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W(h)ither Tuvalu? International Law and Disappearing States

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Abstract
Not since the demise of the fabled state of Atlantis has the world witnessed the actual physical disappearance of a state. However, climate change induced sea level rise now threatens to redraw the physical geographical map of the world, radically altering coastlines and creating new ocean areas. The extreme vulnerability of low-lying coastal areas and islands to sea encroachment is now notorious with the most serious threat being to the continued viability and actual existence of island states such as Tuvalu, Kiribati, the Marshall Islands and the Maldive Islands. While the possibility of 'disappearing' states has been recognized since the late 1980s, the issue is usually addressed in the context of 'climate' or 'environmental refugees'. This paper examines the issue of sea level rise and disappearing states in light of traditional international law principles relating to statehood, the law of the sea and entitlement to and jurisdiction over maritime spaces. This paper argues in favour of an international strategy to freeze existing baselines and maritime zones to promote achievement of the Law of the Sea Convention objectives of peace, stability, certainty, fairness, and efficiency in oceans governance and as a means of ensuring providing disappearing states with continued access to and benefit from their marine resources. The paper introduces the concept of the 'deterritorialised state' and argues for its application as the basis for continuing recognition of the sovereignty of disappeared states over their pre-existing maritime zones and the resources therein.

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Introduction

Not since the demise of the fabled state of Atlantis has the world witnessed the actual physical disappearance of a state. Certainly, states have come and gone as a result of conflict, conquest or politics continuously changing the geopolitical map of the world. However, with a few minor exceptions of islands and other areas emerging or disappearing, the geophysical map has remained constant over the past millennium. This now looks set to change, with climate change induced sea level rise threatening to redraw the physical geographical reality of the world, radically altering coastlines, creating new ocean areas, and potentially inundating entire nation states.

The effects of sea level rise and the threats it poses for coastal states and international governance have been the subject of extensive study and commentary since the 1980s. Sea level rise – whether caused by natural or anthropogenically induced or exacerbated climate change – will affect food and water security, health and sanitation, and will seriously threaten the lives and livelihoods of people around the world, leading ultimately to displacement and migration. The extreme vulnerability of low-lying coastal areas and islands to sea encroachment is now notorious with the most serious threat being to the continued viability and actual existence of island states such as Tuvalu, Kiribati, the Marshall Islands and the Maldive Islands.

While the possibility of 'disappearing' states has been recognized since the late 1980s, the issue has thus far been dealt with predominantly as one involving 'climate' or 'environmental refugees' requiring relocation to protect them from the rising waters. This focus on 'environmental refugees' has, however, been heavily criticized as lacking in intellectual, theoretical and empirical rigour, and as a distraction from the real issues of mitigation and adaptation to climate change, poverty eradication, sustainable development and conflict resolution.[1] Indeed, far from protecting the rights of persons

[1] Richard Black, 'Environmental Refugees: myth or reality', *New Issues in Refugee Research*, Working Paper No, 34, available at http://www.unhcr.ch/refworld/pubs/pubon.htm; Stephen Castles, 'The International Politics of Forced Migration' 43(3) *Development* (2003) p 15; David Corlett, *Stormy Weather: The Challenge of Climate Change and Displacement*, (UNSW Press, 2008) pp 47-55

displaced due to sea level rise, the use of the pejorative, essentially negative concepts of refugee law serves only to conclusively disempower the persons being displaced.

This paper examines an alternative, and potentially more constructive, approach to the issue of disappearing states by focusing on analysis of the issue of sea level rise and the possible inundation of vulnerable island states as one of oceans governance involving questions of entitlement to and jurisdiction over maritime spaces.

