

# A Threat of State Extinction: The Plight of Small Island Developing States Amid a Changing Climate and Sea-level Rise

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## Abstract

Climate change and rising sea levels are triggering a quest for survival for Small Island Developing States (SIDS) worldwide. SIDS, such as the Republic of Kiribati and the Marshall Islands, are experiencing the threat of rising sea levels coupled with the other side effects of this phenomenon, including food insecurity due to groundwater salinification, and scarce access to freshwater sources. If SIDS become uninhabitable or submerged as a result of rising sea levels, it may affect the legal basis of these states to maintain statehood. State extinction due to climate change may be an eventuality we could see within this century as SIDS become uninhabitable or submerged. This article considers the criteria for statehood and examines the question as to whether a SIDS may become extinct under international law because of climate change. It is argued that under current international law, statehood cannot continue without a population or natural territory. Although there is a presumption of state continuity under international law, this only remedies the temporary absence of an essential criterion of statehood. With the effects of climate change being experienced by SIDS, the absence of one or more of the criteria of statehood would be permanent. This article considers how international law could be developed to enable SIDS to retain their statehood notwithstanding the consequences of climate change and sea-level rise.

**Keywords:** statehood; state extinction; climate change; sea-level rise; small island developing states; island submergence; state survival



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## Introduction and Background

The effects of climate change, particularly global warming, are widely observed to be intensifying, and the Intergovernmental Panel on Climate Change (IPCC) has highlighted that without immediate action to limit global emissions, it will not be possible to prevent global warming above one and a half degrees Celsius.<sup>1</sup> The IPCC has noted that ‘there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all.’<sup>2</sup> The IPCC has found that accelerating sea-level rise as a consequence of deep ocean warming and melting ice sheets, severe heat waves, droughts, and extreme rainfall are just some of the effects of climate change that are being observed across the globe, and the consequences are only set to increase with time.<sup>3</sup> Some states, however, are experiencing the adverse effects of the changing climate in a disproportionately harsh manner.

For SIDS,<sup>4</sup> the issue of climate change is one of survival, as increased temperatures and rising sea levels may result in these low-lying island states becoming uninhabitable or wholly submerged. SIDS have warned the global community about sea-level rise and the effects of climate change since 1989. This is evidenced by the signing of the Male Declaration on Global Warming and Sea Level Rise,<sup>5</sup> which was the first intergovernmental statement that recognised that climate change affected people’s human rights.<sup>6</sup> Despite the early warning signs, human-induced climate change is causing damage to nature and human systems, some of which are irreversible.<sup>7</sup> The IPCC estimates that sea levels may rise to just less than one metre above sea level by 2100.<sup>8</sup> The sea is rising twice as fast in the twenty-first century than it was during the

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1 IPCC, ‘Sections’ in Lee and Jose Romero (eds), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC 2022) <doi: 10.59327/IPCC/AR6-9789291691647 57>.

2 ibid 88.

3 ibid 18; ‘The Effect of Climate Change’ *NASA Global Climate Change Vital Signs of the Planet* <<https://climate.nasa.gov/effects/>> accessed 30 January 2023.

4 Antigua and Barbuda, Bahamas, Barbados, Belize, Cabo Verde, Comoros, Cook Islands, Cuba, Dominica, Dominican Republic, Republic of Fiji, Grenada, Guinea-Bissau, Guyana, Haiti,\* Jamaica, Republic of Kiribati, Republic of the Maldives, Marshall Islands, Federated States of Micronesia, Mauritius, Nauru, Niue, Palau, Papua New Guinea, Samoa, São Tomé and Príncipe, Singapore, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Seychelles, Solomon Islands, Suriname, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu and Vanuatu.

5 Male Declaration on Global Warming and Sea Level Rise. Adopted on 18 November 1989, UN Doc A/C.2/44/7.

6 United Nations Human Rights Council ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (A/HRC/31/52 1 February 2016) para 7 and 8.

7 IPCC, ‘Summary for Policymakers’ in Han-Otto Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022).

8 ibid 342.

twentieth century.<sup>9</sup> The detrimental effect that a rise of just less than one metre will have on many SIDS is profound, and these effects are not just physical; they span legal aspects, including the international law on statehood.

The criterion of statehood is widely believed to be outlined in the Convention on the Rights and Duties of States, 1933 (the Montevideo Convention).<sup>10</sup> Article 1 of the Montevideo Convention provides that a state requires a permanent population, a defined territory, a government, and a capacity to enter into relations with other states in order to be a state under international law. These requirements of statehood become essential in an enquiry regarding sea-level rise and its effect on statehood for SIDS. Climate change and sea-level rise threaten the essence of statehood for SIDS in that they may result in the loss of territory and forced migration of a state's population due to the territory becoming uninhabitable. This reality for SIDS is accurately summarised by Former President Tong of the Republic of Kiribati:

For low-lying atoll nations like my country, climate change is an issue of survival with the very real possibility of our nation disappearing under the ocean within the century. What I want to share with you is that even before that happens, we are already experiencing extremely high tides, and even more severe storms on an unprecedented magnitude. Damage to homes, severe inundation of the coastline, and consequent damage to food crops and portable water are now becoming even more frequent events. Relocation must therefore become part of our strategy for adaptation.<sup>11</sup>

The challenges faced by SIDS have drawn increased attention. The International Law Commission (ILC), created by the United Nations General Assembly (UNGA), established a study group to analyse sea-level rise concerning international law and the legal effects.<sup>12</sup> The mandate of the sea-level rise study group includes statehood issues in relation to sea-level rise. The sea-level rise study group has provided that the Montevideo Convention is the benchmark for the creation of states and also for determining the status of a state thereafter.<sup>13</sup> In the First Issues Paper produced by the

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9 'Choices Made Now Are Critical for the Future of Our Ocean and Cryosphere' (IPCC Press Release, 29 September 2019) <<https://www.ipcc.ch/2019/09/25/srocc-press-release/>> accessed 17 January 2023.

10 Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States, Date of Adoption 26 December 1933, LNTS 165 (entered into force 26 December 1934).

