Cambridge Law Review (2023) Vol 8, Issue 2, 31–55

Sinking States, Sunken Statehood? The Recognition of Submerged States under International Law

SARAH LOK*

ABSTRACT

Several low-lying Small Island Developing States (SIDS) worldwide are finding themselves imminently submerged because of climate change-induced sea level rise. This raises questions about whether they can, and should, have their statehood continually recognised under international law. This article first outlines a typology of territorial submergence for submerging SIDS, encompassing the dual phases of 'quasi-submerged' and 'submerged'. It argues that the criteria for statehood under the Montevideo Convention ('Montevideo') are relevant to both the creation and extinction of states as the criteria fulfil restrictive, reflective, representative, and responsive functions in the international legal order. It subsequently argues that, notwithstanding Montevideo's theoretical flexibility, its practical application indicates that submerging SIDS likely cannot be recognised under its framework, though the Montevideo analysis suggests that these SIDS should nevertheless continue to be recognised as continued recognition will prevent statelessness from occurring. Lastly, this article examines the principles surrounding state responsibility, which reveal that submerging SIDS can, and should, have their statehood continually recognised under international law. This is because state liability for climate change can potentially be found and recognition constitutes a possible and desirable reparatory option that can be used to mitigate issues arising from loss and damage negotiations.

Keywords: Small Island Developing States, Montevideo Convention, climate change, statehood

* LLB (LSE) '24. The author is grateful to Dr Yusra Suedi for her guidance. The views expressed are solely the author's own.

I. Introduction

What is to happen to submerged states? The mythology of historical lost cities is well-established: these submerged island subcontinents, such as Plato's Atlantis or Pytheas' Thule, exist solely within the pages of the ancient Greek oeuvre. Yet, a not-so-lost island nation situated in today's Pacific Ocean shows that the prospect of territorial submergence is not solely found in fiction.

At the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP27), Tuvalu announced plans to build a digital version of itself in the metaverse given rising sea levels.[1] As only seven governments have agreed to continual recognition of Tuvalu, the Minister for Justice, Communication and Foreign Affairs of Tuvalu, Simon Kofe, acknowledged that the country must 'look at alternative solutions for [its] survival'.[2] This bleakly indicates that international law, despite comprising a whole gamut of legal principles and actors, may not enable the continuous recognition of Tuvalu's statehood as it undergoes an inevitable process of territorial submergence. However, Tuvalu is not alone in having its continued recognition as a state under international law questioned. Beyond Tuvalu, there are numerous low-lying—and thus submerging—Small Island Developing States (SIDS) worldwide, such as Kiribati, the Maldives, and the Marshall Islands. Indeed, these islands currently find themselves precariously above present sea levels: Tuvalu has a landmass that rarely exceeds five metres above sea level, with the average height of its islands being less than two metres above sea level; Kiribati has few points that measure over two metres above sea level;[3] and the Maldives has a maximum height of around three metres above sea level.[4] The imminent submergence of these states thus invites the question of whether quasi-submerged and submerged SIDS can, and should, have their statehood continually recognised under international law.

To answer this question, this article will proceed as follows. It will first outline a typology of territorial submergence—encompassing the dual phases of 'quasi-submerged' and 'submerged'—tailored to the context of SIDS composed entirely of archipelagos of low-lying coral atolls. An interdisciplinary doctrinal ap-

[1] Aimée McLaughlin, 'How Tuvalu Could Become the First Country to Exist Solely in the Metaverse' (*Creative Review*, 22 November 2022) <www.creativereview.co.uk/tuvalu-metaverse-cop27/> accessed 30 November 2022.

[2] Lucy Craymer, 'Tuvalu Turns to the Metaverse as Rising Seas Threaten Existence' *Reuters* (Wellington, 15 November 2022) <www.reuters.com/business/cop/tuvalu-turns-metaverse-rising-seas-threaten-existence-2022-11-15/> accessed 30 November 2022.

[3] Justin T Locke, 'Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments' (2009) 175 The Geographical Journal 171; Tauisi Taupo, Harold Cuffe, and Ilan Noy, 'Household Vulnerability on the Frontline of Climate Change: The Pacific Atoll Nation of Tuvalu' (2018) 20 Environmental Economics and Policy Studies 705, 707.

[4] Fathimath Ghina, 'Sustainable Development in Small Island Developing States' (2003) 5 Environment, Development and Sustainability 139, 146.

proach utilising existing legal and geographical concepts will be deployed. Subsequently, this article will seek to explore two potential argumentative routes that can be used to justify the continued recognition of SIDS' statehood under international law: (a) the Montevideo Convention on the Rights and Duties of States 1933 ('Montevideo'); and (b) state responsibility. It will establish the relevance of Article 1 of Montevideo—which holds that states should have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states[5]—for both the creation and extinction of states so as to ground the later analysis. This article will then question whether quasi-submerged and submerged SIDS can, and should, be recognised under international law through examining: (a) the theory and practice relating to Montevideo; and (b) state responsibility under the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Ultimately, this article finds that quasi-submerged and submerged SIDS can, and should, have their statehood continually recognised under international law.

This article seeks to fill three existing gaps in the literature on statehood and state recognition. Firstly, there is insufficient literature incorporating theoretical analysis of this problem through a historical lens, specifically in relation to Westphalian sovereignty and its relationship with territory and statehood. Although works focusing on the possibility of 'climate deterritorialised nations' question the concept of territory itself,[6] they do not closely interrogate the relationship between territory and Westphalian sovereignty. Secondly, there is a lack of normative argumentation on whether Montevideo should (not) be relevant for not just the creation, but also the extinction, of states. A significant number of writers operate under the assumption that Montevideo is relevant to the extinction of states;[7] few examine countervailing arguments.[8] Lastly, the question of whether

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

[6] Catherine Blanchard, 'Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise' (2016) 53 The Canadian Yearbook of International Law 66; Davorin Lapaš, 'Climate Change and International Legal Personality: "Climate Deterritorialized Nations" as Emerging Subjects of International Law?' (2022) 59 The Canadian Yearbook of International Law 1; Fiona McConnell, 'Governments-in-Exile: Statehood, Statelessness and the Reconfiguration of Territory and Sovereignty' (2009) 3 Geography Compass 1902

[7] See eg James Ker-Lindsay, 'Climate Change and State Death' (2016) 58(4) Survival 73 and Łukasz Kułaga, 'The Impact of Climate Change on States: The Territorial Aspect' (2021) 23 International Community Law Review 115.

[8] Abhimanyu G Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Statehood' (*EJIL: Talk!*, 8 November 2013) <www.ejiltalk.org/the-21st-century-atlantis-the-international-law-of-statehood-and-climate-change-induced-loss-of-statehood/#more-9752> accessed 1 November 2022 ('Jain, 'Climate Change-Induced Loss of Statehood''); Abhimanyu G 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.

submerged states should continue to be recognised under international law is underexplored. Existing arguments in this regard are mostly limited to issues of sovereign equality and morality,[9] and it is necessary for international legal scholarship to question whether the current legal and political landscape is well-suited to meet the exigencies of the climate crisis.

This article first establishes that the criteria for statehood under Montevideo are relevant to the question of statehood for quasi-submerged and submerged SIDS (as defined in Section II.B) in fulfilling restrictive, reflective, representative, and responsive functions in the international legal order (Section III.A). It subsequently argues that, notwithstanding Montevideo's theoretical flexibility, its practical application suggests that it cannot provide a sound framework for continued recognition of quasi-submerged and submerged SIDS (Section III.B). Nevertheless, the Montevideo analysis reveals an argument that can be made to justify that these SIDS should be continually recognised under international law (Section III.B). Lastly, this article examines the principles surrounding state responsibility, which reveal that it is not only potentially arguable under ARSIWA that these SIDS can be continually recognised (Sections IV.A and IV.B), but also that they should (Section IV.B).

