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Chapter 6

Alternative Solutions to Preserve the Sovereignty of Atoll Island States

6.1 Introduction

...the first problem is a lack of sufficient consensus on the criteria for statehood. Also the establishment of legally binding criteria, as opposed to politically judged factors, is not widely supported in practice. Many authors maintain that states consider various factors, but the final determination ranges from a purely political one to one at least intimately bound to political considerations, not as a neutral assessment of fixed criteria.¹

The 1933 Montevideo Convention in its Art. 1 enumerates the criteria for statehood, which are a permanent population, a defined territory, a government and the capacity to enter into relations with other States. However, during its existence a State might increase or decrease in territory, its population oscillate and the capacity to enter into relations with other States vary.² As Worster points out, the criteria for statehood is contentious and practice has not been consistent in international law. Although it is taken for granted that the Montevideo requirements should be met, there is ample evidence demonstrating that opportunism also plays an important role on the establishment and recognition of States.³

The effectiveness of Atoll Islands as States has already been put in doubt due to their geographic isolation, limited natural resources and tiny populations.⁴ Nevertheless, despite these limitations there is currently no doubt as to whether they constitute States. Thus, the question that needs to be asked is whether statehood can be maintained even with the loss of some of the elements required by the Montevideo Convention, and for the case of Atoll Island States whether this is necessarily linked to a territory.⁵ Although these criteria exist, it is difficult to say

¹ Worster (2009), pp. 158–159.

² Emanuelli (2003), p. 1277.

³ Worster (2009), p. 153.

⁴ Grant (2000), p. 181.

⁵ Although as McAdam points out, before the territory disappears due to the sea level rise it is more probable that other indicia of statehood, such as a permanent population, an effective government

that there is a consistent custom in international law that would necessarily follow what the Montevideo Convention on the Rights and Duties of States requires.⁶

Thus it is important to distinguish between the elements necessary to establish statehood and the requirements to ensure a State's continuing existence. In the present chapter we will discuss how as there is a lack of consensus on the requirements for statehood, its continuity would not rely exclusively on the strict criteria set out in the 1933 Montevideo Convention. A blend of legal and political judgements could in fact ultimately determine whether statehood can be preserved, and we will thus argue how it is not clear to what extent statehood can be extinguished because of the lack of territory or even government, since once statehood is established there is a presumption of continuity.⁷

This question is essential to Atoll Island States as it would not only determine their ability to continue utilising the resources which had previously been within their EEZ (such as fisheries) but also from the point of view of preserving the cultural identity of their citizens. Atoll Island States are often seen as being all essentially alike, as are their human populations, when they are recognised at all.⁸ However, inhabitants of Atoll Island States have a strong connection to their islands, and even as some appear resigned to the fact that they might have to leave the islands in the future, they are hoping to periodically return to them in order to have a connection to their heritage.⁹ Losing their islands would not only potentially deprive their inhabitants of residing in a sovereign State encompassing the lands where they were born, but would also violate their right to dispose of their own wealth. Art. 1(2) of the International Covenant on Civil and Political Rights sets forth that

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Indeed, it could be argued that even if they were to relocate to other lands, the inhabitants of Atoll Island States could never be satisfactorily compensated for the loss of their physical bases.¹⁰ The IPCC 4AR notes how the population of many small islands have "long developed and maintained unique lifestyles, adapted to their natural environment".¹¹ In fact, the loss of such cultures could not only have consequences for the islanders but would constitute also a loss for human heritage.

and the capacity of enter into relations with other states will have been challenged, McAdam (2012), p. 131.

⁶ Worster (2009), p. 153.

⁷ Kreijen (2004), p. 332, see also McAdam (2012), p. 128 referring to Crawford (2006), p. 715.

⁸ Barnett and Campbell (2010), p. 2.

⁹ Rakova (2009).

¹⁰ Barnett and Adger (2003), p. 331.

¹¹ Mimura et al. (2007), section 16.3.2, http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch16s16-3-2.html.

The preservation of statehood would have positive cultural and psychological effects for the inhabitants of these islands.¹² On the other hand, the loss of all territory would not only deprive islanders of all means of subsistence but could put into question their citizenship.¹³ Other privileges that are derived from statehood, such as the membership of international organizations, diplomatic immunity, trade relations, eligibility for development loans or aid from the International Monetary Fund (IMF) and the World Bank or accessing the International Court of Justice (ICJ) could also be affected.¹⁴

A list of possible solutions for Atoll Island States to attempt to preserve their sovereignty against the threats highlighted in Chaps. 2 and 3 (which would include sea level rise, increases in coral mortality and stronger tropical cyclones) encompass the following:

- Cession of territory¹⁵
- Construction of coastal protection works and raising the level of the islands (Scenarios IV and VII given in Chap. 5)
- Construction of artificial islands and amendments of UNCLOS to accept artificial islands as a “defined territory”¹⁶ (as outlined also in Chap. 5)
- Merger with another State¹⁷
- De-territorialized State,¹⁸ including application of the United Nations International Trusteeship system in order to create an *ex-situ* nation which would consist of a de-territorialized State¹⁹

In this chapter we will not deal with the second and third solutions, based on the use of engineering works, as we already discussed them in detail in Chap. 5. We also wish to note once more that it is also likely that if an Atoll Island State can afford to build an artificial island it would choose to build defences and elevate an existing island instead, as outlined in Chap. 5. Hence, the idea of building an artificial island to preserve sovereignty is unrealistic and would not make sense from a financial or engineering point of view, as these resources would be put to much better use preserving existing lands, which have a clear status under UNCLOS²⁰ (see Scenario VII in Chap. 5).

¹² Burkett (2011), p. 369.

¹³ Though it should be noted that although statelessness occurs when the individual is not considered as a national by any State under the operation of its law. See Convention relating to the Status of Stateless Persons, Art. 1(1).

¹⁴ Maas and Carius (2012), p. 658.

¹⁵ Soons (1990), p. 230.

¹⁶ Gagain (2012).

¹⁷ UN High Commissioner for Refugees (2011), p. 18, Soons (1990), p. 230, and Caron (1990), p. 650.

¹⁸ Rayfuse (2010), p. 10.

¹⁹ Burkett (2011).

²⁰ However, there are theoretical suggestions that an artificial island would be a solution for maintaining the statehood of these islands. See Gagain (2012).

In order for a country to preserve its statehood, according to a strict interpretation of the Montevideo Convention, it could attempt to acquire new territory in foreign lands.²¹ The territory could be purchased as a State, or the population could be accepted into another country, acquiring land as individuals but preserving at least some degree of autonomy over lands belonging to a different State. The purchase of territory, in fact, does not result in an automatic transfer of sovereignty, as will be explained later in this chapter. This type of solution could eventually result in a situation similar to that status of indigenous populations in Canada and New Zealand.²² However under such a scenario the Atoll Island State would probably lose its statehood, though its former inhabitants might still be able to indirectly manage the resources of the newly acquired lands under some form of autonomous local government.

It should be noted that this type of solutions (cession of territory or merger with another State) were often applied in colonial times to bring non-European people to the realm of international law.²³ In past centuries treaties of cession, the creation of protectorates, conquest or the annexation of territories were standard methods to acquire territory. Historically, Atoll Island States were already a stage for colonialist ambitions since many European States could vastly profit from extracting copra, cotton, sugar cane, whales teeth, copper and other Pacific island resources.²⁴

The solutions that we will be presenting in this chapter create theoretical scenarios for the governments of Atoll Island States, who might see their inhabitants depart from their current islands and either attempt to resettle to another territory or scatter around the world in a diaspora that would leave them divided amongst various countries. If the State could acquire some territory they could, however, at least maintain some form of geographic cohesion.²⁵ On the other hand, if there is no single territory for the entire population to relocate to it would be challenging for the government to provide services for a diffuse population spread over various countries.

²¹ This solution has been suggested by United Nations High Commissioner for Refugees on the submission of Climate Change and Statelessness: an overview supported by the International Organization for Migration (IOM) and the Norwegian Refugee Council (NRC) to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany, and scholars such as Soons (1990).

²² Kelman (2008), p. 21.

²³ Anghie (1999), p. 32.

²⁴ Teaiwa (2005), pp. 173–174.

²⁵ It is unlikely, however, that an Atoll Island State would build an artificial island in a territory that was outside its original area, or that it would choose such an option over the construction of coastal defences around an existing island, as explained in Chap. 5. Building an artificial island is cheaper in shallow areas, and thus even if atolls were to disappear the relative shallow area around the reefs would be a much better place to build an artificial island than a deeper area elsewhere. It is clear that an Atoll Island State, provided it had sufficient financial resources, would choose to protect an existing island and its infrastructure rather than allow the last of its original islands to disappear, which would lead to them being catalogued as “artificial” islands, as explained in Chap. 5.

In fact, migrating to foreign lands is nothing new for the inhabitants of Atoll Island States. Even nowadays a part of the population of these States is living abroad,²⁶ with a meaningful amount of the income of islanders coming from remittances.²⁷ Resettlement of the entire population of small islands has taken place in the past and thus it would not be the first time that this kind of arrangement has been made. The Carteret islands have, for example, attempted to internally relocate its population to nearby larger islands.²⁸

Historical accounts of displacement in the Pacific and Indian oceans are numerous.²⁹ The mining of phosphate by the British colonial administration displaced the population of the island of Banaba in the 1940s. The entire population was relocated to Rabi Island, which currently belongs to the Republic of Fiji.³⁰ Another example is that of the Chagossians (the inhabitants of the Chagos Islands in the Indian Ocean, close to the Maldives, as shown in Fig. 5.2) who were displaced by the UK government from Diego Garcia to the Mauritius and Seychelles due to military interests, but were not provided with land to resettle in.

The Banaban and Chagossian cases, although not related to sea level rise, will also be discussed in this chapter. They represent cases of population displacement among island dwellers and provide some examples of what type of governmental arrangements were provided after resettlement as well as the challenges currently faced by those displaced and their descendants. Although these forced displacements took place in the colonial context, they have a number of common points with the case of Atoll Island States. While Banabans were resettled to an uninhabited island, Chagossians were even less fortunate and were relocated without any systematic long-term plan. Both have in common the fact that they were displaced without the population being previously consulted and that this was caused solely due to the political and economic interests of an industrialized nation, in this case Great Britain.

Thus, if the population of Atoll Island States is displaced because of the emissions of greenhouse gases, which allowed the economic development of industrialized nations, the ultimate reasons for the relocation will be similar to those of the Banabans and Chagossians. In the past, the reason was either to appropriate natural resources or due to military interests, while in the future it will be due through the consequences of climate change (as highlighted in Chap. 3) that stem from the greenhouse gas emissions by industries in the past and present.

²⁶ For example 17.6 % of the Tuvaluan population lives abroad, in p. 7, but only 1 % of Kiribadians do. See Secretariat of the Pacific Community (2007), p. 31

²⁷ Connel and Brown (2005).

²⁸ Views on the Possible Security Implications of Climate Change to be included in the report of the Secretary-General to the 64th Session of the United Nations General Assembly, Fiji, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, available on the internet at http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf, p. 11.

²⁹ See the cause of relocation at Campbell et al. (2005), p. 21.

³⁰ Ferris et al. (2011), p. 26.