11 'Keynote Address on the Second Day of the 106th Session of the IOM's Council' (*IOM – UN Migration*) 26 November 2015 <<https://www.youtube.com/watch?v=rqrTOui2Bk0>> accessed 28 December 2019.

12 ILC, 'Sea-Level Rise in Relation to International Law,' *Annex II Yearbook of the International Law Commission Volume II* (2018).

13 United Nations, International Law Commission, Seventy-third Session, 'Second Issues Paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group On Sea-level Rise in Relation to International Law' Geneva, 18 April to 3 June and 4 July to 5 August 2022 <<https://documents-dds.ny.un.org/doc/UNDOC/GEN/N22/276/29/PDF/N2227629.pdf?OpenElement>> para 192.

co-chairs of the study group on sea-level rise in 2020, the complexities of climate change for SIDS were highlighted, with one of the considerations being the maintenance of statehood.<sup>14</sup> It was outlined that it is important to consider the possibility of maintaining statehood where states may encounter submergence of territory or the territory becomes uninhabitable, as well as considerations of possible forms of international legal personality that may persist in place of statehood if such statehood were to be lost.<sup>15</sup> The study group has further provided that within international law, there is a strong presumption of state continuity, meaning that a state should continue to exist in the absence of evidence to the contrary, but this does not mean that there are no difficulties within the context of sea-level rise on the issue of statehood.<sup>16</sup> The sea-level study group recognises that there may be instances where governments find it challenging to provide diplomatic protection to populations and may struggle to assert protection over living and non-living resources in the event of submerging territory, which may affect statehood.<sup>17</sup> The sea-level rise study group has not completed its final report, and as such, the deliberations are ongoing, with the final report consolidating the group's findings expected in 2025.<sup>18</sup>

Due to the seriousness of these issues for SIDS, some states are considering alternative ways to survive. For example, the Republic of Kiribati is taking steps to become the world's first 'digital nation' and is moving to recreate its natural islands in a virtual space.<sup>19</sup> As such, this area requires further research and deliberation by scholars and international lawmakers alike.

This article provides an overview of the legal consequences of sea level rise and the changing climate for SIDS in the field of statehood in terms of international law. To provide an accurate analysis of the issue, the legal consequences of sea level rise for SIDS will be outlined, and an overview of the impact of sea level rise on various SIDS will be provided. We will consider the plight of SIDS located in the Indo-Pacific region to set the context with specific reference to the states of Tuvalu, Kiribati, the Maldives, Seychelles, and the Marshall Islands to highlight the global problems that SIDS are facing. Thereafter, the current international law of statehood will be considered, and the origins of statehood will be outlined, including a discussion on the declaratory and constitutive theories of statehood. It will be argued that, practically within international law, there is a middle ground between these theories of statehood. The Montevideo

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14 United Nations General Assembly International Law Commission, 'Sea Level Rise in Relation to International Law, First Issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on Sea Level Rise in Relation to International Law,' Geneva, 27 April to 5 June and 6 to 7 August 2020.

15 *ibid* 20.

16 *ibid* 48.

17 *ibid* 48.

18 *ibid* 18.

19 'Hon. Minister Simon Kofe Speaks at COP27' (*Department of Foreign Affairs Government of Tuvalu*, 21 November 2022) <<https://dfa.gov.tv/index.php/2022/11/21/hon-minister-simon-kofe-speaks-at-cop27/>> accessed 30 January 2023.

Convention will be discussed with an analysis provided for each of the four requirements, namely: (a) permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other states. The issue of state extinction will be considered to determine the thresholds of extinction, wherein it will be asserted that the issue of state extinction will hinge on the permanent population requirement before the defined territory requirement of statehood. Subsequently, we will consider mitigation measures and options for SIDS to maintain statehood amidst a changing climate. It will then be argued that creating a draft negotiating text is the most viable option to remedy the lacuna in the international law of statehood for SIDS. Lastly, a conclusion will be provided, and the way forward will be hypothesised to ensure the long-term survival of SIDS.

## Legal Consequences

Due to the requirements provided for statehood in the Montevideo Convention, discussed below, it has been asserted that SIDS may lose the ability to sustain statehood. The sea-level rise group has highlighted in the additional paper to the first issues paper that many scholars assert that a state cannot exist without a defined territory.<sup>20</sup> Furthermore, a state must be able to sustain a population, even if it is a tiny population, in order to maintain statehood.<sup>21</sup> Therefore, in the event of total island submergence or an island becoming incapable of sustaining a human population, a state would no longer satisfy the current customary international law criteria for statehood. SIDS and the inhabitants that reside within these areas may stand to lose their cultural heritage and the physical territory that they call their home. In addition, the consequences of this supersede the physical loss, as if statehood is lost, it would result in a lack of rights and responsibilities within the international community for these countries. These rights and responsibilities include, for example, debts and liabilities, legal obligations under international agreements, and the ability to engage within United Nations (UN) structures.

Despite these very real concerns for SIDS under international law, the international community and the structures therein have yet to produce any amendments that aim to bridge the gap in the law to account for the changes that have occurred to the climate and the legal consequences that may eventuate. The Montevideo Convention, outlining the criteria for the creation of statehood, was accepted into customary international law before the issue of human-induced climate change and rising sea levels came to the fore. Accordingly, there is a lacuna within customary international law concerning state

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20 United Nations, International Law Commission, Seventy-fourth Session ‘Sea-level Rise in Relation to International Law, Additional Paper to the First Issues Paper (2020), by Bogdan Aurescu and Nilüfer Oral,\* Co-Chairs of the Study Group On Sea-level Rise in Relation to International Law’ Geneva, 24 April to 2 June and 3 July to 4 August, <<https://digitallibrary.un.org/record/4009306?ln=en&v=pdf>> para 148; and *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, 38 para 80.

