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Policy Brief On Climate Change Governance State sovereignty revisited in the context of climate change: From statehoodness to statelessness

Project Acronym : Borderless
Project Full Title : Borderless Challenges: Redefining Sovereignty
Project Number : HFRI-FM17-1415
Classification : Public
Version Number & Date : 1.0 – 20/12/2021
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Policy Brief #2
State sovereignty revisited: From statehoodness to statelessness
in the context of climate change

“Apart from the fabled demise of Atlantis, the world has never experienced the physical disappearance of a state”.¹

States, and their peoples, are particularly vulnerable to climate change. According to the Migration Data Portal, it is estimated that in 2019, approximately 5.1 million people in 95 countries and territories were living in displacement as a result of weather-related disasters and changes in climatic conditions.² Already, five of the Solomon Islands have vanished due to rising sea levels,³ while fears are being expressed that over the next century, even more coastal states will experience substantial changes to their territory linked to global warming, to name a few, rising sea levels, recession to shorelines, shrinking sea ice and loss of arable land. Indeed, the Climate Vulnerable Forum Virtual Summit identified 48 islands that are expected to be completely submerged by 2100, while Tuvalu is the first island state to become uninhabitable due to rising sea levels, leaving its people utterly unprotected.

Climate change may have implications not only for the enjoyment of basic human rights of the peoples of the affected states such as the right to life, the right to a healthy environment, the right to food and shelter, but may also undermine the physical territory of the States, and ultimately their very same existence. The criteria of statehood, as set forth in the 1933 Montevideo Convention on the Rights and Duties of States, were formulated without consideration of the climate change, which has emerged as a phenomenon and a threat quite recently. Admittedly, a rapidly changing climate is placing island states in particular risk of becoming submerged due to rising sea levels and their populations in move, precipitating a discredit of the concept of sovereignty.

This Policy Brief seeks to review the approaches expressed in relation to disappearing States and the significance of climate change for the concept of sovereignty and examine whether the concept of sovereignty should be revisited.

A. The climate change conundrum

The term ‘climate change’ is to be understood in this Policy Brief within the meaning of the United Nations Framework Convention on Climate Change (UNFCCC), as ‘a

¹ Rayfuse, R., *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood*. 41(6) *Environmental Policy and Law* 281-287 (2011), at p.1.

² https://migrationdataportal.org/themes/environmental_migration

³ Simon Albert, Javier Leon, Alistair Grinham, John Church, Badin Gibbes and Colin Woodroffe, ‘Interactions between Sea Level Rise and Wave Exposure on Reef Island Dynamics in the Solomon Islands’, 11 *Environmental Research Letters* 1-9 (2016).

change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability'.⁴ Rising sea levels and land degradation as a result of climate change definitely impacts the territory of a State, but they are also exacerbating factors that can create prompt migration. Climate change poses immediate and far-reaching threats to people and communities around the world with implications to the full enjoyment of human rights.⁵ The low-lying, Small Island Developing States (SIDS) are both geographically and economically more susceptible to climate change-related effects.⁶ Indeed, the World Bank has estimated that three regions (Latin America, sub-Saharan Africa, and Southeast Asia) will generate 143 million more climate migrants by 2050,⁷ thus potentially leading to global crisis and international instability.

Climate change is by definition borderless; it cannot affect one state without affecting, even slightly, the neighbouring states. At the same time, it is transborder, attributable to States in certain cases. Even so, it is very hard to establish responsibility of one state for the adverse effects of climate change created in another. Due to its borderless and transborder nature, it is argued that climate change can only be mitigated through cooperation by all members of the international community.⁸ In fact, all contracting States to the UNFCCC are under the common but differentiated obligation to effectively reduce their carbon emissions,⁹ while, pursuant to the principles of due diligence¹⁰ and vigilance,¹¹ States must not cause any harm to territory beyond their national jurisdiction.¹²

⁴ United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, 31 ILM 849, 9 May 1992, Article 1 par. 2.

⁵ Human Rights Council (HRC) Resolution 7/23, Human Rights and Climate Change, UN Doc. A/HRC/RES/7/23, 28 March 2008.