Nevertheless, differences do exist between the case of Atoll Island States, which are member States of the UN, and that of Banabans and Chagossians, which were not independent States at the time. Although Banabans were given an island to relocate to they did not become an independent country, with the islanders currently holding dual citizenship.³¹ These forced displacements of populations took place in a time when self-determination was not an established principle.³² Currently, the problem of the disappearance of coral islands represents a test to the self-determination principle, as it will challenge whether Atoll Island States can preserve their political organization despite the potential lack of a territory and population.

6.2 The Lack of Consensus on the Criteria for Statehood

The possible submergence of Atoll Island States raises the question of whether they can survive as a State without a population and/or territory. It could be assumed that as the States are the main subjects of international law, its definition would be clear. However, this is far from being the reality and many attempts of defining what constitutes a State have been carried out.³³ According to Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States, the elements of a State are a permanent population, a defined territory, a government and the capacity to enter into relations with other States. It is generally agreed that territory is one of the key elements of statehood, though huge areas of land existed in the past without any State (in the present sense of the word) exercising territorial sovereignty over it (i.e. *terra nullius*). However, it has been postulated that the latter cannot exist without the former.³⁴

If Atoll Island States manage to acquire lands in other places after the last of their islands has been submerged they could argue to still possess a territory and therefore could claim that their statehood is preserved even after its geographical location has changed. A territory is claimed to be a necessary element of statehood on account that it allows a State and its government to be effective by having a physical identity.³⁵ However, could we take for granted that the Montevideo

³¹ Banaban Island is under the sovereignty of Kiribati and Rabi island, which is the island they were resettled in, belongs to the Republic of Fiji.

³² On the self-determination stage after the WW2, “. . . in the years after 1945 the question whether self-determination was a legal right or a principle was a divisive issue. Self-determination as a legal right threatened to bring about significant changes in the political geography of the world, not limited to the dismemberment of Empires. . .” See Crawford (2006), p. 108.

³³ Bathon (2001), p. 609.

³⁴ Raič (2002), p. 59.

³⁵ Stahl (2010), p. 30 Citing James S. Anaya & Robert A. Williams Jr., The Protection of Indigenous People’s Rights over lands and natural resources under the Inter-American Human Rights System.

Convention, which is signed only by countries of western culture in the American continent,³⁶ is a *jus cogens*³⁷ law and that in order to have its statehood recognized an entity which seeks recognition should necessarily fulfil the four criteria established in its Art. 1? As Grant points out the Montevideo definition of statehood was at best a “soft law”.³⁸ Moreover, if it is binding, it is only to the small number of American States that were party to it.³⁹

However, during the course of history “there are certain actors of international law that were treated like States (and are even sometimes defined as States) although they did not meet all the criteria that are traditionally deemed necessary for them to be called as such”.⁴⁰ As Agnew points out

territoriality, the use of territory for political, social, and economic ends, is in fact a strategy that has developed more in some historical contexts than in others. Thus, the territorial state, as it is known to contemporary political theory, developed initially in early modern Europe with the retreat of non territorial dynastic systems of rule and the transfer of sovereignty from the personhood of monarchs to discrete national populations. That modern state sovereignty, as usually construed, did not occur overnight following the Peace of Westphalia in 1648 is now well established.⁴¹

In the eighteenth century, legitimism would equate the State to personal ownership of a land by a monarch. A dynasty enjoyed historic rights to rule a State.⁴² In the nineteenth century, the contiguity or geographic doctrine, which assumes geographical proximity, would state that the acquisition of territory would not rely on the effective control of a territory, as long as adjacent lands were not subjected to another sovereign’s effective control. It is important to note that territories which were not constituted on the European model of a State were considered as *terra nullius*.⁴³ This theory benefited Europeans by assuming that lands which were inhabited by indigenous populations that did not possess political or social systems similar to their own did not constitute a State according to the criteria of the time, thus allowing them to occupy the lands. Atoll Island States were also part of the societies that were considered by European powers as *terra nullius*, allowing them to take control over these territories.

The 1933 Montevideo Convention’s criteria are historically contingent⁴⁴ and can perhaps change over time as it has occurred in the past with previous criteria of

³⁶ The Convention was signed by the United States, Argentina, Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

³⁷ *Jus cogens* is a group of laws which are hierarchically superior and in which no derogation is allowed. They are recognized as being essential to the maintenance of an international legal order.

³⁸ Grant (1999), p. 456.

³⁹ Grant (1999), p. 456.

⁴⁰ Acquaviva (2005), p. 9.

⁴¹ Agnew (2005), p. 441.

⁴² Grant (1999), p. 419.

⁴³ Grant (1999), p. 421.

⁴⁴ Grant (1999), p. 456.

statehood, such as legitimism. Nevertheless, theories to determine statehood in the past served the interests of European countries,⁴⁵ particularly in the eighteenth and nineteenth centuries. In fact, the future submergence of islands could test to what extent after self-determination came into the international scene Atoll Island States could use international law to preserve their statehood.

A further problem related to the use of the Montevideo criteria to strictly require States to have a territory is that the treaty concerns itself with the creation of a State and not with its extinction.⁴⁶ As Grant points out in the case of belligerent occupation:

it therefore appears to be the case that once an entity has established itself in international society as a State **it does not lose statehood by losing its territory or effective control over that territory**. To be sure the Montevideo Convention was concerned with whether an entity becomes a State, not with how an entity might cease to be a State⁴⁷ (emphasis added)

From a legal point of view there are two competing theories regarding the recognition of States as such.⁴⁸ The declaratory theory looks at the purported States assertion of its sovereignty within its territory to determine if it can act on the international stage.⁴⁹ According to this theory, recognition is based on specific criteria and the determination on whether a State exists or not is based on fact, not on the discretion of an individual State.⁵⁰ On the other hand, according to the constitutive theory obtaining the status of a State is not automatic, but depends on the recognition by other States.⁵¹ Both theories have their criticisms and problems.⁵² A problem with the declaratory theory is that States do not acquire rights on the international scene until they are recognised.⁵³ The problem with the constitutive theory is that even when a State is not recognised by others it does not mean that its territory is regarded as *terra nullius*.⁵⁴ In addition, there is a risk that the requirement of recognition by other States fosters the abuse of power by certain States.⁵⁵

⁴⁵ Anghie (1999), p. 2, where the author explains how positivism instead of naturalism determined what should be considered a State. While naturalism in the sixteenth century based the subject of international law on a sovereign State, positivism expelled the non-European world of legality by distinguishing civilized and non-civilized nations.

⁴⁶ Grant (1999), p. 435.

⁴⁷ Grant (1999), p. 435.

⁴⁸ Worster (2009), p. 115.

⁴⁹ Worster (2009), p. 115.

⁵⁰ Worster (2009), p. 115.

⁵¹ Worster (2009), p. 115.

⁵² For an extensive discussion on this see Worster (2009), p. 115.

⁵³ This can be seen for example on the case of Somaliland, which meets the four conditions required by the Montevideo Convention for statehood (a permanent population, a defined territory, a government, and the capacity to enter into relations with other states) but has not been recognised by any State yet, despite declaring independence from Somalia in 1991, according to Eggers (2007), p. 217.

⁵⁴ Worster (2009), p. 115.

⁵⁵ Worster (2009), p. 115.

Regarding the case of Atoll Island States, if they were to lose their entire territory (and thus no longer have a population in the geographical area they currently occupy) at some point in the future they would lack some of the elements of statehood required by the Montevideo Convention, as explained previously. It has been argued that for States who do not fulfil all the requirements of statehood stated in the Montevideo Convention recognition would follow the constitutive theory, while for entities that do fulfil them recognition by other States would be declarative. For example, the Holy See (located in the Vatican City) is recognised as a State in international law, although it lacks a permanent population. The recognition of the Vatican City would therefore have a constitutive and reparative effect since the lack of population would place doubts on its statehood.⁵⁶ In the same way, it could be argued that since Atoll Island States would lack some statehood elements, future continuing recognition by other States would have also a reparative effect.

Therefore, the lack of territory, one element of statehood, would not prevent a State from being so if other States agree to recognise it as such. However, Atoll Island States could potentially face the inherent problem associated with the constitutive theory: a high vulnerability to the abuse of power by other States in deciding or not on the continuity of a State. International courts either apply one theory or another. For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Celebici case argued that the conflict within the former Yugoslavia was international after there was international recognition of Croatia and Bosnia and Herzegovina, which means that the constitutive theory was backed.⁵⁷ This necessary recognition often thus depends on political choices and not on legal requirements.

It is important to note how Art. 6 of the UN Charter provides that States can only be expelled from the UN for persistently breaking the principles of the Charter and after recommendations of the UN Security Council.⁵⁸ Also, Atoll Island States appear to be willing to maintain their separate identity, EEZs and seat at the UN, as expressed for example by the Tuvalu Government spokesman.⁵⁹ Thus, it would be up to other countries to stop recognizing these States and breaking-off diplomatic relations, though non-recognition by other UN member States does not necessarily lead to expulsion from the UN (such in the case of Turkey not recognizing Cyprus or North Korea recognising South Korea).⁶⁰ The issue of recognition (constitutive

⁵⁶ Grant (1997), p. 678.

⁵⁷ Worster (2009), p. 135.

⁵⁸ Maas and Carius (2012), p. 659.

⁵⁹ Maclellan (2009). It is also important to note that small Island States can get revenue from a variety of other sources, and for example the government of Tuvalu obtains revenue from the selling of coins and stamps, renting its telephone country code for “900” lines and the lease of its internet domain name (“.tv”, which is worth approximately US\$ 50 million over 10 years, see Grant (2000), p. 177.

⁶⁰ Maas and Carius (2012), p. 651.

theory) appears particularly important, and in recent times⁶¹ there have been much State practice connecting recognition with the appearance of new States.⁶² Particularly interesting is the case of Bosnia, with the US and the EU recognising and cementing a legal status that would have otherwise probably remained in doubt.⁶³ However, if only some countries recognise a certain State, it is not really clear if it thus represents a State only to them or to the world. There are a number of political entities such as Kosovo, Taiwan, Abkhazia and South Ossetia that enjoy only very limited recognition.⁶⁴ In fact, the recognition by other States can often involve vested political and economical interests. An extreme example of the political character of the recognition of States is the recognition of Abkhazia, which was a province of Georgia during Soviet times. Nauru recognized the independence of Abhakazia on December 15, 2009 in exchange of \$50 million in aid for this recognition.⁶⁵

An argument that rebuts the constitutive theory is given by Acquaviva,

throughout the history of modern international relations, the main feature of subjects of international law has been their ability to assert that they are not subordinates to other authorities; in other words, subjects of international law were those entities *superiorem non recognoscentes*, able not to recognize any superior within the international community. This feature is at the basis of the fact that the international community is not structured as a hierarchical society, but rather as a community of (formal) peers.⁶⁶

If States cannot be in a subordinate position to other States that would mean that the declarative theory would prevail. States should not depend on others to exist. Nevertheless, even when a State does not depend on others to exist, the lack of recognition of its status by the international community would limit its activities. This consequence can be clearly understood by the following claim:

Though political communities (...) can without recognition continue to operate as states within the 4 walls of their domestic territorial enclave, they cannot enter into relations with any other state unless that other state expressly or by putting up with such relations impliedly recognize(s) that political community as a subject of international law.⁶⁷

The effectiveness of Atoll Island States as sovereign States has already been put into question due to their geographic isolation, limited natural resources and tiny

⁶¹ Particularly in connection to the events in the 1990s relating to the appearance of new states in Eastern Europe and the former Soviet Union.

