

# SOVEREIGNTY SUNK? THE POSITION OF 'SINKING STATES' AT INTERNATIONAL LAW

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*Article 1 of the Montevideo Convention on Rights and Duties of States provides that a state should possess a defined territory. Traditional definitions of the state also include this requirement. What, then, of a state that becomes inundated with water such that its nationals leave its territory? What are the consequences if a state becomes completely inundated and has no territory above sea level? Does this automatically result in extinction? This article examines the issue in four parts. First, it is observed that both traditional and contemporary definitions of the state include a requirement of territory. It is noted that the requirement has been loosely applied. Secondly, it is argued that mass migration of a state's nationals does not give rise to the abandonment of sovereignty or a loss of statehood. Thirdly, the issue of state extinction via loss of territory is considered. It is contended that the presumption of continuity — while a useful consideration — cannot provide an answer. It is argued that the purchase of territory — short of cession — would not be sufficient to satisfy the territory requirement. Nevertheless, it is submitted that the state will not become extinct once there is no territory above sea level: international law would not tolerate such instability. Instead, a necessary legal construction would be imposed: a fiction that prevents the state from becoming extinct despite the first wave washing over the last rock. Finally, solutions proposed in the existing literature are examined and it is ultimately concluded that none provide a satisfactory or complete answer.*

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## I INTRODUCTION

[T]he argument is so obvious as to be unnecessary. That a State would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (eg an island which would become submerged) can be taken for granted ...

— Krystyna Marek<sup>1</sup>

The state has long been accepted as international law's central actor:<sup>2</sup> its position as the primary concern of international law is an 'axiomatic feature[] of international legal thought'.<sup>3</sup> Although this position is sometimes challenged,<sup>4</sup> the state remains the primary actor in international law. It remains the 'principal maker and subject of international law: its law-abiding subject and its violator'<sup>5</sup>

<sup>1</sup> Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz, 2<sup>nd</sup> ed, 1968) 7.

<sup>2</sup> See, eg, Inger Österdahl, 'Relatively Failed. Troubled Statehood and International Law' (2003) 14 *Finnish Yearbook of International Law* 49, 49; Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 95, 95; Nii Lante Wallace-Bruce, 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law' (2000) 47 *Netherlands International Law Review* 53, 54; Thomas D Grant, 'Defining Statehood: The *Montevideo Convention* and Its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403, 407; Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447, 447; Manfred Lachs, 'The Development and General Trends of International Law in Our Time' (1980) 169 *Recueil des Cours* 32.

<sup>3</sup> Matthew Craven, 'Statehood, Self-Determination, and Recognition' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3<sup>rd</sup> ed, 2010) 203, 203. See also Jeffrey L Dunoff, Steven R Ratner and David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (Aspen, 2002) 105.

<sup>4</sup> It has been suggested that there are two key challenges to state sovereignty, namely economic interdependence and the universal recognition of human rights: Ali Khan, 'The Extinction of Nation-States' (1992) 7 *American University Journal of International Law and Policy* 197, 199–201; Bernd Ladwig and Beate Rudolf, 'International Legal and Moral Standards of Good Governance in Fragile States' in Thomas Risse (ed), *Governance without a State? Policies and Politics in Areas of Limited Statehood* (Columbia University Press, 2011) 199. See also Nico Schrijver, 'The Changing Nature of State Sovereignty' (1999)

70 *British Yearbook of International Law* 65, 81–3; Gerard Kreijen, *State Failure, Sovereignty and Effectiveness* (Martinus Nijhoff, 2004) 8. Some commentators go so far as to suggest that the very concept of the nation-state is outdated and artificial: see, eg, Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press, 1995) 1–2; Hans J Morgenthau, 'The Intellectual and Political Functions of a Theory of International Relations' in Horace V Harrison (ed), *The Role of Theory in International Relations* (Van Nostrand, 1964) 99, 116.

<sup>5</sup> Lachs, above n 2, 32.

and ‘it still makes a great difference whether an entity is or is not a State’.<sup>6</sup> Indeed, despite the increased potential for disasters and trade and commerce to transcend borders, the world remains divided on a territorial basis.<sup>7</sup>

International law has assumed territory will always exist<sup>8</sup> and focused on state creation and succession, rather than continuity or extinction. Extinction and succession are related but distinct concepts.<sup>9</sup> Succession concerns a ‘definitive replacement of one state by another in respect of sovereignty over a given territory’.<sup>10</sup> It assumes the continued existence of one (or several) state(s) and asks which successor holds the rights and obligations of the original state.<sup>11</sup> Tests for extinction, however, remain unclear and are considered below.

Until now, state extinction has been treated as only of theoretical interest. In 1905, Oppenheim wrote: ‘*Theoretically* such extinction of International Persons is possible through emigration or the perishing of the whole population of a State’.<sup>12</sup> It was beyond contemplation that a state’s territory or people would disappear.<sup>13</sup> This sentence was removed from later editions of Oppenheim’s *International Law: A Treatise*.

What, then, of a state that becomes inundated with water such that its nationals leave its territory? What are the consequences if a state becomes completely inundated and has no territory above sea level? Does this *automatically* result in extinction? These scenarios, once considered merely of theoretical interest, are becoming reality. There are a number of low-lying island states at risk of becoming inundated due to rising sea levels. The highest point of

<sup>6</sup> James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 31. See also Malcolm N Shaw, *International Law* (Cambridge University Press, 6<sup>th</sup> ed, 2008) 197; Jean d’Aspremont, ‘International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?’ in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate, 2010) 171, 179–80; Knop, above n 2, 96–7. Predictions of the end of the sovereign state were similarly made in the early 20<sup>th</sup> century: see Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR — A Study of the Tension between Normativity and Power in International Law* (Martinus Nijhoff, 2003) 3.

<sup>7</sup> Schrijver, above n 4, 95; Robert H Jackson and Alan James, ‘The Character of Independent Statehood’ in Robert H Jackson and Alan James (eds), *States in a Changing World: A Contemporary Analysis* (Clarendon Press, 1993) 3, 9. Cf Enrico Milano, ‘The Deterritorialization of International Law’ (2013) 2(3) *ESIL Reflections* <[http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflections%20-%20Milano\\_0.pdf](http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflections%20-%20Milano_0.pdf)>.

<sup>8</sup> Wallace-Bruce, above n 2, 67.

<sup>9</sup> See Crawford, *The Creation of States in International Law*, above n 6, 667–8.

<sup>10</sup> James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8<sup>th</sup> ed, 2012) 423. See also D P O’Connell, *International Law* (Stevens & Sons, 2<sup>nd</sup> ed, 1970) vol 1, 365; Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press, 2007) 56.

<sup>11</sup> See *Vienna Convention on Succession of States in Respect of Treaties*, opened for signature 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996) art 2(1)(b); *Vienna Convention on Succession of States in respect of State Property, Archives and Debts*, opened for signature 8 April 1983, 22 ILM 306 (not yet in force) art 2(1)(a).

<sup>12</sup> L Oppenheim, *International Law: A Treatise* (Longmans, 1905) vol 1, 117–18 (emphasis added).

<sup>13</sup> Even in 1990, physical disappearance was ‘far-fetched and purely hypothetical’: A H A Soons, ‘The Effects of a Rising Sea Level on Maritime Limits and Boundaries’ (1990) 37 *Netherlands International Law Review* 207, 229.

the Maldives is 2.4 metres,<sup>14</sup> 5 metres in Tuvalu<sup>15</sup> and 81 metres in Kiribati.<sup>16</sup> Their average height, however, is far lower at approximately 1.5 metres (Maldives)<sup>17</sup> and 3–4 metres (Tuvalu and Kiribati).<sup>18</sup> Consequently, a slight sea level rise will threaten their physical existence.<sup>19</sup>

Statehood is important for island states for three reasons. First, United Nations membership<sup>20</sup> and standing before the International Court of Justice ('ICJ') is limited to states.<sup>21</sup> UN membership is crucial because it provides a cost-effective method of maintaining international contacts, thus avoiding the need for a worldwide diplomatic apparatus.<sup>22</sup> Uncontroversial access to the ICJ is critical when a state is vulnerable: protection of the law is 'most necessary' for small states.<sup>23</sup> Secondly, the people of island states have strong links with their culture,

<sup>14</sup> World Factbook, *South Asia: Maldives* (31 October 2013) Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html>>.

<sup>15</sup> World Factbook, *Australia-Oceania: Tuvalu* (14 November 2013) Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>>.

<sup>16</sup> World Factbook, *Australia-Oceania: Kiribati* (14 November 2013) Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/geos/kr.html>>. The only highland in Kiribati is Banaba, which was depopulated to facilitate mining in the 1940s: see Jane McAdam, 'Caught between Homelands', *Inside Story* (online), 15 March 2013 <<http://inside.org.au/caught-between-homelands>>.

<sup>17</sup> 'National Adaptation Program of Action: Republic of Maldives' (Report, Ministry of Environment, Energy and Water, Republic of Maldives, 2007) 16 <<http://unfccc.int/resource/docs/napa/mdv01.pdf>>.

<sup>18</sup> 'Tuvalu's National Adaptation Programme of Action: Under the Auspices of the *United Nations Framework Convention on Climate Change*' (Report, Ministry of Natural Resources, Environment, Agriculture and Lands, Department of Environment, Tuvalu, May 2007) 13 <<http://unfccc.int/resource/docs/napa/tuv01.pdf>>; 'Republic of Kiribati: National Adaptation Program of Action (NAPA)' (Report, Environment and Conservation Division, Ministry of Environment, Land and Agricultural Development, Government of Kiribati, January 2007) iii <<http://unfccc.int/resource/docs/napa/kir01.pdf>>.

<sup>19</sup> W N Adger et al, 'Assessment of Adaptation Practices, Options, Constraints and Capacity' in M L Parry et al (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability — Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 717, 736 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter17.pdf>>; Maldives, Submission to the Office of the United Nations High Commissioner for Human Rights *Human Rights Council Resolution 7/23* 'Human Rights and Climate Change', 25 September 2008, 21, 47 <[http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives Submission.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives%20Submission.pdf)> ('*Maldives Submission*'); *Follow-Up to and Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, GA Res 63/213, UN GAOR, 63<sup>rd</sup> sess, 72<sup>nd</sup> plen mtg, Agenda Item 49(b), Supp No 49, UN Doc A/RES/63/213 (10 February 2009). These low-lying island states will be referred to as 'island states'.

<sup>20</sup> *Charter of the United Nations* art 4(1) ('*UN Charter*').

<sup>21</sup> *Statute of the International Court of Justice* art 34(1).

<sup>22</sup> Thomas D Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Martinus Nijhoff, 2009) 238.

<sup>23</sup> *Report of the Chairman of the Committee of Experts Concerning the Conditions under Which Liechtenstein May Become a Party to the Statute of the International Court of Justice*, UN Doc S/1342 (23 June 1949) 2 ('*Report of the Committee of Experts*'); Gregory E Wannier and Michael B Gerrard, 'Overview' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 3, 7.

land and state.<sup>24</sup> This connection and the desire to be viewed as valued community members were among the reasons why Tuvaluans rejected resettlement between 2008 and 2010<sup>25</sup> and continue to reject the refugee label.<sup>26</sup> Thirdly, the consequences of extinction are unclear.<sup>27</sup> At best, the state will lose its status as a state but remain ‘a subject of international law ... capable of possessing international rights and duties’,<sup>28</sup> thus retaining the capacity to bring international claims. Or certain obligations may be owed *erga omnes* and continue to bind third states.<sup>29</sup> At worst, physical extinction may result in the corresponding extinction of obligations. The people will have no recourse at international law, at least in the context of pre-existing obligations vis-a-vis the extinct state. At the very least, extinction will result in the loss of maritime rights,<sup>30</sup> which are of key concern to island states.<sup>31</sup>

<sup>24</sup> John Campbell, ‘Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, 2010) 57, 60–4. See also Maxine A Burkett, ‘The Nation Ex-Situ’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 89, 116–17.

<sup>25</sup> See European Parliament, ‘Climate Change Threatens Tuvalu’s Survival, Says Prime Minister Apisai Ielemia’ (Press Release, 10 December 2009) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20091207IPR66100+0+DOC+XML+V0//EN>>; Tuvalu’s Prime Minister Optimistic His Government Will Be Stable (6 October 2010) <<http://www.radioaustralia.net.au/international/2010-10-06/tuvalu-s-prime-minister-optimistic-his-government-will-be-stable/175382>>.

<sup>26</sup> Jane McAdam and Maryanne Loughry, ‘We Aren’t Refugees’, *Inside Story* (online), 30 June 2009 <<http://inside.org.au/we-arent-refugees>>. See also Rosemary Rayfuse, ‘International Law and Disappearing States — Maritime Zones and the Criteria for Statehood’ (2011) 41 *Environmental Policy and Law* 281, 286.

<sup>27</sup> This assumes that there are states in breach of their obligations and that the putative state wishes to air its claim in legal fora. As to the first, questions relating to the status of its people in third states may arise. They are unlikely to be refugees: Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 39–48. States near the Pacific island states have been reluctant to assist: see below n 33. Accordingly, difficult questions arise as to whether states are obliged to accept people into their territory; individuals may be detained for processing (and mistreated). Australia, for example, has a policy of detention as an ‘essential component of ... border control’: Parliamentary Library, *Immigration Detention in Australia* (20 March 2012) Parliament of Australia <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention)>.

<sup>28</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179 (‘*Reparation for Injuries*’).

<sup>29</sup> See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32.

<sup>30</sup> See Rayfuse, ‘International Law and Disappearing States’, above n 26; Charles Di Leva and Sachiko Morita, ‘Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?’ (Law & Development Working Paper Series No 5, World Bank, 2008) <[http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/L&D\\_number5.pdf](http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/L&D_number5.pdf)>.

<sup>31</sup> ABC Radio National, ‘Climate Change: The Pacific’, *Law Report*, 22 November 2011 (Damien Carrick) <<http://www.abc.net.au/radionational/programs/lawreport/climate-change-the-pacific/3684242#transcript>>; Ann Powers and Christopher Stucko, ‘Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 123, 131–2.

Climate change is not a sudden phenomenon and loss of territory will not occur instantaneously.<sup>32</sup> There are therefore two periods which require consideration. The first is when the people migrate due to the effects of rising sea levels. Crucially, there is still territory but issues relating to abandonment of sovereignty may arise. The second period commences with the complete loss of territory. Here, the question is whether extinction automatically follows from a complete loss of territory. While this is unlikely to occur within the next 50 years, any solution will require time, resources and political will.<sup>33</sup>

This article commences in Part II by examining the conventional requirements for statehood. As the rules on succession are inapplicable, the principles surrounding the creation of states form the starting point.<sup>34</sup> Part III questions whether mass migration constitutes an abandonment of sovereignty. Part IV considers whether the requirements for statehood are continuing and, critically, whether the complete loss of territory automatically results in state extinction. It is ultimately concluded that state extinction will not automatically occur due to a loss of territory, whether total or partial. Finally, Part V addresses some of the solutions proposed in the existing literature.

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<sup>32</sup> Burkett, 'The Nation Ex-Situ', above n 24, 93; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 119, 123.

<sup>33</sup> President Tong of Kiribati has noted that solutions must be found now to avoid his people becoming 'a football to be kicked around' in 50 to 60 years: Duncan Wilson, 'Interview: Climate Change ... Nobody Is Immune — Anote Tong, President of Kiribati' (Interview, 2008, 2 <[http://www.pacificdisaster.net/pdnadmin/data/original/KIR\\_Inter view\\_Climate\\_Change\\_nobody\\_immune.pdf](http://www.pacificdisaster.net/pdnadmin/data/original/KIR_Inter_view_Climate_Change_nobody_immune.pdf)>. These concerns are grounded by Tuvalu's sobering experience when, in 2001, it sought assistance from other states. Australia 'flatly refused': Rayfuse, 'International Law and Disappearing States', above n 26, 285. New Zealand's 'Pacific Access Category', created in 2002, permits an annual quota of 75 citizens each from Tuvalu and Kiribati and 250 from Tonga, as well as their partners and dependent children, to settle in New Zealand. Only those that are of good character and health, have basic English skills, possess a job offer in New Zealand and are between the ages of 18 and 45 are eligible: Katrina M Wyman, 'The National Immigration Policy Option: Limits and Potential' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 337, 353; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 115–17.

<sup>34</sup> This approach is also adopted by McAdam: McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 127–8.

## II DEFINITIONS OF THE 'STATE'

'A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices'.

— James Crawford<sup>35</sup>

'[O]ne cannot contemplate a State as a kind of disembodied spirit'.

— United Nations Security Council<sup>36</sup>

### A *The Requirement of Territory in State Formation*

#### 1 *No Settled Definition of a State*

There is no authoritative definition of a state, despite its importance in international law.<sup>37</sup> The term is used in many different ways;<sup>38</sup> 'no exact definition is possible'.<sup>39</sup> The problem is not the absence of academic writing, but rather the lack of legal sources that provide a definition.<sup>40</sup>

This article does not seek to elucidate a test for the definition or creation of a state, nor does it seek to examine its philosophical foundations.<sup>41</sup> Instead, it considers the requirement (if any) of territory, ultimately concluding that territory — loosely defined — is required for state formation.

#### 2 *Territory and Early Definitions*

Modern international law dates from the Peace of Westphalia of 1648,<sup>42</sup> where unity was established by nation states exercising sovereignty over certain territories.<sup>43</sup> While it is tempting to accept, based on the territorial nature of Westphalia, that statehood is conditioned on territory, the conclusion does not automatically follow. Although the treaties of Westphalia consolidated existing entities by dividing Europe into territorial states,<sup>44</sup> they did not consider the question of what made up a state or whether territory was required.