21 Jenny Stoutenburg, *Disappearing Island States* (1st edn, Brill Nijhoff 2015) 524.

extinction in the face of these climate change-induced consequences. Furthermore, there is a lack of urgency to provide any real, swift change in the current trajectory of the changing climate, such as slowing the rate of emissions globally.<sup>22</sup>

## Small Island Developing States and the Impact of Sea-Level Rise

Scientists have observed that the rise in sea level is not uniform globally. Sea-level rise tends to vary across regional areas, with differences in excess of thirty per cent across different regions, resulting from diverse variations in how ocean warming circulates.<sup>23</sup> For many reasons, SIDS are amongst the most affected by climate change globally. They are particularly vulnerable because of limited access to resources, economies that depend heavily upon the environment, remote locality, economies with limited capabilities and dependence on fossil fuel imports.<sup>24</sup> As such, these states have a reduced ability to adapt to the effects of climate change, including sea-level rise.<sup>25</sup> We will discuss five SIDS that are already experiencing the devastating effects of climate change and are considered to be some of the most affected territories in the world by the increase in global emissions. The reasons for vulnerability discussed below outline the unique circumstances of each state. We will also consider the measures that each state has taken to enhance the chances of long-term survival.

### Tuvalu (Pacific Ocean)

The Republic of Tuvalu is a low-lying SIDS within the South Pacific. As an archipelagic nation, it comprises nine coral islands.<sup>26</sup> Tuvalu is, on average, one metre above sea level, which makes it one of the most vulnerable states to rapidly rising sea levels.<sup>27</sup> Scientists have predicted the submergence of this SIDS within the next fifty to 100 years; however, according to journalistic investigations, the people of Tuvalu who inhabit this area believe that this will happen much sooner.<sup>28</sup> Tuvalu is projected to become uninhabitable with a sea-level rise in the ‘tens of centimetres’ region.<sup>29</sup> There are also other climate-related challenges faced by this state’s population daily. The

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22 ‘Climate Plans Remain Insufficient: More Ambitious Action Needed Now’ (UN Climate Press Release, 26 October 2022) <<https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now>> accessed 19 January 2023.

23 IPCC (n 7).

24 Kalyan Keo and Yoona Jo, ‘The State of Climate Ambition’ (UNDP, December 2022) 3 <<https://www.undp.org/publications/state-climate-ambition-snapshots-least-developed-countries-ldcs-and-small-island-developing-states-sids>> accessed 21 January 2023.

25 *ibid.*

26 Ann Powers, ‘Sea Level Rise and Its Impact on Vulnerable States: Four Examples’ (2012) 73 (1) *Louisiana LR* 155.

27 *ibid* 155.

28 Eleonar Ainge Roy, ‘One Day We’ll Disappear: Tuvalu’s Sinking Islands’ (*Mail & Guardian Online*, 16 May 2019) <<https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu-sinking-islands-rising-seas-climate-change>> accessed on 18 February 2021.

29 Chris Armstrong and Jack Corbette, ‘Climate Change, Sea-level Rise and Maritime Baselines: Responding to the Plight of Low-Lying Atoll States’ (2021) *Global Environmental Politics* 93.

people of Tuvalu are being exposed to storm surges, king tides, and floods, which are intensifying.<sup>30</sup> The ocean is rising significantly within this region, and it is likely to cause contamination of underground water supplies.<sup>31</sup> The people of Tuvalu assert that the State already relies on rainwater.<sup>32</sup> As a result, a lack of rainwater storage capacity and the risk of changing rainfall patterns cause vulnerabilities.<sup>33</sup> Scientists can predict this state's uninhabitability based on data, but the accounts of the people living within this territory provide a daunting picture.

In 2002, Tuvalu intended to lay claims against the United States of America and Australia over the emissions the countries have produced, which have inevitably contributed to climate change.<sup>34</sup> However, the claims were abandoned in 2006 as the State believed that they did not have a strong enough case, as a causal link must be shown between the emissions of the countries concerned and the effects of climate change being experienced in Tuvalu specifically.<sup>35</sup> It would not be enough to prove that climate change is caused by emissions, which various states have contributed to, and that the effects of climate change have caused damage to Tuvalu.

The government of Tuvalu has an official policy to remain on the island despite changes to the territory as a result of climate change.<sup>36</sup> The government is trying to ensure adaptation and survival with limited resources.<sup>37</sup> The government has established the Long Term Adaptation Plan (hereinafter L-TAP), which aims to ensure the long-term survival of the State by creating three point six kilometres of raised land to act as a Noah's Ark for the population, protecting the people and facilities within this territory.<sup>38</sup> The adaptation plans include a harbour, housing, hospitals, schools, and civic centres, amongst other essential services necessary for the long-term survival of a population.<sup>39</sup> The L-TAP plan aims to ensure safety for the State and its people beyond 2100.<sup>40</sup> The government of Tuvalu has also tried to cement their claims to statehood by amending its Constitution and changing the definition of statehood to a more progressive definition as follows:

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30 UNFCCC, 'Government of Tuvalu Updated Nationally Determined Contribution (NDC) November 2022' (*UNFCCC*, November 2022) <<https://gggi.org/wp-content/uploads/2023/02/Tuvalu-Updated-NDC-for-UNFCCC-Submission.pdf>> accessed 20 June 2023.

31 *ibid.*

32 Ainge Roy (n 28).

33 *ibid.*

34 Vincent Cogliati-Bantz, 'Sea Level Rise and Coastal States' Maritime Entitlements: A Cautious Approach' (2020) 7 (1) *Journal of Territorial and Maritime Studies* 89.

35 *ibid* 89.

36 Ainge Roy (n 28).

37 *ibid.*

38 '*Te Lafiga o Tuvalu – Tuvalu's Long Term Adaptation Plan (2022)*' (*UNDP Climate*, 4 November 2022) <<https://www.youtube.com/watch?v=Gp14MhdaSTs>> accessed 20 June 2023.

