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## International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma

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# International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma

Rosemary Rayfuse

## **Abstract**

This paper examines the rules of international law relating to the establishment of maritime zones and their application in the case of sea level rise with particular reference to ‘disappearing states’. Substantive and procedural options for overcoming the presumption of the ambulatory nature of baselines are examined and the analysis applied to situations of inundation of island states by sea level encroachment. It is argued that it would be both inequitable and inconsistent with the objectives of the law of the sea for disappearing states to lose their maritime zones. A solution to the ‘disappearing state’ dilemma is suggested through adoption of a positive rule freezing baselines and through recognition of the category of ‘deterritorialised state’. It is concluded that the articulation of new rules of international law may be needed to provide stability, certainty and a future to disappearing states.

# **International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma**

by  
**Rosemary Rayfuse\***

## **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 volcanic islands and other areas emerging or disappearing, the geophysical map has remained constant over the past millennium. This situation may soon change. Scientists have warned that climate change induced sea level rise threatens to redraw the physical geographical reality of the world.

Of course, sea level rise is not a new phenomenon. Ocean levels have waxed and waned across geological time, at times revealing land bridges between existing continents while at other times blanketing the earth in oceans at least seven meters deeper than at present. What is new, in the geological timescale sense, is the presence of six billion human inhabitants scattered across a globe, divided into geopolitical units called 'states'. Sea level rise – whether a result of natural processes or caused by anthropogenically induced or exacerbated climate change – will affect food and water security, health and sanitation, and will seriously threaten the lives and livelihoods of millions of people around the world. It will radically alter coastlines and create new ocean areas, leading ultimately to human displacement and migration. Low-lying coastal areas and islands are extremely vulnerable to sea encroachment and, in some cases, the continued viability and actual existence of island states such as Tuvalu, Kiribati, the Marshall Islands and the Maldives may be at risk.

This paper examines the issue of disappearing states from the perspective of entitlement to and jurisdiction over maritime spaces. It examines the rules of the international law relating to the establishment of maritime zones and their application in the case of sea level rise. It then applies this analysis to situations of inundation of island states by sea level encroachment and suggests a solution to the disappearing state dilemma on the basis of acceptance of a new category of statehood. It is concluded that new rules of international law will be needed to provide stability, certainty and a future to disappearing states.

## **Maritime Entitlements and the Baseline Dilemma**

International law relating to entitlement to maritime zones is set out in the 1982 Law of the Sea Convention (LOSC).<sup>1</sup> All coastal states are entitled to certain maritime zones, to wit, internal waters, a territorial sea, an exclusive economic zone, a continental shelf and,

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<sup>1</sup> United Nations Convention on the Law of the Sea, 10 December 1982, into force 16 November 1994. 21 *International Legal Materials* 1245 (1982)

where the geomorphological conditions exist, an extended continental shelf. Within each of these zones states exercise varying degrees of sovereignty. Internal waters, as the term implies, are wholly under the jurisdiction and sovereignty of a state and may be equated, for present purposes, to a piece of territory.<sup>2</sup> Within the territorial sea a coastal state exercises complete sovereignty, subject only to a right of innocent passage for foreign ships.<sup>3</sup> In the exclusive economic zone a coastal state enjoys sovereign rights for the exploration and exploitation of living and non-living natural resources of the water column,<sup>4</sup> while on the continental shelf the state enjoys sovereign rights for the exploration and exploitation of the natural resources of the seabed and subsoil.<sup>5</sup> Beyond the areas under the national jurisdiction of states lie the 'global commons'. Here, the high seas water column is subject to an open access regime of equal right of user in which all states enjoy the 'freedom of the high seas'.<sup>6</sup> The deep seabed, known as 'the Area'<sup>7</sup> is governed by the International Seabed Authority (ISBA).<sup>8</sup>

While jurisdictional rights over the territorial sea, exclusive economic zone and continental shelf may differ, the outer boundary of each of these zones is measured from a common baseline. 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.<sup>9</sup> In the case of islands situated on atolls or of islands having fringing reefs, the baseline is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal state.<sup>10</sup> Where a low-tide elevation<sup>11</sup> is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on the elevation may be used as the baseline for measuring the territorial sea. In other words, low-tide elevations within 12 nautical miles from the coast generate a territorial sea.

