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The small island states in the Indo-Pacific: sovereignty lost?

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ABSTRACT

The consequences of climate change are being experienced asymmetrically, with States which were exploited during the colonial era disproportionately bearing the costs. Among these States, the case of the Small Island Developing States (SIDS) is haunting due to their increasing uninhabitability amidst rising sea-levels. This article will interrogate the crystallized Western notion of Statehood and urge a vision of its four pillars as interconnected. By training a postcolonial lens, it will then exemplify the ways in which international law and policy has been constructed and wielded so as to invert the interests of the SIDS, thereby necessitating the proposed shift in the understanding of Statehood. The article will thereafter analyse the array of options available to the SIDS as recourse, with the endeavour of initiating a dialogue that is mindful of their particularities and trajectories.

KEYWORDS

Climate change; postcolonial theory; SIDS; Statehood; territory

I. Introduction

Anthropocentric climate change is asymmetrically affecting certain States. In fact, some of its most drastic effects are being experienced by States that were economically, socially, and politically exploited during the colonial era, and which witnessed massive fossil-fuel-based industrialization.[1] Among these States, the case of the Small Island Developing States (SIDS) is uniquely concerning. Though academics and practitioners frequently refer to the SIDS as a modern-day 'Atlantis'[2,3] – a term that invokes the imagery of total inundation and societal extinction – we believe that the parallel is flawed as it diverts attention from the problem of increasing uninhabitability and mislocates it in the physical

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[1]IPCC – Sixth Assessment Cycle, 'Climate Change Widespread, Rapid, and Intensifying' *Intergovernmental Panel on Climate Change* (Geneva, 8 August 2021) <www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>.

[2]Plato, 'Timaeus', *The Collected Dialogues of Plato including the Letters* (1961).

[3]See, for instance, Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50(1) Stanford Journal of International Law 3; Andrew Holland and Esther Babson, 'Atlantis 2.0.: How Climate Change Could Make States Disappear – and What That Means for Global Security' in Caitlin E Werrell and Francisco Femia (eds), *Epicenters of Climate and Security: The New Geostrategic Landscape of the Anthropocene* (The Center for Climate and Security, 2017) 28 <https://climateandsecurity.org/wp-content/uploads/2017/06/3_disappearing-islands.pdf>; Ben Juvelier, 'When the Levee Breaks: Climate Change, Rising Seas, and the Loss of Island Nation Statehood' (2017) 46(1) Denver Journal of International Law and Policy 21, 42.

disappearance of the SIDS instead.[4] In this context, the representation of 'New Asgard' on Earth, as depicted in 'Avengers: Endgame', is a more accurate fictional epitomization.

In the prequel, 'Thor: Ragnarok', the destruction of planet 'Asgard' rendered the Asgardians' homeland uninhabitable, forcing its inhabitants to flee and settle down in a small locality on Earth known as 'New Asgard'. The Asgardians' civilizational relocation to a region that is originally not theirs serves as a representation that is palpably resonant with some possible scenarios the SIDS might face in the foreseeable future. Further, 'New Asgard' serves as a normative representation of the issue as it initiates discourse about novel, creative solutions to an unprecedented situation which is emerging against the backdrop of a colonial history. It neither forecloses such avenues for discourse by presuming the extinction of the State nor does it erase the contextually rich antecedents to the event, narratives about the SIDS which can potentially be read into the fable of 'Atlantis'. We employ this representation not with the intention of diluting the severity of the dilemmas and realities being experienced by the SIDS, but rather to exemplify the need for a shift in our understanding of the issues at the heart of this discourse. In doing so, we also intend to carve out space for 'a communal way of seeing the world in consistent terms, sharing a host of reference points which provide the basis for everyday discourse and action'.[5]

Climate change and SIDS animate the contemporary contours of the international relations that will not only define the political/legal understanding of the subject but also provide fertile ground for its Eurocentric tenets to be normatively challenged. The normative understanding of Statehood and sovereignty has most often been linked to the Montevideo Convention on the Rights and Duties of States, 1933,[6] which establishes the four pillars a polity must fulfil in order for it to be considered a State in the international system. Article 1 of the Convention enumerates the criteria for Statehood as (1) a permanent population, (2) a defined territory, (3) an effective government, and (4) the capacity to enter into relations with other States.[7] It should be noted that the Convention was initially applicable only to the Americas, but gradually began to be accepted as a universal standard for the birth and recognition of a State ('State-birth').

We have consciously chosen to articulate our findings along the lines of the Montevideo Convention as the four pillars are well-premised in State practice and have often been cited as the (customary) definition of the State.[8] Nonetheless, it is not inconsiderate of the critique levied on this conceptualization by scholars who illustrate its heavy colonial baggage.[9] Furthermore, James Crawford, speaking in the context of the Convention, had stated that it is

[4]A similar idea is brought into discourse by Wong, who also critiques the operationalisation of the imagery of 'Atlantis'. See, for instance, Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2014) 14(2) Melbourne Journal of International Law 346, 389: 'speaking of "Atlantis-style" disappearance at the expense of informed debate on gradual population displacement may undermine more effective policymaking'.

[5]Tim Edensor, *National Identity, Popular Culture and Everyday Life* (Routledge, 2002) 19.

[6]Montevideo Convention on Rights and Duties of States, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

[7]Ibid, Art. 1.

[8]See, for instance, Seokwoo Lee and Lowell Bautista, 'Climate Change and Sea Level Rise: Nature of the State and of State Extinction' in Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill, 2021) 194; Augusto Hernández-Campos, 'The Criteria of Statehood in International Law and the Hallstein Doctrine: The Case of the Republic of China on Taiwan' (2006) 24 Chinese (Taiwan) Yearbook of International Law and Affairs 75; James Crawford, *The Creation of States in International Law* (2nd edn, Oxford Academic, 2006); James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press, 2019).

[9]Thomas Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 372 Columbia Journal of Transnational Law 403.

not necessary for all conditions to be met, and that further criteria will need to be placed to produce a working definition.[10] We argue that in the context of climate change, the conditions will need to be reconfigured to produce an applicable working definition.

It is also worth emphasizing that neither the Convention nor any other legal/scholarly literature provides a framework as per which 'State-death/extinction' can be analysed or on the basis of which a State can be said to have lost its status of being a recognized international entity.[11] In *Theory of International Politics*,[12] Waltz mentions the idea of 'State-death' in passing. Waltz remarks, 'States are the units whose interactions form the structure of international political systems. They will long remain so. The death rate among [S]tates is remarkably low. Few [S]tates die; many firms do.'[13] While he mentions that 'few [S]tates die', he fails to articulate the manner in which State-death manifests or to specify which States have indeed 'died'. Further, in Chapter 7, he describes Cold War geopolitics between the USA and the USSR where, if the latter were to foreclose American trade in different parts of the world, the former could 'be quietly strangled to death'.[14] Evidently, this metaphorical juxtaposition of mortality and geopolitical competition in no way presents a formal or organized manner for the interpretation of State-death. This neo-realist understanding of State existence has since been deeply rooted in international relations analysis and interpretation.

Keeping this in mind, this article will depict that the four pillars are interconnected and that the failure to meet one of the pillars post-conferment of Statehood does not *de facto* or *de jure* trigger 'State-death'. By training a postcolonial lens, we will then exemplify the ways in which international law has been constructed and wielded so as to invert the interests of the SIDS, treating this as an inflection point to advocate for the proposed shift in the understanding of Statehood. We will then proceed to discuss the array of legal and policy options available to the SIDS as recourse, urging the international community to recognize the need to engage in a dialogue that takes into consideration the particularities of the SIDS, their territories, and their sovereignty. This is of significance given the recent developments in Tuvalu, where the State is surveying the legal options available to it in order to remain a State[15] and the establishment of the Commission of Small Island States on Climate Change and International Law.[16]

While we acknowledge that rising sea-levels are a threat faced by all coastal and island States, this article will focus specifically on Indo-Pacific Island countries (IPIC). We have divided our intervention into four parts:

a. Statehood, SIDS, and the international system;
b. Shifting frameworks: a postcolonial perspective on Statehood, SIDS, and the international system;
c. Charting a discussion about the array of options available to the SIDS; and,
d. Conclusion.