39 *ibid.*

40 *ibid.*

The State of Tuvalu within its historical, cultural and legal framework 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.<sup>41</sup>

Furthermore, it is ascribed within the Constitution that the lasting statehood of Tuvalu is within the will of the people.<sup>42</sup>

### **Kiribati (Pacific Ocean)**

Kiribati is another example of a vulnerable SIDS located in the Pacific Region.<sup>43</sup> It is isolated from the countries surrounding it (Australia, New Zealand, Fiji, and Japan) within the Pacific region.<sup>44</sup> Kiribati also struggles to develop agricultural enterprises due to the general lack of arable soil within the territory.<sup>45</sup> Additionally, many of the islands that constitute the State are uninhabitable in their current form<sup>46</sup> due to a lack of drinking water and essential resources.<sup>47</sup> Whilst submergence is an ever-present threat for the State of Kiribati, with estimates that fifty-five per cent of the country may be uninhabitable by 2050, more concerning is the lack of access to fresh water and food due to salt contamination of the groundwater as a result of rising sea levels.<sup>48</sup>

To mitigate the effects of climate change, the government is focusing on adaptation measures such as sea walls; however, the state does not have the resources to install breakwaters to slow down the rate of waves crashing upon the shore, resulting in less beach erosion than standard sea walls.<sup>49</sup>

The government of Kiribati has purchased freehold land in the state of Fiji, which is preliminarily being used to create food security for the nation. This land has not been ruled out as a possible location for the migration of their population on a small scale.<sup>50</sup>

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41 Section 2(1), The Constitution of Tuvalu Bill 2022 (Department of Foreign Affairs, 2022) <<https://dfa.gov.tv/wp-content/uploads/2022/12/Tuvalu-Constitutional-Bill-.pdf>> accessed 26 September 2023.

42 *ibid* s 2(7). The people of Tuvalu wish for the statehood of their country to remain in perpetuity despite any changes to its territory or the migration of its population. This is primarily because the continued existence of the state despite possible physical submergence is of utmost importance to the people of Tuvalu.

43 Lacey Allgood and Karen McNamara, 'Climate-induced Migration: Exploring Local Perspectives in Kiribati' (2017) 38(1) *Singapore Journal of Trop Geo* 371.

44 Donovan Storey and Shawn Hunter, 'Kiribati: An Environmental "Perfect Storm"' (2010) 41(2) *Australian Geographer* 168.

45 *ibid* 170.

46 *ibid* 168.

47 *ibid* 168.

48 *ibid* 170.

49 Simon Donner and Sophie Webber, 'Obstacles to Climate Change Adaptation Decisions: A Case Study of Sea Level Rise and Coastal Protection Measures in Kiribati' (2014) *Springer Japan* 337.

50 Elfriede Hermann and Wolfgang Kempf, 'Climate Change and the Imagining of Migration: Emerging Discourses on Kiribati's Land Purchase in Fiji' (2017) 29(2) *The Contemporary Pacific* 232.



The President of Kiribati in 2015 noted that they are preparing their people for relocation by ensuring that they are upskilled in order to provide skills to other countries where necessary.<sup>51</sup>

### The Marshall Islands (Pacific Ocean)

The Marshall Islands is a state comprising twenty-nine low-lying atolls.<sup>52</sup> Similar to the SIDS of Kiribati and Tuvalu, there is also a lack of fresh water on the islands, particularly in the northern parts of the country.<sup>53</sup> There is also food insecurity, which has been somewhat remedied by international aid; however, the provision of aid has other consequences, one of which is that the population does not grow climate-resistant food.<sup>54</sup>

The Marshall Islands has warned that the international community is not doing enough to mitigate climate change. In 2013, former President Chris Loeak declared that the international community is not listening to the pleas of smaller states such as the Marshall Islands, and the island states stand to lose everything as a result of global inaction on the issue of climate change.<sup>55</sup> The former President highlighted that the state and the 60,000 inhabitants may lose their homes, livelihoods, history, security and culture.<sup>56</sup> The government of the Marshall Islands has worked tirelessly to bring attention to climate change issues, hosting the forty-fourth Pacific Islands Forum Summit, where the Majuro Declaration was discussed.<sup>57</sup> The Majuro Declaration was a drive to ensure that the Pacific states use renewable energy and reduce carbon emissions to curb climate change.<sup>58</sup>

The Marshall Islands also has a policy, the *Tile Til Eo* 2050 Climate Strategy,<sup>59</sup> to achieve net zero emissions and complete renewable energy by 2050, and ensure climate

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51 'Keynote Address on the Second Day of the 106th Session of the IOM's Council' (*IOM – UN Migration*, 26 November 2015) <<https://www.youtube.com/watch?v=rqrTOui2Bk0>> accessed 28 December 2019.

52 Ingrid Ahlgren, Seidi Yamada and Allen Wong, 'Rising Oceans, Climate Change, Food Aid, and Human Rights in the Marshall Islands' (2014) 16 (1) *Health and Human Rights Journal* 70.

53 *ibid* 70.

54 Jo Leong and Others, 'Hawai'i and U.S. Affiliated Pacific Islands. Climate Change Impacts in the United States: The Third National Climate Assessment. In Jerry Melillo, Terese Richmond and Gary Yohe (eds), *US Global Change Research Program* (National Climate Assessment 2014). <doi:10.7930/J0W66HPM>

55 'World Leaders Forum: Christopher Jorebon Loeak, President of the Republic of the Marshall Islands' <[https://www.youtube.com/watch?v=dU\\_hVpduok4](https://www.youtube.com/watch?v=dU_hVpduok4)> accessed 28 January 2022.

56 *ibid*.

57 Ahlgren (n 52) 77.

58 *ibid*.

59 Republic of the Marshall Islands, 'Tile Til Eo 2050 Climate Strategy "Lighting the way" The Republic of the Marshall Islands' (September 2018) <[https://www.climate-laws.org/legislation\\_and\\_policies?from\\_geography\\_page=Marshall+Islands&geography%5B%5D=111&type%5B%5D=executive](https://www.climate-laws.org/legislation_and_policies?from_geography_page=Marshall+Islands&geography%5B%5D=111&type%5B%5D=executive)> accessed 8 February 2023.

adaptation.<sup>60</sup> Additionally, the Marshall Islands has implemented some physical adaptations, such as the building of seawalls. The government allocated USD 4,5 million to create seventy-eight seawalls along the Ebeye Atoll in 2020.<sup>61</sup> The Minister of Health and Welfare of the Marshall Islands has also stressed that global financing for states affected by climate change should be split between mitigation and adaptation in a fifty-fifty split.<sup>62</sup> The primary hurdle to adaptation for this island State is climate finance.<sup>63</sup> As such, the government asserts in the *Tile Til Eo 20250* Climate Strategy that it is essential to secure a long-term finance strategy for climate mechanisms to be put in place, including considerations regarding how funding can be targeted.<sup>64</sup> The strategy further emphasises that an improvement of the Overseas Development Assistance Coordination is required to ensure that the State attracts the funding required for climate priorities, as in the absence of these efforts, the aid and investment will be constrained.<sup>65</sup>