⁶ Susannah Willcox, A Rising Tide: The Implications of Climate Change Inundation for Human Rights and State Sovereignty, 9 (1) *Essex Human Rights Review* (2012).

⁷ Kumari Rigaud, Kanta, Alex de Sherbinin, Bryan Jones, Jonas Bergmann, Viviane Clement, Kayly Ober, Jacob Schewe, Susana Adamo, Brent McCusker, Silke Heuser, and Amelia Midgley, Groundswell: Preparing for Internal Climate Migration. The World Bank, 2008, at p. 2.

⁸ OHCHR, Climate Change and Human Rights, at par. 99.

⁹ Preamble, Arts.3 par. 1, 3 par. 3 and 4 par. 1b UNFCCC; Principle 7, Rio Declaration on Environment and Development (Rio Declaration), *United Nations Conference on Environment and Development*, UN Doc. A/C.151/26/L.1 (1992); Stockholm Declaration on the Human Environment (Stockholm Declaration), U.N. Doc. A/C.48/14/L.2 (1972), Principle 23.

¹⁰ *Pulp Mills on the River Uruguay Case*, Argentina/Uruguay, Judgment, ICJ Rep.2010, par. 101; *Corfu Channel Case*, UK/Albania, Merits, ICJ Rep.1949, p. 22-23.

¹¹ *Armed Activities on the Territory of the Congo*, DRC/Uganda, Judgment, Declaration of the Judge Tomka, ICJ Rep.2005, p.352, par. 4.

¹² *Legality of the Threat or Use of Nuclear Weapons Case*, Adv.Op., ICJ Rep.1996, par. 29; *Trail Smelter Case*, USA/Canada, 1938, 3 UNRIAA 1905, p.1965; *Lac Lanoux Case*, France/Spain, 1957, 12 UNRIAA 281, p.308; Art.194 par. 21982 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3; A/RES/37/7(1982), Principle 21(d); International Law Commission (ILC): Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, II(2) *Yearbook of the International Law Commission* 2001, Art. 3; Submission of Tuvalu of 20/3/2009, in Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan, FCCC/AWGLCA/2009/MISC.4/Add.2, p. 9.

The challenges faced today across the globe vary, depending on the climate and socioeconomic settings; in the Arctic, scientists are concerned about the reduction of ice cover, while in the Mediterranean we have become witnesses of major wildfires and extended heat waves. These challenges will increase in the future, essentially interfering with the physical dimension of States (changes in seashores, displacement of populations) until they cease to exist.

B. The concept of sovereignty

Although “sovereignty” is a fundamental principle of international law, it is difficult to formulate an all-inclusive definition, given that “its meaning has been changing across historical and political contexts and has also been heavily contested at any given time and space”.¹³ Bodley defines sovereignty as “the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein”.¹⁴

The concept of sovereignty has evolved over time and the international community today is formed around the concept on Westphalian sovereignty, the latter understood as

“an institutional arrangement for organising political life and is based on two principles, namely territoriality and the exclusion of external factors from domestic structures of authority. Westphalian sovereignty is violated when external factors influence or determine the domestic authority structures. This form of sovereignty can be compromised through intervention as well as through invitation, when a state voluntarily subjects internal authority structures to external constraints”.¹⁵

Since the 1648 Treaty of Westphalia, state sovereignty has been regarded as “a system of political authority, based on territory, mutual recognition, autonomy and control”,¹⁶ “used to legitimize a strong and undivided power that could secure law and order in times of civil and religious wars”.¹⁷

Evidently, sovereignty is inherent to the existence of State, manifested internally as the supreme authority over all people and all things within a territory and externally in the

¹³ Max Planck Encyclopedia.

¹⁴ Bodley Anne, Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia, 31 *New York University Journal of International Law and Politics* 1993, at p. 419.

¹⁵ Krasner S., Sovereignty: Organized hypocrisy, in Steiner & Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), at p. 567-577.

¹⁶ Krasner, S., Rethinking the Sovereign State Model, 27 *Review of International Studies* 17-42 (2001), p.18.