[10]Wong (n 4).
[11]Milla Emilia Vaha, 'Drowning Under: Small Island States and the Right to Exist' (2015) 11(2) Journal of International Political Theory 206.
[12]Kenneth N Waltz, *Theory of International Politics* (Addison-Wesley Pub Co, 1979).
[13]Ibid, 95.
[14]Ibid, 159.
[15]Stefica Nicol Bikes, 'Tuvalu Looking at Legal Ways to be a State if it is Submerged' (*Reuters*, 9 November 2021) <www.reuters.com/business/cop/tuvalu-looking-legal-ways-be-state-if-it-is-submerged-2021-11-09/>.
[16]Anna Therese Gallagher, 'Climate Justice: Small Island States Push Back' (Commonwealth Foundation, 11 November 2021) <https://commonwealthfoundation.com/climate-justice-small-island-states-push-back/>.

II. Statehood, SIDS, and the international system

As entities that claimed sovereignty during the decolonization period, these SIDS reclaimed control over their national destinies.[17] But roughly six decades later, these States find themselves at an ambiguous crossroads again, where their fate hangs in the balance due to the omnipresent threat of climate change. To add to this dilemma, the Indo-Pacific Island States like Maldives, Tuvalu, and Samoa are relatively the least polluting and Greenhouse Gases producing States but are arguably incurring the largest cost.[18] This cost threatens their territorial security on a scale that is unprecedented in international affairs and presents itself as the emerging contours on the subject of Statehood.

Across history, and within the Westphalian system, the pillars of population, governments, and even international interaction have been subject to change, erosion, or revision. Borders, governments, and States changed, but within an accepted configuration of natural territory.[19] Given this primordial understanding of natural land and borders drawn by humans, it is falsely conflated with a hierarchical representation of the pillars, where territory is always presupposed as the principal necessity for Statehood. However, it is imperative to not analyse territoriality in a vacuum but rather think about it in the context of local human existence.[20] Therefore, the question of territoriality in international relations is not only a spatial one but also one of inhabitability.[21] Studies have shown that significant geomorphic changes are likely in the topography of the SIDS.[22] The high vulnerability of IPIC has been recognized since the first assessment report of the Intergovernmental Panel on Climate Change.[23] Chronologically, given the current projections associated with rising sea-levels, an increase of salinity in water resources in the islands, and coastal erosion,[24] the SIDS will become uninhabitable before they physically disappear. In this section of the article, we will analyse the dichotomized question of: how do the interlinkages between the four pillars of Statehood inhibit the idea of State-death? Moreover, what is the association of citizenship and population to inhabitable/uninhabitable territory within our contemporary understandings of Statehood?

A. The interlinkage

To best exemplify the interlinkage between the four pillars is to look at certain cases where one of the pillars has arguably not been met post-conferment of Statehood, and

[17] Jenny Grote, 'The Changing Tides of Small Island States Discourse – a Historical Overview of the Appearance of Small Island States in the International Arena' (2010) 43(2) Law and Politics in Africa, Asia and Latin America 164.

[18] See, Wong (n 4); Sheila C McAnaney, 'Sinking Islands? Formulating a Realistic Solution to Climate Change Displacement' (2012) 87(4) New York University Law Review 1172.

[19] Gideon Biger, 'Historical Geography and International Boundaries' (2021) 29(1) European Review 69.

[20] Jane Mcadam, '"Disappearing States", Statelessness and the Boundaries of International Law' in *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury Publishing, 2012) 122.

[21] Meghna Sengupta, Murray R Ford, and Paul S Kench, 'Shoreline Changes in Coral Reef Islands of the Federated States of Micronesia since the Mid-20th Century' (2021) 377 Geomorphology 107584; Diamir de Scally and Brent Doberstein, 'Local Knowledge in Climate Change Adaptation in the Cook Islands' (2021) 14(4) Climate and Development 360; Leonard A Nurse and others, 'Small Islands' in Thomas Spencer and Kazuya Yasuhara (eds), *Climate Change 2014: Impacts Adaptation, and Vulnerability* (Cambridge University Press, 2014).

[22] Virginie KE Duvat and Alexandre K Magnan, 'Rapid Human-Driven Undermining of Atoll Island Capacity to Adjust to Ocean Climate-Related Pressures' (2019) 9 Scientific Reports 15129.

[23] Intergovernmental Panel on Climate Change – Working Group 2, 'Climate Change: The IPCC Impacts Assessment' (1990) <www.ipcc.ch/site/assets/uploads/2018/03/ipcc_far_wg_II_full_report.pdf>.

[24] Ilan Kelman and Jennifer J West, 'Climate Change and Small Island Developing States: A Critical Review' (2009) 5(1) Ecological and Environmental Anthropology 1.

how despite being a 'failing/failed' State has remained a legal entity in the international system. Focusing on the pillar of an effective government, Crawford has noted it to be constituted by a centralized administration and legislative organs.[25] All through WWII, governments were forced into exile due to territorial sovereign loss but maintained their Statehood during and in the aftermath of the war.[26] Governments-in-exile continued to engage in functions related to pillars of effective governance and maintaining external relations, maintaining jurisdiction and privileges on and for its nationals, and continued entering into and maintaining treaties.[27]

The contemporary case of the prolonged political crisis in Somalia is also highly applicable. In the 1990s, after Siad Barre's regime fell, he was forced to flee Somalia and plummeted the Coastal State into a fragmented, political crisis characterized by the loss of effective governance.[28] The rise of corporate and privatized governance that emerged within this vacuum practically turned Somalia into a war economy, fuelling multiparty privatized control over essential resources such as water, food, and electricity. They actively served as weapon suppliers to different militia groups who were often in conflict with one-another which further fuelled the crisis. Even a service like banking was overtaken by the Hawala (illicit money transfer) system controlled by companies like Al-Barakaat in the absence of a State-controlled central bank.[29] Somalia was stamped a 'failed' State by the international community due to the paucity of an effective government, secure borders, or capacity to reciprocate to its external relations. While the fall of one of the pillars seemingly had a domino effect on the other pillars, at no point was Somalia's position as a legally recognized entity effectively challenged. Somalia was and continues to be a State. This is proved by its continued membership in the United Nations, as well as by the UN Security Council's ongoing engagement with the other Member States and relevant organizations/stakeholders to undertake State-building measures in the interest of stabilizing a crisis-ridden Somalia.[30]

Conversely, across academic literature, the notion of 'State-death' or disappearance alluding to death is increasingly being associated with SIDS in the Indo-Pacific.[31] Interestingly, the first mention of State-death in association with climate change-induced territorial loss was in the address of the former Maldivian President to the UN General Assembly in 1983. The pressures around this unchartered concept are due to the unrecognized

[25]Crawford, *Brownlie's Principles of Public International Law* (n 8).

[26]Ian Harvey, 'Governments-in-Exile and Royalty Relocated to London During World War Two' (War History Online, 1 March 2015) <www.warhistoryonline.com/war-articles/governments-exile-royalty-relocated-london-world-war-two.html?safari=1>.

[27]Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford University Press, 1998).

[28]Mohamed Haji Ingiriis, 'Profiting from the Failed State of Somalia: The Violent Political Marketplace and Insecurity in Contemporary Mogadishu' (2020) 38(3) Journal of Contemporary African Studies 437.

[29]Ibid.

[30]United Nations Security Council, 'Resolution 2568 (2021)' (2021).

[31]See, for instance, James Ker-Lindsay, 'Climate Change and State Death' (2016) 58(4) Survival 73; Wong (n 4); Michael Gagain, 'Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the Constitution of the Oceans' (2012) 23(1) Colorado Journal of International Environmental Law and Policy 77; Jenny Grote Stoutenburg, 'When Do States Disappear?: Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island State' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, 2013) 57; Gregory E Wannier and Michael B Gerrard, 'Disappearing States: Harnessing International Law to Preserve Cultures and Society' in Oliver C Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Nomos, 2013); McAnaney (n 18).

limitations of the current structures of territorial sovereignty.[32] This non-recognition exists in different variations; currently, countries such as Greece have rejected necessary legal adaptations in the context of climate change 'due to lack of State Practice', whereas the United States and United Kingdom have stated that the law shall operate as is unless there is an explicit agreement between parties that describes otherwise.[33]

To epitomize this point, we can juxtapose Somalia's continued status as a State despite the multi-pillar 'failure' against the questioned Statehood of the SIDS. That territorial fragility might result in State-death for the SIDS is based erroneously on the notion that there is a hierarchy or immovable requirement for a State to have a certain amount of bounded territory. Further, the Westphalian conception of territory inhibits the global community's understanding of this scenario as it assumes that territory or naturally formed land is static and unchanging, with only borders and cartographic demarcations being subject to change.[34] By extension, the articulation of laws pertaining to artificial islands, which were conceptualized within a European/colonial context, need a revisitation too. This will be elaborated upon in the subsequent sections.