Sea Level Rise and Maritime Jurisdiction

International law relating to entitlement to maritime zones is set out in the 1982 Law of the Sea Convention. While jurisdictional rights over the territorial sea, contiguous zone, exclusive economic zone and continental shelf may differ, the outer boundary of each of these zones is measured from a common baseline. According to Article 5, except where otherwise provided in the LOSC, the normal baseline is the 'low-water line along the coast as marked on large-scale charts officially recognized by the coastal state'. In certain circumstances, straight baselines drawn in accordance with the specific rules set out in Article 7 may be used. However, with the exception of deltaic baselines provided for in Article 7(2) and the outer boundary of the extended continental shelf which is arguably permanently fixed by operation of Article 76(9), the LOSC does not indicate whether the outer boundary of maritime zones moves as baselines – or the low-water mark on which they are based – move. Rather, the question is left to be dealt with by negative implication based on textual interpretation with commentators such as Alexander,[2] Caron[3] and Soons[4] concluding that outer boundaries of the territorial sea, contiguous zone, and exclusive economic zone must, as a result of this negative implication, be ambulatory.

[2] Alexander, 'Baseline Delimitations and Maritime Boundaries' 23 *Virginia Journal of International Law* 503 (1983) p 535

[3] David D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' *17 Ecology Law Quarterly* (1990) 621-653, p 634

[4] Alfred H. A. Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' 37(2) *Netherlands International Law Review* (1990) 207-232, pp 216-218

The difficulty with the theory of ambulatory baselines is immediately apparent. Applying the ambulatory interpretation, if the baseline moves the outer boundary of the zone moves. All coastlines, and hence the delimitation of all maritime zones, will thus be affected. Of particular concern, permanent inundation of low-tide elevations and fringing reefs which had been within 12 nautical miles of shore and thus used as basepoints in accordance with Articles 13 and 6 of the LOSC would result in significant loss of width of all maritime zones. Even greater shifts would occur in the case of islands. While an island can generate all maritime zones, 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.[5] Thus, once rendered uninhabitable by sea level rise, uninhabitable islands would lose their exclusive economic zone and their continental shelf. Should the island disappear entirely, it would lose its territorial sea as well.[6] Apart from the uncertainty as to the location of maritime boundaries and zones thus created, as Khadem puts it: 'changes of this magnitude could provide a fertile source of inter-state conflict and spark disputes over navigation rights and more particularly sovereignty rights to living and non-living resources'.[7]

Admittedly states might seek to reinforce basepoint features to preserve them from inundation or erosion by wave action. Japan's attempts to preserve Okinotorishima are an oft-cited example. According to Soons, artificial conservation of coastline and islands through construction of shoreline protection, reinforcement, and sea defences, is fully permitted under international law. He argues that a natural feature thus enforced should not, by virtue of that reinforcement lose its status as a base point even if the natural feature itself is no longer above water. However, as he notes, both the costs and the technical challenges associated with such projects may prove insurmountable.[8] As Caron notes, artificial conservation of baselines for the purpose of preserving maritime entitlements leads inexorably to economic ineffiency and waste, potentially diverting

[5] LOSC Art 121(3)
[6] Soons p 216-217
[7] Alain Khadem, 'Protecting Maritime Zones from the Effects of Sea Level Rise' 5(3) *IBRU Boundary and Security Bulletin* (Autumn 1998)
[8] Soons p 222-223. See also, Barbara Kwiatkowska and Alfred H.A. Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' 21 *Netherlands Yearbook of International Law* 139-181, p 172

assets from the more pressing task of funding more appropriate and effective climate change mitigation and adaptation activities that will allow a state to continue to develop sustainably.[9]

One argument raised to rebut the ambulatory interpretation suggests that the practical effect of marking the low water line on a chart as required by Article 5 may be to 'fix' that baseline as against coastal regression and the claims of other states, at least until such time as new charts are produced.[10] However, as Caron notes, this is a practical matter which does not resolve the legal question of whether the LOSC intended baselines to be fixed or ambulatory in the case of coastal regression.[11] Indeed, except for the two specific cases already referred to and positively addressed in the LOSC (deltaic baselines and the limits of the outer continental shelf), the issue of the effect of coastal regression on the location of baselines and the delimitation of maritime zones does not appear to have been in the contemplation of the drafters of the LOSC.