⁶² Grant (2000), p. 177.

⁶³ Grant (2000), p. 177.

⁶⁴ And some other entities, such as Transnistria, Nagorno Karabakh and Somaliland are actually not recognized by any member of the UN, as explained in Maas and Carius (2012). Somaliland is a particularly interesting case, as despite having a constitutional working democracy, passports and others aspects of a normal country, it is still not recognized by any government, and its president is treated like a regional governor, see Lacey (2006), http://www.nytimes.com/2006/06/05/world/africa/05somaliland.html?_r=1.

⁶⁵ Farley (2010), p. 794.

⁶⁶ Acquaviva (2005), p. 36.

⁶⁷ Farley (2010), p. 792.

populations⁶⁸. However, the classical view that statehood is exclusive to entities with substantial political and economic gravity can be considered as anachronistic.⁶⁹ Indeed, Atoll Island States have been accepted into the UN and play a role in many international forums, having a prominent voice within many UN organisations, including the UNFCCC (as detailed in Chap. 4). Some of these Atoll Island States, such as Kiribati and Tonga, were admitted to the UN as late as 1999, proving how the sovereignty of small States is currently widely accepted.

Therefore, the UN could be thought of as a collective recognition mechanism, with Art. 4(1) of the UN Charter providing that States can be considered for membership of the organisation, though this is an exclusive provision in the sense that only States may be admitted.⁷⁰ In fact, there are a number of States that have existed without being part of the UN, though most of them have been recognised by a number of other countries.⁷¹ Switzerland is one example of this, and Tuvalu was also not a part of the UN for most of its history, though it was recognised as a State since its independence from the UK in 1978.⁷²

Once a State is recognised as such (and this recognition part is key to it being considered a State by the rest of States), is it possible then for other States to de-recognise it and break-off diplomatic relations, under the grounds it no longer abides by the criteria of the Montevideo Convention? One possible answer could be given by Art. 6 of Montevideo Convention which establishes that

The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law.

Recognition is unconditional and irrevocable. (emphasis added)

Thus, not only recognition is irrevocable according to Art. 6 of the Montevideo Convention, but the presumption of continuity of a State (a well established principle) claims that once a State has its statehood tested, there is a presumption that it continues to exist even without meeting all the requirements. According to Krejjen, the principle could be summarized as “States may have a complicated birth, but they do not die easily”.⁷³ The rationale for this presumption is explained by Marek,

the starting point for the development of the rule (i.e. the presumption in favour of the continuity of the State) was not providing by theoretical considerations, but by practical concern for the maintenance of international rights and obligations - in other words for the security and stability of international legal relations.⁷⁴

⁶⁸ Grant (2000), p. 181.

⁶⁹ Grant (2000), p. 181.

⁷⁰ Grant (2000), p. 177.

⁷¹ Grant (2000), p. 177.

⁷² Grant (2000), p. 177.

⁷³ Krejjen (2004), p. 37.

⁷⁴ Marek, cited by Krejjen (2004), p. 37.

What would really happen if an Atoll Island State lost all of its territory remains to be seen, though the lack of precedent for something like this could mean that different States would hold competing views about whether to continue recognising its sovereignty. However, even if most countries decided to break-off diplomatic relations, the government of an Atoll Island State could preserve an international status even if no longer classed as a normal State, as will be explained later in this chapter.

The continued existence of a sovereign entity is also linked to the question of how effective that entity is. Nevertheless there are some historical examples of States which were not effective anymore, but this was not an obstacle for them to continue to be considered as States. This includes, for example, entities which were annexed illegally, such as Ethiopia, Austria, Poland or the Baltic States.⁷⁵ In the case of Poland, Yugoslavia and Czechoslovakia they were accepted as having international status as governments-in exile by the Allied Powers during World War 2.⁷⁶ Moreover, there are effective entities that are not considered as States, such as Taiwan and the Turkish Republic of Northern Cyprus. Therefore, as Crawford points out “the proposition that statehood must necessarily be equated with effectiveness is not supported by this practice”.⁷⁷

Another case which illustrates how the lack of one of the elements of statehood after its establishment does not lead to its demise can be seen in Somalia’s case, where due to the presumption of continuity of statehood the country did not lose its status despite lacking a government for a long time.⁷⁸ The question is whether the same could happen in the case of a lack of territory. It could be argued that the presumption of continuity exists for as long as the government of an Atoll island States is actively trying to find a new territory to resettle its population. In essence, the lack of territory for a certain period of time or the relocation to another area should not present insurmountable obstacles to preserve the statehood of the Atoll Island States, and examples of this [such as the Sovereign Military Order of St John of Jerusalem of Rhodes and of Malta (SMOM) or the Holy See] will be presented later in this chapter. Nevertheless, first we will discuss how an Atoll Island State could attempt to solve the problem of lack of territory by attempting to acquire new lands and what would be the legal consequences of this.

⁷⁵ Crawford (2006), p. 97.

⁷⁶ Bathon (2001), p. 621.

⁷⁷ Crawford (2006), p. 97.

⁷⁸ Raič (2002), p. 71.

6.3 Cession of Territory

In the cession of territory a transfer of sovereignty over a certain territory would take place between the owner-State and an Atoll Island State that has lost the last of its current islands.⁷⁹ Cession of territory represents a “bilateral mode of acquisition which requires the co-operation of the two States concerned, whereas all the other modes⁸⁰ are unilateral”.⁸¹ It is important to note that if this cession of territory or the union with another State are not possible then the continuity of statehood would rely only on the recognition of other States,⁸² as explained earlier in this chapter.

Exchanges of territory have actually occurred frequently in the course of history. In the eighteenth century these transfers were common between countries, when monarchs could cede territory by marriage or testament.⁸³ However, Oppenheim disagrees that a monarch could cede a territory in an absolute government,⁸⁴ a point of view shared by Vattel, who stated that

I know that many authors, and particularly Grotius, give long enumerations of the alienations of sovereignties. But examples often prove only the abuse of power, not the right. And besides, the people consented to the alienation, either willingly or by force.⁸⁵

Vattel disagreed with the voluntarism of monarchs, stating that the territory of a State could not be considered as a private inheritance.⁸⁶ He argues that,

the nation alone has a right to subject itself to a foreign power, the right of really alienating the state can never belong to the sovereign, unless it is expressly given to him by the entire body of the people.⁸⁷

Since these thoughts express current interpretations of what a State and territory means to its population, a cession of territory should be carried out with express consultation with them. Previously it was quite simple for the sovereign to deal with a treaty of cession as it was his or her exclusive decision, though nowadays that process would involve consultations with the populations in order to attempt that no harm is caused to the people who live in a certain land.

⁷⁹ Oppenheim (2008), p. 376.

⁸⁰ Other modes of acquisition are occupation of a territory that is not under sovereignty of any State, prescription, by which the title flows from an effective possession over a period of time, accession or accretion, where the shape of land is changed by the processes of nature and subjugation or conquest, Jennings (1963), pp. 6–7.

⁸¹ Jennings (1963), p. 17.

⁸² UN High Commissioner for Refugees (2011), p. 19.

⁸³ Oppenheim (2008), p. 379.

⁸⁴ Oppenheim (2008), p. 379.

⁸⁵ Beaulac (2003), para. 1342 quoting Vattel in Vattel’s doctrine on territory transfers in international law and the cession of Louisiana to the United States of America.

⁸⁶ Vattel (1758), para. 61. Available on the Internet at <http://www.lonang.com/exlibris/vattel/vatt-105.htm>, access on 22 August 2011.

⁸⁷ Beaulac (2003) p. 1343.

Voluntary cessions of territory between countries have also taken place in more modern times, such as the selling of Louisiana by France to the United States in 1803,⁸⁸ Alaska by Russia to the United States in 1867,⁸⁹ or Denmark ceding the Danish West Indies to the United States in 1917.⁹⁰ The treaty of cession must be followed by tradition, which is the transfer of the property,⁹¹ but after the ratification of the treaty. Western States believed indigenous people did not possess political structures that could be considered as being subjects of international law, and were thus susceptible to being taken over. Therefore, they would buy and sell these territories at their will, without consultation with local inhabitants.

Cession of territory due to an environmental disaster also has a precedent in the 1870s when Iceland suffered a volcanic eruption that worsened poverty in the island. In this occasion Canada granted Icelanders a piece of land and provided them with Canadian citizenships, guaranteeing them a dual Canadian/Icelandic citizenship. Afterwards, New Iceland joined the province of Manitoba and was completely integrated into Canada.⁹²

However, and although the cession of territories is not rare in history,⁹³ Rayfuse points out that for the case of Atoll Island States (that could become submerged) it is unfeasible from a practical perspective since currently it would be difficult to find a State

which would agree to cede part of its territory unless the territory is uninhabited, uninhabitable, not subject to any property, personal, cultural or other claims, and devoid of all resources and any value whatsoever to the ceding state.⁹⁴

Currently, and taking into account the evolution of the self-determination principle, it would be quite difficult to find a land which would be available for the resettlement of the whole population of a country.

Nevertheless, even if unlikely it is worth to consider what would be the possible consequences if some country was prepared to cede some lands to an Atoll Island State. In fact, there is precedent for the case in which the majority of the population of a State resettled in a land different to that which it originally occupied but managed to preserve its identity, and there are also examples where the populations

⁸⁸ Treaty concerning the Cession of Louisiana to United States, 20 October 1803. Available on the internet at http://www.archives.gov/exhibits/american_originals/louistxt.html.

⁸⁹ Treaty concerning the Cession of the Russian possessions in North America by his Majesty the Emperor of all the Russians to the United States of America: June 20, 1867, available on the Internet at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=572>.

⁹⁰ Convention on the cession of Danish West Indies, between the United States and Denmark, January 25, 1917, Available on the Internet at <http://www.doi.gov/oia/pdf/vitreaty.pdf>.

⁹¹ Oppenheim (2008), p. 379.

⁹² Rayfuse (2009), p. 8.

⁹³ Other cessions of territory which were cited by Oppenheim are: Russia sold her territory in America to the USA, Spain sold the Caroline Islands to Germany in 1899, Denmark sold the islands of St. Thomas St John and St Croix in the West Indies to the USA.

⁹⁴ Rayfuse (2010), p. 9.

of small islands were forced to relocate. These examples can perhaps give a hint of what are the possible consequences of such a relocation and thus warrant further discussion.

In their search for an alternative land to relocate to, Atoll Island States could attempt to acquire a number of different types of lands, which could be broadly divided into two different groups:

- Islands, where the Atoll Island State would acquire (in some form or another) the entire island of another country
- Portions of land belonging to a larger landmass, which would result in the sharing of a small island or a territory being located in a continental mass or large island.

