

James Ker-Lindsay

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Climate Change and State Death

James Ker-Lindsay
London School of Economics

Abstract

It is widely accepted that states can die. Through conquest, mergers and disintegration states have disappeared as political entities in the international system. In such cases, there are clear legal rules defining how the international community can and should respond. But what happens if a state ceases to meet the objective criteria of statehood, most notably by failing to have a defined territory? As is shown, there are no defined rules to manage such an eventuality. This is largely because it has never happened. However, processes of climate change mean that a number of atoll island states in the Pacific and Indian Oceans now face the real prospect of disappearing. In such circumstances, significant legal and political issues would arise. In addition to serious questions as to how to handle the displaced populations, there are also very important issues concerning the continuing recognition of such states and their place in international organisations. To this extent, if this option were to be pursued, there is a strong case to be made that it should be conducted in a collective framework.

Keywords: climate change, recognition, state death, statehood, United Nations

Introduction

It is now generally understood that climate change poses a grave threat to international security.¹ At the same time as rising temperatures will lead to droughts in large parts of Africa,² many low-lying countries in Europe and Asia face the prospects of catastrophic flooding. This is likely to lead to massive population displacement, food shortages, resource competition and an increased risk of conflict.³ However, for one group of countries the effects of global warming will be nothing short of apocalyptic. According to its most recent estimates, published in 2013, the Intergovernmental Panel on Climate Change (IPCC)⁴ estimates that the oceans will rise between 26 and 82 centimetres by the end of this century.⁴ This means that, in the decades to come, there is the very real chance that a number of island states in the Pacific and Indian Oceans will be completely submerged.⁵ At present, the four countries most at risk are Kiribati, Maldives, the Marshall Islands and Tuvalu.⁶

The possible disappearance of these countries poses very real challenges to international policy makers on several levels. First and foremost, there are serious questions about what will happen to the populations of these 'sinking states'. Where will they live? What will be

¹ Joshua S. Goldstein, 'Climate Change as a Global Security Issue', *Journal of Global Security Studies*, 2016 [Early view].

² Oli Brown, Anne Hammill and Robert McLeman, 'Climate Change as the 'New' Security Threat: Implications for Africa', *International Affairs*, Volume 83, Number 6, November 2007.

³ Shiloh Fetzek and Jeffrey Mazo, 'Climate, Scarcity and Conflict', *Survival*, Volume 56, Number 5, 2014.

⁴ Intergovernmental Panel on Climate Change, 'Climate Change 2013: The Physical Science Basis; IPCC Working Group I Contribution to AR5', 2013.

⁵ For an early work examining the effects of climate change on these countries see Jon Barnett and W. Neil Adger, 'Climate Change Dangers and Atoll States', *Climate Change*, Number 61, 2003.

⁶ Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', p.2. Yamamoto and Esteban, 'Vanishing Island States and Sovereignty', p.1.

their status? At the same time, it raises profound legal and political questions. As things stand, it is wholly unclear how the international community would handle the repercussions arising from the physical disappearance of these countries. In some instances, such uncertainty could well lead to territorial tensions and conflict.

In large part, the problems arise because climate change presents us with hitherto unknown problems. While it is widely accepted that states can die, traditionally this has been understood as the loss of independent existence.⁷ A new state replaces the old. While states as political entities may come and go, the land on which they have existed has remained all but 'constant over the past millennium.'⁸ With climate change this will no longer be the case. We are now faced with the real possibility of the full and final extermination of a number of countries; not only as defined political units in the international system, but also as geographic entities on the world map. In view of the fact that traditional legal thinking maintains that without territory there can be no state, climate change raises entirely new questions. Indeed, it fundamentally challenges our traditional understanding of state death. While we know how to handle the legal and political consequences of state death in cases of military aggression, or when states decide to unite or collapse in on themselves, what happens when the very territory on which a state is located disappears and its settled inhabitants are forced to leave, thereby undermining the very conceptual foundations of statehood? Given that there have been no modern examples of countries that have become defunct through the complete and irreversible loss of their entire territory, there are no ready answers to these questions.

While some observers have considered the implications of climate change and state death in the context of the of migration issues,⁹ or on the ways in which the state may be kept alive in some alternative form,¹⁰ the question of how one might address the extinction of 'sinking states', or 'disappearing states', as they have been termed, has largely been unexplored.¹¹ This article seeks to address the problem of state death caused by climate change by considering the wider implications of state extinction and by exploring the specific processes involved in any effort to declare a country to be no longer existent following the complete loss of its

⁷ James Crawford, *The Creation of States in International Law*, 2nd Edition (Oxford: Oxford University Press, 2006), pp.700-717. For the most significant works on this topic from an International Relations perspective see Tanisha M. Fazal, *State Death: The Politics and Geography of Conquest, Occupation, and Annexation* (Princeton: Princeton University Press, 2007); Norman Davies, *Vanished Kingdoms: The History of Half-Forgotten Europe* (London: Allen Lane, 2011); Karen Ruth Adams, *State Survival and State Death: International and Technological Contexts*, Ph.D. Dissertation, Department of Political Science, University of California, Berkeley, 2000.

⁸ Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', University of New South Wales Faculty of Law Research Series, Paper 9, 2009, p.2.

⁹ See John R. Campbell, Michael Goldsmith and Kanyathu Koshy, 'Community Relocation as an Option for Adaptation to the Effects of Climate Change and Climate Variability in Pacific Island Countries (PICs)', Final report for APN project 2005-14-NSY-Campbell, Asia-Pacific Network for Global Change Research, 2005.

¹⁰ See, *inter alia*, Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era', *Climate Law*, Volume 2, 2011; Michael Gagain, 'Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'', *Colorado Journal of Environmental Law Policy*, Volume 23, Number 1, 2012; Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty', *Ocean and Coastal Management*, Volume 53, Number 1, 2010.