Hindsight is always 20/20. With hindsight it is easy to suggest that the LOSC negotiators should have considered the effects of sea level rise on the legal regime they were crafting and provided rules covering its eventuality. That the issue was not considered in the 1970s is, however, no reason not to consider it now, in light of changing circumstances, and to examine the risks that might flow from adopting the ambulatory interpretation of the rules on baselines. The imperative for this consideration is highlighted by the increasing evidence of both real and projected global sea level rise, the effects of which will be felt on coastlines everywhere, but most particularly where low-tide elevations, fringing reefs or islands have been used as baseline points, and especially in the case of island states.

To counter the potential for economic waste and potential conflict that the assumption of the ambulatory theory of baselines implies, both Caron and Soons propose rejecting the ambulatory theory and developing a new rule of customary or conventional law freezing

[9] Caron pp 639-640
[10] D. Kapoor and A. Kerr, *A Guide to Maritime Boundary Delimitation* (1986) p 31
[11] Caron p 634

the outer limits of maritime zones 'where they were located at a certain moment in accordance with the general rules in force at the time'.[12] This is not to suggest that all disputes over entitlement to and delimitation of maritime zones would thus be resolved. Like the freeze on disputed sovereignty claims in Antarctica, freezing existing maritime zones would not imply acceptance of disputed basepoint and island claims. Pre-existing disputes over the status of rocks and islands or the location and legitimacy of straight baselines would persist until resolved through the normal processes. However, pending resolution of any such outstanding disputes, a freezing of the outer limits of all maritime zones accepted at the relevant moment – whenever that might be – would be consistent with, and would significantly assist in, the promotion and achievement of the LOSC objectives of peace, stability, certainty, fairness, and efficiency in oceans governance. Ultimately, as Caron suggests, a freeze on the outer limits of maritime zones would also be a valuable climate change adaptation strategy in that resources could be directed to substantive adaptation needs rather than the artificial preservation of baselines merely for the purpose of preserving maritime entitlements; new wetlands and coastal ecosystems could be created to replace those lost to rising seas thereby assisting in the relocation and conservation of species and habitats under threat; and the prime asset of many coastal states, in particular of small island and developing states would be preserved.[13] This becomes particularly important in the case of disappearing states.

Sea Level Rise and Disappearing States

Even assuming a freeze on the outer limits of maritime zones, however, this does not entirely dispose of the problem of maritime zones in the context of disappearing states. Only states are entitled to claim maritime zones. Thus, the existence of maritime zones depends on the existence of a state. The traditional international law criteria for statehood include the fundamental requirements of territory and a permanent population. As the territory of a threatened island state disappears beneath the waves, the criteria of territory will no longer be met and the claim to statehood will fail. Of course, disappearance is most likely to be a gradual process with the territory being rendered uninhabitable and the

[12] Soons, p 225. See also Caron, p 650
[13] Caron pp 642-50

population having fled long before the territory's total physical disappearance. In this case, too, the criteria for statehood will cease to be met from the time of evacuation and the state will cease to exist. The now former state's maritime zones and boundaries will therefore lapse, reverting either to high seas and the Area or, where geographical conditions permit, to areas under the jurisdiction of neighbouring states.[14]

Once considered an almost fanciful scenario, the reality of increasingly severe ocean encroachment causing loss of landmass and potable water and rendering islands uninhabitable is already blamed for displacement of at least two populations. In 2006 the residents of Lohachara island in the Bay of Bengal moved to a nearby island to escape their rapidly disappearing island.[15] In 2007 residents of Papua New Guinea's Cateret Islands were evacuated to nearby Bourgainville.[16] While these relocations have been intra-state, the problem of the disappearing state requires consideration of the *modus operandi* for what will ultimately be the wholesale relocation of the entire population of a state; an issue which has concerned governments of vulnerable island states such as Tuvalu, Kiribati and the Maldives since the 1980s.

One possibility, alluded to by Soons, is for the disappearing state to acquire new territory from a distant state by treaty of cession.[17] Like the Alaska purchase, sovereignty over the ceded land would transfer in its entirety to the disappearing state which would then relocate its population to the new territorial location. The continued existence of the state would now be secured in accordance with traditional rules of international law. The pre-existing maritime zones of the state would continue to inure to the relocated state regardless of geographical proximity in the same way that any state currently claims maritime zones in respect of oceanic islands forming a part of its territory.