This possibility that the acquired land would be part of a larger land mass would arguably constitute a fundamental change to the culture of the islanders, as they would move from a situation of relative isolation to having to interact with other groups of people. It would also represent a change from having the sea as the boundary of their lands to a situation where people and goods could move more easily through the territory. The citizens of these islands would also cease to be the main actors in the new land (for the case where there was no transfer of sovereignty that accompanied the cession of land). While this of course can result in advantages, it also represents a shift from a situation in which it is relatively easy for the islanders to keep control of what is happening in their territory. What type of border controls are established would depend on the status of the acquired land and the arrangements the Atoll Island State would reach with the country ceding the land.

6.3.1 The Boers and the Preservation of the Government in a New Territory

Although the case of the Boers is not an example of cession of territory, but rather of the transfer of a sovereign entity to a new territory, it might serve as an example of how an entire cultural group migrated while preserving its identity and government. The Dutch settled The Cape of Good Hope in 1652 and, notwithstanding some short interruptions, the area remained under Dutch sovereignty until 1806. During this time (before the colony was ceded to Great Britain) Boer farmers were constantly moving the location of their settlements. After the change in administration from the Netherlands to Great Britain in 1814 there was discontent amongst the population, who did not agree with several policies of the new colonial State (such as the abolition of slavery in 1833) and most of the African-Dutch community decided to form the Free State of Orange, the African-Dutch Republic and the

Colony of Natal.⁹⁵ In other words, the population decided to establish a new colony on an independent basis on lands that were considered as “*terra nullius*”, with no restrictions imposed by Great Britain.

The example of the Boers thus constitutes a case where a total change of territory took place, with the old entity preserving its sovereignty while relocating to new lands.⁹⁶ In fact the resettlement was possible due to the fact that Western Nations and their colonists assumed that all lands around them were *terra nullius*, allowing them to profit from their occupation regardless of whether other people already inhabited the lands.

This solution of the total transfer of a population to a new territory is unlikely to happen at present as it appears unlikely that any State will be willing to cede some of their land to another country, as we will discuss in the next section. A more viable solution would be perhaps to establish a treaty of fusion between the disappearing State and another State.⁹⁷

6.3.2 Political Climate Regarding the Purchasing of Territories by Atoll Island States

The former president of the Maldives, Mohamed Nasheed,⁹⁸ had showed interest in purchasing lands in 2008 to avoid the loss of statehood that could result from the Maldives becoming submerged by the oceans.⁹⁹ As a possible list of countries that could offer lands he mentioned Sri Lanka and India, since they have a culture, cuisine and climate similar to that of the Maldives. The funds for acquiring these territories would come from a “sovereign wealth fund” generated by a tax on tourists.¹⁰⁰ Although this could appear to be a straightforward and appealing solution¹⁰¹ it is probably unlikely that the Maldives would face such a need to relocate, at least in the middle term (as we have explained in Chap. 5). The Maldives have actually been investing in other solutions such as the man-made protections¹⁰² and thus probably have the resources to reinforce the perimeters of a limited number of existing islands and elevate them to compensate for sea level

⁹⁵ Acquaviva (2005), p. 14.

⁹⁶ Acquaviva (2005), p. 15.

⁹⁷ Soons (1990), p. 230.

⁹⁸ BBC (2012a), Maldives President Mohamed Nasheed resigns amid unrest, available at <http://www.bbc.co.uk/news/world-asia-16922570>.

⁹⁹ Martin (2010) “Climate Change and International Migration”, by the German Marshall Fund of the United States.

¹⁰⁰ Randeep (2008) <http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change>, http://news.bbc.co.uk/2/hi/south_asia/7719501.stm.

¹⁰¹ Rayfuse (2010), p. 8.

¹⁰² Including the construction of artificial islands like Hulhumalé.

rise. Nevertheless, poorer nations such as Kiribati or Tuvalu could struggle to find the necessary resources to raise the level of existing islands, and could be forced to relocate. In this sense, Kiribati also demonstrated interest in 2012 to purchase 25 km² of land on Viti Levu (which belongs to the Republic of Fiji), an investment that was approved by the cabinet of president Anote Tong.¹⁰³ Another option mentioned would be the renting of islands. One such plan has already been approved by the Minister of Marine Resources and Fisheries of Indonesia, Fadel Muhammad. According to this plan, the Indonesian government will not rent the island to another state, but rather to a Maldives investor, PT Safari International Resort. PT Safari is planning to rent the island for the next 30 years at a cost of Rp 100 billion.¹⁰⁴

In 2008 Tuvalu had requested the government of Australia to grant resettlement to Tuvaluans, though the Australian government did not support the request. However, representatives of Torres Strait Islands, which belong to Australia, informally offered Tuvalu the use of one of their islands.¹⁰⁵ It should be noted, however, that these islands themselves would also suffer the effects of climate change, and that they might face the problem of a massive influx of people from the low-lying swampy southern coast of Papua New Guinea.¹⁰⁶

Political changes in the government of Atoll Island States can also cause changes to these plans. This can be demonstrated by the fact that although the previous government of Tuvalu had plans to purchase a piece of land in Fiji and to build some infrastructure these plans were not kept for a long time.¹⁰⁷

To highlight the challenges that these theoretical solutions could pose to the inhabitants of Atoll Island States (such as cession of territory and merger with another State) it is worth considering two case studies related to the relocation of islanders, that of the Banabans and Chagossians.

6.3.3 Purchase of Rabi and Resettlement of Banabans: Examples of Cession and Merger of Territory

The experience of Banabans can serve to illustrate the consequences that a total transfer of population between two islands can have on its inhabitants. Through the study of this case we argue that the solution of purchasing territory was feasible

¹⁰³ Pacific island to buy piece of Fiji as climate plan <http://www.newscientist.com/article/dn21581-pacific-island-to-buy-piece-of-fiji-as-climate-plan.html>.

¹⁰⁴ Jakarta Post (2010) <http://www.thejakartapost.com/news/2010/04/01/govt-approves-plan-rent-tabuhan-island-maldives-investor.html>.

¹⁰⁵ Displacement Solutions (2009) http://displacementsolutions.org/files/documents/DS_Climate_change_strategies.pdf.

¹⁰⁶ Boege (2010), p. 21.

¹⁰⁷ McAdam (2012), p. 145.

during the times of colonialism, though it brought a number of challenges and problems to these populations, some of which persist today. However, although the study of such a case can highlight the perils involved in such a solution, we would nevertheless like to emphasize in the current context these solutions are unlikely to be applied due to the challenge of finding a State which would be willing to relinquish some of its territory (as we outlined in the previous section).

6.3.3.1 The Banaban Displacement

The fate of the Banaban people started to radically change when their island was annexed by British Empire after it was found that 80 % of the island was composed of phosphate.¹⁰⁸

“Between 1901 and 1979, all but 60 hectares of their 595 ha home island of Banaba¹⁰⁹ was mined and shipped off by colonial interests”.¹¹⁰ This sentence summarizes the reason why Banabans were forced to leave their island. The beginning of the Phosphate extraction goes back to 1900, when the Pacific Islands Company secured the sole rights to mine the Island for 999 years in exchange for 50 pounds per year.¹¹¹ Phosphate, used as a fertilizer, boosted the development of farming in New Zealand and Australia. In 1901 a British warship raised a British flag in the island, which was then considered as a protectorate, though it was transformed into a colony in 1916.¹¹² In 1942 Japanese troops occupied the island and left three years later, moment in which the British Phosphate Commission decided to relocate the remaining population to Rabi island, 2,400 km away from Banaba Island and belonging to what is nowadays the Republic of Fiji.¹¹³ Rabi island was purchased with the Banaban Provident Fund of the islanders. Currently, the island itself is under the sovereignty of Kiribati,¹¹⁴ while Banabans live in Rabi island, which is part of the Republic of Fiji.

The administration system in Rabi Island was set forth in the 1945 Banaban Settlement Ordinance No. 28. The community was under the control of Europeans, who became advisors to the Banabans. In the 1960s the Banabans gained more autonomy under the Rabi Council of Elders. Banabans enjoyed freedom of movement to Banaban island and their land interests, payment of annuities from mining

¹⁰⁸ Hindmarsh (2002), pp. 15–16.

¹⁰⁹ It is also called Ocean Island and it is located in the west-central Pacific Ocean. The island has a circumference of about 6 miles (10 km). Banaba is the location of the highest point in Kiribati, reaching 87 metres above sea level. See <http://www.britannica.com/EBchecked/topic/51280/Banaba>, Accessed on 23 March 2012.

¹¹⁰ Hindmarsh (2002), p. 9.

¹¹¹ Hindmarsh (2002), p. 15.

¹¹² Hindmarsh (2002), p. 17.

¹¹³ Hindmarsh (2002), p. 10.

¹¹⁴ Hindmarsh (2002), p. 10.

in Banaba.¹¹⁵ In 1979, mining was finished and the Banabans lost their annuity, making their economic situation more precarious (although they still have their trust fund).¹¹⁶ The only formal employer on Rabi is the Rabi Island Council, the institute that manages the Rabi Island Trust Fund, which employs 30 % of the households (through government paid jobs, such as nurses, policemen or teachers). Most of the population lives out of subsistence farming (53 % of households) or have small businesses (7 %).¹¹⁷ Thus it is clear that Banabans have limited resources to develop economically, and that their autonomy is limited by economic factors since there are not many jobs available in Rabi island. This in turn places at risk their cultural heritage and many have been forced to migrate to other islands in Fiji in order to seek better opportunities.

Regarding their legal status, the Banabans were classified as Fijians according to the 1970 Constitution, under the same category as indigenous Fijians. Other groups, such as the Tuvaluan community, were registered as “General voters”. However, following the Constitutions of 1990 and 1997 the status of the Banabans shifted from “Fijians” to “Generals”. Thus, currently their legal status within Fiji is that of a minority group, in the same way as that of Rotumans, Indians, Europeans, part Fijian and Chinese minorities. Due to this status they have limited rights and educational benefits, which could result in future generations being left out of the mainstream economic and educational benefits.¹¹⁸ In practice, this means that Banabans are no longer able to gain access to special benefit schemes of affirmative action available to indigenous Fijians. Banabans can vote in national elections and the process of formal naturalization started in 2005 when the government stipulated that they should apply for citizenship in three months.¹¹⁹

Banaban island is currently under Kiribati’s sovereignty¹²⁰ and its status is provided in the Chapter IX of the Kiribati Constitution. These provisions include some safeguards to Banabans, such as that the right over their land will not be affected by virtue that they live in Rabi island (Art.119), all land that was acquired by the Crown before Kiribati Independence Day would be returned to the Banabans upon the completion of Phosphate extraction [Arts.119, 2 (b)], Banabans are entitled to enter and reside in Banaba, and the administration of Banaba is provided by the Banabans through the Banaba Island Council [Art.121(1)].¹²¹ Banabans, therefore, have their status established in legislation both in Kiribati and the Republic of Fiji.

¹¹⁵ Hindmarsh (2002), p. 24.

¹¹⁶ Hindmarsh (2002), p. 28.

¹¹⁷ Kumar et al. (2006), p. 136.

¹¹⁸ Kitaguchi et al. (2004), p. 848.

¹¹⁹ Kumar et al. (2006), p. 139.

¹²⁰ President Anote Tong mentioned that Banaba, which is the highest land in Kiribati, could host the government of Kiribati in order to assure the presence in the territory, see McAdam (2011), p. 109.