¹⁷ Werner, W. & De Wilde, J., The Endurance of Sovereignty, 7(3) *European Journal of International Relations* 283-313 (2001), at p. 283.

relations between the States outside their national boundaries and their equal rights in mutual relations, as an expression of the principle of non-intervention in the domestic affairs of other States.¹⁸

It is nowadays generally acknowledged that the state-centered international order, as we know it, was established with the Treaty of Westphalia in 1648, and has been unaltered ever since. In this international order, the territory constitutes one of the fundamental elements both for the creation of states, and for the continuity of their existence. As Julio Barberis suggests, “[L]e concept territoire de l’Etat est en rapport avec celui de ‘souveraineté territoriale’ et le fait d’énoncer une définition de ‘territoire de l’Etat’ implique, dans une certaine mesure, de donner également une définition de cette dernière”.¹⁹ Does this mean that once territory is lost, and population is gone, sovereignty is lost with it? Ulrich Fastenrath has argued in this regard that “[A]ccording to international law, a State becomes extinct with the disappearance of one of the criteria of statehood (territory, people and government), either because it has physically ceased to exist or has merged into a larger unit or split up into smaller units, thereby removing the social foundation of the former State”.²⁰

Sovereignty is also closely linked to recognition. The constitutive theory of recognition asserts that the existence of States depends on their recognition by other States, while according to the declaratory theory, the act of recognition of a new State is “a political act, which is, in principle, independent of the existence of the new State as a subject of international law”.²¹ Conceding to the constitutive theory would mean that the States themselves may choose to formally recognize a State and consequently, to attribute the character of State to any entity, irrespective of whether such entity meets *stricto sensu* the criteria of statehood. This premise is particularly relevant to the climate change and its effects on the physical integrity of States, their population, and by extension, their autonomy and political independence.

C. From Statehood to Statehoodlessness: the loss of territory (or climate change affecting the territory)

In the classical doctrine of international law, the central function of the State has been to ensure the security of its population against external threats. However, in present years, States’ continuity, sovereignty, and territorial integrity is likely to be undermined not only by other States and traditional threats, such as aggression or use of force by third states, but also by non-traditional threats, such as climate change. Climate change

¹⁸ Max Planck Encyclopedia.

¹⁹ Julio Barberis, ‘Les liens juridiques entre l’Etat et son territoire: perspectives théoriques et évolution du droit international’, XLV *Annuaire Français de Droit International* 132-147 (1999), at p. 132.

²⁰ Ulrich Fastenrath, States, Extinction, 10 *Encyclopedia of Public International Law* 465-467 (1987), at p. 465.

²¹ Yamamoto, L. & Esteban, M., Vanishing Island States and Sovereignty, 53 *Ocean and Coastal Management* 1-9 (2010), at p.4.

affects all States and all persons living in their territory; however, the small island States are by nature more susceptible to be affected by climate change. In this regard, state disappearance becomes also pertinent when discussing the adverse effects of climate change and the question is when exactly States cease to exist.

In the *Reparation for Injuries suffered in the Service of the United Nations*, the ICJ defined states as “political entities equal in law, similar in form.....the direct subjects of international law”.²² The criteria of statehood are laid down in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States (Montevideo Convention), admittedly reflecting customary law,²³ which stipulates that “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States”.²⁴ Given that climate-change related changes are gradual processes that usually take time, it is crucial to indicate the point when the loss of statehood occurs. In this regard, the criteria of statehood should be examined one by one, to determine whether and to what extent these are affected by climate change. Indeed, the first danger one could identify is that states might lack at least one of the criteria that are essential to their existence, thus positioning them on the way to extinction and loss of sovereignty.²⁵

It should be recalled that statehood is based on the principle of effectiveness which focuses on the factual situation of whether a State has territory, population, government and a certain measure of independence; In the words of Oppenheim, “the formation of a new State is.....a matter of fact, and not of law”.²⁶ Though egalitarian in essence,²⁷ since it accords statehood to all entities meeting the above criteria, the principle of effectiveness excludes in practice many other entities from the international community, without taking due regard of the fact that, as Crawford states, effectiveness is nonetheless a *legal* principle,²⁸ therefore, the legality in the formation or extinction of a State should be equally satisfied.

²² *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Rep 1949, p. 174, at p. 177-8.

