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TO BE OR NOT TO BE: STATE EXTINCTION THROUGH CLIMATE CHANGE

BY
ORI SHARON*

Sea levels are rising. Within our lifetimes, several low-lying island states will be submerged. Until recently, the dominant position in legal circles has been that sinking island states lose their status as states once their territory is submerged. However, a contrary view is emerging. Writing in aid of island states, prominent legal scholars have advanced the position that the state, as a legal person, may continue to exist detached from territory. This proposition is supposed to aid island nations during the tumultuous times ahead. Maintaining the legal person of the state, we are told, allows access to international tribunals, facilitates coordination of international support, and protects the substantive rights of the individual citizens of island states facing climatic catastrophes.

Legal scholars who advance this new position are more concerned with theoretical legal questions than the real challenges island states will inevitably face. What the people of island states need are options for communal resettlement. Continued statehood undermines communal resettlement efforts. No state will admit the people of an island state into its sovereign territory if they come as a state. Fighting for the continuation of the state post-submergence is therefore a disservice to island states.

To protect the people of island states from becoming climate refugees, this Article proposes a new pragmatic approach that trades statehood for life. Potential host states would only agree to accept communities from island states, if doing so will not entail competing sovereignty claims. Survival of the people of island states, therefore, is founded in state termination, not continuation. Based on this appreciation, this Article develops a legal framework of state-

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association that eliminates sovereignty clashes between potential host states and the people of island states. This framework secures communal resettlement options for the people of island states, guaranteeing their long-term survival.

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I. INTRODUCTION

The impressive man stood in front of the crowd of state representatives. For the past two years, he has been campaigning around the world on behalf of his people. He took a deep breath and said:

We don't want no sea level rise. There must be a way out. Neither the Maldives nor any small island nation wants to drown. That's for sure.

Neither do we want our lands eroded, or our economies destroyed. Nor do we want to become environmental refugees either. . . . All we ask is that the more affluent nations, and the international community in general, help us.¹

The impassioned plea moved the listeners, but the message did not have the hoped-for effect. In the 23 years since Maumoon Abdul Gayoom, President of the Maldives, urged the leaders of the world's richest countries to reduce emissions of greenhouse gasses ("GHG"), yearly emissions have almost doubled.² The rising concentrations of GHG in the atmosphere cause the sea level to rise. Between 1902 and 2010, the sea has risen sixteen centimeters.³ As GHG emissions increase and global temperatures rise, sea level will continue to rise at an accelerating rate.⁴ By the end of this century, according to some estimates, the sea level will rise an additional two meters.⁵ At that level, one billion people will be exposed to environmental and climatic risks like floods, king tides, and superstorms.⁶

Realizing the imminent danger posed by rising seas, many coastal states have developed and are implementing adaptation plans to mitigate the risks associated with sea level rise. However, not all coastal states face similar risks. For Small Islands Developing States ("SIDS"), like the Maldives, climate change poses an existential threat.⁷ As low-lying island territories, SIDS are extremely vulnerable to changes in sea level.⁸ If sea

¹ Maumoon Abdul Gayoom, International Assistance Can Save Our Peoples, in *THE MALDIVES A NATION IN PERIL: SPEECHES BY MAUMOON ABDUL GAYOOM, PRESIDENT OF THE MALDIVES, ON THE CHALLENGE OF ENVIRONMENTAL INSTABILITY TO THE MALDIVES AND THE GLOBAL COMMUNITY* 21, 29 (M.A. Gayoom ed., 1998).

² Total annual GHG emissions in 1998 stood at 31.9 gigatons (CO₂ equivalent). *Total Greenhouse Gas Emissions (kt of CO₂ Equivalent)*, THE WORLD BANK, <https://perma.cc/WU9S-9RAE> (last visited Dec. 8, 2021). Annual global GHG emissions in 2019 amounted to 57.4 gigatons (CO₂ equivalent). J.G.J. OLIVIER & J.A.H.W. PETERS, *TRENDS IN GLOBAL CO₂ AND TOTAL GREENHOUSE GAS EMISSIONS* 15 (2020).

³ Michael Oppenheimer et al., *Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities*, in *THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE* 321, 334 (Ayako Abe-Ouchi et al. eds., 2019).

⁴ David Vidas, et al., *International Law and Sea Level Rise*, in *INTERNATIONAL LAW ASSOCIATION SYDNEY CONFERENCE* 871 (2018) [hereinafter *ILA* 2018].

⁵ David Freestone & Clive Schofield, *Sea Level Rise and Archipelagic States: A Preliminary Risk Assessment*, 35 *OCEAN Y.B.* 340, 342-43 (2021).

⁶ Scott A. Kulp & Benjamin H. Strauss, *New Elevation Data Triple Estimates of Global Vulnerability to Sea-Level Rise and Coastal Flooding*, 10 *NAT. COMM'NS* 1, 3 (2019); Gillian Flaccus, *King Tides' Documented Globally Show Risks of Climate Change*, PBS NEWS HOUR (Feb. 5, 2020), <https://perma.cc/RM5D-E5X3>; Brian Kahn, *Superstorm Sandy and Sea Level Rise*, NOAA CLIMATE.GOV, <https://perma.cc/GXP5-RWHK> (last updated June 3, 2021).

⁷ Matilde Orlandi, *Sinking Islands: Maldives Facing Climate Change*, PEACE FOR ASIA (Oct. 26, 2021), <https://perma.cc/476W-P7LE>.

⁸ Nobuo Mimura et al., *Small Islands*, in *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY* 687, 689, 691 (Gillian Cambers & Ulric Trotz eds., 2007); Sumudu A. Atapattu & Andrea C. Simonelli, *Climate Justice, Sustainable Development, and Small Island States: A Case Study of the Maldives*, in *THE CAMBRIDGE HANDBOOK OF*

levels continue to rise, many SIDS will become uninhabitable or even submerged.⁹ By the end of the twenty-first century, several SIDS in the South Pacific and Indian Oceans will disappear.¹⁰ The dangers President Gayoom warned about are already materializing. In May 2016, a group of researchers reported that five of the Solomon Islands have disappeared, due to sea level rise.¹¹ The following year, another group of researchers found that several islands in Micronesia had suffered the same fate.¹²

Rising sea levels introduce complex legal challenges, most prominent of which is the question whether the affected island communities—following complete submergence—cease to be states. Conventional legal thinking holds that a state cannot exist without a territory.¹³ It is therefore widely accepted in legal and geopolitical circles that SIDS will lose their status as states, once their territory submerges.¹⁴ Many scholars explain that loss of statehood is intertwined with challenges of communal and individual survival, as only states are considered full legal persons in international law.¹⁵ With no territory or legal standing in the global geopolitical arena, the people of SIDS may become climate

ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT 434, 435 (Sumudu A. Atapattu et al. eds., 2021).

⁹ Jenny Grote Stoutenburg, *Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise*, 26 INT'L J. MARINE & COASTAL L. 263, 265 (2011); Leonard A. Nurse et al., *Small Islands, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY PART B: REGIONAL ASPECTS* 1613, 1618 (Thomas Spencer & Kazuya Yasuhara eds., 2014).

¹⁰ Emma Allen, *Climate Change and Disappearing Island States: Pursuing Remedial Territory*, BRILL OPEN L., 2018, at 1, 2.

¹¹ Simon Albert et al., *Interactions Between Sea Level Rise and Wave Exposure on Reef Island Dynamics in the Solomon Islands*, ENV'T RES. LETTERS, 2016, at 1, 2; Atapattu & Simonelli, *supra* note 8, at 438 ("Some villages such as that of Vunidogoloa in Fiji have been abandoned because of king tides and extreme weather events associated with climate change. Similarly, five islands that were part of the Solomon Islands have been claimed by the ocean, and six other islands had large areas of land washed to the sea destroying villages, and forcing people to relocate.").

¹² Patrick D. Nunn et al., *Identifying and Assessing Evidence for Recent Shoreline Change Attributable to Uncommonly Rapid Sea-Level Rise in Pohnpei, Federated States of Micronesia, Northwest Pacific Ocean*, 21 J. COASTAL CONSERVATION, 719, 726 (2017); Adelle Thomas et al., *Climate Change and Small Island Developing States*, 45 ANN. REV. ENV'T. RESOURCES, 1, 6 (2020).

¹³ Ori Sharon, *Tides of Climate Change: Protecting the Natural Wealth Rights of Disappearing States*, 60 HARV. INT'L L. J. 95, 96–97 (2019).

¹⁴ *Id.*; See EDWIN EGEDE & PETER SUTCH, THE POLITICS OF INTERNATIONAL LAW AND INTERNATIONAL JUSTICE 103 (2013); KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 7 (2d ed. 1968); Gregory E. Wannier & Michael B. Gerrard, *Disappearing States: Harnessing International Law to Preserve Cultures and Society*, in CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE 615, 620 (Oliver C. Ruppel et al. eds., 2013).

¹⁵ Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change Induced Loss of Territory*, 50 STAN. J. INT'L L. 1, 6 (2014); Derek Wong, *Sovereignty Sunk? The Position of 'Sinking States' at International Law*, 14 MELBOURNE J. INT'L L. 346, 349 (2013); Veronika Bílková, *A State Without Territory?*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2016 19, 22 (Martin Kuijer & Wouter Werner eds., 2017).

refugees, relying for their security on the goodwill of the same countries which, by their continuing and escalating GHG emissions, caused the plight of SIDS.¹⁶

Writing in support of SIDS, several prominent legal scholars have proposed creative interpretations of international law norms, advancing the idea that SIDS may continue to exist as states post-submergence.¹⁷ They introduce a new category of legal person in international law: the non-territorial state.¹⁸ These new legal persons are sovereign states but are not attached to a specific territory.¹⁹ The scholars who endorse this idea argue that “[i]t would protect the peoples forced from their original place of being by serving as a political entity that remains constant even as its citizens establish residence in other [s]tates.”²⁰

Against the backdrop of legal initiatives considering international law innovations which will allow SIDS to maintain statehood post-submergence, this Article offers a different perspective. This Article recognizes the problem of sinking states as a major challenge for the countries of the world, the international legal system, and the people of SIDS. However, this Article argues that the question of continued statehood post-submergence has no pragmatic value for SIDS. The focus on post-submergence statehood is legal self-centeredness. Crafting legal fictions that allow SIDS to maintain statehood, without a territory in which to exercise sovereignty, is a remarkable scholarly achievement. Nonetheless, this feat has no impact outside law books. In the world of *realpolitik*, states without territory will disappear, notwithstanding legal fiction to the contrary.

¹⁶ As explained in Part V.D, *infra*, the legal definition of “refugee” does not apply to individuals who were forced to flee their state due to environmental catastrophes. *What is a refugee?*, U.N. REFUGEE AGENCY, <https://perma.cc/82MU-MX5T> (last visited Oct. 28, 2021). The use of the term “climate refugee” or “environmental refugee” in this Article refers to climate-induced forced migration and does not connote legal meaning.

¹⁷ See, e.g., Emily Crawford & Rosemary Rayfuse, *Climate Change and Statehood*, in INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE 243, 250 (Rosemary Rayfuse & Shirley V. Scott eds., 2012); Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States*, UNIV. NEW SOUTH WALES FAC. L. LEGAL STUD. RSCH. PAPER SERIES, 2009, at 10; Jacquelynn Kittel, *The Global “Disappearing Act”: How Island States Can Maintain Statehood in the Face of Disappearing Territory*, 4 MICH. ST. L. REV. 1207, 1228 (2014); Walter Kälin, *Conceptualising Climate-Induced Displacement*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 81, 102 (Jane McAdam ed., 2010); Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 346 (2011); see generally, Milla Emilia Vaha, *Drowning Under: Small Island States and the Right to Exist*, 11 J. Int’l Pol. Theory 206, 216 (2015) (providing a political theory justification in political theory for the nonterritorial state).

¹⁸ Kälin, *supra* note 17.

¹⁹ Burkett, *supra* note 17.

²⁰ Maxine A. Burkett, *The Nation Ex-Situ*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 89, 90 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

Focusing on statehood is legally superfluous and practically foolish. SIDS who follow the advice of these scholars, urging them to fight for continued statehood post-submergence, undermine prospects for a real solution to their problems. The sad truth is that the people of SIDS will inevitably become climate refugees. SIDS should therefore devote all their efforts to creating viable immigration and resettlement options for their people. Fighting for continued statehood does not aid these efforts. On the contrary, as this Article demonstrates, maintenance of the state as a legal fiction which only reduces the chances for communal relocation of SIDS. Post-submergence statehood creates a legal anomaly, what this Article calls “sovereignty clash.” For the first time in legal history, nations that accept refugee communities may end up with another sovereign state within their borders. This will occur because, in the absence of an anchoring territory, the sovereignty of the non-territorial state follows its people *wherever they are*. The risk of a sovereignty clash between the host state and refugee communities from SIDS will reduce the willingness of states to accept migrants from SIDS, undermining real and much needed resettlement efforts.

Focusing on pragmatism, this Article argues that for resettlement efforts to succeed, SIDS must engage in negotiations with potential host states. These negotiations will succeed only if host states secure meaningful and tangible benefits that make hosting SIDS worthwhile. Based on this realization, this Article demonstrates the futility of continued statehood and other solutions suggested by scholars. This Article analyzes the geopolitical and tangible assets of SIDS, looking for benefits that may be traded in negotiations. This analysis identifies the sovereignty of SIDS over natural resources and maritime territory as the most lucrative asset of SIDS. This Article therefore suggests that instead of maintaining sovereignty, SIDS should give up sovereignty, to save their people. In other words, the path for the survival of SIDS does not lie in continued statehood, but rather in trading sovereignty in return for resettlement rights. Building on case studies of the Pacific free-associated states, this Article suggests that SIDS enter free association treaties with regional or global powers, incorporating as free-associated non-state territories. This approach is the most plausible legal and political path for securing a safe future for the people of SIDS.

The discussion in this Article is timely and important. In the very near future, leading international law authorities are expected to decide whether to support the idea of a non-territorial state.²¹ In 2012, responding to the growing concern about the effect of sea level rise on global peace and stability, the International Law Association (“ILA”) established a committee on International Law and Sea Level Rise.²² The committee’s 2018 report provided recommendations concerning law of the

²¹ See generally G.A. Res. 74/3, at 6–7 (Oct. 10, 2019) (calling on international organizations to take urgent action in supporting SIDS threatened by rising sea levels).

