ENGAGING INTERNATIONAL RESPONSABILITY FOR DAMAGES SUFFERED BY STATES AS AN EFFECT OF CLIMATE CHANGE

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ABSTRACT: *This article exploits the possibility of archipelagic states to seek compensation for the loss of land caused by climate change. In this scope, we shall analyse the general conditions for engaging states responsibility for internationally wrongful acts and focus on identifying a rule of international law that would engage state responsibility. Also, we shall analyse the effect of the loss of territory on the statehood of the archipelagic state.*

KEYWORDS: *international responsibility; climate change; sinking islands*
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1. INTRODUCTORY REMARKS

We shall argue in the following lines that sinking islands in the Pacific can make a case against states that have a direct contribution to climate change. The elements of state responsibility, as defined by the customary provisions of the ARSIWA (ARSIWA) (Olleson, 2006) and elaborated upon by doctrine (Aust, 2006) and jurisprudence (United States Diplomatic and Consular Staff in Tehran, (Nicaragua v United States of America), 1980) (Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997) can, as it will shown in the following, by fulfilled in the envisaged scenario and consequently, archipelagic states that lose land due to climate change should be entitled to reparation ARSIWA art 31;, in the form of satisfaction (Aust, 2006), which implies the recognition of their statehood statehood (in the case that the territory is completely submerged), and compensation (DARSIWA, 2001).

In the following, the questions of existence of a breach of an international obligation and responsibility of large polluting states will be examined and answered in the affirmative.

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2. BREACH OF AN INTERNATIONAL OBLIGATION

In order for state responsibility to be engaged, a state must commit a wrongful act, either consisting of an action of omission (Voigt, 2008). Given that in environmental cases, responsibility will normally arise from a breach of treaty provisions or customary rules (Voigt, 2008) (Fitzmaurice, 2006), as sources of public international law (Thirlway, 2006), the conduct of polluting states will be assessed in respect to conventional and customary obligations.

Firstly, with regard to treaty law, considered to be the main source of law in international environmental law (Gehring, 2006) (Beyerlin, 2006), the relevant and most important treaty with regard to climate change induced damages, is the UNFCCC (United Nations Framework Convention on Climate Change (UNFCCC) is an international environmental treaty adopted on 9 May 1992 and opened for signature at the Earth Summit in Rio de Janeiro from 3 to 14 June 1992). This convention, considering its scope and intention of the drafters, imposes at least two substantive obligations upon its parties, namely the duty to prevent with regard to dangerous climate change and the obligation to reduce greenhouse gas emissions

Therefore, read in conjunction, articles 2 and 4.2 of the UNFCCC, obliges parties to take action to adopt policies and measures to secure the stabilization of atmospheric concentrations of greenhouse gases. This obligation of due diligence (Certain Phosphate Lands in Nauru (Nauru v Australia), 1992), must be interpreted in light of the regime imposed by the VCLT (Vienna Convention on the Law of Treaties, 1967), namely the obligation not to defeat the purpose of the treaty (VCLT, 1967), principle of good faith and of *pacta sunt servanda* (VCLT,1967). Provided that a neighbouring polluting state falls in the category of Annex I Parties to the UNFCCC, it is specifically committed under the above mentioned regulations to implement policies and measures which correspond to this obligations. Given that following, if after the ratification of the UNFCCC, the neighbouring polluting state increases its greenhouse gas emissions, it can be argued that the say state is in breach of the obligations assumed under the UNFCCC treaty, which triggers the international responsibility of that state.

Considering the second potential source of an international environmental obligation, custom, special attention must be given to the *no-harm rule*. The existing jurisprudence (Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997) (Legality of the Threat or Use of Nuclear Weapon, 1996), accompanied by significant support from doctrine (Higgins, Problems and Process: International Law and How We Use It, 1994), gives this rule the status of custom in international law. This rule contains an obligation not to cause harm, to prevent foreseeable risk of damage and to minimize risk thereof. Furthermore, where actual harm was caused, the rule also entails the obligation to compensation. States that are directly or indirectly affected (Factory of Chorzow, (Germany v Poland), 1927) if the damage is significant or serious (Lac Lanoux Arbitration (France v Spain) , 1957). In the case of sinking islands, the question of significance or seriousness of damage is indisputably answered in the affirmative. Also, recalling that the threat caused by the rising sea levels to the safety of the islands was known as late as the beginning of the 20th century and the link between greenhouse gas emissions and the rise of the sea levels was scientifically proven, states that increase their

GHG emissions, could be held responsible for breaking the *no harm rule*, and consequently, harmed states could have grounds for seeking compensation.

The necessity of a causal link between the activity and the occurring damage is the second condition required to engage state responsibility. While the general link, namely the adverse reactions of pollution, is a well established fact, attributable to the international community as a whole, the contribution of a given state could be difficult to prove in practice.

As a matter of applied rule, international tribunals have held governments responsible only for proximate and foreseeable causes of their actions (Cheng, 1953). In regard to foreseeability requirement, a proper link between the omitted activity, i.e. regulation of GHG reductions, and the injurious consequences can be established if the State actually knew or foresaw or ought to have known or foreseen that individual conduct was or would be part of a composite cause bringing about inadmissible harm. Recalling that there is no requirement that the wrongdoer must have foreseen the precise magnitude or location of the injury (Corfu Channel Case (United Kingdom v. Albania), 1949), and considering the polluting activity of some states in a given region, states should be aware of the impact that their GHG emissions would have on endangered island states. This link could furthermore be supported by the proximity of the States.