II. A Typology of Territorial Submergence

This section seeks to outline a typology of territorial submergence for submerging SIDS to ground the analysis in the subsequent sections. It will first outline the relevant concepts (that is, low tide elevations, habitability, low-elevation coastal zone, and extreme sea level rise) for the sake of clarity before introducing the typology itself.

The Intergovernmental Panel on Climate Change (IPCC) has argued that SIDS, especially the atoll nations of the Pacific and Indian Oceans, are amongst the most vulnerable to climate change and rising sea levels.[10] It is important to note here that SIDS are not homogenous in their geographical composition. Although some SIDS are composed of single islands (for example, Barbados and Sri Lanka), others are archipelagos of several (for example, Tuvalu), hundreds (for example, Tonga), or thousands of islands (for example, the Maldives).[11] Furthermore, although some islands or groups of islands can be mountainous (for example, Dominica), others, for which sea level rise is especially threatening, consist

[9] Jenny G Stoutenberg, 'When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialised" Island States' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 59, 85; Blanchard (n 6) 72, 107.

[10] Leonard A Nurse and others, 'Small Islands' in Vicente R Barros and others (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2014) 1613.

[11] James Lewis, 'The Vulnerability of Small Island States to Sea Level Rise: The Need for Holistic Strategies' (1990) 14 Disasters 241.

entirely of atolls and reef islands (for example, Kiribati).[12] As exposure to climatic hazards is ultimately contingent on structural characteristics—such as geographical and population size, remoteness, and low elevation—that increase susceptibility to flooding and coastal inundation,[13] this heterogeneity in SIDS' geographical composition translates into heterogeneity in their vulnerability to sea level rise. Therefore, this analysis and its associated framework will be focused on the SIDS composed entirely of archipelagos of low-lying coral atolls that are most vulnerable to climate change-induced sea level rise, namely Tuvalu, Kiribati, the Maldives, and the Marshall Islands. These SIDS will be collectively referred to as 'submerging SIDS' (when referring to their present state) and 'quasi-submerged and submerged SIDS' (when referring to their potential future state) in this article. The concepts of 'quasi-submerged' and 'submerged' will be defined later in Section II.B.

A. Legal and geographical concepts

One relevant overarching legal concept, along with one implied legal concept, can be distilled from the United Nations Convention on the Law of the Sea (UNCLOS) and the jurisprudence of the International Court of Justice (ICJ) pertaining to archipelagos, namely: (a) low tide elevations; and (b) habitability. Article 13(1) of UNCLOS provides that a low-tide elevation is 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide'.[14] It is clear from this definition that low-tide elevations have reduced habitability in terms of human habitation and economic life when compared to landmasses that are not submerged at both high and low tide. Furthermore, as the ICJ noted in *Maritime Delimitation (Qatar/Bahrain)*, low-tide elevations are not territory 'in the same sense as islands' or other land territory.[15] Taken together, the legal authorities on low-tide elevation further imply that territories need to possess a certain level of habitability.[16]

There are also relevant concepts in the sphere of coastal geography that can be utilised to craft this typology. Firstly, the low-elevation coastal zone (LECZ) refers to the contiguous area along the coast that is less than ten metres above sea

[12] ibid.

[13] Karen E McNamara and others, 'What is Shaping Vulnerability to Climate Change? The Case of Laamu Atoll, Maldives' (2019) 14(1) Island Studies Journal 81, 83.

[14] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 ('UNCLOS') art 13(1).

[15] *Maritime Delimitation and Territorial Questions (Qatar/Bahrain)* (Merits) [2001] ICJ Rep 40, 206.

[16] As UNCLOS art 121 provides guidance on individual islands and not archipelagic states that are 'constituted wholly by one or more archipelagos' as per UNCLOS art 46(a), art 121 does not apply to archipelagos and thus cannot be used for this article's analysis. See Myron H Nordquist and others (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol III (Martinus Nijhoff 1995) 326.

level.[17] This area sees increased flood risk, particularly when high tides combine with storm surges or high river flows; if floods occur, environmental damage may occur.[18] Furthermore, coastal geography identifies two challenges faced by submerging SIDS, namely an increased frequency of flooding and an increased vulnerability to extreme sea level rise (ESLR). On the former, the frequency of extreme water-level events in SIDS is projected to double by 2050;[19] on the latter, extreme sea levels that are historically rare will become more common under all projections of global warming, with SIDS expected to experience such events annually by 2050.[20] IPCC reports—which contain national and global assessments of projected coastal flooding given ESLR—corroborate the relevance of these challenges.[21]

B. TYPOLOGY OF TERRITORIAL SUBMERGENCE

A dual-phase typology of territorial submergence can be derived from the abovementioned legal and geographical concepts. For the sake of simplicity, the term 'land mass' will be used as a general term to refer to all the islands as part of archipelagos and atolls that comprise the state's territory.[22]

The first phase in this typology comprises the 'quasi-submerged' state, which sees significant submergence of at least a majority of its total land mass at high tide, though some islands may still be restrictively habitable. Here, the land mass will adhere to the definition of low-tide elevation provided in UNCLOS Article 13(1), which therefore means that it will cease to carry the same legal implications as land territory on the basis of *Qatar/Bahrain*. The land mass will be at the LECZ and will see significant submergence at high tide because of ESLR, as well as a significant increase in coastal flooding. Human habitation and economic life, especially along the coasts, may thus be adversely affected and restricted. As a result, the capacity of communities to continue living in certain areas is likely to be

[17] Gordon McGranahan, Deborah Balk, and Bridget Anderson, 'The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones' (2007) 19 Environment and Urbanisation 17; Stewart Angus and James D Hansom, 'Enhancing the Resilience of High-Vulnerability, Low-Elevation Coastal Zones' (2021) 200 Ocean and Coastal Management 105414.

[18] Molly E Keogh and Torbjörn E Törnqvist, 'Measuring Rates of Present-Day Relative Sea-Level Rise in Low-Elevation Coastal Zones: A Critical Evaluation' (2019) 15 Ocean Science 61, 67.

[19] Adelle Thomas and others, 'Climate Change and Small Island Developing States' (2020) 45 Annual Review of Environment and Resources 1, 8.

[20] Ebru Kirezci and others, 'Projections of Global-Scale Extreme Sea Levels and Resulting Episodic Coastal Flooding Over the 21st Century' (2020) 10 Scientific Reports 11629.

[21] IPCC, 'Intergovernmental Panel on Climate Change. 2019. Summary for policymakers' in Hans-Otto Pörtner and others (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*.

[22] This is a generally accepted term. See McNamara and others (n 13) 83.

reduced.[23] Given the projected increased frequency of flooding and ESLR, this is the phase that SIDS will likely find themselves in by 2050.[24]

The second phase in this typology comprises the 'submerged' state, which sees almost complete or complete submergence of at least a majority of the total land mass at high tide, with very few or no islands left that are (restrictively) habitable. The land mass here, like that of the quasi-submerged state, does not carry the same legal implications as land territory on the basis of *Qatar/Bahrain*. However, unlike with the quasi-submerged state, the land mass will no longer be at the LECZ: it will be largely or wholly submerged at high tide (and possibly even low tide), thereby rendering it unable to sustain human habitation and economic life. As future ESLR is projected to reach 1.5 to 2.5 metres in the Pacific Ocean region—which is where Kiribati and Tuvalu are situated—based on a 100-year return period,[25] both SIDS—having most of their islands lying less than two metres above sea level—are likely to reach this phase within a century.

III. State Recognition under Montevideo

This section explores the viability of arguing for the continued recognition of quasi-submerged and submerged SIDS' statehood under Montevideo. It will first establish Montevideo's relevance for the recognition of quasi-submerged and submerged SIDS before analysing whether they can be recognised under Montevideo and whether they should, more generally, continue to be recognised. Although international law lacks an authoritative legal definition of a state, Montevideo is used in this analysis as it is the most cited definition[26] and is considered customary international law.[27]

A. Montevideo in the International Legal Order

The Montevideo Convention holds that states should have: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.[28] As mentioned in Section I, a significant majority

[23] Ann Powers and Christopher Stucko, 'Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 133; Clive Shofield and David Freestone, 'Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013) 146.