²² ILA 2018, *supra* note 4, at 1.

sea and forced migration challenges arising from sea level rise.²³ The committee had insufficient time to address the issue of potential loss of statehood, due to total submergence of the territory of an island state.²⁴ The committee therefore requested the International Law Association to extend its term beyond 2018 to allow it to examine the question, “would the impact of sea level rise require the creation of a new category of subjects of international law?”²⁵ In 2018, the mandate of the committee was extended until 2022.²⁶ Speaking at the 2019 Madrid Meeting of the ILA, the chair of the committee signaled his approach to the question, explaining that: “[i]n the face of profound changes in natural conditions . . . [w]e may need to *re-visit the concept of international legal personality under international law.*”²⁷

Similarly, in the summer of 2019, the International Law Commission (“ILC”) included the topic “Sea-level rise in international law” in its program of work at its seventieth session.²⁸ Among the legal issues to be addressed under this topic, the ILC included “[a]nalysis of the possible legal effects on the continuity or loss of statehood in cases where the territory of island [s]tates is completely covered by the sea or becomes uninhabitable.”²⁹ This Article provides a clear explanation why, despite framing it as a solution for SIDS, the idea of a non-territorial state is disastrous for SIDS and to the international legal system. It therefore recommends that instead of undermining the system of international law, those who care for SIDS should direct their well-intentioned efforts to establishing resettlement options.

This Article proceeds as follows. Part II discusses sea level rise, the problem with which SIDS are battling, describing what SIDS are, their unique attributes, their susceptibility to climate change, and how sea level rise threatens both their physical and legal existence. Part III engages the international legal framework concerning the recognition and continuation of states in international law, and explains why territory is considered a prerequisite to statehood in international law. This Article discusses the differing views of legal scholars on the question of whether a state can continue to exist without a territory and critically assess each position.

Part IV questions the assumption that SIDS should fight to maintain statehood post-submergence. This Article describes the natural processes by which an island becomes submerged, demonstrating that the

²³ *Id.* at 8.

²⁴ J. Ashley Roach, *Sea Level Rise and the Law of the Sea: Maritime Zones and Maritime Boundaries*, in *THE MARINE ENVIRONMENT AND UNITED NATIONS SUSTAINABLE DEVELOPMENT GOAL 14: LIFE BELOW WATER* 342, 366 (Myron H. Nordquist et al., 2018).

²⁵ ILA 2018, *supra* note 4, at 9, 25.

²⁶ Freestone & Schofield, *supra* note 5, at 346.

²⁷ Davor Vidas, *Madrid Meeting of the Committee on International Law and Sea Level Rise, December 2019*, *AQUIESCENCIA* (Jan. 28, 2020), <https://perma.cc/PL5A-K45X> (emphasis added).

²⁸ Rep. of the Int'l Law Comm'n, 70th Session, U.N. Doc. A/73/10, at 326 (2018).

²⁹ *Id.* at 329.

disappearance of an island is not a one-time event but a slow transformation which spans decades, if not centuries. Emigration from an island state due to sea level rise will therefore occur gradually and over a very long time. This Article discusses the minimal territorial threshold for the preservation of the state in international law, demonstrating that SIDS may maintain their status as a state, long after their population had left the island and resettled elsewhere. The maintenance of statehood, therefore, has no real value to SIDS. Then this Article discusses the problem that maintenance of statehood may create in international law—the sovereignty clash. After their original territory has become submerged, SIDS who maintain state status may be able to claim sovereignty in the host state. This potential legal anomaly will deter other states from accepting immigrants from SIDS. Fighting for post-submergence statehood, therefore, hurts SIDS.

Part V discusses other options for addressing the plight of SIDS, suggested in the literature: the purchase of alternative territory in another state to which SIDS could relocate their population, entering into a federation with another state, construction of artificial structures to protect the island from erosion, and the use of refugee law to claim protection and asylum as climate refugees. This part demonstrates that these “solutions” do not provide much hope for SIDS.

Part VI proposes that to save their people as an organic community, SIDS should give up statehood. This Article reviews the case study of the Pacific Associated States, small island territories that, instead of claiming independence, chose to associate with the United States under a free association compact. This choice, created relocation and adaptation avenues for the Pacific territories which are unavailable to other SIDS. This Article then discusses the benefits free association compacts create for SIDS, and why free association compacts are also attractive to potential principal states. This Article concludes with a discussion of potential legal hurdles to free association, demonstrating that the option of becoming a freely associated state is legally available to any island state which chooses to take it.

II. RISING SEAS AND SIDS

A. *The Unique Characteristics of SIDS*

SIDS are developing maritime nations “in a particularly disadvantageous developmental situation.”³⁰ Worldwide, there are approximately sixty SIDS dispersed among several geographical regions,

³⁰ Jenny Grote, *The Changing Tides of Small Island States Discourse – A Historical Overview of the Appearance of Small Island States in the International Arena*, 43 L. POL. AFR., ASIA LATIN AM. 164, 168 (2010); see U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, Annex I, Chapter 17(G), 17.124, 17.126, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), (Aug. 12, 1992) [hereinafter UNCED].

the Caribbean, the Pacific, the Atlantic, the Indian Ocean, and the South China Sea.³¹ SIDS are known for their biodiversity, endemic species, and unique cultural heritage.³² Other attributes shared by SIDS are small size, geographic isolation, and small but growing populations.³³

SIDS face many environmental, economic, and social challenges. The most common of these challenges are excessive dependence on international trade; small domestic markets that prevent the benefits of economies of scale; high and disproportionate costs of energy, infrastructure, communication, and public administration; vulnerability to ecological disturbances; limited ability to recover from environmental shocks; narrow resource base; ecological fragility; limited freshwater resources; and increasing amounts of hazardous waste.³⁴

Due to their uniquely disadvantageous position, United Nation (“UN”) member states at the 1992 Earth Summit recognized SIDS as a subgroup of developing countries with special social, economic, and environmental vulnerabilities.³⁵ Under Agenda 21,³⁶ UN member states have committed to helping SIDS meet their development challenges and “[t]o adopt and implement plans and programmes to support the sustainable development and utilization of their marine and coastal resources, including meeting essential human needs, maintaining biodiversity and improving the quality of life for island people.”³⁷ These commitments were reaffirmed in succeeding international instruments.³⁸

³¹ Because there are no official criteria for defining SIDS, the number of SIDS in academic literature varies. Most accounts list between 50 to 60 countries as SIDS. See U.N. OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED DEVELOPING COUNTRIES AND SMALL ISLAND DEVELOPING STATES (UN-OHRLLS), SMALL ISLAND DEVELOPING STATES IN NUMBERS: CLIMATE CHANGE EDITION 2015 40–41 (2015); UN-OHRLLS, SMALL ISLAND DEVELOPING STATES: SMALL ISLANDS BIG(GER) STAKES 26–27 (2011) [hereinafter UN-OHRLLS 2011].

³² UN-OHRLLS 2011, *supra* note 31, at 7.

³³ Liz Thompson, *Financing Change*, OUR PLANET 30, 30 (2014).

³⁴ About Small Island Developing States, UN-OHRLLS, <https://perma.cc/44RZ-4DT5> (last visited Nov. 3, 2021); United Nations Conference on Environment and Development, Bridgetown, Barb., April 26–May 6, 1994 *Report for the Global Conference on the Sustainable Development of Small Island Developing States*, Annex II, *Programme of Action for the Sustainable Development of Small Island Developing States*, 7, U.N. Doc. A/CONF.167/9 (May 6, 1994).

³⁵ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Report of the United Nations Conference on Environment and Development*, ¶¶ 17.23–25, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 13, 1992).

³⁶ *Id.*

³⁷ UNCED, *supra* note 30, at ¶ 17.128(a).

³⁸ See, e.g., G.A. Res. S-19/2, Annex, *Programme for the Further Implementation of Agenda 21*, ¶¶ 36(g), 61, 67, 70–73 (June 23–28, 1997); United Nations World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sep. 4, 2002, *Report of the World Summit on Sustainable Development*, Annex, *Plan of Implementation of the World Summit on Sustainable Development*, ¶¶ 20(n), 31(g), 38, 47(c), 58–61, 76, 161, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002); United Nations Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barb., Apr. 25–May 6, 1994, *Report of the Global Conference on the Sustainable Development of Small Island Developing States*, Annex II, *Programme of Action for the Sustainable Development of Small Island*

B. The Impact of Climate Change on SIDS

SIDS are particularly vulnerable to the impacts of climate change.³⁹ Because of their unique vulnerability, SIDS have been recognized as special class countries in the United Nations Framework Convention on Climate Change (“UNFCCC”)⁴⁰ and subsequent climate treaties.⁴¹ Article 4.8 of the UNFCCC refers to “the specific needs and concerns of developing country Parties arising from the adverse effects of climate change ... especially on: (a) Small island countries; (b) Countries with low-lying coastal areas.”⁴² The 2015 Paris Accord⁴³ requires signatories to work with SIDS, to build their capacity to engage in effective climate action, by providing access to finance, technology, information, training, knowledge, mitigation, etc.⁴⁴

Coastal states all over the world are expected to experience salinization, flooding, loss of low-elevation geological formations, and pressure on ecosystems due to climate-induced sea level rise.⁴⁵ For SIDS, sea level rise poses an existential threat, as many SIDS may become uninhabitable or even completely submerged.⁴⁶ One of the most critical legal issues in the context of SIDS and sea level rise is the question of statehood. Territory is one of the requirements for recognizing statehood in international law.⁴⁷ It is widely accepted in legal and geopolitical

Developing States, ¶¶ 1–135, U.N. Doc. A/CONF.167/9 (May 6, 1994); United Nations International Meeting to Review the Implementation of the Program of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, Jan. 10–14, 2005, *Report of the International Meeting to Review the Implementation of the Program of Action for the Sustainable Development of Small Island Developing States*, Annex II, *Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, ¶¶ 1–103, U.N. Doc. A/CONF.207/11 (Jan. 10, 2005); G.A. Res. 66/288, Annex, *The Future We Want*, ¶¶ 16, 32–33, 174–75, 178–80, 265 (Jul. 27, 2012); G.A. Res. 69/15, Annex, *SIDS Accelerated Modalities of Action (SAMOA) Pathway*, ¶ 2, (Nov. 14, 2014).

³⁹ U.N. CLIMATE CHANGE SECRETARIAT, CLIMATE CHANGE: SMALL ISLAND DEVELOPING STATES 2–3, 5 (2005); Atapattu & Simonelli, *supra* note 8, at 434–35. The difficulties that all countries face in coping with climate change impacts are exacerbated in SIDS because of their small geographical area, isolation, and environmental exposure. Thomas et al., *supra* note 12, at 4–9.

⁴⁰ United Nations Framework Convention on Climate Change art. 4, May 9, 1992, S. TREATY DOC NO. 102-38, 1771 U.N.T.S. 107, 174 [hereinafter UNFCCC]; Atapattu & Simonelli, *supra* note 8, at 435.

⁴¹ CLIMATE CHANGE: SMALL ISLAND DEVELOPING STATES, *supra* note 39, at 8–9.

⁴² UNFCCC, *supra* note 40; see Timothée Ourbak & Alexandre K. Magnan, *The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players*, 18 REG. ENV'T CHANGE 2201, 2201 (2018) (“Ever since its first assessment report, the Intergovernmental Panel on Climate Change (IPCC) has recognized Small Islands and atoll countries as being highly vulnerable to climate change, notably to sea level rise.”).

⁴³ Paris Agreement, Dec. 12, 2015, T.I.A.S. NO. 16-1104.

⁴⁴ *Id.* ¶¶ 7.7(a)–(d), 9.4, 9.9, 11.1, 13.3; Ourbak & Magnan, *supra* note 42, at 2203.

⁴⁵ Mathew E. Hauer et al., *Sea-Level Rise and Human Migration*, 1 NATURE REV. EARTH. & ENV'T 28, 28–29 (2020).

⁴⁶ Stoutenburg, *supra* note 9, at 265; Nurse et al., *supra* note 9, at 1618.

⁴⁷ Sharon, *supra* note 13, at 97.

circles that SIDS will lose their status as states once the territory of SIDS submerges.⁴⁸

States are the building blocks of international law, “the principal maker[s] and subject[s] of international law,”⁴⁹ and “the origin of ‘international law’s value.’”⁵⁰ Within the realm of international law, states are the only entities considered full legal persons,⁵¹ “the ‘most complete expression of international legal personality’” and “the entity with the ‘greatest capacity to claim rights and duties under international law.’”⁵² As explained by Crawford, states are “the gatekeepers and legislators of the international system.”⁵³ Since states are *the* central actors of international law and an “axiomatic feature[] of international legal thought,”⁵⁴ many writers argue that if SIDS lose their legal status as states, the ability of the peoples of SIDS to exercise individual and collective rights will be significantly diminished.⁵⁵

III. ON STATEHOOD AND TERRITORY

This Part discusses the link in international law between statehood and territory. It explains the basis for the view that a state cannot exist without territory and discusses the differing positions of scholars who, in aid of SIDS, suggest departing from this view. Finally, it explores the strengths and weaknesses of the arguments against the idea that states must have territory to continue to exist.

⁴⁸ *Id.*; see also MAREK, *supra* note 14, at 7 (explaining that a state becomes extinct with the disappearance of one of its elements, including territory); EGEDE & SUTCH, *supra* note 14, at 103 (“As the territory of a threatened Island State disappears beneath the waves, the criteria of territory will no longer be met and the claim of statehood will fail.”); Wannier & Gerrard, *supra* note 14, at 620–23; Matthew C.R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 EUR. J. INT’L L., 142, 159 (1998) (“[W]here the territory of a state becomes submerged by the sea . . . the state has ceased to exist.”).

⁴⁹ Manfred Lachs, *The Development and General Trends of International Law in Our Time*, in 169 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 32 (1980).

⁵⁰ ALEJANDRA TORRES CAMPRUBÍ, STATEHOOD UNDER WATER: CHALLENGES OF SEA-LEVEL RISE TO THE CONTINUITY OF PACIFIC ISLAND STATES 3–4 (2016).

⁵¹ Bílková, *supra* note 15, at 22.

⁵² CAMPRUBÍ, *supra* note 50, at 4.