The linearization of the history of the decolonization process presents the birth of modern States as a simple process that resulted in homogenous 'units' constituted by the same four pillars, including that of territory.[35] But in reality, decolonized States, reeling from years of exploitation, have multiple empirical vulnerabilities within one or various of these pillars which contribute to territorial fragility of IPIC.[36] Thus, contextualizing these vulnerabilities within the international system and in our attempts at adapting to contemporary circumstances of anthropocentric climate change is pivotal.

The territorial fragility being faced by the IPIC should not serve as a pre-emptive death sentence normatively, and the strength of the remaining three pillars should not be discarded as invaluable. Governance and external relations of some of these States are noted to be functioning well and they are no longer considered fragile by the World Bank.[37] These States have oriented themselves not only in the interest of their citizens but also in abidance with their international obligations in regards to environmental protection and the Sustainable Development Goals (SDGs). The Pacific Island States like Tuvalu, Kiribati, and Samoa were classified as 'Least Developed Countries' (LDCs) but have shown high growth rates and sustainable development. Samoa graduated from the LDC in 2014, and other States in the region are scheduled to as well in the near future.[38] Similarly, Maldives too graduated to the status of a Developing Country in 2011.[39] All these countries have seen significant improvement in public service delivery, reduction of

[32]Bogdan Aurescu and Nilufer Oral, 'Sea-Level Rise in Relation to International Law: First Issues Paper' (2020) A/CN.4/740 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/053/91/PDF/N2005391.pdf?OpenElement>.
[33]Ibid.
[34]Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Oxford University Press, 2008).
[35]Nina Caspersen, 'Playing the Recognition Game: External Actors and de Facto States' (2009) 44(4) The International Spectator 47.
[36]Oppenheimer Micheal and others, 'Sea Level Rise and Implications for Low Lying Islands, Coasts and Communities' in Ayako Abe-Ouchi, Kapil Gupta, and Joy Pereira (eds), *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) <www.ipcc.ch/srocc/>.
[37]Stephen Howes, 'Poor Governance in the Pacific: The Forgotten Issue' (*Devpolicy*, 15 August 2019) <https://devpolicy.org/poor-governance-in-the-pacific-a-forgotten-issue-20190816/>.
[38]Andrzej Bolesta, 'Asia-Pacific Small Island Developing States: Development Challenges and Policy Solutions' (2020) WP/20/02.
[39]United Nations Conference on Trade and Development, 'The Least Developed Countries Report 2016: The National Dynamics of Graduation' (2016).

poverty, increase in literacy rates, and have adopted environmentally sustainable policies. Maintaining that the 'disappearance', 'extinction' or 'death' of these SIDS depends solely on the territorial pillar is legally undefined and morally questionable.

Another very pertinent aspect that many scholars have failed to address is State recognition (fourth pillar). There is no means in international law for a State recognized by the UN to have its self-determined status nullified. Further, there is also uncertainty about how other States will recall the recognition of threatened SIDS. In accordance with international custom and State practice, from which Lauterpacht believes legal principles can be extracted,[40] State recognition flows through formal means of communication that officially and explicitly illustrates the intention of recognition.[41] Gagain further elaborates on two prevailing theories of 'State birth' in International Law, the first being constitutive, where other existing States recognize the new State's status, and the second being declaratory, which indicates the entity has met the criteria of Statehood and is a State *de facto*.[42] Gagain also considers the criteria of the Montevideo Convention applicable to the declaratory theory. Therefore, it would be reasonable to note that the intention to recall this recognition will also need to be official and explicit.

These situations illustrate that Statehood is born and founded within the integration of the pillars, and that the removal of any one pillar does not cause a cessation of this integration. Lauterpacht states that 'to recognize a political community as a State is to declare that it fulfils the conditions as required by international law'.[43] He further mentions that a community (first pillar), with a territory (second pillar) and a government (third pillar) 'possess[es] a measure of Statehood … In many cases, substantial rights of Statehood have been accorded, notwithstanding the absence of recognition as a State'.[44] Crawford echoed a similar view in his suggestion '[the enumeration of the pillars] is no more than a basis for further investigation [for defining Statehood]. Not all conditions are necessary, and in any case, further criteria must be employed to produce a working definition'.[45]

On the other hand, Oppenheim opined that 'a State without territory is not possible' which default places the pillar as a hierarchical feature.[46] However, he fails to primarily define what territory is in international law. In contradistinction, Gottman asserts that territory is 'the product and indeed the expression of the psychological features of human groups'.[47] Thus, humans give meaning to meaningless 'space' and must be considered while defining 'territory'. In turn, their identity is solidified by the existence of this demarcated territory. Keeping these arguments in mind, we argue that the existing territorial fragility is not a pre-condition to a normative 'State-death' but rather incentive to pursue further criteria and revisit existing definitions in international law to produce a working definition in the context of climate change.

[40]Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 2013).
[41]Hans Kelsen, 'Recognition in International Law' (1941) 35(4) American Journal of International Law 605.
[42]Gagain, 'Climate Change, Sea Level Rise, and Artificial Islands' (n 31).
[43]Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) The Yale Law Journal 385, 385.
[44]Ibid, 435–36.
[45]Crawford, *Brownlie's Principles of Public International Law* (n 8) 117.
[46]Jennings and Watts (n 34) 563.
[47]Jean Gottmann, *The Significance of Territory* (University Press of Virginia, 1973) 15.

B. Human existence and territory

To analyse this question, the pillar of 'permanent population' is to be principally considered. There is no clear indication of an empirical value or number associated with the 'permanency' of a population.[48] In the context of the SIDS and this pillar, three critical challenges have emerged. National sovereignty and national citizenship, human rights, and the aspect of self-determination. It is critical to note that the principle of self-determination is already fulfilled and satisfied in the status quo, and the response of the international community needs to be cognizant of this.[49] Agency of the 'Oriental' polities were subverted during the colonial period within a Eurocentric Statehood model.[50] And, considering how the SIDS are bearing a disproportionate cost of climate change, it will be cardinally antithetical and unjust if human rights are not configured to be central within the international response to this burgeoning crisis.

In regards to permanent population and citizenship, it is noted that numerous persons with SIDS' nationality live in other States. For example, 500,000 Samoans live outside of Samoan territory in comparison to the 200,000 living within.[51] SIDS deliver public utilities such as documentation, representation, and bilateral agreements with host States on behalf of their citizens, such as permanent migration schemes with New Zealand.[52] With emerging trends of migration, the impact of climate change on such numbers will arguably become increasingly visible amongst the other Indo-Pacific Island States. Furthermore, citizenship and territorial sovereignty are closely intertwined in the Westphalian system. Traditionally, the identity of being a citizen of a State is bestowed upon by the government that is effectively ruling over a defined territory. This identity manifests in various forms such as fundamental Constitutional rights, political participation, and even in documentation through national identity cards and passports.

But citizenship to a State is usually applicable to the entirety of the State's natural territory – even parts of it that are uninhabitable. For example, the citizens of a State enjoy citizenship even in the uninhabitable parts of the Sahara Desert or the stark summits of the Himalayas. And, States enjoy territorial sovereignty over these regions as well while being protected from any external force under Article 2.4 of the UN Charter. We acknowledge that there is a normative association between inhabitance and nationality, but they are not fundamentally a sum of one another. Given that uninhabitability is likely to precede the physical disappearance of the SIDS, international law, treaties, and customs should continue to apply as they presently do in the interim as well.[53] This is pivotal due to the flawed synonymity between uninhabitability of SIDS and 'Statelessness' of its people which implies non-existence of the origin State. This nuance will be deeply

[48]Thomas M Franck and Paul Hoffman, 'The Right of Self Determination in Very Small Places' (1976) 8 NYU Journal of International Law and Politics 331.

[49]Susannah Willcox, 'Rising Tide: Implications of Climate Change Inundation for Human Rights and State Sovereignty' (2012) 9(1) Essex Human Rights Review 1.

[50]Mohammad-Mahmoud Ould Mohamedou, 'In Search of the Non-Western State: Historicising and De-Westphalianising Statehood' in Dirk Berg-Schlosser, Bertrand Badie, and Leonardo Morlino (eds), *The Sage Handbook of Political Science* (Sage, 2020).

[51]Dominic Godfrey, 'Samoan Diaspora Seeks More Political Say' (RNZ, 7 April 2021) <www.rnz.co.nz/international/pacific-news/439974/samoan-diaspora-seeks-more-political-say>.

[52]Migration Data Portal, *Migration Data in Oceania* (Migration Data Portal, 2021).

