

States Without Territory: The Legal Fate of Sinking States Under International Law

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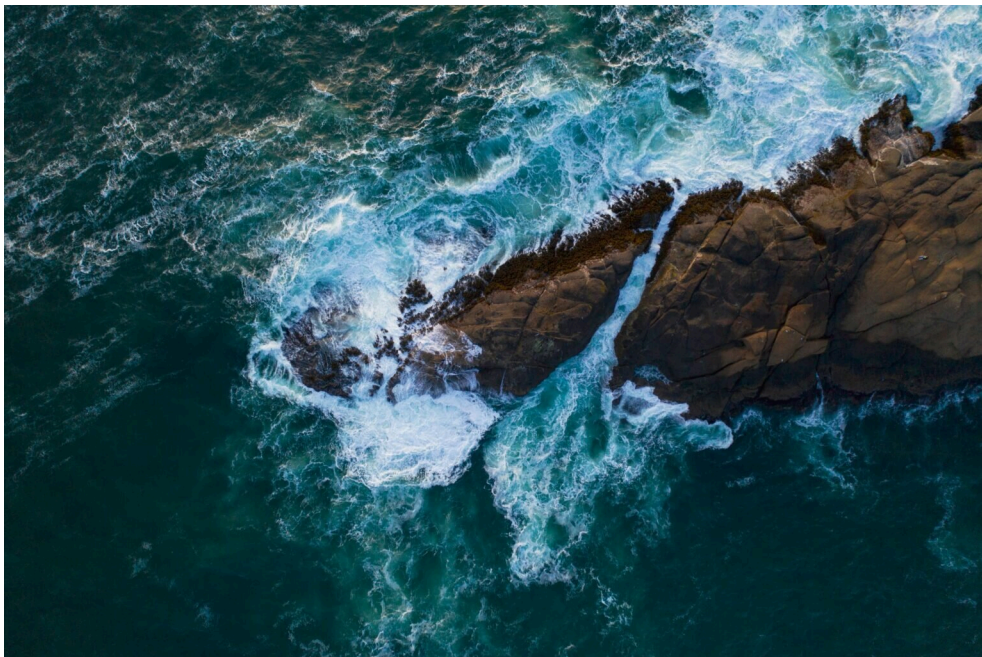


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The Challenge of State Continuity in the Age of Sea-Level Rise

Rising sea levels present international law with an unprecedented challenge: can an established State retain its legal personality if its physical territory becomes permanently uninhabitable, or ultimately disappears altogether? The traditional criteria for statehood, most famously expressed in Article 1 of the Montevideo Convention, are usually invoked to determine when a State comes into being. However, they do not straightforwardly resolve what happens when an already existing State progressively loses one of its core attributes. The problem is therefore not one of state formation, but of state continuity under conditions of climatic displacement and territorial erosion.

The distinction between initial formation and ongoing continuity is crucial. The established doctrines of occupation, government in exile, or temporary loss of effective control all presuppose a continuing territory

that remains legally available, even if it is temporarily controlled by another power or governed from outside. Sea-level rise is different in kind, unfolding as a gradual erosion: for vulnerable atoll States such as Tuvalu and Kiribati, the territory itself becomes uninhabitable long before it physically vanishes, leading to mass displacement and undermining effective government capacity, until finally the territory becomes submerged. Rather than treating this gradual erosion as fatal to statehood, emerging State practice and institutional deliberations suggest that international law is moving towards a strong presumption of continuity rather than extinction, even in extreme cases of territorial loss.

To accept a presumption of continuity in these circumstances is not to deny the significance of territory, but to acknowledge that the function of territory in international law is not merely physical, but also normative. It serves as a spatial basis for the exercise of jurisdiction, as a ground for the political community, and as a marker of sovereignty. When the territory itself is threatened by forces beyond the control of the State, the legal order may respond not by declaring the State extinct, but by adapting its understanding of what it means to be a State in the age of climate change.

State Continuity and the Limits of the Montevideo Criteria

The classic criteria of statehood, reflected in Article 1 of the Montevideo Convention on the Rights and Duties of States (1933), provide the traditional starting point for analysing the legal consequences of sea-level rise for statehood. According to Article 1, a State requires a permanent population, a defined territory, a government, and the capacity to enter into relations with other States (Montevideo Convention on the Rights and Duties of States, 1933, Art. 1). These criteria, however, are generally understood to govern the emergence of statehood, but do not necessarily apply to substantial changes in, or extensive disruptions to, constituent elements such as territory or effective government (Crawford, 2006, pp. 700–701).