¹²¹ Sigragh and King (2004), pp. 1046–1047.

A number of similarities can be found between the re-settlement of the Banabans and the case of Atoll Island States deciding to relocate.¹²² For instance, as Edwards points out, in both cases the direct cause of relocation is man-made. For the case of the Banabans, phosphate mining was clearly the main factor that caused the forced resettlement of the islanders, an action on which they were not consulted. For the case of Atoll Island States, the displacement would be caused by sea-level rise due to the emissions of greenhouse gases and the death of the coral reefs, both of which are a consequence of anthropogenic interference in the global climate,¹²³ as outlined in Chap. 3. However, the relocation of the Banabans had a clear agent, the British Commission (which planned the resettlement), while for the case of Atoll Island States there is no clear identifiable agent, since the actors of climate change are diffuse. In both cases, though, the indirect cause of the relocation has as its source the economic development of industrialized countries. The mined phosphate which was used as a fertilizer contributed to farming in Australia and New Zealand, and major emissions of greenhouse gases has boosted the development of many countries since the industrial revolution. At the time of the resettlement of the Banabans the issue of self-determination was not one that was thoroughly embraced throughout all countries and territories, and the British Empire was able to force the movement of populations without consultation of those who would be implicated by such major changes. UNCLOS had not been established at that time,¹²⁴ and therefore discussions of EEZs, continental shelves and other maritime zones did not take place, as all territories were within the British Empire anyway. Currently, these questions would be unavoidable.

At the time when the Banabans were relocated such propositions were far easier, though nowadays countries would be extremely wary of doing this, for reasons explained later in this chapter. The islanders could relocate to an island already inhabited, though this would probably generate problems of adaptation to a new community¹²⁵ and of preserving their identity and culture. Moreover, the ever present hope of discovering oil, gas or other valuable resources under the seabed dissuades States nowadays from selling their territory.

Using the case of the Banabans as an illustration, it becomes clear that even if the population of Atoll Island States manages to obtain a new piece of territory their economic situation would be hardly satisfactory, as it is unlikely that they will be given land of much value in terms of natural resources.¹²⁶ The governments might be able to claim some income from fishing rights around their existing EEZ (if they managed to retain control of it, as outlined in Chap. 5, though the potential impacts of climate change on fish stocks is also something to be considered¹²⁷), but

¹²² Edwards (2011), p. 8.

¹²³ Edwards (2011), p. 9.

¹²⁴ UNCLOS was established in 1982.

¹²⁵ Displacement Solutions (2009).

¹²⁶ Rayfuse (2009), p. 8.

¹²⁷ UN High Commissioner for Refugees (2011), p. 13.

otherwise it is unlikely that any new piece of land that they could obtain would offer them many opportunities. If an Atoll Island State was to lose its EEZ, it would be fair that in compensation it should be given an EEZ in another country, but the potential areas that could be given are also unlikely to be of great value.¹²⁸ If a third State accepts to cede land to an Atoll Island State, then it appears that in return it might have to agree on a joint access with that State to the archipelago's resources¹²⁹ while the islands are not completely submerged. If only a rock is left above the water at high tide, a possible successor State (which could be the State ceding land to the Atoll Island State) would be entitled to territorial sea and contiguous zone, although it would probably not be able to secure its EEZ, as discussed in Chap. 5. Furthermore, if they had not managed to permanently delimit the outer limits of the continental shelf then this could potentially also be lost.¹³⁰ Maritime resources have always been highly valued, and in a world of ever-increasing need for raw materials and resources the awareness of which areas have any potential value is forever increasing. Hence it is unlikely that any State would agree to relinquish control over any land that can give a claim to maritime areas, as there have been examples of how a State has voluntarily handed over control of a certain area (for example the sale of Alaska to the U.S.A.), and then valuable natural resources have been found on it.

By inhabiting Rabi and keeping Banaba island, Banabans have actually increased the territory in which they reside, though they now fall under the jurisdiction of both Kiribati and Fiji. However since Banaba cannot currently support any agriculture or population the result is that they increased their responsibilities without having the resources to sustain the administration and infrastructure of both islands. For the case of Atoll Island States, it could be theoretically possible for them to keep two different territories for some period of time while there is a meaningful "inhabitable" piece of land that is not submerged in their native archipelago, so that they could preserve their maritime rights (see Chap. 5). However, once the last island is completely submerged they would lose this great economic resource. Therefore, careful planning for what could become a predictable situation appears necessary.

The case of the Banabans can provide good insight into the challenges that Atoll Island States could face in resettling to another territory. It will be difficult to resettle in inhabited lands within another State's territory and claim sovereignty over them, as the local population would have to share the land with the newcomers.¹³¹ This type of transfer has occurred in the past in the cession of

¹²⁸ Rayfuse (2009), p. 8.

¹²⁹ Kelman (2008), p. 21.

¹³⁰ Hayashi (2010), p. 106. Note that often States claim a continental shelf larger than the extent of the EEZ, and that thus this discussion is more complicated than summarised here. For more details see the different scenarios outlined in Chap. 5.

¹³¹ Nauru Local Government Council turned down resettlement to Australia because such scheme "would lead to assimilation of the Nauruans into metropolitan communities where they settled". See McAdam (2012), p. 151.

Alaska or the Virgin Islands, but nowadays such a proposition would be even more challenging since States are not supposed to dispose of their territory without consulting the local population. Therefore, although it could be envisaged how a State might be prepared to allocate some territory for a certain group of people to inhabit, it appears more difficult that a State would be prepared to surrender sovereignty over that piece of land so that another State might start exercising sovereignty over it. If the inhabitants of an Atoll Island State migrate to other States but do not acquire any land for the population to resettle, they could attempt to establish a place to base their government facilities and become a de-territorialized entity such as the Sovereign Military Order of Malta (SMOM), as will be explained later in this chapter. This would rely on the recognition of other States, and *de jure* recognition by other States is of key importance to maintain sovereignty for governments who could lose territorial control of all of their lands.¹³²

The resettlement of the Banabans was not caused by climate change but imposed by the British Empire on the local population. However, their experience can give an example of how the entire population of a Pacific island fared after they were forcibly displaced to an uninhabited island of different geographical characteristics. The case of Banabans involved both a cession of territory (since an entire island was purchased for their resettlement) and the merger with other entities (since they are now part of Fijian and Kiribati States).

6.3.3.2 The Chagossian Displacement

The Chagos Archipelago (“the Chagos”) is a small group of atolls in the Indian Ocean, lying south of the equator, about halfway between India and Africa.¹³³ The largest island in the archipelago is Diego Garcia, leased to the US by the UK, and which currently hosts a US military base. The Chagos archipelago belonged to the British Colony of Mauritius for about 200 years and on the verge of becoming independent was excluded from Mauritius to become the British Indian Ocean Territory (BIOT) on November 1965 under the BIOT Order of the Queen of England. Through this Order the Chagos continued to belong to the United Kingdom while Mauritius became independent in 1968.¹³⁴ The archipelago is thus currently under American and British control, though the Republic of Mauritius also claims sovereignty over it. The Americans control the base and the British manage the police, court system, work and entry permits.¹³⁵

In order to build the base, the UK expelled the entire population, about 1,800 people at the time.¹³⁶ By purchasing Chagos Agalega, the only company on the

¹³² Maas and Carius (2012), p. 658.

¹³³ Nauvel (2006), p. 96.

¹³⁴ Nauvel (2006), p. 100.

¹³⁵ Nauvel (2006), p. 97.

¹³⁶ Allen (2008), p. 684.

island (which was involved in the extraction of copra), the UK claimed that copra production had declining profits, thus ending the extraction and resettling the inhabitants to other islands.¹³⁷ The process of expelling the residents started by reducing food supplies, forcing people to leave the island. In 1971 the remaining inhabitants were removed from Diego Garcia to Peros Banhos and Solomon, and finally in 1973 to Mauritius, where there were neither resettlement nor reintegration plans for them. In the same year the British government agreed to pay £650,000 to the government of Mauritius for the resettlement, an amount that took 5 years to be handed to the Chagossians. Later in 1979 the government agreed to pay £1.25 million. Eventually, a final settlement was made in 1982 and the inhabitants received £4 million. The Mauritian government established a trust to manage the funds.¹³⁸

Although the main cause of their displacement differs from that of the Banabans and Atoll Island States, it also has human influence at its core. While in the displacement of Banaban at least the inhabitants were guaranteed an entire island where they could resettle and did not become stateless, Chagossians, on the other hand, arrived in Mauritius and Seychelles without any piece of land reserved for them to resettle to. Hence this represents a case when the displacement of a population took place without any organized system or assistance provided for the resettlement (Table 6.1).

6.4 Status of Acquired Territories

Only a formal cession of land at the State-to-State level would enable the inhabitants of Atoll Island States to treat any acquired land as part of their own territory.¹³⁹ As Crawford points out, “international law defines ‘territory’ not by adopting private law analogies of real property, but by reference to the extent of government power exercised, or capable of being exercised with respect to some area and population”.¹⁴⁰ Thus, the territory of a State is not like a private property which can be sold and automatically transferred to the purchasing State. It is an operation which requires agreement between States, and what is characteristic of a State’s territory is the power that its government has over it.

However, the forced displacement of Banabans and the purchase of Rabi Island, which belonged to Lever’s Pacific Plantation Pty. Ltd and was sold to the Western Pacific High Commission, was similar to a real property transaction since the whole island was bought in order to receive a new population. It was not necessary to deal with a sovereign entity, but rather with the plantation company in Rabi Island since

¹³⁷ Bradley (1999), p. 86.

¹³⁸ Bradley (1999), p. 86.

¹³⁹ McAdam (2012), p. 149.

¹⁴⁰ McAdam (2012), p. 147 referring to Crawford (2006), p. 56.

Table 6.1 Comparison of Banabans and Chagossians in relation to the possibility of the future relocation of Atoll Island States

	Atoll Island States	Banabans	Chagossians
Cause of displacement	Sea level rise and the possible death of coral reefs (and other climate change related causes brought about by anthropogenic influences in the climate)	Phosphate extraction destroyed the environment of the island	Construction of a military base required removing all local population
Cession of territory	This solution could preserve their status as a sovereign country although it is probably not feasible since it is unlikely any other country would agree to provide lands	Yes. Purchase the uninhabited island of Rabi which belongs to Fiji Republic (while the Banaban Island belongs to Kiribati)	No. Population spread over Seychelles and Mauritius
Merge of territory	This solution would result in a loss of sovereignty to the Atoll Island State	Yes. Their old territory was merged with Kiribati while the new island belongs to Fiji	No. They did not have any exclusive territory in which the population could resettle
Statehood	Yes. Tuvalu, Marshall Islands, Maldives and Kiribati are all States (and members of the UN), but if they merge with another country they could lose it	No. Before the resettlement Banaba was part of the British Empire. Currently, the constitutions of Kiribati and Fiji guarantee some rights	No. Chagos was separated from Mauritius before independence. The population was relocated before independence was declared. This has perpetuated UK sovereignty over the territory
Resettlement location	Still to be decided, if any. Many inhabitants of these islands currently reside in other States, such as Australia or New Zealand	Another uninhabited island	Other inhabited islands and States
Statelessness	It can be avoided if dual citizenship is granted or if other States continue to recognise the sovereignty of the Atoll Island State	No, they have dual citizenship	Yes, they lost British citizenship, but recovered it after 30 years

(continued)

Table 6.1 (continued)

	Atoll Island States	Banabans	Chagossians
Type of territory for resettlement	If population resettles to a larger land mass it would represent change of identity and possibly the assimilation of the population	Island	Islands
Beneficiaries of the resettlement of the Islanders	Primarily large polluting nations, which can continue to pollute without taking drastic mitigation action	Australia and New Zealand: main recipients of the mined phosphate	US and UK: established military base in Diego Garcia
Plans for resettlement	Some indications have been made by some countries (such as the Maldives or Kiribati) that they could be eventually forced to resettle. However, no formal plans exist yet	Yes, partially. An island was acquired, but lack of infrastructure and jobs caused impoverishment	No. UK provided some compensation to Mauritius to invest on the resettlement, but it took a long time for the Chagossians to receive it

there was no government¹⁴¹ that existed before the purchase of the island. In the following section we will examine some of the potential implications of the acquisition and merger of territory from the point of view of Atoll Island States. As we have explained earlier, it is unlikely that Atoll Island States could acquire lands of any meaningful value and it is more probable that the poorer States should as Tuvalu would eventually end up as some sort of de-territorialized entity, a point that will be discussed later in this chapter.

