

**EVOLUTION OR REVOLUTION?  
EVALUATING THE TERRITORIAL STATE-BASED REGIME OF  
INTERNATIONAL LAW IN THE CONTEXT OF PHYSICAL DISAPPEARANCE OF  
TERRITORY DUE TO CLIMATE CHANGE AND SEA-LEVEL RISE**

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*The ascription of full status and participation rights usually reserved for “traditional” States to genuinely nonterritorial entities would require the greatest structural transformation international law has seen since the establishment of the so-called Westphalian order.*  
- Jenny Grote Stoutenburg\*

*All these challenges go deeper than simply questioning the appropriateness of certain existing rules of international law. The nature of the challenges is such that they call into question some basic axioms of international law.*  
- Davor Vidas\*\*

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\*“When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 57 at 87.

\*\*“Sea-Level Rise and International Law: At the Convergence of Two Epochs” (2014) 4 *Climate Law* 70 at 73.

# TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	1
<b>1. WHAT IS HAPPENING? THE CLASSICAL VIEW ON STATEHOOD AND THE NEW REALITY OF TERRITORIAL DISAPPEARANCE</b> .....	6
1.1 STATES AND STATEHOOD .....	6
1.1.1 The role of territorial States under international law.....	6
1.1.2 The classical definition of statehood .....	8
1.2 THE RIGHTS AND OBLIGATIONS TRIGGERED BY THE PHYSICAL DISAPPEARANCE OF THE TERRITORY OF STATES .....	12
1.2.1 Claims over maritime zones and right to resources .....	13
1.2.2 Forced displacements .....	14
1.2.3 Self-determination .....	16
1.2.4 State responsibility and the consequences of territorial disappearance due to sea-level rise: the appropriateness of the climate-change regime.....	17
<b>2. WHAT CAN BE DONE? POSSIBLE SOLUTIONS PROPOSED TO ENSURE THE CONTINUITY OF STATES WITH TERRITORIES THAT ARE PHYSICALLY DISAPPEARING</b> .....	22
2.1 TRADITIONAL RESPONSES .....	22
2.1.1 Man-made preservation solutions: Using artificial means to protect existing lands and/or building artificial islands or installations .....	22
2.1.2 Acquisition of territory .....	25
2.2 A <i>SUI GENERIS</i> ENTITY: THE “DETERRITORIALIZED” STATE .....	26
2.2.1 The “deterritorialized” State: What is it? .....	27
2.2.2 How would it work? Government in exile and political trusteeship analyzed.....	28
<b>3. BEYOND THE WESTPHALIAN SYSTEM: STATEHOOD IN THE 21<sup>ST</sup> CENTURY</b> .....	31
3.1 PRESERVING THE LEGITIMACY OF INTERNATIONAL LAW.....	33
3.2 WHEN REALITIES TRANSCEND BORDERS: POSSIBLE BASIS FOR A NEW MODEL .....	35
3.2.1 Diaspora and cosmopolitanism .....	36
3.2.2 Global governance.....	38
3.2.3 Equity and moral duty: exceptional solutions for exceptional circumstances .....	40
<b>CONCLUSION</b> .....	43
<b>BIBLIOGRAPHY</b> .....	46

## INTRODUCTION

How does international law react to the threat of the territorial disappearance of the State, the heart of the international legal regime?<sup>1</sup> In practice, the State-centered system and State-driven framework of international law are based on the existence of nation-States — a socio-cultural entity coinciding with a politico-legal entity — that evolve on defined territorial areas.<sup>2</sup> In recent decades, these concepts have however been questioned by the growing role of various actors<sup>3</sup> and the rise of transboundary challenges necessitating the involvement of the global community.<sup>4</sup> The increasing presence of non-State actors has caused States to interact with these entities and with one another in new and previously unforeseen ways. They also raise questions concerning the importance of the role of States within the international legal order. While these issues cannot be ignored and have been addressed extensively in the legal literature, State consent and State sovereignty still remain at the core of the international legal system.<sup>5</sup>

But what would happen if the basis of this system, the State itself, was to see its territory disappear? International law has in the past been faced with the extinction of statehood through dissolution (e.g. Yugoslavia, Soviet Union), as well as through merger or absorption (e.g. the People's Democratic Republic of Yemen united with the Yemen Arab Republic, the German Democratic Republic absorbed by the Federal Republic of Germany).<sup>6</sup> The permanent physical disappearance of the territory of States, however, is unprecedented.<sup>7</sup>

<sup>1</sup> See, e.g., Derek Wong, "Sovereignty Sunk? The Position of 'Sinking States' at International Law" (2013) 14 *Melb J Int'l L* 346 at 347.

<sup>2</sup> UNESCO, "Nation-State", online: UNESCO <<http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/nation-state/>>; Cara Nine, "Ecological Refugees, States Borders, and the Lockean Proviso" (2010) 27:4 *Journal of Applied Philosophy* 359 at 362; Stéphane Pierré-Caps, "La mondialisation et la crise de l'État national" in Jean-Denis Mouton & Jean-Pierre Cot (eds), *L'État dans la mondialisation: colloque de Nancy* (Paris: Éditions Pedone, 2013) 39 at 40.

<sup>3</sup> See, e.g., Immanuel Wallerstein, "The New World Disorder: If the States Collapse, Can the Nations be United?" in Albert Paolini, Anthony Jarvis and Christian Reus-Smit (eds), *Between Sovereignty and Global Governance. The United Nations, the State and Civil Society* (MacMillan Press: Houndmills, Basingstoke, London; St Martin's Press: New York, NY, 1998) 171 at 181-182; Roman Kwiecién, "On Some Contemporary Challenges to Statehood in the International Legal Order: International Law Between Lotus and Global Administrative Law" (2013) 51:3 *Archiv des Völkerrechts* 279 at 298. See also, generally, Oscar Schachter, "The Decline of the Nation-State and its Implications for International Law" (1998) 36 *Colum J Transnat'l L* 7.

<sup>4</sup> Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods" (2014) 108:1 *AJIL* 1 at 3, 6-7; Milena Sterio, "A Grotian Moment: Changes in the Legal Theory of Statehood" (2011) 39 *Denv J Int'l L & Pol'y* 209 at 209.

<sup>5</sup> Kwiecién, *supra* note 3 at 288, 310-311; Emily Crawford & Rosemary Rayfuse, "Climate Change and Statehood" in Rosemary Rayfuse & Shirley Scott (eds), *International Law in the Era of Climate Change* (Cheltenham, UK; Northampton, Mass: Edward Elgar, 2012) 243 at 245; Allen Buchanan, "The Legitimacy of International Law" in Samantha Besson & John Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 79 at 91, 93; John Herz, "Rise and Demise of the Territorial State" (1957) 9:4 *World Politics* 473 at 480; Inger Österdahl, "Relatively Failed: Troubled Statehood and International Law" (2003) 14 *Finnish Yearbook of International Law* 49 at 49; Ian Brownlie, "Rebirth of Statehood" in M Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth: Aldershot, 1996) 5 at 6; Abhimanyu George Jain, "The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss Of Territory" (2014) 50 *Stan J Int'l L* 1 at 7-9.

<sup>6</sup> Malcom Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 151-153. See also Allen Buchanan & Margaret Moore, "Introduction: The Making and Unmaking of Boundaries" in Allen

Climate change and sea-level rise appear to be the main causes of the eventual territorial disappearance of States, leading to floods and to the submersion of territories, whether total or partial. But lands and coastlines are also affected by other natural phenomena, such as storms or erosion.<sup>8</sup> The scientific evidence supporting such a hypothesis is now well-known: in its Fifth Assessment Report of 2014, the International Panel on Climate Change (IPCC) has underlined that “[t]he atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen”,<sup>9</sup> and greenhouse gases (GHGs) “are extremely likely to have been the dominant cause of the observed warming since the mid-20th century”.<sup>10</sup> As a consequence of these changes, the possible occurrence of sea-level rise cannot be denied even if its measure remains uncertain.<sup>11</sup>

All coastal States are at risk of eventually being so affected.<sup>12</sup> But the consequences of climate change seem even more dramatic and imminent for Small Island Developing States (SIDS).<sup>13</sup> Indeed, small States such as Tuvalu, Kiribati, the Marshall Islands, the Federated States of Micronesia and Palau in the South Pacific, or the Maldives in the Indian Ocean, have started to experience the effects of sea-level rise because their entire territory is located only a few meters above the ocean.<sup>14</sup>

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Buchanan & Margaret Moore (eds), *States, Nations and Borders. The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 1 at 1-2.

<sup>7</sup> Crawford & Rayfuse, *supra* note 5 at 248; Maxine Burkett, “The Nation Ex-Situ” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 89 at 93 [Burkett, “Nation Ex-Situ”]; Julien Jeanneney, “L’Atlantide, remarques sur la submersion de l’intégralité du territoire d’un État” (2014) 118:1 RGDIP 95 at 99; International Law Association Committee on International Law and Sea-Level Rise, *Minutes of the Closed Session (I)* (Washington, 2014) at 7 (statement by the Chair), online: International Law Association <<http://www.ila-hq.org/en/committees/index.cfm/cid/1043>> [ILA SLR, *Closed Session (I)* 2014].

<sup>8</sup> David Caron, “Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict” in Seoung-Yong Hong & Jon M. Van Dyke, eds, *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Lieden-Boston, Nijhoff, 2009) 1 at 8; Tony George Puthucherril, “Climate Change, Sea Level Rise and Protecting Displaced Coastal Communities: Possible Solutions” (2012) 1 *Global Journal of Comparative Law* 225 at 234; Jain, *supra* note 5 at 4-5.

<sup>9</sup> International Panel on Climate Change, *Climate Change 2014 Synthesis Report. Summary for Policymakers* at 2, online: <[http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf)> [IPCC, 2014 *Synthesis Report*].

<sup>10</sup> *Ibid* at 4.

<sup>11</sup> Davor Vidas, David Freestone and Jane McAdam, “International Law and Sea Level Rise: The New ILA Committee” (2015) 21 *ILSA J Int’l & Comp L* 397 at 397-398; Achim Maas & Alexander Carius, “Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond” in Jürgen Scheffran, Michael Brzoska, Hans Günter Brauch, Peter Michael Link & Janpeter Schilling (eds), *Climate Change, Human Security and Violent Conflict. Challenges for Societal Stability* (Berlin: Springer, 2012) 651 at 653.

<sup>12</sup> Puthucherril, *supra* note 8; Clive Schofield & David Freestone, “Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 141 at 141; Clive Schofield & I Mande Andi Arsana, “Imaginary Islands? Options to Preserve Maritime Jurisdictional Entitlements and Provide Stable Maritime Limits in the Face of Coastal Instability” (Proceedings of the Advisory Board on the Law of the Sea (ABLOS) conference on Contentious Issues in UNCLOS – Surely Not? delivered in Monaco, 2010) at 8-9.

<sup>13</sup> *Ibid* at 2.

<sup>14</sup> *Ibid*; Puthucherril, *supra* note 8 at 232.

The issue of the impact of sea-level rise on certain aspects of international law, raised for the first time among legal scholars at the end of the 1980s,<sup>15</sup> resurfaced in the academic literature recently. However, most of the research has focused on issues *stemming from* the disappearance of the territory of States, such as maritime zones entitlements, forced migrations and the new phenomenon of environmental/ecological refugees, as well as the regime of international responsibility for climate change.<sup>16</sup> And while the broader issues of statehood and sovereignty have generated much research,<sup>17</sup> few scholars have addressed the actual issue of the quality of statehood of States with a territory that is physically disappearing.<sup>18</sup> Further, most scholars working in the area have focused on addressing the proposition of how “[t]he continued existence of the state would be secured in accordance with traditional rules of international law.”<sup>19</sup>

The concerns mentioned above — statehood, maritime zones and access to resources, migrations, human rights, etc. — fall within a broader set of issues raised by territorial loss.<sup>20</sup> They are crucial to the question of the disappearance of States’ territories and will be

<sup>15</sup> See, e.g., Alfred Soons, ‘The Effects of a Rising Sea Level on Maritime Limits and Boundaries’ (1990) 37 *Neth Int’l L Rev* 207; David Caron, “When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level” (1990) 17 *Ecology LQ* 621 [Caron, “When Law”]; David Freestone, “International Law and Sea Level Rise”, in R Churchill & D Freestone (eds), *International Law and Global Climate Change* (Graham & Trotman/Martinus Nijhoff Publishers, London/Dordrecht, 1991) 109 [Freestone, “International Law”].

<sup>16</sup> Jain, *supra* note 5 at 12, referring to, e.g., Michele Klein Solomon & Koko Warner, “Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 243; Alice Edwards, “Climate Change and International Refugee Law” in Rosemary Rayfuse & Shirley Scott (eds), *International Law in the Era of Climate Change* (Cheltenham, UK; Northampton, Mass: Edward Elgar, 2012) 58; Catherine Redgewell, “Climate Change and International Environmental Law” in Rosemary Rayfuse & Shirley Scott (eds), *International Law in the Era of Climate Change* (Cheltenham, UK; Northampton, Mass.: Edward Elgar, 2012) 118; Schofield & Freestone, *supra* note 12; Maketo Robertetal, “Transboundary Climate Challenge to Coal: One Small Step Against Dirty Energy, One Giant Leap for Climate Justice” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 589; Jacob David Werksman, “Could a Small Island Successfully Sue a Big Emitter?: Pursuing a Legal Theory and a Venue for Climate Justice” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 409. See also Jenny Grote Stoutenburg, “Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise” (2011) 26 *Int’l J Mar & Coast L* 263 [Stoutenburg, “Implementing”]; Schofield & Arsana, *supra* note 12.

<sup>17</sup> James Crawford, *The Creation of State in International Law*, 2d ed (Oxford: Oxford University Press, 2006); Thomas Grant, “Defining Statehood: The Montevideo Convention and its Discontents” (1998-1999) 37 *Colum J Transnat’l L* 403; Jure Vidmar, “Territorial Integrity and the Law of Statehood” (2012) 44 *Geo Wash Int’l L Rev* 697; Österdahl, *supra* note 5.

<sup>18</sup> Jain, *supra* note 5 at 13, referring to Burkett, “Nation Ex-Situ”, *supra* note 7; Jenny Grote Stoutenburg, “When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 57 [Stoutenburg, “When Do”]; Crawford & Rayfuse, *supra* note 5; Maxine Burkett, “The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era” (2011) 2 *Climate Law* 345; Davor Vidas, “Sea-Level Rise and International Law: At the Convergence of Two Epochs” (2014) 4 *Climate Law* 70; Wong, *supra* note 1.

<sup>19</sup> Crawford & Rayfuse, *supra* note 5 at 249-250.

<sup>20</sup> International Law Association Committee on Baselines under the International Law of the Sea, *Final Report* (Sofia, 2012) at 1, online: International Law Association <<http://www.ila-hq.org/en/committees/index.cfm/cid/1028>> [ILA CB, *Final Report*], cited in Vidas, Freestone & McAdam, *supra* note 11 at 401.

addressed in the present study. However, this research aims to go one step further and question the use of the classical notion of statehood under international law within the new practical realities of the 21<sup>st</sup> century created by climate change and sea-level rise, assessed within the general framework of globalization. This study will therefore focus on the following question: *Facing the physical disappearance of States' territories, is the territorial State still an appropriate basis for the international legal system?*

This analysis will find its starting point in the classical approach to statehood as defined under article 1 of the 1933 *Montevideo Convention*<sup>21</sup> and customary international law, and will mostly focus on the criteria of permanent population and defined territory. While the other criteria (government and capacity to enter into relations with the other States) will be touched upon, they will not be at the core of the analysis. It is also important to note that even though rules and principles related to the creation of States might be used for comparison purposes, this research will not address the issue of *creation* of States, but their *continuity* as legal entities. Further, while all States, especially coastal States, can eventually be affected by the impacts of climate change, SIDS will be looked at as a case study for the purpose of this research. Measures undertaken by other States can however be referred to.

The first chapter of this study aims at providing a portrait of the current rules on statehood within the context of the physical disappearance of States' territories. Therefore, we will firstly look at the role of territorial States within the international order and the classical definition of statehood under current international law, and at how these concepts are affected by territorial and population loss (section 1.1). We will then explore the issue of how rights and entitlements of SIDS associated to statehood are affected by climate change, sea-level rise, and physical disappearance of territory, as discussed among scholars (section 1.2).