⁵³ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 29 (2d ed. 2006).

⁵⁴ Matthew Craven, *Statehood, Self-Determination, and Recognition*, in INTERNATIONAL LAW 203, 203 (Malcolm D. Evans ed., 3d ed. 2010).

⁵⁵ Jain, *supra* note 15, at 6; Wong, *supra* note 15, at 349; Bílková, *supra* note 15, at 22; Seokwoo Lee & Lowell Bautista, *Climate Change and Sea Level Rise: Nature of the State and of State Extinction*, in FRONTIERS IN INTERNATIONAL ENVIRONMENTAL LAW: OCEANS AND CLIMATE CHALLENGES 194, 195 (Richard Barnes & Ronán Long eds., 2021); Atapattu & Simonelli, *supra* note 8, at 434, 436–37.

A. *Why is Territory Important for Statehood?*

The notion that loss of territory equals loss of statehood is rooted in the Montevideo Convention on the Rights and Duties of States.⁵⁶ According to customary international law, for an entity to be recognized as a state, it must meet the four requirements listed in the Montevideo Convention:⁵⁷ “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.”⁵⁸ Considering the Montevideo criteria, certain scholars have maintained that an island state loses its state status, once its territory is submerged.⁵⁹ However, this line of thinking conflicts with public international law’s firmly established principle of state continuity. According to this principle, a state, once recognized in international law, continues to exist indefinitely.⁶⁰ How can law overcome this conflict?

B. *Does the Principle of State Continuity Support Continuation of SIDS Statehood Post-Submergence?*

Alberto Costi and Nathan Ross argue that the Principle of State Continuity mandates the continuation of statehood, regardless of territory.⁶¹ Costi and Ross explain that the Principle of State Continuity reflects the commitment of international law to the protection of substantive rights.⁶² In times of crisis, when substantive rights are threatened, the Principle of State Continuity is applied to safeguard “the cultural, ethnic and/or historical identity or individuality (the ‘self’) of [the] collectivity, that is, of [the] ‘people.’”⁶³ Loss of territory endangers the substantive legal rights of the people of SIDS. Thus, once again the principle of state continuity should be applied to maintain statehood *de jure*. Applying similar logic, writers Maxine Burkett and Jacquelynn Kittel argued that the Principle of State Continuity mandates recognition of a new category of international actor: a nonterritorial state⁶⁴ or the *nation ex-situ*.⁶⁵ The new legal status will be that “of a sovereign state, afforded all the rights and benefits of sovereignty amongst the family of nation-states, in perpetuity. It would protect the peoples forced from their

⁵⁶ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

⁵⁷ CRAWFORD, *supra* note 53, at 45–46.

⁵⁸ Montevideo Convention, *supra* note 56, at art. 1.

⁵⁹ See *supra* text accompanying notes 47–48.

⁶⁰ CRAWFORD, *supra* note 53, at 668.

⁶¹ Alberto Costi & Nathan Jon Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future*, in SMALL STATES IN A LEGAL WORLD 101, 102 (Petra Butler & Caroline Morris eds., 2017).

⁶² *Id.* at 114; Sharon, *supra* note 13, at 102.

⁶³ David Raič, STATEHOOD AND THE LAW OF SELF-DETERMINATION 223 (2002).

⁶⁴ Burkett, *supra* note 17; Kittel, *supra* note 17, at 1228–30 (discussing the “deterritorialized state”); See Costi & Ross, *supra* note 61, at 113; Wannier & Gerrard, *supra* note 14, at 623–27.

⁶⁵ Burkett, *supra* note 17, at 360, 363.

[homeland] by serving as a political entity that remains constant even as its citizens establish residence in other states.”⁶⁶

To others, the idea of creating non-territorial states based on the Principle of State Continuity stretches legal fundamentals too far. Opponents of the idea of the nonterritorial state view the Principle of State Continuity differently. To them, the principle is a legal mechanism designed to provide stability during periods of change and transition.⁶⁷ States may undergo significant transformations during their lifetime. To maintain stability and accommodate dynamism, the Principle of State Continuity allows international law to avoid turning statehood ‘on and off.’⁶⁸ But the principle was not designed to accommodate a permanent disruption of the state. On the contrary, the Principle of State Continuity assumes that “[a]s long as a State *continues to have a territory* it will continue to be a State.”⁶⁹ Thus, complete and permanent loss of territory is the exception that proves the rule. If the Principle of State Continuity supports state continuation as long as some territory is left, then once there is a complete and permanent loss of territory, we must accept the harsh legal consequence of state termination.⁷⁰

C. Relaxing the Territory Requirement

Another way to address the problem of disappearing states, set forth in the literature, focuses on the rationale of Montevideo-based discussions concerning the extinction of states in extreme conditions. Scholars explain that Montevideo is a treaty for recognizing new states in international law, not un-recognizing established states.⁷¹ These scholars observe that there is no support in the Convention’s text or purpose in customary international law for the idea that the same criteria for recognition of new states should apply to strip already recognized states of their legal status.⁷² Indeed, “[u]nlike the question of establishing statehood, the issue of continuity of an existing state is a different legal question.”⁷³

⁶⁶ *Id.* at 346; see Bílková, *supra* note 15, at 28, 41 (“[E]ntities that did not possess territory were recognized as States.”).

⁶⁷ Pablo Moscoso de la Cuba, *The Statehood of ‘Collapsed’ States in Public International Law*, INT’L AGENDA, 121, 131–32 (2011); see Sharon, *supra* note 13, at 100; see also CRAWFORD, *supra* note 53, at 667–68 (discussing “[t]he law of State succession”).

⁶⁸ Moscoso de la Cuba, *supra* note 67, at 131–34; see LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE: VOL. I. PEACE 122 (2d ed. 2005) (“A State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory.”).

⁶⁹ Moscoso de la Cuba, *supra* note 67, at 132 (emphasis added).

⁷⁰ MAREK, *supra* note 14, at 7; Lee & Bautista, *supra* note 55, at 205–06.

⁷¹ See Costi & Ross, *supra* note 61, at 109–10 (discussing establishment and continuity, but not un-recognizing established states).

⁷² Jain, *supra* note 15, at 28; Costi & Ross, *supra* note 61, at 101–02; Sharon, *supra* note 13, at 98.

⁷³ Sharon, *supra* note 13, at 100.

Although there is some appeal to the argument that the Montevideo Convention is irrelevant for assessing state continuity, the argument is overly formalistic. Montevideo's four criteria were not chosen in a void, and their significance transcends recognition. They are necessary attributes of the state. If we focus on territory, one of the reasons it is included as a criterion for recognizing states in customary international law is that it serves important functions that are crucial for the existence of states. "[T]erritory is a critical constituent of statehood because it provides security, economic and cultural resources and delimits and protects the jurisdiction and sovereignty of the state."⁷⁴ Moreover, from a practical standpoint, it is extremely difficult, if not impossible, to envision a state without territory. "[O]ne cannot contemplate a State as kind of a disembodied spirit . . . there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority."⁷⁵

The notion "[t]hat States possess and control territory is . . . one of the most important assumptions that international law stems from."⁷⁶ Long before climate change became a threat to sovereignty, Marek, the foremost authority on the continuation of states in international law, observed: "[t]hat a State would cease to exist . . . if its territory were to disappear (e.g. an island which would become submerged) can be taken for granted."⁷⁷ According to Craven, "where the territory of a state becomes submerged by the sea . . . it should be possible to conclude that the state has ceased to exist."⁷⁸ Both of these statements concerned not the Montevideo criteria but the common legal view of sovereignty as reflecting "the 'totality of international rights and duties recognized by international law' as *residing in an independent territorial unit*."⁷⁹

D. Applying International Law Precedents in Aid of SIDS

Even though a defined territory is required for recognizing statehood in international law, this requirement is not followed *stricto sensu*. Albania, Burundi, Estonia, Israel, Kuwait, Latvia, Rwanda, and Zaire are just some of the countries admitted to the UN or the League of Nations, without having clearly defined borders.⁸⁰ History is replete with examples of states maintaining international recognition, while being "detached" from their territory and residing in the territory of other states. The classic example is that of "governments-in-exile," a common practice in international law of continuing the recognition of states, where the state

⁷⁴ Jain, *supra* note 15, at 23.

⁷⁵ U.N. SCOR, 3d Sess., 383d mtg., at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948).

⁷⁶ Bílková, *supra* note 15, at 43.

⁷⁷ MAREK, *supra* note 14, at 7.

⁷⁸ Craven, *supra* note 48, at 159.

⁷⁹ CRAWFORD, *supra* note 53, at 32 (emphasis added).

⁸⁰ Wong, *supra* note 15, at 355-56.

has been subjected to illegal annexation or belligerent occupation.⁸¹ Poland maintained its status as a state during World War II, despite being occupied by the Soviet Union and Germany.⁸² It established itself in exile, first in France and then in the United Kingdom.⁸³

In several instances, states were able to maintain their legal status for a very long time following 'detachment.' The foremost example is that of the Baltic states, which continued to exist *de jure* for fifty years, while their territories were under Soviet occupation.⁸⁴ During the twentieth century, according to Talmon, almost forty states enjoyed continued recognition, despite the loss of one or more of the constitutive elements of the state.⁸⁵ The Holy See, between 1870 and 1929, is one example of a sovereign entity losing control over its territory but having its statehood remain unaffected.⁸⁶ A unique precedent is that of the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta, which has continued to exist as a sovereign entity in international law, even though its people and government were banished from their territory more than 200 years ago and have yet to return.⁸⁷

These examples are not mere exceptions; they are the norm. Since the establishment of the United Nations in 1945, there has not been a single case of involuntary state extinction.⁸⁸ Time and again, international law has been willing to preserve the legal status of states despite significant challenges to their territorial and political integrity. Simply put, there is no international law of state extinction.⁸⁹ "[T]here

⁸¹ Jane McAdam, 'Disappearing States', *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 105, 116 (Jane McAdam ed., 2010).

⁸² The Polish government-in-exile was recognized by the allied powers as the sovereign *ex situ* of Poland. See CRAWFORD, *supra* note 53, at 522, 702 (noting the continued "legal existence" of Poland after 1939); Costi & Ross, *supra* note 61, at 113.

⁸³ See Rosemary Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma*, UNIV. NEW S. WALES L. RES. PAPER, at 1, 10–11 (2010); Jenny Grote Stoutenburg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 57, 68 (Michael B. Gerrard & Gregory E. Wannier eds., 2013); Costi & Ross, *supra* note 61, at 113.

⁸⁴ Peter Van Elsuwege, *State Continuity and its Consequences: The Case of the Baltic States*, 16 LEIDEN J. INT'L L. 377, 377–78 (2003).

⁸⁵ Stefan Talmon, *Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 499, 506, 522 (Guy Goodwin-Gill & Stefan Talmon eds., 1999).

⁸⁶ Rayfuse, *supra* note 17, at 10; Wong, *supra* note 15, at 356.

⁸⁷ Wong, *supra* note 15, at 356.

⁸⁸ JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 129 (2012).

⁸⁹ CRAWFORD *supra* note 53, at 715; Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. J. ENV'T L. & POL'Y 1, 18–19 (2014); see Costi & Ross, *supra* note 61, at 102; Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States*, at 6, U.N. Doc. PPLA/2011/04 (2011).

are no precedents, no rules, no authority, and no legal custom addressing climate-induced loss of statehood.”⁹⁰ Thus, scholars argue, not only is there no legal basis for assuming the disappearance of a state, but “[t]o assume that sovereignty is lost with [state disappearance] retards the potential for creative solutions to an entirely novel problem.”⁹¹

While there is strong appeal to this argument, there are significant problems in applying precedents of state continuation to SIDS. After Poland was invaded, its government-in-exile had a hope of return to its territory; but when an island is submerged, there is generally no such hope—the loss of territory is irremediable and permanent.⁹² The recognition of a government-in-exile is justified not by the Principle of State Continuity but by the Doctrine of Nonrecognition, which applies when a state is subjected to belligerent occupation. According to this doctrine, international law will not recognize “situations brought about in contravention to fundamental principles of international law.”⁹³ The doctrine is comprised of three elements: 1) a legal duty originating in a peremptory norm; 2) a serious breach of that norm; and 3) the breach results in the assertion of a legal claim by the wrongdoer.⁹⁴

The first element, a legal duty originating in a peremptory norm, also known as *jus cogens* or peremptory norms of international law, are those norms that are “accepted and recognized by the international community of [s]tates as a whole as a norm from which no derogation is permitted.”⁹⁵ There is no peremptory norm of international law that governs state GHG emissions and consequent climate change impacts.⁹⁶ The legal regime

⁹⁰ Sharon, *supra* note 13, at 100; see Atapattu, *supra* note 89, at 18–19; Valentina Baiamonte & Chiara Redaelli, *Small Islands Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies*, J. PUB. INT’L AFF., 2017, at 6, 9; Costi & Ross, *supra* note 61, at 114; Jain, *supra* note 15, at 31; Park, *supra* note 89.

⁹¹ Costi & Ross, *supra* note 61, at 113; see Atapattu, *supra* note 89, at 18–19 (arguing that the “international community needs to address the legal vacuum that would arise as a result of states disappearing due to consequences associated with climate change.”); Jain, *supra* note 15, at 31; Baiamonte & Redaelli, *supra* note 90, at 9.

⁹² See ILA 2018, *supra* note 4, at 5–7 (discussing anthropocentric sea level rise and observing that “it is ‘virtually certain’ that sea level will continue to rise during the 21st century, and for centuries beyond—even if greenhouse gas (GHG) concentrations are stabilized”).

⁹³ JENNY GROTE STOUTENBURG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* 265 (2015).

⁹⁴ Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 677, 678 (James Crawford et al. eds., 2010).

⁹⁵ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331. “[P]eremptory norms of international law . . . reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.”; ANIEL CARO DE BEER, *PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) AND THE PROHIBITION OF TERRORISM* 78 (2019).

⁹⁶ Ottavio Quirico, *Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?*, 44 *FORDHAM INT’L L. J.* 923, 929; see PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 109–10 (3d ed. 2009) (noting that international environmental law, of which climate change law is a subset, has yet to have a peremptory norm identified within its field).

surrounding such emissions was developed around the consensual notion “of common but differentiated responsibilities.”⁹⁷ The second element, a serious breach of the peremptory norm does not follow, since at present, there is no peremptory norm that applies to sea-level rise, and there obviously cannot be any breach of this norm.