6.4.1 *Merger of Territory*

One point to consider is that for the case of Atoll Island States most of the discussion by various commentators regarding the acquisition of new lands has centred on islands (i.e. where an Atoll Island State would acquire an island in another country and gain full sovereignty over it). This can then lead to the discussion regarding the acquisition of new EEZ areas, which has the potential to create conflict, as one small island can actually command an EEZ over an extensive area.

However, it could be possible for an Atoll Island State to merge with another State, a possibility suggested by Soons and Caron.¹⁴² In this case an Atoll Island

¹⁴¹ Rabi island was put for sale by the Tongan king in 1855 and was transformed into plantation fields. See Kempf (2011).

¹⁴² Soons and Caron, cited in Rayfuse (2010), p. 9.

State that believed it could end up disappearing would “merge” with another State before this situation happened, “ceding” its ownership over its existing territory and maritime claims. The union with another State could create a new State or the Atoll Island State could subsume into an existing State.¹⁴³ Maritime zone boundaries could be settled between the two countries before the merger. The consequence of this suggestion, according to Rayfuse, is that pre-existing maritime zones would remain effective, but the zones would belong to the host state. The disappearing State would in effect purchase new land in the host State by ceding its maritime zones to this State. In addition, the host State would also represent the interests of the relocated population.¹⁴⁴ It has been suggested, however, that some of the potential countries that could receive the population might not be willing to accept the whole population of the island, but would be interested in acquiring the remaining land of Atoll Island States due to the benefits associated with the Exclusive Economic Zone and the continental shelf.¹⁴⁵ However, given the size of the populations involved and the considerable benefits that could be obtained (the population of Tuvalu, for example, is around ten thousand people¹⁴⁶ but currently have an EEZ of around 757,000 km²¹⁴⁷) it is not implausible that large countries would be willing to accept all inhabitants. Nevertheless, some commentators have questioned whether the population would be willing to move¹⁴⁸ and relinquish their independence, especially while the islands still existed.

The difference between the cession of territory and the union with another State is that in the former the territory would belong to the Atoll Island State, enabling its continuity as a sovereign country,¹⁴⁹ while in the case of a union with another State the Atoll Island State would lose its statehood. In this case, it could be argued that some sort of autonomy could still be preserved, similarly to the regimes that establish the rights of indigenous populations in Canada and New Zealand¹⁵⁰ or to the case of the Banabans, although this would depend on the exact negotiations that would take place at the time. Most of the population could be absorbed by the host State and a place set apart for the distinct socio-political and cultural identity of the islanders to be preserved, though it is also likely that a significant number of individuals would scatter amongst different countries.

¹⁴³ UN High Commissioner for Refugees (2009), p. 18.

¹⁴⁴ Rayfuse (2010), p. 9.

¹⁴⁵ Stahl (2010), p. 34.

¹⁴⁶ 10,619 according to the CIA Factbook (2012) <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>.

¹⁴⁷ Pacific Islands Forum Secretariat (2012), <http://www.forumsec.org/pages.cfm/about-us/member-countries/#tuvalu>.

¹⁴⁸ As an example of a refusal to settle in another land, Nauru Local Government Council rejected proposals of settling to Australia. See McAdam (2012), pp. 149–153.

¹⁴⁹ By changing its geographical location, as in the case of the Boers case mentioned earlier in this chapter.

¹⁵⁰ Kelman (2008), p. 21.

In this case, the purchase of land would ideally not just be done as an exercise in the acquisition of private property, but under the agreement that the areas purchased would have their own autonomous government,¹⁵¹ possibly similar to what exists in many federal countries.¹⁵² Of course this is not necessarily an easy task, and such an undertaking might require the consultation of the population of the country through a referendum. The merger would nevertheless represent a clear loss of status for the population of the Atoll Islands States since they would from that point fall under the sovereignty of another State and would lose the capacity to maintain international relations.

However, if the former Atoll Island State obtained a certain level of autonomy it would be able to preserve its self-government and self-determination. The characteristics of an autonomous territory are not defined uniformly and vary widely amongst countries, but it could include a territorial government which would provide freedom from control or interference in the executive, legislation and judiciary powers,¹⁵³ democratic participation of the population which would enable elected representatives to preserve political power; economic and social jurisdiction which would provide autonomy regarding economic and internal affairs.¹⁵⁴

This form of political organization could be established to preserve the culture, language and economic resources of the population of the Atoll Island State. The extent to which it can be achieved depends on to what State they would relocate to, and this might be especially important if resettlement was to a State that was ethnically uniform, as autonomy could ensure that culture and traditions were preserved.

Although it could be claimed that if the former sovereign people of Atoll Island States move to a new territory they could later claim their right to self-determination in order to secede from the host State,¹⁵⁵ it would be difficult to

¹⁵¹ Benedikter defines autonomy as “a means of internal power sharing aimed at preserving the cultural and ethnic character of a region and ensuring a major dimension of regional democratic self-government”. See Benedikter (2009), p. 10.

¹⁵² See Kelman (2006), p. 8. Other governance models for re-creating island communities include: Provinces, e.g. Prince Edward Island, Canada; Sub-national states, e.g. Tasmania, Australia; Sovereign states, e.g. Barbados; Full self-government in free association with a governing country, e.g. the Cook Islands and Niue with respect to New Zealand; Self-administering territory, e.g. Tokelau with respect to New Zealand; Compact of free association with a governing state, e.g. the Federated States of Micronesia and Palau with respect to the USA; A commonwealth in political union with a governing state, e.g. the Northern Mariana Islands with respect to the USA; Overseas territories, e.g. St. Helena and Pitcairn Island with respect to the UK; A dependency of a territory, e.g. Ascension Island and Tristan da Cunha with respect to St. Helena; Semi-autonomous, e.g. Zanzibar with respect to Tanzania.

¹⁵³ This can involve for example a level of autonomy involving parallel and complementary justice systems, such as those for indigenous people in Canada and New Zealand, see Kelman (2008), p. 21.

¹⁵⁴ Benedikter (2009), p. 13.

¹⁵⁵ Stahl (2010), p. 30.

assure economic independence without access to marine resources, which would make this proposition difficult in practice. As explained previously, it is unlikely that whatever lands could be potentially offered would be of much value. It would be of course possible to obtain an income from other sources, such as offshore banking or tourism, though again it would at present seem difficult that such activities could be successful in any lands that would be ceded (due to their possible remoteness, lack of infrastructure and the necessary skills and finance that would be required).

6.5 De-Territorialized State

Atoll Island States could survive as sovereign entities not only due to the presumption of continuity but also because territory is not necessary for the preservation of statehood, at least after statehood has been established.¹⁵⁶ For example, The Polish, Yugoslav, Czech and Baltic states governments which were annexed by the Axis powers and the Soviet Union between 1936 and 1940 continued to have legal personality and recognition, at least by the Allied Powers.¹⁵⁷ Thus, statehood (in the eyes of certain countries at least) is not necessarily lost following the total loss of territory of a recognised government. Nevertheless, for the case of Atoll Island States climate change and its related consequences could cause the total disappearance of the territory itself, rather than the former government being chased out by an invader. This situation of the territory itself disappearing represents a new situation, at least in modern times, but it does not imply necessarily that statehood (which has already been acquired through the de-colonization process) would be lost. As Crawford points out, in the early part of the twenty-first century international legal doctrine and theory is more pluralist due to the fact that non-State entities can acquire a distinct international status.¹⁵⁸ Although some countries could stop recognizing the sovereignty of submerged Atoll Island States and cut diplomatic relations, States can only have their UN membership rescinded by breaking the principles of the Charter and after recommendation of the United Nations Security Council (Art. 6 of the Charter of the United Nations).

In the long term, though, if coral islands are progressively eroded (as explained in Chap. 3), leaving an area of land devoid of vegetation (a “rock” under UNCLOS, as per Scenario II in Chap. 5), it would be difficult for the Atoll Island State to claim an EEZ around it. However, as long as this uninhabited rock is still above sea level it falls within Art. 121 (3) of UNCLOS and the State would still keep sovereignty over it. Nevertheless, as more and more islands disappear the Atoll Island State

¹⁵⁶ Grant (1999), p. 435.

¹⁵⁷ Grant (1999), p. 435.

¹⁵⁸ Crawford (2006), p. 254.

would see its revenues slowly decrease, which would make the upkeep of the government and services it provides increasingly difficult.

Eventually, if the Atoll Island State was to physically lose all the islands that make its territory (through a combination of coastal erosion and sea level rise), it would find itself in a situation that has certainly not occurred in modern history. Although it is of course possible that a State could obtain new lands, as explained in previous sections of this chapter,¹⁵⁹ it is more likely that third countries will offer residency to Atoll Island States citizens than give them sovereignty over any land offered. In this section we will explore the logic, precedents and implications for a de-territorialized State.

6.5.1 De-Territorialized States in History and Nowadays

In fact, the concept of sovereign entities without a territory is already perceived and recognized by some States, such as for example The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta (SMOM), or the International Committee of the Red Cross (ICRC). Both are considered as sovereign and have a standing invitation to the UN General Assembly.¹⁶⁰ However neither is considered an international organization or a non-member state (such as the Holy See), and have no voting rights.¹⁶¹

The ICRC is formed as an association under the Swiss civil code, and is funded by contributions made by members and donations. Our discussion will concentrate in the other two cases, as they present more clear examples of the concept of a de-territorialized entity. Nevertheless it is important to note that international law has also been recognizing the right of other entities to exercise aspects of functional sovereignty at the international level, such as in the case of European Union. The term “other entity” has also been used in other treaties, such as the United Nations Fish Stock Agreement.¹⁶²

6.5.1.1 The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta (SMOM)

The Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta (SMOM) is an ancient religious order currently dedicated to the provision of medical services. Throughout its history it was sovereign over the islands of Rhodes (1310–1528) and then Malta (1530–1798), from where it was ejected by Napoleon

¹⁵⁹ Maas and Carius (2012), p. 659.

