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When Land Disappears: How Digitization Could Preserve Statehood Beyond Montevideo

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Abstract

Climate change-induced sea-level rise threatens the territorial existence, statehood, and continuity of Small Island Developing States (SIDS). This article explores the legal and political implications of potential island submergence, focusing on sovereignty, international recognition, and preservation of state identity. It argues that digital statehood offers a viable framework for maintaining continuity and governance beyond physical territory. The article thereby examines how digital sovereignty can support SIDS in addressing climate displacement and safeguarding their national existence.

Keywords: Climate change, sea-level rise, digital statehood

I. Introduction

In 2021, Pacific Island nation, Tuvalu's foreign minister, Simon Kofe, standing knee deep in sea water declared, "We are sinking", to the United Nations Climate Change Conference held at Glasgow¹. For decades, climate change has represented a profound and pressing threat to our shared reality. It has led to wide range of interconnected and serious consequences such as wildfires and hurricanes. One of the major impact for small developing islands: rising sea levels. In case green-house gas emissions continues as it has, the global average temperature would increase by 1.5 degree Celsius, resulting in an uptick in sea level rise among natural disasters². Kiribati islands, Tebua, Tarawa and Abanuea can vouch for that³. Apart from the physical danger, rise in sea level can

endanger the very existence of SIDS, thus raising questions with regards to its statehood.

To answer this question, this article will proceed as follows. It will first establish that the criteria for statehood under Montevideo⁴ are irrelevant to the question of statehood for quasi-submerged and submerged SIDS (Section II.A). It subsequently asserts that the Convention's practical application cannot provide a sound framework for continued recognition of quasi-submerged and submerged SIDS (Section II.B). Nevertheless, this article reveals an argument that de-territorialized states should continue to be recognized (Section II.B). This article will then look for the most viable option for SIDS to ensure the state's continuity and ultimately provides arguments on why digital state is the best option (Section III) and the steps to effectuate it (Section IV).

In order to systematically assess the content and main arguments, I have adopted doctrinal methodology. Although paucity of state practice would constrain doctrinal analyse, it still remains one of the most suitable methods for this article as the question of statehood of SIDS is primarily a matter of legal interpretation.

This article tries to fill three gaps in literature with regards to submerging islands and statehood. Firstly, there is insufficient literature on the question of whether continuity of submerging states is relevant with respect to Montevideo Convention. The works mostly focus on morality and sovereign equality⁵ and it is important to determine if the current political and legal landscape is suitable for the current climate crisis. Secondly, the question of whether the solutions for submerging states can retain sovereignty and statehood remains underexplored in literature, which remains grounded in territorial and population-based solutions⁶. Lastly, not many writers⁷ have started to engage with digitalization and sovereignty by extending the analysis to statehood itself.

II. Montevideo Convention and Recognition of Submerging SIDS

A. Montevideo Convention in the International Law

As suggested by Grant,⁸ there is no definition of State that applies universally. Even the Charter of United Nations or the International Law Commission⁹ has not defined state. However, the most accepted definition, even though the Convention is not widely signed or ratified, has been provided in the section 'On the Rights and Duties of States' of the Montevideo Convention which has been inspired by George Jellink¹⁰ elements of State. The Convention proposes four main criteria: A permanent population; A defined

territory; Government; Capacity to enter into relations with other states.¹¹ These criteria have been interpreted by various scholars.¹²