### The Seychelles (Indian Ocean)

The Seychelles is another SIDS that is vulnerable to the effects of climate change; a one-metre rise in sea levels would result in the submergence of seventy per cent of the total land mass of the State.<sup>66</sup> The biggest threats to the Seychelles include rising sea levels, changes in rainfall patterns, increased extreme weather events, and flooding.<sup>67</sup> In the Seychelles, dry seasons are getting drier, and the wet seasons are getting wetter.<sup>68</sup> There has also been a decline in the growth of coral reefs and an increase in coral bleaching incidents.<sup>69</sup> The coral bleaching also results in coastal erosion, combined with increased sea levels, which is problematic.<sup>70</sup> Additionally, coral bleaching and coastal erosion can affect tourism, a primary source of income for the Seychelles economy.<sup>71</sup>

There have also been notable natural disasters in Seychelles over the last few decades as the climate changes. For instance, in 1997, the Seychelles International Airport was flooded, damaging the surfaces across the airport and lifting the asphalt from the sub-

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60 *ibid* 4.

61 Mikiyasu Nakayama and others, 'Alternatives for the Marshall Islands to Cope with the Anticipated Sea Level Rise by Climate Change' (2022) 17(3) *Journal of Disaster Research* 316.

62 *ibid* 316.

63 Republic of the Marshall Islands (n 59) 15.

64 *ibid* 53.

65 *ibid* 53.

66 Rolph Payet and Wills Agricole, 'Climate Change in the Seychelles: Implications for Water and Coral Reefs' (2006) 35 (4) *The Royal Colloquium: Arctic under Stress: A Thawing Tundra* 182.

67 Daniel Etongo, 'Climate Change Adaption in Seychelles: Actors, Actions, Barriers and Strategies for Improvement' (2019) 1 (2) *Seychelles Res J* 46.

68 Daniel Etongo and others, 'Identifying and Overcoming Barriers to Climate Change Adaptation in the Seychelles' in Oguge D and others (eds), *African Handbook of Climate Change Adaptation 4* (Springer 2022).

69 *ibid*.

70 *ibid*.

71 Payet and Agricole (n 66) 182.

base.<sup>72</sup> In 2007, high tides caused widespread flooding of fifty metres inland, damaging roads and other necessary infrastructure.<sup>73</sup> Whilst these examples of natural disasters did not spell the end for Seychelles, they indicate that climate change can strain the infrastructure within this vulnerable state.<sup>74</sup>

The Seychelles has implemented mechanisms to ensure the country's adaptation, such as the Seychelles National Climate Change Committee.<sup>75</sup> The Committee aims to enforce collaboration across private, non-governmental organisations, and the public sector on the issue of climate change.<sup>76</sup> The government updated its Climate Change Policy in 2020 and submitted an updated nationally determined contribution for submission under the Paris Agreement.<sup>77</sup> The Climate Change Policy 2020 recognises the vulnerability of the Seychelles to natural disasters, noting that the SIDS is 'inherently vulnerable to impacts and risks associated with climate change' and as such must ensure the implementation of adaptation and mitigation strategies.<sup>78</sup>

Within this Climate Change Policy, multiple adaptation mechanisms are outlined, including the prioritisation of 'blue' Nature-based Solutions (NbS) to ensure resilience against changes to the climate and the protection of fifty per cent of its 'blue carbon ecosystems,' namely seagrass and mangroves, by 2025, and protection of 100 per cent of these systems by 2030.<sup>79</sup> The Seychelles aims to ensure sustainable resource management and investment in sustainable development to ensure its continued existence.<sup>80</sup>

### **The Maldives (Indian Ocean)**

The Maldives is a low-lying SIDS, and much of the land mass of the Maldives is less than one metre above sea level. Its highest point of elevation is three metres above sea level.<sup>81</sup> The government of the Maldives has also been vocal in the drive to reduce carbon emissions, with former President Nasheed and his cabinet holding a meeting

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72 Etongo (n 67) 46.

73 *ibid* 46.

74 *ibid* 46.

75 Etongo (n 67).

76 *ibid* 15.

77 Republic of Seychelles, Seychelles' Updated Nationally Determined Contribution' (Submission under the Paris Agreement, July 22021) <[https://unfccc.int/sites/default/files/NDC/2022-06/Seychelles%20-%20NDC\\_Jul30th%202021%20\\_Final.pdf](https://unfccc.int/sites/default/files/NDC/2022-06/Seychelles%20-%20NDC_Jul30th%202021%20_Final.pdf)> accessed 24 January 2023.

78 *ibid* 6.

79 *ibid*.

80 *ibid*.

81 Powers (n 26) 155.

underwater to draw attention to the concerns that the Maldives may become completely uninhabitable within the next century.<sup>82</sup>

However, the difference between the Maldives and other SIDS susceptible to climate change is that the Maldives government has taken drastic physical mitigation measures to ensure its survival. It has done this by conducting widespread land reclamation and constructing its own artificial island, Hulhumalé.<sup>83</sup> The island of Hulhumalé has been considered a beacon of hope for the island nation in the event of the submergence of their natural land territory.<sup>84</sup>

Therefore, all SIDS, regardless of how drastic they have been in conducting climate resilience, are still vulnerable to state extinction. The concept of statehood and how a state may become extinct will be considered below.