¹¹ The most comprehensive analysis of this are Jane McAdam, "Disappearing States", Statelessness and the Boundaries of International Law', University of New South Wales Research Paper, Number 2010-2, 2010; and Jenny Grote Stoutenberg, 'When do states disappear? Thresholds of Effective Statehood and the Continued Recognition of 'Deterritorialized' Island States', in Michael B. Gerrard, (ed), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge: Cambridge University Press), 2013. See also Jenny Grote Stoutenberg, *Disappearing Island States in International Law* (Leiden: Brill, 2015).

territory. As will be seen, the challenges posed such a situation not only relate to whether and how states could withdraw their recognition of a submerged state, but also raise questions concerning the termination of the membership of international organisations and steps for dealing with the remaining population of such a country. As will be seen, these would pose huge questions for the international community.

Statehood and state death

The 1933 Montevideo Convention on the Rights and Duties of States is widely considered to lay out the key formal characteristics of statehood.¹² According to Article 1 of the Convention, ‘The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.’

Since they were first devised over eighty years ago, each qualification has been subject to further clarification. For instance, the requirement that a state should have a defined territory does not mean that its borders should be fixed in the final and definitive form at the time of recognition.¹³ A state may be recognised even if it is not in control of all the territory it views as its own.¹⁴ Likewise, while there is no argument over the condition that it should have a settled population, it is also accepted that the presence of a population in the territory concerned is not a sufficient condition in itself for statehood. Rather, it has come to be accepted that the political leadership of the new state should have come to power via some degree of ‘indigenous capability’ and that it ‘receives popular support’.¹⁵ Additionally, there is no specific minimum size – either in terms of land mass or population – for a state. Leaving aside the Vatican City, which holds a unique position in the international order of states, there are seven states that are less than 200 square kilometres in size and have a population under 70,000 people.¹⁶ As for the demand that the state must have a government, this does not just mean that a state has an ability to administer its own affairs. It must be in a position whereby it is actually doing so. In other words, a state must truly be independent and not merely a ‘puppet’ of another country or under de facto colonial rule.¹⁷ Finally, the qualification that an entity wishing to claim statehood must be capable of interacting with other states is no longer viewed as a characteristic solely limited to states.¹⁸ There are now a large number of entities and organisations that have, to some degree or another, the ability to enter into relations with states.¹⁹ Nevertheless, despite all these clarifications, the fact remains that any territory claiming statehood must have an effective and independent government, and with it an ability to enter into relations with other states, a settled population and a defined territory.

¹² Grant, *The Recognition of States*, p.122.

¹³ Crawford, *The Creation of States in International Law*, p.46.

¹⁴ However, its chances of gaining widespread recognition and membership of the UN are likely to be limited in the event of major territorial dispute with another state. Crawford, *The Creation of States in International Law*, p.49.

¹⁵ Scott Pegg, *International Society and the De Facto State* (Aldershot: Ashgate, 1999), p.26; John McGarry, ‘Foreword’, in Tozun Bahceli, Barry Bartman and Henry Srebrnik (editors), *De Facto States: The Quest for Sovereignty* (London: Routledge, 2004), p.x.

¹⁶ Crawford, *The Creation of States in International Law*, pp.47 and 52. The states in question are Monaco (1.5km² / 33,084), Nauru (21 / 11,218), Tuvalu (26 / 9,743), San Marino (61 / 30,472), Liechtenstein (160 / 34,927), Marshall Islands (181 / 54,313) St Kitts and Nevis (267 / 39,601).

¹⁷ That said, ‘a new entity established under occupation might, if able to establish its independence vis-à-vis the occupant, become a State, subject to cessation of hostilities with recognition by the previous sovereign.’ Crawford, *The Creation of States in International Law*, p.75 and p.83.

¹⁸ Keating, Joshua, ‘How to Start Your Own Country in Four Easy Steps’, *Foreign Policy*, February 2008.

¹⁹ Crawford, *The Creation of States in International Law*, p.61.

But what happens when any of these objective criteria of statehood cease to be met? While the nature of statehood and state creation has been subject to considerable investigation, rather less attention has been paid to the phenomenon of state death.²⁰ This is largely because instances of extinction are in fact extremely rare in the contemporary era. Of the 207 states have ceased to exist since 1816, only nine have disappeared since 1945.²¹ Crucially, the few examples of state death in the modern era have exclusively related to a change in the objective conditions of government. They have not involved any material change to the population or territory of the country. As a result, the three broad forms of recognised state extinction all relate to changes in governance: conquest, disintegration and merger.²²

Of these three forms, conquest is now considered obsolete. International law now holds that external military aggression no longer results in the final extinction of a state.²³ This was seen most obviously in the context of Iraq's invasion and illegal annexation of Kuwait, in 1990. UN Resolution 662 stated, the 'annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void...[and called] upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation.'²⁴ Instead, disintegration and merger are now the most usual forms of state death. In terms of the former, the most obvious examples are the dissolutions of the Soviet Union, Czechoslovakia and Yugoslavia in the early 1990s. As for mergers, the most prominent cases over the past half-century or so have been the union between Tanganyika and Zanzibar to form Tanzania (1964), the forcible union between North and South Vietnam (1975), the emergence of a united Germany (1990), and the merger of the Yemen Arab Republic and the Yemen People's Republic (1990).²⁵

Importantly, in all these cases the process of so-called state death in fact amounted to a fundamental change to the sovereign authority governing a territory. The land itself, and its population, continued to exist. Instead, the political authorities exercising political control over the landmass and the population changed, whether by (temporary) conquest, dissolution or merger. To this end, the legal situation was therefore fairly well understood and governed

²⁰ Crawford, *The Creation of States in International Law*, p.700, footnote 1. As Wong notes, from an international law perspective, 'Until now, state extinction has been treated as only of theoretical interest.', Wong, 'Sovereignty Sunk: The Position of 'Sinking States' at International Law', *Melbourne Journal of International Law*, Volume 14, Number 2, 2013, p.348.

