mer; nouveau modèle étatique; légitimité du droit international.

> The ascription of full status and participation rights usually reserved for "traditional" States to genuinely nonterritorial entities would require the greatest structural transformation international law has seen since the establishment of the so-called Westphalian order.
>
> — Jenny Grote Stoutenburg[1]

> All these challenges go deeper than simply questioning the appropriateness of certain existing rules of international law. The nature of the challenges is such that they call into question some basic axioms of international law.
>
> — Davor Vidas[2]

Introduction

How does international law react to the threat of the territorial disappearance of the state, which is the heart of the international legal regime?[3] In practice, the state-centred system and state-driven framework of international law are based on the existence of the nation-state — a socio-cultural entity coinciding with a politico-legal entity — that evolves on a defined territorial area.[4] In recent decades, however, these concepts

[1] Jenny Grote Stoutenburg, "When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of 'Deterritorialized' Island States" in Michael Gerrard & Gregory Wannier, eds, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 57 at 87 [Stoutenburg, "When Do"].

[2] Davor Vidas, "Sea-Level Rise and International Law: At the Convergence of Two Epochs" (2014) 4 Climate Law 70 at 73.

[3] See, eg, Derek Wong, "Sovereignty Sunk? The Position of 'Sinking States' at International Law" (2013) 14 Melb J Int'l L 346 at 347.

[4] UN Educational, Scientific and Cultural Organization (UNESCO), "Nation-State," online: UNESCO <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/nation-state/>; Cara Nine, "Ecological Refugees, States Borders, and the Lockean Proviso" (2010) 27:4 J Applied Philosophy 359 at 362; Stéphane Pierré-Caps, "La mondialisation et la crise de l'État national" in Jean-Denis Mouton & Jean-Pierre Cot, eds, *L'État dans la mondialisation: colloque de Nancy* (Paris: Éditions Pedone, 2013) 39 at 40.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

have been thrown into question by the growing role of various actors and the rise of transboundary challenges necessitating the involvement of the global community.[5] The increasing prominence of non-state actors has caused states to interact with these entities and with one another in new and previously unforeseen ways. The rise of non-state actors also raises questions concerning the importance of the role of states within the international legal order. While these developments cannot be ignored and have been addressed extensively in the legal literature, state consent and state sovereignty still remain at the core of the international legal system.[6]

However, what would happen if the basis of this system — the state itself — were to see its territory disappear? International law has in the past been faced with the extinction of statehood through dissolution (for example, Yugoslavia and Czechoslovakia) as well as through merger or absorption (for example, the People's Democratic Republic of Yemen merged with the Yemen Arab Republic to form the Republic of Yemen; the German Democratic Republic was absorbed by the Federal Republic of Germany).[7]

[5] See, eg, Immanuel Wallerstein, "The New World Disorder: If the States Collapse, Can the Nations be United?" in Albert Paolini, Anthony Jarvis & Christian Reus-Smit, eds, *Between Sovereignty and Global Governance. The United Nations, the State and Civil Society* (London: MacMillan Press; and New York: St Martin's Press, 1998) 171 at 181–82; Roman Kwiecién, "On Some Contemporary Challenges to Statehood in the International Legal Order: International Law between *Lotus* and Global Administrative Law" (2013) 51:3 Archiv des Völkerrechts 279 at 298; Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods" (2014) 108:1 AJIL 1 at 3, 6–7; Milena Sterio, "A Grotian Moment: Changes in the Legal Theory of Statehood" (2011) 39 Denv J Int'l L & Pol'y 209 at 209. See also, generally, Oscar Schachter, "The Decline of the Nation-State and Its Implications for International Law" (1998) 36 Colum J Transnat'l L 7.

[6] Kwiecién, *supra* note 5 at 288, 310–11; Emily Crawford & Rosemary Rayfuse, "Climate Change and Statehood" in Rosemary Rayfuse & Shirley Scott, eds, *International Law in the Era of Climate Change* (Cheltenham, UK: Edward Elgar, 2012) 243 at 245; Allen Buchanan, "The Legitimacy of International Law" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 79 at 91, 93 [Buchanan, "The Legitimacy"]; John Herz, "Rise and Demise of the Territorial State" (1957) 9:4 World Politics 473 at 480; Inger Österdahl, "Relatively Failed: Troubled Statehood and International Law" (2003) 14 Finnish YB Int'l L 49 at 49; Ian Brownlie, "Rebirth of Statehood" in Malcolm Evans, ed, *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth, UK: Aldershot, 1996) 5 at 6; Abhimanyu George Jain, "The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory" (2014) 50 Stan J Int'l L 1 at 7–9.

[7] Malcolm Shaw, *International Law*, 7th edition (Cambridge: Cambridge University Press, 2014) at 151–53. See also Allen Buchanan & Margaret Moore, "Introduction: The Making and Unmaking of Boundaries" in Allen Buchanan & Margaret Moore, eds, *States, Nations and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 1 at 1–2.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

The permanent physical disappearance of the territory of states, however, is unprecedented.[8]

Climate change and sea-level rise, leading to floods and to the submersion of territory, whether total or partial, appear to be the main causes of the potential territorial disappearance of states (although land and coastlines are also affected by other natural phenomena, such as storms and erosion).[9] The scientific evidence supporting the possibility of territorial disappearance is now well known. In its fifth assessment report in 2014, the International Panel on Climate Change (IPCC) underlined that "[t]he atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen."[10] Greenhouse gases (GHGs) "are extremely likely to have been the dominant cause of the observed warming since the mid-20th century."[11] As a consequence of these changes, the occurrence of sea-level rise cannot be denied, even if its measure remains uncertain.[12]

All coastal states are at risk of eventually being affected by rising sea levels.[13] However, the consequences of climate change seem even more

[8] Crawford & Rayfuse, *supra* note 6 at 248; Maxine Burkett, "The Nation Ex-Situ" in Gerrard & Wannier, *supra* note 1, 89 at 93 [Burkett, "Nation Ex-Situ"]; Julien Jeanneney, "L'Atlantide, remarques sur la submersion de l'intégralité du territoire d'un État" (2014) 118:1 RGDIP 95 at 99; International Law Association (ILA), Committee on International Law and Sea-Level Rise (SLR), *Minutes of the Closed Session (I)* (Washington, 2014) at 7 (statement by the Chair), online: ILA <http://www.ila-hq.org/en/committees/index.cfm/cid/1043> [ILA SLR 2014 Closed].

[9] David Caron, "Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict" in Seoung-Yong Hong & Jon M Van Dyke, eds, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden: Martinus Nijhoff, 2009) 1 at 8; Tony George Puthucherril, "Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions" (2012) 1 Global J Comp L 225 at 234; Jain, *supra* note 6 at 4–5.

[10] International Panel on Climate Change (IPCC), *Climate Change 2014 Synthesis Report: Summary for Policymakers* at 2, online: <http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf>.

[11] *Ibid* at 4.

[12] Davor Vidas, David Freestone & Jane McAdam, "International Law and Sea Level Rise: The New ILA Committee" (2015) 21 ILSA J Int'l & Comp L 397 at 397–98; Achim Maas & Alexander Carius, "Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond" in Jürgen Scheffran et al, eds, *Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability* (Berlin: Springer, 2012) 651 at 653.

[13] Puthucherril, *supra* note 9; Clive Schofield & David Freestone, "Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise" in Gerrard & Wannier, *supra* note 1, 141 at 141; Clive Schofield & I Mande Andi Arsana, "Imaginary Islands? Options to Preserve Maritime Jurisdictional Entitlements and Provide Stable Maritime Limits in the Face of Coastal Instability" (Proceedings of the Advisory Board on the Law of the Sea (ABLOS) Conference on Contentious Issues in UNCLOS – Surely Not?, Monaco, 2010) at 8–9.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

dramatic and imminent for small island developing states (SIDS).[14] Indeed, small states such as Tuvalu, Kiribati, the Marshall Islands, the Federated States of Micronesia and Palau in the South Pacific, or the Maldives in the Indian Ocean, have already started to experience the effects of sea-level rise because their entire territory is located only a few metres above sea level.[15]

The impact of sea-level rise on certain aspects of international law, raised for the first time among legal scholars at the end of the 1980s,[16] has recently resurfaced in the academic literature. However, most of this scholarship has focused on issues stemming from the disappearance of the territory of states, such as the effects on maritime zone entitlements, forced migration and the new phenomenon of environmental/ecological refugees, as well as the regime of international responsibility for climate change.[17] And while broader issues of statehood and sovereignty have generated much scholarly activity,[18] few scholars have addressed the specific issue of the continuing statehood of states with territory that is physically disappearing.[19] Further, most scholars working in the area have focused on

[14] Schofield & Arsana, *supra* note 13 at 2.

[15] *Ibid*; Puthucherril, *supra* note 9 at 232.

[16] See, eg, Alfred Soons, "The Effects of a Rising Sea Level on Maritime Limits and Boundaries" (1990) 37 Neth Int'l L Rev 207; David Caron, "When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level" (1990) 17 Ecology LQ 621 [Caron, "When Law"]; David Freestone, "International Law and Sea Level Rise" in R Churchill & D Freestone, eds, *International Law and Global Climate Change* (London: Graham & Trotman / Martinus Nijhoff, 1991) 109 [Freestone, "International Law"].

[17] Jain, *supra* note 6 at 12, referring to, eg, Michele Klein Solomon & Koko Warner, "Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks" in Gerrard & Wannier, *supra* note 1, 243; Alice Edwards, "Climate Change and International Refugee Law" in Rayfuse & Scott, *supra* note 6, 58; Catherine Redgewell, "Climate Change and International Environmental Law" in Rayfuse & Scott, *supra* note 6, 118; Schofield & Freestone, *supra* note 13; Maketo Robert et al, "Transboundary Climate Challenge to Coal: One Small Step against Dirty Energy, One Giant Leap for Climate Justice" in Gerrard Wannier, *supra* note 1, 589; Jacob David Werksman, "Could a Small Island Successfully Sue a Big Emitter?: Pursuing a Legal Theory and a Venue for Climate Justice" in Gerrard & Wannier, *supra* note 1, 409. See also Jenny Grote Stoutenburg, "Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise" (2011) 26 Int'l J Mar & Coast L 263 [Stoutenburg, "Implementing"]; Schofield & Arsana, *supra* note 13.

[18] James Crawford, *The Creation of States in International Law*, 2nd edition (Oxford: Oxford University Press, 2006); Thomas Grant, "Defining Statehood: The Montevideo Convention and Its Discontents" (1998–99) 37 Colum J Transnat'l L 403; Jure Vidmar, "Territorial Integrity and the Law of Statehood" (2012) 44 Geo Wash Int'l L Rev 697; Österdahl, *supra* note 6.

[19] Jain, *supra* note 6 at 13, referring to Burkett, "Nation Ex-Situ," *supra* note 8; Stoutenburg, "When Do," *supra* note 1; Crawford & Rayfuse, *supra* note 6; Maxine Burkett, "The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era" (2011) 2 Climate Law 345; Vidas, *supra* note 2; Wong, *supra* note 3.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

addressing how "[t]he continued existence of the state would be secured in accordance with traditional rules of international law."[20]

The concerns mentioned above — statehood, maritime zones and access to resources, migration, human rights, and so on — fall within a broader set of issues raised by territorial loss.[21] They are crucially affected by the disappearance of states' territories and are therefore addressed in the present article. However, this article aims to go one step further in questioning the classical notion of statehood under international law within the new practical realities of the twenty-first century created by climate change, sea-level rise, and globalization. This article therefore focuses on the following question: Facing the physical disappearance of states' territories, is the territorial state still an appropriate basis for the international legal system?

The first part of this article provides a portrait of the current rules on statehood within the context of the physical disappearance of states' territories. Therefore, we look at the role of territorial states within the international legal order and the classical definition of statehood under current international law and at how these concepts are affected by territorial and population loss. The analysis finds its starting point in the classical approach to statehood as defined under Article 1 of the 1933 *Montevideo Convention on the Rights and Duties of States* and customary international law, focusing mainly on the criteria of permanent population and defined territory.[22] We then explore scholarly debates regarding the manner in which rights and entitlements of states associated with statehood are affected by climate change, sea-level rise, and the physical disappearance of territory. While all states, especially coastal states, may eventually be affected by the impacts of climate change, SIDS are used as a case study for the purpose of this article. It is also important to note that even though rules and principles related to the creation of states may be used for comparison purposes, this article does not address the issue of the creation of states as such but, rather, focuses on their continuity as legal entities.

In the second part of the article, we turn to solutions suggested in the legal literature to address the loss of territory and, potentially, the loss of statehood by SIDS (although measures undertaken by other states are also referred to). This part first analyzes solutions rooted in traditional mechanisms and regimes, such as man-made preservation solutions and options for acquiring territory. We then look at the *sui generis* entity of the

[20] Crawford & Rayfuse, *supra* note 6 at 249–50.

[21] ILA, Committee on Baselines under the International Law of the Sea (CB), *Final Report* (Sofia, 2012) at 1, online: ILA <http://www.ila-hq.org/en/committees/index.cfm/cid/1028> [ILA CB], cited in Vidas, Freestone & McAdam, *supra* note 12 at 401.

[22] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 [*Montevideo Convention*]. While the other criteria (government and capacity to enter into relations with other states) are touched upon, they are not at the core of the analysis.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

"de-territorialized" state. This part of the article concludes with a critique of the feasibility and relevance of these suggested solutions.

Relying on the discussion of *sui generis* entities, the article finally attempts an assessment of potential solutions outside the territorial state-centric regime. We assess whether a new way of understanding statehood, a way that would depart from the view that the state is necessarily a territorial entity, could be more appropriate in the practical context at hand. For this purpose, we look at the concepts of the legitimacy of international law and morality within the international legal order as ethical bases for positing the necessity of an alternative model to the territorial state. The article concludes with an exploration of theoretical lenses — the diasporic and cosmopolitan theories, global governance theory, and concepts of equity — through which such a new model may be contemplated.

This article raises issues at the crossroads of classical concepts of international law and contingencies stemming from globalization and transboundary concerns.[23] It also seeks to outline a new perspective for scholars and practitioners from which to envisage the further development of international law.[24] Most of the impacts — practical and legal — of territorial disappearance have yet to occur; analyzing them beforehand therefore requires a certain level of speculation.[25] As such, this article largely relies on the theoretical work of international legal scholars since relevant international cases, decisions, and instruments on the topic are limited. It is, however, hoped that this article will form the basis for further work concerning the future of the notion of statehood for states with physically disappearing territories.

What Is Happening? The Classical View of Statehood and the New Reality of Territorial Disappearance

Before being able to assess whether the classical definition of statehood still has its place in international law, it is important first to look at the status and role of the state as the basis of the state-driven regime. It is also relevant to look at practical consequences that stem from applying this understanding of the meaning of state and statehood to the current factual setting of sea-level rise.

States and Statehood

The Role of Territorial States in International Law

The notion of "state" can be understood from two perspectives: the state as a territorial entity and the state as the way a particular political

[23] Österdahl, *supra* note 6 at 87.