## The Origins of Statehood

Statehood as a concept is often considered to have its roots in the ‘Westphalian System,’ which may be summarised as the concept of territory-based states.<sup>85</sup> The Peace of Westphalia was a conference that aimed to end decades of war, and it resulted in the Treaties of Munster and Osnabrück.<sup>86</sup> Essentially, the Peace of Westphalia resulted in a shift in power and land ownership; however, the principles upon which the Peace of Westphalia was based still influence international law today.<sup>87</sup> The conference is considered to be monumental as it was based upon ‘self-determination in identity in government.’<sup>88</sup> The idea of recognising states as sovereigns is based upon the states coming together during the Peace of Westphalia.<sup>89</sup>

Along with the Peace of Westphalia, other significant developments took place. One of the most critical developments in the area of statehood in modern international law is the development of theories of statehood through state practice and scholarship. The

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82 Michael Gagain, ‘Climate Change, Sea level Rise, and Artificial Islands: Saving the Maldives’ Statehood and Maritime Claims Through the ‘Constitution of the Oceans’ (2012) 23 (1) *Colo J Int’l Eenvtl L and Pol’y* 79.

83 Robert Stobjanov and others, ‘Local Perceptions of Climate Change Impacts and Migration Patterns in Male Maldives’ (2017) *The Geo Journal* 370.

84 Gagain (n 82) 82.

85 Amos S Hershey, ‘History of International Law Since the Peace of Westphalia’ (1912) 6(1) *American Journal of Int’l Law* 30.

86 ‘Münster and Osnabrück – Sites of the Peace of Westphalia, Germany’ European Commission <<https://ec.europa.eu/culture/cultural-heritage/initiatives-and-success-stories/european-heritage-label/european-heritage-label-sites/munster-and-osnabruck-sites-of-the-peace-of-westphalia-germany>> accessed 12 January 2022.

87 Steven Patton, ‘The Peace of Westphalia and It Affects on International Relations, Diplomacy and Foreign Policy’ (2019) 10(1) *The Histories* 93.

88 *ibid* 93.

89 Leo Gross, ‘The Peace of Westphalia, 1648 – 1948’ (1948) 42(1) *American Journal of Int’l Law* 20.

two theories of statehood include the constitutive theory and the declaratory theory.<sup>90</sup> The constitutive theory of statehood is based on the idea that a state's existence depends not just on whether it may fulfil some of the criteria of statehood but rather on whether other states recognise it as a state, which is the ordinary understanding of statehood that emerged from the nineteenth century.<sup>91</sup> Therefore, if a state were to have all the requirements for statehood objectively, without recognition, it could never possess the status of a state.<sup>92</sup> Whereas the declaratory theory of statehood focuses on the ability of states to satisfy the objective criteria for statehood, should a state meet these standards, it does not require recognition to be considered a state.<sup>93</sup> In our context, these two theories merit further consideration.

### Constitutive Theory

The constitutive theory is often believed to have been based upon the increased interest in legal positivism during the nineteenth century.<sup>94</sup> Lauterpacht summarises the constitutive theory: First, before a nation is recognised, the community has no rights and obligations in terms of international law; second, the recognition of a state is based on political discretion.<sup>95</sup> In practice, within modern international law, widespread recognition often follows UN recognition. This is illustrated by the fact that many states that have not attained UN recognition have not become established states, as will be discussed below. Recognition in terms of the constitutive theory of statehood is entirely subjective rather than objective.<sup>96</sup> Due to the completely subjective nature of this theory, it has been the subject of criticism.<sup>97</sup> The theory also does not account for the situation wherein states have not attained legal recognition but are still held responsible for transgressions of international law.<sup>98</sup> Perhaps this is the element of the constitutive theory that is its downfall. Furthermore, there is a lack of obligation upon other states to recognise other nations as states.<sup>99</sup>

Despite the criticisms of the constitutive theory, there is some evidence of this theory in practice. Guinea-Bissau is an excellent example of the constitutive theory in action. The General Assembly of the UN accepted the independence of Guinea-Bissau, and the Security Council recommended that the nation become a member of the UN. Guinea-

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90 Johan van der Vyver, 'Statehood in International Law' (1991) 5 *Emory Int'L Rev* 12.

91 Stoutenburg (n 21) 240.

92 *ibid* 240.

93 Stephan Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium non datur*' (2005) 75(1) *The British Yearbook of Int'l Law* 106.

94 Stoutenburg (n 21) 240.

95 Hersch Lauterpacht, *Recognition in International Law* (Re-published 1 edn, Cambridge University Press 2013) 38.

96 Talmon (n 93) 102.

97 Eva Erman, 'The Recognitive Practices of Declaring and Constituting Statehood' (2013) 5(1) *International Theory* 133.

98 Talmon (n 93) 103.

99 *ibid* 103.

Bissau became a member of the UN on 17 September 1974.<sup>100</sup> As a result of this recommendation, the State of Guinea-Bissau was established and still exists today. Other nations at the time, such as Biafra, were not afforded the same recognition by the UN. Biafra was recognised as a State by other established countries such as Tanzania and Zambia but could not get the UN Security Council to recommend its admission to the UN, and as such, widespread recognition did not follow.<sup>101</sup> The nation of Biafra may have been considered a state according to the declaratory criteria of statehood, but regardless, it was insufficient for permanent statehood.<sup>102</sup> Recognition of a new State can be vital for its continued survival. As can be seen with Biafra, without widespread international recognition, it only existed for two and a half years from 1967 to 1970.<sup>103</sup>

Although the element of recognition plays a role in statehood, there is commentary pointing towards the declaratory theory of statehood as the leading theory of statehood.<sup>104</sup> We contend that statehood is a fact regardless of recognition, but in practice, recognition can cement claims to statehood and the continuation of statehood.

### Declaratory Theory

The declaratory theory of statehood requires that a state adheres to a set of objective criteria to be considered a state.<sup>105</sup> Upon adhering to the criteria for statehood, the state will automatically attain statehood regardless of any recognition it may receive from other states.<sup>106</sup> The declaratory theory of statehood has been supported by legal treaties, including the Montevideo Convention. Additionally, during the 1992 conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, it was highlighted that recognition of a state is not a condition of statehood and that statehood is purely declaratory, with recognition being a discretionary act that a state may decide to provide or not.<sup>107</sup> Therefore, statehood is a fact regardless of recognition.

### A Middle Ground

Shaw provides a well-reasoned argument that there is a middle ground between the two theories of statehood in terms of international law. This assertion is based on the fact

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100 Nii Lante Wallace-Bruce, 'Africa and International Law – the Emergence to Statehood' (1985) 23(4) *The Journal of Modern African Studies* 595; and United Nations General Assembly 'Admission of the Republic of Guinea-Bissau to membership of the United Nations' A/RES/ 3205(XXIX) <<https://digitallibrary.un.org/record/189827?ln=en&v=pdf>> accessed 15 February 2025.