In certain circumstances, 'straight baselines' drawn in accordance with the specific rules set out in Article 7 may be used. Where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in the immediate vicinity, the method of straight baselines joining appropriate points (basepoints) may be employed in drawing the baseline.<sup>12</sup> Basepoints used will generally include rocky or other prominent points

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<sup>2</sup> LOSC Art 8

<sup>3</sup> LOSC Art 17

<sup>4</sup> LOSC Art 56

<sup>5</sup> LOSC Art 77

<sup>6</sup> LOSC Art 87

<sup>7</sup> Defined as 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.

LOSC Art 1(1)

<sup>8</sup> Established pursuant to LOSC Art 156. All states parties to the LOSC are members of the ISBA which is headquartered in Kingston, Jamaica.

<sup>9</sup> LOSC Art 5. The breadth of the territorial sea is up to 12 nautical miles measured from the baselines. The exclusive economic zone extends for a further 188 nautical miles. The breadth of the continental shelf is up to 200 nautical miles from the baselines or, where an extended continental shelf exists, it may extend up to 350 nautical miles from the baselines (see LOSC Art 76)

<sup>10</sup> LOSC Art 6

<sup>11</sup> A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide: LOSC Art 13(1)

<sup>12</sup> LOSC Art 7(1)

unlikely to suffer from erosion.<sup>13</sup> Although considerable contentious state practice exists to the contrary,<sup>14</sup> straight baselines must not depart to any appreciable extent from the general direction of the coast, and the areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>15</sup> Straight baselines are not to be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them, or unless otherwise generally accepted.<sup>16</sup>

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. Commentators such as Alexander,<sup>17</sup> Caron<sup>18</sup> and Soons<sup>19</sup> have therefore concluded that outer boundaries of the territorial sea, contiguous zone, and exclusive economic zone must, as a result of this negative implication, be ambulatory.

The difficulty with the theory of ambulatory baselines is immediately apparent. Applying the ambulatory theory, if the baseline moves the outer boundary of the zone moves. All coastlines will be affected by sea level rise. It therefore follows that the maritime entitlements of all states will also be affected by sea level rise. Of particular concern, permanent inundation of low-tide elevations and fringing reefs which had been within 12 nautical miles of shore will result in significant loss of width of all maritime zones. Even greater shifts will 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’.<sup>20</sup> Thus, once rendered uninhabitable by sea level rise (or other environmental degradation), uninhabitable islands will, *prima facie*, lose their exclusive economic zone and their continental shelf. Should the island disappear entirely, it will lose its territorial sea as well.<sup>21</sup> Apart from the uncertainty as to the location of maritime boundaries and zones thus created, as Khadem

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<sup>13</sup> LOSC Art 7(2)

<sup>14</sup> See, e.g., J. A. Roach and R. Smith, ‘Straight Baselines: The Need for a Universally Applied Norm’ 31 *Ocean Development and International Law* (2000) p 47 and T. Palmer, ‘Sea level Change and Baselines’ in Proceedings of the Canadian Hydrographic Conference and National Surveyors Conference 2008 ([http://pac.chs.gc.ca/files/session\\_2A/2A-2\\_Palmer.pdf](http://pac.chs.gc.ca/files/session_2A/2A-2_Palmer.pdf)) p 4

<sup>15</sup> LOSC Art 7(3)

<sup>16</sup> LOSC Art 7(4)

<sup>17</sup> Alexander, ‘Baseline Delimitations and Maritime Boundaries’ 23 *Virginia Journal of International Law* 503 (1983) p 535

<sup>18</sup> 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 and, by the same author, ‘Climate Change, Sea Level Rise and the Continuing Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict’ in S.Y. Hong and J. Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes and the Law of the Sea* (2008)

<sup>19</sup> 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

<sup>20</sup> LOSC Art 121(3)

<sup>21</sup> Soons p 216-217

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'.<sup>22</sup>

Admittedly states might seek to reinforce baseline and basepoint features to preserve them from inundation or erosion by wave action. 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.<sup>23</sup> As Caron notes, artificial conservation of baselines for the purpose of preserving maritime entitlements leads inexorably to economic inefficiency and waste, potentially diverting 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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.