Next, we will turn to solutions suggested in the legal literature to counter loss of territory and, eventually, loss of statehood of SIDS (chapter 2). The study will first analyze solutions rooted in traditional mechanisms and regimes (section 2.1), such as man-made preservation solutions and the option of acquiring territory. This research will then look at the *sui generis* entity of the "deterritorialized" State (section 2.2). This chapter also aims at providing a critique of the feasibility and relevance of the suggested solutions.

Relying on the discussion of *sui generis* entities, this research will finally propose an attempt at assessing the possibility of solutions outside the territorial State-centric regime (chapter 3). We will assess if a new way of understanding statehood, a way that would depart from the view that the State is necessarily a territorial entity, could be more appropriate in the practical context at hand. For that purpose, we will first look at the concepts of legitimacy of international law and morality within the international legal order as the ethical basis for the necessity of an alternative model to the territorial State (section 3.1). This research will end

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<sup>21</sup> *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) [*Montevideo Convention*].

with an exploration of theoretical lenses — the diasporic and cosmopolitan theories, global governance, and equity — through which a new model could be contemplated (section 3.2)

This study will raise issues at the crossroads of classical concepts of international law and contingencies stemming from globalization and transboundary concerns.<sup>22</sup> It will also seek to underline a new perspective for scholars and practitioners to envisage for the further development of international law.<sup>23</sup> Most of the impacts — practical and legal — of territorial disappearance are yet to occur; analyzing them beforehand therefore requires a certain level of speculation.<sup>24</sup> As such, this project will largely discuss the theoretical work of international legal scholars, as relevant international cases, decisions, and instruments on the topic are limited. We however hope that this study will form the basis for further research concerning the future of the notion of statehood for States with physically disappearing territories.

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<sup>22</sup> Östendahl, *supra* note 5 at 87.

<sup>23</sup> Vidas, Freestone & McAdam, *supra* note 11 at 400-401.

<sup>24</sup> Jeanneney, *supra* note 7 at 97.

## **1. WHAT IS HAPPENING? THE CLASSICAL VIEW ON STATEHOOD AND THE NEW REALITY OF TERRITORIAL DISAPPEARANCE**

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

### **1.1 STATES AND STATEHOOD**

#### **1.1.1 The role of territorial States under international law**

The meaning behind the notion of “State” can be understood from two perspectives: the State as a territorial entity, and the State as the way a particular political and social community organizes itself. The State as the primary subject of modern international law<sup>25</sup> is therefore the result of the interconnectedness of these two approaches: a politically organized community taking place on a defined territory. What also characterizes modern international law is the place States take at the heart of the regime.<sup>26</sup>

The starting point of this State-centered regime is often referred to as being the Peace of Westphalia of 1648, “where unity was established by nation states exercising sovereignty over certain territories.”<sup>27</sup> With the establishment of defined sovereign entities came a new political order around which societies organize themselves: the Westphalian system, where the interactions of these sovereign entities — nation-States — are regulated by a corpus of rules that form the international legal regime.

Sovereignty over a defined geographical area marks the inextricable link between nation-States and their territory,<sup>28</sup> which led the “territorial State” to be the main actor of the Westphalian system. The predominance of territoriality<sup>29</sup> brought a new structure to the international order: “when contrasted with the age of anarchy and insecurity which immediately preceded it, the age of territoriality appears as one of relative order and safety.”<sup>30</sup>

Indeed, the classical purpose of a territorial State has been one of stability and security.

<sup>31</sup> As stated by Wong, “territory [is] the physical foundation of power and

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<sup>25</sup> See, e.g., Shaw, *supra* note 6 at 143.

<sup>26</sup> See, e.g., Jain, *supra* note 5 at 7.

<sup>27</sup> Leo Gross, “The Peace of Westphalia, 1648 1948” (1948) 42 *American Journal of International Law* 20 at 20, cited in Wong, *supra* note 1 at 352. See also Daniel Bethlehem, “The End of Geography: The Changing Nature of the International System and the Challenge to International Law” (2014) 25:1 *EJIL* 9 at 13; Sterio, *supra* note 4 at 211.

<sup>28</sup> Wong, *supra* note 1 at 353.

<sup>29</sup> Throughout this study, the general meaning of the term “territoriality” is being used, i.e. a link or connection to a particular territory. It is not limited to the territoriality principle of jurisdiction under international law.

<sup>30</sup> Herz, *supra* note 5 at 475, 477.

<sup>31</sup> Jain, *supra* note 5 at 23; Burkett, “Nation Ex-Situ”, *supra* note 7 at 106; Österdahl, *supra* note 5 at 76.



jurisdiction, as well as nationality and, thus, the basis upon which peace and security rest.”<sup>32</sup> But territory is also the basis for a State’s population, the physical area where people “associate and organise themselves”<sup>33</sup> and exercise their right to self-determination.<sup>34</sup> It is further a source of economic resources for the maintenance of the population, as well as a source of historical and cultural resources;<sup>35</sup> it has even been characterized as “reflect[ing] the identity (or goal values) of the society as a whole.”<sup>36</sup> For the governing authorities, territory normally illustrates spatial limitation for the exercise of jurisdiction.<sup>37</sup> The territory is therefore both “a factual reality and a legal construction” creating a “functional framework”.<sup>38</sup>

Territoriality is not only important as part of the characteristics of States themselves or for the role States play in achieving organization and stability, but also through “various other principles and rules of international law”.<sup>39</sup> For example, the prohibition on the threat of use of force “against the territorial integrity [...] of any State”<sup>40</sup> is expressly directed towards its territory.<sup>41</sup> Similarly, State jurisdiction, while being applicable outside a State’s territory in some cases, through the nationality or passive personality principles for example,<sup>42</sup> is still strongly rooted in a State’s territory through the territoriality principle.<sup>43</sup>

This portrait of the nature and the role of States — a nation-State intrinsically linked with its territory — is still the one that prevails under current international law.<sup>44</sup> Even if other actors — individuals, international organizations, corporations, even the market itself<sup>45</sup> — are now playing a competing role, “there is no evidence that the state has died.”<sup>46</sup> And facing a lack of a better model, the State remains, from both a practical and ideological perspective, “the most viable form of social organization”.<sup>47</sup> However, the value of the State’s core

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<sup>32</sup> Wong, *supra* note 1 at 365. See also Andrew Hurrell, “International Law and the Making and Unmaking of Boundaries” in Allen Buchanan & Margaret Moore (eds), *States, nations and borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 275 at 279-280.

<sup>33</sup> *Ibid* at 365-366. See also Yugoslavia Peace Conference Opinion No 1 (1991) 92 ILR 162 at 165 (Arbitration Commission of the Conference on Yugoslavia), cited in Wong, *supra* note 1 at 354-355; Vidas, *supra* note 18 at 81-82.

<sup>34</sup> Nine, *supra* note 2 at 362. The issue of self-determination will be discussed in further details below.

<sup>35</sup> Jain, *supra* note 5 at 23. See also Nine, *supra* note 2 at 362; Allen Buchanan, “The Making and Unmaking of Boundaries: What Liberalism Has to Say” in Allen Buchanan & Margaret Moore (eds), *States, nations and borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 231 at 232 [Buchanan, “The Making”]; Buchanan & Moore, *supra* note 6 at 6; Hurrell, *supra* note 32 at 279.

<sup>36</sup> Surya Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Nijhoff, 1997) at 4, cited in Wong, *supra* note 1 at 365-366. See also Burkett, “Nation Ex-Situ”, *supra* note 7 at 103.

<sup>37</sup> Jain, *supra* note 5 at 22-23.

<sup>38</sup> Jeanneney, *supra* note 7 at 105: “comme réalité factuelle et comme construction juridique [...] un cadre fonctionnel.”

<sup>39</sup> Vidas, *supra* note 18 at 78.

<sup>40</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 2(4) [UN Charter].

<sup>41</sup> Bethlehem, *supra* note 27 at 13; Vidmar, *supra* note 17 at 707.

<sup>42</sup> Shaw, *supra* note 6 at 479-484.

<sup>43</sup> Bethlehem, *supra* note 27 at 13-14.

<sup>44</sup> Vidmar, *supra* note 17 at 699-700.

<sup>45</sup> Schatcher, *supra* note 3 at 9. See also Yves Petit, “Les risques environnementaux globaux et les transformations de la souveraineté” in Jean-Denis Mouton & Jean-Pierre Cot (eds), *L’État dans la mondialisation: colloque de Nancy* (Paris: Éditions Pedone, 2013) 177 at 179.

<sup>46</sup> Brownlie, *supra* note 5 at 5.

<sup>47</sup> Österdahl, *supra* note 5 at 68.

component, that is to say its territory, might change. For example, “technological developments have robbed the territory requirement of much of its functional utility”,<sup>48</sup> since issues of security, resources and jurisdiction can be seen as more closely related to the globalized world and no longer linked to a State’s territory.<sup>49</sup> These developments have brought the territory from being an essential component to only being a relevant one, especially when looking at continuity of statehood.<sup>50</sup> Consequently, if the practical value of the territorial State fades away, the ideological perception of its value might lead to a necessary adaptation of the current model.<sup>51</sup> It might even trigger the need for an alternative model of social organization that drives away from the territory as being the foundation stone.

### **1.1.2 The classical definition of statehood**

No express conventional definition of statehood can be found under international law.<sup>52</sup> As a starting point, one can look at the criteria listed in article 1 of the 1933 *Montevideo Convention*<sup>53</sup> (hereinafter referred to as “the Montevideo criteria”), the only international conventional instrument that can be relied upon for definition purposes. While being a regional treaty, its article 1 is now considered as having entered the sphere of customary law.<sup>54</sup> It reads as follows:

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

However, this definition is often criticized as being incomplete or unsatisfactory,<sup>55</sup> and the normative value of its components remains uncertain.<sup>56</sup> Henkin has even mentioned that the Montevideo criteria are not a pre-requisite for the creation of States but a mere description of what is commonly referred to as statehood.<sup>57</sup> Further, Grant has described the continuous use of the *Montevideo Convention* as “a source of puzzlement” because of its obsolete character:

The Convention includes elements that are not clearly prerequisite to statehood, and it excludes elements that writers now widely regard as indispensable to a definition of the state. [...] It addresses a concept that had been in flux over the century leading up to its framing and that continued to change thereafter. It posits a definition of statehood highly

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<sup>48</sup> Jain, *supra* note 5 at 51.

<sup>49</sup> *Ibid* at 24-25.

<sup>50</sup> *Ibid* at 51. See also Jeanneney, *supra* note 7 at 116. The issue of continuity and creation of State is discussed in greater details in the next sub-section.

<sup>51</sup> Österdahl, *supra* note 5 at 68-69.

<sup>52</sup> See, e.g., Wong, *supra* note 1 at 352; Grant, *supra* note 17 at 413.

<sup>53</sup> *Montevideo Convention*, *supra* note 21.

<sup>54</sup> See, e.g., Grant, *supra* note 17 at 455-456; David Harris, *Cases and Materials on International Law*, 7th ed (London: Sweet & Maxwell, 2010) at 92, cited in Wong, *supra* note 1 at 353; Jeanneney, *supra* note 7 at 101.

<sup>55</sup> Grant, *supra* note 17 at 413-414; Wong, *supra* note 1 at 354.

<sup>56</sup> Jeanneney, *supra* note 7 at 101.

<sup>57</sup> Louis Henkin, *International Law: Politics and Values* (Dordrecht: Nijhoff, 1995) at 13, cited in Jain, *supra* note 5 at 16.

contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated.<sup>58</sup>

To be more in line with the actual state of practical realities, it has been suggested that other elements should be considered when assessing statehood.<sup>59</sup> For example, the independence of a State from other entities (e.g. the establishment of Manchukuo in 1932, considered under international law as being a puppet State under the control of Japanese authorities) and the legality of its creation<sup>60</sup> (e.g. the creation of Rhodesia based on a racist ideology) should be taken into account. Further, the recognition by other States<sup>61</sup> (e.g. Kosovo or Taiwan), or the necessity of democratic institutions and the respect of minorities, two criteria discussed since the end of the 20<sup>th</sup> century, can also be considered.<sup>62</sup>

However, it should be borne in mind that this list is not exhaustive, and even if all elements were fulfilled, the recognition of an entity as a State cannot be guaranteed or officially established.<sup>63</sup> Further, even facing the suggested alternatives and additional criteria, “no proposals codifying statehood have been accepted since the [*Montevideo Convention*]. [T]his problem [has been attributed] in part to a political reluctance by states to announce a clear definition of statehood.”<sup>64</sup>

But whatever are the elements used to define statehood and the existence of an entity as a State, what interests us in the present study is the way these criteria can be preserved and applied when faced with the progressive transformations stemming from climate change and sea-level rise. Before a complete loss of territory occurs, the effects of sea-level rise will first render a territory uninhabitable, leading to migrations and population displacements.<sup>65</sup> It is therefore relevant to look more closely at the role played by the criteria of population and territory in the definition of statehood.

There is firstly no apparent minimum quantitative requirement for population size;<sup>66</sup> what really matters is the qualitative requirement of a communal life; a mere “care-taking population” (e.g. for the maintenance of facilities) would not be sufficient.<sup>67</sup> Further, although

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<sup>58</sup> Grant, *supra* note 17 at 453. See also Österdahl, *supra* note 5 at 87.

<sup>59</sup> Grant, *supra* note 17 at 437-447, 450-451.

<sup>60</sup> See also Stoutenburg, “When Do”, *supra* note 18 at 73-74.

<sup>61</sup> The necessity of recognition by other States forms the basis of the constitutive theory, one of the two theories of statehood under international law, the other being the declaratory theory, based solely on the presence of the Montevideo criteria. A discussion on these theories is however outside the scope of this research. For more on this topic, see, e.g., Shaw, *supra* note 6 at 150-151.

<sup>62</sup> While there might be no express definition of State or statehood under international law, these “newly considered” elements, taken together with the classical criteria described above, as well as State practice, still form a set of tools that could be relied upon by a decision maker as a functional definition of statehood if it were to be determined if an entity can be considered as a State.

<sup>63</sup> Crawford & Rayfuse, *supra* note 5 at 246.

<sup>64</sup> Grant, *supra* note 17 at 447.

<sup>65</sup> Wong, *supra* note 1 at 351; Stoutenburg, “When Do”, *supra* note 18 at 57; Jain, *supra* note 5 at 6, 52.

<sup>66</sup> Crawford, *supra* note 17 at 52; *Western Sahara*, Advisory Opinion, [1975] ICJ Rep 12 at para 81.

<sup>67</sup> Stoutenburg, “When Do”, *supra* note 18 at 61, 64-65; *In Re Duchy of Sealand*, [1978] 80 ILR 683 at 687 (Administrative Court of Cologne), cited and discussed in Michael Gagain, “Climate Change, Sea Level Rise,

“a territory must be adequately recognized and controlled regularly by an entity to qualify for statehood”,<sup>68</sup> there is also no indication as to the minimum requirement for territory size.<sup>69</sup> Imprecise boundary delimitations or unfixed borders will not lead to a lack of a defined territory either.<sup>70</sup> However, a State has to exist on a natural part of land; “a complete artificial construction does not fulfil the criteria.”<sup>71</sup> In a similar vein, the use of artificial islands to preserve statehood can therefore be questioned.<sup>72</sup> There is also a debate as to whether an uninhabitable island or a rock could fulfil the requirement of defined territory, but it is clear that a low-tide elevation does not.<sup>73</sup>

Based on the now famous statement of Max Huber, arbitrator in the *Island of Palmas* case, the existence of a State in the complete absence of a territory does not seem to be a possible option: “[i]nternational law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.”<sup>74</sup> Two trends exist in the literature as to the necessity of the territorial requirement.<sup>75</sup> On the one hand, in the same vein as Huber’s statement, Rayfuse suggests that following a complete submergence of a territory, the requirement would not be met anymore and statehood would consequently fail.<sup>76</sup> She is joined by Ziemele who states that while mere changes to the elements do not have an impact on statehood, the disappearance of territory and/or population would.<sup>77</sup> Jeanneney also suggests that if a State is understood as being a community organized on a territory, the complete submersion of that territory would consequently lead to the extinction of statehood.<sup>78</sup> On the other hand, Wong takes the view that this automatic conclusion of State extinction goes against the “strong presumption in favour of the continued existence of a state”.<sup>79</sup> The present study follows the latter approach and rejects the premise that territorial disappearance automatically entails the extinction of statehood.

