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Sea-level Rise and Continuity of Statehood

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Summary

Sea-level rise caused by anthropogenic climate change poses an unprecedented challenge to international law. For Small Island Developing States (SIDS), the prospect of partial or complete territorial inundation raises fundamental questions concerning the continued existence of States whose territory may become uninhabitable or disappear entirely. Under traditional interpretations of the Montevideo Convention on the Rights and Duties of States, territory constitutes a central element of statehood. At the same time, international law has long recognized a strong presumption in favor of state continuity, even where States experience profound changes to their territory, population, or governmental structures.

This thesis examines whether, and on what legal basis, the continuity of statehood for SIDS threatened by climate-induced territorial loss can be reconciled with the territorial requirement of international law. Employing a doctrinal legal methodology, the study analyses treaties, customary international law, judicial decisions, institutional materials, and legal scholarship. Particular attention is devoted to the doctrine of state continuity, the work of the International Law Commission (ILC) Study Group on Sea-Level Rise in Relation to International Law, the 2025 Advisory Opinion of the International Court of Justice (ICJ) on Obligations of States in Respect of Climate Change, and recent State practice, including the Falepili Union Treaty, the Pacific Islands Forum (PIF) Declaration on the Continuity of Statehood, and the AOSIS Declaration on Sea-Level Rise and Statehood.

The thesis finds that international law increasingly supports a presumption of state continuity notwithstanding climate-induced territorial loss. While the Montevideo criteria remain central to the creation of States, they do not rigidly govern state continuity. Contemporary institutional developments and emerging State practice indicate that continuity may be preserved through an interpretation of territory that emphasizes its functional role in enabling governance, jurisdiction, and political community rather than its purely physical existence. Accordingly, the loss of habitable territory does not necessarily entail the extinction of statehood where a coherent political community, governmental structures, and international recognition persist.

The study further demonstrates that this reconciliation carries significant implications for the doctrine of statehood. Effectiveness is increasingly understood in institutional and relational rather than exclusively territorial terms, recognition assumes a more prominent role in sustaining continuity, and sovereignty may be exercised through cooperative and extraterritorial arrangements. The thesis concludes that the emerging presumption of continuity reflects an adaptation of international law aimed at preserving legal stability, self-determination, and international legal personality in the face of climate-induced territorial loss.

Sammanfattning

Havsnivåhöjningar till följd av antropogena klimatförändringar utgör en växande utmaning för folkrätten. För små östater under utveckling (SIDS) innebär stigande havsnivåer en risk för att delar av eller hela deras territorium blir obeboeliga eller permanent översvämmas. Detta aktualiserar grundläggande frågor om staters fortsatta existens enligt folkrätten. Enligt den traditionella statsläran utgör territorium ett centralt kriterium för statsstatus. Samtidigt präglas folkrätten av en stark presumtion för statskontinuitet, vilket innebär att redan existerande stater som huvudregel består trots omfattande förändringar av deras territorium, befolkning eller styrelseskick.

Syftet med denna uppsats är att undersöka om och i så fall på vilken rättslig grund statskontinuitet för SIDS som hotas av klimatrelaterad territoriell förlust kan förenas med folkrättens territoriella krav. Studien genomförs med en rättsdogmatisk metod och bygger på en analys av traktater, internationell sedvanerätt, rättspraxis, institutionella dokument och juridisk doktrin. Särskild uppmärksamhet ägnas åt läran om statskontinuitet, Internationella lagkommissionens (ILC) arbete om havsnivåhöjningar i relation till internationell rätt, Internationella domstolens (ICJ) rådgivande yttrande om staters skyldigheter i fråga om klimatförändringar från 2025 samt senare statspraktik, däribland Falepili Union-fördraget mellan Australien och Tuvalu, Stilla-havsforumets deklARATION om statskontinuitet och Alliansen av små östater (AOSIS) deklARATION om havsnivåhöjningar och statskap.

Uppsatsen visar att folkrätten i allt högre grad ger stöd för en presumtion för fortsatt statskap trots klimatrelaterad territoriell förlust. Även om Montevideokonventionens kriterier fortsatt är av central betydelse för bildandet av nya stater, kan de inte anses utgöra ett strikt ramverk för bedömningen av statskontinuitet. Samtida institutionella utvecklingar och framväxande statspraktik talar i stället för en mer funktionell syn på territoriet, där dess betydelse ligger i att möjliggöra styrning, jurisdiktion och upprätthållandet av en politisk gemenskap snarare än i dess rent fysiska existens. Förlusten av beboeligt territorium behöver därmed inte innebära att en stat upphör att existera, förutsatt att dess politiska gemenskap, institutioner och internationella rättsliga ställning består.

Analysen visar samtidigt att en sådan utveckling får betydande konsekvenser för folkrättens statsbegrepp. Effektivitetsprincipen får en mer institutionell och relationell innebörd, erkännande får ökad betydelse för upprätthållandet av statskontinuitet och suveränitet kan i större utsträckning komma att utövas genom samarbetsbaserade och extraterritoriella lösningar. Sammantaget visar studien att den framväxande presumtionen för statskontinuitet inte innebär ett avsteg från folkrättens grundläggande principer, utan snarare en gradvis anpassning av statsläran till de utmaningar som klimatförändringarna medför.

Förord

Efter nästan sex år vid universitetet, varav fyra och ett halvt år på juristprogrammet, markerar denna uppsats slutet på en oförglömlig och underbar tid. Det har varit en resa fylld med skratt, glädje och lärdomar för livet. Tack Lund.

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Abbreviations

AOSIS	Alliance of Small Island States
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal of the Law of the Sea
OHRLLS	The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
PIF	Pacific Islands Forum
SIDS	Small Island Developing States
SLR	Sea-Level Rise
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change

1 Introduction

1.1 Background

The doctrine of statehood in international law has long rested on the criteria articulated in the 1933 Montevideo Convention on the Rights and Duties of States, which require a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.¹ Among these, the territorial requirement has served as a foundational pillar. The territorial requirement is not merely a geographical fact, but the spatial anchor upon which the rules that lie at the heart of international law are constructed.² However, climate change is challenging the current dogma. As humans on this earth face the consequences of climate change, our assumptions about the fundamental rules governing society are changing. We are currently living in the Anthropocene, a geological epoch characterized by humans' significant influence on the climate.³ Climate change poses a myriad of issues, one of which is sea-level rise (SLR).⁴ The Intergovernmental Panel on Climate Change (IPCC) has confirmed that global mean sea levels are rising at unprecedented rates, with projections indicating continued rise throughout the twenty-first century and beyond.⁵ Approximately 65 million people reside in Small Island Developing States (SIDS), many of which face the prospect of partial or complete inundation, threatening their very territorial integrity.⁶ Under traditional interpretations of the Montevideo criteria, complete inundation of territory would negatively impact their sovereignty and *inter alia* render

¹ Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (Montevideo Convention). Art. 1.

² Gideon Boas, *Public International Law* (Edward Elgar Publishing 2012) 180.

³ Paul J. Crutzen and Eugene F. Stoermer, 'The Anthropocene' in Joshua P. Howe (ed), *Climate Change History: Documents from Global Warming's Past* (University of Washington Press 2017) 282, 285. While the Subcommittee on Quaternary Stratigraphy did not endorse the Anthropocene as a formally recognised geological time unit, the term has nevertheless become firmly established as a conceptual framework for understanding humanity's transformative impact on the Earth climate system.

⁴ IPCC, 'Summary for Policymakers' in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H Lee and J Romero eds, IPCC 2023) 5-6.

⁵ *Ibid* 17.

⁶ United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 'About Small Island Developing States' <https://www.un.org/ohrlls/content/about-small-island-developing-states> accessed 23 April 2026; IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (H-O Pörtner and others eds, Cambridge University Press 2022) 2068; IPCC, 'Summary for Policymakers' in *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CB Field and others eds, Cambridge University Press 2014) 20.

their populations stateless.⁷ As the 2030 Agenda for Sustainable Development, adopted by the General Assembly in 2015, clearly provides:

Increases in global temperature, sea level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk.⁸

SLR is an inevitable consequence of climate change and an aspect that has, and will continue to, raise questions for international law.⁹ The fate of these states in part lies in our interpretation of international law. In fact, this existential dilemma has generated a rich and evolving body of scholarship. A central fault line in the literature concerns whether the Montevideo criteria, originally developed for the creation of states, should also govern state continuity, the concept that states, despite fundamental changes in their constituent elements, retain their international legal personality as such. It is the tension between the traditional interpretation of international law and its purpose and means for ensuring stability, certainty, and predictability that warrants research. Several scholars have argued that international law has long tolerated the continued existence of states whose effectiveness is impaired, and that applying rigid territorial criteria to SIDS facing climate-induced inundation would be both doctrinally unwarranted and unjust.¹⁰ Others have contended that the territorial requirement, as traditionally understood, constitutes a fixed and obstinate element of statehood.¹¹ Between these positions, a growing body of scholarship has explored whether continuity might be preserved through more innovative conceptions, including deterritorialized statehood and Nation *Ex-Situ* models, which seek to reconcile the preservation of legal personality with the prospect of permanent territorial loss.¹²

At the institutional level, significant developments are emerging to address this dilemma. Early groundwork was laid by the International Law

⁷ Patrícia Galvão Teles and Juan José Ruda Santolaria, ‘Sea-level Rise in Relation to International Law: Second Issues Paper’ (International Law Commission, 19 April 2022) UN Doc A/CN.4/752, paras 192-196.

⁸ UNGA Res 70/1 (25 September 2015) para 14.

⁹ Davor Vidas, ‘Sea-Level Rise and International Law: At the Convergence of Two Epochs’ (2014) 4 *Climate Law* 70, 74.

¹⁰ See influential work by Rosemary Rayfuse, ‘International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma’ (UNSW Law Research Paper No 2010-52, 7 November 2010); and Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 *Climate Law* 345.

¹¹ Derek Wong, ‘Sovereignty Sunk? The Position of “Sinking States” at International Law’ (2013) 14 *Melbourne Journal of International Law* 356; Susannah Willcox, ‘Climate Change and Atoll Island States: Pursuing a “Family Resemblance” Account of Statehood’ (2017) 30 *Leiden Journal of International Law* 117.

¹² Rayfuse (n 10); Burkett (n 10).

Association (ILA), which in 2018 identified emerging State practice in favor of preserving maritime entitlements and opening space for continuity-based approaches to statehood.¹³ Building on this trajectory, the International Law Commission (ILC) Study Group on Sea-Level Rise concluded in its 2025 final report that a strong presumption favors the continuity of statehood notwithstanding climate-induced territorial loss, grounding that position in legal stability, self-determination, and the preservation of international legal personality.¹⁴ These developments have been reinforced, though more cautiously, by the International Court of Justice (ICJ) in its 2025 Advisory Opinion on Climate Change.¹⁵ While the Court stopped short of articulating a definitive rule of continuity, it affirmed that the disappearance of a constituent element of statehood does not necessarily entail loss of statehood, linked sea-level rise to self-determination and international cooperation, and thereby lent support to the presumption of continuity.¹⁶ Parallel regional and bilateral practice has begun to operationalize these developments. Most notably, the “2023 Pacific Islands Forum Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change Related Sea-Level Rise” affirmed a “presumption of continuity” of statehood notwithstanding SLR, marking a significant development in *opinio juris*.¹⁷ Likewise, the 2023 Falepili Union Treaty translated that commitment into a binding bilateral form, while the 2024 Alliance of Small Island States (AOSIS) Declaration extended support for continuity beyond the Pacific into a broader cross-regional consensus.¹⁸ Taken together, these developments suggest an emerging body of doctrine and practice supporting continuity, even if its precise legal contours remain unsettled. Yet the absence of a direct historical precedent for the complete and permanent disappearance of a State’s territory means that much of the reasoning still proceeds through adaptation, analogy, and evolving practice rather than rule.

It is within this context, at the intersection between traditional statehood doctrine, evolving institutional practice, and the unprecedented reality of climate-induced territorial loss, that the present thesis situates its inquiry. By

¹³ International Law Association Committee on International Law and Sea-Level Rise, ‘Final Report’ in *Report of the Seventy-Eighth Conference* (Sydney 2018) (International Law Association, London 2019).

¹⁴ International Law Commission, ‘Final Report of the Study Group on Sea-Level Rise in Relation to International Law’ (2025) UN Doc A/80/10 annex I paras 35-41.

¹⁵ Obligations of States in respect of Climate Change (Advisory Opinion) [2025] ICJ Rep 1.

¹⁶ *Ibid* paras 363-364.

¹⁷ Pacific Islands Forum, ‘2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-Level Rise’ (9 November 2023) <https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change> accessed 12 March, para 12.

¹⁸ Australia–Tuvalu Falepili Union (signed 9 November 2023, entered into force 28 August 2024) <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty/treaty-text-falepili-union> accessed 12 March; Alliance of Small Island States, ‘AOSIS Leaders Declaration on Sea Level Rise and Statehood’ (23 September 2024) <https://www.aosis.org/aosis-leaders-declaration-on-sea-level-rise-and-statehood/> accessed 12 March.

examining the extent to which the presumption of continuity can be reconciled with the territorial requirement, this study aims to contribute to the ongoing doctrinal debate over whether international law can adapt its foundational concepts to address the existential challenges in the Anthropocene.

1.2 Purpose and Research Question

The purpose of this thesis is to examine whether, and on what legal basis, the continuity of statehood for SIDS threatened by climate-induced territorial loss can be reconciled with the territorial requirement of international law. It seeks not only to assess whether existing doctrine, emerging institutional developments, and State practice support a presumption of continuity, but also to evaluate the implications such reconciliation raises for foundational concepts of statehood, including effectiveness, recognition, sovereignty, and the adaptability of international law itself. In fulfilling the purpose of the thesis, the following research question will be addressed:

- How can the presumption of continuity of statehood for Small Island Developing States threatened by climate-induced territorial loss be reconciled with the territorial requirement of international law?

In order to answer this question, the following sub-questions will be examined:

- To what extent does existing international law support a presumption of state continuity despite the loss of habitable territory?
- How do recent institutional developments and State practice contribute to reconciling the presumption of continuity with the territorial requirement?
- What implications would such a reconciliation have for the concepts of effectiveness, recognition, sovereignty and adaptability of international law?

In this thesis, “reconciled” refers to examining whether the apparent tension between the territorial requirement and the continuity of statehood can be addressed through interpretation, doctrine, and evolving State practice so that continuity may be maintained consistently with the territorial requirement.

1.3 Previous Research

The question of whether states threatened by climate change-related SLR may continue to exist despite territory loss has generated an extensive and evolving body of scholarship. A central divide in the literature concerns whether the traditional territorial requirement of statehood can be reconciled with the continuity of statehood under existing international law.

Foundational scholarship on statehood is provided by Crawford, Brownlie, and Shaw, among others.¹⁹ Crawford's work is particularly important for this thesis as his work on the creation and continuity of states remains particularly influential, emphasizing both the importance of effectiveness and the strong presumption in favor of continuity once statehood has been established.²⁰ On continuity, identity, and international legal personality, Marek's research is especially foundational and has shaped most of the succeeding research on the topic.²¹ Within the context of SLR, Rayfuse was among the first scholars to argue that territorial loss should not automatically result in state extinction, developing the concept of the "deterritorialized state".²² Similarly, Burkett's Nation *Ex-Situ* model argues that displaced island populations may continue to exist as sovereign political communities despite territorial loss.²³ These proposals seek to preserve sovereignty, self-determination, and international legal personality despite inundation. Other scholars have focused on reconceptualizing territory itself. Sparks argues for an "anthropic shift" in international law that places greater emphasis on political community and the functions territory performs rather than on physical land alone.²⁴ Jain and Stoutenburg has similarly examined whether the territorial requirement can be understood more flexibly in light of climate-induced territorial loss.²⁵ At the same time, critiques of continuity-based approaches have also emerged. Wong questions whether traditional continuity doctrine can adequately address the permanent disappearance of territory, while Rouleau-Dick identifies tensions between competing understandings of continuity in international law and argues that continuity-based approaches require stronger grounding in State practice.²⁶ Sharon criticizes continuity arguments for focusing excessively on preserving legal statehood rather than addressing the practical realities facing affected populations.²⁷ Willcox likewise questions whether the traditional statehood framework can accommodate climate-related territorial disappearance.²⁸ A further strand of scholarship focuses on self-determination and the

¹⁹ See James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019); and James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006); and Malcolm Shaw, *International Law* (9th edn, Cambridge University Press 2021).

²⁰ Crawford, *The Creation of States* (n 19).

²¹ Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968).

²² Rayfuse (n 10).

²³ Burkett (n 10).

²⁴ Tom Sparks, 'Statehood in an Era of Sinking Islands' in Tahseen Jafry (ed), *Routledge Handbook of Climate Justice* (Routledge 2018) 83.

²⁵ Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 *Stanford Journal of International Law* 1; Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill Nijhoff 2015).

²⁶ Wong (n 11); Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States' (2022) 22 *Melbourne Journal of International Law* 357.

²⁷ Ori Sharon, 'To Be or Not To Be: The Legal Identity of Sinking States in International Law' (2021) 51 *Environmental Law* 1041.

²⁸ Willcox (n 11).

preservation of collective identity. Green and Wewerinke-Singh argue that the peremptory norm of self-determination supports the continued existence of climate-threatened states, while Ödalen examines how political communities may retain collective rights despite territorial loss.²⁹

The existing literature demonstrates both the richness of the debate and its fragmentation. Although extensive scholarship has addressed statehood, continuity, deterritorialized statehood, and recent institutional developments, important questions remain unresolved. Additionally, much of it predates the recent institutional developments that increasingly support a presumption of continuity for SIDS facing inundation. In particular, the implications of the ILC's work on SLR, the ICJ's 2025 Advisory Opinion on climate change, and recent State practice such as the PIF declarations, the Falepili Union Treaty, and the AOSIS Declaration have not yet been fully integrated into the broader doctrinal debate. At the same time, while the ILC has examined how continuity might be preserved in the face of climate-induced territorial loss, it does not conclusively resolve how such continuity is reconciled with the territorial requirement of statehood, nor does it clarify the implications for the doctrine of statehood itself. This leaves a need for further examination not only of whether continuity is supported by existing international law, but of what doctrinal consequences such continuity may entail. This thesis builds on existing scholarship while examining how these contemporary developments contribute to reconciling continuity with the territorial requirement and the implications this may have for the doctrine of statehood itself.