[24] Vidas, Freestone & McAdam, *supra* note 12 at 400–01.

[25] Jeanneney, *supra* note 8 at 97.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

and social community organizes itself. The state as the primary subject of modern international law is the result of the intersection of these two approaches: a politically organized community on a defined territory.[26] What also characterizes modern international law is the place of states at the heart of the regime.[27] The starting point of this state-centred regime is often identified as the Peace of Westphalia of 1648, "where unity was established by nation states exercising sovereignty over certain territories."[28] With the establishment of defined sovereign entities came a new political order around which societies organized themselves — the Westphalian system — where the interactions of these sovereign entities — nation-states — were regulated by a corpus of rules that formed the international legal regime.

Sovereignty over a defined geographical area epitomized the inextricable link between nation-states and their territory and led the "territorial state" to become the main actor in the Westphalian system.[29] The predominance of territoriality brought a new structure to the international order:[30] "[W]hen contrasted with the age of anarchy and insecurity which immediately preceded it, the age of territoriality appears as one of relative order and safety."[31] Indeed, the classical purposes of the territorial state have been stability and security.[32] As stated by Derek Wong, "territory [is] the physical foundation of power and jurisdiction, as well as nationality and, thus, the basis upon which peace and security rest."[33] However, territory is also the basis for a state's population, the physical area where people "associate and organise themselves"[34] and where they exercise their right

[26] See, eg, Shaw, *supra* note 7 at 143.

[27] See, eg, Jain, *supra* note 6 at 7.

[28] Leo Gross, "The Peace of Westphalia, 1648–1948" (1948) 42 AJIL 20 at 20, cited in Wong, *supra* note 3 at 352. See also Daniel Bethlehem, "The End of Geography: The Changing Nature of the International System and the Challenge to International Law" (2014) 25:1 EJIL 9 at 13; Sterio, *supra* note 5 at 211.

[29] Wong, *supra* note 3 at 353.

[30] Throughout this article, "territoriality" is used in its general sense — that is, a link or connection to a particular territory. It is not limited to the territoriality principle of jurisdiction under international law.

[31] Herz, *supra* note 6 at 475, 477.

[32] Jain, *supra* note 6 at 23; Burkett, "Nation Ex-Situ," *supra* note 8 at 106; Österdahl, *supra* note 6 at 76.

[33] Wong, *supra* note 3 at 365. See also Andrew Hurrell, "International Law and the Making and Unmaking of Boundaries" in Buchanan & Moore, *supra* note 7, 275 at 279–80.

[34] Wong, *supra* note 3 at 365–66. See also "Yugoslavia Peace Conference Opinion No 1" (1991) 92 ILR 162 at 165 (Arbitration Commission of the Conference on Yugoslavia), cited in Wong, *supra* note 3 at 354–55; Vidas, *supra* note 2 at 81–82.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

to self-determination.[35] It is, further, a source of economic, historical, and cultural resources for the maintenance of the population.[36] It has even been characterized as "reflect[ing] the identity (or goal values) of the society as a whole."[37] For governing authorities, territory normally defines spatial limitations for the exercise of jurisdiction.[38] Territory is therefore both "a factual reality and a legal construction" creating a "functional framework."[39]

Territoriality is important not only as one of the characteristics of states themselves and as a basis upon which states achieve organization and stability but also for the role it plays in defining the scope of "various other principles and rules of international law."[40] For example, the prohibition on the threat or use of force "against the territorial integrity … of any state"[41] is expressly linked to state territory.[42] Similarly, state jurisdiction, while applicable outside a state's territory in some cases (for example, through the nationality or passive personality principles) is still strongly rooted in a state's territory through the territoriality principle.[43]

This portrait of the nature and role of the state — a nation-state intrinsically linked with its territory — is still the one that prevails under current international law.[44] Even if other actors — individuals, international organizations, corporations, even the market itself[45] — are now playing a competing role, "there is no evidence that the state has died."[46] And in the absence of a better model, the state remains, from both a practical and

[35] Nine, *supra* note 4 at 362. The issue of self-determination will be discussed in further detail below.

[36] Jain, *supra* note 6 at 23. See also Nine, *supra* note 4 at 362; Allen Buchanan, "The Making and Unmaking of Boundaries: What Liberalism Has to Say" in Buchanan & Moore, *supra* note 7, 231 at 232 [Buchanan, "The Making"]; Buchanan & Moore, *supra* note 7 at 6; Hurrell, *supra* note 33 at 279.

[37] Surya Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff, 1997) at 4, cited in Wong, *supra* note 3 at 365–66. See also Burkett, "Nation Ex-Situ," *supra* note 8 at 103.

[38] Jain, *supra* note 6 at 22–23.

[39] Jeanneney, *supra* note 8 at 105: "*comme réalité factuelle et comme construction juridique … un cadre fonctionnel.*"

[40] Vidas, *supra* note 2 at 78.

[41] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(4) [*UN Charter*].

[42] Bethlehem, *supra* note 28 at 13; Vidmar, *supra* note 18 at 707.

[43] Shaw, *supra* note 7 at 479–84; Bethlehem, *supra* note 28 at 13–14.

[44] Vidmar, *supra* note 18 at 699–700.

[45] Schachter, *supra* note 5 at 9. See also Yves Petit, "Les risques environnementaux globaux et les transformations de la souveraineté" in Mouton & Cot, *supra* note 4, 177 at 179.

[46] Brownlie, *supra* note 6 at 5.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

ideological perspective, "the most viable form of social organization."[47] However, the value of the state's core component — that is to say, its territory — might change. For example, "technological developments have robbed the territory requirement of much of its functional utility" since the issues of security, resources, and jurisdiction can be seen as being more closely related to the globalized world than to a state's territory.[48] These developments have reduced territory from an essential component of statehood to only a relevant one, especially when looking at the continuity of the state.[49] Consequently, as the practical value of the territorial state fades, so too may its ideological value, which might in turn lead to the necessity of adapting the current model.[50] It might even trigger the need for an alternative model of social organization that departs from territoriality as its foundation stone.

The Classical Definition of Statehood

No express conventional definition of statehood can be found in international law.[51] As a substitute, one can look to the criteria listed in Article 1 of the 1933 *Montevideo Convention* (Montevideo criteria), the only international conventional instrument to list such criteria. While the *Montevideo Convention* is a regional treaty, its Article 1 is now considered as having entered the sphere of customary international law.[52] It reads as follows:

> The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.[53]

However, this definition is often criticized as being incomplete or unsatisfactory, and the normative value of its components remains uncertain.[54] Louis Henkin has argued that the Montevideo criteria are not a prerequisite for

[47] Österdahl, *supra* note 6 at 68.

[48] Jain, *supra* note 6 at 51, 24–25.

[49] *Ibid* at 51. See also Jeanneney, *supra* note 8 at 116. The issues of the creation and continuity of states are discussed in greater detail in the next sub-section.

[50] Österdahl, *supra* note 6 at 68–69.

[51] See, eg, Wong, *supra* note 3 at 352; Grant, *supra* note 18 at 413.

[52] See, eg, Grant, *supra* note 18 at 455–56; David Harris, *Cases and Materials on International Law*, 7th edition (London: Sweet & Maxwell, 2010) at 92, cited in Wong, *supra* note 3 at 353; Jeanneney, *supra* note 8 at 101.

[53] *Montevideo Convention*, *supra* note 22, art 1.

[54] Grant, *supra* note 18 at 413–14; Wong, *supra* note 3 at 354; Jeanneney, *supra* note 8 at 101.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

the creation of states but, rather, a mere description of what is commonly referred to as statehood.[55] Further, Thomas Grant has described the continuing use of the *Montevideo Convention* as "a source of puzzlement" because of its obsolete character:

> The *Convention* includes elements that are not clearly prerequisite to statehood, and it excludes elements that writers now widely regard as indispensable to a definition of the state … It addresses a concept that had been in flux over the century leading up to its framing and that continued to change thereafter. It posits a definition of statehood highly contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated.[56]

To be more in line with current, practical realities, it has been suggested that other elements should be considered when assessing statehood.[57] For example, the independence of a state from other entities (such as the establishment of Manchukuo in 1932, which was widely considered a puppet state under the control of Japanese authorities) and the legality of its creation (such as the creation of Rhodesia based on a racist ideology) should be taken into account.[58] Further, recognition by other states (for instance, Kosovo or Taiwan)[59] or the necessity of democratic institutions and respect for the rights of minorities — two criteria discussed since the end of the twentieth century — could also be considered.[60]

However, it should be borne in mind that this list is not exhaustive, and even if all elements were fulfilled, the recognition of an entity as a state cannot be guaranteed or officially established.[61] Further, notwithstanding the suggested alternative or additional criteria, "no proposals codifying statehood have been accepted since the [*Montevideo Convention*]. [T]his problem [has been attributed] in part to a political reluctance by states to

[55] Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff, 1995) at 13, cited in Jain, *supra* note 6 at 16.

[56] Grant, *supra* note 18 at 453. See also Österdahl, *supra* note 6 at 87.

[57] Grant, *supra* note 18 at 437–47, 450–51.

[58] See further Stoutenburg, "When Do," *supra* note 1 at 73–74.

[59] The necessity of recognition by other states forms the basis of the constitutive theory, one of the two theories of statehood under international law, the other being the declaratory theory, which is based solely on satisfaction of the Montevideo criteria. For more on this topic, see, eg, Shaw, *supra* note 7 at 150–51.

[60] While there might be no express definition of state or statehood under international law, these "newly considered" elements, taken together with the classical criteria described above, as well as state practice, still form a set of tools that could be relied upon as a functional definition of statehood by a decision maker required to determine whether an entity should be considered a state.

[61] Crawford & Rayfuse, *supra* note 6 at 246.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

announce a clear definition of statehood."[62] Whatever the elements used to define statehood and ascertain the existence of an entity as a state, what interests us in the present article is whether and how these criteria can be preserved and applied when faced with the progressive transformations stemming from climate change and sea-level rise. Before a complete loss of territory occurs, the effects of sea-level rise will first render a territory uninhabitable, leading to migration and population displacement.[63] It is therefore relevant to look more closely at the role played by the criteria of population and territory in the definition of statehood.

There is, first, no apparent minimum quantitative requirement for population size.[64] What really matters is the qualitative requirement of a communal life; a mere "care-taking population" (such as for the maintenance of facilities) would not be sufficient.[65] Similarly, although "a territory must be adequately recognized and controlled regularly by an entity to qualify for statehood,"[66] there is also no minimum requirement for territory size.[67] Imprecise boundary delimitations or unfixed borders will not lead to a lack of a defined territory either.[68] However, a state has to exist on a natural piece of land; "a complete artificial construction does not fulfil the criteria."[69] The use of artificial islands to preserve statehood can therefore be questioned.[70] There is also debate as to whether an uninhabitable island or a rock could fulfil the requirement of defined territory, but it is clear that a low-tide elevation does not.[71]

[62] Grant, *supra* note 18 at 447.

[63] Wong, *supra* note 3 at 351; Stoutenburg, "When Do," *supra* note 1 at 57; Jain, *supra* note 6 at 6, 52.

[64] Crawford, supra note 18 at 52; *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at para 81.

[65] Stoutenburg, "When Do," *supra* note 1 at 61, 64–65; *In Re Duchy of Sealand*, [1978] 80 ILR 683 at 687 (Administrative Court of Cologne), cited and discussed in Michael Gagain, "Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the 'Constitution of the Oceans'" (2012) 23 Colo J Int'l Envt'l L & Pol'y 7 at 116–17.

[66] Stoutenburg, "When Do," *supra* note 1 at 90.

[67] Crawford & Rayfuse, *supra* note 6 at 246; Jain, *supra* note 6 at 18, 21.

[68] Wong, *supra* note 3 at 355; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)*, [1969] ICJ Rep 3 at 32–33, cited in Gagain, *supra* note 65 at 90.

[69] Wong, *supra* note 3 at 355. See also *In Re Duchy of Sealand*, *supra* note 65 at 685.

[70] The issue of artificial structures will be discussed further in the second part of this article.

[71] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, [2001] ICJ Rep 40 at para 100, cited in Stoutenburg, "When Do," *supra* note 1 at 60.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Based on the now famous statement of Max Huber, arbitrator in the *Island of Palmas* case, the existence of a state in the complete absence of a territory does not seem to be a possible option: "International law, the structure of which is not based on any super-state organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations."[72] Two trends exist in the literature as to the necessity of the territorial requirement.[73] On the one hand, in the same vein as Huber's statement, Rosemary Rayfuse suggests that, following a complete submergence of a state's territory, the requirement would no longer be met and statehood would consequently fail.[74] She is joined by Ineta Ziemele who states that, while mere changes to these elements would not have an impact on statehood, the disappearance of territory and/or population would.[75] Julien Jeanneney also suggests that if a state is understood as being a community organized on a territory, the complete submersion of that territory would consequently lead to the extinction of statehood.[76] On the other hand, Wong takes the view that this conclusion of automatic state extinction goes against the "strong presumption in favour of the continued existence of a state."[77] The present article follows the latter approach and rejects the premise that territorial disappearance automatically entails the extinction of statehood.

What is certain is that international law aims at stability. And to preserve that stability, it operates on a key premise: once statehood has been acquired, it is very difficult to lose.[78] This is why, once an entity becomes a state, "the loss of one or more of these criteria will not necessarily deprive an entity of its statehood."[79] One author has even suggested that, by stretching the reasoning that "[t]here is no lower limit on the size of this territory or of its ability to sustain a population," we might consider a submerged

[72] *Island of Palmas case (or Miangas) (United States v The Netherlands)*, [1928] II RIAA 829 at 839, cited in Crawford & Rayfuse, *supra* note 6 at 250.

[73] See Vidas, *supra* note 2 at 78–79.

[74] Rosemary Rayfuse, "International Law and Disappearing States: Maritime Zones and the Criteria for Statehood" (2011) 41:6 Envtl Pol'y & L 281. See also Lilian Yamamoto & Miguel Esteban, "Vanishing Island States and Sovereignty" (2010) 53 Ocean & Coastal Management 1 at 6 [Yamamoto & Esteban, "Vanishing Island"].

[75] Ineta Ziemele, "States, Extinction of," *Max Planck Encyclopedia of Public International Law* (May 2007) at para 3, online: <http://opil.ouplaw.com/home/EPIL>.

[76] Jeanneney, *supra* note 8 at 98–99.

[77] Wong, *supra* note 3 at 362.

[78] Crawford, *supra* note 18 at 701; Jain, *supra* note 6 at 27.

[79] Crawford & Rayfuse, *supra* note 6 at 246–47. See also Grant, *supra* note 18 at 435; Sterio, *supra* note 5 at 216.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

territory as meeting the territorial requirement.[80] We could also rely on Article 6 of the *Montevideo Convention*, which supports this strong presumption of continuity by stating that once recognition has been given, it is irrevocable.[81] Based on this reasoning, SIDS, having been recognized by the international community, would still have the right to have their legal personality acknowledged whatever might happen to the components of their statehood.