²³ *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua/USA, Jurisdiction/Admissibility, ICJ Rep.1984, par. 68,73; *Opinion No. 1* (Disintegration of the SFRY), Conference on Yugoslavia, Arbitration Commission (1991), 92 ILR 162; *Deutsche Continental Gas-Gesellschaft/Polish State*, German–Polish Mixed Arbitral Tribunal, 1929, 5 ILR 11, p.13; *Case of In Re Duchy of Sealand*, Administrative Court of Cologne, 1978, 80 ILR 683, p.685.

²⁴ Art.1, 1933 Montevideo Convention on Rights and Duties of States, 165 LNTS 19.

²⁵ R.Rayfuse & E.Crawford, *Climate Change, Sovereignty and Statehood*, Legal Studies Research Paper No.11/59, at p.1.

²⁶ *Oppenheim's International Law*, 9th ed, vol. 1, Burnt Mill: Longman, 1992.

²⁷ Jenny Grote Stoutenburg, *When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States*, in (eds)Michael B. Gerrard & Gregory E. Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, Cambridge University Press 2014, pp. 57-88, at p.58.

²⁸ J. Crawford, *The Creation of States in International Law*, 2nd ed, Oxford University Press 2006, at p. 5.

States are territorial entities.²⁹ This alludes that, regardless of the size of territory, or unfixed or disputed borders, some portion of the earth's surface on which the State exists, is essential.³⁰ This functional construction of territory as an object of sovereign control was first upheld in the *Island of Palmas* Arbitration, where Huber stated that "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state".³¹

Territory includes not only land, but also the sea adjacent to it. Pursuant to Article 2 of the UN Convention on the Law of the Sea (UNCLOS), a coastal State's sovereignty extends beyond its land territory to its territorial sea.³² Consequently, the sea borders are in fact an extension of the land territory and one cannot exist without the latter. Moreover, according to Articles 86, 88 and 89 UNCLOS, no state may validly claim sovereignty over any part of the high seas, while only States are entitled to claim maritime zones. With the above in mind, the assessment on the existence of statehood in cases of changes on the size of a State's territory depends on the composition of the State, i.e. whether the State is only one island, archipelagic or possesses also some area in mainland, since the sea-level rise as a result of global warming may have the following effects on a State's territory:

- a) it may reduce it significantly, up to the size of a rock, within the meaning of Article 121(3) UNCLOS,
- b) it may result in its total submergence, and
- c) it may result in the creation of a low-tide elevation, within the meaning of Article 13 UNCLOS.³³

In all three cases, the assessment of whether statehood still exists, differs. In the case of a rock, a small portion of territory still exists, though it is doubtful whether it suffices to assert statehood, since rocks are uninhabitable and cannot sustain human habitation. The same concern applies in the case of low-tide elevations. In *Qatar/Bahrain* judgment of the ICJ, the Court rejected Bahrain's claim that "low-tide elevations by their very nature are territory" and clarified that the existing rules "do not justify a general assumption that low-tide elevations are territory in the same sense as islands",³⁴ while there is the possibility of temporary or seasonal submergence of low-tide elevations,

²⁹ J.R.Weiner and D.Morrison, Legal Implications of 'Safe Passage': Reconciling a Viable Palestinian State with Israel's Security Requirements, 22 *Connecticut Journal of International Law* 233-312 (2006-2007), at p.246; J. Crawford, The Criteria for Statehood in International Law, 48(1) *British Yearbook of International Law* 93-182 (1976), at p.111; UN Doc. S/PV.383 (Dec. 2, 1948), p.41.

³⁰ J. Crawford, *The Creation of States*, supra 28, at p. 46. See also *North Sea Continental Shelf cases*, Germany/Denmark, Germany/Netherlands, Judgment, ICJ Rep.1969, pp.32, 33; O. M. Dajani, Stalled Between Seasons: The International Legal Status of Palestine during the Interim Period, 26 *Denver Journal of International Law & Policy* 18-26 (1997-1998), at p.26; UN Doc. S/PV.383 (Dec. 2, 1948).

³¹ *Island of Palmas Case* (1928), P.C.A.(Max Huber), 2 UNRIAA 829,838.

