

WHEN STATES SINK

INTERVIEW: MICHAELA HUTTERER

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The Maldives, Kiribati, Tuvalu, and parts of the Solomon Islands: if the sea level continues to rise, several island states will vanish under the sea within a few decades. As things stand today, the residents will lose their homelands – with little chance of asylum or replacement territory. Lawyer Tom Sparks of the Max Planck Institute for Comparative Public Law and International Law searches for solutions for sinking states.

Can states die, Mr. Sparks?

TOM SPARKS: They will! Tuvalu in the Southwest Pacific is one of five island states that will go under within a few decades if global warming continues unchecked. The latest report of the UN's Intergovernmental Panel on Climate Change (IPCC) assesses that sea

level will rise two meters by the year 2100. The highest point on the Tuvaluan islands is a mere five meters above the water.

Which island states are affected?

Island states the average elevation of which is less than two meters above sea level are in danger. Right now that means Kiribati and the Marshall Islands in the Pacific, the Maldives in the Indian Ocean, and of course Tuvalu. In Micronesia the first islands have already been submerged. And island regions in Germany, the US, and Australia will also be swallowed by the sea in a few decades.

Do sinking states not have rights?

Unfortunately not. In international law we have a legal presumption that states never die. However, a state does not necessarily have to go on existing in the same form. States can be replaced in the same territory, as, for example Rhodesia

with Zimbabwe or the USSR with Russia, at least for part of the former territory, or the GDR with the Federal Republic after reunification. In that sense, Rhodesia, the USSR, and the GDR have vanished, so to speak, but there are successor states, that is, people and governments in the same territories. However, if states lose their national territory due to human-made climate change, that is a completely different kind of disappearance. There is neither a precedent, nor a solution for that.

So, does a state only exist if it has a national territory?

Up to now, we have adhered to a concept of statehood dating back to the year 1900. According to Georg Jellinek's three-element doctrine, every State has three essential elements: people, ruling authority, and territory. In that view, nothing would remain of the island States but an interest group or a legal fiction once they lose their territory.



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Surrounded by the sea: the atoll Funafuti with Vaiaku, the main village of the Pacific island state Tuvalu, is severely threatened by climate change. The rising sea level increases the risk of flooding, storm surges, and erosion on all of Tuvalu's islands.

When a state sinks under the sea, its residents are left without a homeland. What opportunities do they have to resettle?

The island residents are the victims of climate change, and as stateless individuals they enjoy very little protection. There is no obligation to accommodate them, and their chances of gaining asylum are slim: international law considers anyone who flees because they are persecuted and threatened due to their race, religion, or nationality, their membership in a certain social group, or their political beliefs to be a refugee. People who flee due to personal or material difficulties – hunger, war, or the destruction of the environment – unfortunately are not given the same consideration.

Is there a right to a new national territory?

No. The obvious question is: which state should have the duty to provide a new national territory? Within an existing island state, the government can make safer territory available for residents in parts of the state with higher elevations –

provided such places exist. But a country like Tuvalu cannot demand parts of Fiji or Australia on the basis that its territory is disappearing.

The state of Kiribati has already purchased replacement land on Fiji for its approximately 100,000 residents. Is that a good solution?

The island states are negotiating very actively over new settlement areas. Tuvalu, too, is searching for a new national territory. However, when Tuvalu negotiates with Australia, for example, Australia may offer land, but is very unlikely to offer to cede territory. It will not tolerate a state within a state. If the Tuvaluans are offered accommodation, it will be part of Australia – with all the consequences that come with that, including Australian law and Australian tax regulations.

That means the residents gain land, but lose their sovereignty.

Correct. With the exception of the high seas, Antarctica, and a few disputed regions, every part of the surface of the earth is considered a territory of a sov-

eign State, over which it alone can exercise its sovereignty. We have to find solutions so that the islands in question can survive independently and autonomously just as other micro-States do, even if their territory no longer physically exists.

Tuvalu plans to continue its existence on the Internet, should the sea keep rising. A virtual state – is that the solution?

Not in my opinion. Granted, there are ideas to build a digital twin in the metaverse, that is, in a virtual world. Ideas like that are important for cultural life and the survival of a people, but they are unlikely to successfully replace the state in a legal sense.

Another idea under discussion is that the existence of the island states might be ensured by means of their maritime rights. How would that work?

The borders of a state's maritime zones would be "frozen" in their current positions. That way a displaced state could at least continue to profit from the sea's natural resources, and at least they could continue to claim their existence on the basis of their sovereignty over the maritime region. This in itself is hardly a satisfactory solution, however.

What would be better?

