



## Sinking into Statelessness

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### Abstract

If rising seas render small islands uninhabitable, will displaced islanders become stateless? The modern intellectual and legal tradition tells us that states must have defined, habitable territory. If so, small islands will cease to be states, and their inhabitants will accordingly become stateless. Against this, leading scholars have recently argued that the principle of presumption of continuity of state existence implies that island states continue to be states even after becoming uninhabitable. We argue to the contrary: the principle of presumption of continuity of state existence implies no such thing. If nothing is done to prevent the loss of their territory, small islands will lose their statehood, making displaced islanders stateless.

### Keywords

statehood – statelessness – nationality – climate change – small island states – sinking states – continuity of statehood – state recognition – territory

The world's sea levels are rising. By some projections, seas are rising so fast that within a hundred years, low lying island states such as Kiribati and the Maldives will become uninhabitable.<sup>1</sup> Will these island nations cease to exist as such? If so, will their people count as stateless under international law?

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<sup>1</sup> M. L. Parry, O. F. Canziani, J. P. Palutikof, P. J. van der Linden, and C. E. Hanson (eds), *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental*

According to the 1954 Convention Relating to the Status of Stateless Persons, a stateless person is one who is '(...) not considered a national by any State under the operation of its law.'<sup>2</sup> No state needs to *deny* you citizenship by law: you are stateless if no state exists which grants it.<sup>3</sup> At stake then is, whether entities like the Maldives will retain their legal identities as states, even if they become completely and permanently uninhabitable. At a UNHCR expert meeting in Bellagio, a panel held that this is indeed the case due to the presumption of state continuity.<sup>4</sup> This view has been echoed by other scholars concerned with the application of the term 'stateless' to displaced islanders.<sup>5</sup> At another UNHCR expert meeting in Prato, however, a different panel concluded that lack of territory is relevant to any determination of statehood.<sup>6</sup> Our aim is to argue that, contrary to the findings of the Bellagio panel, displaced islanders will be stateless in the sense of the 1954 Convention. In particular, we will argue that the general presumption of continuity of statehood cannot be applied to states like the Maldives if they become permanently and completely uninhabitable. It follows that their laws will no longer be the laws of a state, meaning that those who are Maldivian nationals under the operation of Maldivian law, and who do not hold another citizenship, will become stateless in the sense of the 1954 Convention.

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*Panel on Climate Change* (Cambridge University Press 2007), 694. See also Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford 2012) 124.

- 2 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 U.N.T.S. 117 (1954 Convention), art. 1.1. See also Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).
- 3 For the opposing view, see McAdam, *Climate Change, Forced Migration and International Law* (n. 1) 140.
- 4 UNHCR 'Summary of Deliberations: Climate Change and Displacement, Identifying Gaps and Responses, Expert Roundtable' (Bellagio 2011), para. 30.
- 5 McAdam, *Climate Change, Forced Migration, and International Law* (n. 1) 138, 144. See also Jane McAdam, 'Climate Change Refugees and International Law', New South Wales Bar Association, 24 October 2007, 6; Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2 *Climate Law* 345; Jenny Stoutenburg, 'When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States', in Michael Gerrard and Gregory Wannier (eds.) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge 2013).
- 6 UNHCR 'The Concept of Stateless Persons under International Law, Summary Conclusions, Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy' (27-28 May 2010) paras. 1.23 and 1.27 (Prato Conclusions).

## 1 The Nation in International Law

It is an established principle of international law that a state must have control over habitable territory.<sup>7</sup> It has explicitly been recognised, at least since the Peace of Westphalia, that territory is a foundational element of the modern international legal conception of statehood.<sup>8</sup> The majority of legal scholars are of this opinion.<sup>9</sup> The principle that a state must have sovereign control over habitable territory is also enshrined in the 1933 Montevideo Convention on the Rights and Duties of States.<sup>10</sup> Although this Convention is not universally ratified and many legal scholars have lamented its vagueness,<sup>11</sup> it is widely regarded as codifying principles of international customary law.<sup>12</sup>