For many years, territory was not clearly delineated: borders were ill-defined and precise boundaries rare.<sup>45</sup> It was only in the 18<sup>th</sup> century, when mapping

<sup>35</sup> Crawford, *The Creation of States in International Law*, above n 6, 5.

<sup>36</sup> UN SCOR, 3<sup>rd</sup> sess, 383<sup>rd</sup> mtg, UN Doc S/PV.383 (2 December 1948) 11.

<sup>37</sup> Knop, above n 2, 95.

<sup>38</sup> UN SCOR, 3<sup>rd</sup> sess, 383<sup>rd</sup> mtg, UN Doc S/PV.383 (2 December 1948) 10.

<sup>39</sup> I A Shearer, *Starke's International Law* (Butterworths, 11<sup>th</sup> ed, 1994) 85. See also Leonidas Pitamic, *A Treatise on the State* (J H Furst, 1933) 1; Grant, 'Defining Statehood', above n 2, 408; Crawford, *The Creation of States in International Law*, above n 6, 31; Benjamin R Farley, 'Calling a State a State: Somaliland and International Recognition' (2011) 24 *Emory International Law Review* 777, 790.

<sup>40</sup> Grant, 'Defining Statehood', above n 2, 413.

<sup>41</sup> On this: see generally Crawford, *The Creation of States in International Law*, above n 6; Pitamic, above n 39.

<sup>42</sup> P H Winfield, *The Foundations & the Future of International Law* (Cambridge University Press, 1941) 18. See also Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law* 20.

<sup>43</sup> Gross, above n 42, 20.

<sup>44</sup> Crawford, *The Creation of States in International Law*, above n 6, 10.

<sup>45</sup> Vaughan Lowe, *International Law* (Oxford University Press, 2007) 136.

techniques were refined, that the drawing of more precise boundaries became possible.<sup>46</sup> Despite this, it may be observed that territory has always been a component of the state.<sup>47</sup>

By the 19<sup>th</sup> century, a number of writers proposed definitions of the state. Robert Phillimore, in 1879, concluded that a state is 'a people permanently occupying a fixed territory'.<sup>48</sup> Similar definitions appeared in Italy<sup>49</sup> and in Germany.<sup>50</sup> Analogous descriptions emerged in the early parts of the 20<sup>th</sup> century, with Percy Winfield defining the state as requiring

possession of a fixed territory ... [as] [t]he rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface ...<sup>51</sup>

### 3 The Montevideo Convention

In 1933, the *Montevideo Convention on Rights and Duties of States* ('*Montevideo Convention*' or '*Convention*')<sup>52</sup> was adopted. Article 1 of the *Convention* provides that '[t]he State ... 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'. Although the *Convention* is not widely signed or ratified, this definition is the most widely accepted formulation of the state.<sup>53</sup> It is commonly accepted that these are the four minimum requirements for a state to come into existence<sup>54</sup> and that they are reflective of custom,<sup>55</sup> in the sense that they represent the *minimum* for an entity to become a state.

<sup>46</sup> Ibid 136–7.

<sup>47</sup> On territory in historical times, see generally Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 225.

<sup>48</sup> Sir Robert Phillimore, *Commentaries upon International Law* (Butterworths, 3<sup>rd</sup> ed, 1879) vol 1, 81.

<sup>49</sup> Pasquale Fiore, *International Law Codified and Its Legal Sanction or the Legal Organization of the Society of States* (Edwin M Borcharth trans, Baker, Voorhis and Company, 1918) 106.

<sup>50</sup> See Georg Jellinek, *Allgemeine Staatslehre* [General Theory of the State] (O Häring, 3<sup>rd</sup> ed, 1914) 394–434.

<sup>51</sup> T J Lawrence, *The Principles of International Law* (MacMillan, 7<sup>th</sup> revised ed, 1927) 50–1.

<sup>52</sup> *Montevideo Convention on Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

<sup>53</sup> See, eg, Knop, above n 2, 95; Shaw, above n 6, 198; Lowe, above n 45, 153; Crawford, *The Creation of States in International Law*, above n 6, 45–6; *Prosecutor v Milošević (Decision on Motion for Judgment of Acquittal)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 16 June 2004) [85]–[86]; Österdahl, above n 2, 50; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002) 24, 49; Grant, 'Defining Statehood', above n 2, 416; Michael P Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations' (1995) 28 *Cornell International Law Journal* 29, 32 n 15; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 39; O'Connell, above n 10, 284; Nkambo Mugerwa, 'Subjects of International Law' in Max Sørensen (ed), *Manual of Public International Law* (Macmillan, 1968) 247, 250.

<sup>54</sup> Lowe, above n 45, 153.

<sup>55</sup> David Harris, *Cases and Materials on International Law* (Thomson Reuters, 7<sup>th</sup> ed, 2010) 92.



There was minimal discussion concerning the definition during the drafting process of the *Convention*.<sup>56</sup> Indeed, it was said that '[i]t is not deemed necessary to comment on the stipulations regarding conditions which the State must meet as a party of International Law'.<sup>57</sup> Whether the requirements are continuing, and the consequence of a failure to satisfy them, were not discussed.

Article 1 of the *Convention* is often criticised as being unclear, imprecise or incomplete. Matthew Craven, in particular, writes:

Precisely what Article 1 'declares', furthermore, is a little unclear. As a legal prescription ... [the requirements] appear to be either too abstract or too strict. They are too abstract in the sense that to say that an entity claiming to be a State needs to be able to declare itself as having people, territory and a form of government is really to say very little ...<sup>58</sup>

James Crawford and Thomas Grant similarly criticise the definition. Crawford suggests it is 'no more than a basis for further investigation ... Not all the conditions are necessary, and in any case further criteria must be employed to produce a working definition'.<sup>59</sup> Grant argues that the definition includes elements that are not clearly a prerequisite of statehood and that it excludes elements that are now regarded as indispensable.<sup>60</sup>

None of these criticisms go to the existence of the criteria: they are levelled at their incompleteness or the difficulties (and inconsistencies) encountered when applying them. Craven, in particular, does not criticise the definition's elements, merely their vagueness. Crawford's and Grant's criticism that not all the conditions are necessary does not go as far as to suggest that an entity does not require territory to become a state, merely that the application of the requirement is flexible. Territory does not have to be defined with absolute certainty, but there must still be a territorial base from which to operate.<sup>61</sup> Grant's contention, that an entity may become a state without acquiring territory,<sup>62</sup> is one that goes to control — not existence — of territory. In short, territory is a leg upon which the state must be created; the leg may be bent, but it must exist.

#### 4 *Territory and Later Definitions*

The requirement of territory has been consistently accepted in the 21<sup>st</sup> century. In 1991, the Arbitration Commission of the Peace Conference on Yugoslavia ('Badinter Commission') declared that 'the State is commonly defined as a community which consists of a territory and a population subject to

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<sup>56</sup> Grant, 'Defining Statehood', above n 2, 416.

<sup>57</sup> 'Report of the Second Sub-Committee: Rights and Duties of States' (1933) 1 *Minutes and Antecedents* 165, 165. See also 'Minutes of the Fifth Session (19 December 1933)' (1933) 1 *Minutes and Antecedents* 103.

<sup>58</sup> Craven, 'Statehood, Self-Determination, and Recognition', above n 3, 220.

<sup>59</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 128 (citations omitted).

<sup>60</sup> Grant, 'Defining Statehood', above n 2, 453–4.

<sup>61</sup> Shaw, above n 6, 199.

<sup>62</sup> Grant, 'Defining Statehood', above n 2, 436.

an organized political authority'.<sup>63</sup> Writings in America,<sup>64</sup> Canada,<sup>65</sup> France<sup>66</sup> and Germany<sup>67</sup> adopt similar definitions.

There were two further attempts to define the state: the International Law Commission's *Draft Declaration on Rights and Duties of States*<sup>68</sup> and Gerald G Fitzmaurice's work as a Special Rapporteur on the law of treaties.<sup>69</sup> Although both attempts were eventually unsuccessful, it is notable that both proposals included territory as a requirement.

### B *Application of the Territory Requirement*

Despite definitions requiring a 'defined' territory, the requirement has been loosely applied.<sup>70</sup> There is no minimum size or population required<sup>71</sup> and territory need not be continuous.<sup>72</sup> There are, however, limits to what constitutes territory: it must consist of a natural segment of the earth's surface, a wholly artificial construction will not suffice.<sup>73</sup>

Of greater importance is the fact that ill-defined borders or a failure effectively to control the majority of territory will not be barriers to statehood.<sup>74</sup> Albania, Burundi, Estonia, Israel, Kuwait, Latvia, Rwanda and Zaire were all admitted to the UN or the League of Nations despite having ill-defined borders

<sup>63</sup> *Yugoslavia Peace Conference Opinion No 1* (1991) 92 ILR 162, 165.

<sup>64</sup> See, eg, American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) vol 1, § 201; Barry E Carter and Phillip R Trimble, *International Law* (Little, Brown and Company, 1991) 412–13.

<sup>65</sup> Hugh Kindred et al, *International Law Chiefly as Interpreted and Applied in Canada* (Emond Montgomery, 4<sup>th</sup> ed, 1987) 11–12.

<sup>66</sup> Ngyuen Quoc Dinh, *Droit International Public* [Public International Law] (LGDJ, 8<sup>th</sup> ed, 2009) 454.

<sup>67</sup> Georg Dahm, *Völkerrecht* [International Law] (W Kohlhammer, 1958) vol 1, 76.

<sup>68</sup> *Draft Declaration on Rights and Duties of States*, GA Res 375 (IV), 4<sup>th</sup> sess, 270<sup>th</sup> plen mtg, Agenda Item 49, UN Doc A/RES/375(IV) (6 December 1949) annex ('*Draft Declaration on Rights and Duties of States*'). There was considerable disagreement on whether the declaration should contain a definition: see 'Summary Records of the First Session' [1949] *Yearbook of the International Law Commission* 9, 61–6, 70. It was concluded that the term was to be used 'in the sense commonly accepted in international practice': at 259.

<sup>69</sup> G G Fitzmaurice, 'Law of Treaties' [1956] II *Yearbook of the International Law Commission* 104, 107.

<sup>70</sup> Higgins, *Problems and Process*, above n 53, 40.

<sup>71</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 129; *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Montserrat, New Hebrides, Niue, Pitcairn, St Helena, St Kitts-Nevis-Anguilla, St Lucia, St Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, GA Res 2709 (XXV), UN GAOR, 25<sup>th</sup> sess, 1929<sup>th</sup> plen mtg, Agenda Item 23, UN Doc A/RES/2709(XXV) (14 December 1970) para 4.

<sup>72</sup> See *Sovereignty over Certain Frontier Land (Belgium v Netherlands) (Judgment)* [1959] ICJ Rep 209, 212–13, 229.

<sup>73</sup> '[O]nly structures which make use of a specific piece of the earth's surface can be recognized as State territory': *Re Duchy of Sealand* (1978) 80 ILR 683, 685 (Administrative Court of Cologne).

<sup>74</sup> See *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 32; *Question of the Monastery of Saint-Naoum (Advisory Opinion)* [1924] PCIJ (ser B) No 9, 10; Crawford, *Brownlie's Principles of Public International Law*, above n 10, 128; Shaw, above n 6, 199–200; Harris, above n 55, 92; Shearer, above n 39, 85–6; Raič, above n 53, 61–2.

or a government that lacked control over its territory.<sup>75</sup> This is also reflected in modern practice, with Bosnia and Herzegovina, Croatia and Kosovo being recognised as independent states despite non-governmental forces controlling substantial areas of territory.<sup>76</sup>

Two entities are said to support the proposition that a state may come into existence without territory:<sup>77</sup> the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta ('Order') and the Holy See.

The Order was established in the early 11<sup>th</sup> century, exercising sovereign authority over territory until it was ousted from Malta in 1798.<sup>78</sup> Although several unsuccessful attempts were made to regain territory, it had no territorial base until 1834, when it became domiciled in Rome. The Order remains in Rome to this day, with its headquarters in the Palazzo Malta, which has extraterritorial status but is not sovereign territory.<sup>79</sup> The Order maintains diplomatic relations with 104 countries<sup>80</sup> and is classified by the UN as one of the other entities 'having received a standing invitation to participate as observers in the sessions and the work of the General Assembly'.<sup>81</sup> It is active in the UN<sup>82</sup> and was invited to participate in Security Council meetings in 2009.<sup>83</sup>

<sup>75</sup> Higgins, *Problems and Process*, above n 53, 40; American Law Institute, above n 64, § 201 (Reporters' Notes (1)); *Question of the Monastery of Saint-Naoum (Advisory Opinion)* [1924] PCIJ (ser B) No 9, 10. Another (contentious) example is that of Biafra, which had no defined territory but was recognised by France, Gabon, Haiti, the Ivory Coast, Tanzania and Zambia: David A Ijalaye, 'Was "Biafra" at Any Time a State in International Law?' (1971) 65 *American Journal of International Law* 551.

<sup>76</sup> Shaw, above n 6, 201.

<sup>77</sup> Entities such as the Principality of New Utopia and Wirtland do not have serious claims to statehood and will not be considered here. The Principality of New Utopia claims sovereignty over a submerged mountain plateau: The Principality of New Utopia, *More about New Utopia — The Basic Infrastructure* (2012) <<http://principalityofnewutopia.com/Background-Information.php>>; while Wirtland claims to be the first 'internet-based sovereign country': *Wirtland* (2012) <<http://www.wirtland.com/>>.

<sup>78</sup> For a detailed account of the historical development of the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta ('Order'), see Noel Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta' (2006) 13 *Australian International Law Journal* 211; C d'Olivier Farran, 'The Sovereign Order of Malta in International Law' (1954) 3 *International and Comparative Law Quarterly* 217; C d'Olivier Farran, 'The Sovereign Order of Malta: A Supplementary Note' (1955) 4 *International and Comparative Law Quarterly* 308; Guy Stair Sainty, *The Order of Malta, Sovereignty, and International Law*, The Sovereign Military Hospitaller Order of Malta <<http://www.chivalricorders.org/orders/smom/maltasov.htm>>.

<sup>79</sup> Cox, above n 78, 217.

<sup>80</sup> Order of Malta, *Bilateral Relations with Countries* <[http://www.orderofmalta.org.uk/bilateral\\_relations\\_with\\_countries.asp](http://www.orderofmalta.org.uk/bilateral_relations_with_countries.asp)>.

<sup>81</sup> United Nations, *Permanent Observers* <<http://www.un.org/en/members/nonmembers.shtml>>.

<sup>82</sup> See, eg, Sarah Dunaway, 'Statement by Ms Sarah Dunaway, Adviser to the Third Committee' (Statement, 16 October 2012) <[http://www.un.org/womenwatch/daw/documents/ga67/Order\\_of\\_Malta.pdf](http://www.un.org/womenwatch/daw/documents/ga67/Order_of_Malta.pdf)>; Economic and Social Council, 'Provisional List of Participants' (July 2012) 20 <[http://www.un.org/en/ecosoc/julyhls/pdf12/provisional\\_list\\_of\\_participants.pdf](http://www.un.org/en/ecosoc/julyhls/pdf12/provisional_list_of_participants.pdf)>.

<sup>83</sup> Department of Political Affairs, Security Council Affairs Division, 'Part II — Provisional Rules of Procedure' (Repertoire of the Practice of the Security Council, 16<sup>th</sup> Supplement, 2008–09) 60–1 <[http://www.un.org/ar/sc/repertoire/2008-2009/Part%20II/08-09\\_Part%20II.pdf](http://www.un.org/ar/sc/repertoire/2008-2009/Part%20II/08-09_Part%20II.pdf)>.

It is sometimes suggested that the Order supports the idea of territory not being a requirement for statehood because it has maintained international personality despite periods where it did not exercise sovereignty over territory. The Order is an international person:<sup>84</sup> it has the power to conclude treaties<sup>85</sup> and its Grand Master is entitled to sovereign immunity.<sup>86</sup> It is not, however, a *state*; it is an international body that has some legal personality.<sup>87</sup> At its highest, its legal personality will depend on its role and function, contingent on the 'needs of the community' and the 'requirements of international life'.<sup>88</sup>

The Holy See is a non-member permanent observer of the UN.<sup>89</sup> Its sovereignty over the Vatican City was recognised by Italy in the *Lateran Pacts* of 1929. It is a party to a number of conventions, has diplomatic relations with 179 states and is a member (or observer) of a number of international organisations.<sup>90</sup> From 1870 until the *Lateran Pacts*, however, the Holy See was without territory: it occupied the Vatican Palaces de facto but did not exercise sovereign authority.<sup>91</sup> This has led to suggestions that the Holy See was a sovereign power unaffected by the loss of its territory.<sup>92</sup>

The status of the Holy See as a state as distinct from an entity with international legal personality, however, is controversial at best.<sup>93</sup> Brownlie and Crawford both suggest it is sui generis<sup>94</sup> and Crawford notes that 'it is both an international legal person in its own right and the government of a State [the

<sup>84</sup> *Nanni v Pace and the Sovereign Order of Malta* (1935) 8 ILR 2, 4 (Italian Court of Cassation).

<sup>85</sup> Cox, above n 78, 223–4. On 9 March 2011, the Order and Hungary exchanged ratification instruments for an 'international cooperation agreement': Order of Malta, *International Cooperation Agreement between Hungary and the Order of Malta* (11 March 2011) <<http://www.orderofmalta.int/news/46535/international-cooperation-agreement-between-hungary-and-the-order-of-malta/?lang=en>>.