1.4 Method and Material

This thesis adopts a doctrinal legal research methodology. Doctrinal legal research concerns identifying, interpreting, systematizing, and analyzing the rules, principles, and concepts governing a particular area of law.³⁰ The methodology focuses on law from an internal legal perspective, meaning that the analysis is conducted primarily through recognized legal sources and legal reasoning within the legal system itself *de lege lata*.³¹ The doctrinal approach is appropriate for this thesis because the thesis concerns the legal possibility of continuity of statehood in circumstances of climate-induced territorial loss. The thesis, therefore, examines how international law conceptualizes and regulates statehood, territory, sovereignty, continuity, and recognition within the existing legal framework. At the same time, doctrinal legal research is not limited to static descriptions of existing law. Rather, the methodology allows

²⁹ Alex Green and Margaretha Wewerinke-Singh, 'State Continuity, Self-Determination and Sea-Level Rise' (2025) 74 *International and Comparative Law Quarterly* 555; Jörgen Ödalen, 'Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States' (2014) 17 *Ethics, Policy & Environment* 225.

³⁰ Jan Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (Maastricht European Private Law Institute Working Paper No 2015/06, 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088 accessed 6 May, 5

³¹ *Ibid* 5; Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod, argumentation och språk* (5th edn, Norstedts Juridik 2021) 51.

legal analysis to accommodate new developments, including recent institutional practice and evolving interpretations arising from broader societal change.³² This is particularly relevant in the context of climate change and SLR, where international law is increasingly confronted with legal questions that traditional doctrine did not anticipate.

Doctrinal legal methodology serves three related aims: description, prescription, and justification.³³ First, the thesis seeks to describe and systematize the existing law governing statehood and continuity in international law by organizing legal principles, rules, judicial reasoning, and institutional practice into a coherent legal framework.³⁴ In other words, it “provide[s] a language for discussion” and “create[s] the legal reality”.³⁵ The thesis aims not merely to present isolated legal sources, but to examine how these sources relate to one another within the broader structure of international law. Second, since doctrinal legal research also has a prescriptive dimension in evaluating which legal interpretations and doctrinal developments most coherently fit within the existing legal system, the thesis does the same.³⁶ This is particularly relevant in relation to climate-induced territorial loss, where international law does not yet provide definitive answers and where emerging legal practice raises questions concerning how traditional doctrines should be interpreted under unprecedented circumstances. Third, the doctrinal method also serves a justificatory function by assessing whether evolving interpretations concerning the continuity of statehood can be legally justified within the broader doctrinal structure of international law.³⁷ The thesis, therefore, not only examines what the law currently is, but also evaluates the extent to which contemporary legal developments may legitimately support an evolving understanding of statehood and continuity.

In doing so, the thesis primarily relies upon sources recognized under Article 38(1) of the Statute of the International Court of Justice (ICJ), which provide:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;

³² Smits (n 30) 7.

³³ Ibid 2.

³⁴ Ibid 8.

³⁵ Ibid 9; Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83, 110.

³⁶ Smits (n 30) 10.

³⁷ Ibid 11-12.

- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.³⁸

The above sources are commonly referred to as: (a) treaties; (b) customary law; (c) general legal principles; (d) court decisions and scholarly articles.³⁹ Article 38 distinguishes between primary and secondary sources of law. The first three (treaties, customary law, and general legal principles) are considered *law-creating*, whereas the last one (court decisions and scholarly articles) is *law-identifying*.⁴⁰ In this thesis, materials examined include the Montevideo Convention on the Rights and Duties of States, the Charter of the United Nations, relevant General Assembly resolutions, judicial decisions, and advisory opinions of international courts and tribunals, and academic legal scholarship concerning SLR, statehood, and continuity under international law. Particular attention is given to the Montevideo criteria for statehood, doctrines concerning continuity of statehood, the work of the ILC, especially the work of the Study Group on Sea-Level Rise in Relation to International Law, as well as the 2025 Advisory Opinion of the International Court of Justice (ICJ) on Obligations of States in Respect of Climate Change, including relevant separate opinions and declarations by judges of the ICJ. Although the outputs of the ILC are not formally binding, they carry significant authority as expressions of both codification and the progressive development of international law.⁴¹

In addition to formal legal sources, the thesis also examines emerging State practice and institutional developments concerning continuity of statehood in the context of SLR. These materials include the 2023 Pacific Islands Forum Declarations, the 2023 Falepili Union Treaty between Australia and Tuvalu, and the 2024 Alliance of Small Island States (AOSIS) Declaration on Sea-Level Rise and Statehood. These materials are not treated as binding legal rules in themselves, but rather as evidence of evolving *opinio juris*, institutional endorsement, and the gradual development of international legal practice concerning continuity and territorial loss.⁴² Since there is no direct historical precedent for the complete inundation of a State's territory due to SLR,

³⁸ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art. 38(1)

³⁹ Shahradsad Nasrolahi Fard, *Reciprocity in International Law: Its Impact and Function* (Routledge 2018) 19.

⁴⁰ Anders Henriksen, *International Law* (4th edn, OUP 2023) 22.

⁴¹ Guido Acquaviva, 'ICJ Advisory Opinions: The Binding Nature of the Content of Pronouncements under Article 65 of the ICJ Statute' (2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5029227 accessed 27 April, 11.

⁴² *State practice* is the objective element of customary international law, referring to widespread, representative, and reasonably consistent conduct by states over time. *Opinio Juris* is the subjective element, meaning that states engage in such conduct because they believe they are legally obliged or entitled to do so. North Sea Continental Shelf cases (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Rep 3, para 77.

academic legal scholarship plays a particularly important role in identifying doctrinal tensions, conceptual developments, and possible interpretations of existing international law. The thesis therefore engages with scholarship on statehood, continuity, sovereignty, recognition, and deterritorialized statehood by authors such as Crawford, Rayfuse, Burkett, Wong, Sparks, Jain, Rouleau-Dick, Stoutenburg, and Green and Wewerinke-Singh, among others. Rayfuse and Burkett are given particular attention because the ILC directly engaged with their scholarship. The thesis also draws on scientific reports and climate-related materials as needed to establish the factual context of SLR and its implications for SIDS. In this regard, IPCC reports primarily serve to contextualize the physical and existential risks posed by SLR.

Through doctrinal legal reasoning, the thesis analyzes the material and their relationship among legal principles, doctrines, judicial reasoning, and institutional developments to assess whether the continuity of statehood can be reconciled with the traditional territorial requirement of statehood. The analysis, therefore, moves beyond a purely descriptive account of legal rules and examines the coherence, interaction, and potential development of the legal framework. The thesis relies on established techniques of doctrinal legal reasoning, including deductive reasoning, analogy, and systematic interpretation.⁴³ Deductive reasoning is used when applying established legal principles to the contemporary issue of climate-induced territorial loss, while analogical reasoning is employed where relevant to assess whether existing doctrines concerning continuity may extend to unprecedented circumstances involving disappearing territory. The thesis further evaluates how emerging institutional developments and State practice may influence the interpretation and development of international law. The thesis approaches international law as a legal system whose rules and principles must be interpreted relationally rather than in isolation. The research, therefore, seeks to identify doctrinal consistencies and tensions within the law governing statehood and continuity. In doing so, the thesis aims both to clarify the present legal framework and to assess the extent to which contemporary developments may indicate an evolving understanding of statehood under international law.

1.5 Delimitations

This thesis focuses on the continuity of statehood for SIDS threatened by climate change-related SLR within the framework of international law. More specifically, the study investigates the relationship between the territorial requirement of statehood and the emerging presumption of continuity reflected in doctrine, institutional developments, and State practice. The thesis is therefore limited to examining whether international law can accommodate continuity despite the loss of habitable territory and what implications such accommodation may have for the doctrine of statehood. The thesis focuses on contemporary developments relating specifically to continuity and territorial

⁴³ Hutchinson and Duncan (n 35) 111.

loss rather than providing a complete account of climate change within international law more broadly.

Several delimitations have been made in order to narrow the study and maintain focus on the research question. First, the thesis examines the continuity of already existing states rather than the creation of new states. The Montevideo criteria are therefore analyzed primarily in relation to continuity, extinction, and adaptation rather than state creation as such. While broader theoretical debates concerning declaratory and constitutive theories of recognition are discussed, they are only examined insofar as they are relevant to continuity claims for SIDS facing inundation. Second, the thesis does not provide a comprehensive analysis of all legal consequences arising from climate change or SLR. Issues concerning climate mitigation obligations, State responsibility for greenhouse gas emissions, climate justice, reparations, and environmental governance are excluded from the thesis's scope, except where necessary to contextualize the continuity debate. Similarly, the thesis does not provide an extensive examination of the law of the sea beyond what is required to understand the relationship between maritime entitlements, territory, and continuity. Third, although questions relating to migration, statelessness, refugee law, nationality, and human rights are closely connected to the situation of affected populations, these issues are not examined in depth. Reviewing the broader legal and humanitarian implications of displacement caused by SLR is a task that lies outside the scope of this thesis. Such questions are therefore addressed only briefly, where necessary, to illustrate the significance of preserving statehood and international legal personality. Fourth, the study does not undertake empirical research concerning the practical operation of governance arrangements for possible deterritorialized states. Although scholarly proposals concerning deterritorialized statehood and Nation *Ex-Situ* models are examined, they are analyzed primarily as doctrinal and conceptual responses to the continuity problem rather than as practical institutional blueprints. The thesis, therefore, does not assess in detail how such arrangements would function in practice.

Finally, the thesis does not provide a detailed analysis of all international institutional developments related to climate change and SLR. Although the ILC's work on sea-level rise encompasses the law of the sea, protection of persons, and statehood, this thesis focuses primarily on the ILC's work on statehood. Moreover, the 2024 advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) is excluded from the thesis, as it does not address SLR in relation to statehood or the continuity of States. Similarly, the thesis does not intend to account for how the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, or the Paris Agreement under the United Nations (UN) climate change regime may be mobilized to preserve statehood, except for where their relevance is of importance for understanding the context in which this thesis is situated. Nor does the thesis undertake a comprehensive analysis of individual State

statements submitted in response to the ILC's work on sea-level rise, including interventions in the United Nations Sixth Committee and other exchanges between the Commission and Member States. Such materials are considered only where they have been reflected in broader institutional developments or are otherwise directly relevant to the research question. Other international and regional developments are similarly addressed only where directly relevant to the research question and the doctrinal evolution of continuity in international law.

1.6 Outline

This thesis is divided into six chapters. Following the introductory chapter, Chapter 2 establishes the scientific and institutional background of the study by examining anthropogenic climate change, SLR, the UN climate change regime, and the particular vulnerability of SIDS. The chapter also outlines the structural challenges international law faces in responding to climate change and explains why SLR creates unprecedented legal questions concerning the statehood of SIDS.

Chapter 3 examines the doctrine of statehood in international law. It traces the historical development of the concept of statehood, analyzes the Montevideo Criteria and related concepts such as effectiveness, independence, sovereignty, and UN membership, and then explores the concept of state continuity. The chapter then turns to the territorial requirement specifically and assesses whether international law permits a more flexible or functional understanding of territory. In this context, scholarly proposals concerning deterritorialized statehood and Nation *Ex-Situ* models are examined as possible responses to climate-induced territorial loss, alongside critiques questioning the doctrinal and conceptual viability of continuity-based approaches. Through this analysis, the chapter primarily addresses the first sub-question concerning the extent to which existing international law supports a presumption of continuity despite territorial loss.

Chapter 4 analyzes contemporary institutional developments and emerging State practice concerning SLR and continuity of statehood. Particular attention is given to the work of the ILC, especially the Study Group on Sea-Level Rise in Relation to International Law, as well as the 2025 Advisory Opinion of the ICJ. The chapter also examines relevant regional and bilateral developments, including the Pacific Islands Forum Declarations, the Falepili Union Treaty, and the Alliance of Small Island States (AOSIS) Declaration, to assess whether an emerging presumption of continuity in relation to SIDS facing inundation can be identified in international law. The chapter thereby primarily addresses the second sub-question concerning how institutional developments and State practice contribute to reconciling the presumption of continuity with the territorial requirement.

Chapter 5 examines the implications and tensions of reconciling continuity with the territorial requirement. The chapter discusses how such reconciliation affects foundational concepts of international law, including effectiveness, recognition, sovereignty, and the adaptability of international law itself. It further evaluates the extent to which the presumption of continuity reflects an interpretation of existing doctrine or a broader transformation of the statehood framework. In doing so, the chapter primarily addresses the third subquestion concerning the implications of such reconciliation for international law.

Finally, Chapter 6 concludes the thesis by answering the primary research question and summarizing the main findings of the analysis. The chapter also reflects on the broader implications of the thesis for international law and identifies areas for future research.

2 Climate Change, Sea-Level Rise, and the Vulnerability of Small Island Developing States

The legal questions surrounding the continued statehood of SIDS cannot be understood without regard for the physical phenomenon that gives rise to them. This chapter establishes the scientific and institutional context for the analysis that follows, accounting for how anthropogenic climate change is linked to SLR, outlining the existential threat confronting low-lying islands and SIDS, examining the UN climate change regime centered around the UN-FCCC, the Kyoto Protocol, and the Paris Agreement, and briefly explaining the structural constraints that impede addressing climate change within the domain of international law. In doing so, the chapter provides the factual and institutional framework within which the subsequent doctrinal analysis of statehood, continuity, and territorial loss is situated.

2.1 Anthropogenic Climate Change and Sea Level Rise

The scientific consensus that human activity is the dominant driver of observed warming since the mid-twentieth century is unequivocal. The IPCC, the authoritative body established by the UN to assess climate science, concluded in its Sixth Assessment Report (AR6) that it is "unequivocal that human influence has warmed the atmosphere, ocean and land".⁴⁴ The combustion of fossil fuels has driven an unprecedented increase in atmospheric concentrations of carbon dioxide and other greenhouse gases. Global surface temperatures have risen by approximately 1.1 degrees Celcius above pre-industrial levels (1850–1900), with each of the last four decades successively warmer than any preceding decade since 1850.⁴⁵

SLR is one of the most apparent consequences of global warming and occurs through thermal expansion driven by ocean warming and land-based ice loss.⁴⁶ Many changes resulting from past and future greenhouse gas emissions are irreversible for centuries to millennia, especially those in the ocean, ice sheets, and global sea level.⁴⁷ Regional relative SLR is projected to continue throughout the twenty-first century in almost all parts of the world, with only limited exceptions in areas with significant geological uplift.⁴⁸ Current predictions depend on different scenarios based on the degree of mitigation and

⁴⁴ IPCC, 'Summary for Policymakers' (n 4) 4.

⁴⁵ Ibid 4-5.

⁴⁶ Ibid 11.

⁴⁷ Ibid 21.

⁴⁸ Ibid 25.

continued usage of fossil fuels.⁴⁹ In a worst-case scenario, the global mean sea level could rise up to more than 1 meter by 2100. Yet these estimates do not account for low-probability, high-impact outcomes such as potential ice-sheet instability processes in Antarctica, which could produce SLR exceeding 2 meters by 2100 under high-emission scenarios.⁵⁰ As sea levels continue to rise, extreme coastal flooding events that historically occurred once every hundred years are expected to occur at least annually at more than half of the monitored coastal locations by 2100. This trend will significantly increase both the frequency and severity of flooding in low-lying coastal areas and accelerate erosion along most sandy shorelines. In coastal cities, the combined effects of SLR, storm surges, and extreme rainfall are also expected to increase the likelihood of flooding.⁵¹

2.2 The UN Climate Change Regime

The UN climate regime is a multilateral framework designed to address global climate change, primarily centered around three key international instruments: the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement.⁵² This regime has evolved significantly since its inception in the late 1980s and early 1990s and serves several critical functions, such as facilitating negotiations, tracking, and enabling implementation of commitments in relation to mitigation, adaptation, and supervising compliance.⁵³

The UNFCCC, adopted in 1992 and entering into force in 1994, serves as the foundational "constitution" for the international climate change regime.⁵⁴ Its overarching objective is to stabilize atmospheric greenhouse gas (GHG) concentrations at a level that prevents dangerous anthropogenic interference with the climate system.⁵⁵ The UNFCCC introduced the principles of "common but differentiated responsibilities and respective capabilities" (CBDRRC), acknowledging that developed countries, due to their historical emissions, should take the lead in combating climate change and its adverse impacts.⁵⁶

⁴⁹ IPCC, 'Technical Summary' in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (V Masson-Delmotte and others eds, Cambridge University Press 2021) 77-79.

⁵⁰ Ibid 79.

⁵¹ IPCC, 'Summary for Policymakers' (n 4) 25.

⁵² United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1.

⁵³ Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (OUP 2017) 10.

⁵⁴ Ibid 118.

⁵⁵ UNFCCC art 2.

⁵⁶ UNFCCC art 3.1.

At the time of writing, the UNFCCC has 198 parties, comprising 197 states and the European Union (EU).⁵⁷

Building upon the UNFCCC, the Kyoto Protocol was adopted in Kyoto on December 11, 1997, and entered into force on February 16, 2005. It established that legally-binding quantitative emission targets exist for industrialized countries, so-called "Annex I Parties".⁵⁸ The Protocol introduced three market-based mechanisms: Joint Implementation (JI), the Clean Development Mechanism (CDM), and International Emissions Trading (IET), to enable states to meet their GHG emissions targets.⁵⁹ Despite its ambitious nature, the Kyoto Protocol was proven controversial, as evidenced by the extended period of the seven-eight-year period between its negotiations being finalized and its eventual entry into force.⁶⁰

The Paris Agreement, adopted at COP21 on the 12th of December 2015, marked a significant shift from a "top-down" to a "bottom-up" approach to global climate governance.⁶¹ It aims to limit global warming to well below 2°C, preferably to 1.5°C, compared to pre-industrial levels, and to enhance the ability to adapt to the adverse impacts of climate change.⁶² A key feature of the Paris Agreement is the requirement for all Parties to submit Nationally Determined Contributions (NDCs), outlining their climate action plans.⁶³ These NDCs are intended to be progressively more ambitious over time, fostering a cycle of continuous improvement.⁶⁴ The Paris Agreement is recognized for its ambitious goals, extensive obligations, and compliance mechanisms, and has been described as a monumental triumph.⁶⁵ It has been said, however, that its success relies on the collective efforts stemming from the NDCs, which are a necessary complement to national governmental action.⁶⁶

Despite the existing architecture, climate change continues to pose exceptional challenges for both domestic and international law. Broadly speaking, international law has struggled to address collective action problems because it lacks strong enforcement mechanisms and can offer states only limited assurance that others will act in return. The challenges are multiple. First,

⁵⁷ United Nations Climate Security Mechanism, 'United Nations Framework Convention on Climate Change (UNFCCC) and Climate, Peace and Security' <https://www.un.org/climatesecuritymechanism/en/united-nations-framework-convention-climate-change-unfccc-and-climate-peace-and-security> accessed 8 May 2026.

⁵⁸ UNFCCC Annex I; Bodansky, Brunnée and Rajamani (n 53) 160.

⁵⁹ Kyoto Protocol art 6, 12, 17; Bodansky, Brunnée and Rajamani (n 53) 179.

⁶⁰ Bodansky, Brunnée and Rajamani (n 53) 160-161.

