Received: 4 September 2021 | Accepted: 4 January 2022

DOI: 10.1111/reel.12431

ORIGINAL ARTICLE

RECIEL Review of European, Comparative & International Environmental Law WILEY

Ceci n'est pas un État: The Order of Malta and the Holy See as precedents for deterritorialized statehood?

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Abstract

Sinking island States have become allegories of the Anthropocene and a symbol of the radical violence of climate change. Various theories have been advanced supporting the continued existence of sunken islands as deterritorialized States. A common view among advocates of the deterritorialized statehood thesis is that, while at odds with the dominant concept of States as territorial entities, it is supported by precedent. In this article, we engage critically with this strand of argument and argue that the appeal to precedent raises important paradoxes for the continuation thesis. We seek to make clear that a landless State in the full sense of the term is a proposition for which there is, in actual fact, no precedent in international law and that some of the precedents that are cited in support of deterritorialised statehood—such as the Order of Malta and the Holy See—are precedents of non-State sovereign entities. Pursuing deterritorialized existence on the basis of those precedents would therefore involve a downgrade from State to non-State status, an outcome we show to be normatively undesirable.

1 | INTRODUCTION

The physical disappearance of States has long been considered a radical impossibility, a thing of science fiction or mythology like the legendary Greek kingdom of Atlantis. It has always been accepted, of course, that States can die.[1] But State death has historically been understood to occur in instances of annexation, disintegration or merger, that is, processes where new States replace old ones with more or less predictable legal outcomes.[2] As political entities, States may come and go.[3] But their geophysical existence is generally assumed to be more or less permanent. As Scelle once observed, 'the disappearance of a state, from a material point of view, is an inconceivable thing'.[4]

As with so much else, however, climate change changes everything. What once seemed a far-fetched and purely hypothetical proposition has become a dangerous prospect for many around the world. The Intergovernmental Panel on Climate Change (IPCC) estimates that oceans will rise between 0.28 and 1.02 m by the end of this century.[5] Other experts are warning that, without deep cuts in carbon emissions, sea levels may rise by as much as 2.3 m by 2100 under worst-case scenarios.[6] While the effects of the rising tide will be felt all over the world, for some they will be nothing short of apocalyptic. Human communities living in low-lying coastal zones (currently around 700 million people) will see their livelihoods destroyed and experience

[1] In this article, we speak interchangeably of the 'death', 'extinction' and 'termination' of States by which we mean their ceasing to exist from a legal perspective.

[2] T Fazal, *State Death: The Politics and Geography of Conquest, Occupation and Annexation* (Princeton University Press 2007); J Ker-Lindsay, 'Climate Change and State Death' (2016) 58 Survival 73, 75–76.

[3] Instances of extinction are extremely rare in the contemporary era. Indeed, while many states have come into existence, only a very small number have ceased to exist since 1945. See J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 700.

[4] G Scelle, *Précis de Droit des Gens: Principes et Systématique* (Sirey 1932) 110.

[5] IPCC, *Climate Change 2021: The Physical Science Basis* (2021) 2159.

[6] J Bamber et al, 'Ice Sheet Contributions to Future Sea Level Rise from Structured Expert Judgment' (2019) 116 Proceedings of the National Academy of Sciences of the United States of America 11195, 11199.

more intense and frequent extreme weather events. For a small group of low-lying island States, which have an average elevation of just 2 m above sea level, the threat is quite literally existential. Habitats will be drowned, arable land and freshwater sources will be destroyed and human habitation as we know it will likely be impossible. As the sea rises, these island States are at risk of becoming wholly uninhabitable and, eventually, submerged. For them, physical disappearance is not an inconceivable thing. Without radical action to keep global heating below 1.5°C and major adaptation efforts, it is a near certainty.[7]

Sinking island States have become allegories of the Anthropocene, a symbol of the violence and injustice of our international economic order and a harbinger of things to come.[8] The situation they face also raises a host of critical and hitherto unknown legal questions concerning the implications, under international law, of states being swallowed up by the rising tide. Scholars and bodies such as the International Law Association (ILA) and International Law Commission (ILC) have turned their attention to these questions.[9] Most discussions to date have focused on what may be termed the 'retreat' question. What happens to a State's baselines and maritime boundaries as its coastline recedes?[10] And what protection do persons affected by sea level rise enjoy under international law when they are forced to retreat and seek refuge in other countries?[11] Yet, as the prospect of entire countries being wholly submerged or depopulated becomes more likely, attention is also turning to what may be termed the 'fate' question. In an Atlantis-style scenario, what becomes of a sovereign state when its territory disappears? Will it live or die? And if it lives, what will be its legal status?[12]

In this article, we engage critically with a specific strand of argument developed in response to the 'fate' question that we believe to be in need of clarification and greater nuance. The common view in international law is that the loss by a State of any one of its defining elements will normally entail extinction. In view of the inequitable outcomes produced by this approach with regard to disappearing island States, however, some scholars have developed alternative theories claiming that State death may be avoided through a range of possible processes, from the building of artificial islands to territorial transactions.[13] A more radical proposition—and the focus of this article—is that States may continue to enjoy sovereign status without territory, retaining the rights and benefits of sovereignty on a lasting basis, even as their land is rendered uninhabitable and their citizens are forced to establish residence in other States.[14]

A central defence of the deterritorialized State thesis is that, while radically at odds with the general conception of the State as a territorially bound polity, it is not without precedent. Advocates have pointed to at least two precedents as evidence that deterritorialized statehood is not alien to international law—the Order of Malta and the Holy See. In what follows, we unpack this claim and show its limitations and potential hazards. After a brief introduction to the deterritorialized State thesis (Section 2), we argue that, if the Order of Malta and the Holy See are, to an extent, valuable precedents, they are not in actual fact precedents of deterritorialized States but of non-State sovereign entities (Section 3). As will be seen, the distinction is not merely semantic but carries with it significant legal implications (Section 4), which, we argue, should not be ignored in future conversations about the 'fate' question. Our overall argument is therefore that, while full deterritorialized statehood is the manifestly superior normative outcome, it is also one that is unlikely to be achieved on the basis of existing precedent and it therefore calls for legal reform

[7]S Rahmstorf, 'Global Warming and Climate Change: Modelling Sea Level Rise' (2012) Nature Education Knowledge 3, 4 ('If sea level rise proceeds beyond one metre, coastal protection efforts will in many places not suffice and it is likely that some low-lying island states will have to be abandoned').

[8]In this article, we speak of 'sinking/sunken island States' and 'disappearing/disappeared island States' interchangeably, although we are mindful that each carries problematic connotations. The term 'sinking/sunken' is helpful in that it denotes the severity of the threat, but is technically inaccurate (low-lying island States are not descending from a higher to a lower position). The term 'disappearing/disappeared' is more accurate, but could denote legal as well as physical disappearance when a central premise of this article is that one does not necessarily follow the other. We should also be clear that use of this terminology is not intended to exacerbate a sense of disempowerment already present in low-lying island States from climate change itself. For further discussion of terminological issues, see A Costi and N Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate Changed Future' in P Butler and C Morris (eds), *Small States in a Legal World* (Springer 2017) 101, 102–104.