<sup>86</sup> Cox, above n 78, 223–4; Saintry, above n 78.

<sup>87</sup> Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (Legal and Protection Policy Research Series Paper No PPLA/2011/04, United Nations High Commissioner for Refugees, May 2011) 8; Shaw, above n 6, 243. See also Cox, above n 78, 226. The Legal Adviser to the United States Government does not recognise the Order as a state: at 222, quoting Hyginus Eugene Cardinale, *Orders of Knighthood, Awards and the Holy See* (Van Duren, 1983) 84. Moreover, a special tribunal appointed by Pope Pius XII found that the Order was a sovereign order, but its rights did not 'comprise all the powers and prerogatives that belong to sovereign States' and that the Order only possesses functional sovereignty: Cox, above n 78, 221, quoting James Van der Veldt, *The Ecclesiastical Orders of Knighthood* (Catholic University of America Press, 1956) 22–3.

<sup>88</sup> *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

<sup>89</sup> United Nations, above n 81.

<sup>90</sup> Holy See, *Bilateral Relations of the Holy See* <[http://www.vatican.va/roman\\_curia/secretariat\\_state/documents/rc\\_seg-st\\_20010123\\_holy-see-relations\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html)>.

<sup>91</sup> Saintry, above n 78.

<sup>92</sup> Ibid.

<sup>93</sup> In 1937, an Italian court held that the Holy See could not be considered a state until the conclusion of the *Lateran Pacts* because the Pope did not have territory over which to exercise sovereignty — the application of Italian law in the Vatican Palaces was incompatible with any purported claim of sovereignty: *Guadalupe v Associazione Italiana di S Cecilia* (1937) 8 ILR 151, 151–2 (Court of Rome). It has been noted that the *Lateran Pacts* are 'not always clear as to whether sovereign statehood is vested in the Holy See or the Vatican City': Mugerwa, above n 53, 261.

<sup>94</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 124; Ian Brownlie, *Principles of International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 64.

Vatican City]'.<sup>95</sup> Jorri Duursma's study of the Vatican City concludes that the Holy See is not a state, but 'has an international legal personality of its own which permits it to take international actions such as the conclusion of treaties and the maintenance of diplomatic relations'.<sup>96</sup> The Holy See does not, therefore, provide an example of a state that exists without territory.

### III ABANDONMENT?

'Water, water, every where,  
Nor any drop to drink'.

— Samuel Taylor Coleridge<sup>97</sup>

As discussed above, the effects of climate change are not sudden: 'Atlantis-style' inundation is unlikely.<sup>98</sup> Population displacement due to extreme weather events and food and groundwater scarcities will occur long before territory is completely inundated.<sup>99</sup> This is particularly because island state economic activities are disproportionately located on low-lying terrain.<sup>100</sup>

<sup>95</sup> Crawford, *The Creation of States in International Law*, above n 6, 230. The American position is that the Vatican is accepted as a state and that the Holy See is its government: American Law Institute, above n 64, § 201 (Reporters' Notes).

<sup>96</sup> Jorri C Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996) 386.

<sup>97</sup> Samuel Taylor Coleridge, 'The Rime of the Ancient Mariner' in *Coleridge: Poems and Prose* (Alfred A Knopf, first published 1798, 1997 ed) 17, 24.

<sup>98</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 119, 123.

<sup>99</sup> See Burkett, 'The Nation Ex-Situ', above n 24, 115; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 119–20, 123; Sheila C McAnaney, 'Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement' (2012) 87 *New York University Law Review* 1172, 1180–1; Maxine Burkett, 'In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier' (AsiaPacific Issues Series No 98, East-West Center, January 2011) 4–5; Tiffany T V Duong, 'When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law' (2010) 31 *University of Pennsylvania Journal of International Law* 1239, 1247–8.

<sup>100</sup> Thomas D Grant, 'States Newly Admitted to the United Nations: Some Implications' (2000) 39 *Columbia Journal of Transnational Law* 177, 189; Mary-Elena Carr et al, 'Sea Level Rise in a Changing Climate: What Do We Know?' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 15, 41–2, 47–51.

Territory will become uninhabitable long before full disappearance.<sup>101</sup> This has already occurred in various areas within states. In 2006, the residents of Lohachara Island moved to a nearby island<sup>102</sup> and, in 2007, some Carteret Islands residents relocated to Bougainville.<sup>103</sup> Internal displacement due to natural disasters is not new;<sup>104</sup> but the crucial difference is that, historically, the displaced people remained within the state. In the present scenario, there is nowhere to turn and the move will need to be to another state.

The question is whether the move constitutes abandonment resulting in extinction. Abandonment of territorial sovereignty is distinct from the abandonment of a claim in a disputed case:<sup>105</sup> strictly, abandonment describes a situation where 'a state *intends* to abandon and expressly and formally renounces title (without this involving a procedure by which the territory falls under another sovereignty)'.<sup>106</sup>

Rosemary Rayfuse suggests mass migration will result in abandonment and extinction: 'the criteria for statehood will cease to be met from the time of evacuation and the State will cease to exist'.<sup>107</sup> It is not disputed that the

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- <sup>101</sup> Carr et al, above n 100, 39; Rosemary Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing" States' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 167, 177; Michele Klein Solomon and Koko Warner, 'Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 243, 245–9; Alliance of Small Island States, 'Alliance of Small Island States Leaders' Declaration, 2012' (Declaration, 27 September 2012) para 3 <<http://aosis.org/wp-content/uploads/2012/10/2012-AOSIS-Leaders-Declaration.pdf>>; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 124; UN SCOR, 6587<sup>th</sup> mtg, UN Doc S/PV.6587 (20 July 2011) 29 ('*Maintenance of International Peace and Security*'); Park, above n 87, 9; Nick Bryant, *Low-Lying Pacific Islands Growing Not Sinking*, BBC News: Asia-Pacific (3 June 2010) <<http://www.bbc.co.uk/news/10222679>>; Alexander Carius, Achim Maas and Janina Barkemeyer, 'Climate Change and Security: Two Scenarios for the Indian-Pacific Ocean Island States' (Report, Adelphi Research, 2009) <[http://www.adelphi.de/files/uploads/andere/pdf/application/pdf/us\\_049\\_-\\_ccis\\_regional\\_scenario\\_-\\_island\\_states.pdf](http://www.adelphi.de/files/uploads/andere/pdf/application/pdf/us_049_-_ccis_regional_scenario_-_island_states.pdf)>; *Follow-Up to the Outcome of the Millennium Summit*, UN GAOR, 85<sup>th</sup> plen mtg, Agenda Item 107, UN Doc A/63/PV.85 (3 June 2009) 2 ('*Follow-Up to the Outcome of the Millennium Summit*'). President Nasheed of the Maldives has explicitly indicated that abandonment will eventually be necessary: Mohamed Nasheed, 'Statement by His Excellency Mohamed Nasheed, President of the Republic of Maldives to the General Debate of the General Assembly' (Speech delivered at the 64<sup>th</sup> sess of the General Assembly, New York, 24 September 2009) 3 <[http://www.un.org/en/ga/64/generaldebate/pdf/MV\\_en.pdf](http://www.un.org/en/ga/64/generaldebate/pdf/MV_en.pdf)>.
- <sup>102</sup> Geoffrey Lean, 'Disappearing World: Global Warming Claims Tropical Island', *The Independent* (online), 24 December 2006 <<http://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-429764.html>>.
- <sup>103</sup> Australian Broadcasting Corporation, 'Rising Seas Force Carteret Islanders Out of Home', *Lateline*, 5 February 2007 (James Stewart) <<http://www.abc.net.au/lateline/content/2006/s1840956.htm>>; Oxfam America, *Papua New Guinea: 'The Islands are Shrinking'* (30 November 2007) <<http://www.oxfamamerica.org/articles/papua-new-guinea-the-islands-are-shrinking>>. It is difficult precisely to identify how many people have moved since many often return: Campbell, above n 24, 68–71.
- <sup>104</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 161–85.
- <sup>105</sup> Geoffrey Marston, 'The British Acquisition of the Nicobar Islands, 1869: A Possible Example of Abandonment of Territorial Sovereignty' (1998) 69 *British Yearbook of International Law* 245, 263.
- <sup>106</sup> Brownlie, *Principles of International Law*, above n 94, 139 n 124 (emphasis in original).
- <sup>107</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 284; Rayfuse, 'Sea Level Rise and Maritime Zones', above n 101, 177.

requirements of population and territory are to be read together.<sup>108</sup> Thus, if the requirements are strictly applied, mass migration will sever the link between population and territory, resulting in extinction. This is particularly so if the people do not relocate to one place but are scattered across various states.

This analysis is problematic for two reasons. First, it assumes that the requirements for statehood are continuing and that failure to satisfy the requirements for the creation of states automatically results in the state's extinction. It is also premised on a strict reading of the requirements and, in particular, the nexus between the requirements of population and territory. State practice, however, runs contrary to such an interpretation. Indeed, it suggests that a people may migrate to a different territory and maintain their identity. The African–Dutch community formed the Orange Free State, the African–Dutch Republic and the Colony of Natal after the Boer Colony was ceded to Great Britain in 1814.<sup>109</sup> The colonies maintained an identity recognised by Great Britain and other nations and represent ‘a real migration of an internationally constituted entity’.<sup>110</sup>

Further, such an interpretation of the requirements is not supported in principle. While a link between the requirements is logically necessary, a loose connection is sufficient. A state does not, for example, become extinct if the government is no longer effective or if it ceases to operate from the territory over which it purports to govern.<sup>111</sup> This becomes more tenuous when territory is completely uninhabitable — and issues of extinction may arise from that date<sup>112</sup> — but the analysis adopted below, on the presumption of continuity and necessary legal constructs<sup>113</sup> will be equally applicable.

Secondly, it is unlikely that the island state's actions would constitute abandonment. Here, the ICJ's comments in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*<sup>114</sup> are instructive. Although the ICJ was dealing with disputes over territorial claims, the comments must also be applicable where the renunciation is unilateral.<sup>115</sup> While agreements passing sovereignty may be tacit, the emphasis is on the parties' intentions.<sup>116</sup>

<sup>108</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 128.

<sup>109</sup> Guido Acquaviva, ‘Subjects of International Law: A Power-Based Analysis’ (2005) 38 *Vanderbilt Journal of Transnational Law* 345, 357.

<sup>110</sup> *Ibid* 358–9.

<sup>111</sup> See below Part IV(B).

<sup>112</sup> Jenny Grote Stoutenburg, ‘When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 57, 61–2.

<sup>113</sup> See below Parts IV(B)(1), IV(B)(5).

<sup>114</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12 (‘*Sovereignty over Pedra Branca/Pulau Batu Puteh*’).

<sup>115</sup> Indeed, the intent must not only be to abandon, but to renounce title: Brownlie, *Principles of International Law*, above n 94, 139 n 124. The International Court of Justice (‘ICJ’) has indicated that the extent to which sovereignty over territory is claimed by another state will be relevant: *Sovereignty over Pedra Branca/Pulau Batu Puteh* [2008] ICJ Rep 12, 35–6. Although not directly applicable, logic suggests that abandonment will be less likely to be made out if no other state claims title.

<sup>116</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh* [2008] ICJ Rep 12, 50; O’Connell, above n 10, 444.

The intention must be 'manifested clearly and without any doubt by [the] conduct and the relevant facts. That is especially so if what may be involved ... is in effect the abandonment of sovereignty over part of its territory'.<sup>117</sup> As Daniel O'Connell notes, the 'starting point of any analysis is a presumption against reversion to ... terra nullius, ... because territories without a sovereign are not only rare but a standing challenge to legal order'.<sup>118</sup> The threshold is logically higher if what is involved is the abandonment of the entire territory and potential state extinction.

Although abandonment is a question of fact, it is unlikely to be found here. The intention of island states is not one of renouncing sovereignty, but rather reflective of the reality that movement is necessary.<sup>119</sup> Indeed, the circular nature of movement<sup>120</sup> would suggest abandonment was never intended. Further, it would be highly opportunistic for another state to argue that the territory has been abandoned and, presumably, contend that the island state is extinct.

#### IV EXTINCTION

'There is a beginning and an end to the State, as to everything else. States are born and die, and the determination of these two facts is precisely the proper function of international law. Whatever the claims and aspirations of existing States, it would be legally unsound and historically untrue to affirm their immortality'.

— Krystyna Marek<sup>121</sup>

'The road to Statehood is a one-way street'.

— Vaughn Lowe<sup>122</sup>

#### A *A Lacuna in the Law*

The traditional test for extinction is expressed as follows: a state will 'cease to be an International Person when it ceases to exist'.<sup>123</sup> This analysis has been criticised as unhelpful and it is said that international law does not supply any definite criteria to determine when a state has become extinct.<sup>124</sup> It is well-accepted, however, that there are three ways a state may become extinct: merger, voluntary absorption of one state into another and the breaking up of one

<sup>117</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh* [2008] ICJ Rep 12, 51. The British acquisition of the Nicobar Islands is an example of abandonment: Marston, above n 105. This, however, involved a diplomatic note indicating an intention to abandon.

<sup>118</sup> O'Connell, above n 10, 444.

<sup>119</sup> Tuvalu and the Maldives have consistently maintained their desire to retain sovereignty (including over maritime zones): Rayfuse, 'International Law and Disappearing States', above n 26, 286; Patrick Barkham, 'Going Down', *The Guardian* (online), 16 February 2002 <<http://www.guardian.co.uk/environment/2002/feb/16/weekend-magazine.globalwarming>>. Indeed, it has been said small island states are unlikely to readily relinquish their claims to statehood: see Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, 2010) 81, 102.

<sup>120</sup> Campbell, above n 24, 68–71.

<sup>121</sup> Marek, above n 1, 5–6.

<sup>122</sup> Lowe, above n 45, 165.

<sup>123</sup> Oppenheim, above n 12, 155.

<sup>124</sup> Marek, above n 1, 7.



state into several.<sup>125</sup> For completeness, it is noted that extinction may not result from conquest.<sup>126</sup>

The situation confronting island states is unprecedented: international law has not squarely considered outright physical disappearance of all the land territory of a state.<sup>127</sup> There is thus a lacuna in the law<sup>128</sup> and it is necessary to reason from principle and (imperfect) analogies.

## B *Will Extinction Automatically Follow from a Total Loss of Territory?*

### 1 *The Presumption of Continuity*

There is a strong presumption in favour of the continued existence of a state.<sup>129</sup> It is clear that the rules applying to the admission of an entity as a state become even more flexible once the entity has been admitted to the ‘club’ of states.<sup>130</sup> The rationale of this presumption is one of stability: one of the functions of international law is to maintain order which in turn, rests on the stability of international relations and, where possible and appropriate, the preservation of the status quo.<sup>131</sup> It was on this basis that the Badinter Commission held the loss of personality as ‘something which has major repercussions in international law’ and requires the ‘greatest caution’ before it may be found to have occurred.<sup>132</sup>

<sup>125</sup> See, eg, Crawford, *The Creation of States in International Law*, above n 6, 705–14; Oppenheim, above n 12, 155; Rosemary Rayfuse and Emily Crawford, ‘Climate Change, Sovereignty and Statehood’ (Legal Studies Research Paper No 11/59, University of Sydney Law School, September 2011) 5; Higgins, *Problems and Process*, above n 53, 41; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 127–8; Shaw, above n 6, 208.

<sup>126</sup> SC Res 660 (1990), 2932<sup>nd</sup> mtg, UN Doc S/RES/660 (2 August 1990); Shaw, above n 6, 208. Cf Oppenheim, above n 12, 155.

<sup>127</sup> Burkett, ‘The Nation Ex-Situ’, above n 24, 89; Leslie A Stein, ‘Domestic Law for Resettlement of Persons Displaced by Climate Change’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 369, 369; McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 127–8; Rayfuse and Crawford, ‘Climate Change, Sovereignty and Statehood’, above n 125, 5; Park, above n 87, 6; Jared Hestetune, ‘The Invading Waters: Climate Change Dispossession, State Extinction, and International Law’ (Unpublished Paper, California Western School of Law, 15 January 2010) 19; Lilian Yamamoto and Miguel Esteban, ‘Vanishing Island States and Sovereignty’ (2010) 53 *Ocean and Coastal Management* 1, 6. Cf Marek, above n 1, 15. Shaw suggests in a footnote, without elucidation, that ‘[e]xtinction of statehood may also take place as a consequence of the geographical disappearance of the territory of the state’: Shaw, above n 6, 208 n 52 (citations omitted).

<sup>128</sup> Wallace-Bruce, above n 2, 67.

<sup>129</sup> Rayfuse and Crawford, ‘Climate Change, Sovereignty and Statehood’, above n 125, 5–6; Crawford, *The Creation of States in International Law*, above n 6, 667–8, 715.

<sup>130</sup> Higgins, *Problems and Process*, above n 53, 41.

<sup>131</sup> Konrad G Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer Law International, 2001) 18; Lowe, above n 45, 139; Mälksoo, above n 6, 10–11.

<sup>132</sup> *Yugoslavia Peace Conference Opinion No 8* (1992) 92 ILR 199, 201 (Arbitration Commission of the Peace on Yugoslavia). See also Marek, above n 1, 548.