[14] Caron, p 650 and Soons, p 230
[15] G. Lean, 'Disappearing World: Global Warming Claims Tropical Island' *The Independent* (24 December 2006)
[16] J. Stewart, 'Rising Seas Force Cataret Islanders out of Home' Lateline, ABC television (5 February 2007). Transcript http://www.abc.net.au/lateline/content/2006/s1840956.htm
[17] Soons, p 230

From a legal perspective, the acquisition of title to and sovereignty over new territory by purchase and/or treaty of cession undoubtedly represents the most straightforward and appealing solution. Indeed, precedent exists for this approach to responding to environmental catastrophes. During the 1870s tens of thousands of Icelanders were driven out of Iceland as a result of crushing poverty exacerbated by a devastating volcanic eruption that destroyed half the island. The Canadian government entered into an agreement with these settlers granting them a suitably large piece of land for their new colony, providing them with funding and livestock to assist in their resettlement, and guaranteeing their rights both as citizens of Canada and of Iceland for themselves and their descendants. The colony of New Iceland was run by a government committee elected from amongst the settlers. Located in what is now southern Manitoba, New Iceland eventually joined the province of Manitoba becoming fully integrated into Canada.[18]

However, from a practical perspective it is difficult to envisage any state now agreeing, no matter what the price, to cede a portion of its territory to another state unless that territory is uninhabited, uninhabitable, not subject to any property, personal, cultural or other claims, and devoid of all resources and any value whatsoever to the ceding state. The political, social and economic ramifications of ceding valued and/or inhabited territory may simply exceed the capacities – and courage – of existing governments.

Another alternative suggested but not elaborated on by both Soons and Caron, is for the disappearing state to merge, possibly into some form of federation, with another state.[19] The population of the disappearing state would then be physically relocated within the territory of the other 'host' state. Again, pre-existing maritime zones would continue to remain effective. However, these zones would now inure to the 'host' state. At the domestic level, international human rights law and the rules relating to internal self

[18] See, eg, Elva Simundsson, *Icelandic Settlers in North America* (Winnipeg: Queenstown House Publishing, 1981); Thorstina Walters, *Modern Sagas* (North Dakota Institute for Regional Studies, 1953); Nelson S. Gerrard, *Icelandic River Saga – A History of the Icelandic River and Ísafold Settlements of New Iceland* (Winnipeg, 1985); W. Kristijánsson, *The Icelandic People in Manitoba* (Winnipeg, 1965); W.J. Lindal, *The Icelanders in Canada* (Ottawa/Winnipeg, 1967); and Sigtyggur Jónasson, *The Early Icelandic Settlements in Canada,* Historical Society of Manitoba: Transaction No 59 (Winnipeg, 1901)

[19] Soons, p 230; Caron, p 650

determination would provide protections for the relocated population within the 'host' state. At the international level, however, it would be the 'host' state which would represent their interests. In other words, the disappearing state would cease to exist and have no further say in the exploitation and management of its former maritime zones. The disappeared state would basically have purchased its relocation with its maritime zones.

While this, too, may seem like a straightforward, pragmatic and legally sound solution to the problem of disappearing states, the rationale for and manner in which such a merger would take place also gives rise to a number of concerns. A merger of this type would ultimately require the absorption and relocation by the 'host' state of the total population of the disappearing state. States have already shown their unwillingness to engage in such wholesale population absorptions. When, in 2001, Tuvalu approached Australia and New Zealand about the possibility of taking its population in the case of total loss of its territory, Australia flatly refused, while the most New Zealand would agree to was a 30 year immigration program which accepts up to 75 Tuvaluans per year who must be 'of good character and health, have basic English skills, have a job offer in New Zealand, and be under 45 years of age'.[20] With a current Tuvaluan population of approximately 11,000, this still leaves nearly 9000 people to find resettlement elsewhere or drown. Moreover, the equity and fairness of a solution that requires those who are least to blame for climate change being obliged to relinquish jurisdiction and control over their vast and potentially extremely lucrative maritime zones to states who may well be among those most to blame for climate change must be questioned.