Among the criteria of the Convention, some authors believe that one of the significant challenges faced by SIDS is loss of their territory. Defined territory has been referred to, as a portion of the Earth's surface notwithstanding the ill-definite boundaries.¹³ There are three main possibilities that can arise to the territory in case of a sea level rise: a) island states could decrease itself into a dimension of a rock as per United Nations Law of Sea Convention¹⁴ (UNLOSC), b) reduce to low tide elevation and c) get submerged fully. The territorial effectiveness criteria would be fulfilled in the initial scenario as rocks qualify as land provided it can sustain¹⁵ "human habitation or economic life of their own". However, in the latter cases, the situation would be different. Article 13(1) of UNCLOS defines¹⁶ a low-tide elevation as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". The Montevideo criteria would remain unfulfilled in this case as provided by ICJ in *Qatar v. Bahrain* (2001). The court rebutted¹⁷ Bahrain's argument, "that low-tide elevations by their very nature are territory" and contended that "existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands." It was further mentioned that it would not qualify as an island, even in case there is presence of light house or any other artificial installations.¹⁸ In case of the third possibility, submerged state, majority of the land would remain submerged at high tide. In such cases, it would be hard to sustain economic life¹⁹, thereby disqualifying the criteria.

Antagonists posit broader understanding of territory extending beyond the presence of physical land²⁰ by providing instances of sovereign entities without territories perceived as States. They argue that the Sovereign Order of Malta continued to establish their legal personality even after having been deprived of their territory.²¹ However, the above example deals with cases where state becomes extinct owing to political or military activities. None of them deal with involuntary displacement of population permanently from the territory²² nor is there a precedent for the case of submergence of islands.

An overarching legal concept regarding islands is their habitability which is linked to the Convention's criteria of population. The term population means that there is a requirement for a permanent set of residents in a specific territory.²³ Even though, Article 1 does not set a specific number of people to qualify as permanent population, estimation of minimum quantitative standard can be derived from the argument of Jon Van Dyke. He says that, it takes stable community of 50 people to differentiate islands in Art. 121(1) UNCLOS from uninhabitable rocks as per Art. 121(3) UNCLOS.²⁴ Even

before losing a territory, sea level rise can cause other practical problems in the life of the community such as contamination of freshwater, damage of infrastructure and even disruption of social and cultural considerations.²⁵ Some or all of these factors may lead the population to migrate, leaving the land uninhabitable. Thus, an endangered state is likely to lose its permanent population²⁶ long before its territory actually disappears, thereby defying the criteria.

The third requirement of government can be discerned in two ways:²⁷ “the actual exercise of authority and the right to exercise that authority.” This is closely connected with the other two criteria and mostly depends on the level of control. The requirement of effective government underwent change from second half of 20th century considering the new realities of the modern world.²⁸ As long as the island states maintain a population nucleus capable of forming a political organization which can govern the state, the criteria would be satisfied. In case, the impacts of climate change worsen, the government can operate from a host state as a government in exile.²⁹ However, the autonomy of SIDS would be at stake.³⁰ The authorities would be dependent on the host state and could enjoy competences which has been granted to them. Moreover, the concept of government in exile aims to return to their home state and hence ambiguities of long-term viabilities exist, making it unsuitable for submerged islands. Lastly, capacity to enter into relation with other states are seen³¹ as an integration of independence and effective government; would also be compromised in this situation.

Additionally, scholars have argued,³² “[o]ne cannot contemplate a State as kind of a disembodied spirit[;] . . . there must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority.”

In summary, the Montevideo criteria are ill-equipped to cope with the unprecedented challenge of climate change, sinking islands. The criteria were formulated at a time when territorial changes was primarily a consequence of political means and did not anticipate climate change induced territorial extinction would be the challenge for statehood today.³³ Thus, relying on this framework would render submerging island states legally invisible precisely at the moment when international legal protection is most needed.

B. Continuity of SIDS

Arguments have been raised in support of continuity for SIDS.³⁴ It has been contended that continuity shall be presumed even if submerged if the state has fulfilled the Convention’s criteria previously. When taking into consideration the concept of continuity of states, Shaw notes³⁵ that “one has to consider the classical criteria of statehood together with assertions as to status made by the parties directly concerned and the attitudes adopted by third States and international organizations.”

Continuity has been presumed previously in cases of lack of actual authority owing to political matters or by natural disasters.³⁶ For instance, during WWII, passports issued by governments in exile were not questioned.³⁷ It can broadly be argued that the counter arguments cannot be guaranteed due to absence of state practice³⁸ with respect to SIDS. There is no precedent for the loss of entire territory and displacement of the entire population with no means of reversal of the situation.