⁶¹ Cazadira Fediva Tamzil, "Bottom Up" Paris Agreement and the New Era of Climate Actions' IR-UI Commentaries (Vol II, No 02, March 2021) <https://ir.fisip.ui.ac.id/bottom-up-paris-agreement-and-the-new-era-of-climate-actions/> accessed 8 May 2026, 2.

⁶² Paris Agreement art 2.

⁶³ Ibid art. 4(2).

⁶⁴ Ibid art. 3, 4(3).

⁶⁵ Bodansky, Brunnée and Rajamani (n 53) 249, 209.

⁶⁶ Sander Chan and others, 'Climate Ambition and Sustainable Development for a New Decade: A Catalytic Framework' (2021) 12 *Global Policy* 245, 247.

climate change affects almost every major area of domestic governance, including energy, agriculture, transport, and urban planning, and carries major economic implications, all of which are undeniably politically contested areas. Second, the long-term existential effects of climate change are often placed in the background, while the short-term costs of addressing them and various political issues are placed in the foreground. Third, international cooperation is complicated by the fact that states have vastly different interests, levels of responsibility, and capacities to respond.⁶⁷ There are stark inequalities in wealth, emissions profiles, and vulnerability to climate impacts. The states most responsible for greenhouse gas emissions are often not those facing the most severe consequences. At the same time, states hold divergent views about what constitutes a fair allocation of burdens and responsibilities. Small island states, for example, have strong incentives to support urgent action because they face existential threats from SLR, even though their own emissions are negligible.⁶⁸ Given these structural constraints, it is unsurprising that international law has so far had only limited success in effectively addressing climate change.

2.3 Small Island Developing States

SIDS, as recognized by the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS), are a distinct group of developing countries facing specific social, economic, and environmental vulnerabilities.⁶⁹ They were first recognized as a special case for both their environment and their development at the 1992 United Nations Conference on Environment and Development.⁷⁰ They are located in the Caribbean, the Pacific, the Atlantic, the Indian Ocean, and the South China Sea.⁷¹ Fifty-eight countries and territories are presently classified as SIDS by the UN OHRLLS, with 39 being UN member states and 18 being Non-UN Members or Associate Members of the Regional Commissions, consisting of approximately 65 million people.⁷²

For SIDS, many of which have maximum elevations of only a few meters above current sea level, the implications of the trends described in the chapter are existential. The consequences manifest across several interconnected

⁶⁷ Bodansky, Brunnée and Rajamani (n 53) 3.

⁶⁸ Ibid 4.

⁶⁹ IPCC WGII Report (n 6) annex II glossary, 2923.

⁷⁰ *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3–14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol I) annex II ch 17 para 17.124.

⁷¹ United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, ‘About Small Island Developing States’ <https://www.un.org/ohrls/content/about-small-island-developing-states> accessed 20 April 2026.

⁷² Ibid; United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, ‘List of SIDS’ <https://www.un.org/ohrls/content/list-sids> accessed 20 April 2026.

dimensions. The most direct threat is the progressive loss of habitable land. SIDS may become uninhabitable well before the time of permanent inundation. By 2100, land areas home to 10% or more of the population of many SIDS are at risk of chronic coastal flooding or permanent inundation.⁷³ By 2100, if the global mean surface temperature remains at 1.5 degrees Celsius, more than 400,000 people will have been displaced due to permanent inundation.⁷⁴ Even before 2100, extreme sea-level events will increase in frequency, rendering several atolls uninhabitable by 2050.⁷⁵ It is important to note that there is variability in SIDS vulnerability, with the risk of islands becoming uninhabitable being the highest for atoll nations such as the Marshall Islands or the Maldives.⁷⁶ The effects of inundation are, however, not limited to the displacement of populations. Small islands face the loss of critical marine and coastal biodiversity and the ecosystem services on which communities depend. These impacts also threaten lives, homes, and infrastructure, while undermining food and water security. In addition, SLR may cause significant economic disruption by damaging settlements and essential services, while weakening livelihoods in sectors such as fisheries, agriculture, and tourism.⁷⁷ Natural disasters and slow-onset events require drastic measures such as population relocation and the challenges this entails. These challenges are compounded by SIDS limited institutional capacity, scarce financial resources, and heightened vulnerability to systemic shocks.⁷⁸

2.4 Conclusion

In light of the impact of SLR on SIDS, the question is no longer whether territory is central to statehood, but how international law responds when that territorial foundation is progressively eroded. The scientific realities of climate-induced SLR, together with the institutional responses embodied in the UN climate regime and the limitations that continue to constrain effective international action, illuminate the central legal problem examined in this thesis: whether the traditional doctrine of statehood, and particularly the requirement of a defined territory, can accommodate the continuity of states facing inundation. The following chapter addresses this question by examining the legal principles governing statehood and continuity and assessing the extent to which existing international law supports continuity despite territorial loss.

⁷³ IPCC WGII Report (n 6) 2068.

⁷⁴ D J Rasmussen and others, 'Extreme Sea Level Implications of 1.5 °C, 2.0 °C, and 2.5 °C Temperature Stabilization Targets in the 21st and 22nd Centuries' (2018) 13 *Environmental Research Letters* 034040, 7.

⁷⁵ IPCC WGII Report (n 6) 2165.

⁷⁶ *Ibid* 2073; Curt D Storlazzi and others, 'Most Atolls Will Be Uninhabitable by the Mid-21st Century because of Sea-Level Rise Exacerbating Wave-Driven Flooding' (2018) 4 *Science Advances* eaap9741, 5.

⁷⁷ IPCC, 'Summary for Policymakers' (n 4) 17.

⁷⁸ UN-OHRLLS (n 71).

3 Statehood, Continuity, and the Territorial Requirement

This chapter examines the concept of statehood and the extent to which it can accommodate the unprecedented challenge posed by climate-related SLR. It begins by tracing the historical development of statehood and the criteria traditionally associated with it, including related concepts such as effectiveness, independence, sovereignty, and the significance of UN membership in international practice, before turning to the doctrine of state continuity and the relationship between continuity, extinction, and recognition in international law. The chapter then explores whether the territorial requirement, long regarded as central to statehood, may admit of a more flexible or functional interpretation, including through concepts of deterritorialized statehood and the nation *Ex-Situ*. At the same time, the chapter engages with critiques questioning whether continuity-based approaches can adequately accommodate the permanent loss of territory within existing international law. Through doctrinal analysis of treaties, judicial decisions, institutional materials, and legal scholarship, the chapter systematizes and evaluates the legal principles governing statehood and continuity in order to assess whether existing international law supports a presumption of continuity despite territorial loss.

3.1 A Historical Background on Statehood

Since the Peace of Westphalia in 1648, the nation-state has been regarded as the primary and universally accepted subject of international law.⁷⁹ Consequently, the concept of “statehood” has generated debate since the seventeenth century. However, statehood has historically been a concept that has not been clearly defined. Early conceptions, grounded in the natural law tradition, understood the existence of states as primarily a political fact rather than a matter of legal regulation. Hence, scholars did not formulate any legal criteria for statehood. Instead, writers such as Grotius and Pufendorf conceived of the state as a political community or association.⁸⁰ During the eighteenth and nineteenth centuries, discussions were increasingly grounded in the positivist tradition, with questions of recognition and membership in the international legal order becoming central.⁸¹ The debate regarding whether a state’s existence was dependent on the recognition of other states led to the development of the constitutive and declaratory theory of recognition.⁸² For example, Lauterpacht held the former’s view, arguing that recognition was a legal act that made a state a subject of international law.⁸³ In contrast, the declaratory theory asserts that statehood is decided by a set of objective

⁷⁹ Boas (n 2) 156.

⁸⁰ Crawford, *The Creation of States* (n 19) 6.

⁸¹ *Ibid* 12.

⁸² *Ibid* 4-5.

⁸³ *Ibid* 19-20.

criteria, with scholars such as Charpentier noting that states can exist independently from the recognition of other states.⁸⁴

During the late nineteenth and early to mid twentieth centuries, as states consented to be bound by the League of Nations and later by the UN Charter, discussions of international personality and its connection to statehood emerged.⁸⁵ Famously, Jellinek conceptualized the state as “Land, People and Ruler” and presumed that when these criteria are met, the state exists as a natural person.⁸⁶ Such a view of statehood rested on the effectiveness of a government exercising authority over a defined territory and the people inhabiting that territory.⁸⁷ This understanding of statehood was reflected in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which is widely accepted as international customary law, that put forward four basic criteria: a permanent a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter relations with other states.⁸⁸ These criteria have naturally produced debate within modern scholarship. For example, Vidmar contends that they are better understood as descriptive features of entities already regarded as states, rather than as legal criteria for creating statehood.⁸⁹ On the other hand, and as mentioned earlier, Lauterpacht has argued that recognition should be treated as constitutive of statehood.⁹⁰ Meanwhile, scholars such as Shaw and Crawford have noted that additional criteria, such as independence and sovereignty, are necessary for a working definition.⁹¹

3.2 Montevideo Criteria

As demonstrated, the statehood doctrine has long been the subject of discussion with competing views on its inherent content and description. Crawford has submitted that the concept of statehood is best understood as a form of legal standing within the international legal order rather than merely a collection of specific rights. To exist as a state, therefore, means possessing the capacity to exercise powers and assume responsibilities on the international level.⁹² For the sake of understanding the concept of statehood itself, it is necessary to determine which entities possess it as a status. Specific criteria for when an entity qualifies as a state (statehood criteria) have therefore been

⁸⁴ Crawford, *The Creation of States* (n 19) 22.

⁸⁵ Ibid 29; Janneke Nijman, ‘Sovereignty and Personality: A Process of Inclusion’ in Gerard Kreijen and others (eds), *State, Sovereignty, and International Governance* (OUP 2002) 109.

⁸⁶ Georg Jellinek, *Allgemeine Staatslehre* (O Häring 1905); Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 3.

⁸⁷ Vidmar (n 86) 2.

⁸⁸ Montevideo Convention art 1.

⁸⁹ Vidmar (n 86) 5.

⁹⁰ Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 6.

⁹¹ Crawford, *The Creation of States* (n19) 45; Crawford, *Brownlie’s Principles* (n 19) 118; Shaw (n 19) 185.

⁹² Crawford, *The Creation of States* (n19) 44.

developed in international law. It is worth noting that statehood criteria are regarded as nominal and exclusionary. Hence, they exist not for obvious cases, but for instances of when statehood is unclear or borderline.⁹³

As a result of the Seventh International Conference of American States, the 1933 Montevideo Convention on the Rights and Duties of States was adopted. Primarily dealing with the principle of non-intervention, it has come to be better known for its Article 1:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.⁹⁴

Although the Montevideo Convention is a regional treaty and therefore only formally binding upon its parties, Article 1 is often cited as the most widely accepted formulation of the criteria of statehood and as a point of departure for attempts to define the concept.⁹⁵ Importantly, the provisions contained in Article 1 need to be read with Article 3, which stipulates: “The political existence of the state is independent of recognition by the other states...”.⁹⁶ Thus, the Montevideo Convention adopts a declaratory approach to statehood, according to which recognition by other states acknowledges its existence, rather than creating it. The provisions listed in Article 1 are therefore best understood as criteria to determine whether an entity qualifies as a state rather than constitutive elements that bring a state into existence. Statehood thus becomes a matter of fact, rather than law, in the sense that the criteria can be objectively recognized to prove the factual existence of a state.⁹⁷ Hence, the Montevideo criteria offer requirements for a new state to be established and do not govern, for example, their continued existence as such.⁹⁸ Additionally, the Montevideo criteria are not mutually exclusive. Rather, they are best understood as interconnected.⁹⁹

It is also worth noting that the Montevideo criteria are based on a principle of effectiveness. Broadly speaking, the notion of effectiveness refers to the first three criteria (permanent population, a defined territory, and government), which are expressed in a government’s ability to maintain law and order over

⁹³ Crawford, *The Creation of States* (n19) 56.

⁹⁴ Montevideo Convention art. 1.

⁹⁵ Shaw (n 19) 182; Crawford, *The Creation of States* (n19) 45; Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ (1999) 37 *Columbia Journal of Transnational Law* 403, 414.

⁹⁶ Montevideo Convention art. 3.

⁹⁷ Alejandra Torres Camprubí, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff 2016) 30-31.

⁹⁸ Alberto Costi and Nathan Jon Ross, ‘The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future’ in Caroline Morris and Petra Butler (eds), *Small States in a Legal World* (Springer 2017) 101, 118.

⁹⁹ Boas (n 2) 162.

a more or less defined territory and permanent population. Traditionally, however, effectiveness is understood in terms of the government criteria, reflecting an interpretation that only a minimal level of law and order, along with basic institutional structures, is necessary.¹⁰⁰ Notwithstanding either perspective, the notion of effectiveness takes expression in the Montevideo criteria. The following four subchapters will briefly outline the four criteria articulated in the Montevideo Convention before turning to additional concepts at the center of the Statehood doctrine.

3.2.1 Permanent Population

The population of a state consists of both the state nationals and its aliens.¹⁰¹ In relation to the size of the population, international law does not prescribe a minimum population size, and both practice and doctrine suggest that the requirement includes both quantitative and qualitative elements.¹⁰² In quantitative terms, even very small communities may suffice.¹⁰³ For example, the population of Pitcairn, consisting of approximately fifty inhabitants, has been recognized in several UN General Assembly resolutions as capable of constituting a potential state population.¹⁰⁴ At the same time, it must fulfill some qualitative aspects. This was affirmed in the *Duchy of Sealand* case, concerning a former British coastal sea fort whose occupants claimed statehood.¹⁰⁵ Although the court accepted that international law does not prescribe a minimum population, it held that a permanent population requires more than mere physical presence. It must involve a stable communal life, supported by basic infrastructure necessary for human existence, and a genuine intention to live together as an organized community. As Sealand's alleged nationals were mostly occasional visitors and lacked meaningful communal ties, the court concluded that the requirement was not met.¹⁰⁶ Accordingly, the notion of a "permanent population" is not defined solely by numbers, but by the existence of a stable and organized human community.¹⁰⁷

3.2.2 Defined Territory

Territory refers to the physical area over which a state exercises sovereignty and jurisdiction.¹⁰⁸ It includes both land and adjacent maritime zones such as its internal waters, archipelagic waters, and the territorial sea, as well as the

¹⁰⁰ Alex Green, 'Three Reconstructions of "Effectiveness": Some Implications for State Continuity and Sea-level Rise' (2024) 44 *Oxford Journal of Legal Studies* 201, 205

¹⁰¹ ILC Second Issues Paper (n 7) para 77.

¹⁰² Jenny Grote Stoutenburg, 'When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States' in Michael B Gerard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 57, 64.

¹⁰³ *Ibid* 65; Crawford, Brownlie's Principles (n 19) 118.

¹⁰⁴ Stoutenburg (n 102) 63-64.

¹⁰⁵ *In re Duchy of Sealand* (Administrative Court of Cologne, 3 May 1978) 80 ILR 683.

¹⁰⁶ *Ibid* 683; Stoutenburg (n 102) 64.

¹⁰⁷ Crawford, Brownlie's Principles (n 19) 118.

¹⁰⁸ ILC Second Issues Paper (n 7) para 88.

airspace above these areas.¹⁰⁹ However, the size of such an area is not of importance.¹¹⁰ Likewise, there is no demand for the territory to be contiguous between its parts, which would otherwise call into question the statehood for territories such as Alaska and Hawaii, as they are discontinuous from their “mainland”.¹¹¹ Neither does a territory completely surrounded by the territory of another state infringe statehood.¹¹² Furthermore, borders need not be defined nor settled.¹¹³ For example, disputes between two states regarding the boundaries of their frontiers do not affect statehood.¹¹⁴ Such was, for example, concluded in the case of *Deutsche Continental Gas-Gesellschaft v Polish State*, which held that, despite the absence of accurately delimited boundaries, at least some degree of consistency in the territory controlled by the state’s government was necessary.¹¹⁵ Likewise, the International Court in the *North Sea Continental Shelf* case articulated no need for a State to be fully delimited and defined.¹¹⁶ Put simply, the state must consist of an effectively governed and coherent territory.¹¹⁷

3.2.3 Government

The government refers to the political organization that governs and performs the State’s executive, legislative, and judicial functions.¹¹⁸ However, the government is to be regarded as an expression of a coherent political structure, rather than a fact of the mere existence of an apparatus with executive and legislative functions.¹¹⁹ Nonetheless, it is the criterion upon which the other criteria depend, as international law defines territory by the extent of governmental power over the territory and its population.¹²⁰ However, international law does not define either the nature or extent of such governmental power except for “some degree of maintenance of law and order and the establishment of basic institutions”.¹²¹ Ultimately, it is relative and therefore difficult to generalize.¹²² For example, even where central authorities lose control and public order breaks down, it does not void the existence of statehood.¹²³ In either way, the government must be able to be “effective” in the sense that it

¹⁰⁹ ILC Second Issues Paper (n 7) para 88.

¹¹⁰ Crawford, *The Creation of States* (n19) 46.

¹¹¹ *Ibid* 47; ILC Second Issues Paper (n 7) para 89.

¹¹² ILC Second Issues Paper (n 7) para 89

¹¹³ Shaw (n 19) 183.

¹¹⁴ Crawford, *The Creation of States* (n19) 49-50.

¹¹⁵ *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 14-15.

¹¹⁶ *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, para 46.

¹¹⁷ Crawford, *The Creation of States* (n19) 52.

¹¹⁸ ILC Second Issues Paper (n 7) para 96.

¹¹⁹ Shaw (n 19) 184.

¹²⁰ Crawford, *The Creation of States* (n19) 56.

¹²¹ *Ibid* 59.

¹²² *Ibid* 61.

¹²³ Shaw (n 19) 185.

is independent from the influence of other states.¹²⁴ Further, the structure of a state's political organization varies and may be changed freely without affecting its international legal personality.¹²⁵ In other words, whether a state is a monarchy or a republic, unitary or federal, does not bear relevance for it to be a state. It should also be noted that the government need not be able to exercise its authority throughout its entire territory for the criteria to be considered fulfilled.¹²⁶

3.2.4 Capacity to Enter Into Relations With Other States

It is essential for a state to be able to create legal relations with other units.¹²⁷ The State possesses its own legal personality, enabling it to possess rights and obligations.¹²⁸ As such, a state's capacity to enter into relations with other states is an expression of its sovereignty, meaning that it is independent and not subject to the authority of any other state. This capacity is therefore limited only by the sovereignty of other states and by international law.¹²⁹ The capacity to enter into relations with other states can be seen as a combination of a State having an effective government and independence, enabling it to act independently on the international plane and act with other entities under international law.¹³⁰ As the state's capacity depends partly on the existence of an effective government capable of implementing its international obligations, and partly on its independence in external affairs, Crawford has made the case for the capacity to enter into relations with other states to be a consequence of statehood, rather than a criterion.¹³¹ It is also worth noting that this capacity is not limited to states, as international organizations and other bodies within the sphere of international law can enter into relations with them.¹³²

3.2.5 Montevideo Criteria in International Practice

Although the Montevideo Convention is formally a regional instrument, its criteria have been widely reflected in other legal instruments and international practice. For instance, the 1936 resolution of the Institut de Droit International defines a State as a politically organized society existing within a defined territory, independent of other States, and capable of observing international obligations.¹³³ Similarly, the 1949 Draft Declaration on the Rights and Duties

¹²⁴ Emily Crawford and Rosemary Rayfuse, 'Climate Change and Statehood' in Rosemary Rayfuse and Shirley V Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar Publishing 2012) 243, 246.