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- 7 For a more complete treatment of this issue, see Heather Alexander, 'Vanishing States: Statelessness, Climate Change and the Maldives' Unpublished submission to the UNHCR Protection Learning Program, Bangkok, Thailand (2009) (available upon request). For a discussion of non-habitable territory and statehood, such as territorial waters, see David Freestone and John Pethick, 'Sea Level Rise and Maritime Boundaries, International Implications of Impacts and Responses' in Gerald Blake (ed.) *Maritime Boundaries* (World Boundaries vol. 5, Routledge 1994).
- 8 Thomas Baldwin, 'The Territorial State' in Hyman Gross and Ross Harrison (eds.) *Jurisprudence: Cambridge Essays* (Clarendon Press 1992) 210. See also Max Weber, 'Politics as a Vocation' in H. H. Gerth and C. W. Mills (eds), *From Max Weber* (Routledge and Kegan Paul, 1970), 78. Control of territory, however, should be distinguished from control over a particular piece of territory. Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968) 21.
- 9 James Crawford, *The Creation of States in International Law* (2nd edn., Oxford University Press, 2006), 37. See also US Ambassador to the UN Philip C. Jessup, 'Remarks at UNSCOR, 383d mtg. at 9-11, Supp. No. 128', (2 December 1948) UN. Doc. S/P.V. 383; Ruth Donner, *The Regulation of Nationality in International Law* (2nd Edn., Transnational Publishers, Inc., 1994), 5; Ian Brownlie, *Principles of Public International Law* (6th edn., Oxford University Press, 2003) 57; Malcolm Shaw, *International Law* (5th edn., Cambridge University Press, 2003) 48-64, 171; Vaughan Lowe, *International Law* (Oxford University Press, 2007) 207. To the limited extent this problem has been before municipal courts, they have found that territory is a necessary condition for statehood. See for example the history of Sealand in James Grimmelmann, 'Sealand, Havenco, and the Rule of Law' (2012) 2 *University of Illinois Law Review* 405, 427, 468-473. For a different view, see Jane McAdam, 'Disappearing States, Statelessness and the Boundaries of International Law' in Jane McAdam (ed.) *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford, 2010), Sec. VIII.
- 10 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention) art. 1.
- 11 See for example Mojmir Mrak, *Succession of States* (Martinus Nijhoff, 1999) xv.
- 12 Crawford (n. 9) 37; Brownlie (n. 9) 57; Shaw (n. 9) 48-64; Donner (n. 9) 5.

Unlike cultural or political organizations, membership in legal states is determined by one's relationship, usually *jus solis* or *jus sanguinis*, to the habitable territory under that state's control.<sup>13</sup> Likewise, the jurisdiction of a sovereign state over an individual is determined, if not directly by citizenship, by relation to the territory which that state controls.<sup>14</sup> Additionally, many of the essential rights of citizenship necessitate control over territory, such as the right to return.<sup>15</sup>

Finally, it is important that we distinguish the possibility that a state may exist without territory from the possibility that a sovereign non-state entity or a temporary government-in-exile may do so.<sup>16</sup> These cases are in no way counterexamples to the principle that a state must possess habitable territory because a government-in-exile is temporary by nature and a non-state entity is, as its name suggests, not a state.

## 2 Continuity of State Existence

This brings us to our central conundrum: the application of the principle of presumption of continuity of state existence. Here, we offer two independent lines of argument. First, the principle of presumption of continuity is mainly a limiting principle, telling against the creation of new states in the event of a

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- 13 Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *Int. J. Refugee Law* 156, 157. See also Paul Weis, *Nationality and Statelessness in International Law* (Stevens and Sons 1956) 1-5; David Miller, *On Nationality* (2nd edn., Oxford University Press 1997) 19.
- 14 For example, see the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements (adopted 24 May 1984, entered into force 24 December 2004) 24 *I.L.M.* 468. See also Miller (n. 13) 19. The ongoing debate over Palestine is an example of the importance of territory to citizenship. UNGA Dept. of Public Information, 'General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations' (2012) GA/11317.
- 15 See for example Article 13 of the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res. 217 A(III) UDHR). See also Weis (n. 13) 49; Thomas Baldwin, 'The Territorial State' in Hyman Gross and Ross Harrison (eds.) *Jurisprudence: Cambridge Essays* (Clarendon Press 1992); John Rawls, *A Theory of Justice* (Cambridge 1999); Prato Conclusions para. I.9.
- 16 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press 1998), discussing the temporary nature of a government-in-exile. See also Daniel Philpott, 'Sovereignty' in Edward Zalta (ed.) *Stanford Encyclopedia of Philosophy* (Stanford Metaphysics Research Lab 2010). For a discussion of non-state entities, see Crawford (n. 9) 29; Brownlie (n. 9) 64.

change of government.<sup>17</sup> The principle does not touch on the issue of whether some entity is a state *as such*; it speaks only to the issue of whether a currently established state is continuous with a past state, or whether instead it is a new state. The principle accordingly does not come into conflict with the established principle of international law asserting that states, as such, must possess habitable territory.