[24] Kirezci and others (n 20).

[25] ibid.

[26] Karen Knop, 'Statehood: Territory, People, Government' in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press 2015) 95.

[27] Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14(2) Melbourne Journal of International Law 346.

[28] Montevideo art 1.

of the literature thus far operates under the assumption that Montevideo is relevant to both the creation and extinction of statehood, without providing the necessary justifications for such relevance. There is, however, a stream of legal scholarship that denies the relevance of Montevideo to questions of state recognition in the context of state extinction, and posits that Montevideo only pertains to the creation of states.[29] Another stream of legal scholarship that may deny the relevance of the Montevideo criteria to state extinction asserts that the recognition of statehood is fundamentally a political exercise.[30] Nevertheless, this section argues that Montevideo serves four functions in the international legal order.

Firstly, Montevideo serves a restrictive function: by having a territory requirement as one of its constituent elements, it prevents a potentially indeterminate number of non-territorial entities (that were never considered states under Montevideo) from asserting statehood because they will be unable to fulfil this requirement.[31] Indeed, if this criterion serves as a precondition for the creation of states, but not necessarily for their continued existence, then random non-territorial entities can assert that they constitute states on the basis that certain new or existing states do not fulfil, or have not already fulfilled, the territory requirement. This would risk undermining Montevideo's restrictive function. Therefore, contrary to the argument that this function does not explain the continued relevance of the territory requirement once a state has come into existence,[32] the territory requirement is relevant for both the creation and continuity of statehood.

Furthermore, Montevideo serves a reflective function: it not only comprises legal criteria deployed by the UN to determine questions of statehood,[33] but also functions as a framework that reflects political reality. In other words, the language of Montevideo is not solely limited to the legal ambit of statehood—it is instead also deployed by SIDS in the diplomatic sphere. Even if some posit that the text of Montevideo itself contains no consideration of continuity,[34] arguments made by states pertaining to their continued recognition implicitly reference the criteria under Montevideo itself. These arguments constitute state practice, thereby contributing to the creation of a customary international law notion that the criteria in Montevideo are relevant to the continuity of statehood.[35] When indicating that they considered extinction of statehood to be a consequence of ESLR, the Maldives

[29] See eg Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[30] See eg Milena Sterio, 'Power Politics and State Recognition' in Gëzim Visoka, John Doyle, and Edward Newman (eds), *Routledge Handbook of State Recognition* (Routledge 2019) 82.

[31] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[32] ibid.

[33] Kawser Ahmed, 'Will the ICJ Objectively Assess the Statehood of Palestine? A Brief Reflection' (2023) 22 The Law and Practice of International Courts and Tribunals 119

[34] ibid.

[35] State practice (eg diplomatic acts and correspondence) is relevant in the international legal sphere as it can contribute to customary international law. See Statute of the International Court of Justice, art38(1)(b).

referred to the 'extinction of their State', while Nauru highlighted that submergence rendered states 'in danger of losing their populations and their land as a whole'.[36] This evinces state invocation of the Montevideo criteria—population and territory—when discussing their potential extinction. The argument that the territory requirement does not explain Montevideo's continued relevance to state extinction thus fails to recognise adequately the reality of state practice in international law. It also follows that the argument cannot be made that, as statehood is linked to power politics,[37] Montevideo is irrelevant. Indeed, the problem with this argument is its attempt to divorce law from politics: it solely understands Montevideo as constitutive of legal criteria, without also recognising that the Montevideo lexicon is used in state actions in the political sphere.

Montevideo also serves a representative function, featuring elements that are important to states—especially SIDS—and statehood in the context of the international legal order. This is true for the requirements of government and the capacity to enter legal relations with other states, as they respectively enable internal and external management of the state. The representative function of Montevideo is also reflected in the population requirement because states are (plainly) ultimately composed of people. Further, this representative function holds especially true for the territory requirement, given the link that the notion of Westphalian sovereignty draws between territory and sovereignty and the importance of territory to SIDS' identity.

An argument against this proposition is to the effect that, because technological developments have greatly decreased the functional utility of territory, Montevideo's territory requirement for the continued existence of states can be dispensed with.[38] Yet, this is a *non sequitur*, for it conflates a diminished functional utility with the absence of functional utility. It also overstates the influence of technological developments: although technological and legal developments, such as the expansion of international trade and the exercise of extraterritorial jurisdiction, may make states less reliant on their delineated territory, this does not necessarily mean that these states no longer require a territorial basis. Indeed, territory serves a crucial historical function as a basis for state sovereignty in the international legal order today.[39] Therefore, even if technology can enable the digitisation of a state's presence (for example, Tuvalu's proposal to build a 'digital twin' in the metaverse), it is no perfect substitute for actual, physical territory, be it land or maritime territory.[40] Furthermore, even if it is accepted that technological developments have greatly decreased the functional utility of territory, it does not mean that the territory requirement can be dispensed with, for it is still important in other aspects. Although some have rather quickly dismissed the cultural

[36] Wong (n 27).
[37] Sterio (n 30) 82.
[38] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).
[39] McConnell (n 6) 1903.
[40] This more expansive definition of territory will be elaborated on further in Section III.B.

function of territory in describing it as the 'least tangible and immediately critical purpose that territory serves',[41] this cannot hold true in the cultural context of citizens in SIDS. Sociological studies suggest that Tuvaluan and Kiribatian identities are strongly related to their land territory,[42] and therefore it cannot be argued that a community's cultural ties—and, by extension, cultural fabric—are only partially premised on territory. In short, digital territory is an imperfect replacement for physical territory.

More broadly, Montevideo's importance to statehood is underscored both by the need to ensure Montevideo's substantive coherence and by the law on state continuity. It has been argued that the limited functional utility of territory for statehood is underscored by the absence of a minimum threshold for the satisfaction of the territory requirement.[43] However, this argument is not viable when taken to its logical conclusion: given that there is likewise no minimum threshold for the population requirement under Montevideo, this argument necessarily entails that multiple components of the Montevideo criteria can be done away with. It has also been suggested that the law on state continuity cannot supersede the Montevideo criteria that apply to the creation of statehood.[44] This thus implies that if one were to determine the extinction of a state, one would have to first ascertain if the state existed—and was thus created—under Montevideo in the first place, thereby justifying the importance of the Montevideo criteria.

Lastly, Montevideo serves a responsive function: given its existing prevalence as an analytical rubric for questions pertaining to statehood, it is a framework that enables international law to respond to novel legal problems (in this case, the unprecedented question of continued recognition of sinking states). This is especially because the concept of the state has been largely construed with reference to Montevideo.[45] Although a line of argument posits that statehood continues 'so long as an identified polity exists with respect to a significant part of a given territory and people',[46] how far this presumption of continuity of states—where the same state can still be deemed to exist despite drastic changes in its ability to fulfil the Montevideo criteria—will extend to quasi-submerged and submerged states in the future is unclear. Although it is accepted that the non-fulfilment of one or more of the elements of statehood will not affect state continuity, it is also unclear where

[41] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[42] Carol Farbotko, Elaine Stratford, and Heather Lazrus, 'Climate Migrants and New Identities? The Geopolitics of Embracing or Rejecting Mobility' (2016) 17 Social and Cultural Geography 533, 534; Candice E Steiner, 'A Sea of Warriors: Performing an Identity of Resilience and Empowerment in the Face of Climate Change in the Pacific' (2015) 27 The Contemporary Pacific 147, 149.

[43] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[44] Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States' (2021) 22(2) Melbourne Journal of International Law 357, 377.