¹²⁵ ILC Second Issues Paper (n 7) para 97.

¹²⁶ Henriksen (n 40) 64.

¹²⁷ Shaw (n 19) 185.

¹²⁸ ILC Second Issues Paper (n 7) para 102.

¹²⁹ *Ibid* para 101.

¹³⁰ Crawford and Rayfuse, 'Climate Change and Statehood' (n 124) 246.

¹³¹ Crawford, *The Creation of States* (n19) 61-62.

¹³² Shaw (n 19) 185.

¹³³ Institut de Droit International, 'Resolutions concerning the Recognition of New States and New Governments' (Brussels Session, April 1936) (1936) 30 *American Journal of International Law Supp* 185.

of States, adopted by the ILC, emphasizes key attributes of statehood, including territorial jurisdiction and independence.¹³⁴ While not formulated as explicit criteria, these provisions reflect the same underlying structure as the Montevideo framework. Further, the 1956 ILC draft articles on the law of treaties included a definition of a State comprising a population, a defined territory, a system of government, and the capacity to enter into international relations (although not codified).¹³⁵ The same approach is evident in the Badinter Arbitration Commission in Opinion No. 1 in 1991, which described a State as a community consisting of a territory and population under an organized political authority, characterized by sovereignty.¹³⁶

Taken together, these examples demonstrate that the criteria set out in Article 1 of the Montevideo Convention have been consistently reproduced across different legal contexts. It thus reinforces their status as the primary point of reference for determining statehood in international law.

3.3 Independence and Sovereignty

In addition to the Montevideo criteria, scholars have identified independence as a central requirement of statehood.¹³⁷ Independence refers to the absence of subordination to any other state and the capacity to act autonomously in international relations.¹³⁸ Importantly, in the context of being a criterion of statehood, its role varies. For example, a newly created state must demonstrate a sufficient degree of independence in order to be recognized as such. In contrast, the independence of an existing state is protected by international law and can endure even where effective control is significantly reduced.¹³⁹ Accordingly, a state may continue to exist despite a substantial lack of independence. For example, temporary instances of a lack of independence, such as during belligerent occupation, do not affect statehood.¹⁴⁰ Likewise, as illustrated by the *Austro-German Customs Union Case*, so long as a state is not legally subordinated to another state, it remains independent, even where it is subject to extensive international obligations or practical forms of dependence.¹⁴¹ Further, independence can be understood as comprising both a factual and a legal dimension. Factual independence is linked to the criteria of territory as it refers to a state's practical self-sufficiency, which depends on factors such as its size and the resources available to it. Legal independence

¹³⁴ International Law Commission, 'Draft Declaration on Rights and Duties of States' [1949] II *Yearbook of the International Law Commission* 287

¹³⁵ Gerald Gray Fitzmaurice, 'Law of Treaties' [1956] II *Yearbook of the International Law Commission* 104, 107-108.

¹³⁶ Maurizio Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31 *International Legal Materials* 1488, 1495.

¹³⁷ Crawford, *The Creation of States* (n19) 62; Shaw (n 19) 185.

¹³⁸ ILC Second Issues Paper (n 7) para 101.

¹³⁹ Crawford, *The Creation of States* (n19) 63.

¹⁴⁰ Henriksen (n 40) 64.

¹⁴¹ Crawford, *The Creation of States* (n19) 65-66

refers to the absence of subordination to another state's authority, as mentioned above. When reduced to its legal dimension, independence becomes a formal status that may be attributed to an entity irrespective of its territorial situation. It remains contested, however, whether both the factual and legal dimensions must be satisfied for a state to be considered fully independent.¹⁴²

Closely tied to independence is sovereignty. Whereas statehood is understood as a status, sovereignty defines the state's role on the international plane. Sovereignty relies on the principles of sovereign equality and non-interference in the domestic affairs of a sovereign state and takes expression in both internal and external forms. The former focuses on a state's ability to make and enforce laws over its population within its territory.¹⁴³ The latter, as explained in the judgment in the *Island de Palmas* case, stipulates that sovereignty, *inter alia*, means the right to exercise supreme, independent authority or jurisdiction over a piece of territory.¹⁴⁴ Denoting the independence of the state in the international community.¹⁴⁵ Sovereignty is sometimes used interchangeably with independence as a criterion for statehood. However, it is more accurately understood as a consequence of statehood, referring to the power a state can exercise. It has therefore been suggested that independence should be understood as a criterion for statehood, while sovereignty refers to the legal effects that follow from it.¹⁴⁶

3.4 UN Membership

A brief consideration of UN membership is warranted. International practice within the UN complicates a rigid reading of the criteria of statehood. Although the UN Charter requires that only "States" may be admitted as members in accordance with its Article 4, this notion has generally been interpreted as referring to statehood under general international law rather than constituting a definition in itself.¹⁴⁷ At the same time, practice within UN organs demonstrates a degree of flexibility in how the general statehood criteria are applied. This flexibility takes expression under Article 35(2) of the Charter, which stipulates that a State that is not a member of the United Nations can "bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of the pacific settlement provided in the...Charter".¹⁴⁸ For instance, Indonesia was invited to participate in the Security Council in 1947 despite its statehood being the topic at hand. Similarly, a representative of Hyderabad was heard in the Security Council in 1948

¹⁴² Stoutenberg (n 102) 71.

¹⁴³ Costi and Ross (n 98) 122.

¹⁴⁴ *Island of Palmas arbitration (Island of Palmas Case (Netherlands/United States of America) (Award) (1928) 2 RIAA 829, 838.*

¹⁴⁵ Costi and Ross (n 98) 122.

¹⁴⁶ Crawford, *The Creation of States* (n19) 89.

¹⁴⁷ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 4; Crawford, *The Creation of States* (n19) 179.

¹⁴⁸ UN Charter art 35(2).

regarding its status as a State.¹⁴⁹ These examples illustrate that a strict legal classification of States has not precluded participation at the UN.

Nonetheless, the ICJ in the *Admissions Case* has affirmed that applicants to UN membership must meet five requisite conditions: “(1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so”.¹⁵⁰ Yet the practice surrounding admission to membership also involves political considerations. For example, Bangladesh’s admission was initially vetoed by China, reportedly for political reasons, despite broad recognition of its statehood, and was finalized only after geopolitical tensions had eased.¹⁵¹ A further illustration of this is the case of the Federal Republic of Yugoslavia (FRY) in the 1990s. Following the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the FRY claimed to continue the SFRY’s international legal personality and, thus, its UN membership.¹⁵² However, the Security Council and General Assembly rejected this claim, determining that the FRY could not automatically continue the SFRY’s membership and instead should apply as a new member.¹⁵³ Despite this, between 1992 and 2000 (until the FRY abandoned its claim of continuity of the SFRY), the FRY continued to engage in international legal relations, it paid UN contributions, was a party before the ICJ, and relied on treaties concluded by the SFRY.¹⁵⁴ Thus, the FRY was widely regarded as a State in international law, yet its status within the UN was unsettled. This example illustrates that questions of state identity, continuity, and membership are not always resolved through the strict application of legal criteria. Instead, institutional practice may yield pragmatic, context-specific outcomes that do not align with classical doctrine. This further supports the view that the application of statehood criteria within the UN framework is not rigid, but mediated by political realities.

UN membership has come to carry significant legal and political weight. Although it is not formally constitutive of statehood, admission is regarded as a form of collective validation by the international community.¹⁵⁵ In this sense, statehood emerges not as a rigid legal threshold but as a flexible, context-dependent status, shaped not only by criteria but also by institutional practice.

¹⁴⁹ Crawford, *The Creation of States* (n19) 175.

¹⁵⁰ *Conditions of Admission of a State to Membership in the United Nations advisory opinion* (Advisory Opinion) [1948] ICJ Rep 57, 62.

¹⁵¹ UNGA Res 2937 (XXVII) (29 November 1972) adopted without a vote.; Crawford, *The Creation of States* (n19) 176, 180.

¹⁵² *Ibid* 188.

¹⁵³ UNSC Res 777 (19 September 1992) para 1; UNGA Res 47/1 (22 September 1992) para 1.

¹⁵⁴ Crawford, *The Creation of States* (n19) 189.

¹⁵⁵ James D Fry and Agnes Chong, ‘Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, [1948] ICJ Rep 57; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, [1950] ICJ Rep 4’ in Cedric Ryngaert and others (eds), *Judicial Decisions on the Law of International Organizations* (OUP 2016) 138.

This insight is particularly significant in the context of climate change, where SIDS' continued membership in the UN may serve as a powerful indicator of the international community's willingness to preserve their legal personality despite the erosion, or even loss, of their territorial base.

3.5 State Continuity

At first glance, the Montevideo criteria may appear to be arbitrary checklists for deciding whether an entity is to be regarded as a state. Yet international practice demonstrates that states are not static entities that are "either or". Changes in territory, population, or governmental authority are common, and international law therefore assumes the continuity of states with state succession as its antithesis.¹⁵⁶ State continuity refers to the persistence of a state as a legal entity over time, despite changes to its constituent elements.¹⁵⁷ In this sense, the question of continuity is ultimately one of identity, namely, whether the State in question can be regarded as the same legal person over time.¹⁵⁸ Accordingly, a state still continues to exist despite significant changes to its territory, population, or governmental structure.¹⁵⁹

On state identity, Marek defined it as the continuity of a state's international rights and obligations and regarded continuity as the dynamic expression of that identity.¹⁶⁰ In this view, a state either continues to exist or becomes extinguished, with no room for temporary disappearance or re-emergence of a state.¹⁶¹ Linking state identity to continuity has, however, been criticized by O'Connell, arguing instead that the central issue should be whether existing legal relations and obligations continue after political change.¹⁶² Building on O'Connell's critique, Craven has further highlighted the difficulty of relying on the concept of legal personality to determine questions of continuity or succession.¹⁶³ More recent scholars, such as Crawford, argue that the weight ought to be placed on the existence of a persistent, identifiable political community, embodied in the State, and claim that the determination of continuity should be made with reference to statehood criteria.¹⁶⁴ However, it has been submitted that the concepts of state continuity and statehood criteria are

¹⁵⁶ Crawford, *The Creation of States* (n19) 667.

¹⁵⁷ *Ibid* 667-668.

¹⁵⁸ Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (2nd rev edn, Brill Nijhoff 2022) 22.

¹⁵⁹ Crawford, *The Creation of States* (n19) p. 667-669

¹⁶⁰ Marek (n 21) 5-6.

¹⁶¹ Mälksoo (n 158) 22.

¹⁶² Ineta Ziemele, 'Room for "State Continuity" in International Law? A Constitutionalist Perspective' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015) 273, 277.

¹⁶³ Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2007) 216.

¹⁶⁴ Crawford, *The Creation of States* (n19) 669.

separate legal issues, of which the former need not be strictly governed by the Montevideo criteria.¹⁶⁵

Nonetheless, determining state continuity involves an element of claim and recognition.¹⁶⁶ A state's claim to continuity has been highly influential in practice.¹⁶⁷ Yet the claim alone is not determinative, as its success depends on the response to it. The FRY case is instructive. When the FRY claimed in 1992 to continue the legal personality of the SFRY, the claim was widely rejected by the international community, and the FRY was denied automatic succession to the SFRY's UN membership and treaty obligations.¹⁶⁸ By contrast, when the Russian Federation asserted continuity with the USSR in 1991, the claim was accepted despite the fact that the traditional elements associated with state identity (territory, population, government) had changed substantially between the USSR and the Russian Federation.¹⁶⁹ Similarly, the Federal Republic of Germany's (FRG) assertion of continuity following the unification of Germany displays the importance of the claim. Albeit through a process of voluntary accession of East Germany into the FRG, which retained the legal identity of the former East Germany, which was also recognized by the international community.¹⁷⁰ Nevertheless, recognition also carries a temporal quality in that, traditionally speaking, once a state is recognized, recognition cannot be withdrawn.¹⁷¹ Somalia exemplifies this, as despite the complete collapse of the central government after 1991, its statehood has never been formally revoked, because the recognition that sustained its international legal personality was never retracted.¹⁷² As these cases illustrate, continuity emerges not solely from factual circumstances in the presence of territory, population, or effective government, but from the interaction between legal criteria, the claiming state itself, and the recognition of the international community.

This presumption of continuity is closely linked to the question of state extinction. Extinction occurs when a State ceases to exist as a legal entity, thereby triggering the rules of state succession found in customary law and

¹⁶⁵ Costi and Ross (n 98) 110.

¹⁶⁶ Konrad G Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer Law International 2001) 18.

¹⁶⁷ Crawford, *The Creation of States* (n 19) 671.

¹⁶⁸ UNSC Res 1022 (22 November 1995) preamble, recognising 'that State has ceased to exist'; UNSC Res 757 (30 May 1992) preamble, noting 'that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted; Ibid 708.

¹⁶⁹ Guido Acquaviva, 'Russia as the State Continuing the Legal Personality of the USSR – An Inquiry into State Identity or Succession' (2021) 23 *Journal of the History of International Law / Revue d'histoire du droit international* 2-3.

¹⁷⁰ Crawford, *The Creation of States* (n 19) 674-675

¹⁷¹ Montevideo Convention art 6 ('recognition [of a state] is unconditional and irrevocable'); Costi and Ross (n 98) 119.

¹⁷² Yejoon Rim, 'State Continuity in the Absence of Government: The Underlying Rationale in International Law' (2021) 32 *European Journal of International Law* 485, 487.

within the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.¹⁷³ However, this body of law is primarily designed to address situations in which a state undergoes changes to its borders, government, or degree of territorial control, while continuing to exist in a modified yet still recognizable form.¹⁷⁴ Such continuity is therefore generally conceived of in terms of continuance either as part of another pre-existing state or as an entirely new successor state.¹⁷⁵ When it comes to extinction, international law does not provide for definite criteria for such determination.¹⁷⁶ Notwithstanding this, it is generally assumed that there are three ways for a state to become extinct: merger, voluntary absorption, or dissolution.¹⁷⁷ Albeit in cases where no successor state exists, and the predecessor state has been rendered uninhabitable or has physically disappeared, as would be the case for SIDS facing inundation, this is not provided for by international law.¹⁷⁸

It is clear that extinction is exceptional, and a State is not extinguished merely by substantial changes in its territory, population, or government, nor even by a combination of such changes.¹⁷⁹ Rather, international law adopts a strong presumption in favor of continuity against extinction.¹⁸⁰ Disfavouring extinction reflects a broader concern for order and stability in international law, as once an entity has been “accepted” as a State, the rules governing its continued existence are applied with greater flexibility than those governing its creation.¹⁸¹ As is evident from the *Badinter Commission*: “The dissolution of a State means that it no longer has legal personality, something which has major repercussions in international law. It therefore calls for the greatest caution”.¹⁸² It is also important to note that where the extinction of a state involves serious violations of *jus cogens* norms in international law, the principle of legality prevails over that of effectiveness. If a state is extinguished in violation of such norms, states are required not to recognize the resulting situation and instead to continue recognizing the legal personality of the state

¹⁷³ Crawford, *The Creation of States* (n 19) 700; Crawford and Rayfuse, ‘Climate Change and Statehood’ (n 124) 248; Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (adopted 8 April 1983, not yet in force) (1983) 22 *International Legal Materials* 306.

¹⁷⁴ Crawford and Rayfuse, ‘Climate Change and Statehood’ (n 124) 248.

¹⁷⁵ *Ibid*; Crawford, *The Creation of States* (n19) 667-668.

¹⁷⁶ Marek (n 21) 7; Wong (n 11) 16.

¹⁷⁷ Wong (n 11) 17.

¹⁷⁸ United Nations High Commissioner for Refugees, ‘Climate Change and Statelessness: An Overview’ (submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action under the UN Framework Convention on Climate Change, Bonn, 1–12 June 2009) 2; Jane McAdam, ‘Environmental Migration Governance’ (UNSW Law Research Paper No 2009-1, 2009) 16; Burkett (n 10) 354.

¹⁷⁹ Crawford, *The Creation of States* (n 19) 700.

¹⁸⁰ *Ibid* 701.

¹⁸¹ Bühler (n 166) 18.

¹⁸² Yugoslavia Peace Conference Arbitration Commission Opinion No 8 (1992) 92 ILR 201.

concerned, despite its lack of effectiveness.¹⁸³ As was the case for the continued recognition of the annexed Baltic States by the Soviet Union.¹⁸⁴ Despite the annexation of them after more than 50 years without territorial control, the Baltic states "reemerged" as the same legal entities in 1991.¹⁸⁵ The Annexation of Kuwait by Iraq is also illustrative as it was declared "null and void" by the UN Security Council, which called "for the restoration of Kuwait's sovereignty, independence and territorial integrity and of the authority of its legitimate government".¹⁸⁶

If one uses the Montevideo criteria as guidance in determining continuity, it should be noted that not all criteria are given equal weight. Rather, the application of the criteria is flexible, with varying weights attached to each depending on context.¹⁸⁷ It has been submitted that the criteria of territory and population are given greater significance than the other criteria in Article 1 of the Montevideo Convention.¹⁸⁸ This is reflected in practice, where the absence of an effective government has not been deemed sufficient to terminate statehood, as illustrated by Somalia between 1991 and 2004 and Afghanistan between 1989 and 1996, among others.¹⁸⁹ Additionally, a distinction has been drawn between temporary and permanent defects in the criteria of statehood.¹⁹⁰ In this regard, it has been argued that the permanent loss of a fundamental element, such as territory, cannot be remedied by the presumption of state continuity. Since territory cannot simply "reappear", it does not constitute a temporary defect.¹⁹¹ Yet, in the context of SIDS facing inundation, it has also been argued that state continuity should preserve statehood even in the absence of territory, as continuity reflects international law's commitment to safeguarding substantive rights. In situations of crisis where such rights are at risk, state continuity would protect a people's cultural, ethnic, and historical identity.¹⁹² From this perspective, statehood serves to protect these substantive rights. Consequently, the loss of territory does not necessarily preclude the continued existence of the state *de jure*.¹⁹³ Similarly, as Grant points out with reference to situations where the territory or its effective control has been temporarily "lost" due to disputes over boundaries, or due to foreign occupation or a temporary breakdown of governmental organization: "Once

¹⁸³ Stoutenberg (n 102) 59.