[53]Nathanial Gronewold, 'Island Nations May Keep Some Sovereignty if Rising Seas Make Them Uninhabitable' (NYT, 25 May 2011) <https://archive.nytimes.com/www.nytimes.com/cwire/2011/05/25/25climatewire-island-nations-may-keep-some-sovereignty-if-63590.html?pagewanted=1>.

applicable to evolving conversation on climate change induced migration. Such characterization has been actively present on platforms such as UNHCR[54] and within academic literature as seen in *Threatened Island Nations*.[55]

III. Shifting frameworks: a postcolonial perspective on Statehood, SIDS, and the international system

For centuries, the international entity termed the 'State' has been at the nucleus of the international system. The prolonged period over which the 'State' has occupied this position of primacy has led to a scholar remarking that 'our intellectual undertaking is so immensely embraced and constituted by [S]tates that their self-definitions constitute the schemes in which we think when we clsassify and give meaning to social systems'.[56] Given that the State has primarily been defined with reference to the four pillars in the Montevideo Convention, it is the framework that is operationalized to classify and imbue systems, events, and entities with meanings. In the foregoing part of this article, we have argued that the pillars need to be understood as interconnected, and that the sovereignty of a State can be exercised even when its peoples and territory are geographically disconnected. These arguments are irreconcilable with the Western legacy of the Convention, the understanding of the 'State' it champions,[57] and the ascendancy accorded by it to 'territory'.[58] Consequently, we advocate for a shift in the framework through which the notion of a 'State' is assessed.

In the absence of a shift in frameworks, the 'colonial legacy is [easier consigned] to a past that no longer informs the present',[59] and climate change is portrayed as a global technical problem.[60] The essentialized, universalized, and sanctified conception of Statehood, which is modelled after the West, demands mimicry of the 'legal and economic culture of the West'[61] from decolonized societies. In the process, it obliterates signs (or, rather, in the case of postcolonial States, *scars*) of colonialism.[62] In contrast, postcolonial theory is likely to interrupt these master narratives which 'give hegemonic 'normality' to the uneven development and the differential, often disadvantaged, histories of nations,

[54]Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (Legal and Protection Policy Research Series, United Nations High Commissioner for Refugees, 2011) <www.unhcr.org/4df9cb0c9.pdf>.
[55]Stoutenburg, 'When Do States Disappear?' (n 31).
[56]Gorm Harste, 'The Improbable European State – Its Ideals Observed with Social Systems Theory' in Robert Egnell and Peter Haldén (eds), *New Agendas in Statebuilding: Hybridity, Contingency and Histor* (Routledge, 2013) 95.
[57]Ould Mohamedou (n 50).
[58]See, for instance, Ori Sharon, 'Tides of Climate Change: Protecting the Natural Weath Rights of Disappearing States' (2019) 60(1) Harvard International Law Journal 95; Emma Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law 1; Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 European Journal of International Law 142; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz, 1968).
[59]Benjamin J Richardson, 'Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum' (2000) 11(1) Colorado Journal of International Environmental Law and Policy 1, 6, citing Albert Memmi, *The Colonizer and the Colonized* (Beacon Press, 1991) 30.
[60]Leon Sealey-Huggins, '"1.5°C to Stay Alive": Climate Change, Imperialism, and Justice for the Caribbean' (2017) 38(11) Third World Quarterly 2444; Giulia Jacovella, 'International Law and the (De)Politicisation of Climate Change and Migration: Lessons from the Pacific' (2015) 2 SOAS Law Journal 76; Anneelen Kenis and Matthias Lievens, 'Searching for the Political in Environmental Politics' (2014) 23(4) Enviromental Politics 531.
[61]Richardson (n 59) 6.
[62]Ould Mohamedou (n 50); Rollin F Tusalem, 'The Colonial Foundations of State Fragility and Failure' (2016) 48 Polity 445; Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing, 2013); Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5(3) Social and Legal Studies 337.

races, communities, and peoples' such as those located in the Indo-Pacific.[63] By accounting for lived realities and (dis)continuities in power instead of evaluating the proficiency with which a State replicates the Western ideal,[64] the shift in frameworks can act as a counter-hegemonic narrative to discourses presuming 'State-death' upon territorial loss. This is likely to pave the path for 'creative solutions to an entirely novel problem'.[65]

This framework is equally pivotal to the realization that the continued survival of the State is indicative of the mutable nature of Statehood,[66] and the contingency of 'territory' as a 'logical necessity of Statehood'.[67] When chosen as the lens through which the notion of a 'State' is simultaneously constructed and deconstructed on an ongoing basis,[68] it also enlarges the space for disruptions to the universal ideal by providing the impetus for tragedies, ambivalences, and contradictions to be written into history.[69] Given that as of 2019, an accelerating rise in sea-levels has been projected by the IPCC, the risks of erosion, flooding, and salinization are likely to amplify. Since these will inevitably affect the inhabitability of the IPIC, it is imperative for a shift to be marked in the understanding of the 'State' and for its underlying rationale to be explored.

A. The invisibilization of the imperial underpinnings of international law and its systems

International law, as a body of knowledge, recasts the colonial as universal.[70] The consecration of the Westphalian State as the cornerstone of the modern international system is an instantiation of this.[71] Consequently, despite the architecture and values of the Western State being a reflection of a specific historical episode, decolonizing countries were expected to adopt the European model to gain autonomy and participative rights. This produced the postcolonial dilemma, which 'required – and still requires – self-determining nations to be complicit in the imperial strategies they seek to overcome by copying and adopting Euro-American legal concepts and structures'.[72] Moreover, institutions such as the United Nations, by-products of the colonial empire as well,[73] have contributed to international law's inertia in acknowledging its colonial legacy and to adequately engage with its Eurocentric bias.[74]

[63]Homi K Bhabha, *The Location of Culture* (Routledge, 1994) 171.
[64]Stein Sundstøl Eriksen, '"State Failure" in Theory and Practice: The Idea of the State and the Contradictions of State Formation' (2011) 37(1) Review of International Studies 229; Richardson (n 59).
[65]Sharon (n 58) 100.
[66]Ould Mohamedou (n 50).
[67]Isabelle Berggren, 'Disappearing Island States and Human Rights: Preservation of Statehood and Human Rights in Times of Climate Change' (2018) <www.diva-portal.se/smash/get/diva2:1305106/FULLTEXT01.pd>. See also William Edward Hall, *A Treatise on International Law* (Oxford University Press, 1924).
[68]Ould Mohamedou (n 50).
[69]Richardson (n 59); Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?' (1992) 37 Representations 1.
[70]BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 Melbourne Journal of International Law 499.
[71]Ould Mohamedou (n 50); Lizzie Yarina, 'Microstatecraft: Sovereignty as Currency for Oceania's Island States' (2020) 12 InForma 216.
[72]Darian-Smith (n 62) 255.
[73]Mark M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009).
[74]Anthony Angie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

The invisibilization of the imperial underpinnings of international law and the performative nature of sovereign equality propagated within it have real-world consequences for postcolonial States such as the SIDS. In particular, they provide the impetus for the generation and gradual fortification of false assumptions about climate change as the cause of uninhabitability on these 'naturally' low-lying islands, thereby implicating the debates about their Statehood.[75] As noted in the context of the SIDS located in the Caribbean – neither a homogeneous group in themselves nor collapsible into the SIDS in the Indo-Pacific – such discourses reduce the vulnerability of the SIDS to their 'location or the globally uneven maladies of climate change', thereby 'mis-locat [ing] the causes of climate change in abstract-technical rather than social-relational terms'.[76] Coterminously, such discourses negate the systematic exploitation of their land and life-ways by the colonial powers for decades,[77] negating alongside it the debt owed to these States by colonial powers even today.[78] These discourses also obscure the negligible space carved by international law to account for the historicity of environmental degradation.[79]

Further, the conflation of the colonial and the universal has resulted in an 'infinite pause in decolonization'[80] due to the reduction of the 'global' environmental agenda to the interests and concerns of the affluent, developed States.[81] A shift in the framework is, thus, justified by the need for the surface of international law to be permeated and for unequal global social relations to be examined as a category of analysis,[82] such that 'structural and economic aspects … [are] explicitly taken into account, made visible and re-politicized'.[83]

B. A tale of multiple inversions: international environmental law and politics

Over the last few decades, international law has increasingly been deployed to configure the space of the environment.[84] The emergent body of knowledge termed international environmental law, and the politics associated with it, have significantly implicated as well as been influenced by the dynamic relations characterizing the global order. Supplementarily, competing priorities, interests, and solutions with respect to the global environmental agenda have also resulted in multiple fissures within the international