The final element is an assertion of a legal claim by the wrongdoer. In a case of loss of territory due to belligerent occupation, there is a claim by the illegal occupier to sovereignty over the illegally occupied land. However, in the case of a vanishing SIDS territory, it is unclear what legal claim is being asserted and by whom. No state is asserting a legal claim with regard to the territory of SIDS.⁹⁸ None of these elements apply in the case of climate-related deterritorialization.

IV. IS CONTINUED STATEHOOD POST-SUBMERGENCE TRULY IMPORTANT?

The previous Part discussed the various arguments in support of and against the idea that SIDS may maintain their state status post-submergence. Both camps have presented viable arguments. Since both positions are warranted in law, it is not clear which side will prevail. What is clear, however, is that those writing in support of the continued statehood of SIDS are driven by a sense of justice. The prospect of SIDS losing their territory and statehood due to sea level rise is extremely unjust.⁹⁹ It would mean that the most disadvantaged countries of the world will pay the price of actions taken by the richest and most powerful nations. With a combined population of 65 million and non-industrialized economies, SIDS have contributed 0.03 percent of the total worldwide CO₂ emissions,¹⁰⁰ but few other nations will suffer from the harsh consequences of climate change as will SIDS.¹⁰¹ Jain and others, therefore, argue “that fairness demands the continued statehood of

⁹⁷ Benoît Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, ASIA PAC. J. ENV'T L., 2016, at 79–80. Mayer argues that the failure of the international community to reduce GHG to a safe level constitutes a violation of “the no-harm” rule. *Id.* While the no-harm rule is certainly a good candidate for attaining *jus cogens* status in the future, “[i]t is still unlikely that states have universally accepted any ‘strong ethical [ecological] underpinning’ that would drive recognition of the no-harm rule as *jus cogens*.” Louis J. Kotzé, *Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2015 241, 267 (Maarten den Heijer & Harmen van der Wilt eds., 2016).

⁹⁸ One could imagine a situation in which certain states would refuse to acknowledge the continuation of SIDS statehood pursuant to the loss of territory. However, that would not be an assertion of a legal claim, but rather a refusal to recognize a legal claim asserted by the state in question.

⁹⁹ Atapattu & Simonelli, *supra* note 8, at 434.

¹⁰⁰ Balamonte & Redaelli, *supra* note 90, at 14.

¹⁰¹ See Geoffrey Palmer, *Small Pacific Island States and the Catastrophe of Climate Change*, in SMALL STATES IN A LEGAL WORLD 3, 3 (Petra Butler & Caroline Morris eds., 2017) (noting that “[t]he consequences of climate change fall unevenly upon nations; some will fare better than others”).

[SIDS].¹⁰² Is this assumption warranted? To answer this question, we must understand the natural phenomenon threatening SIDS.

A. What We Know About Sea Level Rise

Sea level rise is a process, not a one-time event. Before sovereign countries sink into the ocean, nature must first take its toll, gradually eroding their islands' viability as life-supporting ecosystems.¹⁰³ Coastal erosion, king tides, soil salination, and increases in the rate and magnitude of storms will probably render SIDS territory uninhabitable, long before the last grain of SIDS soil disappears into the ocean.¹⁰⁴

The Carteret Islands serve as an example. Located in the South Pacific, the Carteret Islands are a group of low-lying atolls belonging to Papua New Guinea.¹⁰⁵ For decades, the islands have been battling inundation, erosion, and water salination due to sea level rise.¹⁰⁶ To protect against the rising sea, starting in the 1960s, the islands have engaged in adaptation measures, including the construction of seawalls and planting mangroves.¹⁰⁷ These efforts may provide some relief and secure precious time to plan for evacuation, but they cannot prevent the inevitable.¹⁰⁸ Since 1994, more than fifty percent of the land in the Carteret Islands has been reclaimed by the sea.¹⁰⁹ In the 1970s, the government of Papua New Guinea started planning for the relocation of the inhabitants of the Carteret Islands to the nearby island of Bougainville.¹¹⁰ Since the 1980s, relocation has been taking place in waves and is ongoing.¹¹¹

¹⁰² Jain, *supra* note 15, at 35.

¹⁰³ Baiamonte & Redaelli, *supra* note 90, at 6–7.

¹⁰⁴ See Jain, *supra* note 15, at 4–5 (discussing the effect of climate change on extreme weather events); McAdam, *supra* note 81, at 108–09; Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, ENV'T MAG., 2008, at 9, 10 (“If sea levels rise by 1 meter, storm surges could make island nations such as the Maldives, the Marshall Islands, Kiribati, or Tuvalu largely uninhabitable.”).

¹⁰⁵ Robin Bronen, *Choice and Necessity: Relocations in the Arctic and South Pacific*, FORCED MIGRATION REV., 2014, at 17, 18.

¹⁰⁶ Robin Bronen, *Community Relocations: The Arctic and South Pacific*, in HUMANITARIAN CRISES AND MIGRATION: CAUSES, CONSEQUENCES AND RESPONSES 221, 230 (Susan F. Martin et al. eds., 2014).

¹⁰⁷ *Id.*

¹⁰⁸ Bronen, *supra* note 105, at 18–19.

¹⁰⁹ *Id.* at 18.

¹¹⁰ Bronen, *supra* note 106, at 230; Bílková, *supra* note 15, at 34.

¹¹¹ Bronen, *supra* note 106, at 230; Darren James, *Lost at Sea: The Race Against Time to Save the Carteret Islands from Climate Change*, ABC NEWS, <https://perma.cc/K6XW-WRLT> (last updated Aug. 3, 2018); see Sarah M. Munoz, *Understanding the Human Side of Climate Change Relocation*, CONVERSATION (June 5, 2019), <https://perma.cc/DV4N-ENEX> (explaining efforts taken to find land for displaced residents of the Carteret Islands).

B. Maintaining Statehood in the Face of Territorial Erosion

SIDS will not disappear in a day. Territorial erosion takes a very long time. The most likely scenario is that the island's landmass will gradually shrink, as will its capacity to serve as a life-supporting ecosystem.¹¹² As the island's habitability decreases, people will have to relocate and live elsewhere.¹¹³ This process may take decades, if not centuries.¹¹⁴ Most of the population of SIDS will therefore leave, long before statehood is endangered. Moreover, SIDS will be able to maintain indicia of statehood for a long period of time, after *all* of their population have left in search of a safer life elsewhere. To understand how this dynamic operates, we need to revisit the Montevideo criterion on territory.

If territory is a prerequisite for statehood, how much territory must an island state continue to possess, in order not to lose statehood? The territory criterion may be construed textually, as implying that as long as some land remains, even a bit of uninhabitable barren rock, the territory requirement is met.¹¹⁵ As Crawford observes, "although a State must possess some territory, there appears to be no rule prescribing the minimum area of that territory."¹¹⁶ An alternative construction focuses on functionality, which Stoutenburg explains: "the postulate of a defined territory was not introduced in the statehood definition as an end in itself, but as a means to an end: it is the physical basis that ensures that people can live together as organized communities."¹¹⁷ According to this view, for a piece of land to qualify as statehood-supporting territory, it must allow for habitation by a permanent population.¹¹⁸

A question then arises about the minimal number of residents that must remain on the island for it to qualify as a state. Here, too, there are two diverging views. According to the textual construction, a permanent population is the lowest number of people that can support the continued existence of a fixed community.¹¹⁹ By this test, the required number of inhabitants may be very small.¹²⁰ Proponents of this view offer the

¹¹² See Baiamonte & Redaelli, *supra* note 90, at 6–7 (noting that "climate change has a major impact on the availability of drinkable water, soil salinization, biodiversity[,] and ecosystems"); William R. Dickinson, *Pacific Atoll Living: How Long Already and Until When?* GAS TODAY, 2009, at 4, 8 (explaining that a future rise in sea level is a clear threat to atoll dwellers).

¹¹³ Lee & Bautista, *supra* note 55, at 209–10.

¹¹⁴ See Oppenheimer et al., *supra* note 3, at 327 ("Many coastal decisions have time horizons of decades to over a century.").

¹¹⁵ Stoutenburg, *supra* note 83, at 60.

¹¹⁶ CRAWFORD, *supra* note 53, at 46; see Lee & Bautista, *supra* note 55, at 197 (noting that while "territory as a prerequisite of Statehood is almost universally accepted, there is no rule requiring a minimum size or that the same be contiguous.").

¹¹⁷ Stoutenburg, *supra* note 83, at 61.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 64; see Costi & Ross, *supra* note 61, at 115 (discussing the ongoing legal status of low-lying states in the climate-changed future).

¹²⁰ See François Doumenge, *The Viability of Small Intertropical Islands*, in STATES, MICROSTATES, AND ISLANDS 70, 84 (Edward Dommen & Philippe Hein eds., 1985)

example of the Pacific island territory of Pitcairn as an example of the ability of a very small community to satisfy the permanent-population requirement.¹²¹ Pitcairn has a permanent population of approximately fifty inhabitants.¹²² In numerous General Assembly Resolutions, the UN has recognized the right of the Pitcairn inhabitants to become a sovereign state.¹²³

According to the alternative, functional view, the permanent-population criterion should be examined according to parameters that focus on the purpose of social organization in political entities.¹²⁴ People organize themselves into a state, as a social and political community, to exercise collective self-determination.¹²⁵ For a community to satisfy the permanent-population criterion, it should, at a minimum, possess certain standards of organization that are essential for the effective exercise of self-determination.¹²⁶ Social organization, however, is not a correlative of population size. The Vatican City State, a highly organized entity and the smallest country in the world, has 618 citizens, of whom only 246 live within its borders.¹²⁷ Moreover, the permanent population of the Vatican City State is comprised of officials who only temporarily reside within its borders. Their nationality terminates when they no longer hold office.¹²⁸ Even according to the more restrictive view, the number of people who should remain on the island for a SIDS member to maintain its state status is very small. Indeed, "infinitesimal smallness has never been seen as a reason to deny self-determination to a population."¹²⁹

By the time the question of statehood becomes a legal issue, most of the challenges awaiting the people of SIDS will already have been settled. When *total* submergence becomes a reality, the need for a legal entity to protect the self-determination of SIDS is unnecessary. The people of SIDS

("Communities which have been reduced to little more than 100 members have survived to begin again on new bases, even under unfavourable conditions.")

¹²¹ Stoutenburg, *supra* note 83, at 63.

¹²² *Id.*

¹²³ See, e.g., G.A. Res. 2869 (XXVI), ¶¶ 1, 7 (Dec. 20, 1971) (deciding that the U.N. should render all help to the people of those colonial territories that have claimed independence).

¹²⁴ See Stoutenburg, *supra* note 8383, at 64 (recounting a German administrative court's finding that a permanent population must fulfil certain purposes of statehood, i.e., establishment of basic infrastructure providing for the vital necessities of human life and "a community that jointly masters all aspects of communal existence").

¹²⁵ *Id.*; Costi & Ross, *supra* note 61, at 115.

¹²⁶ Stoutenburg, *supra* note 8383, at 64; see Costi & Ross, *supra* note 61, at 115 (discussing the ongoing legal status of low-lying states in the climate-changed future).

¹²⁷ *State and Government, General Notes: Population, VATICAN CITY STATE* (July 3, 2018), www.vaticanstate.va/it/stato-governo/note-general/popolazione.html.

¹²⁸ Stoutenburg, *supra* note 83 at 66.

¹²⁹ Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331, 383 (1976).

will have already scattered across the world.¹³⁰ Questions of resettlement, rights of refugees, and reparations will probably be long settled.¹³¹

This realization does not solve the dispute between proponents and opponents of the idea of a non-territorial state, but it significantly narrows its scope. Could a nonterritorial state exist? Maybe. But would it matter for the people of SIDS? Probably not. Since nonterritorial states will come into being only *after* their inhabitants have resettled in other states, the functions of the nonterritorial state are mainly symbolic.

C. Why Maintain State Status?

How does the maintenance of statehood post-submergence assist the people of SIDS? According to Derek Wong, there are three reasons why statehood is important for SIDS. The first is that “United Nations membership and standing before the International Court of Justice (“ICJ”) is limited to states.”¹³² Wong explains that SIDS would want to maintain UN membership “because it provides a cost-effective method of maintaining international contacts, thus avoiding the need for a worldwide diplomatic apparatus.”¹³³ It is crucial for SIDS to maintain international relations during the tumultuous times ahead. Relocation and resettlement initiatives require negotiation with potential host countries.¹³⁴ Securing guarantees for the safety and prosperity of SIDS communities in receiving countries requires legal and diplomatic resources. Indeed, SIDS are already engaged in such efforts.¹³⁵ After the population of SIDS dispersed and resettled in other countries, it is unclear why SIDS would need to maintain international relations.

¹³⁰ See Lee & Bautista, *supra* note 55, at 213 (stating “in reality, small island States are likely to become uninhabitable long before the islands physically disappear by total inundation”); WILLIAM J. HOUSE, UNITED NATIONS DEPT OF ECON. AND SOC. AFFAIRS, POPULATION AND SUSTAINABLE DEVELOPMENT IN SMALL ISLAND DEVELOPING STATES: CHALLENGES, PROGRESS MADE AND OUTSTANDING ISSUES 10 (2013) (indicating that many originally from Caribbean nations have already migrated temporarily or permanently to other countries in order to escape the effects of natural disasters); *Population and Migration*, UNITED NATIONS CONF. ON TRADE AND DEV., <https://perma.cc/2PT6-YVZL> (last visited Nov. 4, 2021) (explaining and giving examples of people emigrating from SIDS).

¹³¹ See generally Wong, *supra* note 15, at 349–50 (indicating that as sea levels rise and completely submerge island nations this results in “physical extinction [which] may result in the corresponding extinction of obligations.” This supports the assertion that questions of resettlement, rights of refugees, and reparations will not merely be long settled but instead will, more probably, become obsolete).

¹³² *Id.* at 349.

¹³³ *Id.*

¹³⁴ See, e.g., Baiamonte & Redaelli, *supra* note 90, at 12–14 (analyzing legal and diplomatic strategies of SIDS as they address challenges posed by climate change).

¹³⁵ See, e.g., *id.* at 13 (describing Kiribati’s purchase of land in Fiji and India’s attempt to achieve access to the Maldives’ EEZ in return for allowing the government of the Maldives to acquire land in India for the safe relocation of its population in the event of sea level rise).