### **Resolving the Baseline Dilemma**

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<sup>27</sup> is, however, no reason not to consider it now, in light of changing circumstances and the increasing evidence of both real and projected global sea level rise, the effects of which will be felt on coastlines everywhere.

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<sup>22</sup> Alain Khadem, 'Protecting Maritime Zones from the Effects of Sea Level Rise' 5(3) *IBRU Boundary and Security Bulletin* (Autumn 1998)

<sup>23</sup> 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

<sup>24</sup> Caron pp 639-640

<sup>25</sup> D. Kapoor and A. Kerr, *A Guide to Maritime Boundary Delimitation* (1986) p 31

<sup>26</sup> Caron p 634

<sup>27</sup> D. Freestone and J. Pethick, 'Sea Level Rise and Maritime Boundaries' in G.H. Blake (ed), *Maritime Boundaries* (1994) p 79

Two different sets of options for dealing with the effects of sea level rise on maritime entitlements currently exist. One set relates to actions taken in accordance with existing law, while the other relates to the development of new rules of international law. With respect to existing rules, Hayashi suggests three possibilities.<sup>28</sup> First, states could take greater advantage of the rules on straight baselines by, for example, building lighthouses and other installations on low-tide elevations to enable them to be used as basepoint, or by simply interpreting the provision on unstable coasts to draw straight baselines in new areas. Once drawn and publicised, these baselines would not move regardless of what happened to the low-water line. Second, states could move to permanently establish the outer limits of their continental shelf for both the 200 nautical mile limit and any extended shelf. Since these limits are described in the LOSC as 'permanent', the recession of baselines due to sea level rise would have no effect on the breadth of the continental shelf. This would be particularly important in the case of small islands which become submerged or uninhabitable and would, under current rules, lose their continental shelf and exclusive economic zone. Third, states could protect many of their maritime entitlements by definitively delimiting their maritime boundaries in bilateral treaties with opposite and adjacent states. Although international law recognizes that a treaty may become void by reason of a fundamental change of circumstances, the operation of that rule is expressly excluded in the case of a treaty which establishes a boundary.<sup>29</sup>

Each of the approaches identified above has limited application. A number of commentators have therefore suggested the need for the explicit rejection of the ambulatory theory of baselines and the adoption of new positive rules of customary or conventional international law freezing either baselines or the outer limits of maritime zones, or both. New rules, they argue, are necessary to counter the potential for economic waste, instability and conflict that the assumption of the ambulatory theory implies.

Caron suggests a rule that would permanently fix the boundaries of all maritime zones on the basis of presentably accepted baselines.<sup>30</sup> Such a rule, he argues, would be fair and equitable because it would merely freeze the present division of authority and allocation of maritime entitlements agreed to in the LOSC. No state would gain any additional share of the earth's space even if the baselines were to recede. Judge Jesus of the International Tribunal for the Law of the Sea agrees that once baselines have been established in accordance with the LOSC they should be seen as permanent, irrespective of any changes in sea level<sup>31</sup> and he would apply this in the case of new-born islands and the future qualification of rocks as either habitable or uninhabitable as well. A future rise in sea level would therefore entail neither a loss nor an acquisition of ocean space and associated jurisdictional rights over maritime spaces and resources. States would maintain their current entitlements and neither the international seabed nor the high seas commons would be affected. Soons proposes a new general rule of international law

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<sup>28</sup> M. Hayashi, 'Sea Level Rise and the Law of the Sea: Legal and Policy Options' *Proceedings of International Symposium on Islands and Oceans*, Ocean Policy and Research Foundation (2009) 78-90 at 79