Moreover, as per the Sameness doctrine,³⁹ continuity shall be presumed only when the States are fundamentally the same in spite of changes to its borders, population and governance. When territory is submerged and population displaced, it would be difficult to argue that the state is the same.

Nevertheless, since climate change would revamp the world, there is a need for 'creative interpretation of law' with regards to continuity.⁴⁰ SIDS are highly vulnerable which they have established by being part⁴¹ of the Alliance of Small Island States (AOSIS). Denying continuity of statehood of submerging states would lead to loss of citizenship status for the citizens.⁴² Furthermore, continuity is essential to maintain the international legal personality of the states. It would help them retain the membership in international organizations, maintain their treaty rights and enjoy their sovereignty. Hence, in order to secure practical benefits, it is important for the statehood of submerging and quasi-submerging SIDS to continue. However, in light of the inadequacies of the Convention, states cannot rely on the traditional doctrine. Consequently, there is compelling need for SIDS to sought recourse to various remedial measures in order to ensure continuity.

III. Array of Options Available to the SIDS

A. Cessation

It would include acquisition of a territory and relocating its population such that it shall continue to be the same state despite the new territory. Full cessation of sovereignty is vital for the population not to be rendered stateless. Furthermore, it is important for other states to recognize that the island state has been established in a new territory.⁴³ Cessation could take place through a treaty between states such as in the Australia-Tuvalu Falepili Union. The treaty acknowledges⁴⁴ that "the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise". A stream of legal scholarship has lauded⁴⁵ the treaty by pointing out that it protects the islands state's citizens from being exposed to further impacts of climate change and as a means for improving the human capital of Tuvalu. However, they fail to recognize the cost for its achievement.⁴⁶ It could mean the island states not only to be dependent on other states

but also the government would find it difficult to enforce its laws and provide basic rights to its citizens. As Yamamoto and Esteban conclude,⁴⁷ “The suggestion to apply this solution ... seems to be misplaced because it overlooks how developing States could face great challenges when trying to apply an instrument that was used to increase territorial influence of developed States in the past.”

As an alternative to cessation, the possibility of purchase of land has been proposed by Kiribati.⁴⁸ However, private purchase of property is different from sovereign ownership. In international law, territory is understood with respect to governing power exercised and not by adopting private law analogies.⁴⁹ As noted by Crawford,⁵⁰ “the persistent analogy of territorial sovereignty to ownership of real property is misguided”.

B. Resettlement as a Reparation

The inability of states to control their emissions should result in obligation of full reparation for the injury caused. It could be asserted under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) for failure “to exert sufficient regulatory control over emission activities within their jurisdiction so as to meet their international obligations”.⁵¹ Though these solutions seem to be apt, it is impractical.

The island needs to seek claim under ARSIWA, it needs to prove that it has been injured,⁵² which in this case is complete submergence of island. However, this is challenging since the island needs to maintain statehood to seek reparation under this treaty, which cannot be guaranteed upon complete submergence. Amending this would be complex and hence unlikely.

C. Merger

The merger of states can either lead to formation of a new state or the island state being assimilated into an existing state.⁵³ The 1961 Convention and the Draft Articles on the Nationality of Natural Persons in Relation to Succession of States offers relevant insight in this matter. Art. 10 of the Convention provides⁵⁴ that citizens of the predecessor state shall acquire the nationality of the host state provided there is no treaty specifying otherwise. The Draft Articles broadens the scope by providing⁵⁵ that “the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State”. Although it can lead to relocation of inhabitants in either case, it can cause several other concerns. Firstly, the inability of SIDS to enter into diplomatic relations and transfer of maritime zones of island to the host state⁵⁶. Even if the host state may introduce measures to alleviate such problems, the extent of its attainment would depend on the actions of the hosting state. Secondly,

it could result in erosion of culture and indigenous knowledge; as suggested by a Tuvaluan Government Official:⁵⁷

There's traditional knowledge on when crops certain crops will grow or should be harvested like bread, fruits. The root crops we call 'pulaka'- it's like taro or tapioca. And there's traditional knowledge on when these crops should be planted and when they should be harvested - Tuvaluan Government Official.