[75] Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford Academic, 2012).
[76] Sealey-Huggins (n 60) 2445, 2453.
[77] Cait Storr, 'Islands and the South: Framing the Relationship Between International Law and Environmental Crisis' (2016) 27(2) European Journal of International Law 519.
[78] Matthew Louis Bishop, 'The Political Economy of Small States: Enduring Vulnerability?' (2012) 19(5) Review of International Political Economy 942.
[79] Storr (n 77); Karin Mickelson, 'Beyond a Politics of the Possible? South-North Relations and Climate Justice' (2009) 10(2) Melbourne Journal of International Law 411.
[80] John Connell, 'New Caledonia: An Infinite Pause in Decolonization' (2003) 92(368) The Round Table: The Commonwealth Journal of International Affairs 125.
[81] Sumudu Atapattu and Carmen G Gonzalez, 'The North–South Divide in International Environmental Law: Framing the Issues' in Shawkat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015).
[82] Ould Mohamedou (n 50); James Mayall, 'The Legacy of Colonialism' in Simon Chesterman, Michael Ignatieff, and Ramesh Thakur (eds), *Making States Work: State Failure and the Crisis of Governance* (United Nations University Press, 2005).
[83] Silija Klepp and Johannes Herbeck, 'The Politics of Environmental Migration and Climate Justice in the Pacific Region' (2016) 7(1) Journal of Human Rights and the Environment 54, 73.
[84] Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88(3) International Affairs 605.

community.[85] The resultant fragmentation of opinion has impeded the implementation of international environmental law and diluted the cooperative framework. This has yielded labels such as 'weak', 'ineffectual', and 'mere lip-service' for the regime, particularly in the face of progressive deterioration of the environment. However, it bears attention that the tragic consequences of climate change are not experienced uniformly by all States, nor do all States possess equal bargaining power within the framework of multilateral agreements.[86] Moreover, the colonial practices embedded as foundational within international law facilitate the continuity of exploitative imperial practices,[87] the benefits of which are reaped by some States at the detriment of others.[88]

In the context of the SIDS, whose vulnerability to climate change has been recognized by the international community since the formative years of the international environmental regime,[89] international environmental law has frequently been wielded in a manner that inverts their interests. The overarching narrative, in this regard, is encapsulated in Jacovella's powerful prose:

> … [T]the tendency, especially in the Global North, [is] to consider these islands as laboratories for climate change laws and policies … [T]he renewed interest in the historically marginalized and exploited populations of the Pacific Islands … arises from using [them] to determine environmental migration, whether the islands are 'drowning', and the eventual consequences for the rest of the planet.[90]

A mosaic of specific instances, across time, play a pivotal role in shaping outcomes detrimental to the SIDS in the Indo-Pacific as well.

The dissonance between the Paris Agreement's urgent calls for capping the increase in temperature amidst the SIDS' advocacy and its simultaneous failure to mandate decarbonization in the absence of which the cap would be 'illusory' is illustrative.[91] It is also instantiated by the gradual erosion of the principle of 'common but differentiated responsibilities' (CBDR),[92] which has failed to yield the necessary concessions for the SIDS, who are owed a debt by States with historically high emissions.[93] The system of States putting forth voluntary and nationally determined contributions (NDCs) has deepened this divide by permitting States leeway with committing to their 'fair share'.[94] A study conducted by Civil Society Review has evidenced that the ambitions articulated by several developed States in their NDCs fall quite short of their 'fair share'.[95]

[85]Valentina Baiamonte and Chiara Redaelli, 'Small Islands Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies' (The Graduate Institute Geneva, 2017).
[86]Ibid; Rajamani (n 84).
[87]Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27(3) Leiden Journal of International Law 573.
[88]Julia Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective' (2016) 33 The Windsor Yearbook of Access to Justice 129; Mickelson (n 79).
[89]Maxine Burkett, 'Small Island States and the Paris Agreement' (Wilson Center, 21 December 2015) <www.wilsoncenter.org/article/small-island-states-and-the-paris-agreement>.
[90]Jacovella (n 60) 98.
[91]Burkett, 'Small Island States and the Paris Agreement' (n 89).
[92]Rajamani (n 84).
[93]Klepp and Herbeck (n 83).
[94]Dehm (n 88).
[95]Civil Society Review, 'Fair Shares: A Civil Society Equity Review of NDCs' (Civil Society Review, 2015) <https://static1.squarespace.com/static/620ef5326bbf2d7627553dbf/t/622827f61f2e1746062ebec6/1646798856616/CSO.Equity.Review--2015--Fair.Shares.A.Civil.Society.Equity.Review.of.INDCs.pdf>.

The interests of the SIDS have, similarly, been inverted in discourse pertaining to their rights over the exclusive economic zone (EEZ) in the scenario of total territorial loss; the vacuum in humanitarian law pertaining to displaced persons crossing international borders in the context of climate change; the focus on mitigation as opposed to adaptation; the contestation over the securitization dimensions of the issue; and, the limited availability of funds.[96] Resultantly, even in 2021, the words uttered by His Excellency Tuiloma Neroni Slade in 2003 may be echoed, '[f]undamentally, it is an issue of equity, and of survival'.[97] The shift in frameworks nurtures the realization that this statement is no longer cautionary. The inextricability of 'survival' from the historic and contemporary inversions of the SIDS' enjoyment of 'equity' demands novel but viable solutions urgently.

C. The geographies of climate (in)justice

The predominant global narrative about climate change is that it poses a common challenge and imposes a collective responsibility on the international community.[98] While this narrative might be generative in thinking about a future in which concerted efforts are taken by the international community to establish a sustainable relationship with the natural world,[99] it fails to contend with the historic and contemporary discrepancies in power, wealth, vulnerability, consumption levels, and contribution to greenhouse gas emissions.[100] As Fisher observes, such a narrative frames

> [c]limate change justice … as a singular discourse and analytical concept … that [has] sought to isolate an idea of climate justice that is additional to existing structural inequalities … [rather than as] mediated through existing institutions and histories of disadvantage [thereby conceiving] climate justice as the resilience of existing social systems rather than the transformation to new more equal societies.[101]

The failure to engage substantively with these crucial dimensions of the relationships which characterize the global order has resulted in a regulatory framework that co-exists comfortably with the increasing likelihood of the SIDS' uninhabitability and discourses in which State-death is predicated upon territorial loss. This is exemplified by IPCC's Report of 2019, which notes that the rise in sea levels is likelier to be faster under all scenarios, including those which are compatible with the achievement of the long-term goal outlined in the Paris Agreement, and entail significant risks for the SIDS unless counteracted by major adaptation efforts.[102] It is also echoed in the words of Anote Tong, the former President of Kiribati, at COP25,

[96]Georgios Kostakos, Ting Zhang, and Wouter Veening, *Climate Security and Justice for Small Island Developing States: An Agenda for Action* (The Hague Institute for Social Justice, 2014) <www.preventionweb.net/publication/climate-security-and-justice-small-island-developing-states-agenda-action>.
[97]Tuiloma Neroni Slade, 'The Making of International Law: The Role of Small Island States' (2003) 17 Temple International and Comparative Law Journal 531, 540.
[98]Dehm (n 88).
[99]Mickelson (n 79).
[100]Dehm (n 88).
[101]Susannah Fisher, 'The Emerging Geographies of Climate Justice' (2012) Centre for Climate Change Economics and Policy Working Paper 94 and Grantham Research Institute on Climate Change and the Environment Working Paper 83 <www.cccep.ac.uk/wp-content/uploads/2015/10/WP83-emerging-geographies-climate-justice.pdf>. See also Paavola Jouni and W Neil Adger, 'Fair Adaptation to Climate Change' (2006) 56(1) Ecological Economics 594.
[102]IPCC – Sixth Assessment Cycle (n 1).

> What is important to understand is that what we have agreed to in Paris in 2015 does not avoid the challenge that we are in the frontline of climate change. Whether we cut emissions to zero, we will continue to go under water. The Paris Agreement is important because we are the example of what should not happen to the rest.[103]

Viewed as a monolithic term – a vision bolstered continually by the predominant narrative – climate (in)justice fails to enfold the voices and experiences of the SIDS or contend adequately with contextual differences, both of which are pivotal to any 'solution(s)' or conversations about the issue.