<sup>29</sup> Vienna Convention on the Law of Treaties, Article 61

<sup>30</sup> Caron 623, 640-641

<sup>31</sup> J.L. Jesus, 'Rocks, New-born Islands, Sea Level Rise and Maritime Space' in J. Frowein, et al (eds) *Verhandeln für den Frieden, Negotiating for Peace* (2003) pp 602-603

freezing 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’.<sup>32</sup>

In assessing these approaches it is important to appreciate the different legal ramifications that result from a permanent fixing of baselines versus a permanent fixing of the outer limits of maritime zones. It will be recalled that baselines serve as the interface between a state’s internal waters, over which it has total sovereignty and jurisdictional control and its territorial sea and exclusive economic zone where the exercise of sovereignty is modified by the right of innocent passage or even by the freedom of navigation. If the baseline is fixed, any new ocean areas created as a result of sea level rise will lie to the landward of the baseline and become internal waters. The legal status of the newly submerged area will be no different than when it was dry land. If only the outer limits of the maritime zones are fixed then, as the sea level rises the baselines will move, thus expanding the breadth of the territorial sea or exclusive economic zone, thereby diminishing a state’s jurisdiction over the newly submerged area. Hayashi concludes that the former approach is the preferable, not only as a matter of fairness, but because it does not involve the need to amend the rules on the breadth of the territorial sea and the exclusive economic zone.<sup>33</sup> Freezing of baselines would, in any event, by necessary implication, have the effect of freezing the outer limits of maritime zones as well.

A final consideration relates to the time from which baselines are to be frozen. Various options exist, ranging from the date of entry into force of the LOSC, either in general or for the individual state, to the date on which the established baselines are publicized on the relevant charts and deposited with the Secretary General of the United Nations as required by Article 16 of the LOSC. Hayashi’s preference is for the latter on the basis that it is both consistent with explicit LOSC obligations and will help to encourage those states which have not yet done so to establish their baselines.<sup>34</sup>

This is not to suggest that the freezing of baselines would resolve all disputes over entitlement to and delimitation of maritime zones. Like the freeze on disputed sovereignty claims in Antarctica, freezing declared baselines would not necessarily imply acceptance of disputed 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 baselines and the associated 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. As Caron suggests, freezing of baselines 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;

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<sup>32</sup> Soons, p 225. See also Caron, p 650

<sup>33</sup> Hayashi p 83

<sup>34</sup> Hayashi p 84

and the prime asset of many coastal states, in particular of small island and developing states would be preserved.<sup>35</sup>

Procedural options for achieving the adoption of these new rules are also many and varied. Adoption of new rules through the normal process for the development of customary international law is probably both too slow and too impractical, particularly given that some states may physically disappear before sufficient state practice and *opinio juris* is accumulated. This is not to suggest that states should not consider modifying their practice and *opinio juris* accordingly, but rather that more expeditious mechanisms should also be sought. Hayashi identifies a range of more immediate mechanisms<sup>36</sup> which might include a formal amendment of the relevant LOSC provisions, *de facto* amendment of the LOSC by a decision of the Meeting of the States Parties, or adoption of a supplementary agreement for modification of implementation of the LOSC provisions either by a separate diplomatic conference<sup>37</sup> or by UN General Assembly resolution.<sup>38</sup> Ultimately, either of the latter two suggestions may prove the most workable and have the benefit of involving all states, not just the parties to the LOSC.

### **The Statehood Dilemma**

Even assuming agreement on a rule freezing baselines and the outer limits of maritime zones, however, this does not entirely dispose of the problem of maritime zones in the context of disappearing small island 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.<sup>39</sup> 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 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 the high seas and the Area or, where geographical conditions permit, to areas under the jurisdiction of neighbouring states.<sup>40</sup>

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

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<sup>35</sup> Caron pp 642-50

<sup>36</sup> Hayashi pp 86-89

<sup>37</sup> As in the case of the 1995 UN Fish Stocks Agreement

<sup>38</sup> As in the case of the 1994 Implementation Agreement on Part XI of the LOSC

<sup>39</sup> 1934 Montevideo Convention on the Rights and Duties of States, Art 1

<sup>40</sup> Caron, p 650 and Soons, p 230

their rapidly disappearing island.<sup>41</sup> In 2007 residents of Papua New Guinea's Cateret Islands were evacuated to nearby Bourgainville.<sup>42</sup> While these relocations have been intra-state, the problem of the disappearing state requires consideration of the effects of 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.