²¹ Fazal, *State Death*, p.23.

²² In her seminal work on the subject, Fazal identifies four forms of state death: conquest, prolonged military occupation, federation or confederation, and dissolution. Fazal, *State Death*, pp.19-20. Davies names five modes of extinction. Four can be broadly mapped on to those presented by Fazal, namely: conquest, merger, implosion, liquidation. However, he also introduces a new category: 'infant mortality'. This is a rare occurrence. The best example is Ruthenia, which existed as a state for a single day, in 1939. Davies, *Vanished Kingdoms*, pp.621-634 and p.733. From a legal perspective, Crawford identifies four forms of state extinction: extinction by voluntary dissolution, extinction by involuntary dissolution, voluntary absorption, extinction by merger. Crawford, *The Creation of States in International Law*, pp.705-714. In line with the general position of international lawyers, and which will be explored shortly, he does not list conquest as a method of state death.

²³ As noted, 'belligerent occupation does not extinguish the State pending a final settlement of the conflict.' James Crawford, *The Creation of States in International Law*, 2nd Edition (Oxford: Oxford University Press, 2006), p.701.

²⁴ Iraqi forces were ousted from Kuwait the following year.

²⁵ For more on these cases see Konrad G. Bühler, *State Succession and Membership in International Organizations: Legal Theories Versus Political Pragmatism* (Leiden: Brill, 2001). As has been noted, South Yemen was serving on the Security Council at the time. The new Republic of Yemen simply replaced it.

by existing principles of state succession, which addresses situations where sovereignty over a territory passes from one state to another.²⁶

Matters become more complicated, however, when the discussion turns to the loss of effective loss of independent governance through internal disruption, or the complete loss of population or territory. Interestingly, in the case of the first of these, the loss of effective governance through internal disorder, this has not tended to result in state extinction in the modern era. One can readily highlight examples of countries that have little or no effective governance and yet have still been recognised as states by the international community,²⁷ often for a considerable period of time. Perhaps the most obvious example has been Somalia, which disintegrated into a patchwork of fiefdoms in the 1990s.²⁸ While Somalia ceased to be able to meet many of its duties and obligations, merely continuing to exist as 'a shell of sovereignty',²⁹ no effort was made to declare it extinct and withdraw recognition. Indeed, it even maintained a presence at the UN, albeit a somewhat forlorn one.³⁰ In such instances, the prevailing presumption is that any loss of government in such cases is temporary and that, 'the temporary ineffectiveness or absence of a government...does not affect statehood.'³¹

On the other hand, the complete loss of population would potentially pose a far more serious challenge to the continuing existence of a state. However, such a situation would seem to be highly unlikely in itself. One obvious way this could happen would be a natural disaster requiring complete evacuation. Although it is theoretically possible that this could occur, there are no recorded cases in the modern era.³² Disasters aside, in cases where the territory of the state remained intact, the prospect of state extinction due to the absence of a population appears to be extremely remote. For a start, the levels at which a state would become unsustainable appear to be very low, both in terms of population density as well as absolute population size. For example, Mongolia, the country with the current lowest density of any country, has 2 inhabitants per square kilometre. Meanwhile, Australia, Iceland, Libya, Namibia and Suriname all exist with 3 inhabitants per square kilometre.³³ More to the point, even where there is a population decline amongst the current indigenous population, there may well be steps taken to encourage immigration to counteract the demographic changes.³⁴

²⁶ James Crawford, *Brownlie's Principles of Public International Law*, 8th Edition (Oxford University Press, 2012), p.423.

²⁷ As Clapham stated, 'Entities which we have been accustomed to regard as states, at least for the purposes of studying them in international relations, sometimes fail to exercise even the minimal responsibilities associated with state power.' Christopher Clapham, 'Degrees of Statehood', *Review of International Studies*, Volume 24, Issue 2, April 1998, p.151. For more on this, see Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Leiden: Martinus Nijhoff, 2004). In the political science literature these have come to be called 'quasi-states'. Robert H. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1990).

²⁸ See Ken Merkhaus, 'Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping', *International Security*, Volume 31, Number 3, 2006, pp.74-106.

²⁹ Riika Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', *Nordic Journal of International Law*, Volume 73, 2004, p.34.

³⁰ See 'Fatun Mohamed Hasan: Somalia's U.N. Delegate Without a Government', *Washington Report on Middle East Affairs*, July 1992.

³¹ Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', p.6.

³² Perhaps the closest we have come to this was the evacuation of two thirds of the 11,500 people living on the Caribbean island of Montserrat, a British colonial territory, after the eruption of a volcano left large swathes of land uninhabitable. 'Montserrat evacuation remembered', *BBC News*, 12 September 2005.

³³ 'Population density (people per sq. km of land area)', *World Bank*, 2011.

³⁴ For example, in Serbia, in the face of a growing trend amongst young women to leave the villages in the rural south of the country, successful efforts have been made to persuade women from neighbouring Albania to marry Serbian men and settle in the areas. 'Albanian Brides Revive Serbia's Dying Villages', *Balkan Insight*, 8 January 2009.

In the worst case scenario, and again where there is no physical loss of territory, the more likely form of state death would most probably be some form of political union with a neighbouring state. Of course, if this were to happen, the international community would again be dealing with a traditional form of state death through merger. This would pose relatively few legal or political complications.