In this context, Wong's conceptual distinction between state succession and state extinction provides a useful analytical starting point: whereas succession presupposes the continued existence of territory over which sovereignty is transferred, extinction concerns the more fundamental question whether the legal personality of the State survives at all (Wong, 2013, p. 348). As Crawford's analysis underlines, the Montevideo criteria are not an automatic test for extinction. He notes that substantial changes in territory, population, or government do not necessarily extinguish a State, reflecting a strong general presumption in favour of State continuity (Crawford, 2006, p. 701). Sea-level rise, however, pushes this logic to an absolute limit.

The significance of this continuity question extends beyond the doctrinal framework of statehood. The persistence of statehood determines the State's ability to retain membership in international organizations, re-

main party to treaties, exercise rights under international law, and appear before international courts, subject in each case to the relevant constituent instrument. For low-lying island States, continuity of statehood is equally important for safeguarding established maritime entitlements and for the preservation of their political and cultural identity. As public statements by Pacific leaders and empirical studies of affected populations highlight, island communities firmly reject the premise that climatic displacement should reduce them to ‘refugees’ or entail the loss of their sovereign statehood and international legal status (Farbotko & Lazrus, 2012; Ielemia, 2009; McAdam & Loughry, 2009; Wong, 2013, p. 350).

Translating Continuity into Practice: Treaties, Declarations, and Global Institutions

The doctrinal shift away from automatic extinction has increasingly been translated into practice by States directly confronting sea-level rise. Tuvalu provides the foremost contemporary example of an existing State seeking to secure ongoing legal personality through both domestic constitutional reform and international agreement.

In 2023, Tuvalu amended its Constitution to declare that “the State of Tuvalu ... shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu” (The Constitution of Tuvalu Act, 2023, section 2(1)). The amendment further provides that Tuvalu’s baselines shall remain fixed despite changes to the coastline caused by sea-level rise and expressly states that the permanence of Tuvalu’s statehood and territorial extent reflects the sovereign will of the Tuvaluan people (section 2(2)–(7)).

This constitutional amendment is doctrinally significant because it distinguishes between the physical territory of the State and its continued legal existence. Rather than treating the gradual disappearance of land as automatically resulting in the extinction of the State, the Constitution affirms that Tuvalu’s legal personality is intended to continue irrespective of changes to its territory. By describing the continuity of statehood as an expression of the sovereign will of the people, the amendment also connects the issue to the principle of self-determination. Statehood is therefore presented not merely as a consequence of territorial control, but as an expression of the continued existence of the political community itself (Crawford, 2006, pp. 700–701; Rouleau-Dick, 2021, p. 360). Yet, the harsh reality remains that a domestic constitutional provision cannot unilaterally dictate international legal status, but depends on whether the broader international community is willing to recognise and uphold Tuvalu’s international legal personality.

Tuvalu’s position is reinforced externally through the Falepili Union Treaty concluded with Australia, which was signed on 9 November 2023 and entered into force on 28 August 2024. Article 2 records the shared understanding of both Parties 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” (Australia & Tuvalu, 2023, Art. 2). The Treaty also recognises Tuvalu’s desire for its people to remain on their territory wherever possible and acknowledges their enduring cultural and ancestral connection to both land and sea. In this respect, the Treaty goes beyond establishing a framework for climate cooperation. It reflects Australia’s acceptance that the physical effects of sea-level rise do not necessarily terminate Tuvalu’s international legal personality.

The legal significance of the Treaty should nevertheless not be overstated. Recognition does not create statehood, nor can a bilateral agreement modify the general rules governing the existence of States. Recognition does, however, have evidential significance and may be particularly important in contexts of uncertainty, where States address novel or legally unsettled claims on an ad hoc and bilateral basis (Crawford, 2006, pp. 144–147; Lok, 2023, pp. 42–47). The Falepili Union Treaty is therefore best understood as external support for Tuvalu’s constitutional position rather than as an independent source of statehood. It demonstrates that at least one other State is prepared to proceed on the assumption that Tuvalu’s legal personality may survive the permanent loss of territory.

Taken together, the constitutional amendment and the Falepili Union Treaty do not establish a new rule of international law. They do, however, demonstrate that the question of state continuity has moved beyond the realm of academic debate. Both instruments proceed from the assumption that an existing State does not necessarily cease to exist merely because its territory becomes permanently uninhabitable or disappears. In that sense, Tuvalu represents one of the clearest contemporary attempts to translate the concept of state continuity into both domestic constitutional law and treaty practice.