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and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans' ” (2012) 23 *Colo J Int'l Envtl L & Pol'y* 7 at 116-117.

<sup>68</sup> *Ibid* at 90.

<sup>69</sup> Crawford & Rayfuse, *supra* note 5 at 246; Jain, *supra* note 5 at 18, 21.

<sup>70</sup> Wong, *supra* note 1 at 355; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)*, [1969] ICJ Rep 3 at 32-33, cited in Gagain, *supra* note 67 at 90.

<sup>71</sup> Wong, *supra* note 1 at 355. See also *In Re Duchy of Sealand*, *supra* note 67 at 685.

<sup>72</sup> This issue of artificial structures will be discussed further in chapter 2.

<sup>73</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, [2001] ICJ Rep 40 at para 100, cited in Stoutenburg, “When Do”, *supra* note 18 at 60.

<sup>74</sup> *Island of Palmas case (or Miangas) (United States v The Netherlands)*, [1928] II RIAA 829 at 839, cited in Crawford & Rayfuse, *supra* note 5 at 250.

<sup>75</sup> See Vidas, *supra* note 18 at 78-79.

<sup>76</sup> Rosemary Rayfuse, “International Law and Disappearing States: Maritime Zones and the Criteria for Statehood” (2011) 41:6 *Envtl Pol'y & L* 281. See also Lilian Yamamoto & Miguel Esteban, “Vanishing Island States and sovereignty” (2010) 53 *Ocean and Coastal Management* 1 at 6 [Yamamoto & Esteban, “Vanishing Island”].

<sup>77</sup> Ineta Ziemele, “States, Extinction of”, MPEPIL at para 3.

<sup>78</sup> Jeanneney, *supra* note 7 at 98-99.

<sup>79</sup> Wong, *supra* note 1 at 362.

What is nonetheless certain is that international law aims at stability. And to preserve that stability, it operates on one premise: once statehood has been acquired, it is very difficult to lose it.<sup>80</sup> This is why, once an entity becomes a State, “the loss of one of more of these criteria will not necessarily deprive an entity of its statehood.”<sup>81</sup> One author has even suggested that, by stretching the reasoning that “[t]here is no lower limit on the size of this territory or of its ability to sustain a population”, we might consider a submerged territory as meeting the territorial requirement.<sup>82</sup> We could also rely on article 6 of the *Montevideo Convention*, which supports this continuity, stating that once recognition has been given, it is irrevocable.<sup>83</sup> Based on that reasoning, SIDS, being recognized by the international community, would still have their legal personality acknowledged, whatever happens with the components of their statehood.

In fact, the Montevideo criteria address the elements needed for an entity to become a State, and not how it can continue to be one or how statehood becomes extinguished.<sup>84</sup> The requirement of territory therefore seems essential for the *creation* of a State, but loses its importance when discussing the *continuity* of that State.<sup>85</sup> Indeed, in State creation settings, territory plays a double role: it is first seen as a source of functional utility and social organization (as discussed in the previous sub-section), but it also acts “as a desirable barrier to statehood” to prevent “uncontrolled proliferation of states”.<sup>86</sup> But when talking about the continuity of an already existing State, only the functional purpose remains. We could therefore assume that if a new model for functional utility can be found, the territory requirement would not be necessary for State continuation.

Nonetheless, a loss of statehood entails the deprivation of entitlements. This is why it “is not an insignificant or insubstantial event; it represents a significant downgrading of status.”<sup>87</sup> For SIDS especially, statehood is important. First, statehood gives access to UN membership,<sup>88</sup> which “is crucial because it provides a cost-effective method of maintaining international contacts, thus avoiding the need for a worldwide diplomatic apparatus.”<sup>89</sup> Statehood is also a sign of links between State, culture and identity, core values for the people

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<sup>80</sup> Crawford, *supra* note 17 at 701; Jain, *supra* note 5 at 27.

<sup>81</sup> Crawford & Rayfuse, *supra* note 5 at 246-247. See also Grant, *supra* note 17 at 435; Sterio, *supra* note 4 at 216.

<sup>82</sup> Jain, *supra* note 5 at 35

<sup>83</sup> *Montevideo Convention*, *supra* note 21, art 6: “The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable”, cited in Lilian Yamamoto & Miguel Esteban, *Atoll Island States and International Law* (Berlin: Springer, 2014) at 186 [Yamamoto & Esteban, *Atoll Island*].

<sup>84</sup> Grant, *supra* note 17 at 435; Gagain, *supra* note 67 at 91; Jeanneney, *supra* note 7 at 102-103; Colin Warbick, “Recognition of States: Recent European Practice” in M Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth: Aldershot, 1996) 9 at 13.

<sup>85</sup> See, e.g., generally, Jain, *supra* note 5; Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 202.

<sup>86</sup> Jain, *supra* note 5 at 27.

<sup>87</sup> *Ibid* at 9. See also Sterio, *supra* note 4 at 217-219 on the reasons why statehood is important.

<sup>88</sup> Yamamoto & Esteban have argued that since they are recognized as UN members, SIDS could not lose that membership only by losing the recognition from other States; indeed, according to article 6 of the UN Charter, UN membership can only be lost if the principles of the Charter has been violated, which is not the case with SIDS, see *Atoll Island*, *supra* note 83 at 202.

<sup>89</sup> Wong, *supra* note 1 at 349.

of SIDS. Finally, the loss of statehood could lead to the loss of maritime rights and other resource-related rights, which could be fatal for States which economy mostly rely on revenues from such activities.<sup>90</sup> These issues will be discussed in greater details in the following sections.

What we are left with is a system that is not adapted to permanent physical disappearance of territory<sup>91</sup> and that is not well-suited to anticipate whether the loss of population and/or territory is fatal to statehood.<sup>92</sup> However, while rooted in factual elements, statehood is a legal status stemming from rules and practices.<sup>93</sup> We could therefore presume that a modification of the legal principles upon which statehood rests could lead to a new way of envisaging it. But one must also keep in mind that statehood is “ultimately a matter of acceptance by the international community.”<sup>94</sup> The coherence normally expected from the Westphalian system is now being confronted by new realities brought by climate change and sea-level rise.<sup>95</sup>

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

When an entity is recognized as a State, the international community acknowledges that this entity is entitled to rights associated to its statehood. Affecting the constituents of statehood therefore does not only affect the legal status of a State, but also entitlements owed either to the State itself or to its people.

This section does not aim at addressing all the legal consequences of sea-level rise; this would go beyond the scope of this research. This second part of the first chapter is rather directed at adding a practical component to the portrait of territoriality<sup>96</sup> and statehood: it will present an overview of some of the main — or most often discussed — legal issues that appear as consequences of the territorial disappearance stemming from sea-level rise. This section will therefore first look at different rights, owed either to the State or its people, that are affected by territorial disappearance. It will then address the issue of State responsibility and how the climate change regime is limited in providing a relevant channel of relief for SIDS.<sup>97</sup>

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<sup>90</sup> *Ibid* at 349-350.

<sup>91</sup> Jain, *supra* note 5 at 28, 33.

<sup>92</sup> Crawford & Rayfuse, *supra* note 5 at 248.

<sup>93</sup> Crawford, *supra* note 17 at 5, cited in Wong, *supra* note 1 at 352; Vidmar, *supra* note 17 at 702, 747; Warbick, *supra* note 84 at 12; Sterio, *supra* note 4 at 215-216.

<sup>94</sup> Rosemary Rayfuse, “Sea Level Rise and Maritime Zones. Preserving the Maritime Entitlements of ‘Disappearing’ States” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 167 at 177.

<sup>95</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 92.

<sup>96</sup> Again, “territoriality” is here used in its broader sense of “connection or link to a territory” and is not limited to the territorial principle of jurisdiction.

<sup>97</sup> David Freestone, “Can the UN Climate Regime Respond to the Challenges of Sea Level Rise?” (2013) 35 U Haw L Rev 671 at 672 [Freestone, “Can the UN”].

### 1.2.1 Claims over maritime zones and right to resources

A first concern that arises when talking about territorial loss is the eventual loss of resources that would ensue. The entitlement to resources found on a State territory also extends to its maritime zones.<sup>98</sup> In the case of SIDS, resources are extrinsically linked with the States' maritime zones,<sup>99</sup> above all revenues coming from fishing licences and the fishing industry.<sup>100</sup> As presented by Powers & Stucko in 2007, fishing licences alone accounted for 42% of all government revenues in Kiribati, and for 11% of all government revenues in Tuvalu.<sup>101</sup> In the Maldives, 10% of the GDP is attributable to fisheries.<sup>102</sup> Maas & Carius have also stated that “the combined exclusive economic zones of the Pacific island states are several times larger than the whole of the EU [and with] the potential of blue-sea fishing and deep-sea mining, the [exclusive economic zones (EEZ)] are important economic assets.”<sup>103</sup> From a human perspective, identity and welfare of coastal communities are “closely intertwined with the resources, ecosystems goods and services available in those particular regions”, putting maritime resources at the core of socio-economic and cultural conditions of the populations of SIDS.<sup>104</sup>

Facing the law of the sea principle that “the land dominates the sea”, the disappearance of the entire territory to which these zones relate raises questions about the continuity of the zones themselves.<sup>105</sup> Even partial submersion of territories could create some concerns because former inhabitable territories that become “[r]ocks which cannot sustain human habitation or economic life of their own” cannot claim an EEZ or a continental shelf.<sup>106</sup> But the *United Nations Convention on the Law of the Sea* (UNCLOS) does not provide an answer: the Convention “was tailored to the geographical circumstances of its own time, not the ones yet to come.”<sup>107</sup> There seems, however, to be a consensus to the effect that “[t]hese marine resources will be lost with the shrinking or disappearance of an island State's maritime zones caused by sea level rise, a consequence that could be prevented only by amending the law of the sea to provide for stable maritime zones.”<sup>108</sup>

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<sup>98</sup> Gagain, *supra* note 67 at 93

<sup>99</sup> See, e.g., Gregory Wannier & Michael Gerrard, “Overview” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 3 at 8; Freestone, “Can the UN”, *supra* note 97 at 674, quoting Schofield & Freestone, *supra* note 12 at 141.

<sup>100</sup> Ann Powers & Christophe Stucko, “Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels” in Michael Gerrard & Gregory Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press, 2013) 123 at 131; Gagain, *supra* note 67 at 94.

<sup>101</sup> Powers & Stucko, *supra* note 100 at 132.

<sup>102</sup> Gagain, *supra* note 67 at 94.

<sup>103</sup> Maas & Carius, *supra* note 11 at 656.

<sup>104</sup> Puthucherril, *supra* note 8 at 258.

<sup>105</sup> See, e.g. Jeanneney, *supra* note 7 at 109.

<sup>106</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 121(3) [UNCLOS]. See also Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 6.

<sup>107</sup> Vidas, *supra* note 18 at 75

<sup>108</sup> Stoutenburg, “When Do”, *supra* note 18 at 78. See also Gagain, *supra* note 67 at 94-95; ILA SLR, *Closed Session (I)* 2014, *supra* note 7 at 2.

The analysis resides in the ambulatory nature of baselines. With the rise of the sea level, these baselines, from which the measurement of zones starts,<sup>109</sup> move landward, consequently creating ambulatory maritime zones.<sup>110</sup> The International Law Association Committee on Baselines concluded in favour of keeping ambulatory baselines,<sup>111</sup> but the possibility of fixing the outer limits of maritime boundaries<sup>112</sup> is still being discussed.<sup>113</sup> Another concern arising from ambulatory baselines is the necessary ratio water/land under article 47(1) of UNCLOS for the drawing of archipelagic baselines.<sup>114</sup> Sea-level rise might affect that ratio and deprive archipelagic States from rights they are entitled to under the current regime, most particularly the ones associated to archipelagic waters.<sup>115</sup>

A problem however remains: while a stable regime is “an adequate solution if only a part of the territory was to be submerged, [...] it is not clear at present whether this solution is acceptable for a completely submerged Island State.”<sup>116</sup> This is why scholars have suggested the idea that, even facing the complete disappearance of a territory, the management of the maritime zones could still be conducted, either by an authority that would manage them for “the benefit of the displaced population, through resource rents that could fund relocation and livelihood in the new host State”<sup>117</sup> or by the migrant population itself.<sup>118</sup> These suggestions open the door to a model that goes beyond the relationship “territory-resources” and create a direct link between the resources and the populations benefiting from them.

## 1.2.2 Forced displacements

The phenomenon of “environmentally displaced persons”<sup>119</sup> fits within the two-step consequences of sea-level rise: a territory might become uninhabitable long before it

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<sup>109</sup> UNCLOS, *supra* note 106, arts. 5, 57 and 76(1). See also, e.g., Gagain, *supra* note 67 at 95-96

<sup>110</sup> See, e.g., Caron, “When Law” *supra* note 15 at 632.

<sup>111</sup> ILA CB, *Final Report*, *supra* note 20 at 31.

<sup>112</sup> See, e.g., Soons, *supra* note 15; Stoutenburg, “Implementing”, *supra* note 16 at 275; Moritaka Hayasi, “Sea Level Rise and the Law of the Sea: Legal and Policy Options” (International Symposium on Islands and Oceans, Tokyo, 22-23 January 2009) 79 at 82; Moritaka Hayasi, “Sea-level Rise and the Law of the Sea: How Can the Affected States be Better Protected” in Clive Schofield, Seokwoo Lee & Moon-Sang Kwoon (eds), *The Limits of Maritime Jurisdiction* (Leiden: Brill, 2013) 609 at 616-617 [Hayasi, “Affected States”].

<sup>113</sup> International Law Association Committee on International Law and Sea-Level Rise, *Summary of the Inter-Sessional Meeting* (Oslo, 2015) [forthcoming] [ILA SLR, *Inter-sessional Meeting* 2015].

<sup>114</sup> *Ibid.*

<sup>115</sup> UNCLOS, *supra* note 106, arts 49, 52, 53.

<sup>116</sup> Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 7.

<sup>117</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 107, citing Rosemary Rayfuse, “W(h)iter Tuvalu? Oceans Governance and Disappearing States” (International Symposium on Islands and Oceans, Tokyo, 22-23 January 2009) 91 at 101.

<sup>118</sup> International Law Association Committee on International Law and Sea-Level Rise, *Minutes of the Open Session* (Washington, 2014) at 5, online: International Law Association <<http://www.ila-hq.org/en/committees/index.cfm/cid/1043>> [ILA SLR, *Open Session* 2014].

<sup>119</sup> Puthucherril, *supra* note 8 at 234-235. The term “environmentally displaced persons” is privileged to expressions such as environmental, ecological or climate refugees because there is legal uncertainty as to whether these people forced to move because of environmental reasons, including climate change, can benefit from refugee protection. Further, the terminology of “environmentally displaced persons” covers both people who are moves suddenly because of natural disasters, and people who will have to move gradually, see Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 288.



completely disappears, triggering the issue of whether statehood survives without the requirement of population. This phenomenon is also multi-faceted: climate change does not only affect migrations, but “it will do so *in combination with* a range of other economic, social and political drivers which themselves affect migration.”<sup>120</sup>

Inhabitants of SIDS form part of the people who will be forced to relocate because of climate-change related causes. They will do so either internally (e.g. by moving to another island forming part of the State’s territory, although this resettlement might be temporary only, as all territory of low-lying island States are endangered by sea-level rise) and eventually by crossing international borders.<sup>121</sup>

While forced displacements might affect the population constituent of statehood, these displacements indubitably raise concerns related to the future of the populations themselves, as well as the protection that can be offered to them. The issue of the internally displaced has for example been addressed in the 1998 Guiding Principles of Internal Displacement.<sup>122</sup> These Principles aim to “address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection” during the different phases of displacement.<sup>123</sup>

The externally displaced, however, face a “legal protection gap”. To benefit from refugee protection, one must have a “well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, [be] outside the country of his nationality and [be] unable or, owing to such fear, [be] unwilling to avail himself of the protection of that country”, and that fear must be personalized.<sup>124</sup> It has been concluded by the New Zealand Immigration and Protection Tribunal, the first instance to have rendered decisions on this matter, that environmentally displaced persons do not fall under the protection of the *Refugee Convention* above all because the risk is faced by the population globally and is not personalized to a particular applicant.<sup>125</sup>

Under the current regime of refugee protection, the status of environmentally- displaced persons therefore remains uncertain. This is why people who advocate in favour of extending refugee protection do so on the basis that “both ‘normal’ and climate-change- related refugees represent involuntary migrants who are unable to return to their homeland, they are both equally entitled to protection under international refugee law.”<sup>126</sup> Indeed,

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<sup>120</sup> Vidas, Freestone & McAdam, *supra* note 11 at 405-406 (emphasis in original).