In contrast to the rather unlikely case of a state losing all of its population, but retaining its territory, the actual loss of the entire land mass of a country poses a far more fundamental and realistic challenge to statehood. The prevailing view in amongst international lawyers is that without territory there can be no state.³⁵ However, as with the example of depopulation, it is also a hitherto unknown event. There has not been a single example in modern history where the entire territory of a state has disappeared.³⁶ States may come and go as political entities. However, despite occasionally gaining or losing tracts of land through earthquakes or volcanic activity, the territory on which they have been constituted has remained a constant of the geography of the modern world. Indeed, as has been noted, ‘International law has assumed territory will always exist’.³⁷ And yet there is now a very clear danger that the complete loss of territory may now occur as a result of climate change. With rising sea levels there is a very real prospect that a number of states could be wholly submerged. Given that the loss of territory would necessarily also be accompanied by the loss of a settled population, thereby compounding the situation,³⁸ it seems almost impossible to conceive of the continued existence of a state under such extraordinary circumstances. Indeed, as one observer has put it, ‘the argument is so obvious as to be unnecessary. That a State would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (e.g. an island which would become submerged).’³⁹

Alternatives to climate change related state death

In view of the very real danger that they may be submerged within the next half century, the countries most at threat have already started to examine the ways in which to avoid extinction.⁴⁰ One of the most interesting, and widely cited, options on the table is the possibility of creating artificial islands that could be used to house the population and thus retain a physical presence on a defined piece of territory.⁴¹ This is already being explored by Kiribati.⁴² Meanwhile, other related suggestions are also being considered. These include building houses on piles above the sea or even maintain a small population in some form of placeholder construction, such as a lighthouse, that is specifically built to be a ‘sovereignty

³⁵ Former senior legal official, Foreign & Commonwealth Office, author interview, December 2013.

³⁶ Former senior legal official, Foreign and Commonwealth Office, author interview, December 2013.

³⁷ Wong, *Sovereignty Sunk*, p.348.

³⁸ Stoutenberg, *Disappearing Island States in International Law*, p.297.

³⁹ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd Edition (Geneva: Librairie Droz, 1968), p.7

⁴⁰ Former legal official, Foreign & Commonwealth Office, correspondence with the author, May 2014. The fullest treatment of this subject is to be found in Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Berlin: Springer, 2014).

⁴¹ See Michael Gagain, ‘Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims Through the ‘Constitution of the Oceans’’, *Colorado Journal of Environmental Law Policy*, Volume 23, Number 1, 2012; Yamamoto and Esteban, *Atoll Island States and International Law*, pp.157-168. See also, ‘Artificial island could be solution for rising Pacific sea levels’, Environment Blog, *The Guardian*, 8 September 2011.

⁴² ‘Drowning Kiribati’, *Bloomberg Businessweek*, 21 November 2013; ‘Kiribati President Says Australia’s Loyalty to Coalmines ‘Selfish and Unjust’’, *The Guardian*, 24 August 2015.

marker'. While these are certainly interesting possibilities, whether these measures would be enough to meet the criteria of defined territory is, at best, open to question.⁴³

Meanwhile, a range of other ideas have also been mooted. Another option is the possibility of moving the state to a new territory purchased from, or ceded by, another state.⁴⁴ For example, the Maldives at one point suggested that it would seek to establish a sovereign wealth fund to buy land in Sri Lanka, India or Australia.⁴⁵ More recently, Kiribati has purchased land in Fiji.⁴⁶ However, this option also faces significant shortcomings. As has been noted, '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.'⁴⁷ Certainly, the option of land purchase seems to have little support amongst existing states thus far. The idea received short-shrift from Australia and New Zealand when suggested by Tuvalu in 2001.⁴⁸ Of course, this may well change as the possibility of extinction becomes more likely.

An alternative suggestion is for the disappearing state to try to pursue a merger with another state, perhaps in the form of a federation or confederation.⁴⁹ In return for accommodating its population, the state may be able to bring with it certain territorial advantages, such as its ongoing claim to territorial waters, continental shelf and exclusive economic zone (EEZ).⁵⁰ While this would certainly be a rather more traditional form of state death, and could presumably be fairly easily accommodated, the problem is that the legal situation would by no means be certain. Indeed, it could quite possibly be challenged, either legally or militarily, by neighbouring states.

Meanwhile, a rather more radical option that has been suggested is to investigate the possibility for some form of deterritorialised statehood.⁵¹ Although this runs against the accepted wisdom of the Montevideo Criteria, advocates of this options have pointed to two precedents for such an incongruous state of affairs. The Vatican existed as a deterritorialised sovereign state from 1870 until it was ceded territory in Rome in 1929. Another commonly cited example is the Sovereign Order of Malta.⁵² In truth, neither model looks realistic. As

⁴³ Yamamoto and Esteban, 'Vanishing Island States and Sovereignty', p.5-6.

⁴⁴ British official, comments to the author, April 2014.

⁴⁵ 'Plan for new Maldives homeland', *BBC News*, 10 November 2008. 'Paradise almost lost: Maldives seek to buy a new homeland', *The Guardian*, 10 November 2008.

⁴⁶ Explaining the decision, President Tong stated, 'We would hope not to put everyone on [this] one piece of land, but if it became absolutely necessary, yes, we could do it.' 'Besieged by the rising tides of climate change, Kiribati buys land in Fiji', *The Guardian*, 1 July 2014. The article noted that some other states, for example Tuvalu, refuse to entertain the possibility of moving their population.

⁴⁷ Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', p.8.

⁴⁸ Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', p.9.

⁴⁹ Alfred H. A. Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' *Netherlands International Law Review*, Volume 37, Number 2, 1990, p.230.

⁵⁰ Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States', p.8. Yamamoto and Esteban, *Atoll Island States and International Law*, pp.199-202.

⁵¹ Yamamoto and Esteban, *Atoll Island States and International Law*, pp.202-203.