³² Art.2 UNCLOS.

³³ M.Gagain, Climate Change, Sea-level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans', 23 *Colorado Journal of Environmental Law & Policy* 77-120 (2012), at p.90.

³⁴ *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)*, Judgment, ICJ Rep. 2001, 40, at 100.

thereby negating, even for a short period of time, their qualification as territory. Therefore, should a functional construction of territory be accepted, an uninhabitable portion of land or better, a portion of land that cannot host a permanent population, cannot qualify as a territory of a State.³⁵

Consequently, the permanent submergence of an island state could signify the total loss of its territory and of its sovereign rights over its former maritime zones which then would become part of the high seas. In such case, it could be quite safe to conclude that the state has thereafter ceased to exist.³⁶ UNCLOS confirms this assumption; From Articles 40 par. 5 and 57 UNCLOS it derives that a submerged territory does not lead to any right to a marine area or any of its resources.

By the same token, even where no complete submergence occurs, island States whose size is reduced significantly but is uninhabitable would most probably be denied the ability to retain statehood, the only difference from the case of total submergence being that, depending on their location or proximity to other States, they could be absorbed by other States.

In such cases, it is difficult to predict the future of a State affected by climate change, given that the Montevideo Convention itself only deals with the issue of creation of statehood and not its extinction³⁷ and is therefore debatable whether the criteria of statehood mentioned therein are relevant to resolve situations where a State was lawfully created, but cannot retain statehood upon submergence of its territory because of climate change.³⁸

As regards this latter issue, the notion of ‘deterritorialized’³⁹ or *ex situ* States has been supported by a number of scholars which suggests that States might exist and bear rights and duties even after permanent loss (total or partial) of territory.⁴⁰ Such assertion is based on the idea that, once created, States are no longer required to possess territory throughout their existence.⁴¹ Indeed, there are examples of entities that have historically been considered sovereign even after temporary or permanent loss of territorial

³⁵ Jenny Grote Stoutenburg, *supra* 27, at p. 61.

³⁶ Thus, Krystyna Marek, *Identity and Continuity of States in Public International Law* (Paris: Librairie Droz, 1968), at p. 7; Matthew Craven, ‘The Problem of State Succession and the Identity of States under International Law’, 9 *European Journal of International Law* 142–162 (1998), at p. 159.

³⁷ R.J. Delahunty and J. Yoo, Statehood and the Third Geneva Convention, 104 *University of Pennsylvania Law Review* 2005; Rayfuse/Crawford, *supra* 1, at p. 5; J. McAdam, Disappearing States, Statelessness and the Boundaries of International Law, UN SW Law Research Paper No.2010-2, at p. 6.

³⁸ J. Crawford, *supra* 28, pp.673, 675-76, 700.

³⁹ M. Burkett, The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era, 2 *Climate Law* 345-374 (2011).

⁴⁰ K. Choo, Washed Away?: As Sea Levels Rise, Island Nations Look to the Law to Help Fend Off Extinction, 98 *ABA JOURNAL* 2012; J. McAdam, *supra* 37, at p. 7, 11.

⁴¹ Rayfuse/Crawford, *supra* 1, at p. 9; S. Stahl, Unprotected Ground: The Plight of Vanishing Island Nations, 23 *New York International Law Review* 1-52 (2010).

control,⁴² or governments-in-exile.⁴³ However, in such cases, the transfer of sovereignty requires the intention of the former State to relinquish territory and the exercise of sovereign powers by the new State,⁴⁴ while an arrangement similar to the UN Trusteeship System has also been proposed, where self-governance and self-determination could be maintained and elected citizens of the nation ex-situ would serve as trustees.⁴⁵

D. From statehoodlessness to statelessness: the loss of population (climate change affecting the population)

In the previous chapters, we established that the international order is constructed around the principles of state sovereignty, political and territorial independence, and non-intervention, while human rights apply within a state's jurisdiction. Without territory, and progressively maybe, without a state, people are no longer adequately protected and remain vulnerable to potential violations of their rights.