By analogy, suppose there was a principle stating a presumption in favour of the continued existence of city parks. Such a principle might mandate that if the park is sold to a private corporation, which changes the park's location or shrinks its size in order to build condos, the park nevertheless remains in existence. But this principle would not imply that if the park ceased to have any open green space at all, it would still be a park. A city park must first meet the independent criteria for being a park in order for a principle of presumption of continuity to apply.

Second of all, the principle of presumption of continuity is naturally construed as a constraint on the grounds of which states should *recognise* a current state as being continuous with a past state and so as inheriting all of its privileges and duties.<sup>18</sup> But even if the principle spoke to the matter of recognition of statehood as such, rather than to the matter of recognition of sameness of state, which as we have just seen is a distinct matter, this still would not be enough to establish that non-territorial entities could be states. Some doubt that recognition plays a constitutive role in determining statehood at all,<sup>19</sup> but even those who take recognition to play a constitutive role generally do not hold that it is constitutively *sufficient* for an entity to be a state; they only hold that it is *necessary*.<sup>20</sup> If recognition were constitutively sufficient for statehood, then if the community of nations, for whatever reason, decided to recognise a boiled egg as a state, then that boiled egg would be a state. But this is absurd. It follows that no amount of recognition extended to some entity could guarantee that that entity were in fact a state. In particular, it would not follow that those entities were states in the sense of the 1954 Convention. This means that

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17 See generally Marek (n. 8) for a discussion of the continuation of statehood in the classic sense, involving, for example, secession, occupation and revolution. See also Shaw (n. 9) 178; Stoutenburg (n. 5).

18 Marek (n. 8) 5, 141-143. See also Montevideo Convention, art. 3.

19 Crawford (n. 9) 7-9, 27, 98; Brownlie (n. 9) 87; Shaw (n. 9) 186.

20 Marek, (n. 8) 142. For the opposing view, see McAdam, *Climate Change, Forced Migration, and International Law* (n. 1) 138. It may be difficult to obtain recognition by the international community for a 'state' that has no territory, as other states may wish to avoid setting a precedent that could help to legitimize non-state actors.

one would still count as *de jure* stateless if one's only affiliation were with such an entity, no matter who recognised that entity as a state.

We thus have two independently compelling reasons to disagree with the Bellagio panel. Our aim in this paper has been to show that the principle that territory is a necessary condition for statehood under international law is not in any way trumped or undermined by the principle of presumption of continuity appealed to at the Bellagio meeting. Note that we have not argued that *in fact* states will not continue to recognise submerged island nations as states. We have argued that the principle of presumption of continuity does not necessarily recommend that they do so, and we have argued that even if it did, it would not follow that these submerged entities really were states, any more than a boiled egg would be a state if recognised by the community of nations to be.

### 3 Conclusion

Though we argue that displaced islanders will be stateless, we acknowledge that the Statelessness Conventions do not provide a ready solution to their plight.<sup>21</sup> As a result, continuing to formally recognise submerged states seems desirable because it appears to prevent displaced islanders from losing their cultural identity and legal rights, but in reality we will be creating an empty fiction that may impede a long-term solution. We should not confuse the desirability of preserving culture and national identity with the urgent need for individuals to have legal rights and citizenship protections.

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21 1954 Convention (n. 2); 1961 Convention (n. 2). See also UNGA 63rd session, 9th, 10th, 11th, plenary meetings (25 Sept. 2008) UN doc A/63/PV.9, 10, 11; Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 Int. J. Refugee Law 157, 158; McAdam, *Disappearing States* (n. 9); McAdam, *Climate Change, Forced Migration, and International Law* (n. 1) 144. Though in our forthcoming paper, we argue statelessness is necessary to establish refugee status for persons lacking a nationality and unable to return to their country of former habitual residence under the 1951 Convention Relating to the Status of Refugees.