¹⁸⁴ Ibid. 59.

¹⁸⁵ Ibid 75.

¹⁸⁶ UNSC Res 662 (9 August 1990); UNSC Res 674 (29 October 1990).

¹⁸⁷ Crawford and Rayfuse, 'Climate Change and Statehood' (n 124) 247.

¹⁸⁸ Wong (n 11) 20.

¹⁸⁹ Further examples include China 1930-5, Russia 1917-21, Bosnia and Herzegovina 1991-4, Zaire/Congo 1997-2004, Ethiopia 1935-45, Poland 1939-45, and Kuwait 1990-1). See Crawford, *The Creation of States* (n 19) 694.

¹⁹⁰ Wong (n 11) 22; Susin Park, *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States* (UNHCR Legal and Protection Policy Research Series, 2011) 6-7.

¹⁹¹ Wong (n 11) 21-22.

¹⁹² Costi and Ross (n 98) 101-102.

¹⁹³ Sharon (n 27) 1052.

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”.¹⁹⁴

The importance of state continuity is not merely conceptual. Statehood determines access to fundamental aspects of the international legal order, including membership in international organizations such as the UN and the ability to stand before international courts and tribunals.¹⁹⁵ For vulnerable states, particularly SIDS, the preservation of statehood is therefore essential for the protection and enforcement of their rights under international law. The Montevideo criteria can inform continuity, but they do not necessarily govern it, and significant changes to a state’s population, territory, and government do not necessarily entail a state’s extinction. Yet, the presumption of continuity does not imply that a State persists indefinitely regardless of circumstances. If changes become too extensive, the State’s continued existence may be called into question. Nevertheless, international law sets a high threshold for such a conclusion.

3.6 Relaxing the Territorial Requirement

As reflected in the Montevideo criteria, territory constitutes one of the conditions necessary for an entity to qualify as a state. As discussed above, these criteria are commonly understood to reflect the principle of effectiveness, in that a government maintains law and order over a more-or-less defined territory and a permanent population.¹⁹⁶ From this perspective, the territorial requirement is not to be seen as an isolated criterion, but rather as an enabling factor for effectiveness. At the same time, the function extends beyond effectiveness. It provides the spatial framework within which jurisdiction is defined, authority is exercised, and the relationship between the state and the population is organized. As put by Wong: "...the state must have a nucleus, so to speak, in which to locate itself".¹⁹⁷ Doctrine, however, has offered different views on the link between territory and effectiveness. On the one hand, associated with scholars such as Kelsen, territory is understood as a consequence of the establishment of a legal order. Where effective governance exists, territory represents the spatial sphere within which that legal order operates.¹⁹⁸ On the other hand, as advanced by scholars such as Crawford, territory constitutes a prerequisite for effectiveness, as it provides the framework within which authority can be exercised.¹⁹⁹ Although these approaches differ, both link territory closely to the state’s functioning. Whether understood as a precondition or a consequence, territory has traditionally been an integral

¹⁹⁴ Grant (n 95) 435.

¹⁹⁵ Wong (n 11) 4.

¹⁹⁶ Rowan Nicholson, *Statehood and the State-Like in International Law* (OUP 2019) 95; Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 25-26.

¹⁹⁷ Wong (n 11) 21.

¹⁹⁸ Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44; Jain (n 25) 16.

¹⁹⁹ Crawford, *The Creation of States* (n 19) 46.

component of the state's ability to maintain order, exercise jurisdiction, and act within the international legal system.²⁰⁰

Accordingly, international law has traditionally treated territory as a necessity. However, as noted earlier, state practice demonstrates that the territorial requirement is not applied strictly. It is sufficient that a state possesses "some" territory; its size, precise delimitation, or even the existence of boundary disputes does not preclude statehood. Moreover, the case of the Sovereign Military Hospitaller Order of Saint John of Jerusalem, of Rhodes and of Malta (hereafter the Sovereign Order of Malta or the Order) has demonstrated that the absence of territory has not prevented the order from engaging as a sovereign entity in international law. The Order was established in the early eleventh century and exercised sovereign authority over territory until its expulsion from Malta in 1798.²⁰¹ Although it made several attempts to regain territorial control, these were unsuccessful, and it has not possessed sovereign territory since then. In 1834, the Order established its seat in Rome, where it remains today. Its headquarters in Rome enjoys extraterritorial status but does not constitute sovereign territory.²⁰² Despite the absence of a territorial base, the Order maintains diplomatic relations with a large number of states and has been granted observer status at the UN.²⁰³ Even though it is not recognized as a state in international law, the Sovereign Order of Malta has historically been regarded as a sovereign international subject, demonstrating that the absence of territory does not entirely preclude participation in the international legal system.²⁰⁴

A similar, albeit exceptional, example is provided by the Holy See. Following the annexation of the Papal States in 1870, the Holy See exercised no territorial sovereignty until the establishment of Vatican City in 1929.²⁰⁵ Nevertheless, it retained international legal personality throughout this period, as evidenced, for example, by the continued accreditation of diplomats to the Holy See and the persistence of its treaty-making capacity. As Crawford notes, the Holy See's international position was, at least in part, independent of its territorial competence.²⁰⁶ Although this example is *sui generis* and cannot be directly applied to all cases of statehood, it nevertheless illustrates that international legal personality and representative authority have, in exceptional

²⁰⁰ Jain (n 25) 16.

²⁰¹ Jozef Batora and Nik Hynek, 'The Sovereign Military Order of Malta: Extraordinary Resilience Meets Chance' in *Fringe Players and the Diplomatic Order* (Palgrave Macmillan 2014) 112.

²⁰² Noel Stanley Cox, 'The Continuing Question of Sovereignty and the Sovereign Military Order of Jerusalem, of Rhodes and of Malta' (2008) 13 *Australian Journal of International Law* 211, 217.

²⁰³ Wong (n 11) 11.

²⁰⁴ Rayfuse (n 10) 10.

²⁰⁵ Guido Acquaviva, 'Subjects of International Law: A Power-Based Analysis' (2005) 38 *Vanderbilt Journal of Transnational Law* 345, 354; Crawford, *The Creation of States* (n19) 226.

²⁰⁶ Crawford, *The Creation of States* (n 19) 226.

cases, been maintained despite the absence of territorial control. The case of the Sovereign Order of Malta and the Holy See amply illustrates that sovereignty and nation can be separated from territory, and that the territorial requirement and international law can accommodate and accept sovereign non-territorial entities.

Governments-in-exile further illustrate the functional yet non-territorial nature of sovereignty. International law has long recognized governments-in-exile, allowing them to continue exercising authority even when detached from their territory.²⁰⁷ Traditionally, such governments have emerged either because of external events, such as occupation or annexation, or because of internal upheavals such as civil war.²⁰⁸ Once recognized, governments-in-exile maintain all the powers that the *de jure* government of a State can exercise extraterritorially, such as the ability to conclude treaties, perform diplomatic representation, and exercise jurisdiction over nationals abroad, since they are not a separate legal subject, but an organ of the state they continue to represent.²⁰⁹

The above points to a certain flexibility, suggesting that maintaining effectiveness is not necessarily tied to a rigid territory but rather to the capacity to organize and exercise authority within a spatial domain. As Jain highlights, it raises the question of whether territory is strictly necessary for effectiveness, or whether it has historically constituted the primary means through which effectiveness has been realized.²¹⁰ If the latter is the case, the territorial requirement may be understood as flexible rather than absolute. Such a view finds support in Marek's competence theory.²¹¹ By conceptualizing territory as the spatial scope of jurisdiction, it emphasizes the functional role of territory in enabling the exercise of state authority, rather than treating it as an essential attribute of statehood in itself.²¹² Building on this functional understanding of territory, it becomes possible to question whether the link between territory and statehood remains valid in all scenarios and under all circumstances. Jain points out that, *inter alia*, technological developments, globalization, and the increasing acceptance of extraterritorial jurisdiction have weakened the exclusive link between territorial control and the exercise of authority.²¹³ The fact that territory facilitates effectiveness is palpable, but so is its apparent functional nature.

Sparks has elaborated on the notion of functional territory, rethinking territory not primarily as a fixed physical land but as the functions it performs in statehood. On this view, territory matters less because of its material existence as

²⁰⁷ Stoutenberg (n 102) 68.

²⁰⁸ Ibid 68.

²⁰⁹ Ibid 69.

²¹⁰ Jain (n 25) 18.

²¹¹ Marek (n 21) 18.

²¹² Jain (n 25) 19-20.

²¹³ Ibid 24-25.

land, and more because it has historically served as a mechanism for delineating authority. That is, for allocating jurisdiction, organizing governance, and enabling a political community to exercise self-determination.²¹⁴ As he argues, the central function of territory in international law is not constitutive in itself, but instrumental. It defines the space within which a political community governs itself and prevents other States from exercising authority there within.²¹⁵ From this perspective, the essential concern is not territoriality, but whether the functions traditionally enabled through territory, such as jurisdiction, political organization, and collective self-rule, can continue to be exercised.²¹⁶ This shifts attention from territory as physical land to territory as a functional concept. Under this approach, the coherence of the political community, rather than geographical boundedness, is primary. As such, territory is understood as a consequence of community and self-determination, rather than a precondition.²¹⁷ This opens the possibility that the delineating function of territory might be maintained through alternative legal and institutional arrangements even where land is lost or submerged. Functional territory thus supports the argument that continuity may be preserved if a State retains the capacity to organize authority, represent its people, and sustain jurisdictional claims, including its maritime zones, despite territorial inundation. Further, Vidmar has argued that territory is better understood as a legal and social construct rather than a natural fact.²¹⁸ A spatial area becomes “territory” not simply by virtue of its physical characteristics, but through processes of legal delimitation and political organization.²¹⁹ As Kelsen has advanced, natural features such as rivers or mountains do not inherently constitute borders.²²⁰ Rather, they acquire legal significance only through human decision-making and recognition. Vidmar makes the point that territory is thus not merely land, but a legal construct.²²¹ Similarly, this understanding challenges the assumption that territory must necessarily be conceived as a fixed physical foundation of statehood, and instead suggests that its role is shaped by how authority is organized and recognized within a particular legal order.

This has particular significance in the context of SIDS facing inundation. If territory is required primarily because it enables the organization and exercise of authority, then the loss of territory does not necessarily entail the loss of statehood, provided that a sufficient degree of authority can be maintained through alternative means. Conversely, if such authority cannot be sustained without a territorial base, the loss of territory may call into question the

²¹⁴ Sparks (n 24) 90.

²¹⁵ Ibid 84.

²¹⁶ Ibid 91-92.

²¹⁷ Ibid 92.

²¹⁸ Vidmar (n 86) 22.

²¹⁹ Ibid 21.

²²⁰ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945) 213.

²²¹ Vidmar (n 86) 17.

continued existence of the state. In either case, the territorial requirement should not be understood as an isolated or rigid criterion, but rather as flexible and not strictly defined in all circumstances. Notwithstanding this flexibility, the existing doctrine remains premised on the assumption that some form of territorial basis continues to exist. Both classical interpretations and contemporary practice largely concern situations in which territory is reduced, disputed, or temporarily lost, rather than permanently disappearing. In this sense, the legal framework governing statehood and continuity has developed in relation to transformations of territory, rather than to its complete absence. The prospect of entire states losing their habitable territory due to climate change, therefore, presents a different challenge. This raises the question of whether the territorial requirement can be reinterpreted to accommodate such scenarios, or whether new conceptualizations of statehood are required. It is within this context that the notion of deterritorialized statehood emerges as a potential response to the limitations of the traditional framework.

3.6.1 The Deterritorialized State and the Nation *Ex Situ*

The possibility of disappearing states has been discussed since the 1980s, though initially with an early focus on climate refugees.²²² In the 1990s, Caron and Soons drew attention to the implications of sea-level rise for maritime zones, suggesting that fixed baselines would, *inter alia*, facilitate climate change adaptation.²²³ However, it wasn't until 2010 that the concept of the deterritorialized state in the context of climate-related SLR was articulated. It was Rosemary Rayfuse who first proposed that a state could continue to exist as a subject of international law as a legal response to the existential threat posed by SLR to low-lying island states. Rayfuse argues that the disappearance of territory should not automatically result in the extinction of statehood.²²⁴ Instead, she ponders whether the recognition of a new category of statehood in which a state may continue to exist as a deterritorialized sovereign entity, even after the loss of physical territory, is the solution. Under this model, the state would persist through a governing authority representing its displaced population, maintaining international legal personality and retaining control over its maritime entitlements, particularly its exclusive economic zone and continental shelf.²²⁵

A central argument she deploys is that international law can sever territory from sovereignty and thus respond to the problem of disappearing states without extinguishing their sovereign rights.²²⁶ Rather than forcing affected

²²² Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (UNSW Law Research Paper No 2009-9, 2009) 3.

²²³ David Caron, 'When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level' (1990) 17 *Ecology Law Quarterly* 621, 651; Alfred Soons, 'The Effects of a Rising Sea Level on Maritime Limits and Boundaries' (1990) 37 *Netherlands International Law Review* 207.

²²⁴ See Rayfuse (n 10) 10-11.

²²⁵ *Ibid* 10-11.

²²⁶ Rayfuse (n 10) 11.

populations into solutions based on absorption by other states or reducing them to climate refugees, deterritorialized statehood would preserve them as political communities.²²⁷ Rayfuse presents this as a more just response, as many threatened island states have contributed little to climate change yet stand to suffer its gravest consequences.²²⁸ Furthermore, Rayfuse links deterritorialized statehood to the proposal to freeze maritime baselines despite SLR. If statehood can continue after territorial loss, these states could retain jurisdiction over their maritime zones and use the revenues from marine resources to support displaced populations.²²⁹ Rayfuse further argues that the idea is not as radical as it may seem, as international law already contains precedents for separating sovereignty from territory. She points to the Sovereign Order of Malta and the historical status of the Holy See to support her broader claim that international law is flexible enough to recognize sovereignty beyond strict territorial control.²³⁰ Preserving maritime entitlements through frozen baselines and deterritorialized statehood would promote “peace, stability, certainty, fairness, and efficiency in oceans governance” while also functioning as a climate change adaptation strategy.²³¹ Though she acknowledges such a status may be transitional rather than permanent, she presents it as a necessary innovation to ensure that territorial loss does not automatically entail the legal and political extinction of the State.²³²

Maxine Burkett develops and significantly expands the concept of deterritorialized statehood through her proposal for the Nation *Ex-Situ*, arguing that climate change may require a reconfiguration of statehood and international law.²³³ Her central claim is that states rendered uninhabitable by SLR should not lose sovereignty, but rather continue as sovereign deterritorialized nations in perpetuity, retaining legal personality, citizenship, and rights under international law.²³⁴ Burkett defines the Nation *Ex-Situ* as a new category of statehood in which a displaced nation continues to exist through a government capable of exercising authority at a distance.²³⁵ The *Ex-Situ* nation would preserve the rights and benefits of sovereignty despite territorial loss and would act in the interests of its citizens wherever relocated. This model is justified as an ethical and legal response to the plight of small island states facing existential threats despite their minimal contribution to climate change and the inadequacy of the traditional Westphalian order.²³⁶ She situates the Nation *Ex-Situ* within a “post-climate era”, an epoch in which climate change forces deeper transformations in law and political order.²³⁷ In this sense,

²²⁷ Rayfuse (n 10) 8.

²²⁸ Ibid 10.

²²⁹ Ibid 12.

²³⁰ Ibid 11.

²³¹ Ibid 12.

²³² Ibid 13.

²³³ Burkett (n 10) 346.

²³⁴ Ibid 345-347, 355.

²³⁵ Ibid 363.

²³⁶ Ibid 349.

²³⁷ Ibid 371-373.

deterritorialized nationhood is not merely an emergency solution for disappearing states, but an example of the legal evolution climate change demands. She links the proposal to continuity of statehood and prevention of statelessness, emphasizing the strong presumption in international law against state extinction.²³⁸ She argues that international law already contains flexibility for such innovation, as she, similarly to Rayfuse, points to the Sovereign Order of Malta and the Holy See, while also illustrating the flexibility through the existence of governments-in-exile, and quasi-sovereign actors like the European Union.²³⁹ Through concepts of “roots and routes”, she contends that political community can persist across dispersed populations, and that a “virtual” or deterritorialized nation can sustain identity, culture, and long-distance sovereignty even without territory.²⁴⁰

A distinctive contribution of Burkett’s argument is her proposal for a modified political trusteeship system to support *Ex-Situ* statehood.²⁴¹ Drawing inspiration from the UN Trusteeship Council, she proposes an interim and then permanent governing arrangement in which elected trustees from the displaced nation would administer the affairs of the *Ex-Situ* state.²⁴² This authority would thus manage citizenship, diplomatic representation, maritime resources, and the protection of their diasporic populations, while preserving self-governance and sovereign equality.²⁴³ Importantly, this is not framed as external administration or guardianship, but as a tool for continued self-determination, serving as the political and cultural nucleus of the deterritorialized state.²⁴⁴ According to Burkett, the Nation *Ex-Situ* offers a legally plausible, normatively just, and institutionally workable response to disappearing states.²⁴⁵ By preserving sovereignty without territory, grounding governance in trusteeship, and reconceiving statehood in the post-climate era, she argues that international law can adapt to prevent territorial loss from entailing the extinction of nations.

3.6.2 Critiques of Continuity-based Approaches

While the preceding analysis has demonstrated that international law possesses doctrinal resources to accommodate the continuity of SIDS facing inundation through the presumption of continuity and with a functional perspective on territory, this position is not without significant scholarly challenge. For example, Ori Sharon argues that fighting to preserve the state after submersion is, paradoxically, a disservice to island-state populations.²⁴⁶ Sharon’s contention is that legal scholars advancing the continuity position “are

²³⁸ Burkett (n 10) 353-354.

²³⁹ Ibid 356-357.

²⁴⁰ Ibid 360-362.

²⁴¹ Ibid 363.

²⁴² Ibid 364.

²⁴³ Ibid 364-365.

²⁴⁴ Ibid 363.

²⁴⁵ Ibid 373-374.