[9]The ILA established the Committee on International Law and Sea Level Rise in 2012. The study undertaken by the Committee in Phase One and its proposals are contained in its 2018 Report as well as in two Resolutions. See ILA, 'Report of the Seventy-Eighth Conference, Sydney (19–24 August 2018)' (ILA 2018). Published also separately in an edited version as D Vidas, D Freestone and J McAdam (eds), *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill 2019). The outcome of the study undertaken by the Committee in Phase Two will be contained in its 2022 Report. In 2019, the ILC likewise decided to include the topic of 'Sea Level Rise in Relation to International Law' in its programme of work. For information concerning the progress and future work of the ILC on this topic, see ILC, 'Report of the Seventy-Second Session (26 April-4 June and 5 July-6 August 2021), Official Records of the General Assembly, Seventy-Sixth Session, Supplement No 10' UN Doc A/76/10 (2021) Chapter IX.

[10]For early discussion of these issues, see D Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17 Ecology Law Quarterly 621; D Freestone, 'International Law and Sea Level Rise' in R Churchill and D Freestone (eds), *International Law and Global Climate Change* (Graham and Trotman 1991) 109; S Menefee, 'Half Seas Over: The Impact of Sea Level Rise on International Law and Policy' (1991) 9 UCLA Journal of Environmental Law and Policy 175; A Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37 Netherlands International Law Review 207. More recently, see C Armstrong and J Corbett, 'Climate Change, Sea Level Rise and Maritime Baselines: Responding to the Plight of Low-Lying Atoll States' (2021) 21 Global Environmental Politics 89; E Johansen, S Busch and I Jakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2020).

[11]See, for example, J McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012). More recently, see I Borges, *Environmental Change, Forced Displacement and International Law* (Routledge 2019); G Sciaccaluga, *International Law and the Protection of 'Climate Refugees'* (Palgrave Macmillan 2020); M Scott, *Climate Change, Disasters and the Refugee Convention* (Cambridge University Press 2020).

[12]See H Alexander and J Simon, 'Sinking into Statelessness' (2014) 19 Tilburg Law Review 20; M Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialised Nationhood and the Post-Climate Era' (2011) 2 Climate Law 345; M Gerrard and G Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013); J Grote Stoutenburg, *Disappearing Island States in International Law* (Brill 2015); A Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change Induced Loss of Territory' (2014) 50 Stanford Journal of International Law 1; J McAdam, 'Disappearing States, Statelessness and the Boundaries of International Law' (University of New South Wales 2010); R Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (University of New South Wales 2009); A Torres Camprubí, *Statehood under Water: Challenges of Sea Level Rise to the Continuity of Pacific Island States* (Brill 2016); D Wong, 'Sovereignty Sunk? The Position of Sinking States at International Law' (2013) 14 Melbourne Journal of International Law 346; L Yamamoto and M Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer 2014).

[13]E Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' (2018) Brill Open Law 1; M Gagain, 'Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims through the Constitution of the Oceans' (2012) 23 Colorado Journal of International Environmental Law and Policy 77.

[14]Burkett (n 12); J Ödalen, 'Underwater Self-Determination: Sea Level Rise and Deterritorialised Small Island States' (2014) 17 Ethics, Policy and Environment 225; Rayfuse (n 12); E Woodward, 'Promoting the Continued Sovereign Status of Deterritorialised Island Nations' (2019) 14 Yale Journal of International Affairs 49.

or at the very least creative interpretation of existing legal categories. We conclude with some general thoughts on what is a stake, behind this seemingly narrow doctrinal debate, for the inhabitants of disappearing island States.

2 | STATE DEATH, SOVEREIGN ZOMBIES AND DETERRITORIALIZED EXISTENCE

The dominant concept of statehood requires that a territory of some form must be held in order for a State to exist. Sovereign possession and control of a given territory is a defining part of what it means to be a State under international law and what makes States different from other international legal persons. A State's territory does not have to be permanently fixed. It may be small, fragmented, disputed, surrounded by huge expanses of water or enclaved. But the general assumption is that the nexus between territory and sovereignty is absolute and that there can be no State without territory.[15] There must be some portion of land a State can call home, a foothold on Earth that belongs to no one else which its population inhabits, and over which it exercises supreme authority. Paradigmatically, States are thus rooted in territory. Territory is vitally important in defining a State's domain of legitimate jurisdictional power, as well as providing the material basis for its continued reproduction and development. A territory-less entity—even one that otherwise meets the relevant legal requirements—is thus not generally thought to be capable of statehood.[16]

The requirement of territory has been consistently affirmed by legal scholars since at least the 19th century. It was notoriously codified in the 1933 Montevideo Convention on the Rights and Duties of States, which refers to States as more or less stable human communities possessing an effective governmental administration and located within a discrete territory.[17] The 'territory-people-government' concept of the State was likewise formulated in the *Deutsche Continental Gas-Gesellschaft* arbitration, where the tribunal found that a State 'does not exist unless it fulfils the conditions of possessing a territory, a people inhabiting that territory and a public power that is exercised over the people and the territory'.[18] Although the concept of the State continues to generate great academic controversy—including on the role and legal status of the so-called Montevideo criteria[19]—the scholarly consensus remains that it is of the essence of a State that it exercises sovereignty over a given territory.

Given the necessity of habitable territory to create State sovereignty, territorial loss poses an existential problem to sinking island States. What should happen to a State whose territory becomes uninhabitable or vanishes beneath the rising tide? International law has developed techniques and doctrines to deal with a range of scenarios involving territorial loss, from conquest to cession or decolonization. But these are scenarios involving political loss, not physical destruction, of territory and they are managed through the mechanism of succession, where the territory of one State is taken over by another.[20] The possibility that a State's territorial base might cease to exist altogether, on the other hand, is one that international law has not historically grappled with and for which there are therefore no readily available legal standards or determinate outcomes. A range of scenarios have thus been envisaged by legal scholars, from extinction to continuation in various forms. As will become apparent, these scenarios are not necessarily exclusive and proposals often cut across or combine them (not always helpfully, as we shall see). However, and for the purpose of our argument, the three dominant approaches are briefly summarized here.

The first scenario, which in most cases represents the default position in the literature, is State death. According to this line of argument, while a State may survive nondestructive fluctuations in its population, territory or government—perhaps even the temporary loss of one of these requisites—no State lacking territory altogether can exist in perpetuity.[21] An island State that is submerged, under this view, is not a State any longer. As the rising sea overwhelms the land, rendering it uninhabitable or submerging it altogether, the criterion of territory is annihilated and a foundational requisite of the State is lost. As its material basis disappears, the State can no longer be reasonably considered to persist and its physical disappearance must necessarily be followed by its legal extinction.[22] That stage may be postponed by building seawalls and other structures to keep the ocean at bay or retain some area of land above water. But in the event that all of a State's territory becomes permanently inundated and no alternative territory is obtained, the prevailing view is that continued existence is impossible and state death cannot be avoided. Climate change will eventually render disappeared States both factually and legally extinct.[23]

The State death thesis leads to outcomes that are fundamentally at odds with basic notions of equity and natural justice. Under this scenario, the end result is one where those least responsible for causing the climate crisis are made to pay the ultimate price—juridical death—while those overwhelmingly responsible for the problem continue to exist and may even profit from the disappearance of sunken States (for instance, by gaining access to new maritime resources). In

[15]A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 82–83; J Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 128–129; V Lowe, *International Law* (Oxford University Press 2007) 138.