This presumption explains why it is well-accepted that the loss (or gain) of some territory does not affect legal personality.<sup>133</sup> This is not based on vague concerns about state identity but the practical need for rights and obligations to continue despite changes to territory: legal certainty would be undermined if each territorial change altered the obligations of a state vis-a-vis other states.<sup>134</sup>

The same may be said for entities which are often described as 'failed states'.<sup>135</sup> Although the requirement of government is flexibly applied when a state first comes into existence, what is 'absolutely clear'<sup>136</sup> is that the failure to maintain an effective government does not result in extinction.<sup>137</sup> Gerard Kreijen suggests that 'it may be assumed that the occurrence of a "defect" in any of the constituent elements of statehood does not jeopardise the continuity of the State'.<sup>138</sup> This is termed a 'fail-safe mechanism at exit', where states that 'do not qualify for statehood in any empirical respect' continue to be recognised as states.<sup>139</sup> Somalia, for example, remained a state despite the lack of a functioning government for over ten years, a complete lack of international representation, an inability to take its seat in the General Assembly and the lack of any embassies abroad (as well as the shutting down of all foreign diplomatic missions in Mogadishu).<sup>140</sup> Other states have continued to exist despite a total loss of control over territory for 8 months (Kuwait),<sup>141</sup> 7 years (Afghanistan)<sup>142</sup> and 10 years (Ethiopia).<sup>143</sup> This doctrine has been criticised as a fiction, creating the result that states are granted an immortality that is 'legally unsound and historically untrue',<sup>144</sup> thereby putting the 'juridical cart ... before the empirical horse'<sup>145</sup> for '[r]amshackle states ... are not allowed to disappear juridically — even if for all intents and purposes they have already fallen or been pulled down in fact'.<sup>146</sup>

As noted, however, the presumption exists to maintain international stability. If states were to become extinct each time there was a revolution or difficult regime change, questions of extinction would frequently arise. This would not, of itself, be an issue, but the consequences of extinction generate instability. Leaving aside the current uncertainty of the law on state extinction, the minimum

<sup>133</sup> *Admission of New Members: Letter from the Chairman of the Sixth Committee Addressed to the Chairman of the First Committee, Dated 8 October 1947*, UN GAOR, UN Doc A/C.1/212 (11 October 1947) 2 (although each case is to be judged on its facts); Harris, above n 55, 92; Lawrence, above n 51, 88; Shearer, above n 39, 85–6.

<sup>134</sup> Marek, above n 1, 15.

<sup>135</sup> It is acknowledged that the term 'failed state' is imprecise and condescending: Crawford, *The Creation of States in International Law*, above n 6, 720–2. For present purposes, the 'failed state' refers to a situation where the government suffers from a 'lack of capacity or factual power': Kreijen, above n 4, 96.

<sup>136</sup> Higgins, *Problems and Process*, above n 53, 40.

<sup>137</sup> Lawrence, above n 51, 88; Wallace-Bruce, above n 2, 66–7; Grant, 'Defining Statehood', above n 2, 435; Dunoff, Ratner and Wippman, above n 3, 110.

<sup>138</sup> Kreijen, above n 4, 34.

<sup>139</sup> *Ibid* 159–60.

<sup>140</sup> *Ibid* 160; Crawford, *The Creation of States in International Law*, above n 6, 694.

<sup>141</sup> SC Res 662 (1990), 2934<sup>th</sup> mtg, UN Doc S/RES/662 (9 August 1990).

<sup>142</sup> Crawford, *The Creation of States in International Law*, above n 6, 694.

<sup>143</sup> *Ibid* 519–20.

<sup>144</sup> Marek, above n 1, 6.

<sup>145</sup> Robert H Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge University Press, 1990) 23–4.

<sup>146</sup> *Ibid* 23.

consequence must be that no entity will be responsible for that territory and population and consequently there would be no entity to enforce any rights (and to be bound by any obligations). Indeed, international law recognises a distinction between state and government, which logically requires the notion of continuity.<sup>147</sup> Difficult issues would also arise where a government is able to exercise effective control, loses control and subsequently regains it. Without the presumption of continuity, a state could have periods of extinction and revival, followed by extinction. The criticisms are, in truth, directed at the application of the doctrine and its results in extreme cases and not at the presumption itself.

Moreover, the presumption explains why international law does not impose strict links between the requirement of government and the territory and people it purports to govern: ‘governments in exile’. There are many examples of governments operating ‘in exile’ from the territory of other states, particularly where the state has been subjected to illegal annexation or occupation.<sup>148</sup> This is said to support the proposition that ‘[s]tates are willing to tolerate a hiatus between the loss of indicia of statehood and acknowledgement that a State has ceased to exist’.<sup>149</sup>

## 2 Membership of the UN: A Special Case?

Admission to the UN is *prima facie* evidence of statehood and would seem to constitute recognition by all other members.<sup>150</sup> The UN is, for practical purposes, ‘the collective arbiter of statehood through the process of admission and non-recognition’.<sup>151</sup> While these propositions go only to the creation of the state, continued membership may be seen as implicit recognition that a state continues to exist. Indeed, membership ‘entails a presumption of statehood which ... would be very difficult to dislodge’.<sup>152</sup>

UN members can be suspended or expelled by the General Assembly upon the recommendation of the Security Council.<sup>153</sup> There are no other provisions in the *Charter of the United Nations* (‘UN Charter’) concerning loss of membership. On one view, the principle of *expressio unius est exclusio alterius*<sup>154</sup> would suggest that there are no other methods of losing

<sup>147</sup> Crawford, *The Creation of States in International Law*, above n 6, 34, 668.

<sup>148</sup> See, eg, *ibid* 688–95; Crawford, *Brownlie’s Principles of Public International Law*, above n 10, 370.

<sup>149</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 135.

<sup>150</sup> Crawford, *Brownlie’s Principles of Public International Law*, above n 10, 150; Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (Oxford University Press, 2010) 8; Brownlie, *Principles of International Law*, above n 94, 94.

<sup>151</sup> John Dugard, *Recognition and the United Nations* (Grotius, 1987) 126. See also American Law Institute, above n 64, § 201 (Comment (h)); Shearer, above n 39, 87. Membership is, however, not conclusive in that a state may not be a member due to financial or political reasons: Duursma, above n 96, 112.

<sup>152</sup> Martin Dixon, *Textbook on International Law* (Oxford University Press, 5<sup>th</sup> ed, 2005) 105.

<sup>153</sup> *UN Charter* arts 5–6.

<sup>154</sup> This is an accepted principle of treaty interpretation: see, eg, *Railway Traffic between Lithuania and Poland (Advisory Opinion)* [1931] PCIJ (ser A/B) No 42, 121; *Niederstrasser v Polish State* (1931) 6 ILR 66 (Germano-Polish Mixed Arbitral Tribunal); *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149–50; Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer Law International, 2<sup>nd</sup> ed, 1997) 160.

membership.<sup>155</sup> A term may only be implied by reading 'the provisions of the [UN] Charter considered as a whole, or from some particular provision thereof which makes it *unavoidable* to do so in order to give effect to the [UN] Charter'.<sup>156</sup> Automatic expulsion would not be necessary to give effect to the UN Charter. Indeed, the gravity of extinction and its consequences are such that automatic expulsion would seem contrary to the UN's goal of maintaining international peace and security.

There must, however, be limits to this proposition; it must be possible for an entity to lose its membership on the basis that it is no longer a state. If not, a state that ceased to exist on the basis of one of the established categories of extinction would remain a state. For example, when the Federal Republic of Yugoslavia was admitted to the UN, the Secretary-General took the view that admission 'necessarily and automatically terminated the membership of the former Yugoslavia in the United Nations'.<sup>157</sup> Indeed, if this were not the case, a permanent member of the Security Council could prevent itself from ever becoming extinct by vetoing any resolution recommending suspension or expulsion.

### 3 *The Territorial Nature of Statehood — The Case for Extinction*

It will be recalled that the criteria for state formation include territory.<sup>158</sup> It has been suggested that the criteria for state formation must also be applied to determine whether a state has become, or is in the process of becoming, extinct.<sup>159</sup> This is logically attractive: if an entity must satisfy certain criteria to become a state, surely it must maintain those criteria to continue as one. Indeed, all states in existence today have territory, people and a government.<sup>160</sup>

Moreover, it is difficult to envisage a state without territory. Territory provides the physical basis with which the people of a state associate and organise themselves.<sup>161</sup> States are primarily concerned with protecting territorial integrity:<sup>162</sup> territory being the physical foundation of power and jurisdiction,<sup>163</sup> as well as nationality and, thus, the basis upon which peace and security rest.<sup>164</sup> Indeed, the notion of territory has been explained as 'reflect[ing] the identity (or

<sup>155</sup> Membership is not readily lost, if it can be lost at all: Grant, *Admission to the United Nations*, above n 22, 266, 273.

<sup>156</sup> *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 159 (emphasis added).

<sup>157</sup> *Unpaid Assessed Contributions of the Former Yugoslavia: Report of the Secretary-General*, UN GAOR, 60<sup>th</sup> sess, Provisional Agenda Item 129, UN Doc A/60/140 (16 September 2005) 3 [8].

<sup>158</sup> See above Part II(A).

<sup>159</sup> Matthew C R Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *European Journal of International Law* 142, 159.

<sup>160</sup> Fowler and Bunck, above n 4, 33.

<sup>161</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 128; Robert Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 2.

<sup>162</sup> Jackson and James, above n 7, 9.

<sup>163</sup> Lachs, above n 2, 36; Lowe, above n 45, 138.

<sup>164</sup> Ian Brownlie, 'Rebirth of Statehood' in Malcolm D Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth, 1997) 5, 6.

goal values) of the society as a whole',<sup>165</sup> a view strongly held by the population of island states.<sup>166</sup> The notion of territory has also been said to be inseparable from concepts of population,<sup>167</sup> government and independence.<sup>168</sup>

Thus, while the requirements of statehood are flexible, there must be an 'undeniable core' of what constitutes a state.<sup>169</sup> States are primarily territorial entities<sup>170</sup> and international law is 'based on a simple representational structure: a state speaks for its people in international law by virtue of controlling its territory'.<sup>171</sup> Indeed, as Leonidas Pitamic writes, 'everything which happens must happen somewhere'.<sup>172</sup> It is almost impossible even to contemplate power, jurisdiction and sovereignty (and therefore the ability to participate effectively at international law)<sup>173</sup> without territory.<sup>174</sup> Thus, territory has a central role in the system of international law itself.<sup>175</sup> As Philip Jessup explains, 'one cannot contemplate a State as a kind of disembodied spirit'.<sup>176</sup> It is on this basis that the possession of a territory is described as 'fundamental' to statehood.<sup>177</sup> In short, statehood cannot be understood in the abstract: the state must have a nucleus, so to speak, in which to locate itself. This proposition does not depend on whether one is considering the creation of a state or its extinction.

This difficulty cannot be resolved by the presumption of continuity and by flexible application of the criteria of statehood for two reasons. First, while it is accepted that the existence of a 'defect' in the elements of statehood will not affect state continuity, it is not clear what constitutes a mere 'defect' and where the limits of a 'defect' lie. It is true that statehood may continue despite a lack of effective government. Indeed, where there is a breakdown in government, particularly in periods of extended collapse coupled with failed attempts to stabilise the situation, it will not be predictable when government will be restored.

The underlying assumption, however, is that there will be a government at some point. More precisely, it is possible for there to be a government, whereas territory will not 'reappear'. Fundamentally, there must be limits to the presumption and a line between a mere defect and a matter which affects the continuity of a state.<sup>178</sup> The concept of the state is premised on control over

<sup>165</sup> Surya P Sharma, *Territorial Acquisition, Disputes and International Law* (Kluwer Law International, 1997) 4.

<sup>166</sup> See above Part I. See also Campbell, above n 24.

<sup>167</sup> Crawford, *Brownlie's Principles of Public International Law*, above n 10, 128; Hestetune, above n 127, 31.

<sup>168</sup> Raič, above n 53, 62.

<sup>169</sup> Higgins, *Problems and Process*, above n 53, 42.

<sup>170</sup> See above Part II(A).

<sup>171</sup> Knop, above n 2, 97.

<sup>172</sup> Pitamic, above n 39, 15.

<sup>173</sup> Sharma, above n 165, 2.

<sup>174</sup> Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis, 2<sup>nd</sup> ed, 2011) 208; Charles de Visscher, *Theory and Reality in Public International Law* (Percy Corbett trans, Princeton University Press, 1957) 197; Jennings, above n 161, 1.

<sup>175</sup> Jennings, above n 161, 1.

<sup>176</sup> UN SCOR, 383<sup>rd</sup> mtg, UN Doc S/PV.383 (2 December 1948) 11.

<sup>177</sup> Sharma, above n 165, 3.

<sup>178</sup> Jared Hestetune notes that the presumption of continuity may apply to cases of 'dramatic alteration' of one or more criteria of statehood, but has not applied — as yet — to cases of their total loss: Hestetune, above n 127, 44.

territory and the purpose of statehood is to 'ensure that activities within its borders are not regulated by any other State';<sup>179</sup> hence, territorial control is said to be the 'essence' of a state.<sup>180</sup> Just as territory is required for the creation of states,<sup>181</sup> some territory must exist for its survival.<sup>182</sup> Thus, in principle, a permanent loss of territory will fall outside of the scope of a mere 'defect' and result in the loss of statehood.<sup>183</sup>

Secondly, the practice with regards to continuity is generally limited to the government criterion (including its link to territory and population).<sup>184</sup> This is distinguishable because there is never any doubt about the existence of the state itself. Certainly, there are temporary 'defects', in that there is no effective government, but there is no doubt that these issues are temporary. Again, there is no doubt that there will not be any territory in the future.

Similarly, while it is true that international law will not impose strict links between the requirements of statehood, it has not dealt with situations where the indicia of statehood have been lost. In the government in exile cases, there is still a government, whether it is the belligerent occupier or the government in exile. In the case of the government in exile, the purported government is still linked (albeit tenuously) to the territory of the state it purports to govern. The willingness of the international community to accept that the proper government is the government in exile merely shows that the link between the requirements of statehood will not be strictly applied.

States have also indicated that they consider extinction to be a real consequence of rising sea levels. The Maldives have made reference to the 'extinction of their State';<sup>185</sup> Nauru (speaking on behalf of itself and 11 other states) indicated that submersion would put states 'in danger of losing their populations and their land as a whole. They will cease to be States'.<sup>186</sup> Similar statements have been made in General Assembly resolutions,<sup>187</sup> by France,<sup>188</sup> Portugal,<sup>189</sup> Lebanon,<sup>190</sup> India and Australia.<sup>191</sup> A joint statement along the same

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<sup>179</sup> Lowe, above n 45, 138.

<sup>180</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, 7<sup>th</sup> revised ed, 1997) 75; Shaw, above n 6, 198–9.

<sup>181</sup> See above Part II(A).

<sup>182</sup> Dahm, above n 67, 76; Dinh, above n 66, 454.

<sup>183</sup> See Park, above n 87, 6–8.

<sup>184</sup> Cf Kreijen, above n 4, 37. Kreijen suggests that the rule is not strictly confined to the problem of ineffective government and it should be accepted as an axiom of international law that '[s]tates may have a complicated birth, but they do not die easily': at 37 (emphasis altered).

<sup>185</sup> *Maldives Submission*, above n 19, 47.

<sup>186</sup> *Follow-Up to the Outcome of the Millennium Summit*, UN Doc A/63/PV.85, 2.

<sup>187</sup> *Follow-Up to and Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, GA Res 63/213, UN GAOR, 63<sup>rd</sup> sess, 72<sup>nd</sup> plen mtg, Agenda Item 49(b), Supp No 49, UN Doc A/RES/63/213 (10 February 2009) Preamble para 7 ('threaten the very existence').

<sup>188</sup> *Maintenance of International Peace and Security*, UN Doc S/PV.6587, 14 ('whose very existence is in peril').

<sup>189</sup> *Ibid* 20 ('whose very existence is at risk').

<sup>190</sup> *Ibid* 16 ('loss of entire countries').

<sup>191</sup> *Ibid* 19, 24 ('existential threat'). The same phrase was used by Haiti, Canada and Samoa in 2009: *Follow-Up to the Outcome of the Millennium Summit*, UN Doc A/63/PV.85, 7, 16.

lines was made by the Group of 77 and China,<sup>192</sup> as well as 14 island states.<sup>193</sup> While the use of the word ‘extinction’ is inconclusive and is political, rather than a legal term of art (and certainly not *opinio juris*), it is notable that loss of statehood is perceived to be a likely consequence of inundation.

#### 4 Sovereign Territory?

If territory is a continuing requirement, the question is whether there are requirements that go to the nature of the relationship between the putative state and the territory. In late 2008, the Maldives announced it would build a sovereign fund with the aim of purchasing territory to resettle its population.<sup>194</sup> Assuming that such a purchase would fall short of cession,<sup>195</sup> the question becomes whether private concepts of ownership would suffice to satisfy the requirement of territory. In the words of Rayfuse and Crawford:

Would a semi-autonomous region within another sovereign state, or an artificial island, still be Tuvalu or the Maldives? It is this question that lies at the heart of the challenge to international law and statehood presented by climate change.<sup>196</sup>

Two issues arise. The first relates to the concept of territory and whether ‘ownership’ in a private law sense would suffice for statehood. The second concerns whether a semi-autonomous region could ever be an independent state under international law.

International law does not envisage ownership of territory for it ‘defines “territory” not by adopting private law analogies of real property but by reference to the extent of governmental power exercised’.<sup>197</sup> Ultimately, it is ‘not ownership of but governing power with respect to territory’<sup>198</sup> that defines the requisite relationship. Territory as a requirement is a question of power and

<sup>192</sup> *Maintenance of International Peace and Security*, UN Doc S/PV.6587, 28 (‘threats to their survival’).