In fact, the Montevideo criteria address the elements needed for an entity to become a state and not the circumstances under which it can continue as such or how statehood becomes extinguished.[82] The requirement of territory therefore seems essential for the creation of a state, but loses its importance when discussing the continuity of that state.[83] Indeed, in state creation settings, territory plays a double role: it is first seen as a source of functional utility and social organization (as discussed earlier in this article), but it also acts "as a desirable barrier to statehood" to prevent the "uncontrolled proliferation of states."[84] However, when talking about the continuity of an existing state, only the functional purpose remains. We could therefore posit that, if a new model for functional utility could be found, the territorial requirement would not be necessary for state continuity.

Nonetheless, a loss of statehood entails a deprivation of entitlements. This is why it "is not an insignificant or insubstantial event; it represents a significant downgrading of status."[85] For SIDS especially, statehood is important. First, statehood gives access to United Nations (UN) membership,[86] which

[80] Jain, *supra* note 6 at 35.

[81] *Montevideo Convention*, *supra* note 22, art 6: "The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable." Cited in Lilian Yamamoto & Miguel Esteban, *Atoll Island States and International Law* (Berlin: Springer, 2014) at 186 [Yamamoto & Esteban, *Atoll Island*].

[82] Grant, *supra* note 18 at 435; Gagain, *supra* note 65 at 91; Jeanneney, *supra* note 8 at 102–03; Colin Warbrick, "Recognition of States: Recent European Practice" in Evans, *supra* note 6, 9 at 13.

[83] See, generally, eg, Jain, *supra* note 6; Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 202.

[84] Jain, *supra* note 6 at 27.

[85] *Ibid* at 9. See also Sterio, *supra* note 5 at 217–19, on the reasons for which statehood is important.

[86] Yamamoto & Esteban have argued that since they are recognized as UN members, SIDS could not lose that membership only by losing recognition of their statehood by other states. Indeed, according to art 6 of the *UN Charter*, *supra* note 41, UN membership can only be lost if the principles of the *Charter* have been violated, which would not generally be the case with SIDS. See Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 202.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

"is crucial because it provides a cost-effective method of maintaining international contacts, thus avoiding the need for a worldwide diplomatic apparatus."[87] Statehood is also a sign of links between state, culture, and identity, which are core values for the peoples inhabiting SIDS. Finally, the loss of statehood could lead to the loss of maritime rights and other resource-related rights, which could be fatal for states with economies that mostly rely on revenues from such activities.[88] These issues will be discussed in greater detail in the following sections.

What we are left with is a system that is not adapted to the permanent physical disappearance of territory[89] and that is not well suited to anticipating whether the loss of population and/or territory is fatal to statehood.[90] However, while rooted in factual elements, statehood is a legal status stemming from rules and practices.[91] We can therefore presume that a modification of the legal principles upon which statehood rests could lead to a new way of envisaging it. But one must also keep in mind that statehood is "ultimately a matter of acceptance by the international community."[92] The coherence normally expected from the Westphalian system is now being confronted by new realities brought on by climate change and sea-level rise.[93]

RIGHTS AND OBLIGATIONS TRIGGERED BY THE PHYSICAL DISAPPEARANCE OF THE TERRITORY OF STATES

When an entity is recognized as a state, the international community acknowledges that it is entitled to rights associated with statehood. Modifying the constituent elements of statehood therefore affects not only the legal status of a state but also the entitlements owed either to the state itself or to its people. This section does not aim to address all of the legal consequences of sea-level rise as this would go beyond the scope of this article. Rather, it is directed at adding a practical component to the portrait of territoriality and statehood: it will present an overview of some of the main — or most often discussed — international legal consequences

[87] Wong, *supra* note 3 at 349.

[88] *Ibid* at 349–50.

[89] Jain, *supra* note 6 at 28, 33.

[90] Crawford & Rayfuse, *supra* note 6 at 248.

[91] Crawford, *supra* note 18 at 5, cited in Wong, *supra* note 3 at 352; Vidmar, *supra* note 18 at 702, 747; Warbrick, *supra* note 82 at 12; Sterio, *supra* note 5 at 215–16.

[92] Rosemary Rayfuse, "Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of 'Disappearing' States" in Gerrard & Wannier, *supra* note 1, 167 at 177 [Rayfuse, "Sea Level Rise"].

[93] Burkett, "Nation Ex-Situ," *supra* note 8 at 92.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

of territorial disappearance stemming from sea-level rise. This section will therefore first look at various rights, owed either to the state or to its people, that are affected by territorial disappearance. It will then address the issue of state responsibility and show how the climate change regime provides limited relevant channels of relief for SIDS.[94]

Claims over Maritime Zones and Rights to Resources

A first concern that arises when talking about territorial loss is the potential loss of resources that would ensue. The entitlement to resources found in a state's territory also extends to its maritime zones.[95] In the case of SIDS, resources are intrinsically linked to states' maritime zones,[96] particularly through revenues coming from fishing licences and the fishing industry.[97] As shown by Ann Powers and Christophe Stucko in 2007, fishing licences alone accounted for 42 percent of all government revenues in Kiribati and 11 percent of all government revenues in Tuvalu.[98] In the Maldives, 10 percent of the gross domestic product is attributable to fisheries.[99] Achim Maas and Alexander Carius have also observed that "the combined exclusive economic zones [(EEZs)] of the Pacific island states are several times larger than the whole of the [European Union, and with] the potential of blue-sea fishing and deep-sea mining, the [EEZs] are important economic assets."[100] From a human perspective, the identity and welfare of coastal communities are "closely intertwined with the resources, ecosystems, goods and services available in those particular regions," putting maritime resources at the core of socio-economic and cultural conditions of the populations of SIDS.[101]

In light of the law of the sea principle that "the land dominates the sea," the disappearance of the entire territory to which these zones relate raises questions about the continuity of the zones themselves.[102] Even partial

[94] David Freestone, "Can the UN Climate Regime Respond to the Challenges of Sea Level Rise?" (2013) 35 U Haw L Rev 671 at 672 [Freestone, "Can the UN"].

[95] Gagain, *supra* note 65 at 93

[96] See, eg, Gregory Wannier & Michael Gerrard, "Overview" in Gerrard & Wannier, *supra* note 1, 3 at 8; Freestone, "Can the UN," *supra* note 94 at 674, quoting Schofield & Freestone, *supra* note 13 at 141.

[97] Ann Powers & Christophe Stucko, "Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels" in Gerrard & Wannier, *supra* note 1, 123 at 131; Gagain, *supra* note 65 at 94.

[98] Powers & Stucko, *supra* note 97 at 132.

[99] Gagain, *supra* note 65 at 94.

[100] Maas & Carius, *supra* note 12 at 656.

[101] Puthucherril, *supra* note 9 at 258.

[102] See, e.g. Jeanneney, *supra* note 8 at 109.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

submersion of territories could create some concerns because formerly habitable territories that become "[r]ocks which cannot sustain human habitation or economic life of their own" may not support claims to an EEZ or a continental shelf.[103] Even the *United Nations Convention on the Law of the Sea* (*UNCLOS*) does not provide answers to these questions as the convention "was tailored to the geographical circumstances of its own time, not the ones yet to come."[104] Yet there seems to be a consensus that "[t]hese marine resources will be lost with the shrinking or disappearance of an island state's maritime zones caused by sea level rise, a consequence that could be prevented only by amending the law of the sea to provide for stable maritime zones."[105]

The basis for this consensus resides in the ambulatory nature of baselines. With the rise of the sea level, these baselines, from which the measurement of zones proceeds,[106] move inland, consequently creating ambulatory maritime zones.[107] The International Law Association's Committee on Baselines concluded in favour of keeping ambulatory baselines,[108] but the possibility of fixing the outer limits of maritime boundaries is still being discussed.[109] Another concern arising from ambulatory baselines is the water/land ratio required under Article 47(1) of *UNCLOS* for the drawing of archipelagic baselines.[110] Sea-level rise might affect this ratio and deprive archipelagic states of rights to which they are entitled under the current regime, most particularly those associated with archipelagic waters.[111]

[103] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, art 121(3) [*UNCLOS*]. See also Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 6.

[104] Vidas, *supra* note 2 at 75.

[105] Stoutenburg, "When Do," *supra* note 1 at 78. See also Gagain, *supra* note 65 at 94–95; ILA SLR 2014 Closed, *supra* note 8 at 2.

[106] *UNCLOS*, *supra* note 103, arts 5, 57, 76(1). See also, eg, Gagain, *supra* note 65 at 95–96.

[107] See, eg, Caron, "When Law," *supra* note 16 at 632.

[108] ILA CB, *supra* note 21 at 31.

[109] See, eg, Soons, *supra* note 16; Stoutenburg, "Implementing," *supra* note 17 at 275; Moritaka Hayasi, "Sea Level Rise and the Law of the Sea: Legal and Policy Options" (International Symposium on Islands and Oceans, Tokyo, 22–23 January 2009) 79 at 82; Moritaka Hayasi, "Sea-level Rise and the Law of the Sea: How Can the Affected States be Better Protected" in Clive Schofield, Seokwoo Lee & Moon-Sang Kwoon, eds, *The Limits of Maritime Jurisdiction* (Leiden: Brill, 2013) 609 at 616–17 [Hayasi, "Affected States"]; ILA, SLR, *Draft Conference Report* (Johannesburg, 2016) at 12–4, online: ILA <http://www.ila-hq.org/en/committees/index.cfm/cid/1043> [ILA SLR 2016].

[110] See, eg, Stoutenburg, "Implementing," *supra* note 17 at 275.

[111] *UNCLOS*, *supra* note 103, arts 49, 52–53.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Even if a stable regime of baselines or maritime zones were adopted, a problem would remain. While a stable regime is "an adequate solution if only a part of the territory was to be submerged … it is not clear at present whether this solution is acceptable for a completely submerged Island State."[112] This is why scholars have suggested that, even faced with the complete disappearance of territory, the maritime zones could still be managed either by an authority for "the benefit of the displaced population, through resource rents that could fund relocation and livelihood in the new host state"[113] or by the displaced population itself.[114] These suggestions open the door to a model that goes beyond the "territory-resources" relationship and creates a direct link between the resources and the populations benefiting from them.

Forced Displacements

The phenomenon of "environmentally displaced persons" fits the two-step model of consequences of sea-level rise: a territory might become uninhabitable long before it completely disappears, triggering the issue of whether a state can survive the loss of its population.[115] This phenomenon is also likely to be multifaceted: climate change not only affects migration, but "it will do so *in combination with* a range of other economic, social and political drivers which themselves affect migration."[116]

Inhabitants of SIDS are among those who will be forced by climate change-related causes to relocate. They will do so either internally (for example, by moving to another island forming part of the state's territory, although this resettlement might only be temporary, as all territory of low-lying island states is endangered by sea-level rise) or, potentially, by crossing international borders.[117] While forced displacements may affect

[112] Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 7.

[113] Burkett, "Nation Ex-Situ," *supra* note 8 at 107, citing Rosemary Rayfuse, "W(h)ither Tuvalu? Oceans Governance and Disappearing States" (International Symposium on Islands and Oceans, Tokyo, 22–23 January 2009) at 101 [Rayfuse, "W(h)ither Tuvalu"].

[114] ILA, SLR, *Minutes of the Open Session* (Washington, 2014) at 5, online: ILA <http://www.ila-hq.org/en/committees/index.cfm/cid/1043> [ILA SLR 2014 Open].

[115] Puthucherril, *supra* note 9 at 234–35. The term "environmentally displaced persons" is preferable to expressions such as environmental, ecological or climate refugees because there is legal uncertainty as to whether people forced to move for environmental reasons, including climate change, can benefit from refugee protection. Further, the expression "environmentally displaced persons" covers both people who are suddenly displaced because of natural disasters, and people who have to move gradually or in a planned manner: see Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 288.

[116] Vidas, Freestone & McAdam, *supra* note 12 at 405–06 (emphasis in original).

[117] *Ibid.*

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

the population criterion of statehood, these displacements indubitably also raise concerns related to the future of the populations themselves as well as to the protection that can be offered to them. The issue of internally displaced persons has, for example, been addressed in the 1998 *Guiding Principles on Internal Displacement*.[118] These principles aim to "address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection" during the different phases of displacement.[119]

Externally displaced persons, however, face a "legal protection gap." To benefit from refugee protection, one must have a "well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, [be] outside the country of his nationality and [be] unable or, owing to such fear, [be] unwilling to avail himself of the protection of that country," and the fear of persecution must be personalized.[120] It has been concluded by the New Zealand Immigration and Protection Tribunal — the first instance to have rendered decisions on this matter — that environmentally displaced persons do not fall under the protection of the *Convention Relating to the Status of Refugees*, above all, because the risk is faced by populations as a whole and is not personalized to a particular applicant.[121]

Under the current regime of refugee protection, the status of environmentally displaced persons therefore remains uncertain. This is why those who advocate in favour of extending refugee protection do so on the basis that, because "both 'normal' and climate-change-related refugees represent involuntary migrants who are unable to return to their homeland, they are both equally entitled to protection under international refugee law."[122] Indeed, because of the close relationship between environmental degradation and human vulnerability, "pathways [could] … be created into international protection regimes."[123] For example, the International Law Commission has recently adopted draft articles on the protection of

[118] Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39: Addendum: Guiding Principles on Internal Displacement*, UNESC, Doc E/CN.4/1998/53/Add.2 (1998).

[119] *Ibid* at 3, para 9. See also Puthucherril, *supra* note 9 at 246.

[120] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, art 1A(2) [*Refugee Convention*].

[121] See, eg, *BG (Fiji)*, [2012] NZIPT 800091; *AF (Kiribati)*, [2013] NZIPT 800413; *AD (Tuvalu)*, [2014] NZIT 800517–520.

[122] Puthucherril, *supra* note 9 at 252. See also Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 234; Jeanneney, *supra* note 8 at 107–09.

[123] *AF (Kiribati)*, *supra* note 121 at para 57.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

persons in the event of natural disasters, and its work could potentially be used as a framework for filling the current gap regarding persons who are externally displaced due to environmental-related causes.[124]

Self-Determination

Potential loss of territory goes even further than affecting a state's entitlements to its resources or causing the forced displacement of its people. As argued by Jenny Stoutenburg, "[c]limate-change-induced sea level rise will damage island state economies, tear up the social fabric, and uproot island cultures. By destroying the physical basis for the exercise of any kind of activity, the inundation of a small island state's territory would *impair the ability of the islanders to determine their political, economic, social, and cultural future*."[125] Indeed, changes triggered by territorial loss could even be seen as affecting a people's right to self-determination.

The right to self-determination recognizes the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[126] In light of this definition, and following the discussion in the previous sub-sections of this article, two observations can be made. First, a negative impact on peoples' ability to "pursue their economic … development" due to impacts on entitlements over maritime zones and their resources would be a direct interference with their self-determination. Second and similarly, if a SIDS population cannot be relocated as a people to a new territory, that people's potential dispersal caused by forced migration would create an obstacle to its social and cultural development.[127]

[124] International Law Commission (ILC), *Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading*, Doc A/CN.4/L.831 (2014).

