Summary and Conclusion: The Limits of *Ex Post* Solidarity in the Context of Climate Change

Despite their apparent marginality, small islands have always been the object of foreign interests, whether as colonial resource base or places of strategic importance. In the optimistic quest for a new world order of the 1970s following the wave of decolonization, island states as a group started to make an appearance in the international arena as a subcategory of structurally disadvantaged developing states deserving special support. Numerically significant, they have become recognized international actors, rhetorically courted by other states.

Nevertheless, some small island states are now at risk of becoming a casualty of the globalized world and its byproduct, climate change. Unless aggressive global emission reductions are undertaken, sea level rise might cause low-lying atoll island states such as the Maldives, Tuvalu, Kiribati, and the Marshall Islands to become uninhabitable or disappear completely. Although these states have been accepted into the ‘community of nations’ as formally equal members, their continued existence has thus far not been considered important enough to warrant a modification of the fossil fuel-based global economic lifestyle that causes anthropogenic climate change. The international climate regime provides no satisfactory answer for this problem, as neither its mitigation nor its adaptation provisions are stringent enough to prevent dangerous anthropogenic interference with the climate system, or to adequately cope with its consequences. The consent-based structure of international law reaches its limits when it comes to solving the collective action problem of preventing a tragedy of the global atmospheric commons and, incidentally, the disappearance of some of the most vulnerable participants in this multilateral process.

Indeed, in many respects, international law appears to be a ‘feedback mechanism’ rather than a remedy for the challenges low-lying island states are confronted with by global warming. The international law of the sea as it currently stands would cause the shrinking and loss of their maritime zones, thus endangering their economic even before their physical viability. This could be avoided through the implementation of a new regime of stable maritime zones, pursuant to which the extent of the maritime zones would become independent from changes in the land territory. Uncoordinated strategies to achieve such a stabilization, such as those relying on the general inertia of maritime charts, the conclusion of maritime boundary agreements, the invocation of the historic waters doctrine, or the creation of new customary international
law by individual states, would fail to provide the necessary legal security, especially because they would not resolve the problem of disputed areas. Collective coordinated responses, which could take the form of an Implementation Agreement on Sea Level Rise or a UN General Assembly resolution on stable maritime zones, seem to present the better alternative.

While the ambulatory nature of baselines and maritime limits can ultimately only be abolished by amending the law of the sea, other problems could be solved through a teleological interpretation of the existing law as embodied in the Law of the Sea Convention, whether with regard to the maintenance of the status of islands by islands that have been reduced to rocks or low-tide elevations by sea level rise, or concerning the granting of maritime zones around artificial islands or structures an island state might erect to replace its inundated territory.

Unless a threatened island state maintained a territorial existence by entering into a merger or federation with another state, which would terminate its former international legal personality, or through the purchase of substitute territory from another state by way of cession, which is unlikely to be realized in practice, the only way for it to maintain its maritime zones while at the same time maintaining its international legal personality would be for it to be recognized as a ‘detrerritorialized’ state. This would not only require the international law of the sea to evolve towards a regime in which the allocation of maritime spaces no longer exclusively depends on their adjacency to land territory, but also the endowment of ‘detrerritorialized’ states with the same kind of plenary sovereignty that is enjoyed by their territorial counterparts.

Just as sea level rise itself, the loss by a threatened island state of the traditional insignia of statehood will likely be a gradual process. The threshold at which a state would lose its territorial effectiveness would be crossed once the island state’s territory became uninhabitable. This would be the case once the last ‘population nucleus’ had to leave the remaining land, although a pure ‘caretaker population’ might also be accepted by other states as embodying the personal component of statehood, just as an artificial installation might pass for its territorial basis. Being an organ of the state it represents, the continued existence of the island state’s government would depend on the continued existence of its state. If this continued existence of the state was assured, if necessary through its recognition as a ‘detrerritorialized’ state, its government might be able to function from exile while maintaining the full range of competences of a de jure government. This would also safeguard the island state’s independence, which would otherwise lapse together with the loss of its territorial and personal effectiveness.