⁵² Formed in the middle of the eleventh century, and recognised by Pope Paschal II in February 1113, it was ousted from its last permanent home, in Malta, at the end of the eighteenth century. Today, it functions as an international humanitarian organisation based in Rome. Despite not having any territory, it maintains formal diplomatic relations with 104 states. It also has permanent observer status at the United Nations and has delegations or representations to a number of UN agencies as well as eleven international organisations; including at ambassadorial level at the European Union. Information on the Order can be found on its website < <http://www.orderofmalta.int> > (last accessed 24 February 2015). For more on the order see, C. d'Olivier Farran, 'The Sovereign Order of Malta in International Law', *The International and Comparative Law Quarterly*, Volume 3, Number 2, April 1954, pp.217-234.

noted, the Vatican is widely regarded as a rather special case in international politics. And while the Order of Malta may be a curious example of sovereignty without territory, although it has an international personality it is not in fact considered to be a state.⁵³ Nevertheless, other forms of statehood without territory could potentially be devised with sufficient political will. For example, one model that has been presented envisages a form of ‘ex-situ nationhood’. This would allow a people to exercise sovereignty as a population in perpetuity.⁵⁴

Finally, the international community could simply continue to act as though the state continues, even though the government no longer has any formal and effective control over its territory.⁵⁵ Clearly, there is a precedent for this. As seen, states have continued to exist even through they do not have an effective government, notably through processes of invasion and occupation. In such instances, international law ‘artificially constructs the continuation of the state’.⁵⁶ It may well be possible that the international community would somehow decide to adapt this precedent for use in the event that states do find themselves affected by climate change. Indeed, it has even been suggested that states have a moral duty to continue to recognise islands that have been submerged as a result of manmade climate change.⁵⁷ The question is whether this could really be a permanent state of affairs. While it is possible sea-levels may again drop, and allow the territory to be reclaimed, this would seem an unlikely outcome in anything other than the very long term. In view of this, ongoing ‘recognition...cannot create a situation that does not in fact exist: the continuity of a state cannot rest on recognition alone’.⁵⁸ Others have therefore suggested that this approach could be a stop gap measure that could be adopted for, say, 30-100 years.⁵⁹ This would allow time to ‘resolve uncertainties as to status and allow for new situations to be regularized’.⁶⁰

The challenges of climate change-related state death

Even if a temporary solution could be established, it would seem all but inevitable that at some point the status of the submerged country would have to be addressed. After a certain period of time, the international community would surely have to accept that the state in question has not only ceased to meet the Montevideo Criteria, but that it has no realistic chance of resurrection. Interestingly, however, this option has barely been considered so far. In most of the academic literature, it hardly merits a mention. Likewise, officials also seem to have ignored this option. Certainly, it has not been discussed openly or privately by the British government.⁶¹ Even though Kiribati, the Maldives and Tuvalu are all former British colonies and members of the Commonwealth of Nations, and London has taken a very close interest in the effects of climate change on these states, the United Kingdom has never

⁵³ Former senior legal official, Foreign and Commonwealth Office, author interview, December 2013.

⁵⁴ Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’, *Climate Law*, Volume 2, 2011.

⁵⁵ Wong, *Sovereignty Sunk*, p.376.

⁵⁶ Wong, *Sovereignty Sunk*, p.378.

⁵⁷ Stoutenberg, ‘When do states disappear?’, p.58 and p.66.

⁵⁸ Wong, *Sovereignty Sunk*, p.380.

⁵⁹ Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’, p.13.

⁶⁰ Wong, *Sovereignty Sunk*, p.381.

⁶¹ As one official in the Foreign Office noted, in the two years that they had worked on South Pacific issues, including climate change and the real threat posed to certain islands, the subject of how the eventual extinction would be managed, including derecognition, had not once been raised. Nor had it ever been raised by colleagues from other relevant departments, such as the Department for International Development (DFID). British official, comments to the author, April 2014.

seriously considered this matter.⁶² Neither has the issue been given serious thought by United States, which is in free association with the Marshall Islands.⁶³

The general reluctance to engage with the issue may well stem from the fact that it seems to be a long way off. This would appear to leave plenty of time for the other options to be explored. However, it may also be a result of the awareness of the huge problems that would arise if this uncharted route were to be followed.

First and foremost, there are major political implications to consider. Any state facing extinction would in all probability 'fight to the bitter end before surrendering their sovereignty'.⁶⁴ Likewise, many other states, especially others that could be affected by climate change, would almost certainly be strongly opposed to any moves to accept the principle that states could be deemed to have become extinct and their sovereign rights annulled. Other countries may have their own individual reasons to oppose such a drastic course of action. For instance, Britain and the United States could well be particularly reluctant to allow this to happen due to their special ties to these states. Meanwhile, in contrast, some countries, especially neighbouring states, may well have a particular incentive to withdraw recognition. One obvious reason may be to lay claim to maritime zones. This could potentially lead to competing territorial claims. This could in turn lead to conflict. If nothing else, differences of opinion on the question of withdrawing recognition could well give rise to an anomalous situation whereby some countries continue to recognise the state, whereas others do not. Although this is admittedly less of a strange occurrence in the contemporary era than it once was, the potential for confusion and instability is apparent.

Then there are the tricky legal questions that would arise. As noted, in all previous cases of state death the territory has remained intact. Consequently, international law has evolved to think of state death within this framework. As has been said, 'when a state is deprived of its independence and of its territory, these do not vanish into a legal vacuum. They are acquired by another State or by a number of States which have arisen on what was formerly its territory.'⁶⁵ However, when an island disappears beneath the waves there would be no process of acquisition. The international community would necessarily be confronted with such a 'legal vacuum'. At conceptual level, it is entirely unclear how it should respond. On the key question of recognition, there is simply no consensus as to whether, let alone how, it could happen. Some scholars have taken the view that, once granted, recognition cannot be rescinded.⁶⁶ In contrast, others have argued that it should be possible when the objective conditions of recognition no longer exist.⁶⁷ Still others contend that no formal process would actually be necessary. Once a state ceased to meet the criteria of statehood, it would automatically cease to be a state.⁶⁸ No further action would need to be taken.