Article 31 of the ARSIWA states that the responsible state is under an obligation to make reparation for the injury caused by the international wrongful act (Aust, 2006). In the scenario envisaged, we consider that reparation can be given only in compensation, as the loos of land is probably definitive.

Another problem that might come in mind is the matter of statehood of the affected island state.

Given the absence of an authoritive and precise definition of what is meant by State under International Law (Crawford, 2006), the questionable status of the Montevideo criteria of statehood (Grant, 1999), the firmly grounded principle of continuity of established States (Schachter, 1993) (Mushkat, 1997) (Koskenniemi, 1994) and also considering the primary objectives of the United Nations to facilitate cooperation in solving international problems of an economic, social and cultural nature UN Charter art 1 para 3;, the circumstances that might robe an island state of its territory, should be attributable to the international community as a whole. As a consequence, it would be unjust for the grieved state to be robbed of its statehood. Such a finding would be in contradiction with the principles of equity and *nemo auditur propriam turpitudinem allegans*.

There is a general consent among publicists that there is neither an agreed definition of statehood (Warbrick, 2006) nor any relevant norms which regulate the termination of statehood when one or more attributes are lost. This voidness in the fabric of international law is caused in part by the inexistence of any precedent (McAdam, Disappearing States, Statelessness and the Boundaries of International Law, 2010); or relevant jurisprudence and of any recent and authoritive definition of a state, this issue being neglected even by the ILC (Crawford, 2006). The status of an entity in relation to its ambition to statehood is a mix question of fact and law (Waldock, 1962);. The existent case law in the matter of creation of states suggests that a large degree of freedom of action and tolerance in regard to the criteria of statehood (McAdam, Disappearing States, Statelessness and the Boundaries of International Law, 2010) must be given in order to

ensure the primordiality of the will of the peoples UN Charter, wording of preambular clause;. As such, in absence of a *lex lata* definition, we must analyze the hypotetic scenario set forward in this paper, which in the view of many highly regarded publicists have primordiality in the context of the question of statehood (Marston, 1969). In analyzing the current situation special attention must be given to the principle of the presumption of continuity of statehood (Crawford, 2006) and right of the people to self-determination.

While there is no universally agreed definition for a state, publicists often turn to the criteria laid down in the Montevideo Convention Montevideo Convention art 1; in order to define statehood (Warbrick, 2006).

The requirement that a State have an effective government is regarded as central to its claim for statehood. An effective government is also a basis for the other central requirements of independence and capacity to maintain international relations (Kamada, 1961).

In examining the claim of a sinking island of the capacity to fulfil and maintain the requirement of an effective government, we must recall the following considerations. First, the subsequent state practice after the adoption of the Montevideo Convention, questions the strictness by which this criteria should be applied, at least in particular contexts. The examples of the situation in the Republic of the Congo, after its rushed independence in 1960, the similar situations to the one of Congo, Rwanda and Burundi (Higgins, Problems and Process: International Law and How We Use I, 2003), and the case of Palestine's admission as a non member observer state to the UN GA Verbatim Record;, despite the findings of the CANM, proves that the criterion of effective government is less strictly applied in practice. Secondly, refering to the implied condition of independence, it is crucial to observe that territorial sovereignty is not ownership of, but governing power with respect to, territory (Moldovan, 2018).

The criterion of territory is closely interconnected to the one of government, State practice has proved that international law defines 'territory' not by adopting private law analogies of real property, but by reference to the extent of governmental power exercised, or capable of being exercised, with respect to some area and population.

Firstly, it is generally agreed that there is no threshold minimum limit for the area of the territory (McAdam, Disappearing States, Statelessness and the Boundaries of International Law, 2010). Secondly, any disputes regarding the boundary of the state or the clear delimitation of the area of the territory do not affect statehood (North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark & the Netherlands),, 1969). Thirdly, and most important, history provides examples in which an entity has become a state in the first instance without having yet acquired territory. For example, France recognized Poland and Czechoslovakia as 'nations' during World War I; when their territories were occupied. Finally, the examples of the governments in exile give rise to the rule of presumed continuity in relation to statehood even when one or more attributes were lost by the state. As such, even though their governments lost all territorial power during WWII, the Polish, Yugoslav, Czechoslovak, and Baltic states retained recognition, at least by the Allied Powers. This abundance of state practice leads to only one conclusion, almost generally embraced by doctrine, that issues regarding to the criterion of territory, in relation to entities whose statehood was firmly established, must not stand as a barrier for the continuity of this acquired status.

Consequently, given the aforementioned and considering the fact that there is no relevant doctrine of state practice that would imply the criterion of permanence for the attribute of territory, a sinking island should remain a state as long as even a small portion of the land remains above sea surface.

We believe that the condition of a permanent population and capacity to enter into international relations (sea the example of the Maltese Order) should not pose any debate on in this scenario.

3. CONCLUSION

The phenomena of sinking islands is not far fetched scenario. It is a reality facing a group of archipelagic states in the Pacific region. Their statehood is as stake as a consequence of the rising of the sea levels. This article has explored possible remedies for the affected states against large polluting states. We conclude that states affected by climate change could engage the international responsibility of large polluting states, seeking compensation in the form of financial relief.

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