This emerging view is not confined to Tuvalu alone. In 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, Forum leaders affirmed that international law supports a presumption of continuity of statehood and does not demand its demise in the context of climate change-related sea-level rise. They further declared that the statehood and sovereignty of Forum members will continue, and linked continuity explicitly to self-determination, nationality, territorial integrity, political independence, equity, and permanent sovereignty over natural resources (Freestone & Rayfuse, 2025, pp. 228–229).

This position was reinforced globally by the AOSIS Leaders Declaration on Sea-Level Rise and Statehood, in which the Alliance of Small Island States reaffirmed that, under international law, there is a principle that a State, once established, will continue to exist and endure, and that international law does not contemplate the loss of statehood in the context of sea-level rise. The Declaration explicitly connects continuity of statehood

to self-determination, nationality and several other rights (AOSIS Leaders Declaration on Sea-Level Rise and Statehood, 2024, paras. 5–7).

Crucially, these regional assertions have intersected with distinct, multi-layered developments at the universal level, each carrying a different normative character and legal weight:

First, the International Law Commission concluded its study on sea-level rise in 2025, providing influential expert and institutional analysis. The Study Group's Final Report recorded strong support among States for preserving statehood, sovereignty and international legal personality, as well as membership in international organisations. It also noted that Article 1 of the Montevideo Convention does not address continuity in the sea-level-rise context and linked continuity to legal stability, self-determination, sovereign equality, equity and cooperation (International Law Commission, 2025, paras. 35, 37–41, 56, 59).

Second, the International Court of Justice addressed this issue in its 2025 Advisory Opinion on climate change obligations. While advisory opinions lack the formal binding effect of contentious judgments, they carry considerable authoritative weight as statements of international law. Delivering a measured judicial finding rather than an unconditional political guarantee, the Court observed in paragraph 363 that the disappearance of one of the constituent elements of an established State “would not necessarily entail the loss of its statehood,” expressly invoking the presumption of continuity (ICJ, 2025, para. 363).

Third, the United Nations General Assembly built upon the Court's finding in Resolution 80/263 (2026). Although General Assembly resolutions are generally not legally binding, their wording, voting record and accompanying explanations of vote may provide evidence of State practice and *opinio juris*. In paragraph 7, the General Assembly recalled the ICJ's finding and affirmed the continuity of statehood in the face of sea-level rise. The resolution therefore provides important evidence of broad international support, but does not by itself conclusively establish the content or scope of a customary rule.

Taken together, these developments show that State continuity is no longer merely an academic proposal. Domestic constitutional positions, bilateral treaty practice, regional declarations, the ILC Study Group's institutional analysis, the ICJ's Advisory Opinion and the General Assembly resolution collectively reinforce an emerging presumption against automatic extinction.

The Territorial Objection, Scholarly Frameworks, and Legal Constructs

To systematize the normative persistence of statehood, recent scholarship has proposed different models. Notably, Rouleau-Dick proposes to conceptualise the presumption of continuity as having a ‘ratchet effect’ that makes statehood difficult to lose once acquired (Rouleau-Dick, 2021, p. 360). He distinguishes between a ‘ratchet’ doctrine, which treats state-

hood as quasi-irreversible, and a ‘sameness’ doctrine, which understands continuity primarily as a question of identity over time (Rouleau-Dick, 2021, pp. 373–376). This analysis underlines that the law of statehood is not exhausted by the mechanical application of four criteria. Rather, those criteria operate against a background norm that existing States are presumed to continue unless there is a clear basis for treating them as extinguished. In this sense, continuity is the default position, and extinction the exception that requires specific justification. Stewart reinforces this by highlighting that the extinction of sinking states would directly undermine sovereign equality, self-determination, and the stability of the international legal order (Stewart, 2023, pp. 146–157).

The formidable counterargument to this thesis, however, is the territorial objection. On this view, territory is not merely one constituent element among others, but the legal nucleus of statehood itself. A State is fundamentally a territorial entity because territory provides the physical basis for jurisdiction, authority, and the organisation of political life. If that territorial base disappears permanently, it is argued, the State does not merely suffer a defect in one of its constituent elements; it loses the very foundation on which its legal personality rests (Crawford, 2006, pp. 46–52; Grote Stoutenburg, 2013, pp. 57–70).