⁶² British official, comments to the author, April 2014.

⁶³ US official, comments to the author, May 2014.

⁶⁴ Joshua Keating, 'Can a Country 'Die'?', War of Ideas, *Foreign Affairs*, 10 May 2013.

⁶⁵ Lauterpacht, *Recognition in International Law*, p.351.

⁶⁶ 'Even those who regard recognition as being in the nature of a contractual bargain or voluntary grant are emphatic that once recognition has been given it is binding on the recognizing State by virtue of the rule of pacta sunt servanda ['agreements must be kept'] or otherwise.' Lauterpacht, *Recognition in International Law*, p.349.

⁶⁷ Lauterpacht, *Recognition in International Law*, p.349; Hans Kelsen, 'Recognition in International Law: Theoretical Observations', *American Journal of International Law*, Volume 35, Number 4, 1941, p.611. However, as Lauterpacht also noted, in such cases, it is not a question of withdrawing recognition entirely, as this would leave a territorial void. Rather, it is about recognising a 'new authority' in place of the previously recognised one. Lauterpacht, *Recognition in International Law*, p.351.

⁶⁸ Former senior legal official, Foreign and Commonwealth Office, author interview, December 2013.

While it may be theoretically possible to do nothing, in reality the situation this seems unfeasible. Unlike recognition, which usually represents the beginning of a formal relationship,⁶⁹ and thus presents a clean slate on which to build ties, the withdrawal of recognition would mark the termination of a relationship. There would necessarily be any number of loose ends that would need to be addressed. To this extent, it would therefore seem all but certain that it would have to be formally announced in some manner. Again, however, there is no precedent for this. Conceivably, one could modify the recognition process.⁷⁰ Under usual circumstances, a state recognising another state will announce its decision through a statement or press release. Alternatively, it will communicate its intention to the state in question directly, such as by sending a letter to a senior official.⁷¹

Even if this relatively trifling problem of communicating a decision to withdraw recognition could be overcome, it would merely mark the start of a far bigger set of issues. There would be any number of very important practical matters that would have to be managed. For instance, one very immediate and obvious problem would be the question of how to deal with the embassy and associated diplomatic staff of the extinct state. It seems unrealistic to suppose that one day an embassy is recognised, and the next its staff are no longer accorded diplomatic immunity and it simply stops receiving invitations to official receptions. Additionally, there would be issues relating to official state property, such as the embassy itself, or state holdings that may be held in the country.

Aside from the bilateral problems that would arise, there would also be a range of questions thrown up at the multilateral level. For a start, what would happen to the country's membership of various international organisations. Again, this presents a range of legal and political problems. The constitutions of most international and regional bodies appear to make no provision for rescinding membership.⁷² Even the Pacific Island Forum, which faces the extinction of at least three members, makes no mention of such a process.⁷³ Again, the anomaly of a state still remaining a member of one organisation but not another would create problems and uncertainties. What would happen, for example, if the PIF decided to maintain the membership of several extinct states, but then tried to enter into an agreement with another organisation that does not? This could create no end of legal complications.

Such concerns would be most acute in terms of the United Nations. While the UN cannot recognise states,⁷⁴ membership is nevertheless seen to have an important legitimising effect. Indeed, it is widely understood to mark a state's general, though not necessarily universal,

⁶⁹ Recognition and the establishment of diplomatic relations usually run hand-in-hand in the modern era. Nevertheless, it is important to note that the two are in fact separate processes. 'Recognition of States and Establishment of Diplomatic Relations', Sir Ivor Roberts (editor), *Satow's Diplomatic Practice* (sixth edition) (Oxford: Oxford University Press, 2009), p.72.

⁷⁰ O'Brien and Goebel identify five general modes of recognition, which in turn encompass a range of specific methods of recognition. William V. O'Brien and Ulf H Goebel, 'United States Recognition Policy Towards the New Nations', in William V. O'Brien (editor), *The New Nations in International Law and Diplomacy* (London: Stevens and Sons, 1965), pp.112-113.

⁷¹ Hans Kelsen, 'Recognition in International Law', *American Journal of International Law*, Volume 35, 1941.

⁷² A survey of the constitutions of a number of international organisations reveals that few deal with the cessation of membership in a non-voluntary manner. See, inter alia, Constitutive Act of the African Union (Articles 29-31)

⁷³ 'Agreement Establishing the Pacific Islands Forum', 27 October 2005.

⁷⁴ As one former UN official stated, 'as a matter of international law, neither the UN nor any other international organization can give legal validity to the creation of a state. The UN is not in the recognition business; only states can recognise states.' Alvaro de Soto cited by Bernard Avishai, 'What The UN Vote Means – And Does Not', *Talking Points Memo*, 11 July 2011.

acceptance within the international community of states.⁷⁵ Crucially, membership of the United Nations and its associated bodies is also linked to the process of securing many of the internationally accepted trappings of statehood.⁷⁶ Just to give one example, membership of the International Telecommunications Union (ITU) gives a state a telephone dialling code. Then there are a range of other practical matters that would need to be resolved. For instance, decisions would have to be made as to how to manage the funds or any other assets released by the effective termination of membership of international organisations. If joining the UN means ‘hooking up with the international system’s buried wiring’,⁷⁷ then presumably leaving would mark require untangling a defunct entity from that mass of cables.⁷⁸ A decision to remove a state from the UN and associated organisations could therefore have important wider ramifications in terms of its symbolic standing as a state.