[125] Stoutenburg, "When Do," *supra* note 1 at 76–77 (emphasis added). On the issue of cultural identity, see also ILA SLR 2016, *supra* note 109 at 17.

[126] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 1(1) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 1(1) [*ICESCR*]. The same wording is used in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, Doc A/RES/1514(XV) (14 December 1960) at para 2. See also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, Doc A/RES/25/2625 (24 October 1970) at principle 5. Mostly used in the context of decolonization, the concept of self-determination, however, has been applied outside this traditional context. See, eg, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at para 79; Daniel Thürer & Thomas Burri, "Self-Determination," *Max Planck Encyclopedia of Public International Law* (December 2008) at para 34.

[127] See, generally, Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 176.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

This right to free manifestation of status and development is expressed from two perspectives: autonomy and independence, which can be intertwined. While autonomy normally refers to the ability of a people to govern itself, or what is also called internal self-determination, "independence is the requirement that a group possesses a domain of political control independent of higher or foreign political units," which is also referred to as external self-determination.[128] A people or self-determination unit normally expresses autonomy and independence against another entity, most traditionally another state or colonial power. One could therefore question, under existing rules of self-determination, against whom a SIDS people, as a self-determination unit, would express this right.

It has also been argued that the right to self-determination, from the perspectives of both autonomy and independence, cannot be fully exercised without a connection to territory.[129] Jörgen Ödalen, summarizing Cara Nine's argument, explains how the absence of such a connection would negatively impact on the exercise of the right of self-determination:

> Territorial rights are justified because they protect and promote the self-determination of peoples and peoples' capacities to establish justice for their members. If a people is to be self-determining, it must rule itself; and in order for it to rule itself it must have the moral and political authority to establish justice for its members. In order to be self-determining then, a group which is a legitimate holder of a right to self-determination must have sovereignty over the territory where its members (usually) live. Without territorial rights, a self-determining group may cease to exist *qua* self-determining group.[130]

This explanation raises a major concern. According to this approach, the only way to ensure the full self-determination of the people of SIDS would be to change the way territorial entitlements are understood and applied since there are nowadays no new territories available.[131]

State Responsibility and the Consequences of Territorial Disappearance Due to Sea-Level Rise: The Appropriateness of the Climate Change Regime

The above discussions of the right to resources, forced displacements, and self-determination show that the consequences of territorial disappearance stemming from sea-level rise must be assessed from a broad perspective.

[128] Jörgen Ödalen, "Underwater Self-determination: Sea-level Rise and Deterritorialised Small Island States" (2014) 17:2 Ethics, Policy & Environment 225 at 233. See also Nine, *supra* note 4 at 362.

[129] Ödalen, *supra* note 128 at 226, 232.

[130] *Ibid* at 229–30.

[131] Nine, *supra* note 4 at 366.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Indeed, as discussed above, the situation must not only be seen from the sole perspective of statehood but also from the perspective of rights and obligations associated with it. This broader perspective therefore leads us to address how the impacts of sea-level rise could affect certain obligations owed by states under other regimes and trigger consequences for potential breaches of these obligations.

In order for a state to raise the responsibility of another, it must show "[a]n internationally wrongful act[, which] requires two elements: first, the attribution of a certain conduct (which can be an act or an omission) to a state under international law, which must secondly constitute a breach of an international obligation of the state."[132] In the present case, it is difficult to see how the impacts of sea-level rise on SIDS could trigger the application of the regime of state responsibility or satisfy both of its requirements.

Nevertheless, it would be logical to turn to the climate change regime to determine whether there is a way of raising responsibility and seeking reparation, as climate change has been identified as the most probable cause of sea-level rise.[133] The conventional climate change regime is based on two main instruments. First, the *United Nations Framework Convention on Climate Change* (*UNFCCC*) sets general commitments directed towards GHG reduction.[134] The second instrument, the *Kyoto Protocol*, establishes hard targets and timetables to achieve the reduction of emissions as well as the means to achieve these targets.[135] Additionally, once it enters into force, the recently adopted *Paris Agreement* will complete the framework for climate change mitigation by limiting the increase of global average temperatures to 2 degrees Celsius — and preferably 1.5 degrees Celsius — through nationally determined, progressive contributions that will be renewable every five years.[136]

[132] Stoutenburg, "When Do," *supra* note 1 at 80. See also ILC, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83 (3 August 2001), art 2; Jain, *supra* note 6 at 41–42.

[133] IPCC, *supra* note 10 at 2, 4.

[134] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, art 4 [UNFCCC].

[135] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162, arts 3–4, 6, 12, 17 [Kyoto Protocol]. The targets were subsequently amended at the Doha Conference in 2012 for the second commitment period (2013–20), but the amendments are not yet into force (as of May 2016).

[136] *Adoption of the Paris Agreement*, UNFCCC, UN Doc FCCC/CP/2015/L.9 (12 December 2015), arts 2–3, 4(9) [*Paris Agreement*]. The *Paris Agreement* will enter into force when fifty-five states representing 55 percent of global emissions will have ratified or acceded to the Agreement. It will be open for signature from 22 April 2016 to 21 April 2017. See Daniel Bodansky, "Reflections on the Paris Conference" (15 December 2015), online: Opinio Juris <http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference/>.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

This conventional regime, however, has had limited impact as the obligations imposed on states are mainly restricted to obligations of means, and the few obligations of result do not bind major emitters.[137] Further, the nationally determined contributions under the *Paris Agreement* will be non-binding and solely dependent on the will of states, and while a pledge to mobilize US $100 billion for a "green fund" has been made, no specific mechanism has been established to achieve that target. The *Paris Agreement* nevertheless shows the strong desire of states to come together to revitalize the structure of the climate change regime, based on transparency and facilitation rather than on a punitive approach.[138]

To these conventional instruments can be added the duty to prevent transboundary harm, which finds its root in the *Trail Smelter Case (United States v Canada)* and the *Stockholm Declaration on the Human Environment*.[139] The 2001 *Articles on Prevention of Transboundary Harm from Hazardous Activities* complete the general framework.[140] It is now well established that the prohibition on causing significant transboundary environmental damage has entered the realm of customary international law.[141]

[137] Eg, the United States is not a party to the Kyoto Protocol; China, while a party to the protocol, is not bound by the reduction targets; and Canada withdrew from the protocol in 2011, before the start of the second commitment period.

[138] See, eg, Corinne Lepage & Christian Huglo, "Commentaire iconoclaste (?) de 'l'Accord de Paris'" (2016) 41:1 Revue juridique de l'environnement 9; Benoît Mayer, "Enjeux et résultats de la COP21" (2016) 41:1 Revue juridique de l'environnement 13; Sophie Lavallée, "L'Accord de Paris: trois questions passées sous silence" (23 December 2015), online: Policy Options Politiques <http://policyoptions.irpp.org/fr/magazines/december-2015/laccord-de-paris-troisquestions-passees-sous-silence/>.

[139] *Trail Smelter Case (United States v Canada)*, [1938/1941] III RIAA 1905 at 1963: "A state owes at all times a duty to protect against injurious acts by individuals from within its jurisdiction" and "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another … when the case is of serious consequence" (at 1965); *Stockholm Declaration on the Human Environment*, UN Doc A/Conf.48/14/Rev. 1 (1973), Principle 21 (*Stockholm Declaration*): "States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." See also *Rio Declaration on Environmental and Development*, UN Doc A/CONF.151/26 (vol I) (1992), Principle 2 (*Rio Declaration*).

[140] ILC, *Articles on Prevention of Transboundary Harm from Hazardous Activities*, UN Doc A/56/10 (2001), art 3: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." See also ILA, Committee on the Legal Principles Relating to Climate Change, *ILA Legal Principles Relating to Climate Change* (Washington, 2014), online: ILA <http://www.ila-hq.org/en/committees/index.cfm/cid/1029/member/1>. Draft art 7A(1) deals with the obligation of prevention, putting the emphasis on climate change. These drafts articles have been raised as relevant for the work of the ILA Committee on Sea Level Rise. See ILA SLR 2014 Open, *supra* note 114 at 5.

[141] Philippe Sands & Jacqueline Peel, *Principles of International Environmental Law*, 3rd edition (Cambridge: Cambridge University Press, 2012) at 242–43.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

To establish responsibility, the first issue that arises would be to identify the breach of an international obligation. The emission of GHGs is not in itself an activity prohibited under international law. What triggers responsibility is "the failure of states to regulate" the emissions by not fulfilling their general commitments under the *UNFCCC* or reaching the specific reduction targets established under the *Kyoto Protocol*[142] and, eventually, the *Paris Agreement*. A state having taken appropriate means to ensure this regulation would therefore have fulfilled its duty on that level. Another breach, related to the first one, would be a failure to fulfil the general duty to prevent significant transboundary harm. Loss of territory could reasonably be considered a significant harm. Yet, as Abhimanyu Jain puts it, "there is a clear legal duty to not deprive a state of its territory, but there is no duty to protect a state from loss of territory."[143]

Stoutenburg raises another possibility. Under Article 41(2) of the *Articles on Responsibility of States for Internationally Wrongful Acts*, a state would be in breach of international law if it recognized as lawful a situation created through a serious breach of *jus cogens* norms. We could see this provision as expressing "a general principle of modern international law according to which there is a duty not to recognize the extinction of a state caused by a serious violation of *jus cogens*, and thus to continue recognizing the international legal personality of the affected state."[144] The key issue, then, would be to determine "whether the extinction of low-lying island states due to anthropogenic climate change constitutes a serious violation of peremptory norms of general international law."[145] Thus, this possibility brings the additional challenge of proving not only the breach of a general obligation but also the breach of a peremptory norm of international law.

What would that peremptory norm of international law be? Certainly, territorial loss or inundation of certain parts of territory may raise human rights issues. While a stand-alone human right to a healthy environment could hardly form the legal basis of a claim, as it has not yet been codified or generally recognized as customary international law,[146] the rights to life, security, and an adequate standard of living including food, water, and

142 Stoutenburg, "When Do," *supra* note 1 at 80–81; Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 276.

143 Jain, *supra* note 6 at 41–42.

144 Stoutenburg, "When Do," *supra* note 1 at 75.

145 *Ibid*.

146 *Ibid* at 78.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

housing could however be relied upon.[147] Even the right to nationality could potentially be triggered as it is uncertain what nationality people forced to relocate would be able to claim.[148] However, while climate change and sea-level rise impact the enjoyment of human rights, there is doubt as to whether such impact flows from, or gives rise to, an actual human rights violation.[149] And it is impossible to assert that a *jus cogens* norm requiring the prevention of climate change exists.[150]

As noted above, even if one succeeded in establishing a breach of an international obligation, a second requirement would have to be fulfilled: attribution of the breach to a state. While states cannot normally be held responsible for natural disasters,[151] there is nowadays conclusive scientific evidence that climate change does result from human activities.[152] However, even if we relied on "cumulative causation — the fact that not one state alone, but all states together (mainly of course the largest emitters) contribute to climate change,"[153] the causal link between the GHG emissions of a particular state (or group of states) and climate change, and, subsequently, between climate change and sea-level rise, would still have to be established.[154]

While a claim against major emitters would not be a complete legal impossibility, as suggested by the foregoing arguable legal bases for such a claim, there would remain problems at the level of geopolitics and international relations: "[F]or example, does the complaining island nation have the financial and human resources and capacity to pursue these claims

[147] *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess Supp No 13, UN Doc A/810 (1948), arts 3, 25(1) [*UDHR*]; *ICCPR*, *supra* note 126, arts 6(1), 9(1); *ICESCR*, *supra* note 126, art 11(1). See, eg, Maxine Burkett, "A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy" (2013) 35 U Haw L Rev 633 at 646–47 [Burkett, "Justice Paradox"]; *Human Rights and Climate Change*, UNHCR, UN Doc A/HRC/RES/26/27 (2014) at para 1 and preamble; *Human Rights and Climate Change*, UNHCR, UN Doc A/HRC/RES/18/22 (2011) at para 1; ILA SLR 2016, *supra* note 109 at 16–17.

[148] *UDHR*, *supra* note 147, art 15(1). Lisa Friedman, "If a Country Sinks beneath the Sea, Is It Still a Country?" *New York Times* (23 August 2010), online: New York Times <http://www.nytimes.com/cwire/2010/08/23/23climatewire-if-a-country-sinks-beneath-the-sea-is-it-sti-70169.html?pagewanted=all>.

[149] Stoutenburg, "When Do," *supra* note 1 at 79 (emphasis added).

[150] Jain, *supra* note 6 at 41–42.

[151] Puthucherril, *supra* note 9 at 238.

[152] IPCC, *supra* note 10 at 2. It must however be underlined that climate change and sea-level rise are not only triggered by human activities but also come from natural causes.

[153] Stoutenburg, "When Do," *supra* note 1 at 84–85.

[154] Jain, *supra* note 6 at 42.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

against large emitters? And, on a related note, if a vulnerable nation pursues legal recourse, will the very nation-state(s) from which it seeks remedy retaliate?"[155] For example, in 2011, Palau intended to propose that the UN General Assembly request an advisory opinion from the International Court of Justice on the legal responsibility of large emitters for climate change.[156] Palau, however, did not pursue its initiative, seemingly following a threat of reprisal from the United States.[157] Indeed, the states most responsible for GHG emissions are those that SIDS are most reliant upon, not only for general economic and commercial activity but also for assistance measures to counter the effects of sea-level rise.[158] One can therefore question the legitimacy and adequacy of the international system to protect vulnerable states suffering from a situation for which they are the least responsible.[159]

Other avenues for relief have been envisaged. SIDS could raise the responsibility of emitters on which they are less dependent.[160] The same issues of proving breach of an obligation and attribution would however arise. Alternatively, SIDS could rely on dispute settlement mechanisms under other environmental law regimes, such as the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, or the *Convention on Biological Diversity*.[161] *UNCLOS* "may [also] be a promising instrument … due to its expansive definition of pollution, the clear obligations on states parties to preserve the health of the environment, and the availability of voluntary and compulsory dispute resolution mechanisms to press claims related to environmental pollution."[162] It must indeed be

[155] Burkett, "Justice Paradox," *supra* note 147 at 643. See also Stoutenburg, "When Do," *supra* note 1 at 59.

[156] See, eg, Lawrence Hurley, "Island Nation Girds for Legal Battle against Industrial Emissions," *New York Times* (28 September 2011), online: New York Times <http://www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html>.

[157] Burkett, "Justice Paradox," *supra* note 147 at 635.

[158] Wong, *supra* note 3 at 389.

[159] Burkett, "Justice Paradox," *supra* note 147 at 634; Hayasi, "Affected States," *supra* note 109 at 620; Powers & Stucko, *supra* note 97 at 139–40; Rayfuse, "Sea Level Rise," *supra* note 92 at 178. The issue of legitimacy will be discussed further in the third part of this article.

[160] Burkett, "Justice Paradox," *supra* note 147 at 661.

[161] *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 2 February 1971, 996 UNTS 245; *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 23 November 1972, 1037 UNTS 151; *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79. See Burkett, "Justice Paradox," *supra* note 147 at 642; Wannier & Gerrard, *supra* note 96 at 12; ILA SLR 2014 Closed, *supra* note 8 at 4–5.