²⁴⁶ Sharon (n 27) 1064.

more concerned with theoretical legal questions than the real challenges island states will inevitably face”.²⁴⁷ What the people of sinking states actually need, Sharon argues, are options for communal resettlement, and continued statehood directly undermines those options.²⁴⁸ Similarly, Derek Wong is critical of relying on the presumption of state continuity as a sufficient solution for SIDS facing inundation. He accepts that continuity plays an important role in international law by promoting stability and explaining why states do not easily “disappear” when one element of statehood is weakened.²⁴⁹ However, he argues that this presumption cannot, on its own, determine what happens when territory is completely lost. In particular, Wong stresses that international law lacks a clear rule on this issue, leaving continuity without a clear doctrinal answer.²⁵⁰ He further points out that continuity has mainly been applied in situations involving defects in government or control, not the total and permanent loss of territory. Unlike political authority, territory cannot re-emerge, which limits the analogy to other cases of continuity. For that reason, Wong argues that it is unclear whether the loss of territory can still be treated as a mere “defect” within the existing framework.²⁵¹ Wong concludes that while continuity is a useful consideration, it cannot resolve the problem of “sinking states” and that international law would likely need to rely on “necessary legal constructs” to prevent immediate extinction and manage the consequences in a way that preserves stability.²⁵²

Moreover, Michel Rouleau-Dick identifies two competing understandings of continuity. The first, which he calls the “ratchet” doctrine, treats continuity as a strong presumption against state extinction, suggesting that once statehood is achieved, it is difficult to lose, even in extreme circumstances such as the disappearance of territory and population.²⁵³ In contrast, the “sameness” doctrine understands continuity only as a question of identity rather than survival.²⁵⁴ Here, the presumption of continuity functions to determine whether a state remains the same legal entity over time despite internal or external changes.²⁵⁵ Rouleau-Dick argues that existing state practice to a greater extent supports the sameness approach rather than the ratchet model. He therefore argues that relying on the presumption of continuity as a basis for “deterritorialized” statehood is conceptually weak and potentially misleading, unless the gap between these two doctrines is more rigorously addressed.²⁵⁶ It is submitted that, as will be shown by the following chapter, practice is bridging the gap between the ratchet model and the sameness model as the presumption

²⁴⁷ Sharon (n 27) 1041.

²⁴⁸ Ibid 1065.

²⁴⁹ Wong (n 11) 17.

²⁵⁰ Ibid 16-17.

²⁵¹ Ibid 21-22.

²⁵² Ibid 31.

²⁵³ Rouleau-Dick (n 11) 360.

²⁵⁴ Ibid 363.

²⁵⁵ Ibid 357.

²⁵⁶ Ibid 381.

of continuity is increasingly being anchored in state practice and the sources of international law, which Rouleau-Dick likewise acknowledged to be a positive outcome for the survival of islands facing territorial inundation.²⁵⁷

Additionally, Susannah Willcox challenges the continuity debate from a different angle, not by rejecting continuity, but by arguing that the entire framework rests on a flawed “minimum threshold” account of statehood that is incapable of accommodating the reality of climate inundation.²⁵⁸ Willcox proposes that an alternative approach understands the criteria of statehood not as a rigid minimum threshold, but as a set of overlapping similarities and relationships among state-like entities. It thereby creates conceptual room to consider forms of statehood in which sovereignty and self-determination are no longer tied to territory.²⁵⁹ This reframing implies that continuity arguments that work within the Montevideo criteria, seeking to show that territory can be reinterpreted or effectiveness reconceived, are ultimately constrained by the very paradigm they seek to modify.

3.7 Conclusion

This chapter has shown that the traditional statehood doctrine, while historically grounded in territoriality and effectiveness, is neither as rigid nor as territorially absolute as classical formulations may suggest. Through an examination of the historical development of statehood doctrine, the Montevideo criteria, state continuity, and scholarship on relaxing the territorial requirement, the chapter has demonstrated that statehood in international law has always contained a significant degree of flexibility. Although territory has long been treated as a central element of statehood, international law and practice reveal that its significance lies not simply in physical land as such, but in the functions territory enables: the organization of authority, the exercise of jurisdiction, and the preservation of political community.

Continuity, rather than extinction, is the prevailing presumption in international law. States have historically endured despite profound transformations in territory, government, and effectiveness, and extinction remains exceptional and disfavored. This suggests that the Montevideo criteria, while relevant to state creation, do not necessarily provide a rigid framework for determining a state’s continued existence. In this light, emerging theories of functional territory, deterritorialized statehood, and nation *Ex-Situ* should not be understood as wholly detached from existing doctrine, but rather as attempts to develop principles already latent within it, in response to climate change. At the same time, the chapter has shown that disagreement persists over whether continuity-based approaches can adequately accommodate the permanent loss of territory within existing international law. These tensions

²⁵⁷ Rouleau-Dick (n 11) 379.

²⁵⁸ Willcox (n 11) 174.

²⁵⁹ *Ibid* 175.

reveal that, although international law contains doctrinal resources capable of supporting continuity despite territorial loss, the prospect of complete territorial disappearance nevertheless poses challenges that traditional doctrine does not fully address. Existing law was developed primarily in response to territorial transformation, occupation, or succession, rather than to the permanent disappearance of habitable territory. It is precisely here that SLR exposes the limits of classical understandings of statehood and necessitates engagement with the question of whether international law can adapt. This question forms the basis for the next chapter, which turns to contemporary legal developments and State practice to assess whether such adaptation is already underway.

4 Institutional Developments

This chapter examines how contemporary international law has responded to the question of whether statehood can endure despite climate-related territorial loss. First, it considers the ILC's work, particularly the Study Group on Sea-Level Rise, as the most systematic effort to assess the implications of SLR for statehood and to articulate possible legal responses. Second, it examines the contribution of the ICJ, especially its 2025 Advisory Opinion on climate change, as an authoritative judicial pronouncement that reinforces and partly develops these questions. Third, it turns to emerging regional and State practice, including declarations and treaty arrangements, to assess how these legal developments are being operationalized. Through doctrinal analysis of judicial decisions, institutional materials, and emerging State practice, the chapter evaluates the extent to which contemporary developments support a presumption of continuity and contribute to reconciling continuity with the territorial requirement under international law.

4.1 The International Law Commission

The ILC is a subsidiary organ of the UN General Assembly, established in 1947 through General Assembly Resolution 174 (II) with the mandate to promote the "progressive development of international law and its codification" under Article 13(1)(a) of the UN Charter.²⁶⁰ Composed of thirty-four members elected by the General Assembly and serving in their personal capacity as independent legal experts, importantly not as representatives of their governments, the Commission is designed to reflect the world's principal legal systems and civilizations.²⁶¹ Over the course of more than seven decades, the ILC has produced several crucial instruments in different areas of international law, including the draft articles that became the basis for the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, and the draft articles on Responsibility of States for Internationally Wrongful Acts.

While the Commission's outputs are not themselves legally binding, they carry exceptional authority as statements of existing law and as catalysts for its progressive development. Its draft articles and conclusions are often cited by international courts and tribunals, invoked by States in diplomatic practice, and its outputs largely fall into the category of "teachings of the most highly

²⁶⁰ UNGA Res 174 (II) (21 November 1947)

²⁶¹ Ibid; International Law Commission, 'Membership' <https://legal.un.org/ilc/ilcmembe.shtml> accessed 15 April; International Law Commission, 'About the Commission' <https://legal.un.org/ilc/ilcintro.shtml> accessed 15 April.

qualified publicists” on which international courts and tribunals may rely ”as subsidiary means for the determination of rules of law”.²⁶²

4.1.1 Study Group on Sea Level Rise in Relation to International Law

The ILC’s engagement with SLR represents the most authoritative attempt by an international body to systematically assess whether, and how, international law can accommodate the prospect of states losing their territorial foundation. At its seventieth session in 2018, the Commission decided to include ”sea-level rise in relation to international law” in its long-term program of work.²⁶³ The following year, at the seventy-first session in 2019, the topic was formally added to the Commission’s active agenda, and an open-ended Study Group was established, co-chaired on a rotating basis by five members: Bogdan Aurescu, Yacouba Cissé, Patrícia Galvão Teles, Nilüfer Oral, and Juan José Ruda Santolaria.²⁶⁴ The Study Group’s mandate was structured around three subtopics: the law of the sea, statehood, and the protection of persons affected by sea-level rise.²⁶⁵ The Study Group’s work was concluded after over six years’ worth of work, across successive sessions of the Commission. It produced a series of issue papers, additional papers, and a Secretariat memorandum before the final report was adopted in 2025.²⁶⁶

The first issues paper, co-authored by Bogdan Aurescu and Nilüfer Oral, addressed the potential impact of SLR on baselines, maritime zones, and boundaries under the United Nations Convention on the Law of the Sea (UNCLOS).²⁶⁷ A central concern was whether baselines, the low-water lines from which maritime zones are measured, should be treated as ”ambulatory” (shifting landward as coastlines recede) or ”fixed” (preserved at their historically declared positions).²⁶⁸ The Study Group drew on the prior work of the ILA, whose ”Committee on International Law and Sea Level Rise” had by 2018 identified an emerging body of State practice, particularly among Pacific Island States and Territories, in favor of preserving existing maritime zone claims notwithstanding physical changes to coastlines, which the ILC

²⁶² Stylianos-Ioannis Lekkas, ‘The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?’ (2022) 69 *Netherlands International Law Review* 327, 329.

²⁶³ International Law Commission, *Report of the International Law Commission: Seventieth Session (30 April–1 June and 2 July–10 August 2018)* UN Doc A/73/10, annex B.

²⁶⁴ International Law Commission, *Report of the International Law Commission on the Work of Its Seventy-First Session [2019] II(2) Yearbook of the International Law Commission* 1, para 285.

²⁶⁵ ILC Seventieth Session Report (n 263) annex B, para 11.

²⁶⁶ International Law Commission, ‘Analytical Guide to the Work of the International Law Commission: Sea-level Rise in Relation to International Law’ https://legal.un.org/ilc/guide/8_9.shtml accessed 20 April.

²⁶⁷ See Bogdan Aurescu and Nilüfer Oral, ‘Sea-level Rise in Relation to International Law: First Issues Paper’ (International Law Commission, 28 February 2020) UN Doc A/CN.4/740.

²⁶⁸ *Ibid* para 68, 74.

similarly would come to conclude in their final report.²⁶⁹ The Study Group documented a clear trend in State practice towards treating baselines and maritime zone limits as fixed rather than ambulatory, thereby preserving the maritime entitlements of affected States even as their physical coastlines recede.²⁷⁰ The convergence between the findings of the ILA and the emerging practice of States affected by SLR provided an important foundation for the Study Group's subsequent work on statehood.

The second issue paper, co-authored by Patrícia Galvão Teles and Juan José Ruda Santolaria, partly confronted the question at the heart of the present thesis: what happens to statehood when territory becomes uninhabitable or submerged?²⁷¹ The paper examined the traditional criteria for statehood codified in the 1933 Montevideo Convention and assessed the effects of the loss of one or more of these criteria due to SLR. In the final consolidated report, the ILC concluded that there is a strong presumption in favor of continuity of statehood for States whose land territory is partially or completely submerged.²⁷² As Aurescu has reflected upon, there is a strong presumption for continuity of statehood even if territory is fully underwater because of SLR, and it is necessary for maintaining a coherent approach, considering the study group's conclusions on the preservation of maritime zones, since, in accordance with UNCLOS, only States are entitled to maritime zones.²⁷³

In their final report, the ILC concluded that the presumption of continuity is grounded in the right of States to preserve their existence, territorial integrity, and peoples' right to self-determination and is linked to legal stability, certainty and predictability, the sovereign equality of States, permanent sovereignty of State over their natural resources, the maintenance of international law peace and security, equity and justice, and international cooperation. They likewise concluded that it is essential to avoid a situation of loss of nationality and statelessness. It was additionally concluded that the preservation of statehood correlates with the right of peoples, including Indigenous Peoples, to self-determination.²⁷⁴ It was also underscored that, in preserving their rights, states particularly affected by SLR are entitled to take measures available to them under international law in response to varying levels of submersion of land surfaces or challenges to habitability, while upholding their

²⁶⁹ International Law Association, *International Law and Sea Level Rise* (Sydney Conference, 2018).

²⁷⁰ ILC First Issues Paper (n 267) para 89.

²⁷¹ See ILC Second Issues Paper (n 7).

²⁷² Patrícia Galvão Teles, Nilüfer Oral and Juan José Ruda Santolaria, 'Sea-level Rise in Relation to International Law: Final Consolidated Report of the Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law' (International Law Commission, 2025) UN Doc A/CN.4/783, para 35.

²⁷³ Bogdan Aurescu, 'Lessons Learned from the Work of the United Nations International Law Commission on Sea-level Rise in Relation to International Law' (2025) 14 *Cambridge International Law Journal* 234, 243.

²⁷⁴ ILC Final Consolidated Report (n 272) para 38-39.

obligations under international law.²⁷⁵ The importance of international cooperation was also underlined as essential, particularly between those affected by SLR and other entities in the international community.²⁷⁶

In the additional paper to the second issue paper, the ILC confronted the scholarly proposals concerning deterritorialized statehood and Nation *Ex-Situ* models. Although the ILC acknowledged the proposals, the commission did not endorse them and instead expressed skepticism about creating a new category of international actors.²⁷⁷ The creation of a nation *Ex-Situ* distinct from the pre-existing state “would create serious difficulties”, as the international legal order remains fundamentally state-centered: only states are members of the UN, only states possess rights over maritime zones under UNCLOS, and only states can access institutions such as the ICJ.²⁷⁸ The ILC suggests that state territory should be understood to include both unsubmerged and submerged land, together with maritime areas under state jurisdiction, so that submergence would not necessarily entail the state’s sovereignty being extinguished.²⁷⁹ In accordance with this view, the submergence of land does not necessarily extinguish the state or its sovereignty. As such, the ILC favors preserving sovereignty through the continuity of the state rather than by creating a new legal entity. Additionally, the ILC rejected the proposal to mobilize the Trusteeship Council as a governance mechanism for deterritorialized states. The Commission found such proposals unviable, arguing the Trusteeship Council was designed for non-self-governing territories and is incompatible with the sovereign equality of existing independent states, especially UN member states.²⁸⁰ Although skeptical of deterritorialized statehood and *Ex-Situ* statehood, the ILC did not dismiss the need for international institutional responses. Instead, it pointed to international cooperation as a crucial response for addressing the challenges posed by disappearing territory.²⁸¹ Thus, rather than legal innovation through new forms of statehood, the ILC emphasized adaptation through cooperative support within the existing international order. Additionally, the ILC underscored that there is no one-size-fits-all response. Rather, there are different alternatives depending on the circumstances of each case, which may be set out in bilateral or multilateral agreements.²⁸²

At the seventy-sixth session in 2025, the Study Group had before it the final consolidated report of the Co-Chairs, which addressed the law of the sea,

²⁷⁵ Ibid, para 37, 46.

²⁷⁶ International Law Commission, *Report of the International Law Commission: Seventy-Sixth Session (28 April–30 May 2025)* UN Doc A/80/10, annex I, para 41.

²⁷⁷ Patrícia Galvão Teles and Juan José Ruda Santolaria, ‘Sea-level Rise in Relation to International Law: Additional Paper to the Second Issues Paper (International Law Commission, 2022)’ (19 February 2024) UN Doc A/CN.4/774, para. 117-121.

²⁷⁸ Ibid para 119.

²⁷⁹ Ibid para 118.

²⁸⁰ Ibid para 120.

²⁸¹ Ibid para 121.

²⁸² Ibid para 102.

statehood, and the protection of persons, as well as the Study Group's draft final report proposed by the Co-Chairs. The Commission adopted the final report of the Study Group and concluded its consideration of the topic on the 26th of May 2025.²⁸³ The ILC's work, implicitly through the endorsements of member States and increasingly explicitly, rejects the proposition that the loss of territory through inundation would automatically terminate the statehood of SIDS. This position stands in tension with a "classical" reading and understanding of statehood, under which states that permanently lose effectiveness also lose their statehood.²⁸⁴ The ILC's endorsement of the presumption of continuity aligns with this doctrinal trajectory, effectively closing the door on the most strict interpretation of the Montevideo criteria as requiring the physical persistence of all four elements in perpetuity. It remains unclear, however, what the scope of the presumption is. As the effects of climate change on SIDS would be permanent, if the presumption articulated by the ILC is understood as applicable temporarily, it may prove insufficient to address the permanent, irreversible character of territorial loss through inundation.

Throughout their investigation, the ILC outlined several modalities through which statehood, or at a minimum its core attributes, might be maintained, transformed, or reconstituted. Territorial cession or assignment was presented as one possible modality, either with or without a transfer of sovereignty.²⁸⁵ In the first scenario, another State could transfer sovereignty over a portion of its territory to an endangered State, thereby allowing the latter to reconstitute itself territorially elsewhere and preserve its statehood.²⁸⁶ In the second scenario, territory could be made available without transferring sovereignty through an arrangement that permits the affected State and its population to relocate while maintaining a distinct governmental and political identity.²⁸⁷ A second modality submitted was association with another State, whereby an endangered State could maintain its sovereignty while entering into a formalized relationship with a larger State. Such an arrangement may involve shared citizenship, external assistance, and varying degrees of cooperation while preserving the associated State's independent status.²⁸⁸ A third possibility is the creation of confederations or federations.²⁸⁹ A confederal model would preserve the sovereignty of participating States while embedding them within a common political structure to pursue shared purposes.²⁹⁰ A federal model goes further by integrating the affected State into a larger sovereign entity while potentially preserving sub-state autonomy, identity, and in some cases

²⁸³ ILC Seventy-Sixth Session Report (n 276) annex I, para 23.

²⁸⁴ Nicholsson (n 196) 93, 110; Vidmar, McGibbon and Raible (eds) (n 196) 25-26.

²⁸⁵ ILC Second Issues Paper (n 7) para 198-204.

²⁸⁶ *Ibid* para 198.

²⁸⁷ *Ibid* para 200.

²⁸⁸ *Ibid* para 205.

²⁸⁹ *Ibid* para 206-208.

²⁹⁰ *Ibid* para 206.

even limited external capacities.²⁹¹ A fourth alternative is unification or merger with another State, under which the affected State would be absorbed into an existing State. Unlike association or federation, this option generally implies the cessation of separate international personality, though the ILC notes that an arrangement could be agreed to preserve the ceding states' cultural or group identity.²⁹² Beyond these modalities, the ILC also considered hybrid arrangements that combine elements from multiple modalities. These include joint sovereignty, highly autonomous territorial arrangements, differentiated citizenship regimes, and constitutional models that divide competences among multiple authorities.²⁹³ The significance of these proposals lies in the fact that they share the premise that sovereignty and political community may be adaptable rather than territorially fixed. In any manner, the ILC does not prescribe a single model, leaving this question for future development by States and scholars alike.

It is worth noting that the ILC's conclusions did not emerge in a vacuum. The ILA had engaged with the legal implications of SLR well before the ILC took up the topic. The ILA's Committee on Baselines under the International Law of the Sea first flagged the problem in 2008 when it was established, eventually concluding during the Sofia Conference in 2012 that existing law did not offer adequate solutions to, *inter alia*, the consequences of landward baseline shifts, including total territorial loss and the consequent loss of maritime zones.²⁹⁴ Building on this foundation, the ILA established a "Committee on International Law and Sea Level Rise", which produced resolutions and a comprehensive report adopted at the Association's 78th Biennial Conference in Sydney in August 2018.²⁹⁵ The ILA Committee's identification of a trend toward legal certainty and stability in State practice was, as proven above, echoed and subsequently endorsed by the ILC.