<sup>121</sup> *Ibid.*

<sup>122</sup> Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39: Addendum: Guiding Principles on Internal Displacement*, UNES, 44th Sess, E/CN.4/1998/53/Add.2, (1998).

<sup>123</sup> *Ibid* at 3 para 9. See also Puthucherril, *supra* note 8 at 246.

<sup>124</sup> *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 1A(2) [*Refugee Convention*].

<sup>125</sup> See, e.g., *BG (Fiji)*, [2012] NZIPT 800091; *AF (Kiribati)*, [2013] NZIPT 800413; *AD (Tuvalu)*, [2014] NZIT 800517-520.

<sup>126</sup> Puthucherril, *supra* note 8 at 252. See also Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 234; Jeanneney, *supra* note 7 at 107-109.

because of the close relationship between environmental degradation and human vulnerability, “pathways [could] [...] be created into international protection regimes”.<sup>127</sup> For example, the International Law Commission has recently adopted draft articles on the protection of persons in the event of natural disasters,<sup>128</sup> and its work could eventually be used as a framework to fill the existing gap regarding persons externally displaced because of environmental-related causes.

### 1.2.3 Self-determination

The eventual loss of territory even goes further than affecting a State’s entitlements to its resources or the forced displacement of its people. As presented by Stoutenburg, “[c]limate-change-induced sea level rise will damage island State economies, tear up the social fabric, and uproot island cultures. By destroying the physical basis for the exercise of any kind of activity, the inundation of a small island State’s territory would *impair the ability of the islanders to determine their political, economic, social, and cultural future.*”<sup>129</sup> Indeed, changes triggered by territorial loss can even be seen as affecting a people’s right to self-determination.

The right to self-determination recognizes the right of the people to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>130</sup> Following that definition, and following the discussion in the previous sub-sections, two observations can be made. First, a negative impact on the people’s ability to “pursue their economic [...] development”, since the entitlements over maritime zones and their resources are being affected, would be a direct interference with their self-determination. Secondly and similarly, if SIDS’ population cannot be relocated as a people on new territory, their eventual dispersal caused by forced migrations creates an obstacle to the people’s social and cultural development.<sup>131</sup>

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<sup>127</sup> *AF (Kiribati)*, *supra* note 125 at para 57.

<sup>128</sup> International Law Commission, *Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on First Reading*, 66th Sess, A/CN.4/L.831, (2014).

<sup>129</sup> Stoutenburg, “When Do”, *supra* note 18 at 76-77 (emphasis added). On the issue of cultural identity, see also ILA SLR, *Inter-sessional Meeting 2015*, *supra* note 113.

<sup>130</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 1(1) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 1(1) [ICESCR]. The exact same wording is used in the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, A/RES/1514(XV), (14 December 1960) at para 2. See also *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25th Sess, A/RES/25/2625, (24 October 1970) at principle 5.

Mostly used in the context of decolonization, the concept of self-determination has however been applied outside this traditional context, see, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] IJ Rep 403 at para 79; Daniel Thirer & Thomas Burri, “Self-determination”, MPEPIL at para 34.

<sup>131</sup> See, generally, Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 176.

This right to free manifestation of status and development is expressed from two perspectives: autonomy and independence, which can be intertwined. While autonomy normally refers to the ability of a people to govern itself, or what is also called internal self-determination, “independence is the requirement that a group possesses a domain of political control independent of higher or foreign political units”,<sup>132</sup> or external self-determination. A people or self-determination unit normally expresses autonomy and independence against another entity, most traditionally another State or colonial power. One could therefore question, under the existing rules of self-determination, against who SIDS, as a self-determination unit, would be expressing this right.

Further, it has been argued that the right to self-determination, from the perspectives of both autonomy and independence, cannot be fully exercised without a territory.<sup>133</sup> Ödalen, summarizing Nine’s argument, explains how this loss would negatively impact self-determination:

Territorial rights are justified because they protect and promote the self-determination of peoples and peoples’ capacities to establish justice for their members. If a people is to be self-determining, it must rule itself; and in order for it to rule itself it must have the moral and political authority to establish justice for its members. In order to be self-determining then, a group which is a legitimate holder of a right to self-determination must have sovereignty over the territory where its members (usually) live. Without territorial rights, a self-determining group may cease to exist *qua* self-determining group.<sup>134</sup>

This raises a major concern: according to this approach, the only way to ensure the full self-determination of the people of SIDS would be to change the way territorial entitlements are understood and applied,<sup>135</sup> since there are nowadays no new territories available.

#### **1.2.4 State responsibility and the consequences of territorial disappearance due to sea-level rise: the appropriateness of the climate-change regime**

The above discussions on the right to resources, forced displacements and self-determination show that consequences of the territorial disappearance stemming from sea-level rise must be assessed from a broad perspective. Indeed, as discussed above, the situation must not only be seen from the sole perspective of statehood, but also from the rights and obligations associated to it. This broader perspective therefore leads us to address how the impact of sea-level could trigger the consideration of certain obligations held by States under other regimes and the eventual breach of these obligations.

In order for a State to raise the responsibility of another, “[a]n internationally wrongful act [...] requires two elements: first, the attribution of a certain conduct (which can be an act or an omission) to a State under international law, which must secondly constitute a breach of

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<sup>132</sup> Jörgen Ödalen, “Underwater self-determination: Sea-level rise and deterritorialised small island States” (2014) 17:2 *Ethics, Policy and Environment* 225 at 233. See also Nine, *supra* note 2 at 362.

<sup>133</sup> Ödalen, *supra* note 132 at 226, 232.

<sup>134</sup> *Ibid* at 229-230.

<sup>135</sup> Nine, *supra* note 2 at 366.

an international obligation of the State”.<sup>136</sup> In the present case, it is difficult to see how the consequences of sea-level rise on SIDS could trigger the application of the regime of State responsibility and the fulfilment of both of its requirements.

From the outset, it would be logical to turn to the climate change regime to find a way of raising responsibility and seeking reparation, as climate change has been identified as the most probable cause of sea-level rise.<sup>137</sup> The climate change conventional regime is based on two main instruments. First, the *United Nations Framework Convention on Climate Change* (UNFCCC) sets general commitments directed towards GHGs reduction.<sup>138</sup> The second instrument, the Kyoto Protocol, establishes hard targets and timetables to achieve the reduction of emissions,<sup>139</sup> as well as means to achieve these targets.<sup>140</sup> This conventional regime however has a limited impact as the obligations imposed on States are mainly restricted to obligations of means and the obligations of result that can be found do not bind major emitters.<sup>141</sup>

To these conventions can be added the duty to prevent transboundary harm, which finds its root in the *Trail Smelter case*<sup>142</sup> and the *Stockholm Declaration*.<sup>143</sup> The 2001 *Draft articles on Prevention of Transboundary Harm from Hazardous Activities* complete the general framework.<sup>144</sup> It is now well established that the prohibition from causing significant transboundary environmental damage has entered the realm of customary international law.<sup>145</sup>

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<sup>136</sup> Stoutenburg, “When Do”, *supra* note 18 at 80. See also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53d Sess, Supp No 10, A/56/10 (2001) art 2 [DARSIWA]; Jain, *supra* note 5 at 41-42.

<sup>137</sup> IPCC, *2014 Synthesis Report*, *supra* note 9 at 2, 4.

<sup>138</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), art 4.

<sup>139</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005), art 3. The targets have subsequently been amended at the Doha Conference in 2012 for the second commitment period (2013-2020).

<sup>140</sup> *Ibid*, arts. 4, 6, 12 and 17.

<sup>141</sup> For example, the United States are not party to the Kyoto Protocol, China, while party to the Protocol, is not bound by the reduction targets, and Canada withdrew from the Protocol in 2011, before the start of the second commitment period.

<sup>142</sup> *Trail Smelter case (United States, Canada)*, [1938 and 1941] III RIAA 1905 at 1963 (“A States owes at all times a duty to protect against injurious acts by individuals from within its jurisdiction”, citing Professor Eagleton, *Responsability of States in International Law*, 1928 at 80) and 1965 (“no State has the right to use or permit the use of its territory in such a manner as to cause injury fumes in or to the territory of another [...] when the case is of serious consequence”).

<sup>143</sup> *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, UN Doc A/Conf.48/14/Rev. 1, (1973), principle 21: “States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

See also *Rio Declaration on Environmental and Development (Rio Declaration)*, UN Doc A/CONF.151/26 (vol I), (1992), principle 2.

<sup>144</sup> International Law Commission, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, 53d Sess, UN Doc A/56/10, (2001), art 3: “[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”.

See also International Law Association Committee on the Legal Principles relating to Climate Change, *ILA Legal Principles Relating to Climate Change* (Washington, 2014), online: International Law Association <<http://www.ila-hq.org/en/committees/index.cfm/cid/1029/member/1>>. Draft article 7A(1) deals with the obligation of prevention, putting the emphasis on climate change. These drafts articles have been raised as

To establish responsibility, the first issue that arises would be to identify the breach of an international obligation. The emission of GHGs is not in itself an activity prohibited under international law. What triggers responsibility is “the failure of States to regulate” the emissions<sup>146</sup> by not fulfilling their general commitments under the UNFCCC or reaching the specific reduction targets established under the Kyoto Protocol. A State having taken appropriate means to ensure this regulation would therefore fulfil its duty on that level. Another breach, related to the first one, would be a failure to the general duty of preventing significant transboundary harm. Loss of territory could reasonably be considered as a significant harm. Yet, as Jain puts it, “there is a clear legal duty to not deprive a state of its territory, but there is no duty to protect a state from loss of territory.”<sup>147</sup>

Stoutenburg raises another possibility. Under article 41(2) of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, a State would be in breach of international law if it has recognized a situation created through violations of *jus cogens* norms. We could see this provision as expressing “a general principle of modern international law according to which there is a duty not to recognize the extinction of a State caused by a serious violation of *jus cogens*, and thus to continue recognizing the international legal personality of the affected State.”<sup>148</sup> The next issue is to identify “whether the extinction of low-lying island States due to anthropogenic climate change constitutes a serious violation of peremptory norms of general international law.”<sup>149</sup> This possibility also brings the additional challenge of proving not only the breach of a general obligation, but the breach of a peremptory norm of international law.

And what would that peremptory norm of international law be? Of course, territorial loss or inundation of certain parts of territory inevitably raises human rights issues. While a stand-alone human right to a healthy environment could hardly form the legal basis of a claim, as it has not yet been codified or cannot yet be considered as customary law,<sup>150</sup> right to life and security,<sup>151</sup> adequate standard of living including food, water, and housing<sup>152</sup> could however be relied upon.<sup>153</sup> Even the right to nationality<sup>154</sup> could potentially be triggered, as it

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relevant for the work of the ILA Committee on Sea Level Rise, see ILA SLR, *Open Session* 2014, *supra* note 118 at 5.

<sup>145</sup> Philippe Sands & Jacqueline Peel, *Principles of International Environmental Law*, 3d ed (Cambridge: Cambridge University Press, 2012) at 242-243.

<sup>146</sup> Stoutenburg, “When Do”, *supra* note 18 at 80-81; Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 276.

<sup>147</sup> Jain, *supra* note 5 at 41-42

<sup>148</sup> Stoutenburg, “When Do”, *supra* note 18 at 75.

<sup>149</sup> *Ibid* at 75.

<sup>150</sup> *Ibid* at 78.

<sup>151</sup> *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess Supp No 13, UN Doc A/810, (1948), art 3 [UDHR]; ICCPR, *supra* note 130, arts 6(1), 9(1).

<sup>152</sup> UDHR, *supra* note 151, art 25(1); ICESCR, *supra* note 130, art 11(1).

<sup>153</sup> See, e.g., Maxine Burkett, “A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy” (2013) 35 U Haw L Rev 633 at 646-647 [Burkett, “Justice Paradox”]; *Human Rights and Climate Change*, UNHCR, 26th Sess, UN Doc A/HRC/RES/26/27, (2014) at para 1 and preamble; *Human Rights and Climate Change*, UNHCR, 18th Sess, UN Doc A/HRC/RES/18/22, (2011) at para 1; ILA SLR, *Inter-sessional Meeting* 2015, *supra* note 113.

<sup>154</sup> UDHR, *supra* note 151, art 15(1).

is uncertain what nationality people forced to relocate would be able to claim.<sup>155</sup> However, while climate change and sea-level rise impact the *enjoyment* of human rights, there is doubt as to whether there was an actual human rights *violation*.<sup>156</sup> And it is impossible to assert that a *jus cogens* norm to prevent climate change exists.<sup>157</sup>

Even if one succeeds in establishing a breach, a second requirement must be fulfilled: who should the breach be attributed to? While one cannot normally be held responsible for natural disaster,<sup>158</sup> there is nowadays enough scientific evidence showing that climate-change does come from human activities.<sup>159</sup> But even if we rely on “cumulative causation — the fact that not one State alone, but all States together (mainly of course the largest emitters) contribute to climate change”,<sup>160</sup> the causation between the GHGs emissions of a particular country (or group of countries) and climate change, and subsequently between climate change and sea-level rise, must still be established.<sup>161</sup>

In any event, a claim against major emitters would not be completely impossible as a legal basis does exist. The problem, however, rests at the level of geopolitics and international relations: “for example, does the complaining island nation have the financial and human resources and capacity to pursue these claims against large emitters? And, on a related note, if a vulnerable nation pursues legal recourse, will the very nation-state(s) from which it seeks remedy retaliate?”<sup>162</sup> For example, in 2011, Palau intended to ask the UN General Assembly to request an advisory opinion from the International Court of Justice on the legal responsibility of large emitters regarding climate change.<sup>163</sup> Palau however does not seem to have pursued its claim following a threat of reprisal from the United States.<sup>164</sup> Indeed, the States responsible for GHGs emissions are the ones SIDS are reliant upon, not only for general economic and commercial reasons, but also regarding assistance measures that can be provided facing sea-level rise.<sup>165</sup> One can therefore question the legitimacy and adequacy of the international system to protect vulnerable States suffering from a situation for which they are the least responsible.<sup>166</sup>

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<sup>155</sup> Lisa Friedman, “If a Country Sinks Beneath the Sea, Is It Still a Country?” (23 August 2010), online: The New York Times <<http://www.nytimes.com/cwire/2010/08/23/23climatewire-if-a-country-sinks-beneath-the-sea-is-it-sti-70169.html?pagewanted=all>>

<sup>156</sup> Stoutenburg, “When Do”, *supra* note 18 at 79 (emphasis added).

<sup>157</sup> Jain, *supra* note 5 at 41-42.

<sup>158</sup> Puthucherril, *supra* note 8 at 238.

<sup>159</sup> IPCC, *2014 Synthesis Report*, *supra* note 9 at 2. It must however be underlined that the causes of climate-change and sea-level rise are not entirely triggered by human activities, but also come from natural causes.

<sup>160</sup> Stoutenburg, “When Do”, *supra* note 18 at 84-85.

<sup>161</sup> Jain, *supra* note 5 at 42.

<sup>162</sup> Burkett, “Justice Paradox”, *supra* note 153 at 643. See also Stoutenburg, “When Do”, *supra* note 18 at 59.

<sup>163</sup> See, e.g., Lawrence Hurley, “Island Nation Girds for Legal Battle Against Industrial Emissions” (28 September 2011), online: The New York Times <<http://www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html>>.

<sup>164</sup> Burkett, “Justice Paradox”, *supra* note 153 at 635.

<sup>165</sup> Wong, *supra* note 1 at 389.

<sup>166</sup> Burkett, “Justice Paradox”, *supra* note 153 at 634; Hayasi, “Affected States”, *supra* note 112 at 620; Powers & Stucko, *supra* note 100 at 139-140; Rayfuse, “Sea Level Rise”, *supra* note 94 at 178. The issue of legitimacy will be discussed further under chapter 3.