[162] Burkett, "Justice Paradox," *supra* note 147 at 652–53.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

remembered that the legal impacts of sea-level rise extend far beyond concerns of baselines, migration, and human rights and must also be assessed from the perspective of affected ecosystems.[163]

Apart from the major legal issues stemming from the physical disappearance of territory due to sea-level rise, the portrait drawn in the first part of this article shows that various regimes under international law are ill-equipped to face this new reality created by climate change. Further, the relevance of the core building block of the current international system, the territorial state, is being questioned as the physical disappearance of some of its components may affect the continuity of its legal status. To be able to address this changing state of affairs adequately, the international legal framework will have to adapt itself to "actual needs and purposes, and not primarily … the … assertion of sovereign rights over territory."[164]

What Can Be Done? Possible Solutions to Ensure the Continuity of States with Territories That Are Physically Disappearing

The stability sought by international law is protected by the presumption of continuity of statehood. This doctrine serves to preserve the legal order from events that would deprive a state of one or more of its components. However, the legal construct of continuity can only fill gaps in the constituent elements of statehood "and should not be allowed completely to override the factual matrix surrounding its creation."[165] This is why solutions must be envisaged so that the legal reality can survive the factual one.

Following the IPCC's fourth assessment report, it must be concluded that we have now reached the point where mitigation measures, central to the climate change regime, must be complemented by adaptation measures.[166] As discussed earlier in this article, the current law of the sea regime is based on the principle that the land dominates the sea. The importance of maritime zones for the economy of SIDS underscores the necessity of preserving land territory, which serves as a legal basis for such zones.

Various options have been discussed in the legal literature on climate change and sea-level rise to work towards continuity by physically protecting states with territories that are disappearing. The purpose of this part of the article is to examine those options most often raised by scholars. What is interesting to note, from the outset, is that most responses are traditional

[163] ILA SLR 2016, *supra* note 109 at 8.

[164] Vidas, *supra* note 2 at 83.

[165] Gross, *supra* note 28 at 378, cited in Wong, *supra* note 3 at 352.

[166] *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Conference of the Parties of the United Nations Framework Convention on Climate Change, Doc FCCC/CP/2010/7/Add.1 (2011) at paras 11–20.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

in the sense that they build on existing conceptions of the territorial state under current international law.[167] Indeed, they focus on the preservation of existing, or the acquisition of new, territory. Only the idea of a "deterritorialized" state takes us away from the legal model of a state anchored in its territory.[168] However, whatever option is envisaged, it must be remembered that a case-by-case approach should be preferred, as various scenarios are possible according to the unique situation of every SIDS.[169]

TRADITIONAL RESPONSES

Man-Made Preservation Solutions: Protecting Existing Land by Artificial Means and Building Artificial Islands or Installations

The first solution envisaged in the literature — the construction of artificial structures to preserve land territory — has already been applied in practice. The Netherlands, with its system of dykes and dams, is often cited as an example.[170] The Maldives have also used hard engineering mechanisms, building walls to protect the capital island of Malé and even constructing an entirely artificial island, Hulhumalé, to which people have been relocated to alleviate the overpopulation of Malé.[171] Similarly, in the 1980s, Japan undertook the construction of various structures (including walls, blocks of steel and concrete, and other sea defences) to preserve the existence of Okinotorishima, "two groups of very small rocks" used to claim an extensive EEZ and a continental shelf beyond 200 nautical miles.[172] These solutions have one main goal: maintaining the land territory of a state or its baselines and, consequently, the maritime claims associated with it.

Artificial preservation construction can be divided into two categories: structures that aim at protecting existing land territory and completely artificial islands or installations. Regarding the former, the mechanisms

[167] Crawford & Rayfuse, *supra* note 6 at 249–50; Jeanneney, *supra* note 8 at 117–19.

[168] The expression "*ex-situ* nation" has also been used in the literature. See, eg, Burkett, "Nation Ex-Situ," *supra* note 8.

[169] ILA SLR 2014 Closed, *supra* note 8 at 5; ILA SLR 2016, *supra* note 109 at 20; Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 3.

[170] See, eg, Gagain, *supra* note 65 at 113–14.

[171] Schofield & Freestone, *supra* note 13 at 155; Rayfuse, "Sea Level Rise," *supra* note 92 at 176.

[172] Schofield & Freestone, *supra* note 13 at 155–56; Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 4–6; "Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan on 12 November 2008" at paras 6, 15–20, <http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf>.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

most commonly used are sea walls or other barrier-type structures that "are intended to stabilize the position of the coast and protect key infrastructure located in the coastal zones."[173] However, hard engineering solutions have the potential of impacting the coastline by "interrupting natural sediments flows and causing unexpected erosion and/or deposition to other parts of the coast."[174] This is why "soft" engineering approaches, such as the creation of dunes or the revegetation of coastlines, which "replicate naturally occurring features that may have been previously removed," are also used.[175]

The man-made protection of a natural feature, and even structures that extend a natural feature, do not transform that feature into an artificial island as understood in Article 60 of *UNCLOS*, "given that the island state would not try to *generate* maritime entitlements through artificial means, but only aim to *preserve* its already recognized rights."[176] For example, preserving an island so that it retains its ability to sustain human habitation or economic life (that is, so that it does not become a rock as understood under Article 121(3) of *UNCLOS*) would be acceptable, but the improvement of a rock so that it becomes an island potentially capable of generating zones would not.[177] This distinction raises questions as to whether the structures around Okinotorishima constitute mere protection of an existing feature that can generate zones or an attempt to give rocks an upgraded status.

The second category of preservation construction includes wholly artificial islands or installations and can only be defined *a contrario* — that is, in contrast to the wording of Article 121(1) of *UNCLOS* — which describes an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."[178] The legal status of artificial structures is clear: "Artificial islands, installations and structures do not possess the status of islands" and cannot generate maritime zones of their own.[179]

However, can artificial islands or installations be relied upon to preserve, physically, the territorial component of a state? Stoutenburg argues that if a state were to build an entire artificial island, as the Maldives did with the artificial island of Hulhumalé, the island would count as part of the state's defined territory, although it could not generate maritime zones.[180] On the

[173] Schofield & Freestone, *supra* note 13 at 151.

[174] *Ibid* at 152.

[175] Schofield & Arsana, *supra* note 13 at 10.

[176] Stoutenburg, "When Do," *supra* note 1 at 62 (emphasis in original). See also Schofield & Freestone, *supra* note 13 at 157; Jain, *supra* note 6 at 48.

[177] Soons, *supra* note 16 at 222–23; Schofield & Freestone, *supra* note 13 at 160; Rayfuse, "Sea Level Rise," *supra* note 92 at 175–76.

[178] Gagain, *supra* note 65 at 101.

[179] UNCLOS, *supra* note 103, art 60(8). See also Wong, *supra* note 3 at 384.

[180] Stoutenburg, "When Do," *supra* note 1 at 62.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

other hand, this would not be the case if a state were to replace its entire territory with artificial installations, which would not be characterized as territory.[181] This approach, however, is contested by Wong, who states that "current international law does not allow for wholly man-made structures to constitute territory," therefore not distinguishing between artificial islands and artificial installations.[182] This conclusion is supported by the decision of the Administrative Court of Cologne in *Re Duchy of Sealand*, which held that territory must "consist in a natural segment of the earth's surface" and must "come into existence in a natural way," thus discarding the characterization of artificial islands or installations as territory.[183]

In the end, the notion that artificial islands and installations cannot generate maritime zones remains a major concern for the preservation of the entitlements of SIDS. As a solution, Michael Gagain has suggested that "the regime of artificial islands should be expanded to encompass attribution of maritime zones."[184] Amending the regime of baselines has also been suggested as a solution in order to thwart the potential manipulation of maritime zones through man-made constructs.[185] Ultimately, these man-made solutions raise questions of cost and development since SIDS are developing states. SIDS must therefore carefully balance the costs involved in the construction of such features "against the revenues which the sea [and land] area[s] that may be lost can generate."[186]

Acquisition of Territory

A second solution discussed by scholars is the possibility of acquiring new territory, either by way of cession of territory by another state or through merger or union with other entities.[187] While leading to different legal statuses for SIDS, these two possibilities both imply cooperation with other sovereign entities.[188] Under the first scenario, territory could be ceded either by donation or sale or even by lease.[189] SIDS could exercise sovereignty

181 *Ibid* at 63.

182 Wong, *supra* note 3 at 384.

183 *In Re Duchy of Sealand*, *supra* note 65 at 685. Indeed, the Court held that a British Second World War platform attached to the seabed off the coast of Great Britain did not fulfil the requirement of territory. However, it must be underlined that this case dealt with an artificial installation.

184 Gagain, *supra* note 65 at 107.

185 *Ibid* at 111.

186 Soons, *supra* note 16 at 231. See also Jain, *supra* note 6 at 48.

187 Hayasi, "Affected States," *supra* note 109 at 615; Jeanneney, *supra* note 8 at 121–23.

188 Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 187.

189 Jain, *supra* note 6 at 48.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

over this newly acquired territory.[190] Cession of territory has happened in the past, giving rise to precedents such as the purchase by the United States of Alaska from Russia in 1867 and of the Danish West Indies (now the US Virgin Islands) from Denmark in 1917.[191]

Under the second scenario, a SIDS would merge with another state or would form a union or a federation with one or various other states. While both processes would lead to the disappearance of the SIDS as a sovereign entity, these two options involve different legal processes: a merger would entail absorption of the SIDS by the other state, whose legal personality would remain intact; while a union or federation would lead to the creation of a new legal entity and the extinction of the legal personalities of the formerly separate units (one of them being the former SIDS). As indicated, under both options, the SIDS would lose its statehood to the benefit of the state it was merging with or the newly formed entity by union or federation.[192] Similarly, the "territory and population would be governed by [either] the terms of the [union or federation]"[193] or the laws of the state with which the SIDS had merged. It has been suggested, however, that some kind of autonomy could be preserved for the population of the former SIDS.[194]

These two territorial acquisition scenarios obviously raise the issue of the status and fate of the maritime zones of the SIDS. Under the cession scenario, the SIDS could theoretically retain its entitlements to the maritime zones appurtenant to its former territory. Under the merger/union scenario, however, "the zones would belong to [and be under the control and management of] the host state" or the newly fused state.[195] This outcome has been criticized by Rayfuse since, as she explains, the establishment of maritime boundaries in a manner to achieve equitable results is now recognized under customary international law,[196] and the retention of

190 Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 197–98, 200; Stoutenburg, "When Do," *supra* note 1 at 61.

191 Maas & Carius, *supra* note 12 at 659; Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 188; *Convention between the United States and Denmark. Cession of the West Indies*, 25 January 1917, 39 US Stat 1706: online: <http://www.doi.gov/oia/about/upload/vitreaty.pdf>.

192 Stoutenburg, "When Do," *supra* note 1 at 61.

193 Crawford & Rayfuse, *supra* note 6 at 249–50.

194 Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 198, 200.

195 Rosemary Rayfuse "International Law and Disappearing States: Utilizing Maritime Entitlements to Overcome the Statehood Dilemma" (2010) University of New South Wales Faculty of Law Research Paper no 2010-52 at 9. See also Hayasi, "Affected States," *supra* note 109 at 615; Soons, *supra* note 16 at 230; Rayfuse, "Sea Level Rise," *supra* note 92 at 178.

196 *Maritime Boundary in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Advisory Opinion, [1993] ICJ Rep 38 at paras 46, 48, 50.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

maritime zones should follow the same principle. Since the merger/union scenario would trigger the loss of a SIDS' maritime entitlements, it "would [therefore] appear to be intrinsically inequitable and contrary to international law."[197] However, under both scenarios, whether maritime zones could still be claimed in the face of complete submergence of the land territory to which they are related remains uncertain in any event. And while determining the best solution for the preservation of baselines and maritime zones goes beyond the scope of this article, it is significant that maritime zones and "the state's rights over the valuable marine resources … could offer economic support to populations displaced as a result of sea level rise."[198]

While the acquisition of territory might be a perfectly acceptable legal solution, it seems very unlikely that any state would agree to give away or share, with or without financial compensation, part of its territory.[199] Not only would such a state be voluntarily alienating or modifying its sovereignty over the territory in question, an improbable situation considering the rights and entitlements attached to such status, but it would also be risking complex political, social, and economic outcomes.[200] If such a response to territorial loss were to materialize, however, such a territorial transformation "would arguably constitute a fundamental change to the culture of the islanders" as they would most probably interact with other peoples and modify their relationship to the land.[201]

A *SUI GENERIS* ENTITY: THE "DETERRITORIALIZED" STATE

The solutions suggested above follow traditional principles of international law and are intrinsically linked to the territorial conception of the state. However, as stated by Tony Puthucherril, "the challenges posed by [sea-level rise] and climate change are *sui generis*, and these test our fundamental legal assumptions [related to territoriality]. Consequently, there is a discernible demand for unique legal responses."[202] One *sui generis* response, proposed for the first time in the literature by Rayfuse, is the concept of the "deterritorialized" state. This *sui generis* notion moves away from the idea that territory is a necessary requirement for the existence of states and is therefore of particular interest to the questions underlying this article.[203]

[197] Rayfuse, "Sea Level Rise," *supra* note 92 at 179.

[198] Schofield & Freestone, *supra* note 13 at 162.

[199] See, eg, Wong, *supra* note 3 at 383.

[200] Crawford & Rayfuse, *supra* note 6 at 249–50; Rayfuse, "Sea-Level Rise," *supra* note 92 at 178; Jain, *supra* note 6 at 48.

[201] Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 189.

[202] Puthucherril, *supra* note 9 at 255.

[203] Rayfuse, "W(h)ither Tuvalu," *supra* note 113.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

The Deterritorialized State: What Is It?

Simply put, a deterritorialized state would consist of a government or other form of authority that would continue to represent and protect its people and to manage its resources, wherever they were. The state would continue to exist as a member of international organizations, entitled to rights and the bearer of international obligations, even if it lacked territory.[204] The main benefit of such a new form of organization would be that "[i]n whichever way the former citizens of a vanishing island state continue their lives after having left their homeland … they … could retain a measure of self-determination by exercising independent and autonomous control over their abandoned territory or territorial waters."[205]

International law is already familiar with the existence of entities that lack a territorial basis, which could facilitate the acceptance of the concept of the deterritorialized state.[206] Not only are non-territorial entities recognized under international instruments, but, in some cases, they also enjoy limited forms of functional or non-territorial sovereignty.[207] For example, entities such as the European Union possess some elements of functional sovereignty despite not fulfilling the criteria for statehood.[208] Another example, which is even more analogous to the situation of potential entities without territory, is the Order of Malta, recognized by various states and enjoying multiple benefits of international legal personality.[209] The order formerly occupied the territory of Malta but has existed extraterritorially since 1798. The existence of this entity shows that "sovereignty and nation can be separated from territory."[210] The striking difference

[204] Burkett, "Nation Ex-Situ" *supra* note 8 at 90; Wong, *supra* note 3 at 385; Stoutenburg, "When Do," *supra* note 1 at 85–86; Jain, *supra* note 6 at 49.