[16]J Klabbers, *International Law* (Cambridge University Press 2013) 70 ('The idea of a cyberstate then, a state without territory, is difficult to conceive of under the requirements of international law').

[17]Montevideo Convention (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1.

[18]*Deutsche Continental Gas-Gesellschaft v Polish State* (Germano-Polish Mixed Arbitral Tribunal) (1929) 5 ILR 11, 14–15.

[19]See, for example, T Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 Columbia Journal of Transnational Law 403.

[20]Crawford (n 3) 702–717; Fazal (n 2).

[21]S Lee and L Bautista, 'Climate Change and Sea Level Rise: Nature of the State and of State Extinction' in R Barnes and R Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges – Essays in Honour of David Freestone* (Brill 2021) 194, 205–206; K Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Droz 1968) 7; L Oppenheim, *International Law: A Treatise* (Longmans 1905) 122.

[22]See Alexander and Simon (n 12) 25; Ker-Lindsay (n 2) 77–78; Lee and Bautista (n 21) 209; Wong (n 12) 365.

[23]Extinction is often referred to by States—including island States—as the likely outcome of deterritorialization. See the statements quoted in Wong (n 12) 367–368.

this 'perfect moral storm', the extinction thesis thus produces a radical disjuncture between responsibility for climate change and its impacts, leading to the manifestly unjust situation where perpetrators face a lesser evil than victims.[24]

For this reason, a range of alternative scenarios have been envisaged where the outcome of deterritorialization is something other than extinction. Under one such scenario—which we will call the 'zombie State' thesis—statehood would be maintained artificially through continued recognition by other States.[25] In essence, the international community would continue to act *as if* disappeared States were still effectively in existence, even as their population and government relocate elsewhere, bestowing international legal personality on them despite having factually ceased to exist as effective territorial polities. Like zombies, disappeared States would survive in limbo, revived through the magical act of recognition, decaying yet undead, exercising all the international rights and competences of States that do not require a territorial basis.[26] Despite its appealing simplicity—the thesis does not require formal changes to the law of statehood and merely entails maintenance of the status quo through collective nonrecognition of sunken States' de facto disappearance—the downsides of this approach are immediately apparent. If statehood is maintained through the subjective will of third States, it will remain highly precarious. Some may continue to recognize disappeared States, but others may not. And disputes are bound to occur between States with conflicting interests.[27] Some scholars have attempted to overcome this problem by claiming that a duty of continued recognition may exist under international law, citing the *ex injuria jus non oritur* principle or the obligation of nonrecognition of situations created by *jus cogens* violations.[28] However, views differ regarding the content of the nonrecognition principle and the law on this question is notoriously underdeveloped.[29]

The deterritorialized State thesis represents a more radical proposal, intended to remedy the shortcomings of the aforementioned continuation-through-recognition approach. Under this last scenario, a fundamental shift should take place in the law of statehood to accommodate the emergence of a new category of landless States.[30] The idea here is that territory may not be necessary for statehood once firmly established. As typically envisaged, deterritorialised States would consist of a government elected by the State's population, which would sit inside the territory of a third State, managing the affairs of the State at a distance. In essence, this ex-situ government would act as a trustee looking after the disappeared State's assets (e.g. maritime zones to the extent that they have been successfully retained) and would manage them for the benefit of its diasporic population. The government would continue to exercise other aspects of its internal sovereignty remotely and would engage in international relations as it did before. It would also act as a vital political and cultural nucleus for its citizens scattered across the globe, representing their interests vis-à-vis their new home States and working to maintain their cultural, linguistic and nationality rights.[31]

Various models of 'removed governance' have been proposed for deterritorialized States, some involving governments in exile and others some form of international administration.[32] The essential aspect of these proposals is that, unlike the zombie State thesis, they aim to ensure the continuation of disappeared States on a lasting and objective basis, grounded in international law itself.[33] Critically, these proposals also require key legal categories to be reappraised and repurposed to meet the challenges of State disappearance in a heating world.[34] While formal recognition by other States does not typically form a central component of these proposals, acceptance by the international community of these legal shifts will necessarily form an essential part of their success.

Some of the proposals are not without ambiguities. Those advocating for a creative interpretation of the law, for instance, so that existing categories may accommodate deterritorialized existence, are not always fully consistent when it comes to the legal status of these deterritorialized subjects. It is not always clear, in particular, whether what is being advocated are new and creative ways for States to exist or the creation of a new category of legally proximate non-State entities. If the latter, it is also unclear whether those legally proximate subjects may retain all of the rights and privileges of states or would necessarily lose some of them. We find some of these ambiguities expressed, in particular, when scholars turn to history and precedents to justify the plausibility of deterritorialized statehood. It is to some of these ambiguities that we now turn.

[24]S Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (Oxford University Press 2011). See also H Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014).

[25]We use the zombie signifier metaphorically here because of its symbolic potential and usefulness as a figure that is inherently dual (neither fully living nor entirely dead, agent and object, master and subject) and that—in Afro-Caribbean folklore—denotes a creature reanimated by means of sorcery and magic. As others have noted, the figure of the zombie—in its more contemporary register—also offers a powerful allegory of the violently apocalyptic condition of mankind under late capitalism. On the theoretical potential of zombies, see S Lauro (ed), *Zombie Theory: A Reader* (University of Minnesota Press 2017).

[26]See, most notably, Grote Stoutenburg (n 12) 375.

[27]ibid.

[28]ibid, 315–374; E Allen, 'Climate Change and Disappearing Island States: Deterritorialisation, Sovereignty and Statehood in International Law' (PhD Thesis, Keele University 2020); G Wannier and M Gerrard, 'Disappearing States: Harnessing International Law to Preserve Cultures and Society' in O Ruppel, C Roschmann and K Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Nomos 2013) 615, 627–630.

[29]See generally A Pert, 'The Duty of Non-Recognition in Contemporary International Law: Issues and Uncertainties' (2012) 30 Chinese Yearbook of International Law and Affairs 48; S Talmon, 'The Duty Not to Recognise as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill 2005).

[30]See Rayfuse (n 12) 9. Burkett suggests a new concept of international law which she terms the 'nation ex-situ'. See Burkett (n 12) 346.

[31]Rayfuse (n 12) 11.

[32]ibid 10–11; Burkett (n 12) 356; B Juvelier, 'When the Levee Breaks: Climate Change, Rising Seas and the Loss of Island Nation Statehood' (2017) 46 Denver Journal of International Law and Policy 21, 31–32.