Back in 1990, the Intergovernmental Panel on Climate Change first stated that the "gravest effects of climate change may be those on human migration".⁴⁶ Indeed, extreme environmental conditions will inevitably give rise to mass flight from the affected States, creating internally displaced persons (IDPs), climate migrants, and stateless people. As the people of Maldives have argued, 'the loss of land and State renders all other rights, political and civil as well as economic, cultural, and social rights, unattainable. Climate change ... undermines the inherent dignity of the Maldives people as members of the human family [and] the very foundation and purpose of human rights as enshrined in the UDHR ... [T]he extinction of their State would violate the fundamental right of Maldivians to possess nationality and the right of the Maldives people to self-determination".⁴⁷

Admittedly, a permanent population is indispensable for the existence of the State, no matter the former's size. A State's population cannot by definition be transitory and only refers to people attached to certain territory.⁴⁸ According to the International Covenant on Civil and Political Rights (ICCPR), the states' obligations are limited to

⁴² These include the Sovereign Order of Malta and the Papal Sea, which was recognized as sovereign absent any territory between 1870 and 1929, see N. Cox, *The Acquisition of Sovereignty by Quasi States: The Case of The Order of Malta*, 6 *Mountbatten Journal of Legal Studies* (2002).

⁴³ R. Cohen, *The Concept of Statehood in United Nations Practice*, 109 *University of Pennsylvania Law Review* 1128-1171(1961); J. McAdam, *supra* 37, at p. 10-11.

⁴⁴ *Western Sahara Case* [1975], Advisory Opinion, ICJ Rep., 12; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* [2002], ICJ Rep., 303; *The Legal Status of Eastern Greenland (Denmark v. Norway)* [1933], PCIJ Rep., (Ser.A/B), No.53;

⁴⁵ Burkett, *supra* 39, at p. 364.

⁴⁶ First Assessment Report, Policy Maker Summary of Working Group II: Potential Impacts of Climate Change, Intergovernmental Panel on Climate Change [IPCC], at 103 (1990).

⁴⁷ Maldives, Submission to the OHCHR Under HRC Resolution 7/23, Human Rights and Climate Change, UN Doc. A/HRC/RES/7/23, 28 March 2008.

⁴⁸ *Western Sahara*, Advisory Opinion, ICJ Rep.1975, p.41, par. 87.

those ‘within its territory and subject to its jurisdiction’, therefore it places limitations on its applicability with regard to the transnational impacts of climate change.⁴⁹ On the other hand, obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), are not subject to any jurisdictional limitation and, indeed, require state parties to ‘take steps, individually and through international assistance and cooperation’ towards the full realisation of all relevant rights.⁵⁰ To be noted that, in both cases, the nationality of the persons living in a State at a particular time is irrelevant as to the State’s obligations for respect of human rights. Inevitably, if the population of a sinking state abandons its State to resettle to another state, it is being thereafter under the effective control, and protection, of the receiving states.

While refugees and stateless people are being protected in international law, it is unclear whether environmental migrants are adequately protected as well. Indeed, there is no universal definition of “environmental migrants”, neither exists an agreement regulating who should be protected on grounds of environmentally induced migration and displacement. This gap exists in all related international law regimes, including refugee law, environmental law, the law on stateless persons and human rights law. This protection problem is the same both for environmental migrants to cross an internationally recognized border due to climate change, and for internally displaced persons. Arguably, environmental migrants are not protected by the Geneva Convention Relating to the Status of Refugees (Refugee Convention)⁵¹ and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol)⁵² and in this regard, scholars have been advocating towards a new international treaty for the protection of climate-change displaced persons.⁵³

At the same time, a ‘presumption against statelessness’ exists in international law.⁵⁴ Article 15 of the Universal Declaration of Human Rights [UDHR] recognizes a right to a nationality,⁵⁵ which entails the prevention of statelessness. Similarly, Article 1 of both the ICCPR and ICESCR stipulates that ‘all peoples have the right of self-determination’, in virtue of which they ‘freely determine their political status and freely

⁴⁹ International Covenant on Civil and Political Rights (ICCPR), 993 UNTS 3, 16 December 1966, entered into force 3 January 1976

⁵⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 December 1966, entered into force 3 January 1976

⁵¹ 1951 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁵² 1967 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁵³ Bonnie Docherty and Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 *Harvard Environmental Law Review* 349–403 (2009). *Contra*, Jane McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 *International Journal of Refugee Law* 2–27 (2011).