Maintaining relations with other states through the United Nations is available to non-state members as well.¹³⁶

Concerning access to the ICJ, Wong explains that for SIDS, as vulnerable states, the "protection of the law is 'most necessary.'"¹³⁷ During the difficult times that lay ahead, the people of SIDS will be in urgent need of legal protection. They may attempt to sue for reparations, request restitution for benefits unjustly accrued at the expense of SIDS, seek to enjoin others from violating their sovereignty, or seek adjudication of asylum claims.¹³⁸ Once again, however, it is unclear how access to the ICJ will benefit *resettled* communities of SIDS. As explained earlier, decades, if not centuries, may pass from the time most of the people of SIDS emigrate until the indicia of statehood can no longer be maintained. What will the second or third generation of resettled SIDS citizens want of the ICJ?

Wong's second point focuses on cultural connections. He explains that "the people of [SIDS] have strong links with their culture, land and state" and that "th[ese] connection[s] and the desire to be viewed as valued community members were among the reasons" certain SIDS inhabitants "rejected resettlement" options and "continue to reject the refugee label."¹³⁹ This is undoubtedly true. Unfortunately, legal status as a state in international law does not provide a remedy for these difficulties. A community's distinctive history, language, ethnicity, and culture, as well as its ties to a particular place are an inimitable part of a nation's identity. The right to self-determination is often raised in the context of protecting a people's right freely to choose how to celebrate and exercise their unique attributes.¹⁴⁰ It is not surprising that Wong identifies the maintenance of statehood with the maintenance of links to "culture, land and state."¹⁴¹

Wong is mistaken, however, because he disregards the fact that maintenance of statehood *as a legal fiction* has no impact on the ability of the people of SIDS to maintain the attributes that define their national identity. The maintenance of statehood post-submergence will not prevent the inevitable severance of territorial connections and the accompanying loss of historical and cultural ties to the land. In the absence of territory, the people of SIDS become landless refugees. This is not a matter of legal definitions. Despite their refusal to accept the refugee label, given the advance in sea level rise, the people of SIDS will become refugees one day. Maintenance of statehood post-submergence will not prevent this result.

¹³⁶ Bruce Cronin, *The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism*, 8 GLOB. GOVERNANCE: A REV. OF MULTILATERALISM AND INT'L ORG. 53, 53 (2002).

¹³⁷ Wong, *supra* note 55, at 349.

¹³⁸ Sharon, *supra* note 13, at 132-33.

¹³⁹ Wong, *supra* note 55, at 349-50.

¹⁴⁰ Sharon, *supra* note 13, at 123-24.

¹⁴¹ Wong, *supra* note 55, at 349-50.

D. Maintenance of State Status Harms SIDS

For four decades, SIDS have been trying to avoid piecemeal migration and secure territory in other countries to which they can safely relocate their entire population.¹⁴² Tuvalu has held talks with Australia and New Zealand to obtain their consent to accept the entire Tuvaluan population, when sea level rise renders Tuvalu uninhabitable.¹⁴³ For thirteen years, the Maldives has been diverting a portion of its billion-dollar annual tourist revenue into a wealth-fund designed for buying new land to relocate its entire population.¹⁴⁴ Kiribati has announced its intention to organize the migration of its entire population,¹⁴⁵ and then purchased 2,000 hectares of land in Fiji.¹⁴⁶

Fighting to maintain statehood post-submergence undermines these efforts. If SIDS are to maintain their statehood post-submergence, host countries which accept large communities of refugees from SIDS are at risk of one day discovering a sovereign entity located within their borders. No country will willingly accept refugees from other countries, if doing so may create sovereign conflict internally. If the state continues to exist indefinitely, regardless of a link to a specific territory, then it exists for the people *wherever they are*. In a legal world of nonterritorial states, sovereignty follows the people. Once the population of an island state resettles in another state and their territory of origin disappears, they may exercise or, at the least, seek to exercise sovereignty in their new homeland.

What is so striking about this result is that none of the writers who advance the idea of continued statehood of SIDS have realized the disincentives continued statehood poses for potential host states. On the contrary, in support of the continuation of statehood post-submergence,

¹⁴² See Bilková, *supra* note 51, at 22 (stating “some entities may strive to get or maintain statehood even if they clearly do not, or have ceased to, meet the definition of a State”); Costi & Ross, *supra* note 61, at 114–15 (explaining that “if the territory becomes entirely uninhabitable and all people relocate to the territories of other states, the population” may be fragmented if its “relocation relies on migration law alone”); McAdam, *supra* note 81, at 122 (referencing negotiations between Kiribati and Tuvalu with Australia and New Zealand and between Maldives with India and Australia regarding “en masse relocation of a state’s population to another country,” as well as Indonesia “considering renting out some of its 17,500 islands”); Palmer, *supra* note 101, at 9 (mentioning that Tokelauans should be able to relocate to New Zealand and that Kiribati has a policy of “migration with dignity” which aims “to relocate people in a way that is conducive to community and positive contribution to the host country.”); Rosemary Rayfuse, *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood*, 41 ENV’T POL’Y & L. 281, 284–85 (2011) (evaluating practicalities of options for relocating State populations); Rayfuse, *supra* note 83, at 8 (stating “wholesale relocation of the entire population of a state; an issue which has concerned governments of vulnerable island states such as Tuvalu, Kiribati and the Maldives since the 1980s”).

¹⁴³ Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 LA. L. REV. 151, 172–73 (2012).

¹⁴⁴ *Id.* at 173.

¹⁴⁵ Costi & Ross, *supra* note 61, at 114.

¹⁴⁶ Allen, *supra* note 10, at 11.

Wong writes that the purchase of alternative land in another state would “provide another reason for the [legal] construct [of nonterritorial state] to exist.”¹⁴⁷ According to Wong, the purchased territory would support the claim for continued statehood “so the status of those residing on the purchased territory — nationals of the putative state — do not change when the first wave covers the last rock.”¹⁴⁸ It did not occur to Wong that if the purchase of territory would “provide a reason” for competing sovereignty claims against the host state, no potential host state will ever agree to sell the territory in the first place.¹⁴⁹

Similarly, Jain explains that the reason territory is a prerequisite for recognizing *new* states is that, if international law recognizes the statehood of nonterritorial entities, it will create a strong “basis upon which claims to territorial rights may be found and such claims to these rights would imperil the territorial sovereignty of established states.”¹⁵⁰ This problem does not arise in the context of SIDS, explains Jain, because SIDS are not new states but already recognized states.¹⁵¹ This distinction is unconvincing. A state that one day appears inside another established state is a *new* state which “imperils the territorial sovereignty of the established state.”¹⁵² The fact that the competing state used to exist somewhere else will hardly assuage the concern of potential host states.

Therefore, advancing the notion of nonterritorial states is a disservice to SIDS. Since no state will voluntarily settle within its territory a community with competing sovereignty claims, the insistence of SIDS on maintaining statehood post-submergence will inevitably lead to communal destruction.¹⁵³ To avoid the threat of competing sovereignty claims, states will only be willing to accept a small number of immigrants from SIDS.¹⁵⁴ In that way, host states will guarantee that no host state has a community of immigrants from an island state large enough to claim sovereignty within its territory. By clinging to their statehood, SIDS will guarantee that no collective resettlement plan is ever achievable.

The idea that to save SIDS we are to create a nonterritorial state is myopic because it does not contemplate the long-term implications of sovereignty as detached from a territory. The model of nonterritorial

¹⁴⁷ Wong, *supra* note 55, at 379 (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Jain, *supra* note 55, at 26–27.

¹⁵¹ *Id.* at 27–29.

¹⁵² Jain, *supra* note 55, at 26–27.

¹⁵³ Piecemeal migration is disastrous to SIDS. It will entail “significant economic and non-economic losses to communities, including the loss of ways of life, cultural heritage, biodiversity and a sense of connection to self and communities. The loss of self-determination and self-reliance can erode traditional values, and threaten the social identity of residents.” Adelle Thomas & Lisa Benjamin, *Policies and Mechanisms to Address Climate-Induced Migration and Displacement in Pacific and Caribbean Small Island Developing States*, 10 INT’L J. CLIMATE CHANGE STRATEGIES & MGMT. 86, 89 (2018).

¹⁵⁴ See, e.g., Rayfuse, *supra* note 83, at 9 (explaining that New Zealand would only accept 75 citizens of Tuvalu per year).

states undermines the fundamental concept of the state in international law. The modern system of international law is structured around the idea that to be a state is “the exercise of *full* governmental powers with respect to [a certain] territory.”¹⁵⁵ To be a state is to possess and control territory.¹⁵⁶ Indeed, “inherent in possession of territory (as an indicator of statehood) is exclusive control over it.”¹⁵⁷ As explained by the Permanent Court of International Justice: “one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that . . . the territory is co-terminous with the Sovereignty.”¹⁵⁸ Sovereignty and independence of states are expressed in the prerogative of the state “to ensure that activities within its borders are not regulated by any other State.”¹⁵⁹ This is both a legal statement and a fact of geopolitical life. States go to great lengths to ensure that no one interferes with their sovereignty and internal affairs, especially not other states. Detaching sovereignty from territory means that the crucial link in international law between statehood and the supremacy of the state over its territory will be severed. There could, as well, be a ripple effect far beyond the case of SIDS.¹⁶⁰

V. OTHER SOLUTIONS

The discussion in the previous Part demonstrated that if SIDS continue to signal to other states that they will fight to maintain statehood post-submergence, the prospects for communal relocation significantly diminish. SIDS, therefore, face a cruel dilemma: give up the fight to maintain statehood post-submergence or eliminate the chances for communal resettlement. It is most likely that sea-level rise will eventually cause the territory of SIDS to become uninhabitable and even entirely submerged. The question then is, what should SIDS do? Four options have been discussed in the scholarly literature.

A. Purchase of Territory

One scenario for SIDS is to acquire territory from another state through a treaty of secession.¹⁶¹ In such a case, title to the ceded territory would transfer to the SIDS’ purchaser, which would then be able to relocate its population to the new territory and maintain full sovereignty

¹⁵⁵ CRAWFORD *supra* note 53, at 46 (emphasis added).

¹⁵⁶ VAUGHAN LOWE, *INTERNATIONAL LAW* 138 (2007).

¹⁵⁷ McAdam, *supra* note 81, at 112.

¹⁵⁸ *N. Atl. Coast Fisheries (U.K. v. U.S.)*, 11 R.I.A.A. 167, 180 (Perm. Ct. Arb. 1910).

¹⁵⁹ LOWE, *supra* note 156.

¹⁶⁰ See Jain, *supra* note 150, at 26–27 (explaining that nonterritorial states “would imperil the territorial sovereignty of established states”).

¹⁶¹ A.H.A. Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37 NETH. INT’L L. REV. 207, 230 (1990).

in its new location.¹⁶² This has been the preferred solution for SIDS. Since the 1980s, several low-lying island states have been working to secure alternative territory to allow for “wholesale relocation of the entire population.”¹⁶³

There is some international precedent for collective environmental relocation to new land and the maintenance of communal sovereignty.¹⁶⁴ However, the prospects for this solution are discouraging. It is unlikely that a state will “willingly sell or lease a part of their territory to another State, especially with the prospect that the sale or lease would be for good.”¹⁶⁵

[F]rom a practical perspective it is difficult to envisage any state now agreeing, no matter what the price, to cede a portion of its territory to another state The political, social and economic ramifications of ceding . . . territory may simply exceed the capacities—and courage—of existing governments.¹⁶⁶

B. Federation

A second option for SIDS is federation with another state. A federation allows the maintenance of statehood indefinitely.¹⁶⁷ While the territory of the island state may one day disappear, the territory of the union will continue to exist and the legal entity of the unified state endures.¹⁶⁸ A union with another state will provide the people of the merging SIDS with an alternative territory for its people to relocate. Gradually, as the habitable capacity of their island diminishes, the people of SIDS could emigrate to other, more habitable, territories of the federation. But why would any country choose to enter a union with a threatened SIDS? Federation involves giving up some powers to the union and a concomitant reduction in independence.¹⁶⁹ Decisions and actions that previously could have been executed solely by the government of one state would have to be decided in accordance with the procedures and principles of the newly formed union.¹⁷⁰ What do SIDS have to offer to make such a deal desirable?

¹⁶² Rayfuse, *supra* note 83, at 8.

¹⁶³ *Id.*; Allen, *supra* note 10, at 11.

¹⁶⁴ See, e.g., Rayfuse, *supra* note 83, at 8–9 (discussing how after a volcanic eruption in the 1870s, thousands of Icelanders relocated to land in Canada and formed the colony of New Iceland).

¹⁶⁵ Bilková, *supra* note 51, at 36.

¹⁶⁶ Rayfuse, *supra* note 83, at 9; see Allen, *supra* note 10, at 11 (“While states are in theory well within their rights to cede portions of their territory, the chances of them actually doing so are rather small. Because there are few, if any, significant benefits to be gained from giving away land, the motivation to do this is weak.”).

¹⁶⁷ Within the “host” state created through federation. Rayfuse, *supra* note 83, at 9.

¹⁶⁸ *Id.*

¹⁶⁹ D. Alan Heslop, *Political System*, ENCYC. BRITANNICA, <https://perma.cc/7YQT-R254> (last visited Oct. 13, 2021).

¹⁷⁰ *Id.*

According to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), a coastal state is entitled to an exclusive economic zone (“EEZ”), stretching 200 nautical miles from its coastline.¹⁷¹ Remote and dispersed island states tend to generate relatively large ocean zones.¹⁷² Despite their small size, many SIDS are large ocean nations.¹⁷³ For example, the small archipelago of Kiribati has 3.5 million square kilometers of ocean space, making it the nation with the twelfth largest EEZ.¹⁷⁴ Large EEZs are strategic assets. It is estimated that ninety percent of present commercial fisheries fall within these 200-mile zones.¹⁷⁵ Ocean territories are strategically important, not only for their resources, but also for security reasons. Countries have committed substantial resources to maintain control over remote islands that serve as extensions of sovereignty or outer headland baselines that generate EEZs.¹⁷⁶ Since 2014, to claim sovereignty in the region, China has engaged in a massive military and engineering campaign to create artificial islands on several reefs in the South China Sea.¹⁷⁷ In 1988, Japan committed \$240 million to protect a small coral reef from erosion in the Philippines Sea, 1,740 kilometers from Tokyo.¹⁷⁸ To maintain this reef as an ‘island,’ Japan constructed a steel and concrete platform on and around two rocks that protrude from the reef and extend two feet out of the water at high tide.¹⁷⁹ The project was executed to prevent the loss of 163,000 square miles of Japan’s EEZ.¹⁸⁰ Noting the strategic importance of EEZs, David Caron has argued that SIDS could use their large ocean

¹⁷¹ United Nations Convention on the Law of the Sea, arts. 56–57, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁷² See David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 *ECOLOGY L. Q.* 621, 637–38 (1990) (explaining that a small group of islands could have “at least some 125,664 square nautical miles of ocean”).