¹⁶⁰ Maas and Carius (2012), p. 659.

¹⁶¹ Maas and Carius (2012), p. 659.

¹⁶² Rayfuse (2010), p. 11.

in 1798. Up to that date the SMOM was a State, though from then on it has still retained sovereignty under international law, despite no longer being classified as a State.¹⁶³ The Papal tribunal added that “the status of the sovereign Order (. . .) is functional, that is to say, intended to assure the fulfilment of the scope of activities of the Order and its development throughout the world”.¹⁶⁴ Also, they still have their own government and issue passports, but detain a personality recognized by certain States only.

The organs of the SMOM (which are not subject to taxation) are hosted by Italy and the Order enjoys sovereign immunity in countries that recognize it. Currently, the Order has formal diplomatic relations with 102 States and missions to some European countries, as well as to European and international organisations.¹⁶⁵

6.5.1.2 The Holy See and Vatican City

The Vatican City and the Holy See form another clear example of an entity that, while possessing a clear territory today, has not always done so. Until 1870 the Pope was sovereign over the so-called Papal States, which were then annexed by Italy during the unification of the country. Subsequently the Papal See was recognised as a State despite possessing no territory, until it was granted sovereignty over the Vatican City by the Lateran Treaties of 1929.¹⁶⁶ Although the Holy See lacked any territory during this period this did not affect its status as a subject in international law,¹⁶⁷ as it continued to send legates and emissaries which were recognised by countries throughout the world.¹⁶⁸

Although it could be claimed that this notion of a de-territorialized entity no longer applies to the case of the Vatican as it now possesses a territory, the reality is more complex, as Martens explains.¹⁶⁹ The fact is that “the Vatican and the Holy See are two separate entities” whose relationship in international law is not clear either.¹⁷⁰ According to this commentator there are several competing theories:

According to the monistic theory, there is only one subject of international law, although it is not clear what this subject is. There are three possible candidates. In the first hypothesis, the Holy See is the only subject of international law, Vatican City State is only a territory with extra-territorial rights, but not a separate subject of international law. The second hypothesis is exactly the opposite: because of the Lateran Treaty, the Holy See is no longer

¹⁶³ The Sovereign Military Hospitaller Order of Saint John of Jerusalem Official Website (2008) <http://www.orderofmalta.org/site/struttura.asp?idlingua=5>.

¹⁶⁴ Crawford (2006).

¹⁶⁵ The Sovereign Military Hospitaller Order of Saint John of Jerusalem Official Website (2008) <http://www.orderofmalta.org/site/struttura.asp?idlingua=5>.

¹⁶⁶ Rayfuse (2009), p. 10.

¹⁶⁷ Acquaviva (2005), p. 13.

¹⁶⁸ Martens (2006), p. 743.

¹⁶⁹ Martens (2006), p. 754.

¹⁷⁰ Martens (2006), p. 730.

a subject of international law – only Vatican City State is a subject of international law. The Holy See however can use the advantages of Vatican City State. A third hypothesis is somewhat related to the first one, or least with regard to the result: Vatican City State is not a subject, but an object of international law, because all its competences are taken over by the Holy See¹⁷¹

In fact, as Martens explains, the concept of how the Holy See is categorized is highly complex, as States hold diplomatic relations with it and not with the Vatican City, and this leads to different authors classifying both of these entities (The Holy See and the Vatican City) as either a State, entities *sui generis* (comparable to the SMOM) or “other entities – selected anomalies”. The position of the Holy See within the United Nations is also not questioned, where it is a Permanent Observer State, party to diverse international instruments and member of various United Nations subsidiary bodies, specialized agencies and international intergovernmental organizations.¹⁷² This is despite the fact that the Holy See as such does not have a permanent population or defined territory, and although it currently has a link with the Vatican City (which does possess these elements) it did not possess these between 1870 and 1929. In a certain way it could be claimed that the Holy See was a “government-in-exile” during this time, although the link is far from perfect and far more nuanced in this case.¹⁷³

Nevertheless it could be possible for an Atoll Island State whose territory disappeared to fall within a similar framework as that of the Holy See. Essentially such a State could claim to be waiting for future events to re-establish control over a territory¹⁷⁴ in a way similar also to that of governments-in-exile.

Therefore, the acquisition of lands by an Atoll Island State might not necessarily be the only solution and a number of compromise and intermediate solutions can be envisaged. For example, in order to prevent the issue of statelessness (see Chap. 7) one possibility would be that some small portion of territory could be ceded to the disappearing State to ensure its continued existence,¹⁷⁵ a sort of “Vatican” solution. If other States were to agree that this still represented the same State it could prevent its inhabitants from potentially becoming stateless.¹⁷⁶ The government of an Atoll Island State could acquire land in another country and settle within it, but only be granted full sovereignty over a small portion of one city or village, similar to the Vatican within Rome.¹⁷⁷

¹⁷¹ According to French canon lawyer Roland Minnerath, as summarized by Martens (2006), p. 754.

¹⁷² Martens (2006), p. 758.

¹⁷³ For a more detailed explanations of the legal complexities of the relation between them see Martens (2006), p. 83.

¹⁷⁴ This could be for example the possible future reappearance of the islands, during a period in which sea level started to come down.

¹⁷⁵ UNHCR (2009), p. 2. <http://www.unhcr.org/4a1e50082.html>.

¹⁷⁶ UNHCR (2009), p. 2. <http://www.unhcr.org/4a1e50082.html>.

¹⁷⁷ Where Italy recognized exclusive and absolute power and sovereign jurisdiction of the Holy See over the Vatican City. A special case is made for St. Peter’s Square, which is part of the

The citizens could then buy property and lands around this one area, which would continue to remain part of the “host” State, but could retain their identity and nationality by holding full sovereignty over a small patch of land comprising government buildings and institutions. In essence, these ceded lands would not be much different to an “enlarged embassy”, and it could be possible that certain countries would agree to such an arrangement, especially if the area was landlocked and thus unable to give rise to any claims on EEZs or other maritime zones.

6.5.2 *Political Trusteeship*

Rayfuse proposed a trusteeship to be established in order to manage the assets of the citizens of Atoll Island States which would find themselves living in host States or in diaspora.¹⁷⁸ This authority would represent the de-territorialised State at the international level and the interests of citizens in their new host States.¹⁷⁹ Burkett suggests that a form of preserving self-determination and sovereignty for the case of Atoll Island States would be the establishment of a new international law actor, a de-territorialised state¹⁸⁰ which would be a hybrid structure that would allow long-distance governance and preserve the holding of resources in the best interest of the people.¹⁸¹ Burkett applies as the basis of the model the UN Political Trusteeship, with certain modifications being made to adapt it to the particularities of Atoll Island States. The Political Trusteeship was created after World War 2 and according to it the natural resources of a territory should be kept in the hands of the local population. The territories eligible are (1) territories placed under the Mandate System; (2) territories which were controlled by the defeated powers of World War 2; and (3) any territory brought under the system voluntarily by the States responsible for their administration.¹⁸² The UN Trusteeship System excludes members of the United Nations due to the principle of sovereign equality.¹⁸³ The role of the trustee was to care of the ward and to promote the evolution of the trusted territory so that it could eventually be self-administered. It had a “civilizing mission”.¹⁸⁴

According to Burkett, the modified trusteeship would be essential to maintain the sovereignty and self-determination of the populations of Atoll Island States. The

Vatican City but continue to be open to the public and subject to the powers of Italian policy, thought the power of this police interestingly ends right at the foot steps leading into the basilica. For a more detailed explanation of how this arrangement works see Martens (2006), p. 729.

¹⁷⁸ Rayfuse (2010), p. 11.

¹⁷⁹ Rayfuse (2010), p. 11.

¹⁸⁰ De-territorialised states is called as nation ex-situ by Burkett, see Burkett (2011).

¹⁸¹ Burkett (2011), p. 345.

¹⁸² Art. 77 (1) of the UN Charter.

¹⁸³ Burkett (2011), p. 364.

¹⁸⁴ Wilde (2009), p. 103.

main difference between the traditional Political Trusteeship System (which purportedly had as its main objective to enable a territory to achieve self-determination¹⁸⁵) and that proposed for Atoll Island States is that it would have as its scope the preservation of existing sovereignty.

For the case of Atoll Island States the trusteeship would be established by the Security Council or General Assembly.¹⁸⁶ In order to preserve the sovereignty of the endangered State the United Nations and its member States would only act to support the transition to a de-territorialised state.¹⁸⁷ According to Burkett, the Trustee would serve as a body which governs alongside the existing ex-situ government of the endangered State and would facilitate an orderly transition for its inhabitants; amongst its functions would be to provide diplomatic protection to the citizens of the Atoll Island States living in other States.¹⁸⁸

The concept of the creation of a de-territorialised State would be an interesting possibility, and theoretically speaking a political trusteeship would ensure that Atoll Island States could preserve their resources and culture in a host State.¹⁸⁹ It would afford all the rights and benefits of sovereignty and the government would exercise authority over a diffuse people. It assumes that the population would not be concentrated only in one location, but rather that it would be spread over various countries.¹⁹⁰ This possibility of the existence of a de-territorialized State is a good starting point to discuss how the governments of these Atoll Island States could propose ways of managing their EEZ (if they could still claim them in the future, as discussed in Chap. 5) by having their government relocated to another country. Some authors claim that preserving the statehood of Atoll Island States would help to maintain their personal and group pride ideology, traditionally associated with a territorialized entity.¹⁹¹ These de-territorialized States are somewhat similar to the idea of having a government-in-exile; the difference between a de-territorialized State and the government-in-exile is that in the latter there is expectation that the government could eventually return to its original territory, which would not be the case for a de-territorialized State.

The application of the political trusteeship could prove to be a structure that assists in safeguarding the statehood of Atoll Island States. However, it could also be interpreted as a lack of capacity by Atoll Island States to deal with this transition by themselves and thus require external intervention to ensure their new status before the international community. Would Atoll Island States really require the assistance of the UN and an Administering Authority to deal with their future problems? The political trusteeship was a decolonizing instrument, but its

¹⁸⁵ <http://www.un.org/en/decolonization/its.shtml>.

¹⁸⁶ Burkett (2011), p. 364.

¹⁸⁷ Burkett (2011), p. 346.

¹⁸⁸ Burkett (2011), p. 365.

¹⁸⁹ Burkett (2011), p. 346.

¹⁹⁰ Burkett (2011), p. 346.

¹⁹¹ Burkett (2011), p. 367.

application to independent States could be interpreted as a mechanism that undermines their sovereignty.

Even if these types of de-territorialized entities could be established, a number of practical problems could affect them. The historical experience of governments-in-exile can provide some useful insight into some of the challenges that a de-territorialized State would face once it no longer held any territory, as will be explained in the next section.

6.6 Government-in-Exile

It could be argued that effective government and not territory is essential to preserve political power.¹⁹² This claim can be backed by the fact that governments-in-exile and international organizations have had their status guaranteed in international relations. The case of Somalia¹⁹³ and other governments-in-exile highlights how *de jure* recognition of a State by other States is of key importance to the issue of recognition, as a government without territory can still be recognised as a State by other countries.