⁵⁴ Convention on the Reduction of Statelessness (30 August 1961), 989 U.N.T.S.175 [1960]; Convention relating to the Status of Stateless Persons (28 September 1954), 360 U.N.T.S.117 [1960]; Protocol Relating to a Certain Case of Statelessness (12 April 1930), 179 LNTS 115 [1937].

⁵⁵ *Universal Declaration on Human Rights*, GA Res.217A, UN GAOR, 3d Sess., 1st Plen.Mtg., UN Doc.A/810 (12 December 1948), art.37.

pursue their economic, social, and cultural development'.⁵⁶ The Convention on the Prevention of Statelessness⁵⁷ and the ILC Draft Articles on Nationality⁵⁸ both recognize a duty to prevent statelessness during transfers of sovereignty⁵⁹ as a corollary of the right to a nationality.⁶⁰ In all the above legal instruments, the right to self-determination,⁶¹ is understood to denote a right to a sovereign State.⁶² Last but not least, it should be recalled that in the *Advisory Opinion Concerning Acquisition of Polish Nationality*,⁶³ and later in the *Certain Phosphate Lands in Nauru (Nauru v. Australia)*⁶⁴ the ICJ hesitated to accept people becoming stateless when other alternatives exist, such as obtaining the nationality of a new State.⁶⁵

Against this backdrop, the legal status of a population depends on the existence of a host State, and it is unclear whether in the case of disappearing and sinking States, those citizens will become stateless persons, or landless citizens of a state that still exists, but is inhabitable.

Conclusion

This Policy Brief sets out the current state-of-play regarding sovereignty in international law, and its changing nature as a result of climate change. As explained, the concept of sovereignty has become a controversial issue among international lawyers and academics. Some argue that a re-conceptualization of sovereignty “will require not only a reorientation of regional states’ perceptions of each other, but also a new understanding of the place of human societies as a wholly-owned subsidiary of the natural world”,⁶⁶ while others see it as an opportunity for cooperation between nations in terms of recognition and legitimization of an international law player.⁶⁷

⁵⁶ Additionally, see General Assembly Resolution 637A (VII), The Right of Peoples and Nations to Self-Determination, 20 December 1952; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276*, International Court of Justice (ICJ) Advisory Opinion (ICJ Reports 1971), 313-312 at paras. 52-53; *Western Sahara*, ICJ Advisory Opinion (ICJ Reports 1975), 31-33 at paras. 54-59.

⁵⁷ *Convention on the Reduction of Statelessness*, *supra* 54.

⁵⁸ ILC, *Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)* (1999), UN GAOR, Supp.No.10, UN Doc.A/54/10 23.

⁵⁹ *Cf. Advisory Opinion on the Exchange of Greek and Turkish Populations*, P.C.I.J. Rep. (Ser.B), No.10,19.

⁶⁰ J. Crawford, *supra* 13, at p. 161.

⁶¹ M. Pomerance, *Self-Determination in Law and Practice* (1982), p.48; K. Knop, *Diversity and Self-Determination in International Law*, Cambridge University Press, 2002, p.87.

⁶² *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (24 October 1970), GA Res.2625 (XXV), UN GAOR, 25th Sess., UN Doc.A/810, 122, Principle V.

⁶³ *Acquisition of Polish Nationality* [1923], Advisory Opinion, P.C.I.J. Rep. (Ser.B), No.7; ILC, *Draft articles on Diplomatic Protection* (2006), UN GAOR, 61st Sess., Supp.No.10, UN Doc.A/61/10.

⁶⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)* [1992], ICJ Rep.

⁶⁵ P. Weis, *Nationality and Statelessness in International Law* (1979), at p.75 *et seq.*

⁶⁶ Habib, B., *Climate Change and the Re-imagination of State Sovereignty*, 2015, available at <https://www.e-ir.info/pdf/59505>

⁶⁷ Marcus Arcanjo, *Has Climate Change Rendered the Concept of Sovereignty Obsolete?*, A Climate Institute Publication, January 2019.