[205] Ödalen, *supra* note 128 at 230.

[206] Reference could be made, eg, to the separate opinion of Judge Ago in the Advisory Opinion on the Agreement between the World Health Organization and Egypt, underlining that international organizations, even if they have a different international legal capacity than states, are subjects of international law even if they lack a territorial basis. See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep 73 at 155. See also Crawford & Rayfuse, *supra* note 6 at 252.

[207] See, eg *1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 December 1995, 2167 UNTS 3, art 2(2)(b); *UNCLOS*, *supra* note 103, art 291, art 20(2) of Annex VI, art 13 of Annex XIII. See also Crawford & Rayfuse, *supra* note 6 at 253.

[208] Crawford & Rayfuse, *supra* note 6 at 252–53; Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 203.

[209] See, eg, Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 203; Wong, *supra* note 3 at 385; Maas & Carius, *supra* note 12 at 659.

[210] Crawford & Rayfuse, *supra* note 6 at 251.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

between the Order of Malta and the theoretical deterritorialized state, however, is that the former, while sovereign, is not a state.[211]

Questions nevertheless remain as to the nature and functionality of the proposed deterritorialized state. First, sovereignty concerns must be addressed. For example, as Wong puts it, "would the 'deterritoriali[z]ed state' be equal to other states?"[212] Relegating a former state to the status of a lesser sovereign entity could trigger issues of legitimacy.[213] Second, if the population were dispersed throughout other states, there is a risk that they would become nationals of those other states, therefore limiting the role of the deterritorialized state to that of "advocate for its diaspora."[214] Finally, the exercise of jurisdiction by the deterritorialized state might raise practical challenges.[215] While prescriptive jurisdiction could be exercised over nationals abroad, and adjudicative jurisdiction could be exercised through cooperation with host states and technical means (for example, video conferences for judicial proceedings), exercises of enforcement jurisdiction by the deterritorialized state in another state's territory could be seen as interference. Such challenges require that we dedicate attention to some existing mechanisms under international law that could be relied upon to find possible answers.

How Would It Work? Government in Exile and Political Trusteeship Analyzed

How can authority be exercised over a population that might not be on the same territory as the governing body? While relying on the notion of government in exile seems like an appealing solution, "scholars have [also] suggested a resurrection of the political trusteeship system as a means of administering the duties of a 'deterritorialized' government."[216] While not a solution for the preservation of statehood as such, these mechanisms may be seen as logistical means of administrating a deterritorialized state.

The former option — a government in exile — "accepts governments that are detached from the requirement of territory, or at least locality."[217] This form of government, however, requires the continuing existence of the state the government represents.[218] Based on this premise, it may be

[211] Stoutenburg, "When Do," *supra* note 1 at 85; Maas & Carius, *supra* note 12 at 659.

[212] Wong, *supra* note 3 at 385. See also Jeanneney, *supra* note 8 at 128.

[213] Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 211.

[214] Wong, *supra* note 3 at 385–86.

[215] Jain, *supra* note 6 at 49–51.

[216] Burkett, "Nation Ex-Situ," *supra* note 8 at 90.

[217] Stoutenburg, "When Do," *supra* note 1 at 68. See also Jeanneney, *supra* note 8 at 126.

[218] Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 7.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

possible to push the concept further, to the point of "states-in-exile."[219] But when relying on this model, two distinctions must be drawn with the particular situation of states with disappearing territory.[220] First, in past cases of governments in exile, the population has normally been concentrated on one territory, while the governing authorities have been away in another territory. In the case of SIDS, while displacements could be organized (such as in the resettlement plans already envisaged by various nations), there is also the possibility of the population being dispersed.[221] Second, a government in exile normally acts temporarily because there should always be "the possibility of restoring its power over a determined territory."[222] This would not be the case with SIDS since their territory would be unlikely to re-appear once it was submerged, although this possibility is not officially discarded.[223]

The second option would involve a form of trusteeship system. While the trusteeship regime of the *Charter of the United Nations*, as it stands, could not be relied upon, its essential structure could still serve as a basis.[224] A trusteeship entity could be in charge of promoting "the political, economic, social and educational advancement" of the deterritorialized entity.[225] The nature of such a trusteeship regime, however, would differ from that of the *UN Charter*. The main purpose would still be the traditional one of "the administration of national assets for the benefit of [the nation's] people."[226] But, as explained by Maxine Burkett, "[a] critical difference in the

[219] Crawford & Rayfuse, *supra* note 6 at 253.

[220] Stoutenburg, "When Do," *supra* note 1 at 69.

[221] See, eg, Columbia Law School, *Consolidated Notes from Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, (New York: Center for Climate Change Law, Columbia Law School, 2011) at 10, 14, online: Columbia Law School <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Past- Conferences-and-Events/Threatened%20Island%20Nations%20-%20Compiled%20Notes.pdf>; Wong, *supra* note 3 at 368; Maas & Carius, *supra* note 12 at 658.

[222] Yamamoto & Esteban, "Vanishing Island," *supra* note 74 at 7.

[223] *Ibid.*

[224] The *UN Charter* trusteeship regime (*UN Charter*, *supra* note 41, ch XIII), poses two main obstacles. First, a UN member state cannot be put under the supervision of the Council. Second, the state responsible for the supervision should be the state in charge of the administration of the territory. The majority of SIDS, being UN member states under the supervision of no other state, would first have to withdraw from the UN for the UN trusteeship regime to apply. However, such withdrawal would undermine the benefits SIDS obtain from being part of multilateral organizations such as the UN, the main one being the preservation of their statehood, which is strengthened by the recognition of other states. See Wong, *supra* note 3 at 386–87; Burkett, "Nation Ex-Situ," *supra* note 8 at 109.

[225] *UN Charter*, *supra* note 41, art 88; Wong, *supra* note 3 at 386.

[226] Wannier & Gerrard, *supra* note 96 at 7. See also Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 206–08.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

contemporary application of the trusteeship system is that the purpose of the arrangement would be to maintain self-governance and self-determination, and elected citizens of the [deterritorialized state] would serve as trustees."[227] The UN would leave the internal functioning to the new entity, contrary to the managing role of the Trusteeship Council, and would act mainly in support of the transition.[228]

The preservation of the displaced people's right to self-determination under such a system would be imperative considering that the notion of trusteeship may have negative connotations for SIDS, many of which "have histories as colonies, trust territories, or the like, and have only achieved statehood and sovereignty in recent decades."[229] The Marshall Islands, for example, were administered as a trust territory under the supervision of the United States before becoming an independent state.[230] Trusteeship could therefore be seen as undermining sovereignty and "be interpreted as a lack of capacity of [SIDS] to deal with [the impacts of sea-level rise] by themselves."[231] Nonetheless, oversight by an international body could have positive outcomes: "Symbolically, this recognises that an international solution is required for the international problems of climate change. Practically, it ensures that there is international oversight of the process."[232]

The legitimacy of all of the proposed solutions discussed in this article would be "subject to the acquiescence of the international community."[233] While the man-made responses so far do not seem contested, schemes for the acquisition of territory and, above all, the concept of the deterritorialized state, because they have not yet been applied in practice, could benefit from some sort of institutionalized framework that could dissipate uncertainty as to their impact on statehood and sovereignty.[234]

The options analyzed above are geared towards fulfilment of the goals sought by the Westphalian system: the promotion, achievement, and protection of security, stability, peace, certainty, fairness, and efficiency.[235] The preferred solution for the attainment of these objectives is the physical preservation of the territory of the state, the basis of the Westphalian system,

[227] Burkett, "Nation Ex-Situ," *supra* note 8 at 108. See also Wannier & Gerrard, *supra* note 96 at 7.

[228] Burkett, "Nation Ex-Situ," *supra* note 8 at 109–14.

[229] Wannier & Gerrard, *supra* note 96 at 6.

[230] Burkett, "Nation Ex-Situ," *supra* note 8 at 118.

[231] Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 207.

[232] Wong, *supra* note 3 at 386.

[233] Burkett, "Nation Ex-Situ," *supra* note 8 at 113.

[234] *Ibid* at 114.

[235] *Ibid* at 106; Rayfuse, "Sea Level Rise," *supra* note 92 at 180.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

so that its legal equivalent — statehood — can also be preserved. The idea of the deterritorialized state offers an option that detaches state and statehood from territory. However, it also triggers the question of whether the territorial state itself is the only form of social organization that can provide the stability and security so prized by the Westphalian system.

Beyond the Westphalian System: Statehood in the Twenty-First Century

In his inaugural lecture in a series in honour of Sir Elihu Lauterpacht given in 2012, Daniel Bethlehem concluded as follows:

> Geographers have a good fortune that lawyers are denied. The law is not about eternal things. It is about the here and now. It is about how humankind organizes and manages its society. We hope that the law is of consequence, and it is our calling to work to this end. But the law can become old-fashioned. Mountains may only rarely change their position, and oceans only very rarely empty themselves of water. But the law is both more vulnerable and more adaptable. The place of geography in the international system is changing. It presents challenges to international law. These are challenges to which we must all rise.[236]

In this statement, Bethlehem suggests that geography is now important for international law in a new way. Geography has always had an impact on the rules of international law and the way they are applied. But what if we are now entering an era where changes in geography influence the system of international law itself,[237] an era where the most appropriate response to territorial disappearance would be to find an alternative to the territorial state — the basis of the current system — in order to ensure the survival of the state as a form of social organization that is independent of its (former) territory?

In the twenty-first century, we have become well aware of the transboundary reality we now inhabit. From a state-driven system, or what Thomas Friedman calls "Globalization 1.0,"[238] we have moved towards a "Globalization 2.0," where actors other than states have emerged as being influential and where situations are not limited to one state's territory.[239] However, it would be wrong to limit our understanding of the phenomenon of globalization to the end of the twentieth century. Indeed, "Globalization 1.0"

[236] Bethlehem, *supra* note 28 at 24.

[237] Jeanneney, *supra* note 8 at 113, 115–16.

[238] Thomas Friedman, *The World Is Flat: A Brief History of the Globalized World in the Twenty-First Century* (London: Allen Lane, 2005) at 9, 11, 19.

[239] *Ibid* at 10.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

goes back to the end of the Middle Ages, to the era of European exploration and so-called discovery, when "the global" came into existence through channels of "trade between the Old World and the New World."[240] Yet, what is new within "global capitalism" is "the shrinking significance of national borders."[241] Similarly, non-state actors and civil society have always existed, formerly mostly organized around religious or cultural groups, but what is new is "their phenomenal growth[, …] their diversity of interests," and the fact that "they have become a force for political change in areas long seen as domestic — outside of international concern."[242]

While globalization is most often seen from economic, commercial, or communications perspectives, it is also evident in other fields.[243] For example, Andrew Hurrell, relying on theories of international relations, has underlined the shift from a pluralist statism, in which states evolved as independent and equal entities whose boundaries should not be disturbed, to a solidarist statism, in which norm making not only comes from states but also from other actors and focuses on schemes of cooperation and common values.[244] This evolution can also be observed within international law: statehood is transformed by interconnectedness, new entities, and "the proliferation of regional and international organizations and legal norms," showing that the international legal order is not left outside of the globalization equation.[245]

However, it can also be argued that we have now moved to a further stage, "Globalization 3.0," where the emphasis is put on "the … power for *individuals* to collaborate and compete globally."[246] We have now moved to a realm not only where it is activities and interests that extend beyond the boundaries of a state but also where individuals, human communities, and societies have "gone global," where they have adapted to become transnational, thus still further eroding the role of the territorial state. These transnational societies face a "more complex social process"[247] that can

[240] *Ibid* at 9.

[241] Schachter, *supra* note 5 at 8. See also Pierré-Caps, *supra* note 4 at 39.

[242] Schachter, *supra* note 5 at 12–13.

[243] Bethlehem, *supra* note 28 at 15.

[244] Hurrell, *supra* note 33 at 278, 281. See also Benedict Kingsbury, "People and Boundaries: An 'Internationalized Public Law' Approach" in Buchanan & Moore, *supra* note 7, 298 at 299–302.

[245] Sterio, *supra* note 5 at 219. See, generally, Tullio Treves, "General Course: The Expansion of International Law" (Lecture delivered at The Hague Academy of International Law, 6–24 July 2015).

[246] Friedman, *supra* note 238 at 10 (emphasis in original).

[247] Hurrell, *supra* note 33 at 285. See also Schachter, *supra* note 5 at 11.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

even reach a need for interdependence.[248] Judge Antônio Cançado Trindade argues in favour of the humanization of international law, suggesting that the international community and even humanity itself should become one of its subjects.[249] And for the international legal system to keep up with these changes and reach such transnationality, it must go "beyond the state, or at least … view the state within the context of a broader legal order,"[250] one that is in fact characterized by a "network of legal orders" and that will adapt its focus and develop according to the phenomena it wishes to govern.[251]

In the first part of this article, we drew a portrait of the "1.0 reality" of international law, the territorial state-driven regime, and presented the situation of SIDS from that perspective. In the second part, we outlined existing and proposed solutions to ensure the continuity of states with physically disappearing territories, most of which mirror that reality. However, as Bethlehem puts it, "[f]rom a vantage point that is still largely rooted in a Westphalian system … is the system of international law with which we are so familiar, a system still so heavily rooted in notions of territoriality — sovereignty, jurisdiction, regulation, accountability — adequate to the challenges that will face us over the coming period?"[252] Based on the erosion of the state-driven framing of international law within the "2.0 reality" and on unprecedented geophysical changes, can we conceive a model that builds not only on the interactions between states and non-state actors and transboundary realities but also on an alternative to the territorial state itself? What we suggest here is that a solution to preserve SIDS as social organizations could be built on a modification of existing norms linked to territoriality and even on the complete dissociation of a state as a social community from its territory.[253]

The third part of this article will therefore start with a discussion of legitimacy within international law in an attempt to understand why alternative models are necessary. It will then move to analyze concepts and theories

[248] Petit, *supra* note 45 at 184.

[249] See, generally, Antônio Cançado Trindade, "Quelques réflexions sur l'humanité comme sujet du droit international" in Denis Alland et al, eds, *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Leiden: Martinus Nijhoff, 2014) 157.

[250] Hurrell, *supra* note 33 at 285. See also Schachter, *supra* note 5 at 11.

[251] See generally Boaventura De Sousa Santos, "Law: A Map of Misreadings: Towards a Post-Modern Conception of Law" (1987) 14:3 J L & Soc'y 279.

[252] Bethlehem, *supra* note 28 at 17. See also Kwiecién, *supra* note 5 at 287; Vidas, *supra* note 2 at 73; Petit, *supra* note 45 at 178, 190; Buchanan, "The Making," *supra* note 36 at 236; Schachter, *supra* note 5 at 7.