¹⁷³ Leila Mead, *Small Islands, Large Oceans: Voices on the Frontline of Climate Change*, INT’L INST. SUSTAINABLE DEV. (March 29, 2021), <https://perma.cc/A2PJ-U5QD>.

¹⁷⁴ Quentin Hanich et al., *Pacific Small-Scale Coastal Fisheries: Strengthening Sustainability, Food Production, and Livelihoods*, in *PACIFIC ECONOMIC MONITOR* 28, 31 (Christopher Edmonds et al. eds., July 2016).

¹⁷⁵ Peter H. Sand, *Sovereignty Bounded: Public Trusteeship for Common Pool Resources?*, *GLOB. ENV’T POL.*, 2004, at 47, 47. For a general discussion concerning the richness of natural resources in EEZ and the outer continental shelf and their importance to SIDS’ economies, see Ann Powers & Christopher Stucko, *Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels*, in *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE* 123, 131–32 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

¹⁷⁶ Yi-Hsuan Chen, *South China Sea Tension on Fire: China’s Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law*, *MAR. SAFETY & SEC. L. J.*, 2015, at 1, 2–3.

¹⁷⁷ *Id.* at 1.

¹⁷⁸ Caron, *supra* note 172, at 640.

¹⁷⁹ *Id.*; Andrew L. Silverstein, *Okinotorishima: Artificial Preservation of a Speck of Sovereignty*, 16 *BROOK. J. INT’L L.* 409, 409–410 (1990).

¹⁸⁰ Silverstein, *supra* note 179, at 409.

territory as a “basis for some form of federation between the island state and a state less threatened by the rising sea level.”¹⁸¹

Unfortunately, although federation is an ideal solution for SIDS, it is not realistic. A merger of this type requires the non-threatened state to give up more than it has bargained for. In a federation, the merging states must give up a measure of sovereignty when they enter the union.¹⁸² Every state in the union subjects its discretion to a set of rules and procedures according to which the union is governed.¹⁸³ It is hard to envision a regional power willingly giving up decision-making powers in return for marine territories. In addition, the creation of a federation with another state involves a change in national identity and constitutional frameworks.¹⁸⁴ While the plight of SIDS generates public concern and empathy, it is doubtful that empathy suffices to garner the needed political capital for effectuating constitutional changes of such magnitude, even if strategic maritime assets are involved.

C. Artificial Structures

Artificial structures, such as seawalls and constructed platforms, are frequently employed to protect against sea level rise.¹⁸⁵ It has been suggested that these measures could be used by SIDS to prevent their territories from becoming submerged.¹⁸⁶ There are two problems with engineering solutions of this kind. The first is that it is not a very sustainable solution. It has often been the case that artificial structures

¹⁸¹ Caron, *supra* note 172, at 650.

¹⁸² D. Alan Heslop, *Political System*, ENCYC. BRITANNICA, <https://perma.cc/8PJU-XBAP> (last visited Dec. 8, 2021). When a confederation, a union or a federation is formed between two or more states, each of the merging states gives up a measure of sovereignty which is transferred to the newly formed transnational entity. See e.g., Tina Oršolić Dalessio, *The Issue of Sovereignty in an Ever-Closin Union*, 10 CROATIAN YEARBOOK EUROPEAN L. & POL'Y, 67, 73 (2014) (discussing “transfer of competences from the national to the supranational level” of states who enter the EU); Case 26/62 Van Gend en Loos [1963] ECR 1, 12 and Case 6/64 Costa v ENEL [1964] ECR 585, 593; see also de Witte (n 8) 154-155 (explaining that states who opted to become part of the European Union traded certain sovereign rights for the benefits offered by becoming EU Member States). Similarly, when Texas, an independent republic, joined the United States, it gave up certain sovereign powers like independence and the right to unilateral secession. MICHAEL C. DORF, NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY-FIRST CENTURY 82 (2006).

¹⁸³ Heslop, *supra* note 182; CARL SCHMITT, CONSTITUTIONAL THEORY 383-385 (1928).

¹⁸⁴ Stefan Rummens & Stefan Sottiaux, *Democratic Legitimacy in the Bund or Federation of States: The Case of Belgium and the EU*, 20 EUROPEAN L. J. 568, 571 (2014); SCHMITT, *supra* note 183.

¹⁸⁵ Powers, *supra* note 143, at 170.

¹⁸⁶ See Camprubi, *supra* note 50, at 98–99 (referring to options suggested by the IPCC Coastal Zone Management Subgroup); Allen, *supra* note 10, at 5 (“One of the first solutions often envisaged for a disappearing small island state to continue its existence in line with the traditional rules of statehood is the construction of artificial territory such as artificial islands.”).

“actually contributed to, rather than prevented, coastal erosion.”¹⁸⁷ In the 2016 *South China Sea Arbitration*,¹⁸⁸ the tribunal concluded “that China’s artificial island-building activities on the seven reefs in the Spratly Islands have caused devastating and long-lasting damage to the marine environment” in the South China Sea.¹⁸⁹ There is also concern that artificial islands and technical solutions to sea level rise cannot last, in the face of sea level rise. Indeed, “even the multi-billion-dollar World Islands in Dubai . . . are sinking back into the sea from where they came.”¹⁹⁰ Second, engineering solutions are extremely costly. Ann Powers estimates that construction to protect the inhabited islands of the Maldives would require investments “more than 30 times the country’s [gross domestic product].”¹⁹¹ Investments of this magnitude are beyond the reach of any country, especially developing island nations with limited resources.

D. Resettlement as Climate Refugees

In 2001, the island nation of Tuvalu inquired of Australia and New Zealand whether, in the case of total loss of its territory, the two countries would be willing to admit the 11,000 inhabitants of Tuvalu.¹⁹² Australia flatly rejected the request.¹⁹³ New Zealand was willing to offer a limited thirty-year immigration program, to allow up to seventy-five Tuvaluans per year to immigrate to New Zealand.¹⁹⁴ What should Tuvaluans and other inhabitants of SIDS do? Could the people of SIDS demand admittance to other states as refugees?

The term ‘climate refugees’ is often invoked with regard to the grim future awaiting the people of SIDS.¹⁹⁵ Unfortunately, as explained by Maxine Burkett, the people of SIDS “exist in a veritable legal no-man’s land.”¹⁹⁶ Although there are many international instruments, norms, conventions, and covenants that govern forced displacement, none of

¹⁸⁷ Powers, *supra* note 143, at 170; see Bílková, *supra* note 15, at 35–36 (explaining that the costs of artificial structures “together with the uncertain prospects of their sustainability” render them infeasible to SIDS).

¹⁸⁸ *In re South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013–19 (2016).

¹⁸⁹ *Id.* at ¶ 983; see Tim Stephens, *The Collateral Damage from China’s ‘Great Wall of Sand’: The Environmental Dimensions of the South China Sea Case*, 34 AUSTL. Y.B. INT’L L., 41, 49–50, 52 (2016) (describing the *South China Sea Arbitration’s* findings of damage to the marine environment).

¹⁹⁰ Allen, *supra* note 10, at 5.

¹⁹¹ Powers, *supra* note 143, at 170.

¹⁹² Rayfuse, *supra* note 83, at 9.

¹⁹³ *Id.*

¹⁹⁴ On the conditions that they are “of good character and health, have basic English skills, have a job offer in New Zealand, and be under 45 years of age.” *Id.*

¹⁹⁵ Suong Vong, *Protecting Climate Refugees is Crucial for the Future*, HUMANITY IN ACTION (May 2017), <https://perma.cc/LY7M-2B5H>.

¹⁹⁶ Burkett, *supra* note 17, at 350.

them applies to climate-induced migration.¹⁹⁷ The 1951 Geneva Convention Relating to the Status of Refugees is the key legal instrument, defining who is a refugee, the rights of refugees, and the legal obligations of states to refugees.¹⁹⁸ The Refugee Convention defines a refugee as any person who:

*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*¹⁹⁹

Scholars who study refugee law maintain that people who escape the impacts of climate change will not qualify as refugees under this definition.²⁰⁰ The most important element in the definition of refugee under the Refugee Convention is that the person seeking protection as a refugee is doing so due to persecution.²⁰¹ Climate change, however, cannot be characterized as persecution, because it “is inevitably indiscriminate.”²⁰² Therefore, the term “climate change refugees” is a misnomer. People displaced due to the impacts of climate change are not recognized as refugees and are not able to claim protection under international refugee law.²⁰³

VI. LESSER OF TWO EVILS

None of the solutions offered in the literature provide SIDS much help. The fight to maintain statehood post-submergence will only reduce prospects for wholesale relocation. Land acquisition and federation have

¹⁹⁷ *Id.* at 354; see Milla Emilia Vaha, *Hosting the Small Island Developing States: Two Scenarios*, 10 INT'L J. CLIMATE CHANGE STRATEGIES & MGMT. 229, 230 (2017) (“[T]he rights of potential climate migrants need to be solved, as the contemporary international legal framework provides no protection for ‘climate refugees.’”).

¹⁹⁸ United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter *Refugee Convention*]; Burkett, *supra* note 17, at 350.

¹⁹⁹ *Refugee Convention*, *supra* note 198, at art. I(A)(2) (emphasis added).

²⁰⁰ Briana Dema, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association*, 37 COLUM. J. ENV'T L. 177, 196 (2012).

²⁰¹ Christopher M. Kozoll, *Poisoning the Well: Persecution, the Environment, and Refugee Status*, 15 COLO. J. INT'L ENV'T L. & POL'Y 271, 278 (2004).

²⁰² Jane McAdam & Ben Saul, *An Insecure Climate for Human Security? Climate-Induced Displacement and International Law* 8 (Sydney Ctr. Int'l L., Working Paper No. 4, 2008).

²⁰³ See, e.g., *Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 at [11–12] (N.Z.) (New Zealand Supreme Court case that rejected a claim by a Kiribati citizen for climate refugee status because the applicant was not subjected to persecution required for the 1951 United Nations Convention relating to the status of refugees).

few chances of materializing—artificial structures are too costly and their efficacy against sea level rise is questionable. Lastly, refugee law does not apply to SIDS facing climate catastrophe, leaving the people of SIDS unable to claim legal protections as refugees. Are SIDS doomed?

A. Giving Up Statehood

Not necessarily. Of the many scholars who have discussed options for continued statehood of SIDS, Jane McAdam is the only one who realized that another alternative exists—giving up statehood altogether.²⁰⁴ According to McAdam, to “preserv[e] the ‘nation’—as an identifiable national, linguistic and cultural community,” SIDS could consider “the deliberate, earlier dissolution of the independent, sovereign state.”²⁰⁵ She explains that this alternative is beneficial to SIDS because it allows them to exercise meaningful communal self-determination elsewhere, without “involv[ing] a claim to statehood and secession [in potential host states].”²⁰⁶ McAdam discussed this option *only* in the context of purchasing alternative territory and *only* with regard to Tuvalu and Kiribati.²⁰⁷ McAdam points out that this option could be realized through the “well-established model within the Pacific: self-governance in free association with another state.”²⁰⁸ McAdam, however, does not elaborate. Following a short description of the model of free association in the Pacific, McAdam concludes that “in light of how recently independence was obtained,” Kiribati and Tuvalu are unlikely to give up statehood.²⁰⁹

McAdam’s observation about SIDS giving up statehood as a potential solution is correct. Her conclusion about its inefficacy is, however, incorrect. The question of whether the people of SIDS would be willing to give up statehood for communal relocation is theirs to answer. As legal scholars who care about the future of SIDS, our responsibility is to develop viable legal options for SIDS. Commitment to the autonomy and self-determination of SIDS means creating as many options as possible to choose from, not deciding for them which options they prefer.²¹⁰ While some SIDS may elect to preserve statehood, that is not necessarily the case for all SIDS, especially when faced with possible extinction. The next Parts discuss the model of free association, its benefits to SIDS and potential host states, and how it may be employed to maximize these potential benefits.

²⁰⁴ McAdam, *supra* note 81, at 106.

²⁰⁵ *Id.* at 126.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 106.

²⁰⁸ *Id.* at 126.

²⁰⁹ *Id.* at 128.

²¹⁰ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 374–76 (1986) (explaining that autonomy is based on a variety of options); Ori Sharon, *Finding Eden in a Cost-Benefit State*, 27 *GEO. MASON L. REV.* 571, 599 (2020) (explaining that autonomy is based on a variety of environmental options).

B. The Unique Position of the Pacific Territories

In 1947, the United States assumed trusteeship responsibilities for a group of islands in the South Pacific known as the Marshall, Mariana, and Caroline islands.²¹¹ The territories were administered by the United States until 1990, when U.N. Security Council Resolution 683 terminated the Trust Territory of the Pacific Islands ("TTPI").²¹² Before the termination of the TTPI, there were a series of negotiations between the United States and the political representatives of the islands.²¹³ These negotiations resulted in the creation of three freely associated states: The Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.²¹⁴

Pursuant to the Free Association Compact ("Compact") between the United States, the Republic of the Marshall Islands ("RMI"), and the Federated States of Micronesia ("FSM"), RMI and FSM ceded to the United States "full authority and responsibility for security and defense matters" relating to the two states.²¹⁵ The Compact granted the United States rights to install and use military facilities on the islands and to prevent military personnel from any other country access to the territory of RMI and FSM.²¹⁶ Under the Compact, the United States committed substantial financial assistance to the two countries and also recognized RMI and FSM as "sovereign nations with authority over internal and foreign affairs."²¹⁷

Under the Compact, citizens of RMI and FSM have been accorded significant immigration rights to the United States.²¹⁸ These rights of immigration include the right to be admitted lawfully into the United States and its territories, and to reside and work in the United States without regard to the relevant requirements of the Immigration and Nationality Act, including requirements concerning visa and work authorizations.²¹⁹ Once admitted, a citizen of RMI and FSM may reside

²¹¹ Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CALIF. L. REV. 915, 919-21 (1990); 1946-47 U.N.Y.B. 394, 398, U.N. Sales No. 1947. L 18.