[45] Ryan Mitra and Sanskriti Sanghi, 'The Small Island States in the Indo-Pacific: Sovereignty Lost?' (2023) 31 Asia Pacific Law Review 428, 436.

[46] James Crawford, *The Creation of States in International Law* (Oxford University Press 2007) 715.

the limits of such non-fulfilment of individual or multiple elements lie.[47] Taken together, all of this means that the challenges that the presumption of continuity itself cannot resolve necessitate reliance on Montevideo, for these challenges require continuous examination of the very boundaries of Montevideo's individual criteria. Therefore, contrary to what some assert, it is not viable to look to historical precedent to justify that loss of territory does not imply loss of statehood.[48] Although historical practice undoubtedly shows that international law does not hold that loss of territory implies loss of statehood,[49] the current situation in which SIDS find themselves lacks precedent[50] and thus raises the possibility that loss of territory could imply loss of statehood.

In summary, Montevideo is relevant for both the creation and extinction of states as it stops non-territorial entities from claiming statehood, reflects the political reality pertaining to continued statehood, features elements important to states and statehood, and functions as a reference point to navigate novel questions pertaining to statehood. It is, then, a *non sequitur* to argue that the failure of the international community to apply Montevideo rigorously to make determinations about statehood entails that Montevideo is irrelevant to questions relating to the continued statehood of quasi-submerged and submerged states.[51] Indeed, the Montevideo criteria are relevant to the question of recognition in the context of state extinction, for they provide international law with a framework through which legal questions related to, as well as the politics of, state recognition can be understood.

B. State recognition

Having established Montevideo's relevance to state extinction, this article will proceed to analyse whether quasi-submerged and submerged SIDS can be continually recognised under Montevideo and whether they should be continually recognised more generally. This section seeks to argue that although quasi-submerged and submerged SIDS likely cannot be continually recognised under Montevideo, analysis arising from this examination nevertheless points towards an argument justifying that these submerging SIDS should be continually recognised.

Some writers deem it impossible for quasi-submerged and submerged states to retain their statehood, for they believe that Montevideo clearly articulates that a state should possess land territory.[52] Proponents of such an approach fail to recognise that Montevideo lacks self-defining criteria, in that international law

[47] Wong (n 27).

[48] Jain, 'Climate Change-Induced Loss of Statehood' (n 8).

[49] Jenny G Stoutenberg, *Disappearing Island States in International Law* (Brill Nijhoff 2015) 264.

[50] ibid.

[51] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press 2012) 236.

[52] Crawford (n 46) 31–32; Lilian Yamamoto and Miguel Esteban, 'Vanishing Island States and Sovereignty' (2010) 53 Ocean and Coastal Management 1.

lacks a singular authoritative exposition on what the various elements of statehood precisely entail.[53] Accordingly, the conceptual indeterminacy surrounding territory reveals that the notion may accommodate definitions extending beyond that of simply the presence of physical land, thereby enabling these states to be continually recognised under Montevideo. Indeed, even though physical territory serves as a basis for state sovereignty in the international legal order today,[54] conceptual and practical advances in international law promote a broader understanding of territory.

In the first place, definitions of territory can encompass both land and maritime territory. Although existing jurisprudence under the law of the sea deems maritime territory to be contingent on the presence of land territory,[55] conceptual developments posit that territory (and maritime territory) can exist if the population thereon so requires for their own identity or existence,[56] which can include citizenship and its associated bundle of rights. Such a broader understanding of territory in the context of these SIDS is supported by the fact that international law presently recognises, albeit to a limited extent, the notion of non-territorial sovereignty in the political sphere, as in the context of diasporic communities (because of invasion or colonisation) or the Sovereign Order of Malta.[57] Given that a state's sovereignty also applies to its entire territory, including its uninhabitable terrain,[58] this implies that a government will still be deemed sovereign over its land, regardless of the form taken—habitable or non-habitable—by such land.

Indeed, to ensure that existing jurisprudence under the law of the sea exists in coherence with conceptual developments in international law, there is a need to maintain exceptionally—at least to a certain extent—present maritime baselines possessed by submerging SIDs to prevent changes to their maritime territory from occurring as their land territory gradually sinks into the sea. This exception to the rule of ambulatory baselines in UNCLOS has been construed as acceptable within a broader interpretation of rules under the law of the sea,[59] thereby enabling UNCLOS to adapt to current challenges arising from climate change and, by extension, ensuring that submerging SIDS continue to possess some maritime territory.

[53] Stoutenberg (n 49) 249.

[54] McConnell (n 6) 1903; Cynthia Weber, 'Reconsidering Statehood: Examining the Sovereignty/Intervention Boundary' (1992) 18 Review of International Studies 199, 211.

[55] *North Sea Continental Shelf (Germany/Denmark, Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [96]; UNCLOS art 2(1). This is also reflected in the principle that 'the land dominates the sea', according to which the terrestrial territorial situation is the starting point for the determination of the maritime rights of coastal states (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* [2007] ICJ Rep 659 [113]).

[56] McConnell (n 6) 1915–1916; Weber (n 54) 215.

[57] Jörgen Ödalen, 'Underwater Self-determination: Sea-level Rise and Deterritorialised Small Island States' (2014) 17 Ethics, Policy & Environment 225, 228.

[58] Mitra and Sanghi (n 45) 435.

[59] Signe Veierud Busch, 'Law of the Sea Responses to Sea-Level Rise and Threatened Maritime Entitlements: Applying an Exception Rule to Manage an Exceptional Situation' in Elise Johansen, Signe Veierud

Moreover, states wield the power to interpret—however broadly or narrowly—whether other states meet Montevideo's criteria.[60] By applying the presumption of continuity, which holds that a state can continue to exist despite drastic changes to its fulfilment of Montevideo,[61] it can broadly be argued that submerging SIDS can be recognised even when submerged because they either fulfilled the Montevideo criteria previously or possess maritime territory. All of the above suggest that, notwithstanding the existing jurisprudence under the law of the sea, theoretical and practical developments indicate that sovereignty may not be solely contingent on land territory, thereby enabling the potential recognition of quasi-submerged and submerged SIDS.

The necessity of this more expansive interpretation is underscored by the undesirability of measures that submerging SIDS have taken or might take to ensure their continual recognition under Montevideo, should a narrow conception of territory as purely encompassing land territory be adopted. Although the phase of the 'submerged' state entails an absence of physical territory, the lack of a baseline territory requirement will mean that these states can simply construct a 'sovereignty marker' that safeguards minimum adherence to Montevideo's territory requirement, such as a lighthouse.[62] Yet, this may cause further practical issues: it is uncertain as to what size such a placeholder must be to ensure 'minimum adherence' and what sorts of constructions can constitute acceptable 'sovereignty markers'. Additionally, the Maldives has been constructing artificial islands within their territorial waters to maintain their statehood.[63] Although this solution is theoretically compliant with the idea of physical territory, this is not only environmentally destructive,[64] but also potentially non-constitutive of territory given international law's unwillingness to open the floodgates regarding the existence of states based on artificial islands.[65] This is especially because no conceptual distinction between the notions of 'claiming new land' and 'reclaiming or maintaining a State's current borders' appears to exist: so long as the new acquired territory was

Busch, and Ingvild Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change* (Cambridge University Press 2020) 334–335.

[60] Stoutenberg (n 49) 252, 269.

[61] Crawford (n 46) 715.

[62] Jessica Drew, 'The Statehood of Disappearing Island States and International Law' (*International Law Blog*, 12 July 2023) <https://internationallaw.blog/2023/07/12/the-statehood-of-disappearing-island-states-and-international-law/#_ftnref20> accessed 12 August 2023.

[63] ibid.

[64] Emma Allen, 'Climate Change and Disappearing Island States: Pursuing Remedial Territory' [2018] Brill Open Law <https://brill.com/view/journals/bol/aop/article-10.1163-23527072-00101008/article-10.1163-23527072-00101008/article-10.1163-23527072-00101008.xml?ebody=pdf-67975> 5–6.