Thus, despite the purported endeavour of international law to renew its efforts at new regulatory sites,[104] asymmetries and their mutation into new forms necessitate a shift in frameworks. Given the complex interactions between the imperial underpinnings of international law and its contemporary manifestations in the law and politics governing climate change, postcolonial theory is a particularly apt framework due to its capacity to act as an 'intellectual bridge'.[105] Moreover, the shift in frameworks animates the paradox at the heart of climate action – 'those most vulnerable to climate change are least responsible and have the least resources to adapt'[106] – and initiates a conversation about the geographies of climate justice/injustice. We suggest that any conceptualization of climate justice must essentially question the necessity of conforming to the Western ideal of 'Statehood'[107] and treat non-Western knowledge as informative for the direction in which the decision pertaining to the SIDS unfolds.[108]

IV. Charting a discussion about the array of options available to the SIDS

Postcolonial theory alerts us to the historic and ongoing experience of the SIDS located in the Indo-Pacific as one characterized by dispossession. It emphasizes that the journey traversed by them has witnessed the dialectics of power/vulnerability, oppression/resistance, exclusion/inclusion, and episodic disruptions to these dialectics.[109] Given that '[s]overeignty over a defined geographical area epitomized the inextricable link between Statehood and territory and led the 'territorial [S]tate' to become the main actor in the Westphalian system',[110] discourse about the loss of sovereignty by the SIDS becomes yet another site for their dispossession and for the reproduction of these dialectical relations. The shift in frameworks proposed by us, however, does more than merely reveal this trajectory of dispossession. It also calls into question the coherence and legitimacy of the Westphalian system – its definition of Statehood, international

[103]Imelda Abano, 'Pacific Island Nations at COP25: Leave No One Behind' (Earth Journalism Network, 12 December 2019) <https://earthjournalism.net/stories/pacific-island-nations-at-cop25-leave-no-one-behind>.
[104]Dehm (n 88).
[105]Darian-Smith (n 62) 252.
[106]Stephen Humphreys, 'Climate Justice: The Claim of the Past' (2014) 5 Journal of Human Rights and the Environment 134, 136. See also Mickelson (n 79).
[107]Ould Mohamedou (n 50).
[108]Boaventura De Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge, 2014).
[109]Ratna Kapur, 'New Cosmologies: Mapping the Postcolonial Feminist Legal Project' in *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press, 2005) 13.
[110]Catherine Blanchard, 'Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory due to Climate Change and Sea-Level Rise' (2016) 53 Canadian Yearbook of International Law 66, 73, citing Wong (n 4).

regulatory structures, and axioms of international law – amidst new realities which bring unprecedented situations and questions.[111]

By doing so, the shift in frameworks urges the international community to recognize that sovereignty is 'conceptually and practically challenging',[112] particularly under conditions of asymmetrically experienced climate change. By arguing that discourse about the future of the SIDS should imagine the implications for their peoples and prioritize their right to self-determine,[113] the shift in frameworks promotes law's accommodation of 'the changing character of the sovereign state landscape by granting legal recognition to alternative forms of Statehood in response to deteriorating climate conditions'.[114] By framing the system's interests as dependent on law's accommodation of these alternative forms, the shift endeavours to impel the international community to adopt a view of the rules and principles of international law as responsive and flexible to changes.[115]

In this section, we dwell on a few proposed solutions to the increasing uninhabitability of the SIDS and the total territorial loss likely to be experienced by them. The discussion will proceed with the endeavour of initiating a conversation about the array of options available to the SIDS and the limitations of these options. The discussion is not intended to champion a singular solution; rather, our endeavour is to engage in a dialogue that is mindful of the particularities and trajectories of the SIDS, their territories, and their sovereignty.

A. Reimagining acquisition of 'territory': cession, remedial territory, and merger

1. Cession

An option that has been explored is cession of territory from a State elsewhere to the affected SIDS.[116] Full cession of sovereignty is likely to result in the persistence of Statehood, in alignment with the rules of international law,[117] making it a lucrative option for the SIDS who are keen to maintain their sovereign status. However, it is unlikely to be practically feasible due to the difficulties of identifying and ascertaining the States which would be agreeable to ceding parts of their territories that are inhabitable and economically viable, even if compensated.[118] Even if States do agree to cede parts of

[111]Blanchard, 'Evolution or Revolution?' (n 110); Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1–2) Climate Law 70; Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 University of Hawai'i Law Review 663; Achim Maas and Alexander Carius, 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond' in Jürgen Scheffran and others (eds), *Climate Change, Human Security and Violent Conflict: Challenges or Societal Stability* (Springer, 2012) 651; Cleo Paskal, *Global Warring: How Environmental, Economic and Political Crises Will Redraw the World Map* (Key Porter Books, 2010).

[112]Alexander Mawyer and Jerry K Jacka, 'Sovereignty, Conservation and Island Ecological Futures' (2018) 45(3) Environmental Conservation 238, 239.

[113]Amy Maguire and Jeffrey McGee, 'A Universal Human Right to Shape Responses to a Global Problem: The Role of Self-Determination in Guiding the International Legal Response to Climate Change' (2017) 26(1) Review of European Community and International Environmental Law 54.

[114]Tracey Skillington, 'Reconfiguring the Contours of Statehood and the Rights of Peoples of Disappearing States in the Age of Global Climate Change' (2016) 5(3) Social Sciences 46, 48.

[115]Susannah Willcox, 'Climate Change Inundation, Self-Determination, and Atoll Island States' (2016) 38(4) Human Rights Quarterly 1022.

[116]Park (n 54); The UN High Commissioner for Refugees, 'Climate Change and Statelessness: An Overview', *6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change* (UN Framework Convention on Climate Change, 2009).

[117]Allen (n 58).

[118]Etienne Piguet, 'Climatic Statelessness: Risk Assessment and Policy Options' (2019) 45(4) Population and Development Review 865; Allen (n 58); Lilian Yamamoto and Esteban Miguel, 'Alternative Solutions to Preserve the Sovereignty of Atoll Island States' in *Atoll Island States and International Law* (Springer, 2014) 175; Rosemary Rayfuse, 'W(h)ither

their territories, given that the acquired lands will be a portion of the larger landmass of the ceding States, the populations of the SIDS are likely to experience a fundamental change to their embedded life-ways[119] and to their means of interacting with and harnessing the advantages offered by their geographic locations.

It is also imperative that cession fulfils the requirements of international law with respect to the exercise of government power rather than that of the laws governing the transactions pertaining to private property.[120] This aligns with Crawford's remark that '[t]erritorial sovereignty is not ownership of but governing power with respect to territory'.[121] Kiribati's purchase of 6000 acres of land on the Fijian island of Vanua Levu is illustrative here.[122] While Fiji's President has commendably declared that '[t]he spirit of the people of Kiribati will not be extinguished. It will live on somewhere else because a nation isn't only a physical place. A nation – and the sense of belonging that comes with it – exists in the hearts and the minds of its citizens wherever they may be',[123] the land continues to be a feature of Fijian sovereignty and Fijian laws govern the public as well as the private. As Camprubí notes, a special agreement between Fiji and Kiribati through which the exercise of certain competencies regarding the police, criminal law and family law are delegated to Kiribati is required in order for Kiribati to 'act and intervene lawfully within the territorial boundaries of [Fiji] to restore or maintain order, though in no case is it tantamount to a delegation of sovereignty as such'.[124]

Pertinently, the legacy of cession, which was frequently used as an instrument of territorial acquisition by the European States during the reign of the colonial empire, also bears attention as a pivotal concern.[125] As Yamamoto and Esteban note,

> The suggestion to apply this solution … seems to be misplaced because it overlooks how developing States could face great challenges when trying to apply an instrument that was used to increase territorial influence of developed States in the past.[126]

2. Remedial territory

More recently, the compulsory cession of territory from States responsible for climate change to injured States such as the SIDS has been proposed as another possible solution.[127] Allen suggests that the failure of certain States to control or restrain their contribution to emission activities must be considered to be internationally wrongful acts, from which the dual obligations of ceasing their wrongful conduct and that of furnishing

Tuvalu? International Law and Disappearing States' (2009) University of New South Wales Faculty of Law Research Series 9.

[119]Yamamoto and Miguel (n 118).

[120]Crawford, *Brownlie's Principles of Public International Law* (n 8).

[121]Crawford, *The Creation of States in International Law* (n 8) 56.

[122]Laurence Caramel, 'Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji' (*The Guardian*, 1 July 2014) <www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>.

[123]Press Release SUVA, 'Fiji Supports Kiribati on Sea Level Rise' <www.climate.gov.ki/2014/02/20/fiji-supports-kiribati-on-sea-level-rise/>.

[124]Alejandra Torres Camprubí, 'The Challenge of De-Territorialisation' in *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill, 2016) 15, 108.

[125]Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law' (1999) 40(1) Harvard International Law Journal 1; Yamamoto and Miguel (n 118).

[126]Yamamoto and Miguel (n 118) 212.

