CLIMATE, STATE, AND SOVEREIGNTY: Self-Determination and Sea Level Rise

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Climate change and sea-level rise are existential threats to low-lying island States, which face the looming submergence of their territory and the correlative depopulation and severe restrictions on their governmental capacity, at a national and international levels. Four States are particularly endangered because they are exclusively (or almost exclusively) composed of coral islands and atolls below 10 or even five meters of altitude. They are Tuvalu, Kiribati, the Marshall Islands in the Pacific Ocean, and the Maldives in the Indian Ocean. In its Fifth Assessment Report, the Intergovernmental Panel on Climate Change foresaw an average rise of sea level of 98 cm by 2100. This prospect, often regarded as conservative, in fact represents a possible death sentence for these States. As a result, low-lying island States are considering and deploying legal and physical strategies to protect their continuity as States, sparking new debates on the potential evolution of the law on Statehood and the international law of the sea.
entity has ceased to exist. At the time when the States most affected by sea-level rise became independent, during the second wave of the decolonization process between the late 1960s and the late 1970s, the possibility of sea-level rise resulting in a loss of territory or permanent population was not yet well-known. It was therefore not contemplated in the Montevideo Convention. Today, there is a much better understanding of these challenges. The threat to State extinction through the strict mirroring application of the doctrine of Statehood constitutes an ontological challenge to international law with respect to the concept of the State.

In 2012, the International Law Association (ILA) Committee on International Law and Sea-Level Rise was established to address these challenges. Even though the committee did not directly address the issue of State extinction due to sea-level rise in its first mandate, it took a position departing from the traditional view on the doctrine of Statehood. Based on international law's inherent bias in favor of stability and order, the ILA Committee endorsed the view that “it is generally agreed that, as guidance and as a starting point, there should be a presumption of continuing Statehood in cases where land territory was lost.” This follows the position taken by prominent scholars, such as James Crawford, who wrote in *The Creation of States in International Law* that “a State is not necessarily extinguished by substantial changes in territory, population, government, or even, in some cases, by a combination of all three.” The approach also stems from the recognition of the fundamental role played by normative standards, the ethical and diplomatic framework in which claims of both access to Statehood and loss of it are framed. Indeed, the recognition of these “micro-States” as independent States with full United Nations (UN) membership (despite not necessarily fulfilling the capacity requirement of Article 4(1) of the UN Charter) can only be explained by the fact that access to territory for these States represented (and may still represent) an expression to their right to self-determination and independence from colonial domination.

Low-lying island States have expressed their concern about the challenge that sea-level rise poses to their continuity ever since the late 1980s, even before the United Nations Framework Convention on Climate Change was adopted at the Rio Conference in 1992. In addition, despite their very limited land extension, Pacific Island States benefited from the so-called

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3 See ILA Committee on International Law and Sea-Level Rise, Final Report (Sydney, 2018), p. 25. At https://brill.com/view/title/54753. The committee's mandate is to analyze the impacts of sea-level rise around three main pillars: 1) basic principles of the law of the sea, 2) human rights, and 3) the law on Statehood and international security. In the 2018 ILA Conference held in Sydney, the committee released its final report, covering the first of these two pillars. As its mandate was extended for another four years, it is now turning to examine more closely how sea-level rise interplays with the law on Statehood—and we await the committee's conclusions in its second report of 2022.


expansionist evolution of the international law of the sea towards a distribution of sovereignty and jurisdiction over greater maritime spaces, which culminated with the adoption in 1982 of the United Nations Law of the Sea Convention (UNCLOS).\(^6\) Disproportionately vast maritime spaces became available to these States, which compensated for their very limited land extension. In some instances, coastal States could operate in a maritime area as vast as up to 300 times the extension of their land territory.\(^7\) Paradoxically, for these “Blue Ocean States” (rather than small-island States), as they often define themselves,\(^8\) the sea is both a fundamental element of their national identity and a source of their livelihoods, and is the main threat to their existence as a People and as a State. Protecting their maritime spaces and rights over such spaces is therefore of crucial importance for these States, and the first step toward the preservation of their continuity.