²¹² For a detailed history of the TTPI and the responsibilities of the United States under the trusteeship, see Chimene I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L. J. 1, 33-39, 41, 43 (2003).

²¹³ *Id.* at 35-38, 49.

²¹⁴ *Id.* at 38; see Dema, *supra* note 200, at 183-84.

²¹⁵ Dema, *supra* note 200, at 184. The compact of free association with Palau was negotiated separately and was entered into force several years after the compacts of free association between the United States, RMI and FSM. The terms of the free association compact between the United States and Palau are roughly the same as the terms of the compacts between the RMI, FSM and the United States. *Id.* at 184-85. For brevity, this Article does not discuss the free association compact between the United States and Palau.

²¹⁶ *Id.* at 184.

²¹⁷ *Id.*

²¹⁸ *Id.* at 185.

²¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-550T, COMPACTS OF FREE ASSOCIATION: ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 6 (2016); see Compact of Free Association Amendments Act of 2003,

in the United States indefinitely.²²⁰ The terms of the Compact relating to immigration played a critical role in the negotiations leading to the adoption of the free association model and, without them, RMI and FSM would not have entered into the Compact with the United States.²²¹ Many citizens of RMI and FSM have exercised their immigration rights under the Compact and have emigrated to the United States.²²² Census data between 2005 and 2009 found that about twenty-five percent of the citizens of the region were living in the United States.²²³

Although the Compact did not envision sea level rise, its immigration provisions “serve as the primary path of migration for citizens of the [pacific territories] who choose to, or are forced to, relocate abroad due to rising sea levels.”²²⁴ Indeed, sea level rise and other “destructive effects of climate change” were cited as leading factors for the mass migration.²²⁵ The Compact’s immigration clauses provide citizens of RMI and FSM an option for communal relocation not available to citizens of other SIDS. Settlement patterns indicate that Compact migrants maintain communal ties after relocation: As of 2011, 32.5 percent of Compact migrants lived on Guam, 21.4 percent resided in Hawaii, and 3.7 percent in the Northern Mariana Islands;²²⁶ the rest of the migrants from RMI and FSM reside in nine communities of roughly the same size on the United States mainland.²²⁷

In addition, the Compact’s economic assistance provisions provide much-needed support to the impoverished and climate-stricken countries. In 2016, United States Compact grants supported a third of FSM’s expenditures and a quarter of RMI’s.²²⁸ The financial support from the United States facilitates climate change adaptation, providing grants to

Pub. L. No. 108-188, § 141, 117 Stat. 2720, 2760–63 (explaining that the Immigration and Nationality Act allows for FSM citizens to “lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions”); Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 141, 99 Stat. 1770, 1804–05 (1986) (RMI and FSM citizens may “engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions”).

²²⁰ Dema, *supra* note 200, at 188.

²²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-40, MIGRATION FROM MICRONESIAN NATIONS HAS HAD SIGNIFICANT IMPACT ON GUAM, HAWAII, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 61 (2001).

²²² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-64, COMPACTS OF FREE ASSOCIATION: IMPROVEMENTS NEEDED TO ASSESS AND ADDRESS GROWING MIGRATION 12 (2011) [hereinafter GAO, COMPACTS OF FREE ASSOCIATION IMPROVEMENTS].

²²³ *Id.*

²²⁴ Dema, *supra* note 200, at 190.

²²⁵ Mike Taibibi & Melanie Saltzman, *Marshall Islands: A Third of the Nation has Left for the U.S.*, PBS NEWS HOUR WEEKEND (Dec. 16, 2018), <https://perma.cc/W4A5-V6TP>.

²²⁶ GAO, COMPACTS OF FREE ASSOCIATION IMPROVEMENTS, *supra* note 222, at 12–13.

²²⁷ *Id.* at 12–14.

²²⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-648T, COMPACTS OF FREE ASSOCIATION: TRUST FUNDS FOR MICRONESIA AND THE MARSHALL ISLANDS ARE UNLIKELY TO FULLY REPLACE EXPIRING U.S. ANNUAL GRANT ASSISTANCE 12 (2019).

build capacity to respond to climate change in FSM and RMI.²²⁹ Earlier, in 2004, pursuant to renewal of the Compact by the parties, a Disaster Assistance Emergency Fund was established by the United States to assist RMI and FSM with disaster-related expenses, including climate-related, extreme weather events.²³⁰ Even without these mechanisms, immigration, by itself, has the potential to strengthen the adaptive capacity of RMI and FSM. According to the World Bank, “in most cases, and in aggregate, migration seems to contribute positively to the capacity of those left behind to adapt to climate change. It also most often leads to net gains in wealth in receiving areas.”²³¹ In other words, not only does the Compact provide a route for communal relocation, but it also strengthens the climate resilience of RMI and FSM. Improved climate resilience means a longer time before the inevitable becomes a reality, when remaining on the island is no longer an option.

This discussion is not an endorsement of the Compact’s provisions. There are significant problems with the Compact, especially since its renewal and amendment in 2003. For instance, while the Compact exempts citizens of RMI and FSM from the provisions of the Immigration Act, according to its amended terms, “any alien who has been admitted under the Compact . . . who cannot show that he or she has sufficient means of support in the United States, is deportable.”²³² This is a significant hurdle for citizens of developing countries “[w]ith unemployment rates surpassing sixty percent.”²³³ The amended Compact also provides that “the United States can, at any time, issue regulations limiting the length of time citizens of the RMI and the FSM are permitted to remain in the United States.”²³⁴ Lastly, any party may unilaterally terminate the Compact on six months’ notice.²³⁵

While the Compact provides RMI and FSM unique opportunities unavailable to other SIDS, it is far from perfect. The options free association models may create for SIDS are appealing and deserve further exploration. As explained, the Compact was not drafted with climate change in mind; if it were, its provisions concerning climate migration and adaptation probably would have been much different.

²²⁹ Among other things, the financial assistance schedule of the amended Compact includes the Pacific-American Climate Fund, a grants-program to build capacity to respond to climate change challenges. *Id.* at 36.

²³⁰ Hidetaka Nishizawa et al., *Fiscal Buffers for Natural Disasters in Pacific Island Countries*, 7 (Int’l Monetary Fund, Working Paper No. 152, 2019).

²³¹ Jon Barnett & Michael Webber, *Accommodating Migration to Promote Adaptation to Climate Change*, 22 (World Bank, Pol’y Rsch., Working Paper No. 5270, 2010).

²³² Compact of Free Association Amendments Act of 2003 § 141(a), (f)(1), 48 U.S.C. § 1921.

²³³ Dema, *supra* note 200, at 199.

²³⁴ *Id.* at 200.

²³⁵ *Id.*

C. The Free Association Model in the Service of SIDS

Free associated states are international legal entities that have ceded to another state "a fundamental sovereign authority and responsibility for the conduct of its own affairs."²³⁶ Within the category of free associated states there are internationally recognized states,²³⁷ and non-state entities, which enjoy "some separate international status by virtue of the relevant association agreements."²³⁸ As explained by Keitner and Reisman, a free association relationship is formed when two international entities "of unequal power voluntarily establish durable links."²³⁹ Free association, therefore, occupies the "middle ground between integration and independence" because it allows the subordinate state to delegate certain responsibilities to the principal state while maintaining some international status.²⁴⁰

Free association is usually employed by small territories interested in strengthening their autonomy through the meaningful support of a much stronger state at the price of reduced independence.²⁴¹ The system of free association, established in Article 73 of the Charter of the United Nations, places on states which assume responsibilities for free associated states "a sacred trust" to promote and protect "to the utmost . . . the well-being of the inhabitants of these territories."²⁴²

If properly negotiated, free association may present several distinct advantages to SIDS and potential principal states. Under a free association compact, SIDS could offer other countries exclusive access rights to the resources in their EEZ,²⁴³ a lucrative right that is expected to become even more valuable, as climate change-induced food shortages increase.²⁴⁴ Doing so will align the interests of SIDS with those of the contracting state-party, because it creates an incentive to invest in the long-term preservation of the island territory. UNCLOS Article 121(3) determines that an island territory that "cannot sustain human habitation or economic life of [its] own shall have no [EEZ]."²⁴⁵ Scholars have therefore argued that once SIDS become uninhabitable, they lose

²³⁶ Arthur John Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOK. J. INT'L L. 179, 182 (1981); see CRAWFORD, *supra* note 53, at 492 (providing a definition of free "associated [s]tates").

²³⁷ Examples include the Marshall Islands, Palau, and FSM. CRAWFORD, *supra* note 53, at 492.

²³⁸ *Id.* Examples of non-states free associated states "include Puerto Rico, the Northern Mariana Islands, the Cook Islands and Niue." *Id.* For a complete list of current non-states free associated states, see *id.* at 634.

²³⁹ Keitner & Reisman, *supra* note 212, at 2.

²⁴⁰ *Id.*

²⁴¹ Eur. Parl. Ass. Political Affairs Committee, *Positive Experiences of Autonomous Regions as a Source of Inspiration for Conflict Resolution in Europe*, Doc. No. 9824 (2003).

²⁴² U.N. Charter art. 73; CRAWFORD, *supra* note 53, at 606.

²⁴³ UNCLOS, *supra* note 171, at art. 76.

²⁴⁴ Caron, *supra* note 172, at 638-39.

²⁴⁵ UNCLOS, *supra* note 171, at art. 121(3).

their EEZ.²⁴⁶ Adaptation to climate change in a manner that postpones the negative impacts of sea level rise on the habitability of the island is costly and beyond the reach of SIDS. More affluent states, which enjoy exclusive access to the ocean and land territories of SIDS, can afford the large-scale investments.

There is growing criticism of the idea that maritime boundaries simply disappear. Recently, scholars have argued that maritime boundaries are stable and permanent.²⁴⁷ Two alternative justifications have been offered in support of this position. The first is rooted in a theory of maritime entitlements as belonging to the people, not the state.²⁴⁸ If the EEZ belongs to the people, then uninhabitability and even submergence will not divest the people of their EEZ rights.²⁴⁹ So long as the people exist, title to the ocean territory that used to be their home continues to exist.²⁵⁰

The second justification is based on an interpretation of UNCLOS's objective of "the strengthening of peace, security, cooperation and friendly relations among all nations."²⁵¹ Allowing maritime delimitations to shift, change, and disappear does not serve those ends. Moreover, when the drafters of UNCLOS were faced with situations whereby natural conditions created instability, they opted for fixing natural boundaries. For instance, UNCLOS Article 7(2) provides that "[w]here because of the presence of a delta *and other natural conditions* the coastline is highly unstable . . . [boundaries] shall remain effective."²⁵² Several scholars have argued that the instability created by climate change justifies fixing all maritime boundaries.²⁵³ This was also the view of the 2018 report of the ILA Committee on International Law and Sea Level Rise.²⁵⁴

If maritime entitlements continue to exist independently of territory or statehood, this gives SIDS a stronger position in bilateral negotiations. If the title to the ocean territory continues to exist, the people of a former island state could, in theory, lease the rights in the EEZ to other states

²⁴⁶ Rayfuse, *supra* note 142, at 282; Soons, *supra* note 161, at 217–18; Stoutenburg, *supra* note 9, at 268.

²⁴⁷ Julia Lisztwan, Note, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT'L L. 154, 155–56 (2012).

²⁴⁸ Sharon, *supra* note 13, at 123–24.

²⁴⁹ *Id.* at 99.

²⁵⁰ *Id.*

²⁵¹ UNCLOS, *supra* note 171, at 25.

²⁵² *Id.* at 17128. (emphasis added).

²⁵³ David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 1, 14 (Seoung-Yong Hong & Jon van Dyke eds., 2009); Jose Luiz Jesus, Rocks, New-Born Islands, *Sea Level Rise and Maritime Space in Negotiating for Peace: Liber Amicorum Tono Eitel*, 593 (Jochen Abr Frowein et al. eds., 2003); Stoutenburg, *supra* note 9, at 271; Soons, *supra* note 144, at 225.

²⁵⁴ INT'L L. ASS'N, SYDNEY CONFERENCE (2018): INTERNATIONAL LAW AND SEA LEVEL RISE 16–17 (2018). (among the arguments offered in support of this recommendation, the committee also noted an emerging state practice of fixing maritime boundaries); Freestone & Schofield, *supra* note 5, at 346.

indefinitely. But while this approach sounds promising, one must remember that legal rights on the books are not always easily exercised in a world of *realpolitik*.²⁵⁵ It is one thing to stake out an ownership claim, a completely different thing to protect it. This is especially true in the case of SIDS where: 1) the ownership claim is rooted in a novel interpretation of international law, 2) the underlying asset is highly sought after, and 3) the states asserting the claim have zero influence in world politics. However, if SIDS provide access rights to their EEZs to a regional or global power, which has an incentive to protect it indefinitely, the chances for the legal interpretation of maritime boundaries as stable and permanent to prevail are improved.

SIDS could present other benefits to potential principal states. For example, SIDS could offer the principal state an indefinite lease of islands or parts of islands for military installations, ports, or trading posts. SIDS may take advantage of the fact that global and regional powers compete strategically in different regions of the world.²⁵⁶ Although the islands are in danger of becoming submerged, there are at least several decades before they will become uninhabitable. Having strategic assets on the islands of SIDS should increase the willingness of the contracting state party to invest in adaptation measures to prolong the life of the island. Another benefit to potential principal states is geopolitical status. States strive for higher status in the international hierarchy and apply different strategies to achieve that goal.²⁵⁷ A common strategy to achieve recognition as a rising power is to “[b]e[] seen as a ‘good international citizen,’” that is, acting “to protect and propagate the rules of the society” of nations and “to lead international cooperation for the common good.”²⁵⁸ Entering a bilateral agreement to save a ‘sinking state’ strengthens the standing of the contracting party state in the international community. The principal state will be seen as a positive force, stepping in to assist a vulnerable state in need, while taking responsibility for past GHG emissions.