Ultimately, a more equitable solution may lie in recognition of a new category of deterritorialised state. While a full analysis of this issue is beyond the scope of this paper, the following sections outline the precendential basis, rationale and parameters of the concept of deterritorialised state and then examine its application in the context of disappearing island states and the management of their maritime zones.

[20] Ministry of Pacific Islands Affairs, *New Immigration Category for Pacific Migrants*, (2002) http://www.minpac.govt.nz/publications/newsletters/nl0mar02/immigration.php

Sea Level Rise and Deterritorialised States

Before going any further, it is important to note that nothing proposed here is intended to suggest a new category of international personality available to peoples, however defined, raising current or future self determination claims in the context of existing states. The discussion here focuses solely on possible options for island states whose territory will become wholly uninhabitable as a result of sea level rise.

It is true that international law generally stipulates the requirement of territory as a necessary precondition for statehood. However, the concept of the deterritorialised state is neither new, nor is it rejected under current international law. The most famous example of a deterrritorialised state is the Sovereign Order of the Military Hospitaller Order of St John of Jerusalem, of Rhodes and of Malta (also known as the Order of St John or the Knights of Malta) which has historically been considered a sovereign international subject, recognised by a large number of states and enjoying the rights of active and passive legation, treaty making and membership of international organizations, despite having lost its territory when rejected from Malta by Napoleon in 1798.[21] Similarly, although regularized by the grant of sovereignty over Vatican City to the Papal See in the Lateran Treaties of 1929, the Papal See was recognized as a state despite possessing no territory between 1870, when the Papal States were annexed by Italy, and 1929.

International law also recognizes the notion of functional, or non-territorial, sovereignty. Historically such claims have been recognized in the context of 'governments-in exile' or in the context of communities either made diasporic by processes of invasion and colonization as, for example, in the case of the Palestinians, or overrun and internally

[21] Costas M Constantinou, 'Irregular States or the Semiotices of Knight Errantry' 17 *Revue International de Sémiotique Juridique* (2004) 229-244. See also Aldo Pezzana, *The Juridical and Historical Foundations of the Sovereignty of the Military Hospitaller Order of St John of Jerusalem, of Rhodes and Malta* (Rome: The Sovereign Military Order (no date given); Gerald Draper, 'Functional Sovereignty and the Sovereign Military Hospitaller Order of St John of Jerusalem, of Rhodes and of Malta' *Annales de l'Ordere Souverain Militaire de Malta* (1974), pp 78-86; Guy Stair Santy, 'The Order of Malta, Sovereignty, and International Law' http://www.chivalficorders.org/chivalric/smon/maltasov.htm; R. Jennings and A. Watts (eds) *Oppenheim's International Law*, Vol 1: Peace (London: Longman, 1996), p328-329; Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press 2003), p 218; and Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990), p 66

dislocated or formally deterritorialised as, for example, in the case of indigenous nations such as the Maori, the Inuit and the Tibetans. In some instances there have been attempts to re-establish or re-assert sovereignty through the re-establishment of a homeland in or near the original site (Palestine). In others, a virtual enclave has been created within the newly created encompassing nation (Maori within New Zealand or Nunavut in Canada).

More recently, international law has also recognized the right of other entities such as Taiwan and the European Union to exercise aspects of functional sovereignty on the international level despite either not being recognized as a state or not fulfilling the criteria for statehood. Of particular relevance in the context of a discussion on oceans governance, the terminology of 'other entity' is now utilized in numerous law of the sea treaties, including the UN Fish Stocks Agreement. In short, international law already recognizes that sovereignty and nation may be separated from territory. International law is thus fully capable of responding to the problem of disappearing states in a way that positively recognizes their sovereign rights without further victimizing them by the loss not only of their territory but of their sovereign existence as well.