II. Securing the Continuity of Low-lying Island States through the Protection of their Maritime Entitlements

As Prosper Weil famously described, one of the cardinal principles of the law of the sea is that “the land dominates the sea, and does so by the intermediary of the coastal front.”\(^9\) Sea-level rise challenges this principle in multiple ways. As sea levels rise, the low-water line along the coast that marks the normal baseline will recede, moving inland. As a result, the outer maritime limits measured from that baseline will recede accordingly. These movements will be ever more substantial when key features used for the construction of straight baselines are inundated or lost, and the same principle applies to archipelagic baselines as sea-level rise may alter the land/water ratio provided for in Article 46 of UNCLOS. In response, and in addition to physical and engineering devices, such as sea walls or extensive mangrove plantation, legal tools are already being implemented by the affected States.

The path seemingly preferred by Pacific Island States is the conclusion of maritime delimitation treaties. Between 2003 and 2014, 12 new maritime delimitation agreements have been

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8 Ibid.

concluded in this region. Remarkably, Kiribati—the State with the highest number of maritime borders in this region—concluded seven new delimitation treaties on a single day. The purpose behind these treaties is to preserve maritime boundaries at a certain point in time because Article 62(2) of the Vienna Convention prevents State Parties from invoking “a fundamental change of circumstances” as grounds for terminating or withdrawing from the Treaty. While the question of their extinction or continuity as States remains unresolved in the international political arena, maritime boundaries are protected by the fundamental principle pacta sunt servanda.

The main obstacle to this first solution is that despite the shielding effects of maritime boundary agreements, these are likely to be temporary or time limited because maintaining the validity of maritime boundary agreements after full submergence would contravene the cardinal principle that “the land dominates the sea,” as noted above. Relatively, the maintenance of low-lying island States’ maritime entitlements even after full submergence would require the recognition (even if implicit) by international society of a new form of subjectivity.

Thus, while the delimitation of the maritime boundaries of the affected States seems to be the most effective option, in the absence of a maritime boundary, low-lying island States may also take unilateral measures seeking to protect their entitlements. In this context, the ILA Committee suggests two different approaches: “freezing” the baselines or “freezing” the outer maritime boundary. An emerging regional State practice in the Pacific seems to indicate a preference by the affected States for the former option, which allows for effective results with limited negative effects. This option enables low-lying island States to control the entire protective legal process because it is operated unilaterally: first, by the publication of their baselines, and then followed by the omission to update official charts. Although as a result the actual low-water line may no longer correspond to the chartered baseline, this will only have the effect of increasing the breadth of the internal waters, instead of increasing the limits of the other maritime spaces provided for in UNCLOS.

Adjudicating maritime boundaries may be another approach to preserving maritime entitlements. While there is limited jurisprudence on the matter, the case Bay of Bengal Maritime Boundary Arbitration (India v. Bangladesh) may already shed some light. Bangladesh argued that low-tide elevations

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and other minor maritime features should not be used as base points because rising sea levels would soon lead to their disappearance. The arbitral tribunal rejected this argument, holding that the relevant issue is not whether coastlines will be affected by climate change in the future, but whether the base points chosen now are feasible in the present case and time. It took this position in part because maritime delimitations—like land boundaries—should be stable and definitive to ensure a peaceful relationship between States. If they were malleable based on future circumstances, this would lead to the continuous reopening of matters, defeating the purpose of delimitation in creating unpredictable and unstable territories.

III. Preservation of the International Legal Personality of Low-Lying Island States through the Acquisition of New Territory or their Integration into Another State’s Territory

Another option is the acquisition of new territory through, for example, the purchase of territory from another State over which the island State would exercise sovereignty with the intention of replacing no longer inhabitable islands. This purchase would provide a home for the State’s population and arguably satisfy the criteria for Statehood. While straightforward in theory, it may be more difficult in practice, as it would require another State to cede sovereignty over that territory and would require acceptance of territory as encompassing land not adjacent to the corresponding maritime entitlements.