[33]There is some difference of opinion regarding how long this status should last. Rayfuse, for instance, views deterritorialized statehood as transitional, lasting one generation or one human lifetime, that is, 30 to 100 years. It is there to give certainty and security to the disappearing island community until their displaced populations have successfully resettled. See Rayfuse (n 12) 13. By contrast, for Burkett, a key element of deterritorialised existence is that it lasts in perpetuity, subject to a decision by members to dissolve at any time. See Burkett (n 12) 366.

[34]See generally T Sparks, 'Statehood in an Era of Sinking Islands' in T Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2018) 83.

3 | DETERRITORIALIZED STATEHOOD AND THE APPEAL TO PRECEDENT

Advocates of the continuation thesis, that is, the view that loss of territory does not have to entail State extinction, typically draw on a range of arguments. Two sets of arguments, in particular, are often used in combination with one another to support the contention that disappeared States may continue to exist in deterritorialized form.

A first set of arguments is aimed at the extinction thesis and seeks to demonstrate that it is theoretically and normatively flawed. A number of scholars have for instance argued that the extinction thesis is misguided and based on an incorrect reading of the Montevideo Convention, a treaty that is relevant to State creation but provides no mechanism for determining the continuity—let alone the termination—of already existing States.[35] State creation and the continuity of existing States must, under this view, be treated as entirely separate legal questions and, while applicable to the former, the Montevideo criteria provide no legal basis for the assumption of State disappearance.[36] In the absence of clear standards governing the involuntary extinction question, we should favour outcomes that are consistent with public international law's strong preference for legal continuity and do not undermine fundamental, overriding principles such as self-determination, human rights or the *ex injuria jus non oritur* principle.[37]

A second set of arguments is aimed at demonstrating not the implausibility of extinction as a legally mandated outcome, but the plausibility of deterritorialized statehood itself. Scholars have for instance pointed out that the history of international law is replete with examples of States continuing to exist and to enjoy recognition despite substantial changes to their territory, population or government, from occupied States such as Poland during the Second World War to so-called 'failed' States such as Somalia during most of the 1990s.[38] Critically, they argue, some of these examples involved the maintenance of legal personality through governments in exile, a proof that nothing in international law prevents ex-situ continuity of sovereignty.[39]

Other scholars, however, go further and claim that international legal history provides precedent not just for temporary ex-situ sovereignty but for potentially indefinite deterritorialized statehood. Two precedents in particular are cited as providing a promising path for disappearing states—the Order of Malta and the Holy See. Jain, for instance, has referred to the two precedents as evidence of 'entities that do not meet the objective requirements of statehood but are in fact recognised as such by the international community'.[40] Likewise, Rayfuse has suggested that 'the most famous example of a deterritorialised state is the Order of Malta' and that 'the Holy See was recognised as a state despite possessing no territory between 1870 … and 1929'.[41] Burkett, along similar lines, has argued that 'the deterritorialised state is neither new nor inconceivable under current international law', citing the Order of Malta and the Holy See as precedents of 'alternative forms of the state' that participate in international relations 'on a par with landholding states'.[42]

It is our contention here that these two precedents—while certainly providing a degree of support for the continuation thesis—cannot be said to support deterritorialized statehood. This is for the simple reason that they are not, in actual fact, States. Before explaining why this matters, it is helpful to briefly recount the nature of the Order of Malta and the Holy See and outline their status under international law.

The Order of Malta (officially the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta) is a lay religious Catholic order with around 13,000 members worldwide. Its origins date back to 1048 when Italian merchants obtained authorization from the Caliph of Egypt to establish a monastic order in Jerusalem to run a hospice and tend to Christian pilgrims in the Holy Land.[43] Gaining official papal recognition in 1113, it was initially exclusively dedicated to its humanitarian mission but was later also tasked with military functions, including the defence of Christians in the Middle East. After the loss of the Holy Land in 1291, the Order went into exile and resettled in Rhodes 20 years later. By that time, the universally recognized right of the Order to maintain and deploy armed forces and to appoint ambassadors constituted key grounds for its international sovereignty.

In 1523, after months of siege and fierce combat, the Order was ousted from Rhodes by the Ottoman Empire and remained without a territory until 1530 when it took possession of Malta. It ruled the island until it was dislodged by Napoleon's army in 1798 and has remained landless ever since, with the exception of two buildings in Rome in which it enjoys extraterritorial legal privileges. Following the loss of sovereign territory, the Order's humanitarian mission has again become its main focus. However, it maintains formal diplomatic relations with over 100 States, enters into

[35] A Costi, 'Climate Change and the Legal Status of a Disappearing State in International Law' (2014) 12 International Law Readings 140, 156–158; Costi and Ross (n 8) 118–119.

[36] See O Sharon, 'Tides of Climate Change: Protecting the Natural Wealth Rights of Disappearing States' (2019) 69 Harvard International Law Journal 95, 98. See also Y Rim, 'State Continuity in the Absence of Government: The Underlying Rationale in International Law' (2021) European Journal of International Law 1 (drawing a distinction between 'constitutive' and 'continuative' requirements of statehood).

[37] Burkett (n 12) 362–363; Grote Stoutenburg (n 12) 374; N Ross, 'Low-Lying States, Climate Change Induced Relocation and the Collective Right to Self-Determination' (PhD Thesis, Victoria University of Wellington 2019).

[38] Burkett (n 12) 356–357; E Crawford and R Rayfuse, 'Climate Change and Statehood' in R Rayfuse and S Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar 2012) 250; Rayfuse (n 12) 10; Yamamoto and Esteban (n 12) 202–203.

[39] Burkett (n 12) 356–357; Costi and Ross (n 8) 113; Grote Stoutenburg (n 12) 377; J Kittel, 'The Global Disappearing Act: How Island States Can Maintain Statehood in the Face of Disappearing Territory' (2014) Michigan State Law Review 1207, 1235; Rayfuse (n 12) 10.

[40] Jain (n 12) 44.

[41] Rayfuse (n 12) 10.

[42] Burkett (n 12) 356–357. See also C Douglas, 'Sea Level Rise, Deterritorialised States and Migration: The Need for a New Framework' (Centre for Climate and Security 2017) 4 ('There are more concrete precedents for the "deterritorialised state", however. The Order of Malta is a much more convincing case for a functioning state without territory'); A Nukusheva et al, 'Global Warming Problem Faced by the International Community: International Legal Aspects' (2021) 21 International Environmental Agreements: Politics, Law and Economics 219, 230 ('The concept of a "deterritorial state" is not new and is not rejected by current international law. An example is the Holy See … as well as the Order of Malta').