101 *ibid* 595.

102 *ibid*.

103 *ibid* 59.

104 *ibid* 595.

105 Erman (n 97) 134.

106 *ibid* 134.

107 Maurizio Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31(6) *Int'l Legal Materials* 1526 para 4.

that there is precedent for a situation where a state is recognised by other states, which often illustrates that the state confirms the criteria for statehood have been met.<sup>108</sup> Shaw also notes that recognition is very often political; for example, the United States of America uses state recognition in a political manner.<sup>109</sup> The United Kingdom, on the other hand, will provide recognition when they have confirmed that a state meets the minimum requirements for statehood.<sup>110</sup>

Whilst recognition is constitutive, Shaw argues that recognition is not what makes a state.<sup>111</sup> A state may become a state regardless of recognition. Without recognition, there will still be rights and obligations for that state in terms of international law.<sup>112</sup> However, statehood is not purely declaratory in that a state is not an international legal person ‘because it satisfied the criteria for statehood’ but rather as a result of international law attributing international legal personality to the factual situation the entity found itself in.<sup>113</sup> Raic asserts that statehood is a matter of both law and fact.<sup>114</sup>

Next, we will consider the Montevideo Convention, which provides us with the objective criteria of statehood.

## The Montevideo Convention

The Montevideo Convention, in substance, codified the declaratory theory of statehood, which by then acquired the status of customary international law, as evidenced in the literature surrounding the issue of statehood when the Convention took effect. In the 1930s, Georg Jellinek proposed the ‘doctrine of three elements’ for a state: territory, population and government.<sup>115</sup> Hall also provided an accurate definition of a state, noting that a state must have exclusive control over all the people within the territory it occupies; the control it exercises must be independent, and the state must have a permanent presence.<sup>116</sup> The Montevideo Convention was adopted on 8 January 1936 and was originally a Pan-American Union Convention.<sup>117</sup> It was signed initially by Honduras, the USA, El Salvador, the Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Paraguay, Mexico, Panama, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru, Cuba and Guatemala.<sup>118</sup> Despite the Convention being regional, it was widely

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108 Malcom Shaw, *International Law* (9 edn, Cambridge University Press 2021) 329.

109 *ibid* 329.

110 *ibid*.

111 *ibid*.

112 *ibid*.

113 David Raic, *The State as an International Legal Person* in *David Raic Statehood and the Law of Self-Determination* (Martinus Nijhoff Publishers 2002) 38.

114 *ibid* 38.

115 Jost Delbrück, Thomas Giegerich and Andreas Zimmermann, *German Yearbook of International Law Jahrbuch Für Internationales Recht* (Duncker and Humnblot GmbH 2007) 252.

116 William Edward Hall, *A Treatise on International Law* (3rd edn, Oxford 1890) 21.

117 Shaw (n 108) 329.

118 Montevideo Convention on the Rights and Duties of States, 1933.

accepted internationally as the criterion for statehood<sup>119</sup> and the benchmark against which statehood should be measured, whether at the start of statehood or further on in the statehood journey.<sup>120</sup> Article 1 of the Montevideo Convention provides as follows:

The State as a person of international law should possess the following qualifications:

- a. Permanent population;
- b. A defined territory;
- c. Government; and
- d. The capacity to enter into relations with other states.<sup>121</sup>

Whilst the requirements for statehood listed in this Article above appear straightforward, the existential crisis faced by SIDS makes it apposite to consider each of the qualifications listed in this article in detail.

### **Permanent Population**

To satisfy the requirement of a permanent population, there is no minimum number of people that must live within a territory.<sup>122</sup> Stoutenburg asserts that the population may be diverse both culturally and ethnically.<sup>123</sup> The population must be stable, and the residents must permanently live within the area.<sup>124</sup> The permanency of the population can be observed by the state issuing its inhabitants with nationality; this essentially illustrates a permanent legal link between the state and its population.<sup>125</sup> It is essential to highlight, however, that a population may comprise both nationals and foreigners of a particular state, as Article 9 of the Montevideo Convention provides that:

... jurisdictions of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals.

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119 John Dugard, *Dugard's International Law: A South African Perspective* (5th edn, Juta 2018) 126.

120 Jane McAdam, "'Disappearing States', Statelessness and the Boundaries of International Law' (2010) University of New South Wales Law Research Paper No. 2 6; *Prosecutor v Slobodan Milosevic* Case No. IT-02-54-T, 16 June 2004 para 86; and Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Islands' (2021) 22(2) Melbourne Journal of Int'l Law 19.

121 Article 1, Montevideo Convention on the Rights and Duties of States 1933.

122 Ruth Lapidot, 'When is An Entity Entitled to Statehood?' (2012) VI (3) Israel Journal of Foreign Affairs 78.

123 Stoutenburg (n 21) 268.

124 Pablo Moscoso de la Cuba, 'The Statehood of 'Collapsed States in Public International Law' (2011) XVIII Agenda Internacional 137.

125 *ibid.*



As such, a foreigner may also be considered an inhabitant of a particular state and form part of the ‘population’ as required for statehood. Based on this contention, Stoutenburg observes that a population is territory-based, as when a population leaves a territory, it means it no longer forms part of the state’s population and would form part of the population of another state within the territory where they reside.<sup>126</sup>

Despite this, a population may substantially reduce but still be considered a population as it has been observed that even in times of war, many inhabitants have fled territories without statehood diminishing.<sup>127</sup> It stands to reason that there would be some point at which the remaining persons residing upon the territory of a state would be too few to be considered a population.<sup>128</sup> Despite its non-self-governing nature, the smallest population that has been offered independence is made up of fifty inhabitants on the Pacific island territory of Pitcairn.<sup>129</sup> It should be emphasised that fifty inhabitants as a minimum population is only a guideline, as in terms of island states, it may be that the inhabitants of a state are below fifty; however, the population forms a community with social and political ties.<sup>130</sup>

## Territory

Territory is considered to be the most fundamental element of statehood.<sup>131</sup> A defined territory requires that a population has a ‘defined area.’<sup>132</sup> Traditionally, territory comprises a ‘natural segment of the earth’s surface.’<sup>133</sup> Territory and territorial sovereignty have a close relationship in terms of understanding what the territory requirement demands under international law, the Montevideo Convention, and customary international law. Territorial sovereignty is the display of activities that are related to a state within a particular geographical area.<sup>134</sup> Therefore, a state must possess a territory wherein it exercises territorial sovereignty. In the *Island of Palmas case (Netherlands/USA)*, the arbitrator Max Huber commented that territorial sovereignty may never be reduced to ‘an abstract right without concrete manifestations.’<sup>135</sup> This sentiment is echoed by other prominent scholars such as Shaw and Oppenheim.<sup>136</sup>

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126 Stoutenburg (n 21) 269.