D. Creation of Artificial Islands

Artificial islands have not been specifically defined in any formal treaty.⁵⁸ In a general sense, it is understood to be human made structures created in water bodies.⁵⁹ Researchers from the University of Southampton, the Tyndall Centre for Climate Change Research at the University of East Anglia and TEDI-London, working with Maldivian scientists⁶⁰ portrayed that construction of raised islands can provide a solution to sea level rise, thus leading to the construction of the artificial island of Hulhumalé next to its capital Male. Nevertheless, the sinking World Islands in Dubai⁶¹ illustrate that it does not offer a sustainable solution. Additionally, scholars like Wong⁶² considers the issue of whether artificial islands qualify as defined territory, a debated issue in international law. Crawford, for instance, notes⁶³ that “artificial islands cannot form the basis for territorial states any more than can ships”. This statement seems flawed as ships are very different from artificial islands. However, under UNCLOS, artificial islands do not qualify as islands and in the context of continental shelves⁶⁴ and Exclusive Economic Zones (EEZ), ‘artificial islands’ do not fit in the definition of islands. Moreover, the law is not clear whether artificial islands would satisfy the statehood criteria as little literature exist on this topic.⁶⁵

IV. Emergence of the Digital State

A digital state can be defined as a state encompassing people and AI agents existing in the digital space.⁶⁶ It makes use of computing technologies to link the digital nation to a specific physical space. While, SIDS have resorted to land reclamation projects, it does not provide permanent relief.⁶⁷ Being a digital state implies recreation of important characteristics of the country including historical documents, cultural heritage and practices. Furthermore, the government here transforms from being a centralised actor to a floating one, thus making sure that citizens of SIDS cease to get absorbed into another state and maintains autonomy in governance. This system provides the most viable solution as it preserves state's national identity and political authority.⁶⁸ An argument against this approach is to the effect that physical territory remains indispensable to digital territory⁶⁹ because “it serves as a crucial historical function as a

basis for state sovereignty” and due to the cultural ties associated with it. However, this is non-sequitur, as territory is not constitutive of sovereignty. For instance,⁷⁰ governments of Netherlands and Norway were deemed to be recognized as states despite not having effective control over their territory during German occupation in WWII. Therefore, if a state can be effectively governed, the purpose of territory can be fulfilled. Moreover, the webpage of Digital Tuvalu shows that it can meaningfully preserve the state’s rituals and culture, thereby proving that culture is portable even if emotionally tied to the land.

Furthermore, it might seem to the international community that it is better to pursue the above stated options than aiding to provide technical tools and scientific expertise. Proponents of such an approach fail to recognize that this attitude not only disregards the needs of the affected population but also braces neo colonial discourse since it is more cost effective from the standpoint of rich states which are primarily responsible for the effects on SIDS due to their emissions.⁷¹ Overall, digital statehood offers more coherent solution to continuity of statehood as it preserves international legal personality by not diluting sovereignty unlike other methods.

V. Conclusion

In sum, extinction of state by submergence is no longer a far-fetched hypothetical. The Montevideo Convention’s criteria, while historically influential, postulate stable territorial and demographic conditions and thus fail to account for the irreversible loss of territory caused by sea-level rise. Although continuity of state offers an important normative safeguard against premature extinction of statehood, existing international law provides insufficient state practice to secure continuity in cases of submerging islands, thereby leaving affected states in a position of legal uncertainty. In response to this impasse, the article has evaluated alternative mechanisms and has shown digital statehood to be the most meaningful framework capable of preserving international legal personality.⁷²

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