[127]Allen (n 58).

full reparations for the injury caused flow. She adds that due to the amorphous nature of ascertaining specific liability for harms caused due to climate change, each emitting State is required to accept its positionality as a necessary element of an overall set. This set denotes the States which have contributed to the harm and which are expected to jointly make reparations to the injured States.

However, it might be difficult to garner adequate support for this proposal. The concern is captured in Stoutenburg's statement,

> while international solidarity after the causation of dangerous anthropogenic interference with the climate system cannot compensate for its absence beforehand, it is by no means clear that the international community of States would be prepared to accept even this ex-post expression of shared responsibility.[128]

Further, the shift from contingency to compulsion fails to account for the 'past behaviour or current political stances' of developed States, an oversight which might render this proposal politically infeasible and also impede the willingness of these States to partake in future climate-change negotiations.[129] The proposal of such a solution also raises several questions about the definitional thresholds of 'injured' and 'responsible' States and that of temporal triggers for 'injury'. These questions will need to be resolved before the proposal can be implemented, though it is likely that the negotiations will result in deadlock.

3. Merger

Some scholars have also suggested the merger of the SIDS in the Indo-Pacific with other States, possibly in the form of a federation, as another potential solution.[130] Such a union is likely to result in either the Island-State being subsumed into the 'host State' or the formation of a new State.[131] It is also prone to result in a cession of the maritime zones of the SIDS to the 'host State', and the transfer of the right to represent the interests of the relocated population to the 'host State'.[132] While a merger may be capable of addressing certain problems faced by the SIDS (e.g. relocating their displaced inhabitants), it raises several concerns about the loss of Statehood.[133]

Given that as a consequence of the merger, the SIDS will be unable to enter into diplomatic relations, or accord an exclusive status to their populations, resistance is expected as they have strived hard for independence. While the 'host State' may indeed agree to a form of political organization which accords the former SIDS a certain measure of autonomy to alleviate some of these concerns, the extent to which this may be achieved shall depend on the nature of the negotiations between the two States.[134]

[128]Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill, 2015) 450.
[129]McAnaney (n 18).
[130]Alfred HA Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37(2) Netherlands International Law Review 207; Rosemary Rayfuse, 'Sea Level Rise and Maritime Zones' in Gerrard and Wannier (eds), *Threatened Island Nations* (n 31) 167.
[131]Park (n 54).
[132]Yamamoto and Miguel (n 119); Rayfuse, 'W(h)ither Tuvalu?' (n 118).
[133]Allen (n 58).
[134]Yamamoto and Miguel (n 118).

B. Reconstituting the populations' 'relationship' with territory: government-in-exile and deterritorialized Statehood

1. Government-in-exile

It has also been proposed that the SIDS consider being hosted as governments-in-exile on the territories of other States. While, historically, governments-in-exile have been established pursuant to events in which the government is ousted, such as a civil war or an external invasion by a military power, in the case of the SIDS, the government-in-exile will be established due to the felt effects of anthropogenic climate change.[135] Notably, a government-in-exile can continue to perform some of the fundamental functions associated with Statehood, such as the exercise of jurisdiction over nationals abroad, maintenance of formal diplomatic relations, participation in international fora, conclusion of treaties, and the provision of consular services and issuance of passports.[136] However, despite the advantages offered by the government-in-exile model, there are several concerns as well.

A primary concern pertains to the potential circumscription of the powers and autonomy of the SIDS in view of the territorial integrity of the host State. This concern is likely to manifest in the form of impediments to the exercise of jurisdiction and enforcement of laws by the SIDS as the 'hosted States'.[137] Another concern is that of the SIDS' citizens resettling and securing citizenship of the host State or of another State, thereby gradually diminishing the role of the government-in-exile and prompting the extinction of its citizenship.[138] Other concerns include the ambiguities about the long-term viability of a government-in-exile given that the model is founded on the prospect of a State returning to its territory at some point in the future.[139] These ambiguities invoke pertinent questions about the extent of the SIDS' right to exercise control over their maritime zones and disappearing territories indefinitely.

Should the SIDS still choose to establish governments-in-exile, the international community must ensure continued recognition. Further, the host and hosted States should enter into clear agreements about the extent of the SIDS' authority over the territory of the host State, and provide for the possibility of their citizens to acquire dual citizenship so that the SIDS may continue to fulfil the criterion pertaining to 'permanent population'.[140]

2. Deterritorialized State

A deterritorialized State or a 'nation ex-situ' is essentially a new kind of State in which a sovereign entity governs its citizens, who may be scattered across the globe, from afar. As Burkett argues, '[i]t is a means of conserving the existing State and holding the resources

[135]Antonio Joseph DelGrande, 'Statelessness in the Context of Climate Change: The Applicability of the Montevideo Criteria to "Sinking States"' (2021) 53 NYU Journal of International Law and Politics 152; Yamamoto and Miguel (n 118); Stoutenburg, 'When Do States Disappear?' (n 31).
[136]Susannah Willcox, 'Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood' (2017) 30(1) Leiden Journal of International Law 117.
[137]DelGrande (n 135); Jacquelynn Kittel, 'The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2014) Michigan State Law Review 1207.
[138]Willcox, 'Climate Change and Atoll Island States' (n 136); Kittel (n 137).
[139]Willcox, 'Climate Change Inundation, Self-Determination, and Atoll Island States' (n 115); Yamamoto and Miguel (n 118).
[140]Kittel (n 137).

and well-being of its citizens – in new and disparate locations – in the care of an entity acting in the best interests of its people'.[141] While we assert that a deterritorialized State is differentiable from a government-in-exile on the parameter that it does not have 'a prescribed expiration date at its inception',[142] i.e. there is no expectation for the 'hosted State' to eventually return to its territory,[143] the presence of a contrary position, adopted by renowned scholars such as Rayfuse must also necessarily be acknowledged.[144] Rayfuse's argument about the transient nature of such an arrangement, which lasts only one generation or a human lifetime, is predicated on the need for the international community to reconfigure other aspects over this duration.[145] On the contrary, Burkett argues that the system should reflect constancy in guaranteeing sovereignty and self-determination even as its other aspects evolve to align with reality.[146] The fractured nature of discourse is indicative of the impediments to a global consensus and coordinated action with respect to these solutions.

Thinking about the deterritorialized State as devoid of an 'expiration date', it offers the SIDS and the international community several advantages: a permanent legal status with ongoing recognition for the State despite the displacement of its peoples; the continued participation of the SIDS in the international fora; the sustained ability to protect certain rights of citizens; the preservation of cultural traditions and pride ideologies; provision of diplomatic protections and consular services; management of maritime zones in the interest of the displaced peoples; and the capacity to leverage State institutions and revenue generated to benefit the populations of the SIDS.[147] However, despite the advantages a deterritorialized State seemingly offers, several aspects of the proposal are concerning.

For instance, due to its dependence on the host State's consent, a deterritorialized State might be as constrained as a government-in-exile with respect to the autonomy a State can exercise and the protection it can offer its populations.[148] The deterritorialized State model also raises questions about the willingness of the international community to accept a new form of Statehood in which States accept responsibilities as 'host States'.[149] These questions may be determinative as they have a bearing on conflicts about the priorities, financial or otherwise, between the prospective 'host States' and the SIDS.[150]

Additionally, given that deterritorialized Statehood is envisaged by some scholars as a modified implementation of the UN Trusteeship system,[151] it is worth questioning whether the proposal infantilizes the SIDS and undermines their sovereignty by requiring

[141]Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2 Climate Law 345, 346.
[142]Ibid, 366 [fn 120].
[143]Yamamoto and Miguel (n 118).
[144]Rayfuse, 'W(h)ither Tuvalu?' (n 118).
[145]Ibid.
[146]Burkett, 'The Nation Ex-Situ' (n 141).
[147]Willcox, 'Climate Change and Atoll Island States' (n 136); Yamamoto and Miguel (n 118); Burkett, 'The Nation Ex-Situ' (n 141); Rayfuse, 'W(h)ither Tuvalu?' (n 118).
[148]Willcox, 'Climate Change Inundation, Self-Determination, and Atoll Island States' (n 115); Willcox, 'Climate Change and Atoll Island States' (n 136).
[149]Yamamoto and Miguel (n 118).
[150]Piguet, 'Climatic Statelessness' (n 118).
[151]Burkett, 'The Nation Ex-Situ' (n 141); Rosemary Rayfuse, 'International Law and Disappearing States: Utilizing Maritime Entitlements to Overcome the Statehood Dilemma' (2010) University of New South Wales Faculty of Law Research Series 52.

external intervention for their transition.[152] In this regard, Stoutenberg's critique of such proposals is worth noting:

> [I]n view of their colonial heritage, any proposals which draw on those (now largely abolished) features of the international legal system that allowed and provide for heteronomous governance, however well intentioned, are likely to be rejected by the people and representatives of threatened island [S]tates. The adequate governance models for the administration of 'deterritorialized' island [S]tates must therefore be developed by these [S]tates themselves, just as every other existing [S]tate is free to choose its own cultural, political, and economic system.[153]

The proposal also raises concerns about a negationist attitude towards the indigenous understanding of territory.