[65] ibid 6–7.

terra nullius, the acquisition would be an act *à titre de souverain*;[66] and the ICJ has also held that reclamation plans are similarly understood.[67]

The ability of submerging SIDS to compel other states to undertake this more expansive interpretation of territory under Montevideo is shown through how SIDS more generally—including states beyond Tuvalu, Kiribati, the Maldives, and the Marshall Islands—have been carving out a legally and politically favourable space for themselves within the international sphere. This is despite arguments to the contrary positing that international environmental law (IEL) has often been utilised contrary to SIDS' interests.[68]

Firstly, SIDS have established their vulnerability in multilateral negotiation spaces, as evinced through their work as part of the Alliance of Small Island States (AOSIS) in advancing clear diplomatic objectives and actively participating in COP negotiations, thereby securing international visibility as vulnerable countries.[69] Such visibility has translated into influence: their vulnerability narrative and use of moral leadership strategies have provided them with leverage in negotiations, enabling them to secure at least some parts of their agenda and interests in international agreements.[70] This, then, has the effect of enabling them to be taken seriously by other countries in both the Global South and Global North, with the international media, policy, and scientific communities placing significant focus on SIDS and recognising them as hotspots of global climate change and paradigm examples of island vulnerability.[71] Furthermore, significant work has been done by SIDS to bring attention to environmental threats and thereby ensure their own survival on the legal front. Vanuatu's request for an advisory opinion from the ICJ pertaining to the international legal obligations of states in relation to climate change has been adopted by the UN General Assembly and accepted by the ICJ;[72] and Antigua and Barbuda and Tuvalu have established a Commission of Small

[66] Sookyeon Huh, 'Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)' (2015) 26 The European Journal of International Law 709, 715.

[67] *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 [274].

[68] Mitra and Sanghi (n 45) 439.

[69] Aaron Atteridge, Cleo Verkuijl, and Adis Dzebo, 'Nationally Determined Contributions (NDCs) As Instruments for Promoting National Development Agendas? An Analysis of Small Island Developing States (SIDS)' (2020) 20 Climate Policy 485, 486; Timothée Ourbak and Alexandre K Magnan, 'The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players' (2018) 18 Regional Environmental Change 2201.

[70] Inés de Águeda Corneloup and Arthur P J Mol, 'Small Island Developing States and International Climate Change Negotiations: The Power of Moral "Leadership"' (2014) 14 International Environmental Agreements: Politics, Law and Economics 281, 292.

[71] Carola Klöck and Patrick D Nunn, 'Adaptation to Climate Change in Small Island Developing States: A Systematic Literature Review of Academic Research' (2019) 28 The Journal of Environment & Development 196, 197; Jan Petzold and Alexandre K Magnan, 'Climate Change: Thinking Small Islands Beyond Small Island Developing States (SIDS)' (2019) 152 Climatic Change 145.

[72] Vanuatu ICJ Initiative, 'Statement ICJ Core Group' (*Vanuatu ICJ Initiative*, 27 October 2022) <www.vanuatuicj.com/statement-icj-core-group> accessed 21 January 2023.

Island States on Climate Change and International Law (COSIS) with express authority to (among other things) request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on matters pertaining to climate change, with proceedings now underway.[73] Although advisory opinions are not legally binding, they have served as authoritative pronouncements of law.[74] Taken together, all of this implies that SIDS are not just securing diplomatic influence, but also buttressing it with legal influence, thereby working towards shaping the international agenda in their favour. It therefore follows that submerging SIDS, in utilising Montevideo's reflective function, could be deemed sufficiently influential to sway other states into adopting a broader understanding of territory that works to their benefit.

Nevertheless, the force of this argument should not be overstated: even as these submerging SIDS are securing and reinforcing their legal and political influence internationally, the actual exercise of Montevideo's theoretical flexibility is still contingent on the continued benevolence of other political actors within the international legal order. This is especially because states are legally entitled to withdraw recognition of another state—and thereby deny that state's statehood—whenever they wish.[75] At most, SIDS might practically influence the international interpretation of the territory requirement under Montevideo, but this is not guaranteed.

Moreover, notwithstanding the broader definition of 'territory' that could be used, Montevideo's historical practical application appears to place stronger practical significance on the criteria of territory and—more importantly for the purposes of this argument—permanent population. An argument can be made that (non-)recognition under Montevideo occurs regardless of whether the entity in question meets all or only some of its criteria:[76] there are some states that fulfil the Montevideo criteria but are not fully recognised by the international community (for example, Kosovo);[77] there are also states that do not fulfil the Montevideo criteria but are recognised by the international community (for example, Somalia).[78] Furthermore, states suffer constant transformations in their constitutive elements that do not affect their statehood, given that a strong presumption applies

[73] Donald R Rothwell, 'The Acid Test: Legal Moves to Force Action on Climate Change' (*Reliefweb*, 19 January 2023) <https://reliefweb.int/report/antigua-and-barbuda/acid-test-legal-moves-force-action-climate-change> accessed 21 January 2023.

[74] Margaretha Wewerinke-Singh, 'Climate Change in an Unequal World: Do International Courts and Tribunals Matter?' (*National University of Singapore Centre for International Law*, 15 September 2022) <https://cil.nus.edu.sg/blogs/climate-change-in-an-unequal-world-do-international-courts-and-tribunals-matter/> accessed 21 January 2023.

[75] Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53 Yale Law Journal 385, 389.

[76] Mitra and Sanghi (n 45) 434.

[77] AJLabs, 'Which Countries Recognise Kosovo's Statehood?' *Al Jazeera* (Doha, 17 February 2023) <www.aljazeera.com/news/2023/2/17/mapping-the-countries-that-recognise-kosovo-as-a-state-2> accessed 27 August 2023.

[78] Ken Menkhaus, 'State Collapse in Somalia: Second Thoughts' (2003) 30 Review of African Political Economy 405.

to the continuity of a state once it has been created and,[79] therefore, against its extinction. For example, 'failed' states that lose an effective government do not fulfil Montevideo's third criterion (that is, government), and, by extension, potentially its fourth criterion as they may lack the institutional capacity and authority to conduct international relations. However, these 'failed' states are still the main claimants to a demarcated territory in which a core population remains (even if a population exodus has occurred) and are still recognised as states by the international community. This suggests that the criteria of territory and permanent population are more crucial to determining statehood as compared to the third and fourth criteria. By contrast, in the case of quasi-submerged and submerged SIDS, a complete departure of the population base will likely occur. This means that even if other states may be swayed by SIDS into adopting a broader interpretation of territory, it will be challenging to assert that submerging SIDS have a permanent population in their 'quasi-submerged' and 'submerged' stages. Habitability will already be severely limited and significant migration would likely have occurred (or be underway) at the phase of the quasi-submerged state. At the phase of the submerged state, there may be little to no population at all. Therefore, given the greater importance that has been implicitly accorded to both territory and a permanent population in the recognition of statehood under Montevideo thus far, it cannot be said that recognition under Montevideo can take place regardless of requirements left unfulfilled by the state in question. It is therefore difficult to conclude that quasi-submerged and submerged SIDS can have their statehood continually recognised under Montevideo.

Nevertheless, the above analysis relating to the broader conception of territory can be utilised to argue that submerged SIDS should be continually recognised, even as they move along the typology of territorial submergence. The point that territory can exist if the population requires it for their own identity or existence works in favour of these SIDS: if SIDS at the phase of the 'submerged' state are deemed to lack territory (as discussed in Section II.B) and thus no longer exist as states, then their citizens have no right under international law to acquire a new nationality from another state.[80] It follows that, at present, non-submerging states do not have any concomitant obligations to grant citizens of submerged SIDS citizenship of their state when submerging SIDS no longer exist as states. Construing these submerged SIDS as having territory (albeit in the maritime sphere) thereby protects their citizens' citizenship status, even as these populations may have to migrate to another non-submerged state; this is especially because the non-submerged state may not grant them citizenship in the short-term. Therefore, contrary to a line of argument holding that maintaining submerging SIDS' statehood

[79] Rouleau-Dick (n 44) 359–360.