[253] Jeanneney, *supra* note 8 at 121.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

that could be relied upon to build an alternative model to the territorial state and ensure the continuity of SIDS as well as the identity of their populations. It is important to note that this article does not suggest a return to the state of relative anarchy that preceded the establishment of the Westphalian regime, nor does it pretend to offer a turnkey solution for the concerns faced by SIDS. Its objective is modest: it merely desires to identify alternative doctrines that could trigger a debate on the most appropriate and relevant forms of social organization available to those states facing territorial disappearance and to situate these proposed solutions within the evolution of international law. As written by Hurrell, "[u]nless law reconciled itself with the realities of the power-political order, it would … 'have a moth-like existence, fluttering inevitably and precariously year by year into the destructive flame of power.'"[254]

PRESERVING THE LEGITIMACY OF INTERNATIONAL LAW

Following Hurrell, we gather that the law diminishes in effectiveness when it does not track the concrete realities of politics and, in our case, of territorial disappearance. It is necessary to look into alternative bases for the international legal order because, in its current state, international law provides incomplete solutions to the problems faced by SIDS. One key objective of the law is to act "as a vehicle, or a container, or an instrument for the realization of particular ethical goals or commitments"[255] and to establish a framework for new circumstances, not only for present generations but also for future ones.[256] The difficulty international law faces in fulfilling this purpose, therefore, affects its legitimacy and the justification for its application.

Three factors can be identified when discussing what determines whether a system of law is legitimate.[257] First, legitimacy can be source orientated, referring to the justification for exercising a certain form of authority; under the current state-driven framing of international law, this would be the authority of states. Under this approach, a decision made by an entity would be legitimate if that entity were authorized to act.[258] Second, legitimacy can be found when the processes employed and the norms applied are "adequate or fair" — this is a procedure-oriented approach to legitimacy.

[254] Hurrell, *supra* note 33 at 276, 280. See also Buchanan, "The Making," *supra* note 36 at 236.

[255] Hurrell, *supra* note 33 at 275.

[256] Buchanan, "The Making," *supra* note 36 at 244; Cançado Trindade, *supra* note 249 at 172.

[257] Allen Buchanan & Robert Keohane, "The Legitimacy of Global Governance Institutions" in Rüdiger Wolfrum & Volker Röben, eds, *Legitimacy in International Law* (Berlin: Springer 2008) 25, cited in Rüdiger Wolfrum, "Legitimacy in International Law," *Max Planck Encyclopedia of Public International Law* (November 2006) at paras 6–8.

[258] Buchanan, "The Legitimacy," *supra* note 6 at 82.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Finally, legitimacy can be result orientated, derived from the outcome of a particular situation. Under this last approach, a system will be considered legitimate if the result reached is considered adequate or fair.[259] These approaches are not exclusive of one another and can be combined.

In the case of SIDS, it is primarily the third approach to legitimacy that interests us. The outcome — the submergence of states' territories — is patently unjustifiable when considering that SIDS, while suffering from some of the worst consequences of climate change, have barely contributed to it.[260] However, the two other approaches described above are also relevant to our analysis: how can the exercise of authority and the processes used — basically the territorial state-centred regime and the current notion of statehood — be considered suitable when they are unable to respond fully to the practical problems currently faced by SIDS and the potential uncertainty of their status stemming from the physical disappearance of their territory?

The inadequacy of the territorial state as the basis of the system affects not only the system's legitimacy in achieving its purpose of maintaining order, security, and stability but also its practical ability and efficacy in doing so.[261] Further, to be legitimate, international law must create a setting in which entities that are in line with reality (for example, deterritorialized states) are viable and recognized.[262] The physical disappearance of states' territories and the consequences that ensue from such disappearance show that current international law fulfils these elements of legitimacy only with great difficulty. The uncertainties that territorial disappearance creates, mostly within the regimes of the law of the sea and migration, show that order and stability are already threatened, and other entities (for instance, governments in exile) are only recognized in limited and specific circumstances, often linked to political considerations.[263] The legitimacy of the system is therefore affected.

In parallel, as argued by Allen Buchanan in his moral theory of international law, a standard of minimal justice is a necessary condition for the realization of the legitimacy of international law. This standard manifests itself not through "peace among states, but [through] justice embedded

[259] This last approach is controversial. For example, and briefly, the intervention of the North Atlantic Treaty Organization in Kosovo, while not legitimate from the source-oriented and procedure-oriented perspective because it was not authorized by the UN Security Council, has been argued to be legitimate from a result-oriented perspective, as it aimed at protecting human rights.

[260] See, eg, Jain, *supra* note 6 at 10; Burkett, "Justice Paradox," *supra* note 147 at 659; Petit, *supra* note 45 at 177, 180.

[261] Jain, *supra* note 6 at 11.

[262] Burkett, "Nation Ex-Situ," *supra* note 8 at 106–07.

[263] See, eg, Buchanan, "The Legitimacy," *supra* note 6 at 87.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

in the effective protection of fundamental human rights."[264] Following this theory, morality in international law would translate into the protection and promotion of human dignity and human rights as shared values.[265] However, one must be careful when characterizing such values as "common" as they find their roots in Western-oriented philosophies. This is why it has been suggested that an inter-civilizational approach should be preferred, focusing on the integration of plural values rather than on the universalization of Western-based values. The morality and legitimacy of the system, as well as a standard of minimal justice, would therefore be achieved by relying on common conditions and practices but within the particular context of a specific society and specific circumstances.[266]

Both approaches, however, have a similar focus: a legitimate and moral international system is one that defines states in terms of human communities, without necessarily linking them to territorial entities.[267] This reflects the interests advanced by "Globalization 3.0," namely the reliance on individuals, communities, and societies and their interaction. Similarly, and complementarily, a legitimate and moral international system is one that builds on a normative framework adapted to current realities.

In the case that interests us, the use of international law to address the issue of disappearing territory would be legitimized by looking at SIDS as social entities and considering this as the key aspect of their continuity. It is within this theoretical framework that this article suggests looking at some concepts that could help reconcile the practical reality of territorial disappearance with legitimacy and morality within the international legal order.

When Realities Transcend Borders: Possible Bases for a New Model

As shown above, current realities have a "geography-defying quality."[268] The submersion of territory represents the ultimate example of such defiance: it drives us away from the premise of the perpetuity of the geophysical territories of states.[269] The ideas of the deterritorialized state and other entities without territory discussed earlier in this article demonstrate that international law has already been confronted with alternative models to

[264] Kwiecién, *supra* note 5 at 286.

[265] Jochen von Bernstorff & Ingo Venzke, "Ethos, Ethics, and Morality in International Relations," *Max Planck Encyclopedia of Public International Law* (August 2011) at paras 13, 28; Cançado Trindade, *supra* note 249 at 161, 164.

[266] See generally Onuma Yasuaki, "The Need for an Intercivilizational Approach to Evaluating Human Rights" (1997) 1:10 Human Rights Dialogue, online: Carnegie Council, <http://www.carnegiecouncil.org/publications/archive/dialogue/1_10/articles/574.html>.

[267] Pierré-Caps, *supra* note 4 at 41; Cançado Trindade, *supra* note 249 at 166.

[268] Bethlehem, *supra* note 28 at 18.

[269] Vidas, *supra* note 2 at 73; Jeanneney, *supra* note 8 at 95–96, 100.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

the idea that a state as a form of social organization is necessarily linked to territory.[270]

This section will look at three theoretical lenses through which we might understand how to expand international law to accommodate the difficult and *sui generis* situation of SIDS in terms of their future statehood and self-determination after they lose their territory — namely the growing importance of individuals and communities as part of a cosmopolitan approach to social organization; global governance; and the role of equity and moral duty. We will look additionally at the limitations of these theories. It is also worth noting that while the ideas suggested rest mostly on ethical and policy-based concepts rather than on purely legal ones, we believe that international law, without losing its legal focus, can benefit from looking at related disciplines, especially when facing challenges it is not quite prepared to tackle as it currently stands.

Diasporas and Cosmopolitanism

As discussed above, to be legitimate within current realities, the international order should develop by focusing on human communities. Burkett has looked at the possibility of relying on the population of SIDS as the sole element of social organization and the continuity of these states (that is, without territory) through the use of two concepts: the role played by diasporas and the cosmopolitan theory.[271] Before discussing how these concepts have evolved, a word must be said on that to which they are opposed: boundaries. Indeed, a boundary was originally seen as drawing a line between "[w]ho is and who is not a member of a particular community … between members and strangers, insiders and outsiders."[272] Buchanan similarly refers to the congruence assumption — that is, the assumption that the membership boundary coincides with the geographical boundary.[273] Citizenship brought this idea of belonging within the legal realm: citizens are part of the group, while non-citizens are not.

Diasporas, and migrant groups in general, provide evidence that belonging to a specific group goes beyond boundaries.[274] It shows that the

[270] Burkett, "Nation Ex-Situ," *supra* note 8 at 91.

[271] This subsection is mostly based on the argumentation in Burkett, *supra* note 8.

[272] Buchanan & Moore, *supra* note 7 at 7.

[273] Buchanan, "The Making," *supra* note 36 at 231 (emphasis in original).

[274] Burkett, "Nation Ex-Situ," *supra* note 8 at 102. The term "diaspora" is, throughout this article, understood as the physical dispersion of the people of a same nation or sharing the same culture. We acknowledge the existence of other meanings of the term, in particular, the one referring to a diaspora as a "way of living," not linked to any ethnic and/or cultural belonging. However, this alternative meaning goes beyond the scope of this article, which focuses on a meaning of diaspora that is linked to "deterritorialized" nationalism or "deterritorialized" communal belonging.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

"deterritorialization" of communities "is another process of imaginary nation-building born of displacement, [sharing] many characteristics of … long-distance nationalism."[275] The existence of these groups also stimulates further migration, acting as an attracting pole for other members of the same community who will rely on their peers for connections and networks to facilitate their establishment.[276] Under a diasporic theory of belonging, the rights and duties between members of a group are held independently of where the members of that group are physically located. The diasporic theory therefore moves the focus away from the nation-state and reorients it towards the nation, understood as a community or society that shares similar historic and cultural characteristics.

Cosmopolitanism has pushed the concept of belonging even further and brings us to another meaning behind the word "nation," one that builds on the notion of "togetherness." Based on a shared morality, persons belong to a global community, independently of their origin, cultural or religious background, and affiliation.[277] Cosmopolitanism has been defined as "a global politics that … projects a sociality of common political engagement among all human beings across the globe."[278]

Prima facie, cosmopolitanism seems contradictory to the diasporic theory. It seems that cosmopolitanism would threaten or destroy the sense of community that members of formerly territorially based groups have with one another in favour of a homogeneous global community. However, cosmopolitanism does not entail the dilution of cultural identities — it builds on "differential equality (together, but different),"[279] on the inclusion of these communities within "transcendent solidarities," based on a moral duty to preserve common values.[280] As explained by Burkett, refugees — and environmentally displaced people — would benefit from belonging

275 Michelle McKinley, "Conviviality, Cosmopolitan Citizenship, and Hospitality" (2009) 5 Unbound 55 at 81, cited in Burkett, "Nation Ex-Situ," *supra* note 8 at 101.

276 Burkett, "Nation Ex-Situ," *supra* note 8 at 104.

277 See generally the writings of Emmanuel Kant, Jacques Derrida, and, most recently, Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (London: Penguin, 2007).

278 Paul James, "Political Philosophies of the Global: A Critical Overview" in Paul James, ed, *Globalization and Politics, Volume IV: Political Philosophies of the Global* (London: Sage, 2014) vii at x.

279 Pierré-Caps, *supra* note 4 at 50. See also Yasuaki, *supra* note 266.

280 McKinley, *supra* note 275 at 68, cited in Burkett, "Nation Ex-Situ," *supra* note 8 at 101. It is worth noting that, while we believe both the differential equality principle and the notion of solidarity as a moral obligation can be used to describe cosmopolitanism, they represent two approaches to legitimacy and morality. Indeed, as discussed earlier in this article, the former can be linked to inter-civilizationalism while the latter is based on a more Western-oriented system of shared common values.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

to a global community that could provide them with such transcendent support.[281]

In short, social entities that are not necessarily related to a territorial area are concepts that the territorial state-driven system is ill-equipped to capture since that system builds on the premise that belonging to a group is grounded in the exercise of rights and duties that are themselves dependent on shared territorial location.[282] Therefore, the diasporic and cosmopolitan theories both rely on a concept of social belonging that would exist independently of territory and that could be used to ensure the continuity of SIDS as social entities.

These theories, however, present some limitations. First, they appropriately put the emphasis on human communities, which should be the main focus, given the current reality, but, for now, still lack pragmatic elements that would be required to be considered as a complete basis for social organization. How would the rights and obligations of the dispersed people be instantiated? How could the members of the diasporically scattered group make claims against one another and satisfy their mutual obligations? Would the rights and obligations between members of the group become correspondingly weaker as they move further apart physically? This raises the question of whether it is really conceivable, on a long-term basis, to ensure the survival of a community and its "feeling of belonging" without any link to territory.[283]

Furthermore, applied to the particular situation of the populations of SIDS, it is necessary to take into consideration the actual will of these populations. Is falling under the label of "global citizens" really what they are hoping for, especially in a context where "the distinction between 'us' and 'them' … remains a pervasive syndrome of humankind," even if the world has "become a 'global neighbourhood' in some respects"?[284] These populations want to be helped in order to survive as they now are, and the diasporic and cosmopolitan theories fail to address such a desire clearly.

Global Governance

The main thrust of the critique is that international law is ineffective in solving global problems as those problems become more salient. To an unprecedented extent, national polities have become — or have begun to understand that they are — dependent on, and vulnerable to, forces and dynamics outside their own boundaries. Although the problems cannot typically be solved through national

[281] Burkett, "Nation Ex-Situ," *supra* note 8 at 100.

[282] *Ibid* at 99.

[283] Jeanneney, *supra* note 8 at 127–28.

[284] Schachter, *supra* note 5 at 19.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

action alone, the requisite transboundary measures often face severe collective-action problems, which international law is generally unable to overcome.[285]

The situation of SIDS illustrates the global problems to which Nico Krisch refers in this passage. Not only does uncertainty relating to maritime zones affect SIDS themselves, but it also affects the international community because of the potential impacts of territorial disappearance on areas beyond national jurisdiction and the resources found in these areas. Similarly, concerns related to migration and climate change are inherently transboundary in nature. We suggest that alternative solutions that address the global character of the consequences faced by SIDS can be found within the doctrine of global governance. This theory could therefore be used to reach both a procedure-oriented (through global processes) and a result-oriented (through global solutions) legitimacy of the international system's response to the situation of SIDS.

The shaping of international law is connected to the development of public policy.[286] By importing the concept of governance into the legal realm, international law became willing to abide by the principle of "close cooperation by states and other actors to achieve desired objectives."[287] Indeed, governance can be seen as a way to complement the role of international law because "in contrast to traditional forms of international law, [governance is] characterized by a focus on the dynamic of processes, as opposed to stable structures … by the permeability of state 'borders' in both the literal, and the symbolic, sense."[288]

The related doctrine of global governance suggests an organizational structure for the international regime that goes "beyond the state,"[289] that envisages the "prospect of a new world order in a future 'world state'."[290] The doctrine was also suggested as the way to establish an organizational

285 Krisch, *supra* note 5 at 3.

286 Karl-Heinz Ladeur, "Governance, Theory of," *Max Planck Encyclopedia of Public International Law* (September 2010) at para 13.