<sup>193</sup> Ibid 22 (‘wipe out many small islands’). The Czech Republic made similar remarks on behalf of the European Union and nine other states: *Follow-Up to the Outcome of the Millennium Summit*, UN Doc A/63/PV.85, 5.

<sup>194</sup> Ishaan Tharoor, ‘The Maldives’ Struggle to Stay Afloat’, *Time* (Asia), 18 May 2009, 29.

<sup>195</sup> On the difficulties associated with this, see below Part V. It is sometimes argued that the grant of ‘complete control’ to the US in Guantanamo Bay suggests ‘a special sort of control and jurisdiction, a view consistent with the ... interpretation that the United States is a temporary sovereign for the duration of the lease’: Kal Raustiala, ‘The Geography of Justice’ (2005) 73 *Fordham Law Review* 2501, 2541. The Cuban Supreme Court has held that the territory of Guantanamo Bay is ‘for all legal effects regarded as foreign’: *Re Guzman and Latamble* (1934) 7 ILR 112, 113. The better view is that sovereignty has not been transferred. Brownlie notes that Panama (and in other similar cases) retains residual sovereignty over the area of the Panama Canal granted to the US: Brownlie, *Principles of International Law*, above n 94, 111. Delegated autonomy, akin to the relationship between the Australian Commonwealth Government and the Northern Territory, would not be sufficient: the same difficulties (governmental control and independence) would be present.

<sup>196</sup> Rayfuse and Crawford, ‘Climate Change, Sovereignty and Statehood’, above n 125, 7. In 1945, the people of the island of Banaba (which is part of present-day Kiribati) moved to Rabi Island in Fiji. Although the population identifies as Banabans, they are, as a matter of law, Fijian: McAdam, ‘Caught Between Homelands’, above n 16.

<sup>197</sup> Crawford, *The Creation of States in International Law*, above n 6, 56. See also *Sovereignty over Pedra Branca/Pulau Batu Puteh* [2008] ICJ Rep 12, 80; Jennings, above n 161, 3.

<sup>198</sup> Crawford, *The Creation of States in International Law*, above n 6, 56.

control, the basis of which is the ability to exercise — to the exclusion of other entities — the right to regulate (by exercising ‘full governmental powers’)<sup>199</sup> a portion of the earth’s surface. Indeed, the ICJ recently had occasion to hold that a ‘treaty’ concluded with ‘important indigenous rulers exercising local rule over identifiable areas of territory’ was not a treaty entered into with a state: the local rulers were not regarded as states because there was no central power over the territory.<sup>200</sup>

The concept is related to, but not the same as, sovereignty. Sovereignty is ‘an attribute of States, not a precondition’.<sup>201</sup> It would be circular to insist on sovereignty (understood as the ‘totality of international rights and duties recognized by international law’)<sup>202</sup> over territory as both a precondition and a consequence of statehood. This is made clear when one is concerned with state extinction via the loss of territory: sovereignty as a state would be lost when the state ceases to have sovereignty over territory.

Why is governmental power and control critical to the relationship between the putative state and its territory? Further, why does the novelty of climate change not call for a rethink of the conditions for statehood? The answer to these questions rests on the premise on which international law as a *system* functions. Ultimately, international law concerns itself with stability, one part of which rests on power allocation on a territorial basis. Indeed, efficacy is the premise on which a valid legal order functions.<sup>203</sup> Regardless of the difficulties associated with the term sovereignty,<sup>204</sup> its consequence is that a state will have the *prima facie* exclusive right to govern in a given territory.<sup>205</sup> Sovereignty over a portion of the earth’s surface is what permits the state to be an organising idea of international law.<sup>206</sup> Sovereignty, in turn, rests on identifying an entity with governmental power and control over a given territory: achieving the aim of stability via the concept of sovereignty cannot be done without such an entity.

<sup>199</sup> Ibid 46.

<sup>200</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [2002] ICJ Rep 303, 405.

<sup>201</sup> Crawford, *The Creation of States in International Law*, above n 6, 32.

<sup>202</sup> Ibid 32, quoting *Reparation for Injuries* [1949] ICJ Rep 174, 180.

<sup>203</sup> Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945) 220. Crawford notes that the requirements of statehood are based on territorial effectiveness: Crawford, *The Creation of States in International Law*, above n 6, 46. See also Marek, above n 1, 161–2.

<sup>204</sup> See Crawford, *The Creation of States in International Law*, above n 6, 89; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, first published 1989, 2005 ed) 228–33, 240–5; Joseph A Camilleri, ‘Rethinking Sovereignty in a Shrinking, Fragmented World’ in R B J Walker and Saul H Mendlovitz (eds), *Contending Sovereignities: Redefining Political Community* (Lynne Rienner, 1990) 13, 15–16.

<sup>205</sup> Sovereignty is here used to denote the ‘full set of legal rights over territory’: Andrew Clapham, *Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations* (Oxford University Press, 7<sup>th</sup> ed, 2012) 168.

<sup>206</sup> See F N Hinsley, *Sovereignty* (Cambridge University Press, 2<sup>nd</sup> ed, 1986) 222; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004); Daniel-Erasmus Khan, above n 47, 237. Robert Jennings notes that the ‘mission and purpose’ of international law is the ‘delimitation of the exercise of sovereign power on a territorial basis’: Jennings, above n 161, 2. See also J L Brierly, *The Outlook for International Law* (Clarendon Press, 1944) 3.



Crucially, responsibility cannot be allocated on a territorial basis without an entity being the ultimate authority over that territory. Elements of control are seen, by way of example, in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.<sup>207</sup> Attribution is a consequence of actions taken by those exercising governmental authority, whether an authority exists (art 5) or is absent (art 9); actions of non-state actors will be actions of the state if the state directs or controls the actors (art 8). Indeed, the obligation on a state not to allow its territory to be used for acts contrary to the rights of other states<sup>208</sup> would be an absurdity if there was no entity which had ultimate authority over the territory. The goal is to prevent a lacuna of responsibility over a given territory and it is only by determining the entity with ultimate control that international law can properly find the entity to hold responsible.

Similarly, international law must be able to determine which entity has the power to bind a territory to a set of obligations and to allocate primary rights to enforce rules over the particular territory. The putative state must have control over the territory in the sense that it is able to bind the land and its inhabitants to a set of obligations (most obviously under treaty). A related requirement is that it must have power to enforce a set of rules — laws — over the land: the concept of jurisdiction. Jurisdiction concerns the ‘allocation of competences between states’<sup>209</sup> and is an ‘attribute of sovereignty’.<sup>210</sup> Thus, a state must be able to exercise its territorial jurisdiction: it must (at least notionally) be the primary rule maker, and enforcer, within its territory.

It is also this ability to control what occurs in a given territory that allows for the principle of the equality of states in international law. States are not, as a matter of fact, equal, but sovereignty artificially imposes the equality that the system requires to function. The inviolability of borders, immunity of heads of state and, crucially, the ability of factually weaker states to maintain their significance in the international system all rest on the same fiction: the idea that states are equal.<sup>211</sup> The assumption underlying this idea is that there is an entity with ultimate authority over the territory. If not, the fiction imposed under the rubric of sovereign equality would generate instability: equality between states cannot be present if all states are not (at least notionally) the ultimate authority over the territory in which they exist.

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<sup>207</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (*‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’*).

<sup>208</sup> *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>209</sup> Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) vol 1, 799.

<sup>210</sup> *Ibid* 801.

<sup>211</sup> *UN Charter* art 2(1).

The same reasoning applies in relation to the requirement of independence.<sup>212</sup> International law is 'a legal order governing relations between *independent States*'.<sup>213</sup> Indeed as Vice-President Weiss of the Permanent Court of International Justice explained in 1927, 'the purpose of this law precisely is to harmonize and reconcile the different sovereignties over which it exercises its sway'.<sup>214</sup> Krystyna Marek notes that this requirement is continuing, for 'the independence of States forms the necessary prerequisite of international law, a condition which [sic] the latter could not renounce, without at the same time renouncing its own *raison d'être*'.<sup>215</sup> This requirement has long been understood as requiring there to be 'one final source' of legal power within a given territory.<sup>216</sup> In the same way that international law as a system rests on sovereignty, which in turn assumes governmental power and control, so too does the system assume the existence of independent states. Concepts of responsibility, equality and the ability to bind and enforce obligations over territory require the state to be legally independent. If the putative state's existence derives from another state, there would be, in truth, no separate state: the putative state would be a component legal order of the state by whom it has been delegated its existence.<sup>217</sup> Consequently, the delegating state would have ultimate legal control over — and be responsible for — the territory in question.

How, then, are these concepts of governmental power and control and independence related? Taken strictly, the two are different. Governmental power and control is a convenient umbrella term that describes the first three factors in the *Convention*. In this sense, the core of governmental power and control relates to whether the entity has 'general control of its territory' and whether it holds 'some degree of maintenance of law and order and the establishment of basic institutions'.<sup>218</sup> On the other hand, the core of independence concerns whether the state is subject to any other power ('the State has over it no other authority than that of international law').<sup>219</sup> A demarcating line cannot be clearly drawn, however, for the concepts overlap. The same factual matrix must be relevant to determining whether a state has governmental power and control to the exclusion of other entities and independence. In considering the posited question of the

<sup>212</sup> Independence and sovereignty are sometimes elided: see, eg, Franz Xaver Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International, 2000) 147. While independence is a component of sovereignty, sovereignty is an imprecise description as it has other meanings and is better understood as the consequence of attaining statehood: Crawford, *The Creation of States in International Law*, above n 6, 89; Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) ch 1; Ingrid Detter De Lupis, *International Law and the Independent State* (Gower, 2<sup>nd</sup> ed, 1987) 3.

<sup>213</sup> Marek, above n 1, 162 (emphasis added). See also *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 18.

<sup>214</sup> *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 44. Marek contends that 'the existence of this higher order [international law] cannot be conceived without these co-ordinated subjects [states], endowed with separate personality': Marek, above n 1, 163.

<sup>215</sup> Marek, above n 1, 163. It is 'indispensable to the continued existence of a State ... With its loss, it becomes extinct': at 188 (citations omitted).

<sup>216</sup> Clapham, above n 205, 8.

<sup>217</sup> Marek, above n 1, 168.

<sup>218</sup> Crawford, *The Creation of States in International Law*, above n 6, 59.

<sup>219</sup> *Customs Regime between Germany and Austria (Advisory Opinion)* [1931] PCIJ (ser A/B) No 41, 57 (Judge Anzilotti) ('*Customs Regime*').

semi-autonomous region, it is not possible to isolate one concept from the other: the overriding question is whether ‘ownership’ (akin to the proposed Maldivian plan) could ever satisfy the twin requirements of governmental control over territory and independence.

What, then, are the thresholds for determining whether an entity satisfies these requirements? Max Huber of the Permanent Court of Arbitration pronounced a classic definition of sovereignty in 1928, which provides suitable a starting point: Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State'.<sup>220</sup> This is expressed as the government of the state being the ‘ultimate authority within its borders and jurisdiction’<sup>221</sup> and ‘not subject to the legal power of another State or of any other higher authority, and stands in principle on an equal footing with other States’.<sup>222</sup>

Expressed in these terms, it seems unlikely that any semi-autonomous region would satisfy the requirements. While the existence of governmental control turns on the facts, most notably the specific terms of the agreement between the host state and putative state,<sup>223</sup> any entity’s residence on another state’s territory would be premised on the host state’s consent<sup>224</sup> and any purported grant of ‘sovereign powers’ would be subject to the rights of the host state. Properly understood, however, the agreements merely ‘imply a grant of only some “sovereign functions”’.<sup>225</sup> For example, the US does not exercise sovereignty over the Panama Canal Zone, despite its extensive rights.<sup>226</sup> Both the US Supreme Court<sup>227</sup> and the Panama Supreme Court<sup>228</sup> have held that the Canal Zone is not sovereign territory of the US. The same analysis applies to the US military base in Cuba, Soviet bases in Finland in 1955 and British military bases in Jordan in 1946–57 and Libya in 1945–69.<sup>229</sup> Crucially, continuous consent of

<sup>220</sup> *Island of Palmas Case (Netherlands v USA) (Awards)* (1928) 2 RIAA 829, 838. See also *Customs Regime* [1931] PCIJ (ser A/B) No 41, 57 (Judge Anzilotti).

<sup>221</sup> Schrijver, above n 4, 70. Matthew Craven suggests that the real issue is ‘the ability to rightfully claim the territory as a domain of exclusive authority’: Craven, ‘Statehood, Self-Determination, and Recognition’, above n 3, 223. Fowler and Bunck, above n 4, 37.

<sup>222</sup> Schrijver, above n 4, 71; Shaw, above n 6, 202; Fowler and Bunck, above n 4, 37; Jennings, above n 161, 4–5.

<sup>223</sup> It is possible to envisage situations where control could be satisfied. By way of example, the US has wideranging powers in regard to Guantanamo Bay in Cuba. Although this is not regarded as sovereign territory of the US, the real barrier to statehood based on that territory is independence, not governmental control. Indeed, ‘continuous consent of the territorial state’ is necessary for a state to locate a military base in a foreign territory: De Lupis, above n 212, 218 (emphasis altered).

<sup>224</sup> Ibid 218.

<sup>225</sup> Ibid 216–17.

<sup>226</sup> Ibid 214–18.

<sup>227</sup> *Coulson v Government of the Canal Zone*, 212 US 553 (1908); *Luckenbach Steamship Company v United States*, 280 US 173 (1930).

<sup>228</sup> *Re Burriel* (1931) 6 ILR 111; *Re Bartlett* (1930) 5 ILR 81; *Re Cia de Transportes de Gelabert* (1939) 9 ILR 118. Cf *Lowe v Lee* (1934) 7 ILR 113.

<sup>229</sup> De Lupis, above n 212, 201–14. The US Supreme Court has held that a lease over territory does not give rise to ‘sovereignty’: *Vermilya-Brown Co Inc v Connell*, 335 US 377, 380–1 (1948); *United States v Spelar*, 338 US 217, 219, 221–2 (1949).

the host state has always been required in order to maintain a military base on foreign territory.<sup>230</sup>

On that basis, it is logically impossible for the entity not to be subject to the power of the host state. In Marek's terms, the putative state would not derive 'its reason of validity directly from international law'.<sup>231</sup> Indeed, the putative state would derive its existence from the host state and would be a mere component of the host state's legal order;<sup>232</sup> it could never be truly independent. Moreover, it is unlikely that the entity would be able to exercise jurisdiction to enforce its own laws<sup>233</sup> and, more importantly, exercise its laws to the exclusion of those of the host state.<sup>234</sup> At its simplest, the extent of the entity's independence would depend on the host state: in truth, there would be no independence and it would be unlikely that the criteria, strictly applied, would be met.<sup>235</sup>

Independence is not, however, understood in absolute terms. There is no doubt that members of the European Union have remained states despite having 'pool[ed] their sovereignties'.<sup>236</sup> Indeed, the Soviet Socialist Republics of Ukraine and Byelorussia, as well as the Philippines and British India, were all original members of the UN despite not being, in truth, independent.<sup>237</sup> Moreover, the Permanent Court of International Justice recognised that the conclusion of a treaty that binds a state to act or refrain from acting in a particular manner does not constitute an abandonment of sovereignty.<sup>238</sup> Indeed, no state exists in a legal and political vacuum, free of influence from other states.<sup>239</sup> The question, therefore, is where the line is drawn between matters of mere influence and matters which go to the heart of independence. An examination of the circumstances surrounding the admission of the micro-states of Andorra, Liechtenstein, Monaco and San Marino to the UN is instructive.<sup>240</sup> These states were admitted on 28 July 1993,<sup>241</sup> 18 September 1990,<sup>242</sup> 16 July 1993<sup>243</sup> and 2 March 1992,<sup>244</sup> respectively. There is no doubt that these

<sup>230</sup> De Lupis, above n 212, 218.

<sup>231</sup> Marek, above n 1, 168.

<sup>232</sup> Ibid.

<sup>233</sup> Park, above n 87, 7.

<sup>234</sup> This led to a finding that the Holy See was not a state: above n 93.

<sup>235</sup> Ibid.

<sup>236</sup> Ali Khan, above n 4, 200.

<sup>237</sup> Bühler, above n 131, 13. This is not determinative, however, as it was made clear that 'for founding members — unlike members admitted later — the characteristics of statehood were not a constitutive feature': Ulrich Fastenrath, 'Article 3' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1995) 155, 157 (citations omitted).

<sup>238</sup> *SS 'Wimbledon' (Britain v Germany) (Judgment)* [1923] PCIJ (ser A) No 1, 25.

<sup>239</sup> De Lupis, above n 212, 227. It is often suggested that states are increasingly subordinate to international organisations: O'Connell, above n 10, 284.

<sup>240</sup> For a comprehensive study of these states, see Duursma, above n 96, chs 4–7.

<sup>241</sup> *Admission of the Principality of Andorra to Membership in the United Nations*, GA Res 47/232, UN GAOR, 47<sup>th</sup> sess, 108<sup>th</sup> plen mtg, Agenda Item 19, Supp No 49, UN Doc A/RES/47/232 (28 July 1993).

<sup>242</sup> *Admission of the Principality of Liechtenstein to Membership in the United Nations*, GA Res 45/1, UN GAOR, 45<sup>th</sup> sess, 1<sup>st</sup> plen mtg, Agenda Item 19, Supp No 49, UN Doc A/RES/45/1 (18 September 1990).