[80] Melissa Stewart, 'Cascading Consequences of Sinking States' (2023) 59 Stanford Journal of International Law (forthcoming).

is a legal fiction bereft of practical utility,[81] a wider understanding of Montevideo's territory requirement will ensure practical benefits in terms of continued citizenship, at least until citizens of submerging SIDS are able to acquire citizenship under a new state, thereby ensuring that these citizens will at no point find themselves stateless. Indeed, recognising the continuation of these states does not merely yield temporary benefits, for it is impossible to predict with certainty the amount of time it would take for all the citizens of these SIDS to acquire citizenship under a new state. Furthermore, as the notion of 'statelessness' presumes that the origin state possesses neither the capacity nor intention to represent them,[82] rendering the citizens of these SIDS stateless would be to misrepresent at least the intentions of submerging SIDS in continuing to fight for their continued physical and political existence.

Overall, Montevideo is sufficiently conceptually flexible to accommodate an expansive interpretation of the concept of territory that includes both land and maritime territory. Nevertheless, even as SIDS potentially possess the political leverage to compel states to adopt this broader interpretation of territory, the practical application of Montevideo thus far—in terms of its general use by states and, more significantly, the relatively heavier weight accorded to the criteria of territory and permanent population—suggests that submerging SIDS likely cannot be recognised within the international legal framework directly pertaining to statehood, regardless of whether they are quasi-submerged or submerged. Montevideo's responsive function thereby raises the possibility that loss of territory could (indirectly) imply loss of statehood through quasi-submerged and submerged SIDS' inevitable non-fulfilment of the criterion of a permanent population. Nevertheless, this examination of statehood recognition under Montevideo allows an argument to be made that submerging SIDS should continue to be recognised, on the basis that recognition prevents statelessness from occurring.

IV. State Recognition through State Responsibility

This section aims to explore the viability of arguing for the continued recognition of submerging SIDS under the alternative route of state responsibility, rather than through the direct route of Montevideo (as seen earlier in Section III). It will do so by addressing the questions of whether quasi-submerged and submerged SIDS can, and should, be continually recognised through the lens of state responsibility. Although a stream of literature posits that this line of argument is conceptually uncertain as well as institutionally and politically challenging to adopt in practice,[83]

[81] Ori Sharon, 'To Be or not to Be: State Extinction through Climate Change' (2021) 51 Environmental Law 1041, 1044–1045.

[82] Mitra and Sanghi (n 45) 447.

[83] See eg Benoît Mayer, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 Asian Journal of International Law 185, 187–188 and Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1, 20–22.

this section will seek to address these points in turn while showing that state responsibility can be used to make arguments in favour of continued recognition of submerging SIDS.

A. ESTABLISHING STATE RESPONSIBILITY

To argue in favour of the continued recognition of submerging SIDS through the framework of state responsibility, potential state responsibility for inadequate climate action that has contributed to ESLR must first be established, after which the various remedies in response to such liability—including continued recognition—can be evaluated. State liability can be established under ARSIWA through IEL and international human rights law (IHRL), with this liability arising from a breach of international obligations necessitating a duty to make reparations.[84] Under ARSIWA, it can be argued that because states have failed to exert sufficient regulatory control over carbon emission activities within their jurisdiction that have contributed to ESLR,[85] they have therefore failed to meet their international obligations.

ARSIWA Article 2 holds that to establish an internationally wrongful act of a state, the act must: (a) be attributable to the state; and (b) constitute a breach of an international obligation owed by that state. Under (a), scientific developments facilitate the establishment of causal links between state emissions and environmental outcomes,[86] thereby enabling attribution; this is notwithstanding arguments positing that establishing causation is complex given the temporally and spatially extensive nature of climate change.[87] Furthermore, although international courts and tribunals have been critiqued for taking inconsistent approaches to causation,[88] this does not necessarily preclude findings of causation.

However, establishing a breach of international obligations under (b) is more complex. At this juncture, it is useful to outline some potential arguments countering the proposition that states are bound by (or have breached) interna-

[84] Articles on Responsibility of States for Internationally Wrongful Acts (2001) Un Doc A/RES/56/83 ('ARSIWA') art 1.

[85] The link between emissions and ESLR is scientifically established: see Jennifer Chu, 'Short-Lived Greenhouse Gases Cause Centuries of Sea-Level Rise' (*NASA: Global Climate Change, Vital Signs of the Planet*, 12 January 2017) <https://climate.nasa.gov/news/2533/short-lived-greenhouse-gases-cause-centuries-of-sea-level-rise/> accessed 5 August 2023.

[86] *Sacchi v Argentina* Communication No 104/2019, UN Doc CRC/C/88/D/104/2019 (CRC, Decision of 22 September 2021) [10.11]; Zia Akhtar, 'Greenhouse Gas Emissions, "Event Attribution" and *Locus Standi* in Foreign Courts' (2021) 50 Environmental Policy and Law 309, 317–320.

[87] Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Alexander Zahar and Benoît Mayer (eds), *Debating Climate Law* (Cambridge University Press 2021) 185–186.

[88] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 European Journal of International Law 471, 479–492; Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' (2022) 90 British Yearbook of International Law 1, 44–78.

tional obligations relating to their emissions activities. Firstly, notwithstanding extensive state participation in the Paris Agreement, the presence of capacious and undefined concepts such as 'highest possible ambition' and 'common but differentiated responsibility' in the Paris Agreement means that states have some—albeit not unlimited—potential argumentative room to evade responsibility for their actions,[89] with there being significant confusion as to what these concepts entail.[90] Furthermore, the potential for inadequate state accountability is exacerbated by the lack of direct enforcement under the Paris Agreement's mitigation mechanism.[91] Lastly, not all provisions in the Paris Agreement are legally binding; at any rate, their status is unclear. It is true that the Agreement contains some legally binding provisions.[92] However, Article 4(3) holds that State Parties' subsequent Nationally Determined Contributions (NDC) (that is, national climate pledges) 'will'—rather than 'shall'—represent a 'progression beyond the Party's then current [NDC] and reflect its highest possible ambition'.[93] It does not create legally binding obligations as to a particular result. Given that there has also been some uncertainty as to the legal bindingness—and thus obligatory nature—of NDCs,[94] particularly because numerous states have refrained from establishing judiciable targets in their NDCs,[95] a state's failure to meet the substantive content of its NDC does not mean that a legal obligation has been breached. These counterarguments, taken together, therefore suggest that states can potentially evade legal liability under ARSIWA Article 2.

While these arguments are theoretically viable within the context of the Paris Agreement, they fail to note that states have broader and more specific duties within IEL. These duties suggest that states are internationally obliged to reduce emissions to prevent harming SIDS through ESLR and can be held liable for their breach. Indeed, the ICJ has repeatedly held that states have substantive obligations

[89] Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 237, 239–243; Sanita van Wyk, 'Climate Change Law and Policy in South Africa and Mauritius: Adaptation and Mitigation Strategies in Terms of the Paris Agreement' (2022) 30 African Journal of International and Comparative Law 1; Benoît Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13 Chinese Journal of International Law 539, 545–547, 571–574.

[90] Andreas Buser, 'National Climate Litigation and the International Rule of Law' (2023) 36 Leiden Journal of International Law 593, 602.

[91] Vegard H Tørstad, 'Participation, Ambition and Compliance: Can the Paris Agreement Solve the Effectiveness Trilemma?' (2020) 29 Environmental Politics 761.

[92] See eg Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 ('Paris Agreement') arts 4(2), 4(8), and 6(2).