287 Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 462. See also Ladeur, *supra* note 286 at para 5.

288 Ladeur, *supra* note 286 at para 14.

289 Kwiecién, *supra* note 5 at 281, 303–04.

290 Two other meanings of global governance have also been underlined: "[I]t may also imply that the role of private self-organization, as opposed to traditional public organization of decision-making, has become a fundamental challenge of public international law, while the other terminology ('international governance') seems to try to reduce the new hybrid forms of governance to a supplementary role in order to preserve the traditional centrality of the concept of State and government in international relations and international law." Ladeur, *supra* note 286 at para 18.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

and institutional cosmopolitanism.[291] Global governance therefore brings the issues faced by SIDS within a sphere that transforms these issues from being "their concern" to being "our concern" and, in fact, "everyone's concern." This, we believe, triggers more global interest and accountability towards these issues and leads to solutions characterized and applied beyond the limits of one's state territory.

Global governance also posits that the creation of norms must be based on a mechanism of rule making and decision making besides state consent.[292] Indeed, the number of states and of other actors, as well as the complexity of the international legal regime, "makes consent an increasingly fictitious means of justifying norms."[293] Broader and more pluralistic mechanisms of norm making should therefore be envisaged[294] — for example, opting for soft law instruments and informal regulations;[295] favouring "club negotiations" (that is, only including states and other actors that have a major impact in a particular field);[296] looking for solutions in various regimes and legal orders; and so on.[297] Global governance therefore makes doctrinal space for permeable boundaries, transnationalism, and a broader perspective on norm making and decision making. This creates an appropriate framework for addressing the situation of SIDS, which, as can be seen, presents unprecedented practical and legal dilemmas.

Yet, while global governance theory proposes taking into account global interests and mechanisms that could help address the consequences stemming from the disappearance of SIDS' territories, the doctrine does not necessarily question the status of the state as a main actor under international law.[298] The theory might be sufficiently well developed to shed light on the changes brought by globalization to international society and the international legal order, but it is weaker at providing a critical analysis of the state-centred regime and at suggesting an alternative form of social organization dissociated from territory.[299]

[291] James, *supra* note 278 at xi.

[292] Ladeur, *supra* note 286 at para 5.

[293] JHH Weiler, "The Geology of International Law: Governance, Democracy and Legitimacy" (2004) 64 Heidelberg J Int'l L 547 at 547, 556, cited in Kwiecién, *supra* note 5 at 285. See also Krisch, *supra* note 5 at 28.

[294] Krisch, *supra* note 5 at 36; Kwiecién, *supra* note 5 at 303; Petit, *supra* note 45 at 193.

[295] Non-binding, soft law mechanisms can be more appropriate when addressing new legal issues to which traditional mechanisms are not yet ready to be applied. See Treves, *supra* note 245; Yamamoto & Esteban, *Atoll Island*, *supra* note 81 at 223; Petit, *supra* note 45 at 192.

[296] Krisch, *supra* note 5 at 16.

[297] *Ibid* at 5.

[298] Kwiecién, *supra* note 5 at 309.

[299] *Ibid* at 303.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Equity and Moral Duty: Exceptional Solutions for Exceptional Circumstances

The third path for grounding the legitimacy of international law in accommodating the realities of territorial disappearance is two-pronged: first, it implies a possible extension, or broad interpretation, of existing rules, and, second, it suggests that the international community is bound by a moral duty to recognize the continuing existence of SIDS independently of their territory.[300] These two approaches are based on the notion of equity as a principle of fairness and reasonableness.[301] "Equity" may refer to a power of complementarity, allowing decision makers to exercise their discretionary power within what is prescribed by law in ways that are proportional to the power exercised by other decision makers.[302] It may also refer to the possibility of a more autonomous power of norm creation, outside the law or even in contravention of it,[303] which makes equity, as Francisco Francioni puts it, "a catalyst for change and modernization of the law."[304]

Under the first of the understandings stated above, equity as a way of achieving fairness would justify "significant departures from precedent or the legal status quo,"[305] manifesting itself through a broader interpretation and application of existing rules and, eventually, as discussed under the doctrine of global governance, a broader and more pluralistic variety of norm making mechanisms.[306] And not only could rules be interpreted and applied more flexibly; moral considerations might also inform what these rules should address, suggesting a focus not on "entitlement to, but on responsibility for" the object or interest they address (for example, resources, protection of human rights, and so on).[307]

A concrete example of the extension of rules following an equity-based analysis of territorial disappearance and state continuity can be found

[300] Burkett, "Nation Ex-Situ," *supra* note 8 at 91.

[301] Francisco Francioni, "Equity in International Law," *Max Planck Encyclopedia of Public International Law* (June 2013) at paras 1, 3, 10. The second refers to the possibility for the International Court of Justice to decide cases on an *ex æquo et bono* basis. See *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XV1, art 38(2).

[302] Francioni, *supra* note 301 at para 10.

[303] *Ibid* at paras 7, 9.

[304] *Ibid* at para 29.

[305] Burkett, "Nation Ex-Situ," *supra* note 8 at 95.

[306] *Ibid* at 105–06.

[307] Davor Vidas & Peter Johan Schei, "The World Ocean in Globalization: Challenges and Responses for the Anthropocen Epoch" in Davor Vidas & Peter Johan Schei, eds, *The World Ocean in Globalization. Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden: Brill and Martinus Nijhoff, 2011) 3 at 6–7 (emphasis in original).

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

within the law of self-determination. A self-determination unit (for instance, a community or people) normally expresses its right to self-determination against another entity, traditionally a state or a colonial power.[308] Populations of SIDS, as members of sovereign states recognized by the international community, are undoubtedly bearers of this right. The preservation of the right to self-determination of these populations without reference to a defined territory will involve extending the meaning and application of the right since the right will not be raised against another entity but, rather, sought to be preserved in the abstract.[309] Alternatively, if, as suggested by Nine, we consider that this right can only be fully expressed in relation to physical territory, and in light of the fact that there is little or no more unoccupied territory available, territorial rights and entitlements of other states will have to be modified to fulfil the moral duty of providing these populations with access to territory.[310] The existing rule of self-determination is therefore extended to achieve equity.

Under the second understanding of equity, if continuity of statehood cannot be accommodated under an expansion or creation of positive law, we could rely on equitable reasoning to continue recognizing states with physically disappearing territory.[311] Equity would, in itself, become the end to be achieved. This would be translated as a moral duty for the international community to ensure such recognition, based on "international justice and solidarity."[312] In other words, "if the international community does not act quickly enough to prevent small island states from losing their effective statehood, the acknowledgment of their entitlement to survive as a legal community is the least that is owed to them."[313] As the example of self-determination once again illustrates, the international community would have the moral duty to recognize the continuing expression of the right of self-determination by the populations of SIDS.

What equity and morality suggest is that exceptional circumstances — the circumstances of climate change and sea-level rise faced by SIDS, created by geophysical phenomena and enhanced by the conduct of other states and leading to unprecedented uncertainty as to their survival[314] — in themselves justify a departure from the norm — that is, a departure from the classical requirements for statehood and from the territorial

[308] See, eg, Thürer & Burri, *supra* note 126 at para 15; Schachter, *supra* note 5 at 15.

[309] See, eg, Pierré-Caps, *supra* note 4 at 44.

[310] Nine, *supra* note 4 at 359, 362, 366.

[311] Wannier & Gerrard, *supra* note 96 at 7.

[312] Stoutenburg, "When Do," *supra* note 1 at 58–59, 66, 85; Jeanneney, *supra* note 8 at 123.

[313] Stoutenburg, "When Do," *supra* note 1 at 87.

[314] Jain, *supra* note 6 at 46.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

state regime.[315] What we are defending here is that the exceptional nature of the situation calls for exceptional solutions. As Jain points out, "[i]f the historically exceptional nature of the submergence of an entire state … cannot justify exceptionalism, then nothing can."[316]

Equity and morality, as with the other theoretical lenses explored above, present some limitations. First, these concepts suggest a path towards the expanded applicability of existing rules and rule-making mechanisms of international law, but they fail to explain how this would be translated into legal mechanisms. Second, equity as an end in itself that triggers a moral duty for the international community is also dependent on political will and geopolitical realities. In the end, "[d]espite the rhetoric of a 'borderless world' and the 'end of geography', globalization has not reduced the political significance of borders and boundaries," suggesting that the state-centred regime and the model of the territorial state are not so easily eroded.[317]

In any event, the three theoretical lenses outlined above contemplate the expansion of international law through the adoption of new values.[318] They are "slogans" at the crossroads between norms, rules, and values. They can be interpreted either as having normative force or as being mere labels from which no rule can be deduced but which can serve as a basis for the development of something new. The power to determine what interpretation is to be given to which concept lies in the hands of what remain, for now, the main actors of the current regime —states.[319]

In spite of these observations, we believe the concepts of diasporas and cosmopolitanism, global governance, and equity and morality remain relevant to the issues addressed in this article. It is true that none of them, taken individually, suggest a clear alternative to the model of the territorial state. However, they may, particularly if considered in the context of one another, shape the mindset that one should adopt when aiming for a change in how we conceive the international legal system, by pointing the way towards a broader norm-making arena.

Conclusion

The reality of territorial disappearance faced by SIDS is unprecedented and triggers a new interaction between geography and law: "[T]ransformations do not happen *on* a territory but are undergone *by* a territory."[320]

[315] Burkett, "Nation Ex-Situ," *supra* note 8 at 91.

[316] Jain, *supra* note 6 at 44.

[317] Hurrell, *supra* note 33 at 287; Buchanan, "The Making," *supra* note 36 at 236.

[318] Treves, *supra* note 245.

[319] See, eg, Petit, *supra* note 45 at 191.

[320] Jeanneney, *supra* note 8 at 115: "*des mutations juridiques sur un territoire plutôt que des mutations subies par le territoire*" (emphasis in original).

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

The consequences of such transformations are also twofold: not only are they practical and factual, but they are also legal, shedding light on the gaps in various existing regimes that may be used to address such consequences. Submersion of territory has therefore brought us to question "whether such a new phenomenon, having such broad repercussions, could alter fundamental representations of international law," most particularly the main model of organization, security, and stability at the core of the international legal order — the territorial state.[321]

States as subjects of international law are the result of the interconnectedness between the two meanings of the notion of "state": the way a social community organizes itself and the territory occupied by that community. The entitlements associated with statehood, held by either the state itself or its population, are rooted in a notion of territory that intrinsically links the current international legal regime to territoriality or connection to a particular geographic area. The threat of the physical disappearance of a state's territory due to sea-level rise and other climate change-induced consequences therefore not only raises questions related to the continuity of the state as a legal entity but also triggers far broader impacts. For example, uncertainty ensues as to the preservation of the entitlements of states over their maritime resources, issues of migration and protection of human rights arise, and questions related to the right of self-determination of peoples are triggered. Furthermore, concerns relating to obligations owed to affected states and populations, including the relevance of the regime of state responsibility in general and in the context of climate change, result.

Most responses to these issues to date are also rooted in the traditional importance of territory as a component of statehood. Indeed, they focus on the preservation or acquisition of territory. The concept of the deterritorialized state, however, departs from a purely territorial notion of the state, focusing instead on its community-oriented meaning. It is exactly this possibility — a meaning of "state" detached from its territorial component — that this article has assessed. We have examined concepts that can be relied upon to suggest an alternative model to the territorial state that would be better adapted to the reality of territorial disappearance. In a globalized context, where a variety of actors interact with each other in situations that transcend borders, the legitimacy of a territorial state-driven regime is questionable. Legitimacy, assessed from a moral perspective, will be reached by focusing on a standard of minimal justice, linked to the protection of human rights held by individuals and communities and on an inter-civilizational integration of values. A legitimate and moral international system is one that defines the state in terms of human communities and that suggests a normative framework adapted to current

[321] *Ibid* at 113.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

realities. And to be legitimate, international law must "vacillate ... between meeting the needs of present justice, on the one hand, and future justice, on the other."[322]

The theoretical lenses looked at, without clearly suggesting an alternative model to the territorial state, propose new ways of approaching the international legal regime. Indeed, despite the limitations they present, the diasporic and cosmopolitan theories, the concept of global governance, and the equitable and moral doctrines, particularly if considered together, suggest ways of developing a form of social organization, a model aiming at stability and security that is not anchored in territory. Nevertheless, a complete solution to the issues discussed will have to move from the theoretical realm to the realm of behaviour and state practice for international law to really come into play.[323]

It would be naive — and even wrong — to claim that the state should be relegated to the background of the international legal regime. States remain the primary subjects of international law. As suggested by Judge Cançado Trindade, claiming that other subjects of international law should be taken into consideration or that new subjects should be envisaged does not mean that the state should be replaced. It merely means that states coexist with other actors and share with them the sphere that is international law.[324] What we are suggesting is to think outside the box that is the regime's intrinsic connection to territoriality. The importance of the current model is seen through the desire of non-state actors and new entities to be recognized by international law instead of challenging its actual structure.[325] However, following such reasoning and relying on current structures offers limited solutions to the practical realities of SIDS. And the need for solutions is pressing. While the transboundary regimes of migration, climate change, and the law of the sea have been discussed in this article, territorial disappearance has a reach that is much broader, "also [opening] the possibility for conflict and disputes"[326] and bringing to the fore issues of international peace and security.[327]

[322] See, generally, Robert Scott, "Chaos Theory and the Justice Paradox" (1993) 35:1 Wm & Mary L Rev 329, cited in Burkett, "Justice Paradox," *supra* note 147 at 636.

[323] Kingsbury, *supra* note 244 at 298; Jeanneney, *supra* note 8 at 109.

[324] Cançado Trindade, *supra* note 249 at 157; Schachter, *supra* note 5 at 22–23; Petit, *supra* note 45 at 185.

[325] Buchanan & Moore, *supra* note 7 at 8; Pierré-Caps, *supra* note 4 at 39: "*il [l'État-nation] est la structure juridique de prédilection des nouveaux États, alors même que les États les plus anciens s'efforcent de l'adapter … sans rien concéder, pour autant, de ses principes.*"

[326] Maas & Carius, *supra* note 12 at 660.

[327] ILA CB, *supra* note 21 at 2, cited in Vidas, Freestone & McAdam, *supra* note 12 at 401.

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4

Will the territorial state-based international regime survive through mere evolution or will it face a complete revolution? While Serge Sur is of the opinion that "transformation does not mean metamorphosis," we dare to say that the most appropriate solution will not only be one that transcends territorial borders but also one that steers away from them; one that takes into consideration not only a transboundary reality but also a "beyond border" reality.[328]

[328] Serge Sur, "Cours général: La créativité du droit international" (lecture delivered at The Hague Academy of International Law, 9–27 July 2012), reprinted in (2012) 363 Rec des Cours 9 at 98: "Transformation n'est pas métamorphose."

Downloaded from https://www.cambridge.org/core. Universiteitsbibliotheek Utrecht, on 22 Sep 2017 at 09:26:31, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/cyl.2016.4