<sup>243</sup> *Admission of the Principality of Monaco to Membership in the United Nations*, GA Res 47/231, UN GAOR, 47<sup>th</sup> sess, 104<sup>th</sup> plen mtg, Agenda Item 19, Supp No 49, UN Doc A/RES/47/231 (16 July 1993).

states have sufficient control over territory, and independence, to satisfy the criteria of statehood.<sup>245</sup>

First, the fact that a state's external relations or defence are conducted, in part, by a foreign state will not be determinative. When it sought admission to the UN, some of Liechtenstein's diplomatic relations had been maintained by Switzerland.<sup>246</sup> Moreover, Switzerland controlled the postal and customs offices in Liechtenstein and Swiss postal and customs legislation (as well as treaties concluded by Switzerland with third states) was applicable in Liechtenstein.<sup>247</sup> Crucially, Liechtenstein could not oppose the application of these treaties in its territory.<sup>248</sup> Similar elements of foreign control existed in Andorra,<sup>249</sup> Monaco<sup>250</sup> and San Marino.<sup>251</sup> Indeed, in *Rights of Nationals of the United States of America in Morocco*, the ICJ held that Morocco remained a sovereign state despite the *Treaty of Fez*<sup>252</sup> establishing a French Protectorate 'whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco'.<sup>253</sup> Morocco was a protected state: a state that 'retained in some measure a separate international personality during the period of their dependency upon another State'.<sup>254</sup> Similarly, the defence of Micronesia and Palau is controlled by the US under 'agreements of free association' and the foreign and defence relations of the Cook Islands are controlled by New Zealand.<sup>255</sup>

<sup>244</sup> *Admission of the Republic of San Marino to Membership in the United Nations*, GA Res 46/231, UN GAOR, 46<sup>th</sup> sess, 86<sup>th</sup> plen mtg, Agenda Item 20, UN Doc A/RES/46/231 (20 July 1992).

<sup>245</sup> By way of example, Liechtenstein has been said to possess 'all the qualifications of a State': *Report of the Committee of Experts*, UN Doc S/1342, 2; its statehood is 'well established and recognized': Duursma, above n 96, 205. The ICJ has also noted that it is a 'sovereign State': *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4, 20.

<sup>246</sup> Duursma, above n 96, 201.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Andorra's postal union was operated by Spain and France, was sometimes represented by French and Spanish diplomatic services and was required to respect the 'fundamental interests' and internal and external security interests of France and Spain: *ibid* 367–70.

<sup>250</sup> French legislation on war material, banking, customs and postal tariffs was applicable in Monaco; Monaco's laws on aliens, arms and munitions, insurance and pharmaceutical matters were harmonised with France; France was under a duty to defend Monaco and Monaco had an obligation not to ally its territory with any power other than France. Critically, under the terms of the 1918 *Treaty Establishing the Relations of France with the Principality of Monaco*, signed 17 July 1918, 981 UNTS 363 (entered into force 23 June 1919) ('*Franco-Monegasque Treaty*'), Monaco was required to: exercise its sovereign rights in conformity with French political, military, naval and economic interests (see art 1); seek French consent to establish a consular or diplomatic mission abroad, appoint a head of the mission or conclude a treaty (see art 2); and France had the right to disapprove of a successor to the Monegasque throne (see art 3). See also Duursma, above n 96, 305–8.

<sup>251</sup> Italian postal and currency legislation was substantially adopted in San Marino and Italy provided consular representation in states where San Marino did not have its own representation: Duursma, above n 96, 257–8.

<sup>252</sup> *Treaty between France and Morocco for the Organisation of the Protectorate*, 216 CTS 20 (signed and entered into force 30 March 1912) ('*Treaty of Fez*').

<sup>253</sup> *Rights of Nationals of the United States of America in Morocco (France v United States of America) (Judgment)* [1952] ICJ Rep 176, 188.

<sup>254</sup> Sir Humphrey Waldock, 'Fifth Report on Succession in Respect of Treaties' [1972] II *Yearbook of the International Law Commission* 1, 4.

<sup>255</sup> Dunoff, Ratner and Wippman, above n 3, 110.

What is crucial in these cases, however, is that the putative state has retained the ability to represent and bind itself to (and be held responsible for) international obligations. It is useful to consider the fettering of independence as a spectrum, ranging from notional constraints, such as the well-accepted principle of not permitting territory 'to be used for acts contrary to the rights of other States',<sup>256</sup> to the fettering of power to such an extent that there is no real independence. In determining whether there is independence, the guiding principle is whether the state has a separate legal order derived from international law. The same must be true of governmental control: the putative state must be able to exercise sufficient control (at least notionally) so as to be meaningfully responsible for the matters occurring in a given territory.

Secondly, limitations on national policy will not deprive a state of independence, even where those limitations are referable to the interests of other states. When Monaco sought admission to the UN, it was under an obligation not to ally its territory with any power other than France and, importantly, it was required to exercise its sovereign rights in conformity with French political, military, naval and economic interests.<sup>257</sup> Similar obligations were binding on Andorra,<sup>258</sup> San Marino<sup>259</sup> and, to a lesser degree, Liechtenstein.<sup>260</sup>

Thirdly, restrictions on who may serve as a head of state will not go to the independence of a state. France had the right to disapprove of a successor to the Monegasque throne.<sup>261</sup> Andorra had two co-princes, one of whom was the French Prime Minister, while the other was appointed by the Holy See.<sup>262</sup>

Fourthly, international law will tolerate a temporary lack of control, extending to a total loss of control for an extended period. It will be recalled that Somalia remained a state despite having no ability to exercise the functions of a state. It is less clear, however, whether this would remain the case if there was *another state* that exercised exclusive power and control over Somali territory. Somalia was a case where there was an absence of any governing authority; it was not a case of the Somali State temporarily subjecting itself to a higher authority. While statehood will not be lost due to involuntary annexation, a state that has voluntarily submitted to another state (therefore losing all independence) cannot, as a matter of principle, continue to exist. It could not be said that that state has *prima facie* exclusive control, or independence, over its territory. Indeed, this is probably best understood as merger or voluntary absorption: the state may

<sup>256</sup> *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>257</sup> Duursma, above n 96, 305–8. See also *Franco-Monegasque Treaty*.

<sup>258</sup> Andorra was required to respect the 'fundamental interests' and internal and external interests of France and Spain: Duursma, above n 96, 369–70. See also *Treaty of Vicinage, Friendship and Cooperation, Andorra–France–Spain*, signed 3 June 1993, 98 RGDIP (1994) (entered into force 1 December 1994).

<sup>259</sup> San Marino was under a duty not to adopt financial measures that could have influenced Italy's tax or monetary systems: Duursma, above n 96, 257. See also *Convenzione di amicizia e di buon vicinato fra la Repubblica di San Marino e il Regno d'Italia* [Convention of Friendship and Good Neighbourliness between the Republic of San Marino and Kingdom of Italy], signed 31 March 1939, BURSM (1939) No 8 (entered into force 30 September 1939).

<sup>260</sup> For example, Liechtenstein could not develop its own monetary policy: Duursma, above n 96, 201.

<sup>261</sup> *Ibid* 307.

<sup>262</sup> *Ibid* 368–9.

re-emerge from temporary merger or absorption as the same entity at a later date if it is so recognised.

Finally, state practice indicates that the independence of a state will not be compromised where its judges are from another state,<sup>263</sup> legislation is harmonised with foreign states<sup>264</sup> or where postal and customs matters are controlled by another state.<sup>265</sup> This is so even where they are in combination with the matters noted above.

The fact remains, however, that the host state will always have the power to evict the putative state from its territory. Fundamentally, the host state will remain sovereign over the territory on which the putative state resides. To take an extreme example, if all of Cuba other than Guantanamo Bay became submerged under water, Cuba would not become extinct due to the loss of territory: it remains sovereign over Guantanamo Bay despite the extensive rights that it has granted to the US. Put another way, the validity of the putative state's legal order would rest on the host state,<sup>266</sup> not on international law.<sup>267</sup> So long as international law does not permit two states to be sovereign over the same territory — and it cannot do so given that sovereignty, as exclusive authority, is the organising idea of international law<sup>268</sup> — it is not possible for the semi-autonomous region to constitute a state under international law.

##### 5 *Necessary Legal Constructs*

Yet, it simply cannot be the case that the island state will become extinct as soon as the first wave washes over the last rock: international law as a system defined by the territorial state would be intolerably uncertain if the existence of rights and obligations were to depend on such an unpredictable event. If that were the case, it would be conceivable — and in some senses inevitable on the postulated factual matrix — that the population, maritime rights and international obligations of island states would lose their status in that very moment. Indeed, in one sense, this instability is precisely what the presumption of continuity seeks to avoid.

Consequently, there must be some sort of method, at least in the short-term, for the continued existence of the island state despite the complete loss of sovereign territory. Brownlie speaks of 'necessary legal constructions', whereby the state as a legal construct 'may be projected on the plane of time for certain

<sup>263</sup> As in the case of Liechtenstein, San Marino and Monaco: *ibid* 201, 258, 305.

<sup>264</sup> As in the case of San Marino and Monaco: *ibid* 257, 306.

<sup>265</sup> As in the case of Liechtenstein and Andorra: *ibid* 201, 367. Similarly, economic dependence is unlikely to result in a loss of independence.

<sup>266</sup> In the case of Banaba and Fiji, the island of Rabi is part of Fiji. Although the people identify as Banabans, there is no separate state of Banaba and the island of Rabi is not part of Kiribati: see, eg, McAdam, 'Caught between Homelands', above n 16.

<sup>267</sup> Marek, above n 1, 168. In relation to governments in exile, the scope of the government's rights will depend on the host state: McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 135–6; Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, 1998) 215–18. This, however, concerns what the government may do vis-a-vis the host state; it is not sovereign over the host state's territory, but remains 'sovereign' over the territory from which it has been ousted.

<sup>268</sup> Kelsen, *General Theory of Law and State*, above n 203, 218; Crawford, *The Creation of States in International Law*, above n 6, 48.

purposes although its physical and political existence has ceased'.<sup>269</sup> On this analysis, international law artificially 'props up' the state and treats it as continuing until the purposes for which it did exist (as distinct from any new or further purposes) cease to be present. Put simply, this analysis is how international law is able to wind-up a state without causing dramatic instability. Brownlie suggests it is this principle that explains how the Germany that surrendered in 1945 was only wound-up in 1990 under the *Treaty on the Final Settlement with respect to Germany*.<sup>270</sup>

Modern practice is consistent with this view, as indicated by the case of Serbia and Montenegro's position vis-a-vis the former Socialist Federal Republic of Yugoslavia ('SFRY'). While the General Assembly noted that the Federal Republic of Yugoslavia could not automatically continue the membership of the SFRY in the UN,<sup>271</sup> it did not terminate or suspend that entity's membership in the UN. Yugoslav missions at the UN headquarters continued, the flag was flown and the seat and nameplate remained as before.<sup>272</sup> Indeed, the ICJ specifically noted that it was only the 'admission of the [Federal Republic of Yugoslavia] to membership of the United Nations on 1 November 2000 [that] put an end to Yugoslavia's sui generis position within the United Nations'.<sup>273</sup> It is through the construct imposed by international law that the SFRY continued to exist for the purposes of UN membership: that is, international law held an otherwise extinct state to exist in order to preserve stability and achieve a gradual winding-up of the state.

A variation of this line of reasoning<sup>274</sup> underlines how international law treats states that have been conquered and illegally annexed as continuing to exist. In 1935, Italy invaded and annexed Ethiopia for 7 years.<sup>275</sup> If international law were to insist on a formalistic understanding of those events, Ethiopia would have become extinct: it had been subject to foreign invasion, occupation, proclamation of premature annexation and, critically, withdrawal of recognition

<sup>269</sup> Brownlie, *Principles of International Law*, above n 94, 78.

<sup>270</sup> Ibid 78–9. See also *Treaty on the Final Settlement with Respect to Germany*, signed 12 September 1990, 1696 UNTS 115 (entered into force 15 March 1991).

<sup>271</sup> *Recommendation of the Security Council of 19 September 1992*, GA Res 47/1, UN GAOR, 47<sup>th</sup> sess, 7<sup>th</sup> plen mtg, Agenda Item 8, Supp No 49, UN Doc A/RES/47/1 (22 September 1992).

<sup>272</sup> *Adoption of the Agenda and Organization of Work — Note by the Secretary-General*, UN GAOR, 47<sup>th</sup> sess, Agenda Item 8, UN Doc A/47/485 (30 September 1992) annex ('Letter Dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, Addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations').

<sup>273</sup> *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections (*Yugoslavia v Bosnia and Herzegovina (Judgment)*) [2003] ICJ Rep 7, 23. See also Karin Oellers-Frahm, 'Article 93 UN Charter' in Andreas Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 179, 182.

<sup>274</sup> An analogy in the domestic sphere of common law systems is the law of estates. When a natural person dies, certain rights and obligations continue in the form of an estate and claims may be made by and against this entity for the specific purpose of dealing with those rights and obligations. Put another way, a person's rights and obligations do not automatically cease to exist on death. This is a necessary legal construct: on a strict view of death — extinction — no person would hold the rights and liabilities. The law of estates imposes this construct to ensure the legal stability of obligations.

<sup>275</sup> Crawford, *The Creation of States in International Law*, above n 6, 519–20.



by the international community.<sup>276</sup> As Marek notes, the mere fact that Ethiopia's Emperor made continued claims to the rights of the Ethiopian State was not determinative.<sup>277</sup> Yet, the entity recognised by the *Italo-Ethiopian Treaty of Friendship and Arbitration* was the same Ethiopia as prior to annexation. Indeed, this treaty expressly recognised that the Italian annexation was a legal nullity. The explanation for the continuation of the 1935 Ethiopian State is the principle that belligerent occupation cannot bring about extinction of a state.<sup>278</sup> But *how* is the temporary 'disappearance' and 'resurrection' to be explained? The answer is the same concept that Brownlie identifies as the necessary legal construct. That is, international law *artificially constructs* the continuation of the state — a legal fiction — so as to achieve the protection of an international legal rule. Marek correctly argues that '[i]t is on the *basis* of this objective rule, and this rule alone, that Ethiopia survived in extremis the whole impact of facts, actions and circumstances which, on the face of it, could have brought about her extinction',<sup>279</sup> but it is the construct that explains *how* Ethiopia continued to exist. The same reasoning applies to the cases of Albania,<sup>280</sup> Austria,<sup>281</sup> the Baltic States<sup>282</sup> and Czechoslovakia.<sup>283</sup>

What, then, are the limits of the construct? Three things must, as a matter of principle, be the case. First, there must be a specific, identifiable reason for the doctrine to apply. It is insufficient to base this on vague notions such as stability, for this would give rise to charges of indeterminacy in respect of the doctrine's limits. In this sense, the test for the legal construct is objective: it does not depend purely on what the putative state sees as 'necessary'. A related limitation is that the reason must exist at the time of *prima facie* extinction: the doctrine has no application to protect what may occur in the future. Strictly, those matters would not be necessary when the construct came into existence. Secondly, the construct must take its form from the factual matrix surrounding its creation and cannot ignore what is currently in existence. In this sense, the principle of *ex factis jus oritur* remains relevant: the construct primarily exists to fill a gap and should not be allowed completely to override the factual matrix surrounding its creation. Thirdly, the construct necessarily terminates when the reason for it ceases to exist.

Here, the reason for the legal construct is the controlled winding-up of the island state, the rationale of which is the maintenance of international stability. While the duration and existence of the construct is necessarily a question of fact, a number of matters are significant. First, principle suggests that the construct will necessarily terminate (and the state be rendered extinct) if a treaty providing for its dissolution comes into effect. This would be the closest analogy to the winding-up of Germany in 1990. Similarly, should the putative state be able to secure sovereign rights over new territory, the necessity for the construct

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<sup>276</sup> Marek, above n 1, 278.

<sup>277</sup> *Ibid.*

<sup>278</sup> Marek, above n 1, 278.

<sup>279</sup> *Ibid.* (emphasis added).

<sup>280</sup> *Ibid.* 337.

<sup>281</sup> *Ibid.* 367.

<sup>282</sup> *Ibid.* 414.

<sup>283</sup> *Ibid.* 328–9.

would cease to exist. The state's existence would once again be grounded in sovereignty over a defined territory. Arguably, however, the construct continues, but only to the limited extent of explaining why the state was not extinct during the period that it did not have a territory over which it was sovereign.

Secondly, the construct is likely to cease to have a purpose if the people of the putative state were to become nationals of other states. The state itself is an artificial phenomenon<sup>284</sup> of international law that serves a particular purpose: it is the 'central organising idea'<sup>285</sup> because it is the method by which international law permits an entity to speak for its people (who would ordinarily be identified by reference to the sovereign territory of the state).<sup>286</sup> As Marek argues, the state is 'not a tangible phenomenon of the physical world, but a construction of the human mind which has joined all these elements [territory and population] into a single and separate whole'.<sup>287</sup> If the population of the putative state ceases to be identifiable as part of the state, then the reason for the existence of the state — and the construct — is likely to cease to exist and the state would become extinct.