[93] Paris Agreement art 4(3).

[94] Some characterise NDCs as being legally binding and/or obligatory (eg Mayer (n 83) 251, Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33 Journal of Environmental Law 1, 5), while others deem it as merely an 'expectation' (eg Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 Transnational Environmental Law 17).

[95] Buser (n 90) 603.

not to utilise their territory to cause transboundary harm under customary international law.[96] This obligation involves a due diligence standard that is assessed against the standard of reasonableness,[97] which is a variable concept involving the interplay of multiple context-dependent considerations.[98] International courts and tribunals can therefore find state liability notwithstanding that the standard of reasonableness allows for a broad scope of state discretion. Moreover, because norms of international climate law increasingly encompass precise obligations,[99] states' argumentative room to evade responsibility for their emissions is gradually reducing. States that fail to reduce emissions that pose a significant risk to the climate system could thus be found to have committed a breach of an international obligation.

Furthermore, notwithstanding the unclear legal nature of the Paris Agreement and its lack of enforcement, there are still ways in which states can be held to account under the Agreement within the domestic, regional, and international legal spheres. Firstly, the surge of climate litigation actions taken worldwide with long-term strategic ambitions,[100] where claimants sometimes make arguments based on their nation's obligations under the Paris Agreement,[101] suggests that there are domestic judicial avenues through which states can be held accountable for their international legal obligations in substance. At the very least, such domestic enforcement mechanisms may nudge states into thinking again about (more closely) adhering to their international legal obligations. Although the Agreement has not yet been used by regional and international courts,[102] these judicial bodies nonetheless provide a potential alternative avenue for litigants to file claims after having exhausted domestic-level remedies, especially as domestic judiciaries may opt to defer to domestic governments for relatively more 'political' questions.[103] These legal institutions could function as a check on states' discretion to self-define the capacious and undefined concepts in the Paris Agreement, thereby filling in

[96] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)* (Merits) 1 December 2022 <www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf> accessed 25 July 2023 [99].

[97] Voigt (n 89) 246.

[98] *Responsibilities and Obligations of States with respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Reports 10 [117]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [223].

[99] Maciej Nyka, 'State Responsibility for Climate Change Damages' (2021) 45 Review of European and Comparative Law 131, 141.

[100] Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Litigation' in César Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilisation Can Bolster Climate Action* (Cambridge University Press 2023) 97.

[101] See eg *Tristan Runge v State of Saxony* [2022] ECLI:DE:BVerfG:2022:rk20220118.1bvr156521 and *Future Generations v Ministry of the Environment* ('*Demanda Generaciones Futuras v Minambiente*') [2018] STC4360-2018, nº 11001-22-03-000-2018-00319-01.

[102] Voigt (n 89) 244.

[103] Benoît Mayer and Harro van Asselt, 'The Rise of International Climate Litigation' (2023) 32 Review of European, Comparative & International Environmental Law 175, 176, 180–183.

the gap left by the Agreement's lack of direct enforcement. Additionally, even if the obligatory nature of NDCs in international law is disputed, many NDCs may still be binding under national legislation.[104] Therefore, states can potentially be held liable under ARSIWA Article 2 for breaches of IEL through domestic, regional, and international courts as well as domestic legislation.

Additional international obligations have also been explicitly imposed on states in the realm of IHRL by international legal mechanisms. In *Sacchi v Argentina*, the United Nations Committee on the Rights of the Child held that countries had extraterritorial responsibilities related to carbon pollution in view of the urgency of the climate crisis and their human rights obligations, and established a test for causation that required the harm resulting from carbon pollution to be 'reasonably foreseeable' and 'significant'.[105] Thus, a breach may be found under ARSIWA Article 2 so long as emissions are attributable to a particular state and that state has failed to fulfil its extraterritorial responsibilities related to carbon pollution. Likewise, in *Torres Strait Islanders*, the United Nations Human Rights Committee held that the Australian Government had violated its human rights obligations to the Torres Strait Islanders—such as its obligations to ensure the right to life and culture—because of its greenhouse gas emissions and climate change inaction.[106] Accordingly, even though the Paris Agreement has not been directly used by regional and international courts, state responsibility for emissions can be established through states' international human rights obligations.

Admittedly, this area is marked by some uncertainty as state responsibility has not been widely litigated in the context of environmental responsibility.[107] It is not a foregone conclusion that states will be found to be in breach of their international obligations and, by extension, be found to have committed an internationally wrongful act under ARSIWA Article 2. In view of the foregoing, however, it is at least arguable that state responsibility can be established for breaches of treaty obligations undertaken under IEL or international legal obligations under IHRL.

B. Reparations

If state responsibility can be established, it can additionally be used to argue that quasi-submerged and submerged SIDS can have their statehood continually recognised under international law as such continued recognition constitutes a viable reparatory option under ARSIWA. It is also a desirable reparatory option that can be used to mitigate the practical problems associated with loss and damage.

[104] David Hunter, Wenhui Ji, and Jenna Ruddock, 'The Paris Agreement and Global Climate Litigation after the Trump Withdrawal' (2019) 34 Maryland Journal of International Law 224, 248; Preston (n 94) 6–14.

[105] *Sacchi* (n 86) [10.7], [10.12].

[106] *Daniel Billy v Australia (Torres Strait Islanders Petition)* Communication No 3624/2019, UN Doc CCPR/C/135/D/3624/2019 (HRC, Decision of 22 September 2022).

[107] Voigt (n 83) 21.

ARSIWA establishes three potential forms of reparation—restitution, compensation, and satisfaction—that flow in a hierarchy.[108] Firstly, restitution is unavailable. ARSIWA Article 35 provides that states are only obliged to make restitution insofar as it is not materially impossible; however, reversing ESLR caused by global warming has been scientifically proven to be materially impossible.[109] Secondly, compensation is practically challenging given the limited guidance on compensation of purely ecological harm, the numerous state contributors to such harm,[110] and the potential inadequacy of reparations.[111] These challenges are likely exacerbated by historical practical problems associated with loss and damage, including the potential unwillingness of states to come to a compromise on the actual implementation of a redistributive mechanism.

The only possible and desirable remedy, then, is satisfaction under ARSIWA Article 37, with recognition of submerging SIDS serving as an 'appropriate modality'[112] that can fall under the Article's remit. This remedy is not disproportionate to the injury suffered by these SIDS.[113] The requirement of proportionality is based on the dual rationales of the equality of states and the avoidance of punitive measures; an act of recognition fulfils both, and indeed facilitates the former.[114] Continued recognition also remedies the shortcomings associated with other potential solutions in this sphere.

One such solution is the concept of 'deterritorialised' island states, where citizens of quasi-submerged and submerged SIDS can continue to exercise sovereign control over their uninhabitable territory.[115] This status is justified on the basis that the 'deterritorialised' state is not a new concept in international law, with its most famous example being the Sovereign Order of Malta.[116] However, to draw an analogy with the Sovereign Order of Malta would be to gloss over the fundamental problems arising in relation to the demarcation of territory, for the Sovereign Order of Malta is not a submerging state. More crucially, this solution may inadvertently undermine the equality of states in the international legal order. It is uncertain if this 'deterritorialised' statehood would be equivalent to the statehood these SIDS currently possess. If not, a hierarchy of states might potentially be created, with submerging SIDS positioned on a lower echelon. This runs coun-

[108] ARSIWA arts 35–37.

[109] Louise Boyle, 'Continued Sea Level Rise "Irreversible" For Centuries, Says Landmark UN Climate Report' *The Independent* (New York, 9 August 2021) <www.independent.co.uk/climate-change/news/sea-level-rise-ipcc-report-2021-b1899177.html> accessed 7 December 2022.

[110] Voigt (n 83) 20.

[111] Mayer (n 83) 216.

[112] ARSIWA art 37(2).

[113] ARSIWA art 37(3).