Many solutions have been proposed to remedy the loss of territory precipitated by climate change. Notably, the creation of artificial territory, in the form of artificial islands, presents significant advantages since it permits people to remain in their ancestral land and does not force them to resettle. On the other hand, such constructions can be heavy on the marine environment,⁶⁸ not to mention that their cost is insurmountable and thus, could not be regarded as a viable solution, especially for the small island states. Moreover, the question poses itself: Could artificial islands be considered to constitute a State's territory? Crawford was arguing that "artificial islands cannot form the basis for territorial states any more than can ships",⁶⁹ however extended state practice of creation of artificial islands by the affected States could lead to a new regard of state territory, opening at the same time a whole new discussion on the legal nature of territory, and subsequently, of statehood and state sovereignty.⁷⁰

Along the same vein, the solution of purchase or lease of land from another state raises the same questions.⁷¹ Purchase of land is to be distinguished from the sovereign acquisition of land, the difference being that the territory entails the right to exercise sovereign rights to the purchased land, as opposed to a deed of ownership over a piece of land issued according to the provisions of national law.⁷² The shortcoming of this solution is that territory becomes an asset that can be exploited, with the subsequent risk of said territory being disconnected from the State, as not something intrinsic to it.

Alternatively, the concept of "deterritorialized states" or *ex-situ* sovereignty is gaining ground, although, as Reyfuse clarifies, it is not in her intentions to suggest "a new category of international personality available to peoples, however defined, raising current or future self-determination claims in context of existing states".⁷³

Although all theories offer a way out from the changing reality that is upon us, it may be suggested that they open the can of worms to a relativisation of the relationship between the State and its territory. Accepting the existence or continuation of a State without a territory could lead to new forms of State with unpredictable consequences, especially nowadays, in the era of technological revolution. In accepting so, a cyber-State, with a cyber-government, could also be a State under international law, assuming that all other criteria of statehood exist.

⁶⁸ In the 2016 South China Sea Arbitration, the tribunal found that "China's artificial island building activities have caused devastating and long-lasting damage to the marine environment", see *South China Sea Arbitration (Philippines v China)* (2016) PCA Case No. 2013-19, par. 983.

⁶⁹ See James Crawford, Islands as Sovereign Nations, 38 *International and Comparative Law Quarterly* 277-298 (1989), at p. 279.

⁷⁰ William Thomas Worster, Territorial Status Triggering a Functional Approach to Statehood, 8 *Penn State Journal of Law & International Affairs* 118-180(2020).

⁷¹ The idea was first expressed in 2008 by then President of the Maldives, Mohamed Nasheed, but was implemented by Kiribati in 2014, when it purchased two thousand hectares of land in Fiji. For more information see Emma Allen, Climate Change and Disappearing Island States: Pursuing Remedial Territory, *BRILL Open Law* 1-23 (2018).

⁷² M. Shaw, *supra* 6, 489.

⁷³ Rosemary Rayfuse, International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma, in University of New South Wales Faculty of Law Research Series, at 1 (Univ. of New South Wales, Paper No. 52, 2010).

Karl Smitt famously said that sovereign is he who decides on the state of exception. In cases of States with a defined territory and population, the question of who decides answers itself. But what happens in the exceptional case of a disappearing State, who shall decide for this State and its population? Can the State continue to exercise unobstructed governmental authority, even with certain limitations? International law knows of examples of States that are recognized as proper subjects of international law, but lacking a standing army or full-scale external affairs, and having relinquished these powers to other States.⁷⁴ Yet, a government hosted in another State's territory is as independent as the host State permits, and until the latter withdraws its hospitality, and in any case it is doubtful whether it has the authority to decide on the core functions of state, such as public health and security, or taxation.

All in all, one cannot deny that global warming precipitates changes in the way the international community has been constructed. Changes in the components of the States will be a reality, sooner than later. Whether these States shall emergence as quasi-sovereign entities, retain their old status or disappear, remains to be seen. Clearly, the need to revisit the classical concept of sovereignty is present, however we are still far from abandoning it.

⁷⁴ M.Sterio, *supra* n.14, at p. 217; Crawford, *supra* 28 at p. 120, 124.