In a free association compact, the associating state delegates to the principal state many of its sovereign responsibilities, including those relating to security, defense, and international relations.²⁵⁹ A free association compact may also include delegation of competence relating to fiscal policy, the granting of limited powers of intervention, and even subordination to the judicial authority of the principal state.²⁶⁰ In this

²⁵⁵ See Jain, *supra* note 55, at 11 (“[c]ritics have long bemoaned the fact that international law is dwarfed by international relations and any semblance of rule of law in international society is illusory at best.”).

²⁵⁶ See CHRISTINA STOLTE, BRAZIL’S AFRICA STRATEGY: ROLE CONCEPTION AND THE DRIVE FOR INTERNATIONAL STATUS 18–19 (2015) (establishing a framework to describe the level of a nation’s global power).

²⁵⁷ *Id.* at 35.

²⁵⁸ *Id.* at 25.

²⁵⁹ CRAWFORD, *supra* note 53, at 625.

²⁶⁰ Hurst Hannum & Richard Lillich, *The Concept of Autonomy in International Law, in* MODELS OF AUTONOMY 215, 249–50 (Yoram Dinstein ed., 1981).

way, sovereign tensions are diminished and there is a mutual interest in the indefinite maintenance of the compact. In addition, entering free association compacts does not require constitutional changes or referendums in the principal state. It is an executive action, subject to ratification by the legislature.

For SIDS, free association creates a path for desperately needed communal relocation.²⁶¹ Free association with a powerful country increases the potential for investment and financial support; it also extends the time SIDS statehood may be maintained. Adaptation to climate change and sea level rise is extremely costly. Associating with a principal of greater economic power and strategic interests in preservation of the territory guarantees long-term protection from erosion.²⁶² These benefits are not theoretical. RMI and FSM are not the only entities that have chosen free association; Puerto Rico, Greenland, the Cook Islands, and Niue are other examples.²⁶³ The climate adaptation capabilities of these SIDS have been strengthened through free association with a regional or global power.²⁶⁴

As previously shown, Pacific free-association compacts, while not perfect, have improved the positions of FSM and RMI compared to non-associated SIDS.²⁶⁵ SIDS need to learn from the experience of the Pacific states and negotiate climate-centered free association compacts. These compacts must address the flaws identified in the Pacific model. First, under a climate-centered free association compact, the principal state may not place significant limitations on immigration from the associating state. Second, the compact must be irrevocable.

This Article takes a *realpolitik* approach to the problem SIDS are facing. One possible critique of the solution suggested herein is that SIDS have no guarantee that the principal states will not one day disregard irrevocability clauses and revoke the compact. This is unlikely. SIDS are very small countries. Free association of a threatened island state with a large nation would eventually lead to integration. Just as with RMI and FSM, a compact of free association will allow for gradual relocation. In a process that will span decades, if not centuries, as the impacts of climate change on the island increase, the population of the island will gradually relocate to the principal state. By the time the island is no longer habitable, the people of the island state or, more likely, their descendants will already have become an integral part of the principal state. This is an important junction: as long as the island has *some* habitable territory,

²⁶¹ Atapattu & Simonelli, *supra* note 8, at 445–46.

²⁶² See *id.* at 436 (explaining that small island states need to associate with other powers to confront climate change).

²⁶³ CRAWFORD, *supra* note 53, at 623 n.82, 626, 629, 631, 746; MASAHIRO IGARASHI, ASSOCIATED STATEHOOD IN INTERNATIONAL LAW 3-5 (2002).

²⁶⁴ Briana Dema, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association*, 37 COLUM. J. ENV'T L. 177, 202 (2012).

²⁶⁵ See CRAWFORD, *supra* note 53, at 626 (explaining that free association had made small island nations more economically and politically viable).

it continues to serve the interests of the principal state.²⁶⁶ When the territory of the island is no longer an asset, the people of the island will have been assimilated into the principal state.

D. Legal Hurdles to Free Association

Is free association available to SIDS? When RMI and FSM entered into the Compact they were not considered states.²⁶⁷ Unlike RMI and FSM, many SIDS are recognized states in international law, nations among the nations.²⁶⁸ When an independent state becomes a free-associated state, it gives up a substantial part of its independence.²⁶⁹ Would international law permit such an act?

1. Free Association and Self-Determination

In international law, the right to self-determination is *jus cogens*, permanent and inalienable.²⁷⁰ Like the rights to life and liberty, the right to self-determination may not be contracted away.²⁷¹ The question therefore arises—would international law permit free association between two established states? Statehood is one way to exercise self-determination, but not the only one. General Assembly Resolution 1541 (XV) recognizes three legal routes for exercising self-determination: “(a) Emergence as a sovereign independent state; (b) Free association with an independent state; or (c) Integration with an independent state.”²⁷² Although only option a) involves complete independence, each of the three alternatives is considered the full exercise of self-determination.²⁷³ A territorial community that enters into a free association compact is considered “to have reached a full measure of self-government.”²⁷⁴ That is

²⁶⁶ See ERIN THOMAS & SHANNON MARCOUX, ICAAD, COMPACTS OF FREE ASSOCIATION (COFA): BALANCING THE SCALES IN NEGOTIATIONS BETWEEN THE UNITED STATES AND THE FEDERATED STATES OF MICRONESIA (FSM) AND THE REPUBLIC OF THE MARSHALL ISLANDS (RMI) 116 (2020) (indicating that United States military agreements with freely associated states will remain in place even after submergence).

²⁶⁷ See *Trust Territory of the Pacific Islands Archive: Introduction*, UNIV. HAW. MANOA LIBR., <https://perma.cc/58XK-HA9G> (last visited Nov. 30, 2021) (explaining that before RMI and FSM entered into the Compact, they were actually Trust Territories).

²⁶⁸ See *Small Island Developing States and Member Island Territories*, WORLD METEOROLOGICAL ORG., <https://perma.cc/CLB9-T4C5> (last visited Nov. 30, 2021) (separating the members of SIDS between states and territory while also making note that they are nations).

²⁶⁹ See Hannum & Lillich, *supra* note 260, at 249–50 (explaining how when a state becomes a free-associated state it becomes dependent upon the sovereign state).

²⁷⁰ See Anne Lagerwall, *Jus Cogens*, OXFORD BIBLIOGRAPHIES, <https://perma.cc/8HRM-AAAXE> (last modified May 29, 2015) (stating that self-determination is one of the preemptory norms of *jus cogens*).

²⁷¹ *Id.*

²⁷² G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., at 29, U.N. Doc. A/Res/1541(XV) (Dec. 15, 1960).

²⁷³ Keitner & Reisman, *supra* note 212, at 4; Shaw *supra* note 58, at 257.

²⁷⁴ G.A. Res. 1541 (XV), *supra* note 272.

why, following the conclusion of the Compact, the U.N. Security Council recognized that RMI and FSM “have freely exercised their right to self-determination.”²⁷⁵ As mentioned above, RMI and FSM are not the only ones who have chosen this path. There are more than a few examples of territories who have opted to exercise their right to self-determination through association with another state.²⁷⁶

2. *Free Association and Sovereignty*

May a sovereign state downgrade its sovereign status? This is a different question than the one concerning self-determination. Sovereignty and self-determination are not the same thing. The most common meaning for “sovereignty” in international law refers to “the ‘totality of international rights and duties recognized by international law’ as residing in an independent territorial unit—the State.”²⁷⁷ Sovereignty is therefore an attribute of statehood, not of self-determination.²⁷⁸ May a state become ‘less’ sovereign? Of course. An inherent part of a state’s sovereignty is the freedom to engage in voluntary acts that will reduce its sovereignty.²⁷⁹ International agreements are a classic example. Any convention creating an obligation on a state restricts the sovereignty of that state. When nations join with others in a trade or political bloc, they voluntarily give up some measure of national sovereignty.²⁸⁰ Similarly, entering an international agreement or joining an international institution reduces the ability of states to make autonomous decisions.²⁸¹ The right to enter into international engagements is an attribute of state sovereignty.²⁸² This principle has been frequently confirmed by international tribunals.²⁸³

²⁷⁵ S.C. Res. 683 (Dec. 22, 1990).

²⁷⁶ See IGARASHI, *supra* note 264, at 3–5 (explain how Niue integrated with New Zealand and Cocos Islands integrated with Australia).

²⁷⁷ CRAWFORD *supra* note 53, at 32.

²⁷⁸ Sovereignty is “a distinctive characteristic of States as constituent units of the international legal system.” *Id.* at 32 n.140.

²⁷⁹ Walter Mattli, *Sovereignty Bargains in Regional Integration*, INT’L STUD. REV., 2000, at 149, 150; Karen T. Litfin, *Sovereignty in World Ecopolitics*, 41 MERSHON INT’L STUD. REV., 167, 170 (1997).

²⁸⁰ See Mattli, *supra* note 279, at 151 (“Membership in a union may have advantages but it often exacts a heavy toll in terms of foregone policymaking autonomy.”).

²⁸¹ Undala Alam et al., *The Benefit-Sharing Principle: Implementing Sovereignty Bargains on Water*, 28 POL. GEOGRAPHY 90, 91 (2009).

²⁸² Case of the S.S. “Wimbledon” (U.K., Fr., It., Japan, Pol. v. Ger), Judgment, 1923 P.C.I.J. (ser A) No. 1, at 25 (Aug. 17).

²⁸³ *Id.* at 25–26; Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENVER J. INT’L L. & POLY 209, 209 (2011). In a modern globalized world, “a complex web of laws, treaties, regulations, resolutions and codes of conduct” restrict the sovereignty of states. *Id.* Through globalization, almost all “states have lost . . . attributes of sovereignty, and their bundle of sovereign rights has been meshed in with regional and global rules, which often supersede states’ decision-making power.” *Id.*

3. State Termination

How far does the freedom to reduce sovereignty extend? May a state voluntarily choose to terminate its legal status? Can a state commit 'legal suicide'? According to Hannum, two elements comprise the answer this question. The first is the "democratically expressed wishes of the people concerned," the second is internal autonomy.²⁸⁴ So long as subordination to a principal government was freely and democratically chosen by the people, *and* internal government is maintained, a territory may freely choose to terminate its statehood.²⁸⁵ As explained by Rosalyn Cohen, "the sovereignty of a state goes so far as to authorize it to resign sovereignty and thus 'commit suicide' under international law."²⁸⁶ The example Cohen provides is that of a state which enters federation, thereby losing its international personality.²⁸⁷ Indeed, when Texas, an independent republic, joined the United States, it gave up its independence and the right to unilateral secession.²⁸⁸ More recently, the German Democratic Republic was absorbed voluntarily into the Federal Republic of Germany,²⁸⁹ Czechoslovakia opted for dissolution, creating in its place two new states, the Czech Republic and Slovakia, and the independent states of North and South Yemen chose to merge into a new legal entity, the Republic of Yemen.²⁹⁰

As mentioned above, free associated states may be internationally recognized states or non-state international entities. The discussion herein makes it clear that SIDS are entitled to choose which option best serves their interests. From the point of view of a potential principal state, when entering a free association compact, the best scenario is for the associating island state to give up completely its state status. Although they are not considered states, non-state free associations enjoy "some separate international status."²⁹¹ This option, therefore, allows SIDS to give up statehood, while avoiding the dangers associated with loss of international personality which Wong and others warned about.²⁹²

²⁸⁴ Hannum & Lillich, *supra* note 260, at 249.

²⁸⁵ *Id.* at 249–250.

²⁸⁶ Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 UNIV. PA. L. REV. 1127, 1140 (1961).

²⁸⁷ *Id.*

²⁸⁸ See MICHAEL C. DORF, NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY-FIRST CENTURY 82 (2006) (discussing Lincoln's argument and similar arguments from the position that the states, upon entering the Union, "perpetually gave up important attributes of sovereignty in doing so.").

²⁸⁹ Crawford & Rayfuse, *supra* note 17, at 247 n.21.

²⁹⁰ *Id.* at 247 nn.20 & 23.

²⁹¹ CRAWFORD, *supra* note 53, at 492.

²⁹² See *supra* text accompanying note 55.

VII. CONCLUSION

The idea that a state may disappear because of wrongful acts committed by others is abhorrent. It is therefore not surprising that scholars devote substantial efforts to find legal paths to prevent an unthinkable outcome. However, good intentions do not always yield good results. In the case of SIDS, no matter how far we are willing to stretch the law, the state as a physical element will disappear. Maintaining the legal embodiment of the state as an empty shell will not change this sad fact.

Wholesale relocation and resettlement are vitally important to SIDS, offering the only means for SIDS to guarantee their continued existence as a distinct national entity. Planned communal migration, negotiated in anticipation of climate change impacts, will "allow[] SIDS to relocate on their own terms, in advance of the potential devastation of disasters or of migration processes that may be developed externally and forced upon them."²⁹³ Preemptive gradual relocation is the "rational adaption response for SIDS," because it will prevent "disruption, loss of life and loss of culture."²⁹⁴ It would also "reduce poverty, diversify and increase incomes and reduce further vulnerability to climate change impacts."²⁹⁵ As described earlier, efforts to establish relocation programs for the people of SIDS have thus far failed. Without communal resettlement options, the people of SIDS and their unique cultural, historical, religious, and social connections will all but disappear.²⁹⁶

SIDS must focus all their efforts on creating viable communal resettlement alternatives. The continuation of statehood as a legal fiction undermines these efforts. As this Article demonstrates, SIDS are locked in a community-statehood dilemma. If SIDS continue to fight for post-submergence statehood, they will cause the destruction of the community which comprises the nation. It is past time to relinquish the dream of continued statehood.

Facing this imminent truth, this Article established a viable path for communal relocation, one based on geopolitical interests, not wishful legalism. This path comes at the price of trading away a substantial measure of the sovereignty of SIDS. It is not an easy price to pay, but the alternative is inconceivable. This Article proposed that SIDS enter free association compacts with other states. Under these compacts, SIDS give up statehood in return for protection, communal relocation rights, and financial support. As explained, free association compacts create tangible benefits for both SIDS and potential principal states. It is a promising process for further exploration by legal scholars and political leaders. This Article charted the way, by explaining the legality of free association and its benefits. Additional research is needed on the structure of treaties,

²⁹³ Thomas & Benjamin, *supra* note 153.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 96.

necessary provisions and guarantees, and additional benefits the parties could reap through free association.