What, then, is the relationship between this principle and the principle of *ex factis ius oritur*? In the same way that the principle of *ex injuria ius non oritur* does not sit comfortably with the *ex factis ius oritur* principle, so too does the construct necessarily conflict with what is apparent on the facts. The legal construct is by its very nature a fiction and is inherently contradictory to the existing facts. The rationale of the principle, however, is to fill a gap and prevent instability. It is therefore limited by the factual matrix surrounding its creation. It is the factual matrix that provides both the reason for its existence and the limits to its application. By way of example, if the island state is able to purchase territory from another state, the construct does not operate to render the purchased territory sovereign territory of the state. Nor does it operate to allow the putative state to satisfy the 'defined territory' requirement. The effect of the construct in this circumstance is as follows. It operates to prevent the island state from becoming extinct, irrespective of the purchased territory: the reason for the state's continuation does not depend on the existence of that territory, but rather the need to stably wind-up the state's existence. The purchased territory, however, influences the nature of the construct. Assuming the purchase occurred before the inundation of the island state's original territory, it may provide another reason for the construct to exist. In the same way that the construct was created to determine the rights and obligations of the state, the existence of the purchased territory would provide a reason for the state to continue existing: so the status of those residing on the purchased territory — nationals of the putative state — do not change when the first wave covers the last rock.

It remains to address two alternative contentions. First, it has been suggested that the purpose of the Peace of Westphalia and the *United Nations Convention*

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<sup>284</sup> Louis Henkin describes the state as, by nature, 'an abstraction, a conception': Louis Henkin, *International Law: Politics, Values and Functions — General Course on Public International Law* (Martinus Nijhoff, 1989) 23.

<sup>285</sup> Knop, above n 2, 95.

<sup>286</sup> *Ibid* 97.

<sup>287</sup> Marek, above n 1, 588.

on the Law of the Sea ('UNCLOS')<sup>288</sup> was to promote stability, certainty and fairness and that an interpretation of international law that does not pay due attention to these purposes would stymie the optimal operation of the law.<sup>289</sup> Thus, it is said that an 'appropriate interpretation of existing laws and the spirit in which they were drafted and ratified supports expansive interpretation for the benefit of the peoples of endangered States'.<sup>290</sup> With respect, such reinterpretation necessarily extends beyond mere interpretation and amounts to rewriting the legal framework in which these laws operate. In particular, it does not address the fact that states are inherently territorial entities and that current international thought is premised on the division of power on a territorial basis. These contentions, however, support the proposition advanced here: the continuation of the state is an *artificial* construct imposed by international law, a construct that will continue to be bound by treaties, rights and obligations until the state can be stably wound-up. Crucially, this explains *how* the state continues to exist, but also recognises limits to the continuation of the state. This analysis balances the goals of fairness against factual reality, thus providing the certainty and stability that international law seeks to achieve.

Secondly, Jenny Stoutenburg has contended that recognition has a constitutive role in determining when a state ceases to exist and other states may have a duty to continue recognising island states, as a failure to do so would result in the impairment of fundamental norms such as the right to self-determination, sovereignty over natural resources, human rights and state survival.<sup>291</sup> It is said, however, that the barrier to this analysis is the lack of a serious breach of a peremptory norm: failure to regulate greenhouse gas emissions will not suffice.<sup>292</sup> The problem, however, is more fundamental. Stoutenburg's argument assumes that recognition in and of itself is sufficient to prevent the extinction of a state. This is said to be supported by the practice of denying statehood to otherwise effective entities created by the use of force, a policy of racial discrimination or in violation of the right to self-determination.<sup>293</sup> This, however, merely explains *why* statehood continued, not *how* it continued. Recognition alone cannot prevent extinction; it may only resolve uncertainties and regularise situations (including artificial continuity of 'resurrected' states).<sup>294</sup> Recognition, however, cannot create a situation that does not in fact exist: the continuity of a state cannot rest on recognition alone — the same reasons that militate against the constitutive theory of statehood<sup>295</sup> apply to continuity. Further difficulties would arise here: there would be no method of determining whether a state's failure to change its attitude to the entity amounts to recognition or whether 'fresh recognition' would be required. Even if one were to require some sort of

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<sup>288</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('UNCLOS').

<sup>289</sup> Burkett, 'The Nation Ex-Situ', above n 24, 106.

<sup>290</sup> *Ibid.* This is said to support the recognition of the 'deterritorialised state': see below Part V.

<sup>291</sup> Stoutenburg, above n 112, 72–6. Jorri Duursma notes that recognition may have a 'special constitutive effect': Duursma, above n 96, 127.

<sup>292</sup> Stoutenburg, above n 112, 76–9.

<sup>293</sup> *Ibid.* 73–5.

<sup>294</sup> See below Part IV(B)(6).

<sup>295</sup> Crawford, *The Creation of States in International Law*, above n 6, 19–28; Marek, above n 1, 130–61.

resolution or consensus adopted at an international organisation (presumably the UN), questions would arise as to the frequency of the meetings and resolutions required. Further, the status of the entity would be unclear should some states actively withdraw their recognition, while others stay silent. Certainly, it cannot be the case that this would result in the entity being a state for the purposes of relationships with some states, but not with others: one of the key problems with recognition as a constitutive element of statehood.<sup>296</sup> Arguably, if recognition had such a constitutive role, the semi-autonomous region could remain a state (and thus hold sovereignty over the area) — a situation inconsistent with current legal conceptions of sovereignty as the organising idea of international law.

## 6 *The Importance of Recognition*

These island states' claims to statehood will be, at best, precarious and represent borderline cases. In these circumstances, recognition by other states is crucial. While statehood is not conditioned,<sup>297</sup> recognition is valuable because it allows states to 'resolve uncertainties as to status and allow for new situations to be regularized':<sup>298</sup> it is important evidence of legal status, particularly in borderline cases.<sup>299</sup> As Crawford notes:

although the criteria for statehood provide a general, applicable standard, the application of that standard to particular situations where there are conflicting and controversial claims is often difficult. It is here in particular that recognition and, equally importantly, other State practice relating to or implying a judgement as to the status of the entity in question are important. ... This is ... particularly the case with problems of identity and extinction, where the general criteria tend to be equivocal and unhelpful.<sup>300</sup>

Thus, recognition by other states will be critical. Indeed, Park notes that '[u]nless there was a cession of territory or union with another State, continuity of statehood would depend largely on continued recognition by other States'.<sup>301</sup> Kreijen suggests, in the context of the so-called 'failed states', that there are a series of states that are 'not states in the strict sense, but only *by courtesy*',<sup>302</sup> meaning that such entities are only states because of recognition by the international community.

<sup>296</sup> Crawford, *The Creation of States in International Law*, above n 6, 27.

<sup>297</sup> Ibid 28; Lowe, above n 45, 161; *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 13 (Germano-Polish Mixed Arbitration Tribunal); *Yugoslavia Peace Conference Opinion No 1* (1991) 92 ILR 162, 164–5 (Arbitration Commission of the Peace Conference on Yugoslavia). See also Marek, above n 1, 130–61. Recognition is a matter of policy, not law: Lord McNair, *International Law Opinions* (Cambridge University Press, 1956) vol 1, 131.

<sup>298</sup> Crawford, *The Creation of States in International Law*, above n 6, 27.

<sup>299</sup> Crawford, *The Creation of States in International Law*, above n 6, 223, 692; *Yugoslavia Peace Conference Opinion No 8* (1992) 92 ILR 199, 201 (Arbitration Commission of the Peace Conference on Yugoslavia); Marek, above n 1, 159.

<sup>300</sup> Crawford, *The Creation of States in International Law*, above n 6, 718. Konrad Bühler suggests that recognition has the important function of overcoming uncertainties in marginal cases (in dealing with dissolution of a state) and is often decisive: Bühler, above n 131, 16–17.

<sup>301</sup> Park, above n 87, 19.

<sup>302</sup> Kreijen, above n 4, 149 (emphasis in original) (citations omitted).

The importance of recognition can be seen in the ability for states to be resurrected after long periods of annexation. Portugal was re-established as the same state despite being incorporated by Spain for 60 years (a dynastic union that joined the the two kingdoms from 1580–1640).<sup>303</sup> In more recent times, Poland was resurrected after over 123 years,<sup>304</sup> Estonia, Latvia and Lithuania after 50 years,<sup>305</sup> Ethiopia after 11,<sup>306</sup> Czechoslovakia and Albania after 8,<sup>307</sup> Austria after 7<sup>308</sup> and Syria after 3.<sup>309</sup> The example of Syria is particularly significant because it was not a case of annexation but rather a voluntary union with Egypt to form the United Arab Republic. Between 1 November 1958 and 28 September 1961, Syria had effectively disappeared from the international community. Yet, after 1961, it was regarded as the same entity as existed prior to unification. Although it is now said that this situation is better seen as a ‘loose association ... [of two states] which was not inconsistent with the continuing international personality of its component parts’<sup>310</sup> — that is, extinction by merger did not occur — it is significant that Syria’s membership of the UN ‘revived’ without the need for readmission: seen by Crawford to be a case of identity without continuity.<sup>311</sup> Both Craven and Koskenniemi observe that recognition, in the context of succession and continuity, will be important in determining whether a new state holds the rights and obligations of the old, extinct state.<sup>312</sup> Here, recognition by the ‘great powers’ will be of importance.<sup>313</sup>

A second important factor will be continued membership of the UN, which has been termed the ‘collective arbiter of statehood’.<sup>314</sup> This, however, may be neither here nor there in that there are no provisions in the *UN Charter* governing cessation of membership and any contention that membership ‘continues’ merely begs the question of whether membership should continue.

The specific nature of what is being recognised will be important. Notably, in relation to the resolution granting Palestine non-member observer state status,<sup>315</sup> Switzerland, Belgium, Finland, New Zealand and Norway<sup>316</sup> expressly indicated

<sup>303</sup> Mälksoo, above n 6, 5.

<sup>304</sup> See L R Lewitter, ‘The Partitions of Poland’ in A Goodwin (ed), *The New Cambridge Modern History: Volume 8 — The American and French Revolutions* (Cambridge University Press, 1976) 333.

<sup>305</sup> Richard Mole, *The Baltic States from the Soviet Union to the European Union: Identity Discourse and Power in the Post-Communist Transition of Estonia, Latvia and Lithuania* (Routledge, 2012) ch 2.

<sup>306</sup> Ibid 6–7. See also O’Connell, above n 10, 130.

<sup>307</sup> Mälksoo, above n 6, 7.

<sup>308</sup> See generally Rolf Steininger, *Austria, Germany and the Cold War: From the Anschluss to the State Treaty, 1938–1955* (Berghahn, 2008).

<sup>309</sup> See Crawford, *The Creation of States in International Law*, above n 6, 690.

<sup>310</sup> Ibid 489.

<sup>311</sup> Ibid 690.

<sup>312</sup> Craven, *The Decolonization of International Law*, above n 10, 79; Martti Koskenniemi, ‘Report of the Director of Studies of the English-Speaking Section of the Centre’ in Pierre Michel Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (Peace Palace Library, 1996) 65, 120–1.

<sup>313</sup> Fabry, above n 150, 8.

<sup>314</sup> Dugard, above n 151, 126. See above Part IV(B)(2).

<sup>315</sup> *Status of Palestine in the United Nations*, GA Res 67/19, UN GAOR, 67<sup>th</sup> sess, 44<sup>th</sup> plen mtg, Agenda Item 37, Supp No 49, UN Doc A/RES/67/19 (4 December 2012).

<sup>316</sup> UN GAOR, 67<sup>th</sup> sess, 44<sup>th</sup> plen mtg, Agenda Item 37, UN Doc A/67/PV.44 (29 November 2012) 16, 20–1.

that their votes did not recognise Palestine as a state. This distinction will be crucial to island states in the present case.

## V POTENTIAL SOLUTIONS

'The future of my country, Tuvalu, is in your hands'.

— Apisai Ielemi<sup>317</sup>

In this section, this article seeks to address some of the solutions proposed in the existing literature.<sup>318</sup> In doing so, four suggestions are outside its scope: addressing the causes of climate change;<sup>319</sup> accepting the move away from full statehood but negotiating a self-governing alternative;<sup>320</sup> constructing seawalls;<sup>321</sup> and the negotiation of a migration programme.<sup>322</sup> None of the existing proposals provide a completely effective solution and some require changes to the law.

The most effective solution would be to negotiate cession of sovereign territory from another state.<sup>323</sup> Sovereignty would transfer to the island state which could then relocate its people.<sup>324</sup> Recognition would maintain its importance in this proposal: 'other States would have to agree that it is the same State establishing itself in a new territory'.<sup>325</sup>

There are two barriers to this proposal. First, it is difficult to imagine a state willing to cede a habitable portion of its territory.<sup>326</sup> Secondly, even if territory were ceded, the state would be likely to face problems with resources on a

<sup>317</sup> Apisai Ielemi (Speech delivered at the United Nations Climate Change Conference, Copenhagen, 2009) <<http://www.un.org/webcast/pdfs/climatechangesummit/tuvalu.pdf>>. See also Ben Block, Interview with Ian Fry, Chief Climate Negotiator for Tuvalu (Copenhagen, 2009) <<http://www.worldwatch.org/node/6360>>; Samantha Maiden, 'Tuvalu No Longer Small Fry on World Stage', *The Australian* (online), 17 December 2009 <<http://www.theaustralian.com.au/news/world/tuvalu-no-longer-sm-all-fry-on-world-stage/story-e6frg6so-1225811159361>>.

<sup>318</sup> Questions of statelessness relate to the rights of the population and will not be considered here. On this, see McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 138–43.

<sup>319</sup> The sea level will continue to rise even if greenhouse gas concentrations are stabilised now and thus this may not suffice as a solution: see Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis* (Cambridge University Press, 2001) 77; Carr et al, above n 100, 37, 54.

<sup>320</sup> On this, see McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 153–8; Crawford, *The Creation of States in International Law*, above n 6, 492, 632–3.

<sup>321</sup> Leaving aside questions of expertise and maintenance, the cost of the seawall put in place to protect Malé cost approximately US\$70 million, amounting to more than 10 per cent of Maldivian Gross Domestic Product at time of completion: *Maldives Submission*, above n 19, 73. Moreover, seawalls may cause erosion in other parts of the coast and may be an ineffective remedy: Clive Schofield and David Freestone, 'Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 141, 151–2.

<sup>322</sup> States have already shown their unwillingness to absorb entire populations: see above Part I. See also Wyman, above n 33.

<sup>323</sup> Soons, above n 13, 230; Rayfuse, 'International Law and Disappearing States', above n 26, 284.

<sup>324</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 284.

<sup>325</sup> Park, above n 87, 18 (citations omitted).

<sup>326</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 284–5.

short-term and continuing basis. Island states are not wealthy<sup>327</sup> and one key concern has been the maintenance of valuable maritime rights.<sup>328</sup> To this end, it has been suggested that baselines from which maritime rights are calculated be frozen.<sup>329</sup> This would allow the state to maintain sovereign rights over its waters, ensuring some level of economic viability.

Two further issues arise in regard to the proposal to freeze maritime baselines. First, how long would the baselines stay frozen? If one assumes that the state has 'shifted' and is now located in a new location, it would seem to follow that the 'old' location is no longer the state's 'home'. Unless the baselines of all states are permanently frozen, it would seem logical for the freeze to be for a finite period. Secondly, if the island state were to relocate some distance from its original location, it would be difficult to envisage effective use of its original rights. Presumably, it could lease or enter into an arrangement whereby it derives income from permitting another state (perhaps the state ceding territory) exclusive use of its maritime zone.

A second solution is the construction of a man-made island or structure that remains above sea level. The technology for this exists.<sup>330</sup> Leaving aside issues of resources and expertise,<sup>331</sup> current international law does not allow for wholly man-made structures to constitute territory: 'only structures which make use of a specific piece of the earth's surface can be recognized as State territory within the meaning of international law'.<sup>332</sup> This is consistent with the *UNCLOS* regime which provides that '[a]rtificial islands, installations and structures do not possess the status of islands'.<sup>333</sup> The ICJ has stated that there is no customary rule allowing for low tide elevations to constitute territory.<sup>334</sup> Although it has recently shown remarkable flexibility under the *UNCLOS* regime — holding a maritime feature of 10–20 centimetres in size, less than a metre above sea level,

<sup>327</sup> Carr et al, above n 100, 41, 51; Wyman, above n 33, 343–4; Wannier and Gerrard, above n 23, 13. See also World Factbook, *Country Comparison: GDP — Per Capita (PPP)*, Central Intelligence Agency <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>>.

<sup>328</sup> ABC Radio National, above n 31. These are rights of the state, not of the individual: *Chierici and Rosa v Ministry of the Merchant Navy and Harbour Office of Rimini* (1969) 71 ILR 258 (Italian Council of State). Consequently, a move to a landlocked area would result in the loss of these rights: see Rayfuse, 'International Law and Disappearing States', above n 26, 282.

<sup>329</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 283. See David D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17 *Ecology Law Quarterly* 621, 641–52.

<sup>330</sup> Shipbuilding Research Center of Japan, *What's Mega-Float?* (2003) <[http://www.srcj.or.jp/html/megafloat\\_en/whatmega/whatmega.html](http://www.srcj.or.jp/html/megafloat_en/whatmega/whatmega.html)>.

<sup>331</sup> States may be able to argue that this falls within the definition of an 'adaptation action' and make claims for funding under the Cancun Adaptation Framework: see Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 — Addendum — Part 2: Action Taken by the Conference of the Parties at Its Sixteenth Session*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) Decision 1/CP.16 ('*The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*') [14], [95]–[112].

<sup>332</sup> *Re Duchy of Sealand* (1978) 80 ILR 683, 685 (Administrative Court of Cologne).

<sup>333</sup> *UNCLOS* art 60(8).