Other avenues for relief have been envisaged. SIDS could look at the possibility of raising the responsibility of emitters they are less dependent on.<sup>167</sup> The same issue of proving the breach and the attribution would however arise. Further, SIDS could rely on dispute settlement mechanisms under other environmental law regimes,<sup>168</sup> such as the *Ramsar Convention*,<sup>169</sup> the *World Heritage Convention*,<sup>170</sup> or the *Convention on Biological Diversity*.<sup>171</sup> The UNCLOS “may [also] be a promising instrument [...] due to its expansive definition of pollution, the clear obligations on State parties to preserve the health of the environment, and the availability of voluntary and compulsory dispute resolution mechanisms to press claims related to environmental pollution.”<sup>172</sup> It must indeed be remembered that the legal impacts of sea-level rise extend far beyond concerns of baselines, migrations and human rights, and must also be assessed from the perspective of affected ecosystems.<sup>173</sup>

Apart from looking at the major legal issues stemming from the physical disappearance of territory due to sea-level rise, the portrait drawn in this first chapter shows that various regimes under international law are ill-equipped to face this new reality created by climate change. Further, the relevance of the core basis of the actual system, the territorial State, is being questioned, as the physical disappearance of some of its components might affect the continuity of its legal status. What is certain, however, is that to be able to adequately address the changing state of factual circumstances, the legal framework will have to adapt itself to “actual needs and purposes, and not primarily on the basis of assertion of sovereign rights over territory.”<sup>174</sup>

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<sup>167</sup> Burkett, “Justice Paradox”, *supra* note 153 at 661.

<sup>168</sup> *Ibid* at 642; Wannier & Gerrard, *supra* note 99 at 12; ILA SLR, *Closed Session (I)* 2014, *supra* note 7 at 4-5.

<sup>169</sup> *Convention on wetlands of international importance especially as waterfowl habitat*, 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

<sup>170</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975).

<sup>171</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>172</sup> Burkett, “Justice Paradox”, *supra* note 153 at 652-653.

<sup>173</sup> ILA SLR, *Inter-sessional Meeting* 2015, *supra* note 113.

<sup>174</sup> Vidas, *supra* note 18 at 83.

## 2. WHAT CAN BE DONE? POSSIBLE SOLUTIONS PROPOSED TO ENSURE THE CONTINUITY OF STATES WITH TERRITORIES THAT ARE PHYSICALLY DISAPPEARING

The stability sought by international law is protected by the presumption of continuity of statehood. This doctrine serves to preserve the legal order from events that would deprive a State from one or more of its components. But the legal construct of continuity can only be seen as filling in the gaps “and should not be allowed completely to override the factual matrix surrounding its creation.”<sup>175</sup> This is why solutions must be envisaged so that the factual reality can ensure the survival of the legal one.

Following the IPCC Fourth Assessment Report, it must be concluded that we have now reached a point where mitigation measures, central to the climate-change regime, must be complemented by adaptation measures<sup>176</sup> if we want effective actions to be undertaken. As discussed previously, the current regime of the law of the sea is based on the principle that the land dominates the sea. The importance of maritime zones for the economy of SIDS consequently brings the necessity of preserving the land territory that serves as a legal basis for claiming the zones.

Various options have been discussed in the legal literature on climate change and sea-level rise to work towards continuity, and to physically protect States with territories that are physically disappearing. The purpose of this chapter is to have a closer look at the ones that are most often raised by scholars. What is interesting to note, from the outset, is that traditional responses are built on existing structures of the territorial State as it stands under international law.<sup>177</sup> Indeed, they focus on the preservation of territories or the acquisition of new ones. Only the idea of a “deterritorialized” State<sup>178</sup> takes us away from the legal model of a State being anchored in its territory. But whatever option is envisaged, it must be remembered that a case-by-case approach should be preferred, as various scenarios are possible and can vary according to the unique situation of every SIDS.<sup>179</sup>

### 2.1 TRADITIONAL RESPONSES

#### 2.1.1 Man-made preservation solutions: Using artificial means to protect existing lands and/or building artificial islands or installations

The first solution envisaged in the literature — the construction of artificial structures to preserve land territory — has already been applied in practice. The Netherlands, with its

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<sup>175</sup> Gross, *supra* note 27 at 378, cited in Wong, *supra* note 1 at 352.

<sup>176</sup> *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, 1/CP.16, Conference of the Parties of the United Nations Framework Convention on Climate Change, 16th Sess, FCCC/CP/2010/7/Add.1 (2011) at paras 11-20.

<sup>177</sup> Crawford & Rayfuse, *supra* note 5 at 249-250; Jeanneney, *supra* note 7 at 117-119.

<sup>178</sup> The expression “ex-situ nation” has also been used in the literature.

<sup>179</sup> ILA SLR, *Closed Session (I)* 2014, *supra* note 7 at 5; ILA SLR, *Inter-sessional Meeting* 2015, *supra* note 113; Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 3.



system of dykes and dams, is often cited as an example.<sup>180</sup> The Maldives have also used hard engineering mechanisms, building walls to protect the capital island of Malé,<sup>181</sup> and even constructing an entirely artificial island, Hulhumalé, on which people have already been relocated to alleviate the overpopulation of Malé.<sup>182</sup> Similarly, Japan has undertaken, in the 1980s, the construction of various structures (including walls, blocks of steel and concrete and other sea defences) to preserve the existence of Okinotorishima, “two groups of very small rocks”<sup>183</sup> used to claim an extensive EEZ and a continental shelf beyond 200 nautical miles.<sup>184</sup> These solutions have one main goal: maintaining the land territory of a State or its base points and, consequently, the maritime claims associated to it.

Artificial preservation constructions can be divided in two categories: structures that aim at protecting existing land territories, and completely artificial islands or installations. Regarding the former, the mechanisms most commonly used are sea walls or other barrier-type structures that “are intended to stabilize the position of the coast and protect key infrastructure located in the coastal zones”.<sup>185</sup> Hard engineering constructions have however the potential of impacting the coastline by “interrupting natural sediments flows and causing unexpected erosion and/or deposition to other parts of the coast.”<sup>186</sup> This is why “soft” engineering approaches, such as the creation of dunes or revegetation of coastlines, which “replicate naturally occurring features that may have been previously removed”, are also used.<sup>187</sup>

Man-made protection of a natural feature, or even structures that would extend a natural feature, does not transform that feature in an artificial island as understood under article 60 UNCLOS, “given that the island State would not try to *generate* maritime entitlements through artificial means, but only aim to *preserve* its already recognized rights.”<sup>188</sup> For example, preserving an island so that it keeps its capability of sustaining human habitation or economic life (i.e. so that it does not become a rock as understood under article 121(3) UNCLOS) would be acceptable, but the improvement of a rock so that it becomes an island capable of generating zones would not.<sup>189</sup> These definitions raise questions as to whether the structures around Okinotorishima constitute a mere protection of an existing feature that can generate zones or an attempt to give rocks an upgraded status.

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<sup>180</sup> See, e.g., Gagain, *supra* note 67 at 113-114.

<sup>181</sup> Schofield & Freestone, *supra* note 12 at 155.

<sup>182</sup> Rayfuse, “Sea Level Rise”, *supra* note 94 at 176.

<sup>183</sup> Schofield & Freestone, *supra* note 12 at 155-156; Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 4-6; ILA SLR, *Inter-sessional meeting 2015*, *supra* note 113.

<sup>184</sup> Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Japan on 12 November 2008 at para 6, 15-20,

<[http://www.un.org/depts/los/clcs\\_new/submissions\\_files/jpn08/com\\_sumrec\\_jpn\\_fin.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf)>.

<sup>185</sup> Schofield & Freestone, *supra* note 12 at 151.

<sup>186</sup> *Ibid* at 152.

<sup>187</sup> Schofield & Arsana, *supra* note 12 at 10.

<sup>188</sup> Stoutenburg, “When Do”, *supra* note 18 at 62 (emphasis in original). See also Schofield & Freestone, *supra* note 12 at 157; Jain, *supra* note 5 at 48.

<sup>189</sup> Soons, *supra* note 15 at 222-223; Schofield & Freestone, *supra* note 12 at 160; Rayfuse, “Sea Level Rise”, *supra* note 94 at 175-176.

The latter category of preservation constructions includes wholly artificial islands or installations, and can only be defined *a contrario*, using the wording of article 121(1) UNCLOS, which describes an island as “a naturally formed area of land, surrounded by water, which is above water at high tide.”<sup>190</sup> The legal status of artificial structures is clear: “[a]rtificial islands, installations and structures do not possess the status of islands” and they cannot claim maritime zones of their own.<sup>191</sup>

However, can these artificial islands or installations be considered as physically preserving the territorial component of a State? For example, Stoutenburg indicates that if a State were to build an entire artificial *island*, like the Maldives did with the artificial island of Hulhumalé, the island could still count as a defined territory, though it could not generate maritime zones.<sup>192</sup> However, this would not be the case if a State were to replace its entire territory with artificial *installations*, which would not be characterized as territory.<sup>193</sup> This approach is however contested by Wong, who states that “current international law does not allow for wholly man-made structures to constitute territory”, therefore not distinguishing between artificial islands and artificial installations.<sup>194</sup> This conclusion is supported by the decision of the Administrative Court of Cologne in *Re Duchy of Sealand*, which held that territory must “consist in a natural segment of the earth’s surface” and must “come into existence in a natural way”,<sup>195</sup> discarding artificial islands or installations as being characterized as territory.

In the end, the impossibility for artificial islands and installations to generate maritime zones remains the major concern for the preservation of SIDS’ entitlements. As a solution, Gagain suggested that “the regime of artificial islands should be expanded to encompass attribution of maritime zones”.<sup>196</sup> Fixing the regime of baselines has also been suggested as a solution to thwart a potential manipulation of maritime zones from man-made constructions.<sup>197</sup> Discussing the possible changes to the current ambulatory regime however falls outside the scope of this research.

Finally, these man-made solutions raise questions of costs and development, as SIDS are developing States. They must therefore carefully assess if the cost involved in the construction of such features can be balanced “against the revenues which the sea [and land] area[s] that may be lost can generate.”<sup>198</sup>

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<sup>190</sup> Gagain, *supra* note 67 at 101.

<sup>191</sup> UNCLOS, *supra* note 106, art 60(8). See also Wong, *supra* note 1 at 384.

<sup>192</sup> Stoutenburg, “When Do”, *supra* note 18 at 62.

<sup>193</sup> *Ibid* at 63.

<sup>194</sup> Wong, *supra* note 1 at 384.

<sup>195</sup> *In Re Duchy of Sealand*, *supra* note 67 at 685. The Court indeed held that a British World War II platform attached to the seabed off the coast of Great Britain did not fulfil the requirement of territory. It must however be underlined that this case dealt with an artificial installation.

<sup>196</sup> Gagain, *supra* note 67 at 107.

<sup>197</sup> *Ibid* at 111.

<sup>198</sup> Soons, *supra* note 15 at 231. See also Jain, *supra* note 5 at 48.

### 2.1.2 Acquisition of territory

A second solution discussed among scholars is the possibility of acquiring new territory, either under a cession of territory by another State or through a merger or union with other entities.<sup>199</sup> While leading to different legal status for SIDS, these two possibilities both imply co-operation with other sovereign entities.<sup>200</sup>

Under the first scenario, territory could be ceded either by donation or purchase, or even lease.<sup>201</sup> SIDS could exercise sovereignty over this newly acquired territory.<sup>202</sup> Cessions of territory have happened in the past and can be used as precedents, for example the purchase by the United States of Alaska from Russia in 1867<sup>203</sup> and of the Danish West Indies (now the United States Virgin Islands) from Denmark in 1917.<sup>204</sup>

Under the second scenario, a SIDS would merge with another State or would form a union or a federation with one or various other States. While both leading to the disappearance of the SIDS as a sovereign entity, these two options implicate different legal processes: a merger would involve the SIDS being absorbed by the other State, while a union or federation leads to the creation of a newly formed entity, within which the separated units (one of them being the former SIDS) would remain. Under both options, it is however very likely that SIDS would lose their statehood to the benefit of the State it is merging with or the newly formed entity by union or federation.<sup>205</sup> Similarly, the “territory and population would be governed by [either] the terms of the [union or federation]”<sup>206</sup> or by the laws of the State with which the SIDS merged. It has however been suggested that some kind of autonomy would be preserved for the population of the former SIDS.<sup>207</sup>

These two scenarios of acquisition of territory obviously raise the issue of the status and fate of the SIDS’ maritime zones. Under the cession scenario, the displaced State could theoretically retain its entitlements over the maritime zones of its former territory. Under the merger/union scenario, however, “the zones would belong to [and be under the control and management of] the host state” or the newly fused State.<sup>208</sup> This outcome has been criticized by Rayfuse: the establishment of maritime boundaries in a manner to achieve equitable results

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<sup>199</sup> Hayasi, “Affected States”, *supra* note 112 at 615; Jeanneney, *supra* note 7 at 121-123.

<sup>200</sup> Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 187.

<sup>201</sup> Jain, *supra* note 5 at 48.

<sup>202</sup> Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 197-198, 200; Stoutenburg, “When Do”, *supra* note 18 at 61.

<sup>203</sup> Maas & Carius, *supra* note 11 at 659; Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 188.

<sup>204</sup> *Convention Between the United States and Denmark. Cession of the West Indies*, 25 January 1917, 39 US Stat 1706: online: <<http://www.doi.gov/oia/about/upload/vitreaty.pdf>>.

<sup>205</sup> Stoutenburg, “When Do”, *supra* note 18 at 61.

<sup>206</sup> Crawford & Rayfuse, *supra* note 5 at 249-250.

<sup>207</sup> Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 198, 200.

<sup>208</sup> Rosemary Rayfuse “International law and disappearing States: utilizing maritime entitlements to overcome the statehood dilemma” (2010) University of New South Wales Faculty of Law Research Paper No 2010-52 at 9. See also Hayasi, “Affected States”, *supra* note 112 at 615; Soons, *supra* note 15 at 230; Rayfuse, “Sea Level Rise”, *supra* note 94 at 178.

is now recognized under customary international law,<sup>209</sup> and the retention of maritime zones should follow the same principle. A scenario that would trigger the loss of a State's entitlements "would [therefore] appear to be intrinsically inequitable and contrary to international law."<sup>210</sup> Nonetheless, under both scenarios, the question of whether maritime zones could still be claimed facing a complete submergence of the land territory they relate to remains. Again, determining what is the most adequate solution for the preservation of baselines and maritime zones falls outside the scope of this research, but suffice to say that the preservation of the maritime zones and "the State's rights over the valuable marine resources [...] could offer economic support to populations displaced as a result of sea level rise."<sup>211</sup>

While the acquisition of territory might be a perfectly acceptable legal solution, it seems however very unlikely that any State would agree to give away or share, with or without financial compensation, part of its territory.<sup>212</sup> Not only would these States be voluntarily alienating or modify their sovereignty, an improbable solution considering rights and entitlements attached to such status, but it would also trigger complex political, social and economic outcomes.<sup>213</sup> If this response to territorial loss would materialize, however, it is certain that such a territorial transformation "would arguably constitute a fundamental change to the culture of the islanders" as they would most probably interact with other groups of people and modify the people's relationship to the land.<sup>214</sup>

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

The solutions suggested above follow traditional principles of international law and are intrinsically linked with the component of territory. But, as stated by Puthucherril, "the challenges posed by [sea-level rise] and climate change are *sui generis*, and these test our fundamental legal assumptions [related to territoriality]. Consequently, there is a discernable demand for unique legal responses."<sup>215</sup> One *sui generis* response proposed in the literature is the "deterritorialized" State, an interesting option to look at for the purpose of answering the research question of the present study, as this *sui generis* entity moves away from the acknowledgment of territory as a necessary requirement for the existence of States.

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<sup>209</sup> *Maritime Boundary in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Advisory Opinion, [1993] ICJ Rep 38 at paras 46, 48, 50.

<sup>210</sup> Rayfuse, "Sea Level Rise", *supra* note 94 at 179.

<sup>211</sup> Schofield & Freestone, *supra* note 12 at 162.

<sup>212</sup> See, e.g., Wong, *supra* note 1 at 383.

<sup>213</sup> Crawford & Rayfuse, *supra* note 5 at 249-250; Rayfuse, "Sea-Level Rise", *supra* note 94 at 178; Jain, *supra* note 5 at 48.