[43] On the history of the Order, see generally H Nicholson, *The Knights Hospitaller* (Boydell Press 2001); W Porter, *A History of the Knights of Malta or The Order of the Hospital of St. John of Jerusalem* (Cambridge University Press 2013).

international treaties, issues its own passports and is granted the status of permanent observer in many international organizations, including the United Nations (UN).[44]

The Holy See is the name given to the ecclesiastic jurisdiction and government of the Roman Catholic Church, administered by the Roman Curia.[45] It was historically associated with the Papal States, territories of central Italy over which the Pope held sovereignty from the 8th century to 1870, when they were annexed in the unification of the Italian peninsula.[46] In spite of the annexation, the territory-less Holy See continued to pursue its international political influence and religious activity, enjoying diplomatic relations with foreign nations, playing an active role in international diplomacy, concluding international agreements and acting as arbitrator to international disputes.[47]

This situation lasted until the Lateran Pacts of 1929 between Benito Mussolini and the papacy, which normalized the relationship between the Italian State and the Holy See. In exchange for formal recognition of the unified State of Italy, with Rome as its capital, Italy recognized the full and independent sovereignty of the Holy See over the territory of the Vatican City, also admitting its right to issue coinage, passports and stamps, send and receive diplomatic representatives and govern as citizens those residing within its borders.[48] The relation between the Vatican City and the Holy See would appear to be that of State and government but with the peculiarity that the government in question, the Holy See, 'has an additional non-territorial status which is much more significant in practice than its status as government of the Vatican City state'.[49] The Holy See exists not just as the temporal government of a populated territory (the Vatican City), but also as the non-territorial authority and administrative organ of the Catholic Church.[50]

As noted above, these two precedents have been taken as evidence that statehood can subsist in spite of temporary (Holy See) or permanent (Order of Malta) loss of territory and that the notion of deterritorialized statehood is, as a matter of fact, already accepted in international law. In our view, however, this interpretation inaccurately characterizes the legal nature and identity of both entities. While the Order of Malta and the Holy See undoubtedly possess international legal personality and are in many respects State-like, they are best described as *sui generis* non-State sovereign entities.[51]

The Holy See survived as an international legal person after the Papal States ceased to exist and, particularly since the conclusion of the Lateran Pacts, it has achieved a status approaching or resembling statehood, practising many of the acts normally associated with that personality, enjoying immunity and inviolability and gaining permanent observer status at the UN.[52] Yet that State-like nature owes much to the fact that, since 1929, the Holy See has possessed a firm, if exiguous, territorial basis in the Vatican City. For the period preceding 1929, when it was positively landless, the general view remains that the Holy See must be regarded as something other than a State.[53] This was confirmed, among other things, by Italian Courts, which ruled that the Holy See could not qualify as a State prior to 1929 due to the absence of territory.[54] Even for the period when it exercised sovereignty over the territory of the Papal States, it is accepted that there were in fact two legally distinct but institutionally intertwined entities—a set of territorial States (the Pontifical States) and a non-State (the Holy See) with a personality of its own independent of its status as the government of these States.[55] The Holy See has thus always been an atypical legal person in its own right. Both with and without territory, then, the Holy See is best described as a *sui generis* entity with a personality that is not akin to that of a State. To this day, that is indeed the view of the Holy See itself, which acknowledges its peculiar status as a sovereign subject of international law the nature of which is different from that of a territorial State.[56]

The Order of Malta occupies a similar position. Whatever statehood the Order may have possessed when it exercised full secular power over physical territories (something that is itself

[44]For more information, see generally C d'Olivier Farran, 'The Sovereign Order of Malta in International Law' (1954) 3 International and Comparative Law Quarterly 217.

[45]R Araujo, 'The Holy See: International Person and Sovereign' (2011) 1 Ave Maria Law Journal 1, 2.

[46]On the history of the Holy See in international affairs, see generally H Cardinale, *The Holy See and the International Order* (Colin Smythe 1976); R Graham, *Vatican Diplomacy: A Study of Church and State on the International Plane* (Princeton University Press 1959); E Hanson, *The Catholic Church in World Politics* (Princeton University Press 1987).

[47]On the Holy See's diplomatic relations, see generally R Araujo and J Lucal, *Papal Diplomacy and the Quest for Peace: The United Nations from Pius XII to Paul VI* (St. Joseph University Press 2010); J Coriden, 'Diplomatic Recognition of the Holy See' (1988) 48 The Jurist 483; K Martens, 'The Position of the Holy See and Vatican City State in International Relations' (2006) 83 University of Detroit Mercy Law Review 729.

[48]See A Géraud, 'The Lateran Treaties: A Step in Vatican Policy' (1929) 7 Foreign Affairs 571.

[49]Crawford (n 3) 230.

[50]See generally M Barbato, 'A State, a Diplomat and a Transnational Church: The Multi-Layered Actorness of the Holy See' (2013) 21 Perspectives: Review of International Affairs 27. See also M Batton, 'The Atypical International Status of the Holy See' (2001) 34 Vanderbilt Journal of Transnational Law 597, 599–600.

[51]For a similar view, see Costi and Ross (n 8) 123–125; V Engström and M Rouleau-Dick, 'The State is Dead: Long Live the State! Statehood in an Age of Catastrophe' (Völkerrechtsblog, 1 May 2020); Juvelier (n 32) 30–31; A Maas and A Carius, 'Territorial Integrity and Sovereignty: Climate Change and Security in the Pacific and Beyond' in J Scheffran et al (eds), *Climate Change, Human Security and Violent Conflict* (Springer 2012) 659; Torres Camprubí (n 12) 110–112; Yamamoto and Esteban (n 12) 203–206.

[52]See I Cismas, *Religious Actors and International Law* (Oxford University Press 2014) 155 (speaking of the Holy See as an entity with 'the resemblance of statehood').

[53]See G Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de Droit International 354, 361; I Brownlie, *Principles of International Law* (7th edn, Oxford University Press 2008) 64; J Kunz, 'The Status of the Holy See in International Law' (1952) 46 American Journal of International Law 308, 313; J Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26 European Journal of International Law 927, 945–946; C Ryngaert, 'The Legal Status of the Holy See' (2011) 3 Goettingen Journal of International Law 829, 830. *Contra* see M Black, 'The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation against the Holy See for Its Role in the Global Priest Sexual Abuse Scandal' (2009) 27 Wisconsin International Law Journal 299, 299 (speaking of the Holy See as the 'world's smallest nation state').

[54]*Thome Guadalupe v Associazione di S Cecilia* (1937) 8 ILR 151.

[55]Crawford (n 3) 225–226.