There is precedent in international law for the purchase of territory. Kiribati bought approximately 2,000 hectares of land in Viti Levu (Fiji) from a private owner and claimed that such land would serve to develop coastal agriculture as well as to potentially relocate the I-Kiribati population when needed. While this example shows the practical feasibility of acquiring new territory through the purchase of land, this is not tantamount to a cession of sovereignty, nor does it solve the problem of maintaining the State’s maritime entitlements surrounding its former territory.

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14 Ibid., 214–15.

Relatedly, in 2017 the autonomous government of French Polynesia signed a Memorandum of Understanding with the Seasteading Institute to implement the Floating Island Project, i.e., to construct new artificial “islands” in French Polynesia’s existing territorial sea. This option would enable the State to retain its territory with the services necessary to be able to sustain human habitation or economic life and by extension, its maritime entitlements. It is open for debate whether these artificial islands would merit special consideration when they replace the entire previously existing low-lying island State, allowing them to be governed by Article 121 of UNCLOS instead of being treated as artificial islands which do not generate any maritime rights under Article 60.

Other options, which remain for the time being hypothetical, are a merger or federation with another State. In the case of a full merger, the deterritorialized State becomes completely subsumed into the host State, and its international legal personality ceases to exist independently in international law.

This option would provide the resettled people with full citizenship rather than risking their being left stateless. Yet, this option falls short from the perspective of ensuring the survival of the State. The option of a federation or similar arrangement has also been suggested. The question remains, however, whether the former island State would retain its entitlements where it already concluded delimitation agreements or had previously litigated its maritime boundaries.

There are advantages and disadvantages to retaining entitlements. Allowing a State to retain these rights ensures that it is not punished for the loss of its territory that occurred for reasons out of its control. However, it could also serve as a perverse incentive for States not to assist small island States in dealing with the challenges of sea-level rise because it would give them the opportunity to subsume the inhabitants into the host State territory, thereby expanding the host State’s maritime territory. As Jenny Grote Stoutenburg observes, this would also not preserve the State per se, but would instead result in the creation of a new international legal person of which it is a constituent part. The new federation would be the relevant actor for the purposes of international law, and the population would have the citizenship conferred by the new federation. Just as with reterritorialization,

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17 On the notion of international legal personality, see e.g., R. Portmann, Legal Personality in International Law (CUP, 2010), p. 1, explaining that: “it is principally employed to distinguish between those social entities relevant to the international legal system and those excluded from it. There is almost universal agreement that states are international persons. But it is unresolved whether and according to what criteria entities other than states—individuals, international and non-governmental organizations, private corporations—can become international persons and what consequences such international legal status entails.” At http://assets.cambridge.org/9780521768450_excerpt/9780521768450_excerpt.pdf.
this approach would allow the State or its successor to continue to exercise sovereignty over the island State’s pre-existing maritime entitlements. Rosemary Rayfuse points out that while the idea of a federation is theoretically straightforward, there is something inequitable about a solution that requires island States to give up a part of their sovereignty to a larger State that was at fault, through greenhouse gas emissions, for the deterritorialization of the island State.  

Similarly, other scholars have proposed continuing to recognize island States even after they no longer inhabit their own territory. Rayfuse proposes the concept of a deterritorialized State, noting that although territory is generally a requirement for Statehood, the “concept of a deterritorialized state is neither new, nor is it rejected under current international law.”  

Similarly, Maxine Burkett proposes the concept of a “nation ex-situ.” The principal precedents cited for such concepts are the Holy See (which did not have any territory between 1870 and 1929, when sovereignty over Vatican City was returned to it through an agreement with Italy), and the Order of Malta, which is recognized as a sovereign entity despite its lack of territory.

Last, some have proposed the possibility of UN Member States recognizing States in their deterritorialized form. There are great risks, however, in pursuing such an initiative, as a negative outcome on such a resolution could signal that States have not agreed to recognize deterritorialized States. 

The sinking island paradigm has emerged—and is here to stay—as one of the latest and perhaps clearest images of today’s postmodern global environmental crisis. While it may only affect a small group of States, this paradigm symbolizes both the limits of international law and the excesses of our civilization.

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