A coterminous aspect will be the transnational climate migration from the region to other States such as Fiji, New Zealand, Australia, and India.[154] The manner in which the process of national identification is shaped for migrating populations over generations possesses the capacity to threaten the existence of the population pillar in the long run. While programmes regarding 'planned relocation' are already underway in some places, it is important to recall the history of 'planned' (often forced) relocation of indigenous communities by French and British colonial forces in the Pacific and ensure that these colonial mistakes are not replicated.[155] The inconsiderate manner in which indigenous communities from the Kiribati island of Banaba were relocated to the Rabi Island in Fiji is one of the many examples.[156] In the present, Fiji is one example which features as a host location for climate change migrants with Rabi and Kioa. The Pacific State is already facing legal, constitutional, and political questions regarding the *in-situ* status of these migrants and what their future holds.[157]

The terminology of 'statelessness' associated with such migrants primarily presumes that the origin State no longer has the capacity (or intention) to represent them, which should not be the normative consequence of such migration. Further, in the long run, the migrating communities should retain the right to continue identifying as nationals of the origin State alongside as nationals and/or residents of the host State. This special consideration should be accorded in international regulation to maintain and not erode the intertwined bonds of citizenship, identities, and memories. Generational continuity of national association and respect for indigenous cultures can pave the path to achieve deterritorialized Statehood in these unique circumstances. It is to be noted here that no international regulation or national legislation of potential host States have adapted to these possibilities and such circumstances as yet.

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[152]Yamamoto and Miguel (n 118).
[153]Stoutenburg, *Disappearing Island States in International Law* (n 128) 383.
[154]Ilan Kelman and others, 'Does Climate Change Influence People's Migration Decisions in Maldives?' (2019) 153 Climatic Change 285; Jane McAdam, 'Environmental Migration' in Alexander Betts (ed), *Global Migration Governance* (Oxford Academic, 2011) 153.
[155]Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) Journal of Genocide Research 387.
[156]Jakob Schou Kupferberg, 'Migration and Dignity–Relocation and Adaptation in the Face of Climate Change Displacement in the Pacific–a Human Rights Perspective' (2021) 25(10) International Journal of Human Rights 1793.
[157]Jane Mcadam, 'Relocation Across Borders: A Prescient Warning in the Pacific' (*Brookings*, 15 March 2013) <www.brookings.edu/opinions/relocation-across-borders-a-prescient-warning-in-the-pacific/>.

C. Reconfiguring artificial islands in international affairs

Artificial islands in international affairs have a very ambiguous legacy. They have not been constructively defined in any formal treaty, lack definitional clarity, and have repeatedly been open to interpretation on the basis of contemporary geopolitical trends and international points of concern. The ILC opined similarly.[158] Its mention in international dialogue can be traced back to the colonial period, including the 1930 Hague Codification Conference under the auspices of the League of Nations. The Conference was, principally, envisioning and expanding the understanding of territorial waters and the high seas, and (artificial) islands were a factor among its considerations.[159] Participating (colonial) governments at the Conference held that for an island to have territorial waters, it must be capable of occupation and use.

Gidel commented that the Conference failed to address the definition of an 'island' substantially. He wrote that an island is a naturally elevated, permanent land formation above the sea whose natural conditions allow the permanent establishment of a human population,[160] and believed artificial islands could be an island if these conditions were met. While the Conference did not result in codification on this point, it initiated a conversation around artificial islands. During this period, the qualification for any kind of island was 'nature of the territory' and effective occupation. Political considerations associated with the length of territorial waters and contiguous zones, politico-military developments in the backdrop of WWII, and technological advancements affected this perception, as was clearly observed in the period between 1958 and 1973.

The question of islands was re-engaged with at the 1958 negotiations of the Geneva Conventions on the Law of the Sea (territorial sea and contiguous zones). In contrast to the 1930 conference, Article 10 clearly defined an island as a 'naturally' formed landmass above water at high tide, with no mention of human existence or occupation as a necessity.

In 1971, during the UNCLOS III discussions, States had continuously called for safety zones around artificial structures or installations with a limit up to 500 metres. These entities were not permitted to have any territorial sea, and were thereby clearly categorized as separate from natural islands.

Currently, not all SIDS can build or develop artificial islands capable of hosting mass human capital. However, this discussion is mainly focused on SIDS that are already pursuing artificial islands as climate adaptation strategies such as Maldives and the artificial island of Hulhumalé which is connected to Male (and is estimated to house 240,000 individuals by 2025, Maldives' total population is 531,000).[161] Adaptation strategies of each State must be given consideration to avoid the colonial trappings of western Statehood. Further, we are also not blind to politico-military connotations surrounding artificial islands in the South China Sea. Given the developments induced by great military powers such as China and the US, it is necessary to constructively define

[158]Aurescu and Oral, 'Sea-Level Rise in Relation to International Law' (n 32).
[159]League of Nations, 'Acts of the Conference for the Codification of International Law: Vol III Territorial Waters' (1930) <https://deriv.nls.uk/dcn23/1913/4073/191340737.23.pdf>.
[160]Gilbert Gidel, *Le Droit International Public de la Mer* (Cedin, 1932).
[161]Housing Development Corporation, 'Annual Report 2017' (2017).

artificial islands and also contextually categorize them (for example, military, non-military, and dual use capable). While the colonial Pacific Mandates of Japan and Britain post-WWI are indicative of the long-standing colonial legacy of the region and the lack of autonomy faced by the former colonies,[162] such engagement should not be conflated with security, economic, political, or strategic agreements SIDS may sign as sovereign States. SIDS stand to benefit from engaging in the development of such artificial islands to combat climate change and ensure human security even if it may include dual-use agreements in the future. The practical example of Hulhumalé is a testament to the potential of non-military artificial islands and can serve as a benchmark of peaceful, best practices in utilising artificial territories in the context of climate change.

V. Conclusion

'New Asgard' was founded in Tonsberg, Norway, where Norse mythology was celebrated. Arguably, while the connection between the Asgardians and the new locality is constructed, it serves as the foundation upon which the civilization can continue to exist and eventually thrive. The geomorphic changes in the Indo-Pacific are certain to challenge the traditional, Eurocentric understanding of Statehood. The international community must, therefore, revisit the colonial legacy of Statehood and reimagine the modern State. Pivotally, these reimaginations must depart from procrustean visions, which have tended to favour the more powerful in the past. Rather, they need to be contextualized to the dilemmas being faced by the SIDS and their actions in furtherance, amidst dialogue that privileges the SIDS' participation and agency.

The realities induced by climate change have visibilized the need to revisit the legacies of sovereignty, governance, and territory and also highlighted the necessity for specialised considerations in the context of geomorphic changes in international law. To illustrate, artificial islands such as Hulhumalé are already serving the role of housing national residents and providing territorial foundations for the State and human activity. Further, the government is currently delivering public goods and services such as housing and education on Hulhumalé. This is emblematic of it continually fulfilling the pillar of effective governance. In the long run, they will require benefits such as those accorded to other islands, particularly in relation to resource extraction and sovereign protection beyond the current 500-metre safety boundary. This option raises various points of consideration, some of which we have identified for further deliberation:

a. Defining and categorizing artificial island land masses in accordance with the latest technologies and techniques associated with land reclamation, dredging, and coastline fortifications;
b. Ensuring that the sovereignty of uninhabited land is protected and maintained by existing treaty obligations;
c. Eventual, temporal transition of land rights from natural islands to artificial islands after effective transfer of human capital and life-sustaining practices;

[162]ET Williams, 'Japan's Mandate in the Pacific' (1933) 27(3) The American Journal of International Law 428.

d. Artificial islands of climate change endangered SIDS to be accorded the status of contiguous zones with special regulations around military operations/ applications.

This article is aimed at contributing to the growing literature regarding the impact of climate change on the subject of international law. Principally, however, it wishes to address the epistemological gap of post-colonial realities within these commentaries, especially from a position that conceptually problematizes the presumptions on 'territory' in association with Statehood. While the discussion in this article is by no means exhaustive, it reinvigorates the conversation about the vulnerability of these States and the value of postcolonial perspectives in emphasizing the discontents of international law and politics as well as the need for reimaginations in the context of climate change.

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