This concern explains why the continuity analogy cannot be pressed too far. Governments in exile, occupation, and temporary loss of effective control all involve situations in which the State remains linked, however tenuously, to a territory that still exists. Sea-level rise, by contrast, raises the possibility that the territory itself will not return. For that reason, critics argue that the presumption of continuity cannot simply be extended from temporary dysfunction to permanent geographical disappearance. The State may continue to exist as a cultural or political community, but not as a subject of international law with full legal personality (Grote Stoutenburg, 2013, pp. 60–65; Rouleau-Dick, 2021, pp. 361–362).

Nevertheless, the territorialist argument does not fully answer the problem. It cannot plausibly be the case that an island State becomes extinct the moment the last remaining piece of land is submerged. Treating the submergence of the final area of dry land as an instantaneous extinction event would create acute uncertainty concerning treaty relations, nationality, institutional membership, maritime entitlements, assets, and outstanding international obligations. Wong’s notion of a “necessary legal construct” is useful here. International law may artificially maintain the State’s legal existence for a limited period in order to preserve stability and wind up its rights and obligations in an orderly fashion (Wong, 2013, pp. 376–378).

On this analysis, continuity is not a denial of the territorial nature of statehood, but a technique for preventing a legal vacuum. The construct does not create a permanent state without territory; rather, it explains how legal personality may be preserved temporarily even where the factual

basis of territory has disappeared. Its purpose is to keep rights, duties, and institutional consequences intelligible while the international order adjusts to the loss of the territorial base. That is especially important where maritime rights, treaty relations, and the legal position of the population would otherwise be thrown into immediate uncertainty (Wong, 2013, pp. 376–378; Rouleau-Dick, 2021, pp. 5–6).

Crucially, the continuity dynamic cannot be addressed through relocation alone. As McAdam highlights, the acquisition of land alone does not secure nationality, governance rights, or cultural continuity, but may risk undermining the very identity and self-determination that continuity seeks to preserve (McAdam, 2010, pp. 15–23). This reinforces the view that continued recognition of statehood, even in the face of territorial loss, is not merely a legal fiction, but a means of protecting the legal personality, nationality, and cultural identity of affected populations.

More radical proposals, such as deterritorialised statehood or an international legal personality short of statehood, risk creating a two-tier system in which sinking States are preserved only through a diminished status that undermines sovereign equality and self-determination. Stewart argues that such proposals would expose the falsity of the claimed sovereign equality of States and entrench neo-colonial power structures, particularly because the most vulnerable States are also those that have only recently exercised their right to self-determination (Stewart, 2023, pp. 146–157). This concern is reflected in regional State practice, as evidenced by the 2023 Pacific Islands Forum Declaration, which explicitly links continuity of statehood to sovereign equality, self-determination, and the protection of affected populations (Freestone & Rayfuse, 2025, p. 228).

The stronger conclusion is not that territory is dispensable, but that its physical loss does not dictate the extinction of statehood. While earlier scholarship viewed continuity merely as a temporary construct to manage an orderly demise, contemporary practice and institutional consensus demonstrate that the presumption of continuity operates more robustly. It decouples legal personality from permanent landmass to preserve the sovereign equality, self-determination and fundamental rights of affected populations.

Conclusion

Sea-level rise forces international law to confront a question it has previously been able to neglect: whether statehood must end when territory is permanently lost, or whether continuity can be maintained despite extreme physical erosion. The Montevideo criteria are generally used to assess the emergence of new States and do not by themselves determine when an established State becomes extinct. In that context, the disappearance of territory does not automatically terminate international legal personality.

Tuvalu's constitutional position, the Falepili Union Treaty, the Pacific Islands Forum and AOSIS declarations, the ILC Study Group's Final Report, the ICJ's 2025 Advisory Opinion and General Assembly Resolution 80/263 collectively demonstrate growing legal and political support for continuity. These developments also connect continuity to self-determination, nationality, sovereign equality, legal stability and the protection of affected populations.

The territorial objection nevertheless remains serious: international law is still organised around territorial States, and the loss of all terrestrial territory raises questions that existing doctrine does not fully answer. The better view is that climate-related loss of habitability or territory does not automatically extinguish an established State's international legal personality. A presumption of continuity is increasingly supported, although the precise conditions and consequences of indefinite statehood after the complete and permanent loss of terrestrial territory remain incompletely settled. International law is therefore moving towards continuity as the default response, while the full legal architecture of deterritorialised statehood remains to be developed.

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