First of all, we need fast solutions to the climate crisis so that states do not go under in the first place. Climate-related displacements will increase. According to reports from the World Bank, more than 143 million people will be impacted by 2050 in the sub-Saharan African states, Southern Asia, and Latin America alone. The United Nations estimates that a global temperature increase of three to four degrees will displace 330 million people just from flooding. More than a billion people worldwide already live in slums, on unstable mountainsides, or in shore areas with a high risk of flooding. We must adapt the international legal structure to the effects of global warming.

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Beach under water: trees in Langa Langa Lagoon on the coast of the Salomon Island Malaita reveal where land used to be. The house in the background may soon vanish into the sea, just like other inhabited parts of the island state.

An eye to rising levels: lawyer Tom Sparks deals with the challenges posed by climate change for international law.

PHOTO: ANNA ZIEGLER FOR MPG





Symbolic act: Simon Kofe, Minister of Foreign Affairs of the island state Tuvalu, delivered his statement to the UN Climate Conference in Glasgow in 2021 while standing in the sea. Photos were widely distributed on social media, drawing public attention to the Tuvaluans' struggle against the rising sea.

How can that be done?

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We have to look past territoriality and rethink the concept of statehood. It is a little hard to imagine. States appear absolutely fixed and unchangeable to us, but the understanding of what makes a state has already changed several times. For example, we no longer see the state as the personal property of the king – even in states that still have royal houses. And the concept of a state will continue developing in the future, as we change our way of thinking. States are social structures that are created and maintained by social activities. This concept should shape the understanding of States in the future. We can no longer cling to territory as a prerequisite for the existence of a state.

Does that amount to a break with existing views?

Perhaps. But we also have to recognize the challenges of our epoch. We no longer live in the Holocene, when the environment and climate were primarily shaped by natural events such as asteroid impacts and seismic and volcanic activity. We now live in the Anthropocene, a new global epoch in which people play a

central role in the development of the environment and climate. Our lifestyle causes CO₂ emissions. As a result, the climate is changing, giving rise to increasingly severe hurricanes, droughts, floods, heat waves, cold spells, and wildfires. Glaciers melt, the sea level rises, oceans acidify, salt intrudes into soils, and the water table sinks. Jellinek's territoriality principle is no longer adequate to cope with these circumstances from a legal standpoint.

So, what makes a state?

Above all, self-determination. It takes a group – the people – and a government from the group that leads the people. A State's territory is a means to actualize this self-determination. Clear territorial boundaries help us to determine which rules relate to a specific group. However, it is not a geographical line in the sand that determines what a state is, but rather the existence of a community. Tuvalu

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has a government, and there are 11,000 Tuvaluans who feel they belong to this state. They do not want to become Australians or Fijians; rather, they want to preserve their identity. Modern international law must recognize that and empower them to do so.

Is it enough, then, if the UN General Assembly says Tuvalu still exists – even without territory?

It is hard to say for sure, but that would certainly help. Many questions would still require clarification, though. These are important research questions. We have to use this time to figure out solutions for those states which depend on the ocean. Not for nothing have these states given themselves a new name: “Large Ocean States.”

And these states are very active. The island republic of Vanuatu just won an important victory: The UN General Assembly voted to submit a request for an advisory

opinion to the International Court of Justice (ICJ).

We expect answers to several important legal questions as a result. With 17 additional petitioners and support from 132 countries, Vanuatu petitioned the ICJ for an opinion regarding what international legal obligations states have to protect the climate and what legal consequences would result if states fail to protect the climate adequately. As a climate change lawyer, I find that extremely exciting! An opinion like that could make an enormous contribution to our understanding of what obligations states have in dealing with climate change. As I see it, the world owes Vanuatu a debt of gratitude, especially the young activists who launched the campaign for the expert opinion and brought it to a successful conclusion.

In Hamburg, too, judges are dealing with climate change.

The International Tribunal for the Law of the Sea in Hamburg will soon issue an

expert opinion clarifying the maritime rights of sunken states. This could answer important questions about the survival of maritime zones and increase pressure on governments worldwide to do more for climate change.

How much time do we have left?

Not much! Very soon it will become clear whether our efforts to stop global heating are bearing fruit. In the next five to ten years, we’ll see very clearly whether we have chosen a relatively safe path and will limit climate change, or whether we are headed straight for catastrophe – both ecological and human. Because of climate change, we are faced with an unimaginable wave of migration, and not just from the island states. That migration will affect every country, including ones that are far from Oceania. We still have time now to change something!



Threat map: island states in the Pacific are especially threatened by climate change. This map published by the IPCC shows what percentage of the population of several states currently lives in areas that will be flooded by the year 2100 if global warming exceeds two degrees.

PERCENTAGE OF THE POPULATION THREATENED BY FLOODING