[114] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 107.

[115] Lapaš (n 6) 1–2; Ödalen (n 57) 225; Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41 Environmental Policy and Law 281.

[116] Ödalen (n 57) 227.

ter to the presumption of continuity, which is rooted in a nation-state-centred conception of international law,[117] for these SIDS will no longer see the continuation of their existing statehood, but will rather have a new, subordinate status imposed on them.

Another solution proffered in this sphere is the concept of the nation *ex situ*, which refers to a status that allows for the continued, perpetual existence of a submerged SIDS, thereby protecting citizens of SIDS through providing them with a link to their state by way of citizenship.[118] The necessity of this solution nevertheless appears unclear, given that continued recognition of submerging SIDS—and, by extension, the maintenance of the status quo—can achieve the same outcome in practice. It is also unclear how this concept can be operationalised in the international arena.

Ultimately, because present legal solutions overcomplicate the matter, the solution lies in convincing other states to continue recognising quasi-submerged and submerged SIDS as states, such that they can maintain their present statehood status. This may either be implicitly through legal avenues like court proceedings or explicitly through political avenues. Such avenues are already present within the international legal sphere: the former can be achieved through ICJ and ITLOS advisory proceedings, while the latter can be achieved through submerging SIDS continuously leveraging their existing diplomatic influence (as highlighted in Section III.B). Therefore, contrary to what some argue, the 'justice paradox' in the current international legal regime does not arise out of the lack of viable legal theories to provide viable remedies for submerging SIDS,[119] for the creation of additional legal theories is unnecessary.

Furthermore, addressing the issue of continued recognition through advisory proceedings is desirable. The injured SIDS need not overcome a heavy burden of proof to establish a breach of international due diligence obligations (as explored in Section IV.A). Further, as advisory proceedings are not fundamentally adversarial,[120] the ICJ and ITLOS can make arguments for recognition that are strongly persuasive on all states without generating inequity between the legally responsible states and the injured states. Lastly, even as some believe that compliance with advisory opinions may be non-existent absent diplomatic power and an ability to impose countermeasures on recalcitrant states,[121] the expanding international influence of SIDS (as expanded on in Section III.B) and ever-increasing international mobilisation to combat the ramifications of the climate crisis suggest

[117] Rouleau-Dick (n 44) 365.

[118] Maxine Burkett, 'The Nation Ex-Situ' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press 2013).

[119] Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 University of Hawai'i Law Review 633, 634–635.

[120] Mason-Case and Dehm (n 87) 183–184; Voigt (n 83) 20–21; Medes Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law' (2021) 68 Netherlands International Law Review 121, 129–130, 142–143.

[121] Mayer (n 83) 188.

that compliance may occur. Therefore, under ARSIWA's reparatory framework, quasi-submerged and submerged SIDS can and should be continually recognised under international law.

Continuous recognition of quasi-submerged and submerged SIDS could additionally help mitigate an issue international law currently faces within the climate change sphere: the practical problems associated with loss and damage. Conceptually, loss and damage involve (among other things) permanent harm or irrecoverable loss, such as ESLR-induced loss of landmass.[122] Although COP27 has been touted as a breakthrough for loss and damage insofar as states have formally agreed to establish a loss and damage fund after decades of negotiations, the decision text does not indicate which states are to contribute to this fund.[123] This uncertainty is exacerbated by the Warsaw International Mechanism for Loss and Damage, which lacks mechanisms regarding compensation liability.[124] Furthermore, although states have agreed to operationalise the COP27 agreement text in COP28,[125] the slow pace at which loss and damage discussions have historically taken place, as well as the historically underdeveloped and unspecific nature of loss and damage policy innovations that impede implementation in submerging SIDS,[126] together suggest that COP28 is unlikely to generate an outcome that clearly indicates (among other things) which states should contribute to this fund, the amount of funding they should contribute, and how this funding is to be distributed to submerging SIDS. Lastly, even if COP28 can create such an outcome, these state contributors may either not actually contribute to this fund, given the inability of international institutions to enforce compliance,[127] or take decades to pay out these funds.[128] If there has been such marked hesitance in the political sphere to reach and implement desirable outcomes pertaining to questions with

[122] Meinhard Doelle and Sara Seck, 'Loss and Damage from Climate Change: From Concept to Remedy?' (2020) 20 Climate Policy 669.

[123] UNFCCC, 'Sharm el Sheikh Implementation Plan' (*United Nations Climate Change*, 20 November 2022) <https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf> accessed 11 September 2023.

[124] Nyka (n 99) 150.

[125] Adeline Stuart-Watt, 'What Will It Take to Deliver Substantive Progress on Loss and Damage at COP27?' (*LSE Grantham Research Institute on Climate Change and the Environment*, 31 October 2022) <www.lse.ac.uk/granthaminstitute/news/what-will-it-take-to-deliver-substantive-progress-on-loss-and-damage-at-cop27/> accessed 13 August 2023.

[126] Elisa Calliari and Lisa Vanhala, 'The 'National Turn' in Climate Change Loss and Damage Governance Research: Constructing the L&D Policy Landscape in Tuvalu' (2022) 22 Climate Policy 184; Reinhard Mechler and others, 'Loss and Damage and Limits to Adaptation: Recent IPCC Insights and Implications for Climate Science and Policy' (2020) 15 Sustainability Science 1245, 1249.

[127] Craig A Johnson, 'Holding Polluting Countries to Account for Climate Change: Is "Loss and Damage" Up to the Task?' (2017) 34(1) Review of Policy Research 50, 63.

[128] Elisabeth Mahase, 'Climate Change: "Loss and Damage" Fund Payouts Could Take Decades, Scientists Warn' (2022) 379 British Medical Journal 3050.

allocative and distributive consequences, then recognition—which does not require any redistribution of finances—is an alternative avenue for states to pursue in resolving this intractable issue of providing reparations for submerging SIDS.

Overall, state liability for ESLR is capable of being established under ARSIWA through the domestic implementation and enforcement of IEL and the additional obligations imposed on states under IHRL. Satisfaction in the form of continued recognition is not only a possible remedy under ARSIWA's reparatory framework, but also the most theoretically desirable and practically feasible form of reparation in comparison to present solutions. Quasi-submerged and submerged SIDS therefore can and should be continually recognised under international law. Furthermore, recognition serves as a (partial) solution to issues faced by international law today; in particular, it can ameliorate loss and damage-related problems as it does not involve any redistribution of finances (and, by extension, accompanying implementation issues).

V. Conclusion

In sum, climate change-induced ESLR will cause submerging SIDS to move along a spectrum of territorial submergence, with these states first finding themselves quasi-submerged before becoming submerged. The restrictive, reflective, representative, and responsive functions of the Montevideo criteria collectively ensure Montevideo's relevance for both the creation and extinction of states. Although quasi-submerged and submerged SIDS cannot be continually recognised under Montevideo given their inevitable non-fulfilment of the permanent population criterion, the analysis nevertheless suggests that these SIDS should be continually recognised as recognition will prevent statelessness from occurring. Yet, the principles of state responsibility can potentially justify the continued recognition of submerging SIDS. State liability under ARSIWA can arguably be established, with recognition constituting a possible remedy under ARSIWA's reparatory framework. The desirability of continued recognition as a remedy is further underscored through comparison with other proposed solutions and its ability to mitigate problems relating to loss and damage.

This analysis also highlights the shortcomings of existing solutions in the literature pertaining to the continuous recognition of submerging SIDS. Further research will be required to refine existing solutions and create additional ones so as to ensure state equality—and therefore centrality—in the international legal order. More broadly, this analysis calls into question the desirability of the continued application of existing international law frameworks in the light of the exigencies and implications of the climate crisis.

So, what is to happen to submerged states? The answer fundamentally lies in the hands of the international community, who possesses the power to ensure that sinking states do not see their statehood—and its concomitant issues—become sunken.