[56]See, for example, Committee on the Rights of the Child 'List of Issues in Relation to the Second Periodic Report of the Holy See: Replies of the Holy See to the List of Issues' UN Doc CRC/C/VAT/Q/2/Add.1 (9 January 2014) para 6 ('The Holy See is a sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction').

contested),[57] the consensus of scholars is that statehood was lost in 1798 when its territory was seized by France.[58] After the State collapsed at the hands of the Napoleonic army, the Order sought to acquire new territories in the Baltic and Aegean seas. These attempts, however, were unsuccessful and the Order has remained landless ever since. To this day, the Order has a permanent humanitarian presence in most countries in the world. It maintains diplomatic ties with many (though by no means all) members of the international community and exercises some of the prerogatives usually reserved for states. Yet State and judicial practice confirm that, to the extent that it is recognized as a subject of international law, the Order of Malta is viewed as a subject possessing special and limited legal personality, with some attributes of sovereignty but no statehood proper. Asked to ascertain the legal status of the Order, a special Papal Tribunal ruled in 1953 that 'the status of the Sovereign Order … comprises the enjoyment of a number of rights which the Order possesses as a subject of international law. … They do not, however, constitute for the Order a complex of rights and privileges which are reserved to entities which are sovereign in the full sense of the term'.[59] As with the Holy See, the Order of Malta itself also does not claim to be a State. Instead, its Constitutional Charter defines the Order as a 'legal entity' which is a 'subject of international law and exercises sovereign functions'.[60]

The key point to note then is that, even if the Order of Malta and the Holy See are, to an extent, valuable precedents for the disappearing island community, they are not in actual fact precedents of deterritorialized States but rather of legally proximate non-State sovereign entities. The two precedents may be drawn upon to prove that there is room in international life for some form of deterritorialized sovereign existence. But these precedents are, at best, examples of *sui generis* entities inhabiting the grey zone between statehood proper and non-State personhood. The idea of deterritorialized statehood in the full sense is theoretically conceivable. But it remains the case that a State without territory is a proposition for which there is, in actual fact, no genuine historical precedent.[61]

Some among those who advocate for State continuation have acknowledged this point and concede that the Order of Malta and the Holy See do not offer a path to statehood proper but, rather, would entail a transition to non-State sovereign entity status.[62] Our claim, however, is that this needs to be more universally recognized and that the implications of this transition also need to be more fully appreciated—something that, in our view, is currently lacking.[63] As the following will seek to make clear, the distinction between States and legally proximate entities is not merely semantic. It matters greatly, not just symbolically but normatively too.

4 | TRANSITIONING TO LEGALLY PROXIMATE NON-STATE STATUS: NORMATIVE IMPLICATIONS

Some scholars have taken the view that transitioning disappearing island States from full statehood to a legally proximate non-State status should not be dismissed as a path for avoiding extinction and may even constitute a desirable option for a range of reasons. Rather than trying to shoehorn sunken States into a model of statehood that is closely tied to territoriality, there may be benefit in pursuing deterritorialized existence under legal categories more tailored to their specific circumstances.[64] The threshold may be an easier one for disappearing States to reach than full-fledged statehood and one for which the Order of Malta and the Holy See may actually offer plausible precedents.[65] It has also been suggested that pursuing non-State existence may be more palatable to the international community since 'accepting that a state can exist without territory might have implications going far beyond the case of disappearing states',[66] for instance by opening the door to concomitant demands by other groups for statehood. It has been suggested, to finish, that a transition to non-State sovereign status may not prevent disappeared States from retaining their sovereign rights and privileges and pursuing their essential role in representing and protecting their displaced population. Burkett, for instance, has claimed that, to the extent that disappeared island communities become 'an entirely new category of actors', they will nevertheless 'continue to be afforded all of the rights and benefits of sovereignty among the family of states'.[67]

It is this latter claim that, we argue, requires critical examination. The international legal system, as others have shown, remains intrinsically and fundamentally State-centric. The proliferation of non-State actors in the last century has hardly made a dent in the *normative*

[57] As noted by Breycha-Vauthier and Potulicki, for example, the contention that the Order of Malta has ever been a State is the result of 'a somewhat regrettable confusion of its permanent position as a non-territorial religious entity and its role as a territorial power'. The character of the Order of Malta did not originate simultaneously with its territorial sovereignty and therefore was not altered with the gain of its territorial possessions. See A Breycha-Vauthier and M Potulicki, 'The Order of St. John in International Law: A Forerunner of the Red Cross' (1954) 48 American Journal of International Law 554, 555–557. See also F Gazzoni, 'Order of Malta' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) paras 5, 12 (claiming that the Order of Malta retained its supranational character even during the period when it ruled over territory).

[58] See N Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, Rhodes and Malta' (2006) 13 Australian International Law Journal 211, 212; Crawford (n 3) 230; d'Olivier Farran (n 44) 227; K Karski, 'The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and Malta' (2012) 14 International Community Law Review 19, 19; J Kovacs, 'The Country above the Hermes Boutique: The International Status of the Sovereign Military Order of Malta' (2003) 11 National Italian American Bar Association Law Journal 27, 42; M Shaw, *International Law* (7th edn, Cambridge University Press 2014) 178.

[59] Cited in Crawford (n 3) 232.

[60] Constitutional Charter and Code of the Sovereign Military Hospitaller Order of St. John of Jerusalem, of Rhodes and of Malta (promulgated 27 June 1961) arts 3–4.

[61] For a similar conclusion, see V Bílková, 'A State Without Territory?' (2016) Netherlands Yearbook of International Law 19, 32.

[62] As already noted, see Costi and Ross (n 8) 123; Engström and Rouleau-Dick (n 51); Juvelier (n 32) 30; Maas and Carius (n 51) 659; Torres Camprubí (n 12) 112; Yamamoto and Esteban (n 12) 211.

[63] For a notable exception, see Grote Stoutenburg (n 12) 388–446.

[64] Bílková (n 61) 41; Engström and Rouleau-Dick (n 51); J Jeanneney, 'L'Atlantide: Remarques sur la Submersion de l'Intégralité du Territoire d'un État' (2014) 1 Revue Générale de Droit International Public 94, 128; S Lavorel, 'Les Enjeux Juridiques de la Disparition du Territoire de Petits États Insulaires' in P Bacot and A Geslin (eds), *Insularité et Sécurité: L'Île entre Sécurité et Conflictualité* (Bruylant 2014) 44.

[65] Costi and Ross (n 8) 123.

[66] Bílková (n 61) 42.

[67] Burkett (n 12) 346. See also Engström and Rouleau-Dick (n 51).

centrality of the State.[68] The State/non-State distinction remains a central structuring feature of international law and, for that reason, it is unlikely that international law will permit non-State entities to claim the full range of sovereign rights and privileges it has traditionally reserved for states. As the following seeks to make clear, downgrading from State to non-State status will inevitably weaken the position of disappeared States in at least four key respects, making it a far less attractive option than full statehood retention.

The first area where a transition to non-State sovereign entity status would produce undesirable outcomes concerns the legal standing of displaced islanders. Under a full statehood retention scenario, the population of sinking States would not become *de jure* stateless as their national States would continue to exist and regard them as nationals under the operation of their law.[69] Nor would they, as some have claimed, become de facto stateless residents in their new host States.[70] While there are many practical constraints that an ex-situ government will face in this scenario and relations with host States will be of fundamental importance, a disappeared island State would likely continue to protect its nationals in some form, including by negotiating arrangements that best serve their interests, ensuring that their rights are respected, issuing passports enabling them to travel abroad and official documents allowing them to carry out the normal functions of civilian life.[71] Once people begin to acquire dual nationality, the burden of protection may gradually shift to the States in which islanders have been forced to relocate on the basis that this is where nationality is more effective.[72] Yet, until this happens, statehood retention will in theory ensure that displaced islanders do not sink into statelessness and, with it, lose the precious legal rights and citizenship protections attached to nationality.