4.2 The International Court of Justice

The ICJ is the principal judicial organ of the UN.²⁹⁶ Under Article 65 of the ICJ Statute, the Court may give advisory opinions on "any legal question" at the request of authorized organs, principally the UN General Assembly and the Security Council, as well as other UN organs and specialized agencies authorized by the General Assembly.²⁹⁷ Crucially, states are not parties to an advisory opinion and cannot request advisory opinions, which therefore allows the Court to consider sensitive legal questions that states might

²⁹¹ ILC Second Issues Paper (n 7) para 207-208.

²⁹² *Ibid* para 216.

²⁹³ *Ibid* para 217-226.

²⁹⁴ International Law Association Committee on Baselines under the International Law of the Sea, 'Baselines under the International Law of the Sea: Committee Report' in *Report of the Seventy-Fifth Conference Held in Sofia, August 2012* (International Law Association, London 2013) 31.

²⁹⁵ Sydney Conference (n 269).

²⁹⁶ ICJ Statute art 1; UN Charter art 92.

²⁹⁷ ICJ Statute art 65.

otherwise be unwilling to submit to it. Consequently, no State is obliged to be involved, and no State is bound by the opinion.²⁹⁸ Yet, advisory opinions carry significant legal influence as they are considered authoritative statements of the law.²⁹⁹ Illustratively, research shows that advisory opinions prompt states and international organizations to conform their conduct to the Court's determinations.³⁰⁰ However, it is also important to note that, in situations involving serious *jus cogens* violations, advisory opinions can have *erga omnes* legal effects.³⁰¹ Notwithstanding their non-binding nature, advisory opinions are treated as authoritative pronouncements upon the current state of international law.³⁰²

4.2.1 ICJ Advisory Opinion on the Obligations of States in Respect of Climate Change

The ICJ's Advisory Opinion on Obligations of States in Respect of Climate Change, delivered on 23 July 2025, represents the first occasion on which the principal judicial organ of the United Nations addressed the intersection of climate change, SLR, and the legal status of threatened States.³⁰³ The proceedings originated in General Assembly Resolution 77/276, adopted on 29 March 2023 at the initiative of a core group led by Vanuatu.³⁰⁴ The request submitted to the ICJ by the General Assembly concerned the obligations of states with respect to climate change and the legal consequences of these obligations, especially with regard to, *inter alia*, SIDS and other vulnerable developing countries.³⁰⁵

Regarding SLR, the Court provided several observations. Firstly, it acknowledged the widespread concern, especially from small island and low-lying States, that rising seas should not reduce existing baselines, maritime entitlements, or maritime boundaries, even where coastlines recede, or territory becomes submerged.³⁰⁶ Secondly, it is considered that, while UNCLOS requires States to establish and publicize charts and coordinates of maritime zones, the Court found no provision obliges States to revise these due to SLR. Once

²⁹⁸ Hugh Thirlway, *The International Court of Justice* (OUP 2016) 109.

²⁹⁹ Teresa Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76 *ZaöRV* 425, 437-438.

³⁰⁰ Haris Huremagić, 'The Many Worlds of Advisory Opinions – About Recent Practice, Compliance and False Dichotomies' (2025) 28 *Austrian Review of International and European Law Online* 95, 116.

³⁰¹ *Ibid* 103.

³⁰² *Acquaviva* (n 41) 11.

³⁰³ *Climate Change Advisory Opinion* (n 15).

³⁰⁴ UNGA Res 77/276 (29 March 2023); Natalie Khng, Kumar Chand and Lucia Solano, 'Res 77/276 on Request for an Advisory Opinion of the ICJ on the Obligations of States in Respect of Climate Change (UNGA): Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (COSIS): Request for an Advisory Opinion on the Climate Emergency and Human Rights (Chile and Colombia)' (2024) 63 *International Legal Materials* 47.

³⁰⁵ UNGA Res 77/276 (29 March 2023).

³⁰⁶ *Climate Change Advisory Opinion* (n 15) para 355.

lawfully established, maritime zones can remain fixed.³⁰⁷ Thirdly, the Court recognized that rising seas threaten territorial integrity, sovereignty over natural resources, and may affect the exercise of the right to self-determination, particularly for vulnerable States.³⁰⁸ Fourthly, and importantly, the Court was of the view that "...once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood".³⁰⁹ Fifthly, and finally, given that SLR is a common concern of humankind, the Court emphasized that international cooperation is not optional but a legal obligation, requiring States to work together to address its consequences.³¹⁰

On the question of state continuity, the Court was cautious. It acknowledged the link between SLR and the exercise of self-determination but stopped short of making an explicit, definitive pronouncement on whether statehood persists in the event of total territorial submergence. The opinion did not directly employ the language of a "presumption of continuity of statehood" that the ILC used. Hence, the Court's findings on statehood remain underdeveloped, leaving the ILC's conclusions as the more detailed and elaborate treatment of the question. Notably, in his separate opinion appended to the Advisory opinion, Judge Aurescu, formerly a member of the ILC's study group on SLR, took a stance in favor of States endangered by SLR.³¹¹ In his view, there is a clear rule of state continuity based on, *inter alia*, the principle of legal stability, security, certainty, and predictability, and argues for an obligation of third states to recognize the continued statehood and maritime entitlements of de-territorialized states.³¹² In Judge Tomka's separate declaration, when speaking of the ICJ conclusions that the disappearance of a state's constituent elements does not necessarily entail the loss of statehood, he stated that there is no doubt that here the ICJ "...has in mind the disappearance of the territory of a State in case it becomes completely submerged as a result of sea-level rise".³¹³ Meanwhile, he expressed doubt as to whether there is a customary legal basis for extending the presumption of continuity to climate-threatened states, as cases of continuity have historically concerned temporary disruptions.³¹⁴ Yet he acknowledged the emerging State support for preserving the international legal personality of small island States affected by climate change, which, however, has yet to amount to a rule in customary international law.³¹⁵ In either way, Judge Bhandari and Judge Sebutinde, who

³⁰⁷ Climate Change Advisory Opinion (n 15) para. 358-362.

³⁰⁸ Ibid para 357.

³⁰⁹ Ibid para 363.

³¹⁰ Ibid para 364-365.

³¹¹ Bogdan Aurescu, *Separate Opinion in Obligations of States in respect of Climate Change* (23 July 2025) para 20, 23.

³¹² Ibid para 23.

³¹³ Peter Tomka, *Declaration in Obligations of States in respect of Climate Change advisory opinion* (23 July 2025) para 2.

³¹⁴ Ibid para 5.

³¹⁵ Ibid para 6.

respectively amended separate opinions, advocated for an even stronger stance in favor of state continuity.³¹⁶

Nevertheless, by confirming that SLR engages the right to self-determination, the Court embedded the issue within the framework of peremptory norms. Green and Wewerinke-Singh argue that this linkage reinforces the case for state continuity.³¹⁷ If the international community were to reject the possibility of statehood enduring even in the face of total submergence, the effects on self-determination would be "severely exacerbated", particularly given that the affected peoples bear minimal responsibility for the anthropogenic emissions driving SLR.³¹⁸ Furthermore, the Court's confirmation that there is no obligation to update maritime charts strengthens the argument for continuity as it effectively preserves the economic and jurisdictional foundation upon which the statehood of SIDS depends.

In sum, the ICJ's Advisory Opinion provides authoritative confirmation that climate change and SLR engage fundamental norms of international law, including the principles of international cooperation and self-determination. However, on state continuity, it defers to the work of the ILC, leaving the presumption of continuity to be operationalized through State practice, institutional endorsement, and future judicial development.³¹⁹

4.3 Regional and State Practice

Beyond the work of the ILC and the ICJ, emerging State practice further supports the presumption of continuity. Recent declarations and treaty arrangements demonstrate how States are beginning to operationalize continuity in response to climate change-related SLR. The following examples illustrate the extent to which this presumption is being reflected in contemporary practice.

4.3.1 Falepili Union

The Australia-Tuvalu Falepili Union Treaty, signed by Tuvalu and Australia on 9 November 2023, represents the most concrete bilateral instrument yet to operationalize state continuity in the face of climate change-related SLR.³²⁰ The treaty proceeds from the premise that Tuvalu's statehood should not be

³¹⁶ Dalveer Bhandari, Separate Opinion in *Obligations of States in respect of Climate Change advisory opinion* (23 July 2025) para 7; Julia Sebutinde, Separate Opinion in *Obligations of States in respect of Climate Change advisory opinion* (23 July 2025) para 8.

³¹⁷ Green and Wewerinke-Singh (n 29) 556.

³¹⁸ Ibid 555.

³¹⁹ Zana Syla and Avidan Kent, 'Statehood in the Climate Crisis: The ICJ's Climate Advisory Opinion and the Presumption of State Continuity' in Maria Antonia Tigre, Maxim Bonnemann and Antoine De Spiegeleir (eds), *The ICJ's Advisory Opinion on Climate Change* (Verfassungsbooks 2025) 193, 199-200.

³²⁰ Australia-Tuvalu Falepili Union (n 18); Alex Green and Douglas Guilfoyle, 'The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change' (2024) *118 American Journal of International Law* 684.

extinguished even if its territory becomes uninhabitable or submerged. Article 2 (2)(b) acknowledges that “the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.”³²¹ The significance of this article lies in that it is the first public and binding rejection of any state of the traditional view that inhabitable land is necessary for State continuity, a clear departure from classical statehood doctrine.³²² By embedding the continuity commitment in a binding treaty, the Falepili Union Treaty converts the presumption articulated through the ILC and other fora into a legal obligation between two parties. As such, it consolidates the presumption and establishes precedent for other states to follow. In combination with the treaty’s migration provisions, which enable Tuvaluan citizens to live and work in Australia, it suggests that the state’s identity is maintained independently of where its nationals reside.³²³ Thus reciprocating the view that the state need not be determined by its territoriality. Additionally, the treaty illustrates a path toward the international community recognizing the continuity of statehood amid climate-related SLR. Such recognition can thus foster a new understanding of effectiveness, sustained by treaty commitments, recognition, and institutional participation.

4.3.2 2023 Pacific Islands Forum Declaration

The 2023 Pacific Islands Forum (PIF) Declaration represents one of the most significant collective expression of state practice on the question of statehood continuity in the face of climate change-related SLR. Adopted at the 52nd Pacific Islands Forum Leaders Meeting in the Cook Islands in November 2023, the Declaration affirms the presumption of continuity of statehood.³²⁴ The Declaration builds upon the earlier 2021 PIF Declaration on Preserving Maritime Zones, which had already stated Forum members’ intention to maintain their maritime zones and the rights and entitlements flowing from those zones, notwithstanding the effects of SLR.³²⁵ The 2021 declaration focused primarily on the maritime dimension and the members of the PIF having no obligation to update their baselines, while the 2023 declaration extended the logic to the question of statehood.³²⁶ The declaration’s significance lies in its character as a state practice that articulates a shared legal position on a question of existential concern. As such, it formulates *opinio juris*.³²⁷ The PIF Declaration consolidated the Pacific position in a form that

³²¹ Australia–Tuvalu Falepili Union (n 18) art 2.

³²² Green and Guilfoyle (n 320) 694.

³²³ Australia–Tuvalu Falepili Union (n 18) art 4.

³²⁴ Pacific Islands Forum Statehood Declaration (n 17) preamble para 8-9.

³²⁵ Ibid preamble para 7; Pacific Islands Forum, ‘Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise’ (12 August 2021) <https://forumsec.org/publications/declaration-preserving-maritime-zones-face-climate-change-related-sea-level-rise> accessed 12 March.

³²⁶ Pacific Islands Forum Maritime Zones Declaration (n 326) operative para 1.

³²⁷ David Freestone and Rosemary Rayfuse, ‘2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea Level Rise’ (2025) 40 *International Journal of Marine and Coastal Law* 223, 230.

subsequent ILC deliberations were further influenced by.³²⁸ Furthermore, the Declaration positions state continuity not as an end in itself but as a precondition for the continued exercise of sovereign responsibilities toward affected populations, and links it to the right to self-determination.³²⁹ Similarly to the Falepili Union Treaty, it fosters the view that the statehood of States facing climate-related SLR need not extinguish the statehood of affected States.

4.3.3 2024 AOSIS Declaration on Sea-Level Rise and Statehood

The 2024 Alliance of Small Island States (AOSIS) Leaders Declaration on Sea Level Rise and Statehood, adopted in September 2024, further represents a pivotal example of state practice supporting the continuity of statehood for SIDS facing inundation.³³⁰ Whereas the 2023 PIF Declaration consolidated a regional consensus on the presumption of statehood continuity among Pacific states, the AOSIS Declaration extended it to the full membership of the Alliance, including thirty-nine SIDS spanning the Caribbean, the Pacific, the Atlantic, and the Indian Ocean, thereby transforming a Pacific position into a cross-regional one.³³¹ The AOSIS Declaration builds directly on the foundation laid by the 2023 PIF Declaration. The declaration proceeds on the premise that the continuity of statehood in the face of climate change-related SLR is, *inter alia*, consistent with principles such as territorial integrity, self-determination, independence, and the state's right to preservation.³³² The AOSIS Declaration carries the additional weight of endorsement by heads of state and government, which reinforces the *opinio juris*. Additionally, the Declaration affirms that the sovereignty and statehood of SIDS are protected against the effects of SLR, and that rights and entitlements attributed from maritime zones should be maintained notwithstanding physical changes to coastlines.³³³ By bringing together States from all around the world, it demonstrates that the presumption of continuity commands support across the entire community of states most directly affected by SLR.

4.4 Conclusion

Each instrument and development discussed in this chapter demonstrates that the presumption of continuity has increasingly evolved from a theoretical proposition into a principle reflected in contemporary international law and practice. The ILA provided the initial doctrinal foundation. The ILC Study Group developed the analytical framework, dividing the topic into the law of the sea, protection of persons, and statehood. The ICJ's 2025 Advisory

³²⁸ Aurescu (n 273) 238-241.

³²⁹ Pacific Islands Forum Statehood Declaration (n 17) para 9.

³³⁰ AOSIS Statehood Declaration (n 18).

³³¹ International Institute for Sustainable Development, 'AOSIS Push for Evolution of International Law to Address Sea-Level Rise' <https://sdg.iisd.org/news/aosis-push-for-evolution-of-international-law-to-address-sea-level-rise/> accessed 18 April.

³³² AOSIS Statehood Declaration (n 18) 4.

³³³ *Ibid* 3.

Opinion reinforced this emerging approach by recognizing that the disappearance of a constituent element of statehood need not necessarily result in the loss of statehood. The 2021 PIF Declaration specifically addressed maritime zones. The 2023 PIF Declaration extended the logic to statehood itself. The Falepili Union Treaty translated the commitment into a binding bilateral obligation, and the 2024 AOSIS Declaration globalized the consensus, carrying it beyond the Pacific to encompass the full community of vulnerable island states. Taken together, they constitute a cumulative body of evidence that is difficult to dismiss as merely aspirational or regional.

5 Implications and Tensions

This chapter examines the implications of the emerging presumption of continuity for SIDS facing climate-induced territorial loss. It does so by analyzing four interconnected tensions. First, it considers the implications for effectiveness. Second, it examines the significance of recognition and the relationship between continuity and political acceptance. Third, it explores the consequences for sovereignty and the exercise of sovereign authority despite territorial loss. Finally, it considers the adaptation of international law itself and whether the presumption of continuity reflects an interpretation of existing doctrine or a broader transformation of the statehood doctrine. Through a doctrinal evaluation of these issues, the chapter assesses the coherence and implications of reconciling continuity with the territorial requirement and examines what such reconciliation means for the doctrine of statehood in international law.

5.1 Effectiveness

A central tension in discussions of continuity concerns the relationship between maintaining statehood and preserving its meaning in a doctrinal sense. Much of the rationale supporting continuity despite territorial loss implicitly or explicitly depends on relaxing the principle of effectiveness. However, the more relaxed the effectiveness is, the harder it becomes to define the minimum content that statehood must keep if the concept is to maintain a clear meaning. Historically, effectiveness has never been interpreted rigidly. As illustrated in Chapter 3, states have endured occupation, governmental collapse, territorial fragmentation, and extended periods of dysfunction without their statehood being regarded as extinguished. Continuity has historically served precisely to moderate strict applications of effectiveness. Nonetheless, these examples mostly involve situations in which deficiencies in the classical criteria were considered temporary, reversible, or exceptional, assuming that the state could regain some territory. SIDS facing inundation raises a qualitatively different problem. It does not involve a temporary interruption of effectiveness, but a potentially permanent transformation. Yet, if a State may persist despite the permanent disappearance of territory, a dispersed population, and only weak forms of governmental authority, it becomes difficult to determine whether effectiveness functions as a threshold at all, or whether the presumption of continuity has become detached from the fundamental assumptions that underpin the statehood doctrine. Put differently, if effectiveness can be relaxed to the point where neither territory, population, nor governance needs to subsist in a traditional sense, one may ask whether continuity preserves the state or merely a legal label.

It is submitted that institutional practice partly complicates this question rather than resolving it. The ILC, the ICJ, and emerging State practice all support a presumption of continuity, yet they do not confront what becomes of

effectiveness itself. Indeed, one could argue that much of this practice does not abandon effectiveness so much as reinterpret it, treating effectiveness less as territorial control and more as the sustained capacity to organize authority and maintain legal relations. The emphasis in the ILC's work on preserving governmental identity, maintaining legal relations, and protecting self-determination suggests an understanding of effectiveness increasingly tied to institutional capacity rather than territorial control. Likewise, instruments such as the Falepili Union Treaty arguably imply that effectiveness may be sustained through treaty structures, recognition, and bilateral arrangements. While the ILC supports continuity, it rejected deterritorialized statehood as a new legal category, leaving unclear how a State with permanently submerged territory would, in practice, satisfy even a different notion of effectiveness. In this sense, the presumption of continuity might be more developed as a principle against extinction than as a practical explanation of how a deterritorialized State would continue to operate. A related difficulty is that much of the supportive practice focuses on preserving legal status rather than demonstrating continued governance capacity. The preservation of maritime zones, continued UN membership, or treaty recognition may support continuity, but they do not by themselves show how governmental effectiveness would operate once territory is lost. This leaves open whether continuity solves the effectiveness problem or bypasses it.