<sup>214</sup> Yamamoto & Esteban, "Vanishing Island", *supra* note 76 at 189.

<sup>215</sup> Puthucherril, *supra* note 8 at 255.

### 2.2.1 The “deterritorialized” State: What is it?

Simply put, a “deterritorialized” State would consist of a government or other form of authority that would continue to represent and protect its people, wherever they are, and would manage the State’s resources. The State would continue to exist as a member of international organizations, entitled to rights and bearer of international obligations, even if it lacks territory.<sup>216</sup> The main benefit from such new form of organization is that “[i]n which ever way the former citizens of an vanishing island state continue their lives after having left their homeland [...] they [...] could retain a measure of self-determination by exercising independent and autonomous control over their abandoned territory or territorial waters.”<sup>217</sup>

International law is already familiar with the existence of “other entities” that lack territorial basis,<sup>218</sup> which could facilitate the acceptance of the concept of “deterritorialized” State.<sup>219</sup> Not only are “other entities” recognized under international instruments,<sup>220</sup> but their sovereignty, sometimes functional or non-territorial, is also recognized in some cases. Indeed, entities such as the European Union possess some elements of functional sovereignty despite not fulfilling the criteria for statehood.<sup>221</sup> An even more analogous example to the situation of potential territory-less entities is the Order of Malta,<sup>222</sup> recognized by various States and enjoying multiple benefits of international legal personality. The Order was formerly occupying the territory of Malta but exists extra-territorially since 1798. This entity shows that “sovereignty and nation can be separated from territory.”<sup>223</sup> The striking difference between the Order of Malta and the theoretical “deterritorialized” State, however, is that the former, while being *sovereign*, is *not a State*.<sup>224</sup>

Questions nevertheless remain as to the nature and functionality of such entities. First, sovereignty concerns must be addressed. For example, as Wong puts it, “would the ‘deterritorializ[ed] state’ be equal to other states?”<sup>225</sup> Relegating a former State to the status of a lower sovereign entity could trigger issues of legitimacy.<sup>226</sup> Secondly, if the population becomes dispersed in many other States, there is a risk that they would become part of these

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<sup>216</sup> Burkett, “Nation Ex-Situ” *supra* note 7 at 90; Wong, *supra* note 175 at 385; Stoutenburg, “When Do”, *supra* note 188 at 85-86; Jain, *supra* note 188 at 49.

<sup>217</sup> Ödalen, *supra* note 132 at 230.

<sup>218</sup> Reference could for example be made to the separate opinion of Judge Ago in the Advisory Opinion on the Agreement between the WHO and Egypt, who underlined that international organizations, even if they have a different international legal capacity than States, are, as much as States, subjects of international law even if they lack territorial basis, see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Rep 73 at 155.

<sup>219</sup> Crawford & Rayfuse, *supra* note 5 at 252.

<sup>220</sup> See, e.g. 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001), art 2(2)(b); UNCLOS, *supra* note 106, art 291, art 20(2) of Annex VI, art 13 of Annex XIII. See also *ibid* at 253.

<sup>221</sup> Crawford & Rayfuse, *supra* note 5 at 252-253; Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 203.

<sup>222</sup> See, e.g., *ibid* at 203; Wong, *supra* note 1 at 385; Maas & Carius, *supra* note 11 at 659.

<sup>223</sup> Crawford & Rayfuse, *supra* note 5 at 251.

<sup>224</sup> Stoutenburg, “When Do”, *supra* note 18 at 85; Maas & Carius, *supra* note 11 at 659.

<sup>225</sup> Wong, *supra* note 1 at 385. See also Jeanneney, *supra* note 7 at 128.

<sup>226</sup> Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 211.

other entities, therefore limiting the role of the “deterritorialized” State to the sole function of “advocate[ing] for its diaspora.”<sup>227</sup> Finally, the exercise of jurisdiction by the “deterritorialized” State might raise practical challenges.<sup>228</sup> While prescriptive jurisdiction can be exercised over nationals abroad, and adjudicative jurisdiction can be exercised through co-operation with the host State and technical means (e.g. video conferences for judicial proceedings), enforcement jurisdiction of the “deterritorialized” State in another State’s territory could be seen as interference. Such challenges deserve that we dedicate attention to some existing mechanisms under international law that could be relied upon to find possible answers.

## 2.2.2 How would it work? Government in exile and political trusteeship analyzed

How can authority be exercised over a population that might not be on the same territory as the governing body? While relying on the notion of government in exile seems like an appealing solution, “scholars have [also] suggested a resurrection of the political trusteeship system as a means of administering the duties of a ‘deterritorialized’ government.”<sup>229</sup> While not being a direct solution for the preservation of statehood, these mechanisms must be seen as providing a logistical mean of administrating the “deterritorialized” State.

The former option, the government in exile, “accepts governments that are detached from the requirement of territory, or at least locality.”<sup>230</sup> This form of government however requires the continuous existence of the State this government represents.<sup>231</sup> Based on that premise, it could be possible to push the concept further, to the point of “states-in-exile”.<sup>232</sup> When relying on that model, two differences must however be drawn with the particular context of States with a disappearing territory.<sup>233</sup> First, according to previous cases of government in exile, the population is normally concentrated on one territory, while the governing authorities are away on another territory. In the case of SIDS, while displacements could be organized, such as the resettlement plans envisaged by various nations,<sup>234</sup> there is also the possibility of the population being dispersed. Secondly, a government in exile normally acts temporarily, because there should always be “the possibility of restoring its power over a determined territory.”<sup>235</sup> This is not the case with SIDS, as their territory is

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<sup>227</sup> Wong, *supra* note 1 at 385-386.

<sup>228</sup> Jain, *supra* note 5 at 49-51.

<sup>229</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 90.

<sup>230</sup> Stoutenburg, “When Do”, *supra* note 18 at 68. See also Jeanneney, *supra* note 7 at 126.

<sup>231</sup> Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 7.

<sup>232</sup> Crawford & Rayfuse, *supra* note 5 at 253.

<sup>233</sup> Stoutenburg, “When Do”, *supra* note 18 at 69.

<sup>234</sup> See, e.g., *Consolidated Notes from Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Columbia Law School 2011, (New York: Center for Climate Change Law, Columbia Law School, 2011) at 10, 14, online : Columbia Law School <<http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Past-Conferences-and-Events/Threatened%20Island%20Nations%20-%20Compiled%20Notes.pdf>>; Wong, *supra* note 1 at 368; Maas & Carius, *supra* note 11 at 658.

<sup>235</sup> Yamamoto & Esteban, “Vanishing Island”, *supra* note 76 at 7.

unlikely to re-appear once it is submerged, although this possibility is not officially discarded.<sup>236</sup>

The latter option would imply a trusteeship system. While the UN Charter trusteeship regime as it stands cannot be relied upon,<sup>237</sup> it could however serve as a basis:<sup>238</sup> a trusteeship entity would be in charge of promoting “the political, economic, social and educational advancement”<sup>239</sup> of the “deterritorialized” entity.

The nature of such trusteeship regime would however be different from the UN Charter trusteeship regime. The main purpose would still be the traditional one of “the administration of national assets for the benefit of its people”.<sup>240</sup> But as explained by Burkett, “[a] critical difference in the contemporary application of the trusteeship system is that the purpose of the arrangement would be to maintain self-governance and self-determination, and elected citizens of the [deterritorialized State] would serve as trustees.”<sup>241</sup> The UN would leave the internal functioning to the new entity, contrary to the managing role of the Trusteeship Council, and would act mainly as a support for the transition.<sup>242</sup>

The preservation of a people’s self-determination is imperative considering that the notion of trusteeship could have a negative implication for SIDS, as most of them “have histories as colonies, trust territories, or the like, and have only achieved statehood and sovereignty in recent decades.”<sup>243</sup> The Marshall Islands for example were a trusteeship under the supervision of the United States before becoming an independent State.<sup>244</sup> Establishing a trusteeship could therefore be seen as undermining their sovereignty and “be interpreted as a lack of capacity of [SIDS] to deal with [the impacts of sea-level rise] by themselves”.<sup>245</sup> Nonetheless, an internationally overseeing body could have positive outcomes: “[s]ymbolically, 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”.<sup>246</sup>

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<sup>236</sup> *Ibid.*

<sup>237</sup> The UN Charter trusteeship regime (chapter XIII), poses two main obstacles. First, a UN member State cannot be put under the supervision of the Council. Second, the State responsible for the supervision should be the State in charge of the administration of the territory. The majority of SIDS being UN members States under the supervision of no other State, they would have to first withdraw from the UN for the UN trusteeship regime to apply. However, such withdrawal would go against the benefits SIDS obtain from being part of multilateral organizations such as the UN, the main one being the preservation of their statehood, which is strengthened by the recognition of other States, see Wong, *supra* note 1 at 386-387.

<sup>238</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 109.

<sup>239</sup> UN Charter, *supra* note 40, art 88; Wong, *supra* note 1 at 386.

<sup>240</sup> Wannier & Gerrard, *supra* note 99 at 7. See also Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 206-208.

<sup>241</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 108. See also Wannier & Gerrard, *supra* note 99 at 7.

<sup>242</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 109-114.

<sup>243</sup> Wannier & Gerrard, *supra* note 99 at 6.

<sup>244</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 118.

<sup>245</sup> Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 207.

<sup>246</sup> Wong, *supra* note 1 at 386.

All the proposed solutions discussed in this chapter have their legitimacy “subject to the acquiescence of the international community”.<sup>247</sup> While the man-made responses do not seem contested, the acquisition of territory and, above all, the “deterritorialized” State, since they have not yet been applied in practice, could benefit from some sort of institutionalized framework that could dissipate uncertainty as to their impact on statehood and sovereignty.<sup>248</sup>

The options analyzed above are part of the solution to fulfil the goals set by the Westphalian system: promote, achieve and protect security, stability, peace, certainty, fairness and efficiency.<sup>249</sup> The preferred solution to reach that objective is to physically preserve the territory of the State, the basis of that system, so that its legal equivalent, statehood, can also remain. The idea of “deterritorialized” State offers an option that detaches statehood and nation from territory. But the physical disappearance of a State’s territory also triggers questions of whether the territorial State itself is the only form of social organization providing such stability and security.

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<sup>247</sup> Burkett, “Nation Ex-Situ”, *supra* note 99 at 113.

<sup>248</sup> *Ibid* at 114.

<sup>249</sup> *Ibid* at 106; Rayfuse, “Sea Level Rise”, *supra* note 94 at 180.



### 3. BEYOND THE WESTPHALIAN SYSTEM: STATEHOOD IN THE 21<sup>ST</sup> CENTURY

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

Geographers have a good fortune that lawyers are denied. The law is not about eternal things. It is about the here and now. It is about how humankind organizes and manages its society. We hope that the law is of consequence, and it is our calling to work to this end. But the law can become old-fashioned. Mountains may only rarely change their position, and oceans only very rarely empty themselves of water. But the law is both more vulnerable and more adaptable. The place of geography in the international system is changing. It presents challenges to international law. These are challenges to which we must all rise.<sup>250</sup>

By this statement, Bethlehem suggests that geography is now important for international law in a new way. Geography has always had an impact on the *rules* of international law and the way they are applied. But what if we were now facing an era where *changes in geography* influence the *system* of international law itself,<sup>251</sup> an era where the most adequate response to territorial disappearance would be to find an alternative to the territorial State, basis of the system, ensuring the survival of the State as a form of social organization, independently from the territory?

In the 21<sup>st</sup> century, we have become well aware of the “transborder” reality we now inhabit. From a State-driven system, or what Friedman calls “Globalization 1.0”,<sup>252</sup> we have moved towards a “Globalization 2.0”, where actors other than States have emerged as influential and where situations are not limited to one State’s territory.<sup>253</sup> However, it would be wrong to limit our understanding of the phenomenon of globalization to the end of the 20<sup>th</sup> century. Indeed, “Globalization 1.0” goes back to the end of the Middle Ages, to the era of the explorations and discoveries, when “the global” came to existence through channels of “trade between the Old World and the New World”.<sup>254</sup> Yet, what is new within that “global capitalism” is “the shrinking significance of national borders.”<sup>255</sup> Similarly, non-State actors and the civil society have always existed, formerly mostly organized around religious or cultural groups; what is new is “their phenomenal growth [...] their diversity of interests” and the fact that “they have become a force for political change in areas long seen as domestic — outside of international concern.”<sup>256</sup>

While globalization is most often seen primarily from the perspective of economics, and commercial or communicational spheres,<sup>257</sup> it can also be applied to other fields. For

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<sup>250</sup> Bethlehem, *supra* note 27 at 24.

<sup>251</sup> Jeanneney, *supra* note 7 at 113, 115-116.

<sup>252</sup> Thomas Friedman, *The world is flat: a brief history of the globalized world in the twenty-first century* (London: Allen Lane, 2005) at 9, 11, 19.

<sup>253</sup> *Ibid* at 10.

<sup>254</sup> *Ibid* at 9.

<sup>255</sup> Schatcher, *supra* note 3 at 8. See also Pierré-Caps, *supra* note 2 at 39.

<sup>256</sup> Schatcher, *supra* 3 at 12-13.

<sup>257</sup> Bethlehem, *supra* note 27 at 15.

example, Hurrell, relying on theories of international relations,<sup>258</sup> has underlined the passage from a pluralist statism, where States evolved as independent and equal entities,<sup>259</sup> and where the preservation of boundaries should not be disturbed,<sup>260</sup> to a solidarist statism, where norm-making does not only come from States but also from other actors, and focuses on schemes of cooperation and common values.<sup>261</sup> This characterization can also be imported within international law: statehood is transformed by interconnectedness, new entities, and “the proliferation of regional and international organizations and legal norms”,<sup>262</sup> showing that the international legal order is not left outside of the globalization equation.<sup>263</sup>

However, we have now moved to a further stage, “Globalization 3.0”, where the emphasis is put on “the [...] power for *individuals* to collaborate and compete globally.”<sup>264</sup> We have now moved to a realm where not only activities and interests extend beyond the boundaries of a State, but where individuals, human communities and societies go global, where they must adapt to become transnational, thus eroding the role of the territorial State even more. These transnational societies face a “more complex social process”<sup>265</sup> that can even reach a need for interdependence.<sup>266</sup> Judge Cançado Trindade argues in favour of the humanization of international law, suggesting that the international community and the humanity in itself should become one of its subjects.<sup>267</sup> And for the international legal system to keep up with these changes and reach such transnationality, it must go “beyond the state, or at least [...] view the state within the context of a broader legal order”,<sup>268</sup> one that is in fact characterized by a “network of legal orders”, and that will adapt its focus and develop according to the phenomena it wishes to cover.<sup>269</sup>

In the first chapter of the present study, we have drawn a portrait of the “1.0 reality” of international law, the territorial State-driven regime, and have presented the situation of SIDS from that perspective. In the second chapter, we have outlined existing solutions to ensure the continuity of States with physically disappearing territories, which mostly mirror that reality. But, as put by Bethlehem, “[f]rom a vantage point that is still largely rooted in a Westphalian

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<sup>258</sup> Benedict Kingsbury, “People and Boundaries: and ‘Internationalized Public Law’ Approach” in Allen Buchanan & Margaret Moore (eds), *States, nations and borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 298 at 299. These three ideas are discussed by Hurrell, *supra* note 32, but are revisited by Kingsbury at 299-302.

<sup>259</sup> Hurrell, *supra* note 32 at 278.

<sup>260</sup> Kingsbury, *supra* note 258 at 300.

<sup>261</sup> Hurrell, *supra* note 32 at 281.

<sup>262</sup> Sterio, *supra* note 4 at 219.

<sup>263</sup> See, generally, Tullio Treves, “General Course: The Expansion of International Law” (Lecture delivered at The Hague Academy of International Law, 6-24 July 2015).

<sup>264</sup> Friedman, *supra* note 252 at 10 (emphasis in original).

<sup>265</sup> Hurrell, *supra* note 32 at 285. See also Schatcher, *supra* note 3 at 11.

<sup>266</sup> Petit, *supra* note 45 at 184.

<sup>267</sup> See, generally, Antônio Cançado Trindade, “Quelques réflexions sur l’humanité comme sujet du droit international” in Denis Alland, Vincent Chetail, Olivier de Frouille & Jorge Viñuales (eds), *Unité et diversité du droit international. Écrits en l’honneur du Professeur Pierre-Marie Dupuis* (Leiden: Martinus Nijhoff, 2014) 157.