The scenario in which a disappeared State maintains international legal personality *sui generis* as a non-State sovereign entity presents a much less desirable outcome from the viewpoint of human security. As sovereign actors, sunken island States would still in theory be able to exercise some functional competencies usually associated with statehood. For example, as noted above, it is perfectly possible for non-State sovereign entities such as the Order of Malta and the Holy See to issue passports and entertain regular diplomatic relations with foreign States. Yet travel documents issued by non-State entities may be refused by destination countries that do not recognize them.[73] More importantly, as only States can confer nationality on individuals, transitioning sunken island States to a legally proximate non-State status would mean that their citizens automatically become *de jure* stateless.[74] Concomitantly, disappeared States would lose the capacity under international law to exercise diplomatic protection and espouse claims on behalf of their citizens, a privilege traditionally reserved to sovereign States.[75] The population of a sunken island, under this scenario, would therefore find itself in a much more precarious position, with more limited rights and fewer avenues of redress.[76]

The advantages of statehood proper are also clear with regard to continued membership of and participation in international organizations. Due to the personal nature of membership, which is attached more to the state as an international person than to its territory,[77] a deterritorialized State may in principle retain its formal standing in intergovernmental organizations and exercise full membership rights. The termination of membership may, in limited circumstances, follow from an organization's object and purpose being inherently tied to the possession of territory, or if the disappeared island State were no longer able to fulfil the responsibilities of membership due to its lack of territory.[78] As standard, however, the capacity of a disappeared island State to defend its interests in international forums would be preserved, including the right to litigate in international courts on an equal footing with other sovereign States.

By contrast, more tenuous forms of membership and participation in international organizations would likely follow from a downgrade to non-State sovereign entity status. Very few international organizations allow for full membership by entities other than States.[79] In accordance with the UN Charter,[80] for instance, membership in the UN is reserved to States, so much so in fact that accession to the UN is often considered as tantamount to universal recognition, the 'final baptism' into the international community.[81] As previously noted, non-State entities such as the Order of Malta and the Holy See have

[68]See generally M Koskenniemi, 'What is International Law For?' in M Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 29; F Mégret, 'L'Étatisme Spécifique du Droit International' (2012) 24 Revue Québécoise de Droit International 105; G Simpson, 'Something To Do With States' in A Orford and F Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 564; T Sparks, 'The State' in J d'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 838.

[69]Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Statelessness Convention) art 1 ('For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any state under the operation of its law'). Only a minority of scholars have taken the position that disappeared States, even if they remain states proper, can have no nationals. See, most notably, H Alexander and J Simon, 'No Port, No Passport: Why Submerged States Can Have No Nationals' (2017) 26 Washington International Law Journal 307 (claiming that, for a State to consider a person as a national, that State must assume the duty to other States of re-admitting that person if deported from abroad and this duty cannot be assumed by a landless State).

[70]See W Kälin, 'Conceptualising Climate Induced Displacement' in J McAdam (ed) *Climate Change and Displacement: Multidisciplinary* Perspectives (Bloomsbury 2010) 101; McAdam (n 12) 14. Although no official definition exists, de facto stateless persons are generally viewed as persons who are nationals of a certain State but cannot derive any benefits therefrom.

[71]Grote Stoutenburg (n 12) 425.

[72]McAdam (n 12) 12.

[73]For further discussion, see Grote Stoutenburg (n 12) 431–434.

[74]ibid 430; McAdam (n 12) 22. It has been suggested that citizens of disappeared States may not even meet the definition of stateless persons under relevant conventions and, as such, may not qualify for the special protections afforded to stateless persons at international law. See A Harrington, 'Citizens of the World' (2010) 104 Proceedings of the ASIL Annual Meeting 55.

[75]ILC 'Draft Articles on Diplomatic Protection with Commentaries' UN Doc A/61/10 (2006) art 1 commentary, para 3 ('diplomatic protection has traditionally been seen as an exclusive state right in the sense that a state exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the state itself').

[76]See generally M Recalde-Vela, 'Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities' (2019) 24 Tilburg Law Review 182.

[77]K Bühler, *State Succession and Membership in International Organisations: Legal Theories* Versus *Political Pragmatism* (Brill 2001) 5.

[78]For instance, membership in the World Meteorological Organisation is only open to States with their own meteorological services. See D Heilmann, 'World Meteorological Organisation' in Wolfrum (n 57) para 7.

[79]See Bühler (n 77) 19; H Schermers and N Blokker, 'Membership of International Organisations or Institutions' in Wolfrum (n 57) para 24.

[80]UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI arts 3–4.

[81]D Geldenhuys, *Contested States in World Politics* (Palgrave Macmillan 2009) 149.

been granted permanent observer status in several international organizations, including the UN.[82] Observer status would allow disappeared island States some scope to ensure that their interests are known and given due consideration. The granting of observer status is purely discretionary, however, and no general rules regulate the rights and obligations of observers.[83] Observers also have much more limited rights than formal members. While usually granted special facilities for attending meetings and accessing documents, observers typically have no voting rights and no agenda-setting powers. Access to international courts and tribunals, to finish, is notoriously limited for non-State entities. While not entirely precluding their participation in multilateral institutions, a transition to non-State status would thus clearly restrict the rights of disappeared states and their international agency.

In terms of treaty obligations, since the treaty-making power of States is axiomatic,[84] a deterritorialized State would be competent to continue concluding all kinds of valid international treaties. Subject to the proviso that the loss of territory may ground termination for supervening impossibility of performance,[85] the deterritorialized State could likewise continue to fulfil its commitments and claim rights under treaties concluded before deterritorialization, ensuring a degree of legal certainty and predictability.

Conversely, neither the sovereign right to enter into or remain a party to international treaties would be guaranteed if the island State were transformed into an international legal entity *sui generis*. While the participation of non-State actors in international law making is long-standing,[86] *jus tractatuum*—the capacity to make treaties—is generally thought to be the exclusive preserve of States, in the sense that only States possess the *inherent* competence to conclude treaties, while other entities have it conferred upon them by States.[87] Whatever treaty-making power disappeared States may possess as non-State sovereign entities would therefore be more limited than under the statehood proper scenario and would in any case be dependent upon recognition and acceptance by other States.[88] Remaining a contracting party to treaties concluded previously would also rely on acquiescence by the other contracting parties.[89] As sovereign non-State entities, sunken islands may of course conclude international agreements other than treaties. But the status and legal force of such agreements is notoriously indeterminate, as is the applicability of the law of treaties to these agreements. It has been suggested, for instance, that treaties concluded by the Holy See are subject to the rules of the Vienna Convention on the Law of Treaties but that those concluded by the Order of Malta are not.[90] A transition to non-State sovereign entity status would therefore create legal uncertainty regarding the validity, operation, interpretation and effects of agreements concluded by sunken islands.[91] This is especially problematic as, under most envisaged scenarios, disappeared States would likely have to rely heavily on international agreements with third States to preserve their interests, whether in the form of maritime boundary agreements, territorial purchase agreements or agreements securing protection for their population.