This tension reveals an underlying uncertainty about the presumption of continuity. On the one hand, one could hold that continuity is exceptional because it undermines a strict conception of effectiveness in order to protect the State. On the other hand, one might argue that continuity is assumed before effectiveness in assessing statehood. The former preserves classical doctrine through exception, while the latter may transform doctrine itself. It is submitted that distinguishing between them matters because continuity is often persuasive when framed as an exception to traditional doctrine, while such arguments may in fact depend on reinterpreting that doctrine at a deeper level. This problem is particularly visible in proposals for deterritorialized statehood. Rayfuse and Burkett seek to preserve continuity by arguing that statehood may survive even without an inhabitable territory, provided a displaced population, a government, and international recognition remain. The strength of these proposals is that they offer a way to avoid extinction without abandoning sovereign identity. Yet they also raise a difficulty. The more continuity depends on treating territory or effectiveness in highly flexible ways, the more uncertain it becomes what minimum content statehood still requires. While such proposals may preserve the State, they do so by loosening the criteria that have traditionally defined it, thereby creating uncertainty. At the same time, insisting too strongly on classical effectiveness creates the opposite problem. It risks treating formal criteria as decisive even where doing so would undermine values international law also seeks to protect, including stability, self-determination, and the preservation of legal personality. The

tension, therefore, is not simply whether effectiveness matters, but how far it can be adapted without losing its limiting function.

5.2 Recognition

A second tension concerns whether continuity ultimately rests on legal principle or political acceptance. Much of the argument supporting the presumption of continuity is framed in terms of legal stability, the protection of self-determination, and the preservation of the State's legal personality and associated rights. At the same time, continuity has never operated independently of recognition. As previously illustrated, recognition has often been integral to sustaining continuity claims. The tension, therefore, is not whether recognition matters, but whether SIDS facing inundation may require recognition to perform a more constitutive role than in prior continuity cases. If continuity increasingly depends on sustained recognition despite weakened factual fulfillment of the traditional criteria associated with statehood, it becomes necessary to ask whether it is still preserved through existing legal doctrine or maintained through continued political support from other States.

If continuity depends in practice upon recognition, institutional participation, and political support, its preservation appears contingent upon the very political discretion it is often argued should not determine statehood. As such, it may come to depend more heavily on recognition as territory, population, and effective government become less capable of anchoring statehood. In ordinary cases, recognition may evidence an obvious legal reality. In marginal cases, it may serve to constitute such a reality. The situation at hand blurs the distinction between declaratory and constitutive understandings of statehood, which continuity arguments often rely upon by treating recognition as acknowledging statehood rather than sustaining it. Emerging institutional practice both strengthens and complicates this tension. On one reading, the PIF and AOSIS declarations can be understood as evidence that recognition is consolidating into *opinio juris* supportive of the presumption of continuity. On the other hand, their significance may itself demonstrate how dependent continuity has become on recognition.

Nevertheless, the more continuity relies on declarations, treaty commitments, and institutional endorsement, the more difficult it becomes to separate legal entitlement from the political practice sustaining it. A similar ambiguity arises regarding continued membership in the UN. As discussed, UN membership is not formally constitutive of statehood, yet it carries considerable legal and political significance as a form of collective validation by the international community. For SIDS facing inundation, continued participation in the UN would likely be regarded as powerful evidence of continuity. At the same time, this highlights the extent to which continuity may depend upon institutional acceptance. If continued statehood is partly inferred from continued membership, the question arises whether membership merely reflects an existing legal status or actively sustains it. It remains to be seen what would

happen to SIDS' UN membership if they are inundated when the waves become too violent to tame.

This raises a further tension. If recognition becomes the mechanism through which continuity is sustained despite diminishing effectiveness, does continuity remain grounded in law, or does it survive because the international community chooses to uphold it? Albeit the political dimension of recognition may not necessarily undermine continuity. One might argue that it reveals that statehood involves an interaction among fact, law, and recognition. From this perspective, the continuity of SIDS facing inundation may not represent an exception to statehood doctrine so much as reveal more clearly a tension already embedded within it, namely that statehood has never depended on factual criteria alone. Yet, if the continued existence of a State facing inundation depends indefinitely on the political will of other States to uphold it, continuity may remain vulnerable to shifts in political support. The concern, therefore, is not simply whether continuity is grounded in law or supported by recognition, but whether international law can preserve continuity without making its survival contingent on ongoing political endorsement. The ICJ's cautious treatment reinforces this ambiguity. Although the Court acknowledged that the disappearance of a constituent element need not terminate statehood, it stopped short of articulating a full rule of continuity, effectively leaving operationalization to State practice and institutional endorsement. That restraint may support continuity by leaving space for practice to develop, but it also underscores that continuity is presently dependent partly on recognition rather than grounded in clear legal criteria.

5.3 Sovereignty

The presumption of continuity in the context of SIDS facing inundation assumes that sovereignty may persist despite territorial disappearance. Yet this assumption raises a tension not necessarily about whether sovereignty survives as a legal consequence of statehood, but about how sovereign authority can be exercised and how far independence can be maintained, given that continuity increasingly depends on cooperative arrangements with other States. In formal terms, sovereignty may be preserved through sustained legal personality, diplomatic representation, nationality, and maritime entitlements. Yet if displaced populations reside permanently under the jurisdiction of host States, governmental functions are exercised remotely or through cooperative arrangements, and political authority depends substantially upon external support, it becomes necessary to consider how far the powers ordinarily associated with sovereignty remain. Although a State may retain international personality, treaty capacity, and formal sovereign rights, it would exercise much of its authority through host States or institutional arrangements. Under such circumstances, continuity can maintain sovereignty while changing the practical ways through which sovereign powers are exercised. It remains to be seen, however, what the nature of such sovereignty would be

and if that would fundamentally call their international legal personality into question.

The Holy See and the Sovereign Military Order of Malta, however, demonstrate that international law recognizes entities capable of diplomatic representation, treaty relations, and external authority despite atypical territorial arrangements. While these are not precedents for submerged States, they sharpen the concern that SIDS facing inundation might retain UN membership, maritime rights, and diplomatic representation while exercising many governmental functions through host-State arrangements. In such a scenario, continuity may preserve legal personality and formal sovereign status while leaving unresolved whether sovereign authority remains fully preserved in substance. Several modalities discussed by the ILC, including association, federation, territorial cession, and hybrid arrangements, preserve continuity through shared or mediated exercises of authority rather than exclusively territorial expressions of sovereignty. Likewise, the Falepili Union illustrates that mechanisms designed to preserve continuity may involve significant trade-offs. While the Falepili Union serves as evidence that statehood can endure despite displacement, it is important to consider that the commitments may affect Tuvalu's freedom in external affairs. While not necessarily negating sovereignty or legal independence, such arrangements may preserve continuity while generating forms of dependence that raise questions about the exercise of external sovereignty, even if they do not amount to legal subordination. There is, therefore, a risk that continuity may preserve statehood while a State's sovereign autonomy is increasingly "watered down". Consequently, a paradox emerges. The more international cooperation is required to preserve continuity after territorial loss, the less independence may be required. Yet denying continuity on such a basis may simply reproduce an overly rigid conception of sovereignty and independence, which is submitted to stand in the way of international law's ability to adapt to climate change. The concern, therefore, is not primarily whether sovereignty can exist without territory, but whether it can remain meaningful in practice rather than become merely a formal legal status maintained through international cooperation.

5.4 Adaptation of International Law

Underlying these concerns is the adaptation of international law itself. Much of the response to SLR has rested on the proposition that international law possesses sufficient flexibility to adapt without abandoning its foundations. Yet such flexibility raises questions about its limits. These developments indicate that accommodating continuity requires a reinterpretation of core elements of statehood, particularly the territorial requirement. The challenge, therefore, lies in how far such adaptation can proceed while maintaining a coherent concept of statehood. The difficulty is that both a rigid interpretation and a more flexible approach threaten the authority of doctrine, albeit in opposite ways. A rigid application of traditional criteria may render international law incapable of responding to the effects of climate change on SIDS.

Yet an adaptive reading risks altering doctrine in ways that may weaken its coherence and predictability, particularly if continuity is sustained without a clear principled basis or widespread support.

At the same time, adaptation is not only found in doctrine but also in practice. The growing body of institutional and State practice clearly indicates that development is already underway. The ILC's conclusions, the ICJ Advisory Opinion, the PIF declarations, the Falepili Union Treaty, and the AOSIS Declaration together indicate an emerging practice in support of the presumption of continuity despite territorial loss. Taken together, these developments suggest not merely that adaptation is occurring through practice, but that practice itself may be shaping doctrine. Although these developments do not conclusively settle the legal question, they substantially alter the doctrinal landscape. Arguments favoring the extinction of statehood following territorial loss must now engage not only with the ILC's analysis and the broader scholarly debate, but also with an emerging body of State practice and *opinio juris* originating from the States most directly concerned. This process is not unique to the law of statehood. International law has previously responded to the challenges posed by climate change through the gradual development of the UN climate regime. The progression from the UNFCCC to the Kyoto Protocol and subsequently the Paris Agreement illustrates how international law can adapt incrementally to novel global challenges through evolving treaty frameworks and institutional practice. While the challenges posed by SLR to statehood differ from those directly addressed by the UN climate regime, it does reflect the capacity of international law to evolve in response to circumstances not contemplated when many of its foundational rules were formulated.

Beyond the legal and institutional developments provided for in this thesis, adaptation is also occurring at the state level through efforts to preserve government functions in digital form. Initiatives such as Tuvalu's "Future Now Project", which seeks to digitally preserve governmental records, cultural heritage, and aspects of state administration, illustrate how threatened States are exploring new mechanisms for maintaining political and legal continuity despite territorial vulnerability. While such initiatives do not, in themselves, resolve the legal question of statehood, they demonstrate an emerging willingness to rethink the practical relationship among territory, governance, and sovereignty. In this respect, technological adaptation may complement legal adaptation by providing mechanisms to operationalize continuity in practice. The significance of the practice lies not only in demonstrating the flexibility of the territorial requirement but also in potentially creating conditions that enable the statehood doctrine to adapt to the existential threat posed by SLR. It is also worth mentioning that the ILC's and the ICJ's conclusions, while authoritative, are not themselves legally binding. The Study Group's final report represents the Commission's assessment of the current state of international law and its potential trajectory, but translating the presumption of continuity into concrete legal guarantees requires further action, such as General

Assembly resolutions, treaty amendments, or the continued and consistent State practice. As such, the gap persists but is considered narrower than before these developments.

International law's legitimacy partly rests on stability and coherence, yet also on its capacity to respond to new realities. SLR and the situation of SIDS facing inundation place these considerations in tension. Emerging developments seek to manage this tension by framing continuity not as innovation, but as an extension of principles already present in international law. At the same time, it remains uncertain whether the presumption of continuity is firmly grounded in existing doctrine, particularly in the absence of direct precedent, or is primarily being shaped through evolving State practice and political endorsement. This creates a deeper tension. Presenting continuity of statehood for SIDS facing inundation as consistent with existing international law risks obscuring the extent to which it may require reinterpreting core assumptions of statehood. The challenge, therefore, is not simply whether international law can adapt, but whether it can do so while maintaining a coherent and stable concept of statehood. The ILC speaks of certainty, stability, and predictability as arguments for continuity, but the same principles could also be invoked to support the claim that statehood doctrine should remain aligned with the traditional "Westphalian order".

5.5 Conclusion

The analysis in this chapter demonstrates that the presumption of continuity can reconcile statehood with climate-induced territorial loss, but only at the cost of significant doctrinal tensions. The concepts of effectiveness, recognition, and sovereignty are not displaced by continuity, yet they are increasingly required to operate in ways that differ from their classical territorial foundations. Effectiveness appears to be evolving from a predominantly territorial concept toward one centered on the continued capacity to organize authority and maintain legal relations. Recognition, while never absent from questions of continuity, assumes a more prominent role as a mechanism that supports and operationalizes continuity. Similarly, sovereignty may persist despite territorial loss, but its exercise is likely to become increasingly dependent upon cooperative and extraterritorial arrangements.

At a broader level, these developments reveal an international legal order in the process of adaptation. The work of the ILC, the ICJ's Advisory Opinion, and emerging State practice all suggest a growing willingness to preserve statehood notwithstanding the loss of habitable territory. At the same time, they leave unresolved important questions concerning the minimum content of statehood, the practical operation of governmental authority, and the extent to which continuity is grounded in existing law or progressive development. The emerging presumption of continuity therefore reflects both the resilience and the flexibility of international law as it seeks to preserve stability, legal personality, and self-determination while responding to circumstances that

traditional doctrine did not contemplate. Ultimately, the tensions identified in this chapter do not undermine the case for continuity. Rather, they illustrate that accommodating continuity requires a reinterpretation of concepts long regarded as central to statehood. The preservation of statehood for SIDS facing inundation is therefore best understood not as an abandonment of international law's foundations, but as an evolutionary adaptation of them. Whether this adaptation will increasingly take root as international customary law remains uncertain, but contemporary developments suggest that international law is moving in that direction.

6 Conclusion

This thesis set out to examine whether, and on what legal basis, international law can accommodate the continuity of statehood for SIDS threatened by climate-related SLR. At its core, the thesis addressed the tension between the traditional territorial requirement of statehood, as reflected in the 1933 Montevideo Convention on the Rights and Duties of States, and the emerging presumption that statehood may persist even in the absence of habitable territory. The analysis has demonstrated that international law, while historically grounded in territoriality and effectiveness, contains a strong and consistent presumption in favor of continuity rather than extinction. This presumption is reflected both in doctrine and practice. States have endured profound disruptions to their territory, government, and population without losing their legal personality, and extinction remains exceptional and disfavoured. Accordingly, the Montevideo criteria, though central to state creation, do not rigidly govern state continuity.

Building on this doctrinal foundation, the thesis has shown that contemporary institutional developments and State practice increasingly support continuity in the context of SLR. The work of the ILC articulates a strong presumption that statehood persists despite territorial loss, *inter alia*, grounded in principles of legal stability, self-determination, and the avoidance of statelessness. The ICJ, while more cautious, confirmed that the disappearance of a constituent element does not necessarily terminate statehood and linked SLR to self-determination and international cooperation. This doctrinal trajectory is reinforced by emerging State practice. Instruments such as the Falepili Union Treaty, the PIF Declaration on Statehood, and the AOSIS Declaration on Sea-Level Rise and Statehood collectively demonstrate that the presumption of continuity is no longer theoretical but is increasingly being operationalized. Taken together, these developments provide a plausible legal basis for reconciling continuity with the territorial requirement, not by abandoning territory entirely, but by reinterpreting its role as functional rather than strictly physical.

In answer to the primary research question, this thesis finds that the continuity of statehood for SIDS threatened by climate-induced territorial loss can be reconciled with the territorial requirement through the presumption of state continuity, supported by contemporary institutional developments and emerging State practice, and by an understanding of territory that emphasizes its functional role in enabling governance, jurisdiction, and political community rather than its purely physical existence. Continuity could therefore be maintained where a State retains a coherent political community, a governmental structure capable of representing that community, and recognition within the international legal order. In this sense, international law does not

discard the territorial requirement, but adapts its meaning, allowing continuity to persist even where the traditional territorial base is fundamentally altered or lost. From a doctrinal perspective, this conclusion is supported by the interaction between the presumption of state continuity, contemporary institutional developments, and emerging State practice, which together indicate that continuity may be accommodated without abandoning the legal significance of territory. This reconciliation, however, carries important implications. Effectiveness is no longer anchored exclusively in territorial control but increasingly in institutional and relational capacity. Recognition assumes a more prominent role in sustaining continuity which makes it increasingly dependent on other States. Sovereignty, while preserved formally, may be exercised through cooperative and extraterritorial arrangements, raising questions about its substantive content.

The implications of these conclusions are both doctrinal and practical. Theoretically, the findings suggest that the application of traditional criteria of statehood is more flexible than classical formulations may imply, and that statehood is shaped not only by factual criteria but also by continuity, recognition, and broader normative principles. The relationship between effectiveness, territory, and sovereignty is shown to be more flexible than classical doctrine may have implied. For practice and policy, recognizing continuity for SIDS facing inundation has significant consequences. It preserves their access to international institutions, maritime entitlements, and their legal personality. Without continuity, SIDS risk not only territorial loss but also legal extinction, statelessness, and the erosion of their populations' collective rights. Continuity, therefore, functions as a mechanism of legal protection and justice, particularly given that SIDS have contributed minimally to the emissions driving SLR. At the same time, the findings highlight that continuity is not a complete solution. It does not, on its own, resolve questions of relocation, governance in exile, or long-term sovereignty. Rather, it provides a legal framework for developing such solutions.

This thesis has several limitations. First, it is doctrinal in nature, focusing on legal interpretation rather than empirical analysis of how continuity would function in practice. As such, it cannot fully assess how governance, citizenship, or institutional participation would operate in a fully deterritorialized context. Second, the analysis relies on emerging and evolving practice, much of which has not yet been recognized as binding customary international law. The presumption of continuity, while increasingly supported, remains partly unsettled in its precise legal scope. Third, the thesis focuses specifically on statehood and continuity and does not provide a comprehensive analysis of related issues, such as migration regimes, human rights protection, or economic adaptation, all of which are central to the broader realities facing SIDS. Nonetheless, the findings of this thesis point to several avenues for future research. There is a need for greater clarity on effectiveness in a deterritorialized context. Future work should examine the minimum levels of governance

and institutional capacity required for statehood to remain meaningful. Further research should also explore the role of recognition in sustaining continuity. Moreover, there is a need for institutional and practical models. This includes examining how governance structures, digital administration, diaspora representation, and treaty-based arrangements could operationalize continuity in practice. It is further submitted that research needs to connect international law with other fields to ensure that continuity is not merely a legal construct but can also anchor assumptions in other fields of research. Finally, future research should critically assess whether continuity represents an adaptation within international law or a transformation of it, and what this means for the coherence and legitimacy of the statehood doctrine.

Although the presumption of continuity has gained significant support from the ILC, the ICJ's Advisory Opinion, and the practice of affected States, its future consolidation remains an open question. The extent to which continuity becomes firmly embedded within international law may depend on whether support extends beyond those States most directly threatened by sea-level rise. Broader endorsement through multilateral declarations, United Nations General Assembly resolutions, treaty practice, and consistent recognition by the wider international community could further strengthen the normative and legal foundations of continuity. Such developments would not only reinforce the position of vulnerable States but also clarify the status of continuity within customary international law. Whether international law ultimately crystallizes around a general presumption of continuity in cases of inundation caused by SLR or continues to rely on a more limited body of supportive practice will likely be one of the defining questions in the future development of the law of statehood.

In any manner, SLR confronts international law with an unprecedented challenge: the possible disappearance of the physical foundation upon which the Westphalian order has been built. This thesis has shown that the response emerging in international law is not to abandon statehood, but to preserve it through the presumption of continuity, supported by principles of legal stability, self-determination, and an emerging body of institutional and State practice. In doing so, international law reveals both its limits and its capacity for adaptation. The presumption of continuity reflects an effort to reconcile stability with change and doctrine with justice. Whether this reconciliation will ultimately succeed remains uncertain. However, what is clear is that the fate of SIDS will not only test the resilience of statehood doctrine but also the international community's willingness to uphold it in the face of anthropogenic climate change.

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