<sup>334</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits)* [2001] ICJ Rep 40, 101–2.

sufficient to give rise to maritime entitlements<sup>335</sup> — it also held that art 121 of *UNCLOS* forms an indivisible customary regime.<sup>336</sup> Thus, it has recognised that there are limits to what constitutes an island (and, presumably, territory): a rock incapable of sustaining life will not suffice. Hence, any solution based on constructing artificial structures will require changes to the law. There does not seem to be anything, in principle, militating against accepting artificial structures (located where territory once was) as territory. Although it would seem desirable that changes to the law occur by treaty, amendment to *UNCLOS*, while providing certainty on the issue of maritime rights, would not be sufficient. *UNCLOS* does not conclusively determine what suffices as 'territory' for the purposes of statehood and the island state would need to obtain 'confirmation' (presumably via recognition) that it remains a state.

The third solution is the 'deterritorialised state'. Under this analysis, the 'state' would remain an entity consisting of the 'government' elected by the people, which would hold the assets of the entity on trust for its people, wherever they are located.<sup>337</sup> The Order of Malta and the Holy See are said to be analogous to this concept.<sup>338</sup> It is further contended that functional sovereignty is recognised in entities such as the European Union and Taiwan, as well as in governments in exile.<sup>339</sup> The position of the Holy See and the Order of Malta (and why international law as a system organised by sovereignty is grounded in conceptions of territory) has been considered.<sup>340</sup> While functional sovereignty is recognised at international law (and to this may be added the recognition of limited personality in international organisations), these entities are not states. The analysis surrounding governments in exile is distinct and has been considered.<sup>341</sup> Moreover, the status of the 'government' is unclear: would it have sovereignty over the area from which it governs? And would the 'deterritorialised state' be equal to other states? If so, would there not be two sovereigns over the same territory? These are all unanswered questions that, arguably, require substantial reconceptualising of international law.

Separately, it has been recognised that this solution faces difficult administrative challenges, is temporary at best and would need to be accompanied by the freezing of maritime baselines.<sup>342</sup> Another issue may be added: if one starts from the proposition that the people of the island state wish to remain a people, an area in which they (or a majority) could reside in would seem necessary. If this is the case, there would seem to be no need for the 'deterritorialised state'. If the people were to be scattered in other states, they would presumably become part of that other state. Even accepting the 'deterritorialised state', the population residing in other states would be subject

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<sup>335</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)* (International Court of Justice, General List No 124, 19 November 2012) [28]–[38].

<sup>336</sup> *Ibid* [139].

<sup>337</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 286.

<sup>338</sup> *Ibid* 285; Burkett, 'The Nation Ex-Situ', above n 24, 96–8.

<sup>339</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 285–6; Grant, 'States Newly Admitted to the UN', above n 100, 192; Burkett, 'The Nation Ex-Situ', above n 24, 98.

<sup>340</sup> See above Parts II(B) and IV(B)(4).

<sup>341</sup> See above Part IV(A)(3).

<sup>342</sup> Rayfuse, 'International Law and Disappearing States', above n 26, 286–7.



to their jurisdiction. If dual nationality is obtained, ‘the presumption of diplomatic protection may gradually favour the State in which the person resides’.<sup>343</sup> The ‘deterritorialised state’ would thus fulfil no real function in a legal sense: its principal role would likely be one of advocacy for its diaspora.

A fourth, temporary, solution is to utilise the *UN Charter*’s trusteeship provisions.<sup>344</sup> Assuming that the island state is able to purchase territory in another state as a short-term solution and that this is insufficient for statehood,<sup>345</sup> the trusteeship regime could provide a temporary solution while the entity seeks other solutions. This enables the promotion of the political, economic, social and educational advancement of the island state’s people in the short- to medium-term, consistent with the aims of the regime.<sup>346</sup> A further benefit is that the power to approve the terms of trusteeship agreements and their alteration or amendment is vested in the General Assembly.<sup>347</sup> 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 — oversight that would be welcome in a time where the island state is particularly vulnerable.

Several barriers need to be overcome. First, the trusteeship system does not apply to UN member states.<sup>348</sup> Thus, the island state would have to cease its UN membership, either by accepting extinction or by withdrawing from the UN. Both options are problematic. Withdrawal is undesirable given that continued membership may serve as implicit recognition by other states that it is still a state (though this may merely beg the question of whether ‘fresh’ recognition is required in the circumstances).

A second issue arises because the trusteeship system requires the entity to be placed into trusteeship by the states responsible for the territory under administration.<sup>349</sup> Consent is required before the trusteeship system is engaged: a territory can be placed under trusteeship only by the authority that is entitled to dispose of the territory.<sup>350</sup> How would this occur if the trusteeship system cannot apply to states that are members of the UN? Seemingly, therefore, withdrawal from the UN would be required. This seems unnatural: why is the state forced to withdraw from the UN, particularly when it most needs the benefits of the multilateral forum to ensure its continuity and to avail itself of the benefits of membership? A solution may manifest itself under a broad reading of the *UN Charter*. As this solution is premised on the entity having purchased

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<sup>343</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 136. Maxine Burkett suggests that the combination of the ‘deterritorialised state’ and a trust administered by its government would allow for the state to remain unified: Burkett, ‘The Nation Ex-Situ’, above n 24, 107–20. It is difficult to envisage how this would operate in the long-term, particularly to the exclusion of host states.

<sup>344</sup> *UN Charter* arts 75–91. See also *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 149 (Judge McNair). This assumes that island states would find this politically acceptable.

<sup>345</sup> This would not be required if continuity were possible under the construct noted above.

<sup>346</sup> *UN Charter* art 76(b).

<sup>347</sup> *Ibid* art 85(1).

<sup>348</sup> *Ibid* art 78.

<sup>349</sup> *Ibid* art 77(1)(c).

<sup>350</sup> Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems, with Supplement* (Lawbook Exchange, 2009) 579.

territory, consent could be manifested by the 'government' of that territory, therefore overcoming this issue.

A fifth proposal is to create a new legal category of state: the 'quasi-state'.<sup>351</sup> These are entities that 'possess juridical statehood, but "[t]hey disclose limited empirical statehood"'.<sup>352</sup> Such entities would have 'fewer obligations and fewer rights than ordinary states. Fewer obligations because a failed state cannot be expected to fulfil its obligations and fewer rights because the amount of rights and obligations should correspond at least roughly'.<sup>353</sup> This concept is problematic for two reasons. First, it is not clear how it would interact with the sovereign equality of states. Inger Österdahl accepts that this will create inequality, but suggests that despite their inequality the entities would remain states.<sup>354</sup> It is said that the real issue would be 'the movement of a state from one category to another ... All states, however, would remain states of some kind. Moving from one category of state to another may be less dramatic a change [than the loss of statehood altogether]'.<sup>355</sup> It is not clear, however, how this would work in practice and how a system based on a hierarchy of states would function. Secondly, in the context of island states, it is not clear which (and to what extent) 'rights' would be curtailed.<sup>356</sup> In the context of 'failed states', this would presumably be the right to inviolable borders. In the present case, however, there is no direct matter that one could see as being curtailed. The obvious option may be rights concerning its people: whether other states may exercise jurisdiction or other powers over its people. This is certainly problematic given that it is the people that would be the primary concern of the island state.

Finally, it is convenient to note a technical issue in relation to standing before the ICJ. The *UN Charter* provides that all members of the UN are ipso facto parties to the *Statute of the International Court of Justice* ('*SICJ*').<sup>357</sup> It may be said that the references in art 34(1) of the *SICJ* to the ICJ being open only to 'states' must be read to enable the ICJ to have jurisdiction over cases involving UN members, regardless of their status as a state. This is consistent with the view that the ICJ's jurisdiction 'should be extended as far as possible'.<sup>358</sup> On this view, the entity would have standing so long as it remained a UN member. This view is by no means clear, however, and the plain meaning of art 34(1) of the *SICJ* is that only states have standing. Moreover, this argument begs the question of whether UN membership is to continue; a question referable back to art 4(1) of the *UN Charter* which restricts membership to states.

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<sup>351</sup> Österdahl, above n 2, 59. See also Jackson, above n 145, 21–31.

<sup>352</sup> Österdahl, above n 2, 59, quoting Jackson, above n 145, 21.

<sup>353</sup> Österdahl, above n 2, 60.

<sup>354</sup> Ibid 60–2.

<sup>355</sup> Ibid 62.

<sup>356</sup> Österdahl suggests that '[t]he most failed states would lose most of their rights and duties and the least failed states would lose fewer': ibid 60. This sounds intuitively attractive but would be difficult to apply. What does it mean to say that Somalia is 'more failed' than Yugoslavia? Moreover, a comparison inherently carries with it a degree of judgment and condescension.

<sup>357</sup> *UN Charter* art 93(1).

<sup>358</sup> *Report of the Committee of Experts*, UN Doc S/1342, 2.

One method to sidestep the issue would be for the island state to commence proceedings before inundation. Jurisdiction is determined at the time that the act instituting proceedings is filed and will continue regardless of subsequent events.<sup>359</sup> The possibility of advancing a claim was mooted in 2002, when former Tuvaluan Prime Minister Talake announced that Tuvalu, joined by Kiribati and the Maldives, planned to sue the US and Australia.<sup>360</sup> Ultimately, the claim was not pursued, but the possibility of advancing claims against those 'responsible' is open.<sup>361</sup>

In advancing a claim, the island state would need to prove that a state is responsible for climate change and its consequences.<sup>362</sup> The primary issues would be proving that the emission of greenhouse gases is an internationally wrongful act and that the emissions by a particular state caused inundation. Proof of the wrongful act may arise from the obligation on states not to allow its territory to be used for acts contrary to the rights of other states.<sup>363</sup> This principle extends to environmental damage<sup>364</sup> and, potentially, acts that would be *prima facie* legal.<sup>365</sup> The ICJ has advised that states are under an obligation 'to ensure

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<sup>359</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 12.

<sup>360</sup> Leslie Allen, 'Will Tuvalu Disappear beneath the Sea? Global Warming Threatens to Swamp a Small Island Nation', *Smithsonian* (online), August 2004 <<http://www.smithsonianmag.com/travel/tuvalu.html?c=y&story=fullstory>>.

<sup>361</sup> See Andrew Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in William C G Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009) 334. A potential claim was once again raised in 2012: Pacific Island News Association, *Island Nations Want Climate Change in World Court* (6 February 2012) <<http://www.pina.com.fj/?p=pacnews&m=read&o=15388406704f2f40dfae884162424e>>.

<sup>362</sup> Jacob David Werksman, 'Could a Small Island Successfully Sue a Big Emitter?: Pursuing a Legal Theory and a Venue for Climate Justice' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 409, 415–28. On questions of causation and responsibility, see Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff, 2005) ch 5; Ilona Millar, Catherine Gascoigne and Elizabeth Caldwell, 'Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 433, 442–3.

<sup>363</sup> *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>364</sup> *Trail Smelter Case (United States of America v Canada) (Awards)* (1938/1941) 3 RIAA 1905, 1965; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) vol 2, § 601(1); Werksman, above n 362, 415–28; Millar, Gascoigne and Caldwell, above n 362, 438–40; Maketo Robert et al, 'Transboundary Climate Challenge to Coal: One Small Step against Dirty Energy, One Giant Leap for Climate Justice' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 589, 591–3.

<sup>365</sup> Pemmaraju Sreenivasa Rao, Special Rapporteur, *International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities) — Second Report on the Legal Regime for the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities*, UN Doc A/CN.4/540 (15 March 2004).

that activities within their jurisdiction and control respect the environment of other States'.<sup>366</sup>

Assuming that the internationally wrongful act and causation could somehow be proven, two further issues arise. First, the remedy would not be the prevention of extinction. The ICJ would not have power to make orders relating to the status of the entity as a state: it could not fashion a situation where one does not exist, particularly vis-a-vis other states.<sup>367</sup> The remedy could potentially be an obligation to accept migrants from the island state or, perhaps, monetary compensation. Secondly, on a practical level, such proceedings would alienate the very states that are in a position to assist the island state. States such as the US and Australia would be the likely defendants, but are also the states with the resources to assist. The island state is therefore confronted with a paradox: the states 'responsible' for the island state's plight are also the ones that can most assist it.

## VI CONCLUSION

'Alone, alone, all, all alone,  
Alone on a wide wide sea!  
And never a saint took pity on  
My soul in agony'

— Samuel Taylor Coleridge<sup>368</sup>

'The Purposes of the United Nations are: ... To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character ...'

— *Charter of the United Nations*<sup>369</sup>

The mortality of a state is no longer a far-fetched hypothetical: the 'theoretical'<sup>370</sup> possibility of state extinction via emigration of its entire population and the complete loss of territory may come to pass in the foreseeable future. While issues of extinction are certainly not likely to arise in the immediate short-term — and speaking of 'Atlantis-style' disappearance at the expense of informed debate on gradual population displacement may undermine more effective policymaking<sup>371</sup> — the issues are real and require long-term solutions,<sup>372</sup> both practical and legal.

The difficulty in discerning whether a state ceases to exist on the complete inundation of its sovereign territory has been examined at length and it is

<sup>366</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 242.

<sup>367</sup> The ICJ could, in principle, declare that the accused state is prevented from denying the island state's statehood, but this would not bind third states or maintain rights under the *UNCLOS*.

<sup>368</sup> Coleridge, above n 97, 30.

<sup>369</sup> *UN Charter* art 1.

<sup>370</sup> See Oppenheim, above n 12, 117–18.

<sup>371</sup> McAdam, *Climate Change, Forced Migration, and International Law*, above n 27, 119, 123. See also United Nations High Commissioner for Refugees, 'Summary of Deliberations on Climate Change and Displacement' (Summary, April 2011) [30].

<sup>372</sup> See Burkett, 'The Nation Ex-Situ', above n 24, 120–1; Solomon and Warner, above n 101, 295, 298.

unnecessary to repeat the analysis here. It is sufficient to note that extinction will not occur as soon as the first wave covers the last rock — such a result would be untenable under international law. Nevertheless, the position of the island state is precarious and, should it be unable to secure sovereign territory, more concrete solutions are necessary. In considering various proposals, several matters should be noted. Legally, with the exception of the cession of sovereign territory, all the current proposals require changes to concepts of territory. Recognition will have a particularly important role<sup>373</sup> and it will be crucial for the island state to ensure that it continues to be recognised — or, preferably, obtain acts of fresh recognition — by sovereign states. Moreover, any solution requires considerations of how the island state is to sustain itself, even if it were to secure sovereign territory. The infrastructure, technology and administrative know-how associated with many of the solutions is likely to be beyond the reach of any of the island states and international aid will be necessary. The future of the country will truly be an ‘international problem of an economic, social, cultural and humanitarian character’.<sup>374</sup> In the short- to medium-term, freezing of maritime baselines may provide a solution, but questions remain as to the duration of the freeze and, in any event, how meaningful the rights would be. Practically, the wishes of the island state’s population should be respected as much as possible. Culture, unity and statehood remain important to the people of island states<sup>375</sup> and solutions that preserve these matters are preferable.

One final issue deserves brief mention. If statehood is lost and the majority of the people of the former state are located in a particular area, either through resettlement or (however unlikely) through domestic law concepts of ownership, questions relating to the right to self-determination may arise. Whether the right to self-determination would permit the people to secede from the host state is unclear. Certainly, there would be an identifiable ‘people’,<sup>376</sup> but it would be exceptionally difficult to ground a case of alien subjugation, domination or exploitation,<sup>377</sup> particularly given that the host state is likely to be acting out of goodwill in allowing the people of the former state to reside in its sovereign territory. The issue, however, is an open one<sup>378</sup> and would largely depend on the factual matrix surrounding the people of the former island state.

Whatever may be the result of inundation of the island state, one hopes that loss of statehood — and its consequences, both legal and symbolic — is no

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<sup>373</sup> In principle, legal constructs are independent of recognition, but recognition would provide strong evidence of continuity.

<sup>374</sup> *UN Charter* art 1(3).

<sup>375</sup> David Hodgkinson and Lucy Young, “‘In the Face of Looming Catastrophe’: A Convention for Climate-Change-Displaced Persons” in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 299, 325–8.

<sup>376</sup> See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15<sup>th</sup> sess, 947<sup>th</sup> plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960).

<sup>377</sup> See *ibid* para 1; *Reference re Secession of Quebec* [1998] 2 SCR 217, 222 et seq.

<sup>378</sup> Hestetune asserts that involuntary extinction will contravene the right to self-determination, but does not propose what consequences arise out of this: Hestetune, above n 127, 49–55. He does not appear to suggest that the principle prevents extinction; if this were so, statehood could never be extinguished involuntarily.

longer so obvious so as to be taken for granted.<sup>379</sup> In a sobering reminder of the purpose of the law, which is 'to preserve and promote the values of freedom and human dignity for individuals',<sup>380</sup> particularly in the international arena,<sup>381</sup> Judge Cançado Trindade has noted that legal doctrine has become

obsessed, throughout the twentieth century, with the ideas of State sovereignty and territorial integrity ... to the exclusion of others, ... oblivious of the most precious constitutive element of statehood: human beings, the 'population' or the 'people'.<sup>382</sup>

It is worth recalling Judge Dillard's comment: 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people'.<sup>383</sup> The importance of people in international law should not change, even if the climate threatens the existence of their territory.

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<sup>379</sup> Cf Marek, above n 1, 7.

<sup>380</sup> William W Bishop, 'The International Rule of Law' (1961) 59 *Michigan Law Review* 553, 553.

<sup>381</sup> See Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 110–12.

<sup>382</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 553. See also Daniel-Erasmus Khan, above n 47, 248.

<sup>383</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 122.