<sup>268</sup> Hurrell, *supra* note 32 at 285. See also Schatcher, *supra* note 3 at 11.

<sup>269</sup> See, generally, Boaventura De Sousa Santos, “Law: A Map of Misreadings. Towards a Post-Modern Conception of Law” (1987) 14:3 *JL & Soc’y* 279.

system, [...] is the system of international law with which we are so familiar, a system still so heavily rooted in notions of territoriality — sovereignty, jurisdiction, regulation, accountability — adequate to the challenges that will face us over the coming period?”<sup>270</sup> Based on the erosion of the State-driven framing of international law within the “2.0 reality”, and based on unprecedented geophysical changes, could we think of a model that builds not only on the interaction between States and other non-State actors, and on situations that travel across borders, but on an alternative to the territorial State itself? What we suggest here is that a solution to preserve SIDS as social organizations would be built on a modification of existing norms linked to territoriality, and even on the complete dissociation between a State as a social community and its territory.<sup>271</sup>

Chapter 3 will therefore start with a discussion on legitimacy within international law in an attempt to understand why alternative models are necessary (section 3.1). It will then move to analyze concepts and theories that could be relied upon to build an alternative model to the territorial State and ensure the continuity of SIDS as well as the identity of their populations (section 3.2).

It is worth mentioning that this study does not aspire to suggest a return to the state of anarchy that preceded the establishment of the Westphalian regime, nor does it pretend to offer a “turnkey solution” for the concerns faced by SIDS. Its objective is modest: it merely desires to identify alternative doctrines that could trigger a debate on the most appropriate and relevant forms of social organization available to those States facing territorial disappearance, and to situate these proposed solutions within the evolution of international law. As written by Hurrell, “[u]nless law reconciled itself with the realities of the power-political order, it would [...] ‘have a moth-like existence, fluttering inevitably and precariously year by year into the destructive flame of power.’”<sup>272</sup>

### 3.1 PRESERVING THE LEGITIMACY OF INTERNATIONAL LAW

Following Hurrell, we gather that the law diminishes in effectiveness when it does not track the concrete realities of politics and, in our case, of territorial disappearance. It is necessary to look into alternative bases for the international legal order because, in its current state, international law provides incomplete solutions to the problems faced by SIDS. One key objective of the law is to act “as a vehicle, or a container, or an instrument for the realization of particular ethical goals or commitments”,<sup>273</sup> to establish a framework for new circumstances, not only for present generations, but also for future ones.<sup>274</sup> The difficulty

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<sup>270</sup> Bethlehem, *supra* note 27 at 17. See also Kwiecién, *supra* note 3 at 287; Vidas, *supra* note 18 at 73; Petit, *supra* note 45 at 178, 190; Buchanan, “The Making”, *supra* note 35 at 236; Schatcher, *supra* note 3 at 7.

<sup>271</sup> Jeanneney, *supra* note 7 at 121.

<sup>272</sup> Hurrell, *supra* note 32 at 276, 280. See also Buchanan, “The Making” *supra* note 35 at 236.

<sup>273</sup> Hurrell, *supra* note 32 at 275.

<sup>274</sup> Buchanan, “The Making”, *supra* note 35 at 244; Cançado *supra* note 267 at 172.

international law faces in fulfilling this purpose therefore affects its legitimacy and the justification for its application.

Three factors can be identified when discussing what determines whether a system of law is legitimate.<sup>275</sup> First, legitimacy can be source-orientated; it refers to the justification to exercise a certain form of authority, which, under the current State-driven framing of international law, would be the authority of States. Under that approach, a decision made by an entity would be legitimate if that entity was justified or authorized to act.<sup>276</sup> Second, legitimacy is found when the processes employed and norms applied are “adequate or fair”; we will then refer to a procedure-oriented approach to legitimacy. Finally, legitimacy can be result-orientated and will derive from the outcomes of a particular situation. Under that last approach, a system will be considered legitimate if the result reached is considered as adequate or fair.<sup>277</sup> These approaches are not exclusive to one another and can be combined.

In the case of SIDS, it is primarily the third definition of legitimacy that interests us: the outcome — the submergence of States’ territories — is patently unjustifiable when considering that SIDS, while suffering from some of the worst consequences of climate change, have barely contributed to it.<sup>278</sup> But the two other factors described above are also relevant to our analysis: how can the exercise of authority and the processes used — basically the territorial State-centred regime and the current notion of statehood — be considered suitable when they are unable to fully respond to the practical problems currently faced by SIDS and the eventual uncertainty of their status stemming from the physical disappearance of their territory?

Inadequacy of the use of territorial States as the basis of the system affects the system’s legitimacy to achieve its purpose of reaching order, security and stability, but also its efficacy in practically achieving this purpose.<sup>279</sup> Further, to be legitimate, international law must create a setting in which entities that are in line with reality (e.g. “deterritorialized” States) are viable and recognized.<sup>280</sup> The physical disappearance of States’ territories and what ensues from these disappearances have shown that current international law fulfils these elements of legitimacy only with great difficulty: the uncertainties that the situation creates, mostly within the regimes of the law of the sea and migrations, show that the order and stability are already threatened, and “other entities” (e.g. government in exile) are only recognized in limited and

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<sup>275</sup> Allen Buchanan and Robert Keohane, “The Legitimacy of Global Governance Institutions” in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Berlin: Springer 2008) 25, cited in Rüdiger Wolfrum, “Legitimacy in International Law”, MPEPIL at paras 6-8.

<sup>276</sup> Allen Buchanan, “The Legitimacy”, *supra* note 5 at 82.

<sup>277</sup> This last approach has been qualified as being controversial. For example, and simply, the intervention of NATO in Kosovo, while not legitimate from the source- and procedure-oriented perspective because it was not authorized by the UN Security Council, has been argued as being legitimate from a result-oriented perspective as it aimed at protecting human rights.

<sup>278</sup> See, e.g., Jain, *supra* note 5 at 10; Burkett, “Justice Paradox”, *supra* note 153 at 659; Petit, *supra* note 45 at 177, 180.

<sup>279</sup> Jain, *supra* note 5 at 11.

<sup>280</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 106-107.

specific circumstances,<sup>281</sup> often linked to political considerations. The legitimacy of the system is therefore affected.

In parallel, as argued by Buchanan in his moral theory of international law, a standard of minimal justice is a necessary condition for the realization of the legitimacy of international law. This standard manifests itself not through “peace among States, but [through] justice embedded in the effective protection of fundamental human rights”.<sup>282</sup> Following that theory, morality in international law would translate into the protection and promotion of human dignity and human rights as shared values.<sup>283</sup> One must however be careful when characterizing such values as “common” as they find their roots in Western- oriented philosophies. This is why it has been suggested that an intercivilizational approach should be preferred, focusing on the integration of plural values rather than on the universalization of Western-based values. Morality and legitimacy of a system, as well as a standard of minimal justice, would therefore be achieved by relying on common conditions and practices, but within the particular context of a specific society and specific circumstances.<sup>284</sup>

Both approaches however have a similar focus: a legitimate and moral international system is one that defines the State around considerations for human communities, without necessarily linking them to a territorial entity.<sup>285</sup> This reflects the interests brought forward by “Globalization 3.0”, namely the reliance on individuals, communities and societies, and their interaction. Similarly, and complementarily, a legitimate and moral international system is one that builds on a normative framework adapted to current realities.

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

### 3.2 WHEN REALITIES TRANSCEND BORDERS: POSSIBLE BASIS FOR A NEW MODEL

As shown above, current realities have a “geography-defying quality”.<sup>286</sup> The submersion of territories represents the ultimate example of such defiance: it brings us away

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<sup>281</sup> See, e.g., Buchanan, “The Legitimacy”, *supra* note 5 at 87.

<sup>282</sup> Kwiecién, *supra* note 3 at 286.

<sup>283</sup> Jochen von Bernstorff & Ingo Venze, “Ethos, Ethics, and Morality in International Relations”, MPEPIL at paras 13, 28; Cançado, *supra* note 267 at 161, 164.

<sup>284</sup> See, generally, Onuma Yasuaki, “The Need for an Intercivilizational Approach to Evaluating Human Rights” (1997) 1:10 Human Rights Dialogue, online: Carnegie Council, <[http://www.carnegiecouncil.org/publications/archive/dialogue/1\\_10/articles/574.html](http://www.carnegiecouncil.org/publications/archive/dialogue/1_10/articles/574.html)>.

<sup>285</sup> Pierré-Caps, *supra* note 2 at 41; Cançado, *supra* note 267 at 166.

<sup>286</sup> Bethlehem, *supra* note 27 at 18.

from the premise of the perpetuity of geophysical territories of States.<sup>287</sup> The idea of the “deterritorialized” State and other territory-less entities shown in the previous chapter demonstrate that international law has already been confronted with alternative models to the idea that a State as a form of social organization is necessarily linked to a territory.<sup>288</sup>

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

### **3.2.1 Diaspora and cosmopolitanism**

As discussed above, to be legitimate within current realities, the international order should develop by focusing on human communities. Burkett has looked at the possibility of relying on the population of SIDS as the sole element of social organization and continuity of these States (i.e. without territory) through the use of two concepts: the role played by diasporas and the cosmopolitan theory.<sup>289</sup>

Before being able to assess how these theories evolve, a word must be said on what they are in opposition with: boundaries. Indeed, a boundary was originally seen as drawing a line between “[w]ho is and who is not a member of a particular community [...] between members and strangers, insiders and outsiders”.<sup>290</sup> Buchanan similarly refers to the congruence assumption, when the membership boundary coincides with the geographical boundary.<sup>291</sup> Citizenship brought this idea of belonging within the legal realm: citizens are part of the group, while non-citizens are not.

Diasporas,<sup>292</sup> and migrant groups in general, provide evidence that belonging to a specific group goes beyond these boundaries.<sup>293</sup> It shows that the “deterritorialization” of

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<sup>287</sup> Vidas, *supra* note 18 at 73; Jeanneney, *supra* note 7 at 95-96, 100.

<sup>288</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 91.

<sup>289</sup> This subsection is mostly based on Burkett’s argumentation in Burkett, *ibid.*

<sup>290</sup> Buchanan & Moore, *supra* note 6 at 7.

<sup>291</sup> Buchanan, “The Making”, *supra* note 35 at 231 (emphasis in original).

<sup>292</sup> The term “diaspora” is, throughout this research, understood as the physical dispersion of the people of a same nation or sharing the same culture. We acknowledge the existence of other meanings of the term, in particular the one referring to a diaspora as a “way of living”, not linked to any ethnic and/or cultural belonging. However, this alternative meaning goes beyond the scope of this research, which will focus on the meaning of a diaspora as linked with a “deterritorialized” nationalism or “deterritorialized” communal belonging.

<sup>293</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 102.

communities “is another process of imaginary nation-building born of displacement, [which groups share] many characteristics of [...] long-distance nationalism”.<sup>294</sup> The existence of these groups also stimulates further migrations, acting as an attracting pole for other members of the same community who will rely on their peers for connections and network to facilitate their establishment.<sup>295</sup> Under a diasporic theory of belonging, the rights and duties between members of a group are held independently of where the members of that group are physically located. The diasporic theory therefore brings the focus away from the *nation-State*, and reorients it towards the *nation*, understood as a community or society that shares similar historic and cultural characteristics.

Cosmopolitanism has pushed the concept of belonging even further and brings us to another meaning behind the word “nation”, one that builds on the notion of “togetherness”. Based on a shared morality, persons belong to a global community, independently of their origin, cultural or religious background and affiliation.<sup>296</sup> It has been defined as “a global politics that [...] projects a sociality of common political engagement among all human beings across the globe”.<sup>297</sup>

*Prima facie*, cosmopolitanism seems contradictory to the diasporic theory discussed above. It seems like cosmopolitanism would threaten to destroy the sense of community that members of formerly territorially-based groups have to one another to the profit of a homogenous global community. However, cosmopolitanism does not embody the dilution of cultural identities; it builds on “differential equality (together, but different)”,<sup>298</sup> on the inclusion of these communities within “transcendent solidarities”<sup>299</sup> based on a moral duty to preserve common values. As explained by Burkett, refugees — and environmentally displaced people — would benefit from belonging to a global community that could provide them with such transcendent support.<sup>300</sup>

In short, social entities that are not necessarily related to a territorial area are concepts that the territorial State-driven system is ill-equipped to capture, since that regime builds on the premise that belonging to a group is grounded in the exercise of rights and duties that are themselves dependent on shared territorial location.<sup>301</sup> The diasporic and cosmopolitan

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<sup>294</sup> Michelle McKinley, “Conviviality, Cosmopolitan Citizenship, and Hospitality” (2009) 5 *Unbound* 55 at 81, cited in *ibid* at 101.

<sup>295</sup> *Ibid* at 104.

<sup>296</sup> See, generally, the writings of Emmanuel Kant, Jacques Derrida, and, most recently, Kwame Anthony Appiah, *Cosmopolitanism: ethics in a world of strangers* (London: Penguin, 2007).

<sup>297</sup> Paul James, “Political Philosophies of the Global: A critical overview” in Paul James (ed), *Globalization and Politics, Volume IV : Political Philosophies of the Global* (Los Angeles, London, New Delhi, Singapore, Washington DC: Sage, 2014) vii at x.

<sup>298</sup> Pierré-Caps, *supra* note 2 at 50. See also Yasuaki, *supra* note 284.

<sup>299</sup> McKinley *supra* note 294 at 68, cited in Burkett, “Nation Ex-Situ”, *supra* note 7 at 101.

It is worth noting that, while we believe both the differential equality principle and the notion of solidarity as a moral obligation can be used to describe cosmopolitanism, they represent two approaches to legitimacy and morality. Indeed, as discussed above (section 3.1), the former can be linked to the intercivilizationalism while the latter is based in a more Western-oriented system of shared common values.

<sup>300</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 100.

<sup>301</sup> *Ibid* at 99.

theories therefore both rely on a concept of social belonging that would exist independently of a territory, and could be used to ensure the continuity of SIDS as social entities.

The theories however present some limitations. First, they appropriately put the emphasis on human communities, the main focus within the current reality, but, for now, are both still lacking pragmatism to be considered as a complete form of social organization. How would the rights and obligations of the dispersed people be instantiated? How could the members of the diasporically scattered group make claims against one another and satisfy their obligations? Would the rights and obligations between the members become correspondingly weaker as the members were further apart physically? This raises the question of whether it is really conceivable, on a long term basis, to ensure the survival of a community and its “feeling of belonging” without any link to a territory.<sup>302</sup>

Further, applied to the particular situation of the populations of SIDS, it is worth taking into consideration the actual *will* of these populations. Is falling under the label of “global citizens” really what they are hoping for, especially in a context where “the distinction between ‘us’ and ‘them’ [...] remains a pervasive syndrome of humankind” even if the world has “become a ‘global neighbourhood’ in some respects”?<sup>303</sup> These populations want to be helped, to survive as they now are, and the theories of diaspora and cosmopolitanism fail in clearly addressing such will.

### **3.2.2 Global governance**

The main thrust of the critique is that international law is ineffective in solving global problems as those problems become more salient. To an unprecedented extent, national polities have become — or have begun to understand that they are — dependent on, and vulnerable to, forces and dynamics outside their own boundaries. Although the problems cannot typically be solved through national action alone, the requisite transboundary measures often face severe collective-action problems, which international law is generally unable to overcome.<sup>304</sup>

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

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<sup>302</sup> Jeanneney, *supra* note 7 at 127-128.

<sup>303</sup> Schatcher, *supra* note 3 at 19.

<sup>304</sup> Krisch, *supra* note 4 at 3.



The shaping of international law is connected to the development of public policies,<sup>305</sup> and by importing the concept of governance into the legal realm, international law became willing to abide by the principle of “close cooperation by states and other actors to achieve desired objectives.”<sup>306</sup> Indeed, governance can be seen as a way to complement the role of international law because “in contrast to traditional forms of international law, [it is] characterized by a focus on the dynamic of processes, as opposed to stable structures [...], by the permeability of State ‘borders’ in both the literal, and the symbolic, sense”.<sup>307</sup>

The related doctrine of global governance suggest an organizational structure for the international regime that goes “beyond the State”,<sup>308</sup> that envisages the “prospect of a new world order in a future ‘world State’ ”.<sup>309</sup> The doctrine was also suggested as being the way of establishing an organizational and institutional cosmopolitanism.<sup>310</sup> Global governance therefore brings the issues faced by SIDS within a sphere that transforms these issues from being “their [the SIDS] concern” to being “our concern” and, in fact, “everyone’s concern”. This, we believe, triggers more global interest and accountability towards these issues, and leads the solutions to be characterized and applied beyond the limits of one’s territory.