Finally, and most importantly, in any bilateral or multilateral process leading to the final acceptance of the extinction of these states, serious consideration would have to be given to the remaining population. Already, we have started to see major demographic changes as a result of climate change. For example, it is reported that a quarter of the population of Kiribati have already had to move due to the impact of environmental change.⁷⁹ In some instances, people are moving from islands and atolls that have become uninhabitable to those that can still support people, at least for the meantime. However, many are already moving to new countries.⁸⁰ In the decades that will come this will increase. Indeed, almost everyone will have had to have fled long before the waves subsume the last piece of land. But what status will they have? Currently, people fleeing climate change are not considered to be refugees,⁸¹ with all the rights associated with this status.⁸² Their situation would have to be carefully considered. In many instances, it seems likely that they will acquire new citizenship. However, this cannot be guaranteed. Unless effective remedies are devised, there is the possibility that many people will be rendered stateless.⁸³ Even decisions by individual states to withdraw recognition could have enormous implications for any nationals of the extinct state residing in their territory. For example, would their passports cease to be recognised?⁸⁴ And what would happen if they require consular assistance? Any effort to declare a state extinct would inevitable have a huge human dimension that would need to be addressed.

Towards a UN process for managing state death?

⁷⁵ Christian Hillgruber, ‘The Admission of States to the International Community’, *European Journal of International Law*, Volume 9, 1998, p.492.

⁷⁶ For more see, Leonie Marilynne Solomons, ‘Design for an Assessment of Gaining Access to the International Interoperability Systems in the Bid for Secession’, Proceedings of the 53rd Annual Meeting of the International Society for the Systems Sciences, University of Queensland, 12-17 July 2009.

⁷⁷ ‘How to start a nation: Trappings of state’, *The Economist*, 10 March 2011.

⁷⁸ Of course, there is always the option to withhold outright extinction, and instead place the state in abeyance. For instance, the United Nations Statistics Division continues to list the country codes for a number of states that no longer exist; merely listing them as ‘codes not in current use’. UN Statistics Office, correspondence with the author, July 2014. The full list can be found at <<https://unstats.un.org/unsd/methods/m49/m49chang.htm#ftnf>> (Last accessed 22 February 2015)

⁷⁹ ‘Population of Tuvalu, Kiribati and Nauru already migrating due to effects of climate change’, *News.com.au*, 3 December 2015.

⁸⁰ ‘Has the great climate change migration already begun?’, *The Guardian*, 15 September 2014.

⁸¹ ‘World’s first ‘climate change refugee’ has appeal rejected as New Zealand rules Ioane Teitiota must return to South Pacific island nation of Kiribati’, *The Independent*, 12 May 2014.

⁸² For a discussion of this see, Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’, *Law and Policy*, Volume 30, Number 4, October 2008.

⁸³ Yamamoto and Esteban, *Atoll Island States and International Law*, p.211.

⁸⁴ Yamamoto and Esteban, *Atoll Island States and International Law*, pp.210 & 211. Former legal official, Foreign and Commonwealth Office, correspondence with the author, May 2014.

As seen, state death in the context of climate change clearly poses a diverse range of complex and hitherto unprecedented political, legal, economic and social questions. There is plenty of scope for turmoil, if not conflict, if states and organisations are simply left to pursue their individual policies. For this reason, there would seem to be a strong, if not compelling, case to be made for developing a single, global mechanism for managing state extinction.⁸⁵ Perhaps the most obvious option would be for the matter to be managed by the United Nations. Specifically, one idea that would seem to stand out would be to return to a problem raised a little earlier and explore the option of using a mechanism for terminating UN membership as a universal mechanism for managing state death. The clear advantage of such a system is that once completed it would allow individual states to engage in a process of controlled withdrawal of recognition.

The problem is that, at present, there is no provision within the Charter for revoking membership for states that no longer exist. The closest the Charter comes to such a mechanism is a process of expulsion, under Article 6, for states that persistently violate the UN's principles. Nevertheless, as one UN official noted, this could conceivably form the basis for a process of removal; albeit 'without the persistent violations of the UN Charter'.⁸⁶ Although this has never been used to expel a state, a form of it was used in the case of Taiwan, which was replaced in the UN following a vote in the General Assembly in October 1971 that admitted the People's Republic of China in its place.⁸⁷ According to the Charter, this process would operate in a manner similar the process of membership. The General Assembly votes on the matter following a recommendation from the Security Council.⁸⁸

The key question is how the Security Council would decide to make such a recommendation in the first place. It would require the acquiescence of the five permanent members. While it may well be the case that by the time the idea is pursued there will be a general consensus on the need for such a mechanism, it is also possible that some members will remain highly reluctant to accept such a step. In such a situation, perhaps the most obvious answer would be for the Security Council, or even the General Assembly, to ask for an advisory opinion from the International Court of Justice.⁸⁹ In doing so, the request could be made either for a judgment on the objective fact of the continued existence of the state in question, or on the specific obligations of states towards the remaining authorities of a state that no longer meets the criteria for statehood.⁹⁰

While an advisory opinion would certainly help to set the legal stage for a decision on membership, it would still leave open a number of practical issues. For this reason, it would seem likely that before taking a final decision on withdrawing recognition, the Security Council would have to establish some sort of mechanism, be it a conference or an international committee, to decide on specific aspects arising from the withdrawal of recognition. This could address a range of specific issues, such as the distribution of state assets and questions of territorial claims. Only once the various issues arising from any decision to revoke the membership of the state had been decided would the Security Council then pass the necessary resolution recommending the termination of membership. At this point, the General Assembly could then have the final say on the matter. The advantage of

⁸⁵ Former legal official, Foreign and Commonwealth Office, correspondence with the author, May 2014.

⁸⁶ UN legal official, correspondence with the author, June 2014.

⁸⁷ United Nations General Assembly Resolution 2758, 25 October 1971. It has also applied for membership of the UN as a separate state, but this application has been denied by the UN under the terms of its One China policy. 'UN rejects Taiwan application for entry', *New York Times*, 24 July 2007.