Last but not least, it is important to consider the consequences of the nature of continued existence on retention by a disappearing island State of its assets, most notably its maritime zones (and the natural wealth contained therein). If it continued as a State proper, a deterritorialized State could in principle retain and continue to administer maritime zones for the benefit of its people since maritime areas only formally accrue to States.[92] Some scholars have argued that the tie between land and maritime zones is functionally indispensable for this purpose, as the performance of management functions becomes vastly more difficult when a state is geographically removed from its ocean spaces.[93] As observed by others, however, the challenges of monitoring, control, surveillance and enforcement could be met with the ongoing development of increasingly sophisticated satellite and other advanced technologies and through cooperation and coordination with regional fisheries management organizations and the International Maritime Organisation (IMO).[94] The more pressing problem, only faced by an island government turned into the executive organ of a non-State sovereign entity, is that it is not self-evident that it could retain its maritime zones at all.[95]

What can be extracted from this brief examination is that certain powers usually inherent in statehood can also be ascribed to non-State entities, but only States are plenipotentiaries of the international legal system, that is, only they can claim full and automatic possession of sovereign rights and privileges under international law. A

[82]See Gazzoni (n 57) para 16; G Westdickenberg, 'Holy See' in Wolfrum (n 57) para 9.
[83]T Rensmann, 'Observer Status in International Organisations or Institutions' in Wolfrum (n 57) para 6.
[84]Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 6 ('every state possesses capacity to conclude treaties').
[85]ibid art 61.
[86]See generally P Webb, 'The Participation of Non-State Actors in the Multilateral Treaty Process' in S Chesterman et al (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019) 633.
[87]M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 129.
[88]A Peters, 'Treaty-Making Power' in *Max Planck Encyclopedia of Public International Law* (2009) para 13–14.
[89]Grote Stoutenburg (n 12) 442.
[90]K Schmalenbach, 'Article 1: Scope of the Present Convention' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 22.
[91]On some of the uncertainties regarding the effects of agreements concluded with non-State actors, see O Corten and P Klein, 'Are Agreements Between States and Non-State Entities Rooted in the International Legal Order?' in E Canizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 3.
[92]See United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).
[93]J Lisztwan, 'Stability of Maritime Boundary Agreements' (2012) 37 Yale Journal of International Law 153, 169; T Puthucherril, 'Rising Seas, Receding Coastlines and Vanishing Maritime Estates and Territories: Possible Solutions and Reassessing the Role of International Law' (2014) 16 International Community Law Review 38, 59.
[94]Rayfuse (n 12) 12–13.
[95]Some scholars have argued that loss of statehood does not necessarily entail loss of maritime entitlements. By identifying that maritime entitlements vest in the island people, it is suggested that only their disappearance entails loss of maritime zones. See Sharon (n 36) 99. The more common view on a traditional reading of UNCLOS, however, is that a people has no right to maritime zones independently nor, presumably, by way of a non-State sovereign entity—that right *only* accrues to a State. See Jain (n 12) 7 (noting that the loss of statehood 'represents a significant downgrading of status' including, in particular, the loss of 'the right to maritime entitlements under the law of the sea').

downgrade to non-State sovereign entity status *à la* Order of Malta/Holy See, as well as generating legal instability, would leave disappeared States in a more precarious and vulnerable position than full statehood retention with diminished international agency, rights and resources to preserve their interests and the welfare of their populations.

5 | CONCLUSION

Our claim in this article is fairly narrow but, in our view, important. We do not take a firm position here on the big normative questions raised by rising sea levels and State extinction, including whether legal disappearance must automatically follow physical disappearance or the extent to which key categories of international law may be revisited in the light of the climate emergency we face.[96] Ours is simply a call for greater analytical clarity as the 'fate' question progressively takes the centre stage in debates regarding rising sea levels and international law.

There is now a significant body of literature claiming that States may continue to exist despite the permanent loss of habitable territory. A range of scenarios are typically envisaged for state continuation, from continuation-through-recognition to the creation of a new category of landless States or continuation as *sui generis* sovereign entities. These scenarios, however, are not always helpfully distinguished and some arguments are, in our view, analytically dubious or at the very least in need of greater consistency. Some, for instance, claim that statehood proper can be retained under the existing law of statehood and cite the Order of Malta and Holy See as precedents of deterritorialized States. Others acknowledge that these entities are best understood as *sui generis* sovereign entities and that, if used as models, they would entail disappeared States pursuing deterritorialized existence in non-State form, while simultaneously claiming that they may retain all of their sovereign rights and privileges.

These claims are, in our view, implausible. As we have attempted to show, the Order of Malta and the Holy See are not precedents of deterritorialized States but of landless non-State sovereign entities, a distinction that is not merely doctrinal but matters greatly when it comes to the legal standing of these international persons. The more correct position is thus that there is in actual fact no existing precedent of deterritorialized States properly-so-called and that pursuing deterritorialized sovereign existence *à la* Order of Malta/Holy See will necessarily entail a loss of agency, an outcome we deem to be normatively undesirable.

It may be the case that pursuing deterritorialized sovereign existence in non-State form is desirable for some other reasons, including strategic considerations. Transitioning to non-State sovereign status may be a tactical compromise worth pursuing if it attracts greater support from the international community than the normatively 'purer' and more desirable statehood proper option. Something, in other words, may be better than nothing. But we do not take a position on these strategic considerations here. Our main argument is simply this: those (and they are many) who mobilize the Order of Malta and the Holy See in support of the continuation thesis must be clear-eyed about the fact that they are not actually arguing for statehood retention but for something else, leading to suboptimal legal outcomes. Equally, those advocating full deterritorialized statehood retention—the outcome we regard as most favourable from a normative standpoint—must do so in the knowledge that this is something for which there is, in actual fact, no existing precedent in legal history. It is not, in other words, an option that is somehow readily available to sunken States. It requires, at minimum, a dynamic interpretation of the law of statehood.

The scale of the climate catastrophe, in our view, offers more than sufficient justification for revisiting key assumptions and international legal categories. It cannot be the case that existing doctrines are allowed to stand unchanged if they spell a death sentence for entire nations. In this debate, we just do not think the appeal to precedent is as helpful as might appear at first glance.

[96]For one of the authors' views on these questions, see Allen (n 28).

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While the first author is a member of the ILA Committee on International Law and Sea Level Rise, all views expressed in the

present article are those of the two authors and do not necessarily represent or reflect the views of the ILA. The authors would like to thank the anonymous reviewers and the editor for their in-depth reading and valuable proposals for improvement of the manuscript.

How to cite this article: Allen E, Prost M. *Ceci n'est pas un État*: The Order of Malta and the Holy See as precedents for deterritorialized statehood? *RECIEL*. 2022;31(2):171-181. doi:10.1111/reel.12431