In the context of disappearing states, the deterritorialised state entity would therefore consist of a 'government' or 'authority' elected by the registered voters of the deterritorialised state. In essence, this 'authority' would act as a trustee of the assets of the state for the benefit of its citizens wherever they might now be located. The maritime zones of the disappearing state would continue to inure to and be managed by that 'authority' such that the resource rents from their exploitation could be used to fund the relocation and continued livelihood of the displaced population – whether diasporic or wholly located within one other 'host' state. Although not having sovereignty over its new property acquisitions the 'authority' would continue to represent the state at the international level and the rights and interests of its citizens vis-à-vis their new 'host' state or states. These rights could include the right to maintain their original personal, property, cultural, linguistic and nationality rights for themselves and their descendants while simultaneously being granted full citizenship rights in the new 'host' state or states.

This deterritorialised state approach appears to be precisely what the governments of Tuvalu and the Maldives are now contemplating. According to press reports the Prime Minister of Tuvalu held secret talks with Australian officials in October 2008 aimed at obtaining Australia's agreement to accept the entire Tuvaluan population if and when it is forced to evacuate.[22] Given current projections of sea level rise by up to 0.8 metres by 2100,[23] evacuation could be necessary before the end of this century. Key to Tuvalu's position is the desire to retain its sovereignty, culture and traditions – including sovereignty over its maritime zones. Similar sentiments have been expressed by the President of the Maldives. Clearly, a strategy that sees international agreement on the freezing of baselines, at least in the case of island states facing inundation, will be a key element in a disappearing state's ability to utilize its maritime zones as both a bargaining chip and as a means of supporting its continued 'sovereign' existence as well as the continued livelihood of its displaced population.

Deterritorialised States and the Management of Maritime Zones

Assuming agreement on the freezing of baselines and the continued adherence of maritime zones to newly deterritorialised states, it is also necessary to consider the position of deterritorialised states from an oceans governance perspective and the effect of this new category of state on the continued management and exploitation of maritime zones. The advantages of this approach have already been noted as contributing to the promotion and achievement of the LOSC objectives of peace, stability, certainty, fairness, and efficiency in oceans governance. Moreover there is no reason in principle, why management should be any more problematic for a deterritorialised or disappeared state as opposed to a state in possession of distant islands. Analogous examples would include the Falkland Islands and South Georgia, Australia's Heard, McDonald and Macquarrie Islands, and the French sub-Antarctic islands of Keurguelan and Crozet.

Admittedly, the challenges of monitoring, control, surveillance and enforcement would be great. However, these challenges can be met with the ongoing development of

[22] Brad Couch, 'Sinking Tuvalu Wants Our Help as Ocean Levels Rise', *The Daily Telegraph,* 5 October 2008, http://www.news.com.au/dailytelegraph/story/0,22049,24448958-5005941,00.html
[23] IPCC Fourth Report

increasingly sophisticated satellite and other MCS technologies and regimes and through cooperation and coordination with regional fisheries management organizations, the International Seabed Authority, the International Maritime Organization and other relevant international organizations.

Equally great will be the challenge of ensuring prompt, adequate and effective payment for resources taken and the establishment of effective structures for ensuring appropriate conduct by the authorities of the deterritorialised state of their obligations including the conservation and sustainable management of the resources and the receipt and distribution of funds to the beneficiaries. In this respect international oversight of the processes may be useful. Indeed, it is possible to envisage a revivified and modified role for the Trusteeship Council (or a revised version thereof) as the central coordinating international authority for deterritorialised states.

Nevertheless, in an international community still based on the Westphalian notion of states, it may not be appropriate or realistic to envisage the permanent establishment and continuing existence of deterritorialised states *ad infinitum*. Rather, it may be useful to view this status as transitional, lasting perhaps one generation (30 yrs) or one human lifetime (100 yrs), by which time it is likely that much else in the international legal regime, including the existing law of the sea regime, will have to be reconsidered and reconfigured, in any event. In the meantime, however, freezing existing baselines and accepting the notion of the sea level affected deterritorialised state would give certainty and security to those states which fear inundation and allow them to concentrate on the tasks of sustainable development and adaption for as long as they can.