⁸⁸ Article 6, Chapter II, Charter of the United Nations.

⁸⁹ Article 96, Chapter XIV, Charter of the United Nations.

⁹⁰ UN legal official, correspondence with the author, June 2014.

such a process would be that once a suitable resolution has been passed by the UN, the way would be open for states and other regional and international organisations to follow through with individual or collective processes of derecognition, or withdrawal of membership.

Although there may be merit to such a route, such an approach could well face strong opposition. Quite apart from the likely objections from states also facing extinction, it could also be challenged by some states as an unacceptable infringement on their sovereignty. Many countries, not least of all the United States, regard recognition as a sovereign prerogative. Just as the idea of collective recognition being undertaken by the UN as a whole was dismissed during the drafting of the UN Charter on the grounds that it amounted to an unacceptable infringement of the fundamental sovereign prerogative of states to recognise other states,⁹¹ so it could well be the case that many countries would want to block any attempt to lay the foundations for the collective withdrawal of recognition for the same reasons. Nevertheless, despite the drawbacks, a mechanism for the controlled withdrawal of recognition would seem to present a far better way to minimise the prospects for conflict than a free-for-all approach that could lead to conflicts and leave the remaining populations in legal limbo.

Conclusion

Climate change poses a very real threat to the continued existence of a number of states. As Frank Bainimarama, the Prime Minister of Fiji put it at the start of climate change summit in November 2015, ‘Unless the world acts decisively in the coming weeks to begin addressing the greatest challenge of our age, then the Pacific, as we know it, is doomed.’⁹² This has also been echoed by President Anote Tong of Kiribati, who has noted that, ‘the science continues to indicate that we will continue to go under water within the century.’⁹³ The physical disappearance of countries would raise complex questions. While the concept of state death is widely accepted, this has almost exclusively been understood in the context of the passing of control over a piece of territory from one state to another by the processes of conquest, merger or dissolution. In such cases, the legal and political mechanisms for managing the situation are well established. However, in the event of the loss of the physical territory, coupled with the displacement of the population, the steps that would need to be taken are unclear. Should it come to pass, it would quite simply be an unprecedented situation that has never been encountered, and thus seriously considered, in international law.

It is perhaps for this reason that attention has so far been focused on strategies for state survival. At present, these are primarily focused on land reclamation or the creation of artificial islands, the possibility of establishing the state on the territory of another country or some other form of merger, or, more radically, on some form of deterritorialised statehood. Alternatively, some have suggested that it may simply be a case of maintaining the fiction that the state survives. While each of these ideas are certainly options to consider, ultimately

⁹¹ United Nations, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Vol. VII (London and New York: United Nations, 1945-46), p.30. As a US representative to the UN put it, ‘There were certain powers and certain rights of a sovereign State which were not yielded by any of the Members who signed the United Nations Charter and in particular this power to recognize the de facto authority of a provisional Government was not yielded.’ *Official Records of the Security Council, Third Year (1948)*, No. 68, p.16. The UN Secretariat agreed with this in its 1950 legal opinion on recognition. Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, Transmitted to the President of the Security Council by the Secretary-General (Lie), March 8, 1950. *United Nations Security Council Document S/1466*. Reprinted in *International Organization*, Volume 4, Issue 2, 1950, pp.356-360.

⁹² ‘Pacific islands make last-ditch plea to world before Paris climate change talks’, *The Guardian*, 1 November 2015.

⁹³ ‘Kiribati looks to artificial islands to save nation from rising sea levels’, Pacific Beat, *Australian Broadcasting Corporation (ABC)*, 16 February 2016.

any decision will have to be based on a wider discussion of the implications of each alternative as well as the benefits to be derived from keeping the states in existence.⁹⁴

Despite the best efforts to try to keep these countries functioning, even as a legal fiction, it may well be the case that a formal process of terminating their place in the international community of states will be needed. As shown, the international community would be on wholly unexplored ground. Such an option has certainly not been considered by policy makers. This would seem to be for several reasons. For a start, there are a range of complex legal issues that would need to be settled. There are no precedents for rescinding recognition. While it seems certain that it could be done, it is unclear how it could happen. The same applies for the loss of membership in international organisations. Meanwhile, at a political level, any move to open up debate on the subject could be highly destabilising. While many states would inevitably be firmly opposed to the idea, there would be others that would see it as an opportunity to capitalise on the situation. This could even lead to conflict. Finally, there is the crucial question of what would happen to the citizens of these countries. Whatever decision is taken, their welfare would have to be placed front and centre of any debates. For all these reasons, there is a good case to be made for considering some formal multilateral mechanism to oversee the process, perhaps as a process that would mirror the admittance to the United Nations. This could even incorporate a decision by the International Court of Justice, which could consider the wider factors. However, even this model, which would be designed to minimise conflict, is likely to meet resistance. States may not wish to set in place a mechanism that allows for the demise of one of their number to be addressed in a formal multilateral manner, thereby undermining their sovereign right to handle recognition issues.

In reality, the possibility of authorised state death therefore seems highly unlikely for the foreseeable future. It still seems more probable that every effort will be made to prolong their existence, not least of because there tends to be a presumption in favour of the continuity of states.⁹⁵ However, even if the withdrawal of recognition by states and the expulsion from international organisations is a step too far from our current vantage point, the fact nevertheless remains that serious thought needs to be given to managing the range of complex issues inevitably arising from the complete and seemingly irreversible disappearance of a state as a physical entity. Although this has hitherto been an unknown occurrence in modern international affairs, climate change means that we could be facing the prospect of sunken territories that no longer objectively qualify as states.

⁹⁴ Yamamoto and Esteban, 'Vanishing Island States and Sovereignty', p.6.

⁹⁵ Kreijen, *State Failure, Sovereignty and Effectiveness*, p.332.