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.<sup>43</sup> Indeed, far from protecting the rights of persons displaced due to sea level rise, the use of the pejorative, essentially negative concepts of refugee and forced migration law serves only to conclusively disempower the persons being displaced. A solution which protects the rights and interests of disappearing states and their citizens while respecting the competing rights and interests of other states is needed. This requires resolution of the statehood dilemma.

### **Resolving the Statehood Dilemma**

One possible resolution to the statehood dilemma, alluded to by Soons, is for the disappearing state to acquire new territory from a distant state by treaty of cession.<sup>44</sup> 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.

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

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<sup>41</sup> G. Lean, 'Disappearing World: Global Warming Claims Tropical Island' *The Independent* (24 December 2006)

<sup>42</sup> J. Stewart, 'Rising Seas Force Cateret Islanders out of Home' Lateline, ABC television (5 February 2007). Transcript <http://www.abc.net.au/lateline/content/2006/s1840956.htm>

<sup>43</sup> 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

<sup>44</sup> Soons, p 230

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.<sup>45</sup>

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.<sup>46</sup> 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 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’.<sup>47</sup> With a current Tuvaluan population of approximately 11,000, this still leaves nearly 9000 people to find resettlement elsewhere or drown.

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<sup>45</sup> 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. Kristjánsson, *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)

<sup>46</sup> Soons, p 230; Caron, p 650

<sup>47</sup> Ministry of Pacific Islands Affairs, *New Immigration Category for Pacific Migrants*, (2002) <http://www.minpac.govt.nz/publications/newsletters/nl0mar02/immigration.php>

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 precedential basis for, and the rationale and parameters of, the concept of deterritorialised state. Application of the concept is then examined in the context of disappearing island states and the management of their maritime zones. 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 following discussion focuses solely on possible options for island states whose territory will become wholly uninhabitable as a result of sea level rise.

### **Deterritorialised States**

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 deterritorialised 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.<sup>48</sup> 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 dislocated or formally deterritorialised as, for example, in the case of indigenous nations

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<sup>48</sup> Costas M Constantinou, 'Irregular States or the Semiotics of Knight Errantry' 17 *Revue Internationale 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

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 the maritime entitlements of disappearing states, 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.

### **Disappearing States as Deterritorialised States**

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. The 'authority' would continue to represent the deterritorialised 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.<sup>49</sup> Given current projections of sea level rise by up to 0.8 metres by 2100,<sup>50</sup> 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 will be a key element in a disappearing state's ability to utilize its

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<sup>49</sup> 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>

<sup>50</sup> IPCC Fourth Report

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 than it is for 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 increasingly sophisticated satellite and other monitoring, control and surveillance 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 revived and modified role for the Trusteeship Council (or a revised version thereof) as the central coordinating international authority for deterritorialised states.

### **Conclusion**

Establishment and maintenance of maritime entitlements is a quintessential hallmark of statehood. Current international law does not adequately address the continued maintenance of these entitlements in the context of sea level rise. The issue is particularly pressing in the context of vulnerable small island states whose very existence is threatened by sea level rise. Protection of maritime entitlements and, in particular, of disappearing states can be progressed in the first instance by all coastal states declaring their baselines and, where relevant, entering into bilateral maritime boundary delimitation agreements with neighbouring states. However, a more lasting solution to the challenges to coastal states posed by sea level rise will require the international community to adopt new positive rules of international law to freeze existing baseline claims. For states

whose very existence is threatened, recognition of a new category of state, able to capitalize on existing maritime entitlements, will also be needed.

It is acknowledged that, in an international community still based on the Westphalian notion of states, it may not be realistic to envisage the continuing existence of deterritorialised states *ad infinitum*. This status might be viewed as transitional, lasting, perhaps, one generation (30 yrs) or one human lifetime (100 yrs). If climate change predictions come true over the course of the next century, 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 agreeing on the concept and parameters of deterritorialised state will give certainty and security to those states which fear inundation from rising sea levels and allow them to concentrate on the more immediately pressing tasks of sustainable development and adaption for as long as they can.