Governments-in-exile have frequently been recognized by their allies as governments of an enemy-occupied State during the course of the conflict and pending its outcome.¹⁹⁴ The possibility exists that in the case of the disappearance of the territory of an Atoll Island State a government-in-exile could be created, as in the case of the Polish government during World War II. However, governments-in-exile normally exist on the assumption of restoring power in their own country, and until recently have been more connected to situations of international (Poland and the Baltic Countries during World War II) or national conflicts (Taiwan and China). In World War II, after Germany's invasion, Poland's government-in-exile was constitutionally continuous with the pre-1939 government.¹⁹⁵ After the Yalta and Potsdam Agreements, Poland's population and territory were redistributed and a different constitutional system was imposed, though in practice the State remained the same as before 1939.¹⁹⁶

The difference between an Atoll Island State whose territory disappeared and a government-in-exile is that while the latter would have the possibility of restoring its power over a determined territory, the former cannot expect to recover its current territory in the near future since the coral islands that constitute it would no longer

¹⁹² Acquaviva (2005), p. 34.

¹⁹³ Where through many years the internationally recognized government only controlled small areas of the capital (and at times not even that, before the intervention of Ethiopian troops in 2006), see BBC (2012a, b).

¹⁹⁴ Crawford (2006), p. 688.

¹⁹⁵ Crawford (2006), p. 692.

¹⁹⁶ Crawford (2006), p. 692.

be there. A change of focus from States to other non-State entities would ensure more attention to the case of the Atoll Island States, and thus to the needs of some of these developing nations.¹⁹⁷

International law emphasizes the political power of States and hence governments-in-exile are a neglected feature of international politics with their achievements under-reported and their existence under-theorized.¹⁹⁸ Most of the geopolitical holes are not visible for western strategists since there is a tendency on focusing on States that have global resources or with important historical or cultural ties to industrialised countries.¹⁹⁹ However, that does not mean that they do not exist. The Tibetan Government-in-Exile, for example, is an entity which tries to preserve a polity by providing health services, education system for Tibetans living in India and Nepal, a voluntary taxation system, the issuing of Tibetan passports and implementation of democratic parliamentary elections.²⁰⁰ Although it struggles to keep the polity, the Tibetan Government-in-Exile is not internationally recognized and lacks sovereignty over a territory. In addition, it has neither a police nor a military force and cannot legally defend its citizens.²⁰¹

However, the key problem for the case of Atoll Island States is that governments-in-exile are usually recognised because they have the prospect of one day returning to their territory. Maas and Carius argue that “this option may be unavailable for island states until sea-levels begin to fall again”.²⁰² This is actually an important point, as in the future eventually sea levels will probably fall once again, if societies learn to live without fossil fuels and due to global long-term climate cycles. Hence, although in the short-term these atolls could disappear, there is always the prospect that they could once again re-appear (although of course this would not be certain even if sea levels went down, as it would depend also on the ability of corals to evolve²⁰³ and re-colonize the islands²⁰⁴).

Even if Atoll Island States do not have power over any territory, their citizens could be prevented from becoming stateless by this continued recognition as governments-in-exile. In fact, the idea of these States becoming governments-in-exile could obtain favour amongst a number of other governments, if it is made clear that it is anchored on the rationale that one day the atolls could re-appear. As governments-in-exile have been recognised by various States throughout history the concept is not new, and would not involve lengthy discussions about its implications. In fact the only difference would be that the government would

¹⁹⁷ McConnell (2009a), p. 1911.

¹⁹⁸ McConnell (2009a), p. 1906.

¹⁹⁹ McConnell (2009a), p. 1906.

²⁰⁰ McConnell (2009b), p. 116.

²⁰¹ McConnell (2009b), p. 116.

²⁰² Maas and Carius (2012), p. 659.

²⁰³ Assuming of course they still even existed as a species.

²⁰⁴ The IPCC 4AR also notes how it would take thousands of years for greenhouse gas concentrations in the atmosphere to reduce, even if emissions completely cease.

have been ousted not by the invasion of a military power, but by climate change brought by emissions of greenhouse gases, mostly from developed States.

6.7 Recognition Scenarios

Essentially, following the arguments presented in the previous section for de-territorialised States and governments-in-exile it would be possible to envisage a number of different scenarios for Atoll Island States that lost all their present lands²⁰⁵:

- A “**Continued Recognition Scenario**”, where Atoll Island States that are completely submerged would continue to be recognised by other States, preserving all membership of international organisations, though their seat of government would be in another land. They could also, for example, keep their status as UN members or be granted the status of Permanent Observer at United Nations, as what happens with the SMOM. It is possible that States which are geographically closer to them would accept to host their organs of government, though it could also be reasonable to have the States which were responsible for major emissions of greenhouse gases to share the burden of receiving not only part of the population of these countries, but to also assure their preservation as sovereign entities. The question which remains is whether the international community would accept this form of statehood.²⁰⁶ If the ability of the de-territorialized State to emit passports is recognised then the issue of preserving the nationality of its citizens (something that will be discussed in more detail in Chap. 7) becomes more straightforward, such as in the case of the SMOM.
- A “**Selective Recognition Scenario**”, where only some States would continue to recognise Atoll Island States whose entire territory had become submerged, with others breaking-off diplomatic relations. However, as stated previously, it is unlikely that the country could be expelled from the UN, as States can only be expelled for consistently breaking the principles of the Charter and after this has been recommended by the UN Security Council. Lack of recognition by some UN members does not necessarily mean the expulsion from the UN or other bodies, as in the case of Turkey and Cyprus.²⁰⁷ This scenario could represent a problem for the citizens of the country, since there is the possibility that their passport would not be recognized by some countries. This would imply issues of statelessness *de facto*, as explained in Chap. 7. The case where only some countries recognized these States could also lead to very complex legal and

²⁰⁵ These scenarios have been adapted from those presented in Maas and Carius (2012), p. 659.

²⁰⁶ Yamamoto and Esteban (2010), p. 6.

²⁰⁷ Maas and Carius (2012), p. 659.

geo-political situations. It could be possible, for example, for one country to recognize the submerged Atoll Island State, provide it with a place to relocate its seat of government and financial funds, in return for access to resources within its former EEZ. Other countries, hoping to access these resources, could choose not to recognize the country, and pretend those areas had become “high seas”.

- A “**Complete Loss of Statehood Scenario**”. Atoll Island States, deprived of their territory, would be expelled from the UN and other international organisations, with their international personality not recognised by anybody. This is unlikely to occur since it would be difficult to expel the country from the UN, as mentioned previously. It is probably an extreme scenario, especially given the strength of organisations such as AOSIS within the UN. Nevertheless, if this scenario became reality the islanders would clearly become stateless, as discussed in more detail in Chap. 7.

The ideal of preserving the statehood of Atoll Island States follows the notion that every nation deserves its own State.²⁰⁸ It is probable that in the future the issue of sovereignty and statehood will become far more complex than nowadays.²⁰⁹ Sovereignty and statehood might cease to be an absolute concept and become more blurred and relative. It might consist of several types of entities, some of which can already be seen today. Supra-national entities such as the European Union would be at the top, followed by “traditional” sovereign States (some of which would be sharing their sovereignty with those supra-national entities, as the current members of the EU do), followed by State-like entities with limited or no recognition (such as Taiwan, Kosovo or Somaliland), and other sovereign “de-territorialized” entities at the bottom, such as the SMOM or potentially Atoll Island States, if they fail to obtain a better solution. Maas and Carius further note how²¹⁰:

Various international forums, such as the climate negotiations or the Doha development round, have revealed the great diversity of interests and thus also the very limited space for consensus in several policy areas. (...) Instead, it is quite likely that fragmentation may further increase, with various states choosing to recognize or not recognize states dispossessed by climate change. The main consequence of climate change in the Pacific and elsewhere may thus be that international relations become more complex and approaches to deal with various entities claiming political legitimacy become more pragmatic in absence of global consensus. Yet, this would erode the global system of nation states symbolized by the United Nations further, making the definition of states ever more arbitrary and blurred. (...) While this would open up possibilities for developing innovative, more reflective and adequate institutions and mechanism on a regional level, this global devolution may also bear the risk of fracturing international solidarity in times when the challenges of climate change would require global, coordinated responses.

²⁰⁸ Biswas (2002), p. 184.

²⁰⁹ Maas and Carius (2012), p. 662.

²¹⁰ Maas and Carius (2012), p. 662.

6.8 Conclusions

It is unlikely that States which have already been recognised as such can lose their status even after losing one of the elements required by the Montevideo Convention (such as population, government or a defined territory). Rather, it appears that Atoll Island States can preserve their status by relying on the recognition of other States. In this case, the continuity of recognition by other States and international organizations would have a reparative effect to compensate for the lack of territory and/or population, giving birth to a State *sui generis*. Essentially, there is a difference between the criteria for the initial recognition of statehood and its continuity. However, a common point between them is that both the birth and continuity of a State rely on a blend of legal and political judgements which could ultimately determine whether statehood can be preserved, even after the last island in an archipelago disappears. Conversely, if there is lack of recognition of statehood after the Atoll Island State has lost its territory then the significance of land as an essential element of statehood will be reconfirmed.

The cession of territory, one of the solutions suggested to enable Atoll Islands States to acquire new territory, was used mainly in the past by Western countries to increase their colonial lands. However, at present it is unlikely that this type of solution could be applied for the case of Atoll States since it is unlikely that any sovereign States will be willing to cede a part of their own territory. If a cession of territory ever took place it would represent a change in the pattern of international relations, as Atoll States would be applying the same instrument that European States used many times to guarantee their territorial acquisitions in Africa and Asia. The suggestion to apply this solution, however, 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.

However, even in the case where a certain Atoll Island State was not able to find lands on which to resettle and its population scattered throughout the world it does not necessarily mean that the State would lose its condition as a subject of international law. The issue of whether a de-territorialized State is possible draws attention to entities such as governments-in-exile which are outside the rule of a “traditional State”. These entities are often overlooked by international law because they are not connected to the more prominent and powerful States. Atoll Island States belong to the category of “developing States”, and thus in this sense trying to secure an exception to established international practices could be challenging. If Atoll Island States can preserve their statehood in a scenario in which one of the elements of statehood required by the Montevideo Convention is missing it will demonstrate not only that the continuity of statehood does not necessarily relate to the existence of all of these elements, but that the issue of recognition relies also on politics.

There have been some past and present examples of sovereign entities without land, in addition to the presumption of the continuity of statehood. The international personality of these States could be preserved because sovereignty can be practiced

in networks across space,²¹¹ which would be equivalent to having a de-territorialized State (a concept which does not fit within the classical interpretation of statehood). This certainly poses some challenges since territoriality has long been emphasized as the almost exclusive way of exercising political power. Nevertheless, there are subjects of international law which do not hold any territory, or did not hold it during certain periods of time, and that was not an obstacle for them to be recognized as sovereign entities before international law.

Obviously, for the case where an Atoll Island State became a de-territorialized entity the population would have to actually relocate to foreign lands. The question of people who are forced to leave their homes due to the sea level rise has been frequently discussed in literature,²¹² and this will be analysed in more detail in Chap. 7.

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²¹¹ Agnew (2004), p. 441.

²¹² Renaud et al. (2007), p. 14.

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