Global governance also submits that the way of creating norms must be based on a mechanism of rule- and decision-making besides State-consent.<sup>311</sup> Indeed, the number of States and the number of actors, as well as the complexity of the international legal regime, “makes consent an increasingly fictitious means of justifying norms”.<sup>312</sup> Broader and more pluralistic mechanisms of norm-making<sup>313</sup> should therefore be envisaged: for example, opting for soft law instruments and informal regulations,<sup>314</sup> favouring “club negotiations”<sup>315</sup> (i.e. only including States and other actors that have a major impact in a particular field), looking for solutions in various regimes and legal orders,<sup>316</sup> etc. Global governance therefore makes doctrinal space for permeable boundaries, transnationalism, and a broader perspective on

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<sup>305</sup> Karl-Heinz Ladeur, “Governance, Theory of”, MPEPIL at para 13.

<sup>306</sup> Donald Rothwell & Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010) at 462. See also *ibid* at para 5.

<sup>307</sup> Ladeur, *supra* note 305 at para 14.

<sup>308</sup> Kwiecién, *supra* note 3 at 281, 303-304.

<sup>309</sup> Ladeur, *supra* note 305 at para 18. Two other meanings of global governance have also been underlined: “it may also imply that the role of private self-organization, as opposed to traditional public organization of decision-making, has become a fundamental challenge of public international law, while the other terminology (‘international governance’) seems to try to reduce the new hybrid forms of governance to a supplementary role in order to preserve the traditional centrality of the concept of State and government in international relations and international law.”

<sup>310</sup> James, *supra* note 297 at xi.

<sup>311</sup> Ladeur, *supra* note 305 at para 5.

<sup>312</sup> JHH Weiler, “The Geology of International Law – Governance, Democracy and Legitimacy” (2004) 64 *Heidelberg J of Int’l L* 547 at 547, 556, cited in Kwiecién, *supra* note 3 at 285. See also Krisch, *supra* note 4 at 28.

<sup>313</sup> *Ibid* at 36; Kwiecién, *supra* note 3 at 303; Petit, *supra* note 45 at 193.

<sup>314</sup> While non binding, soft law mechanisms can be more appropriate facing new legal issues, to which traditional mechanisms are not yet ready to be applied, see Treves, *supra* note 263 (lecture of 21 July 2015); Yamamoto & Esteban, *Atoll Island*, *supra* note 83 at 223; Petit, *supra* note 45 at 192.

<sup>315</sup> Krisch, *supra* note 4 at 16.

<sup>316</sup> *Ibid* at 5.

norm- and decision-making. This creates an appropriate framework to address the situation of SIDS that presents unprecedented practical and legal situations.

Yet, while global governance proposes the taking into account of global interests and global mechanisms that could help address the consequences stemming from the disappearance of SIDS' territories, the doctrine does not necessarily question the status of the State as a main actor under international law.<sup>317</sup> It might be sufficiently well developed to shed light on the changes brought by globalization to international society and the international legal order, but it is weaker at providing a critical analysis of the State centered- regime<sup>318</sup> and at suggesting an alternative form of social organization dissociated from territory.

### **3.2.3 Equity and moral duty: exceptional solutions for exceptional circumstances<sup>319</sup>**

The third path for grounding the legitimacy of international law in a way that reflects the realities of territorial disappearance is twofold: first, it implies a possible extension, or broad interpretation, of existing rules, and second, it suggests that the international community is bound by a moral duty to recognize the continuous existence of SIDS, independently from their territory. These two mechanisms are based on the notion of equity, as principle of fairness and reasonableness.<sup>320</sup>

“Equity” first refers to a power of complementarity, allowing the decision-makers to exercise their discretionary power within what is prescribed by law in ways that are proportional to the power exercised by other decision-makers.<sup>321</sup> It also refers to the possibility of a more autonomous power of norm creation, outside the law or even in contravention of existing law.<sup>322</sup> This latter understanding of equity as an autonomous power of norm creation makes equity, as Francioni puts it, “a catalyst for change and modernization of the law”.<sup>323</sup>

Under this first use, equity as a way of achieving fairness would justify “significant departures from precedent or the legal status quo”<sup>324</sup> which can manifest itself through a broader interpretation and application of existing *rules*,<sup>325</sup> and eventually, as discussed under the doctrine of global governance, a broader and more pluralistic variety of *norm-making mechanisms*. And not only could rules be interpreted and applied more extensively; moral

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<sup>317</sup> Kwiecién, *supra* note 3 at 309.

<sup>318</sup> *Ibid* at 303.

<sup>319</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 91.

<sup>320</sup> Francisco Francioni, “Equity in International Law”, MPEPIL at paras 1, 3, 10. The second one is the possibility for the ICJ to decide *ex aequo et bono*, see *Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XV1, art 38(2).

<sup>321</sup> Francioni, *supra* note 320 at para 10.

<sup>322</sup> *Ibid* at paras 7, 9.

<sup>323</sup> *Ibid* at para 29.

<sup>324</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 95.

<sup>325</sup> *Ibid* at 105-106.

considerations may also inform what these rules should address, suggesting a focus not on “entitlement to, but on *responsibility for*” the object or interest they address (e.g. resources, protection of human rights, etc.).<sup>326</sup>

A concrete example of the extension of rules following an equity-based analysis of those rules within the context of territorial disappearance and statehood continuity can be found within the law of self-determination. A self-determination unit (e.g. a community or a “people”) is normally trying to express that right against another entity, traditionally a State or a colonial power.<sup>327</sup> Populations of SIDS, as members of sovereign States recognized among the international community, are undoubtedly bearers of this right. The preservation of the right to self-determination of these populations outside a defined territory will involve extending the meaning and application of the right, as they are not trying to raise that right against another entity, but rather to preserve it in the abstract.<sup>328</sup> Further, if, as suggested by Nine, we consider that this right is only fully expressed with relation to a physical territory, and facing the fact that there is no more territory available, territorial rights and entitlements of other States would have to be modified to fulfil the moral duty of offering these populations an access to territory.<sup>329</sup> The existing rule of self-determination is therefore extended to reach equity.

Secondly, if continuity of statehood cannot be justified under an expansion or creation of positive law, we could rely on equitable reasons to continue recognizing States with physically disappearing territories;<sup>330</sup> equity would, in itself, be the end to reach. This would be translated in a moral duty for the international community to ensure the recognition,<sup>331</sup> based on “international justice and solidarity”.<sup>332</sup> In other words, “if the international community does not act quickly enough to prevent small island States from losing their effective statehood, the acknowledgment of their entitlement to survive as a legal community is the least that is owed to them.”<sup>333</sup> This shows that the example of self-determination can once again be used: the international community would have the moral duty to recognize the continuous expression of this right by SIDS’ populations.

What equity and morality are suggesting, is that exceptional circumstances — circumstances of climate change and sea-level rise faced by SIDS, but created by geophysical phenomenon and enhanced by the conduct of other States, leading to an unprecedented uncertainty as to the survival of statehood<sup>334</sup> — justify in themselves a departure from the

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<sup>326</sup> Davor Vidas & Peter Johan Schei, “The World Ocean in Globalization: Challenges and Responses for the Anthropocen Epoch” in Davor Vidas & Peter Johan Schei (eds), *The World Ocean in Globalization. Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden: Brill | Nijhoff, 2011) 3 at 6-7 (emphasis in original).

<sup>327</sup> See, e.g., Thirer & Burri, *supra* note 130 at para 15; Schatcher, *supra* note 3 at 15.

<sup>328</sup> See, e.g., Pierré-Caps, *supra* note 2 at 44.

<sup>329</sup> Nine, *supra* note 2 at 359, 362, 366.

<sup>330</sup> Wannier & Gerrard, *supra* note 99 at 7.

<sup>331</sup> Stoutenburg, “When Do”, *supra* note 18 at 58, 66; Jeanneney, *supra* note 7 at 123.

<sup>332</sup> Stoutenburg, “When Do”, *supra* note 18 at 59, 85.

<sup>333</sup> *Ibid* at 87.

<sup>334</sup> Jain, *supra* note 5 at 46.

norm, i.e. a departure from the classical requirements for statehood and from the territorial State regime.<sup>335</sup> What we are defending here is that the exceptional nature of the situation calls for exceptional solutions. As Jain pointed out, “[i]f the historically exceptional nature of the submergence of an entire state [...] cannot justify exceptionalism, then nothing can.”<sup>336</sup>

Equity and morality, as the other theoretical lenses discussed above, present some limitations. First, these concepts suggest a path towards an expanded applicability of existing rules and rule-making mechanisms of international law, but fail to explain how this would be translated into legal mechanisms. Second, equity as an end that triggers a moral duty for the international community is also dependent on political will and geopolitical concerns. In the end, “[d]espite the rhetoric of a ‘borderless world’ and the ‘end of geography’, globalization has not reduced the political significance of borders and boundaries”,<sup>337</sup> the State-centered regime and the model of the territorial State are not so easily erodible.

In any event, the three theoretical lenses outlined above fall under the expansion of international law through new values.<sup>338</sup> They are “slogans”, at the crossroad between norms, rules and values. They can be interpreted either as having a normative force or as being a mere label, from which no rule can be deduced, but that could serve as a basis for the development of something new. The power to determine what interpretation is to be given to which concept lies in the hands of what remains, for now, the main actors of the current regime: the States.<sup>339</sup>

Even facing these observations, we believe the understanding of diasporas and cosmopolitanism, global governance, as well as equity and morality are still relevant within the analysis undertaken in this research. It is true that none of them, taken individually, suggest an express alternative to the model of the territorial State. But they may, particularly if considered in the context of one another, shape the mindset one should have when aiming for a change in how we approach the international legal system by pointing the way towards a broader norm-making arena.

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<sup>335</sup> Burkett, “Nation Ex-Situ”, *supra* note 7 at 91.

<sup>336</sup> Jain, *supra* note 5 at 44.

<sup>337</sup> Hurrell, *supra* note 32 at 287; Buchanan, “The Making”, *supra* note 35 at 236.

<sup>338</sup> Treves, *supra* note 263 (lecture of 23 July 2015).

<sup>339</sup> See, e.g., Petit, *supra* note 45 at 191.

## CONCLUSION

The reality of territorial disappearance faced by SIDS is unprecedented and triggers a new interaction between geography and law: “transformations do not happen *on* a territory but are undergone *by* a territory.”<sup>340</sup> The consequences of such transformations are also twofold: not only are they practical and factual, but they are also legal, shedding light on the gaps existing under the various regimes that can be used to address such consequences. Submersion of territory has therefore brought us to question “whether such a new phenomenon, having such broad repercussions, could alter fundamental representations of international law”,<sup>341</sup> most particularly the main model of organization, security and stability at the core of the international legal order: the territorial State.

States as subjects of international law are the result of the interconnectedness between the two meanings of the notion of “State”: the way a social community organizes itself, and the territory occupied by that community. The entitlements associated to statehood, held by either the State itself or its population, are rooted in a notion of territory that renders the current international legal regime intrinsically linked with territoriality, this connection to a particular geographic area.

The threat of the physical disappearance of the territory, due to sea-level rise and other climate changed induced consequences, therefore not only raises questions related to the continuity of the State as a legal entity, but also triggers impacts that are far broader than only territorial. For example, uncertainty ensues as to the preservation of the entitlements of States over their maritime resources, and issues of migrations and protection of human rights are triggered, also leading to questions of self-determination of the people affected. Furthermore, one can consider the obligations held towards the affected States and populations, and question the relevance of the regime of State responsibility, in general and in the context of climate change, for the breach of such obligations.

The traditional responses to address these issues are also rooted in the importance of territory as a component of statehood; they indeed focus on the preservation of territories or the acquisition of new ones. The concept of the “deterritorialized State”, however, drives away from the territorial perspective of a State, focusing on its “community oriented” meaning.

It is exactly this possibility — the meaning of “State” as detaching itself from its territorial component — that this study has been assessing. This research has indeed been looking at concepts that can be relied upon to suggest an alternative model to the territorial State that would be more appropriate to the reality of territorial disappearance. In a globalized context, where a variety of actors interact with each other in situations that transcend borders, the legitimacy of a territorial State-driven regime is questionable. Legitimacy, assessed from a

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<sup>340</sup> Jeanneney, *supra* note 7 at 115: “des mutations juridiques *sur* un territoire plutôt que des mutations subies *par* le territoire.” (emphasis in original)

<sup>341</sup> *Ibid* at 113.

moral perspective, will be reached by focusing on a standard of minimal justice, linked to the protection of human rights held by individuals and even communities, and on an intercivilizational integration of values. A legitimate and moral international system is one that defines the State around considerations for human communities and that suggests a normative framework adapted to current realities. And to be legitimate, international law must “vacillates between meeting the needs of present justice, on one hand, and future justice, on the other.”<sup>342</sup>

The theoretical lenses looked at, without expressly suggesting an alternative model to the territorial State, propose new ways of approaching the international legal regime. Indeed, despite the limitations they present, the diasporic and cosmopolitan theories, the concept of global governance and the equitable and moral doctrines, especially considered in the context of one another, bring forward the possibility of developing a form of social organization, a model aiming at stability and security, that is not anchored in a territorial basis.

It would be naïve — and even wrong — to claim for the State to be relegated to the background of the international legal regime. States remain the primary subject of international law. As suggested by Judge Cançado Trindade, claiming that other subjects of international law should be taken into consideration or that new subjects should be envisaged does not mean that the State has been replaced. It merely means that States coexist with other actors and share with them the sphere that is international law.<sup>343</sup>

What we are suggesting is to think outside the box that is the regime’s intrinsic connection with territoriality. The importance given to this current model is seen through the desire of non-State actors and new entities to be recognized by international law instead of challenging its actual structure.<sup>344</sup> However, following such reasoning and relying on these current structures offers limited solutions to the practical realities of the SIDS. While the “transborder” spheres of migrations, climate change and the law of the sea have been discussed in the present study, territorial disappearance has a reach that is way broader, “also [opening] the possibility for conflict and disputes”<sup>345</sup> and bringing forward issues of international peace and security.<sup>346</sup> Nevertheless, a complete solution to the issues discussed will have to move from the theoretical realm to the realm of behaviour and State practice for international law to really come into play.<sup>347</sup>

Will the territorial State-based international regime survive with the help of a mere evolution, or will it need to face a complete revolution? While Sur is of the opinion that

<sup>342</sup> See, generally, Robert Scott, “Chaos Theory and the Justice Paradox” (1993) 35:1 *Wm & Mary L Rev* 329, cited in Burkett, “Justice Paradox”, *supra* note 153 at 636.

<sup>343</sup> Cançado, *supra* note 267 at 157; Schatcher, *supra* note 3 at 22-23; Petit, *supra* note 45 at 185.

<sup>344</sup> Buchanan & Moore, *supra* note 6 at 8; Pierré-Caps, *supra* note 2 at 39: “il [l’État-nation] est la structure juridique de predilection des nouveaux États, alors même que les États les plus anciens s’efforcent de l’adapter [...], sans rien concéder, pour autant, de ses principes.”

<sup>345</sup> Maas & Carius, *supra* note 10 at 660

<sup>346</sup> ILA CB, *Final Report*, *supra* note 20 at 2, cited in Vidas, Freestone & McAdam, *supra* note 10 at 401.

<sup>347</sup> Kingbury, *supra* note 258 at 298; Jeanneney, *supra* note 7 at 109.

“transformation does not mean metamorphosis”,<sup>348</sup> we dare to say that the most adequate solution will be one that not only travels across territorial borders, but one that steers away from them; one that not only takes into consideration a “transborder” reality, but a “beyond border” reality.

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<sup>348</sup> Serge Sur, “Cours général: La créativité du droit international” (Lecture delivered at The Hague Academy of International Law, 9-27 July 2012), *Recueil de cours*, vol 363 at 98: “Transformation n’est pas métamorphose.”

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