127 *ibid.*

128 *ibid.*

129 *ibid.*

130 *ibid.*

131 *ibid.* 251.

132 Derek Wong, ‘Sovereignty Sunk? The Position of ‘Sinking States’ at International Law’ (2013) 14 *Melbourne Journal of Int’l Law* 10.

133 *ibid.* 10.

134 *Island of Palmas case (Netherlands/USA)* 4 April 1928, Volume II 838.

135 *ibid.* 839.

136 Malcom Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford University Press 1986) 1; Lassa Francis Oppenheim, *International Law. A Treatise* (2 edn, Longman, Green and Co, 1912) para 168.

Whilst a territory is considered essential for statehood, it is important to note that a state's borders do not have to be completely defined.<sup>137</sup> Many states have established effective statehood in the absence of settled borders.<sup>138</sup> Instead, Shaw asserts that what is essential is that the state has a 'consistent band of territory.'<sup>139</sup> Therefore, it stands to reason that a state must have a territory, but it does not have to be in physical control of the entire territory to fulfil this requirement.<sup>140</sup> For island states, the territory requirement of statehood becomes a bit more of a complex issue; if an island becomes submerged in terms of international law, it would become a low-tide elevation (LTE).<sup>141</sup> An LTE is not considered territory in order to sustain statehood.<sup>142</sup>

## Government

On the other hand, the government requirement necessitates that the government control the population residing within the territory.<sup>143</sup> The critical element of this requirement is that the government is effective.<sup>144</sup> The effectiveness of the government is measured against its ability to hold its citizens accountable for transgressions, as well as the government being contactable.<sup>145</sup> A government may not be entirely self-sufficient; the government can receive financial aid from another state, and its claims to statehood would persist.<sup>146</sup> The government requirement has not been as strictly enforced as other elements of statehood. This was originally due to colonialism and the need for previously colonised states to gain independence, whilst also relying on colonial states for support within this transition.<sup>147</sup>

Additionally, many governments have changed through illegitimate means such as revolutions and *coups d'état*, and the states concerned have not had their statehood questioned.<sup>148</sup> Therefore, it stands to reason that statehood can exist for a period of time in the absence of an effective government. However, within the context of SIDS, the element of government may still be in place, *albeit* in exile.

There is an example of a government that functions in exile in the form of the government of Tibet, which was exiled to India, with the population of Tibet living in

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137 Jan Klabbers, *International Law* (3 edn, Cambridge University Press 2021) 77.

138 *ibid* 77.

139 Shaw (n 136) 183.

140 Chandran Kukathas, 'A Definition of the State' (2014) 33(2) *University of Queensland Law Journal* 361.

141 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.' See Article 13 (1) of the United Nations Convention on the Law of the Sea, Date of Adoption 10 December 1982, Entered into Force 16 November 1994.

142 Stoutenburg (n 21) 252.

143 Lapidoth (n 122) 78.

144 *ibid*.

145 Klabbers (n 137) 77.

146 Dugard (n 119) 130.

147 *ibid*.

148 De la Cuba (n 124) 132.

exile in India and Nepal.<sup>149</sup> The government of Tibet, operating in exile, has a voluntary taxation system; it issues passports, has quasi-embassies in multiple states, and has held elections.<sup>150</sup> It stands as a legal or *de jure* representation of the Tibetan people, but is not a traditional government performing all the functions conventionally performed by a government.<sup>151</sup> The Tibetan government is not internationally recognised; this may be because its territory has been under China's control since 1949, and the government does not have control over a police or military presence and cannot defend or punish its citizens.<sup>152</sup> However, it illustrates an example of a government that can function even in the absence of territory.

### Capacity to Enter into Relations

The last requirement of statehood, namely the capacity to enter into relations with other states, is often thought to be a consequence of statehood rather than a requirement.<sup>153</sup> While recognition is not a requirement for statehood, recognition by other states may illustrate that a state can enter into relations.<sup>154</sup> Entering into diplomatic relations with other states would indicate that the state meets this requirement. Stoutenburg notes that it is often asserted that independence must be both factual (*de facto*) and legal (*de jure*).<sup>155</sup> However, it is important to note that the exact point of dependence that would affect the ability of a nation to achieve or maintain statehood is not entirely settled.<sup>156</sup> Many states rely factually on other states, so it is often emphasised that legal or *de jure* independence is more important than *de facto* independence.<sup>157</sup> Eckert observes that a state may also cede its power to another state, which would not affect its ability to attract statehood.<sup>158</sup> However, the state needs to be able to control its relations by determining who may unilaterally exercise which functions of the state.<sup>159</sup>

## Other Aspects of Statehood

### Self-determination

It is essential to highlight that while there are requirements for statehood, there is also the right of self-determination, namely the ability of people to decide on their

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149 Fiona McConnell, 'Democracy-in-Exile: The 'Uniqueness' and Limitations of Exile Tibetan Democracy' (2009) 58(1) Sociological Bulletin 116.

150 *ibid.*

151 *ibid.*

152 *ibid.*

153 Stoutenburg (n 21) 291.

154 Lapidoth (n 122) 78.

155 Stoutenburg (n 21) 292–294.

156 *ibid.* 292–294.

157 *ibid.* 295.

158 Amy Eckert, 'Constructing States: The Role of the International Community in the Creation of New States' (2002) 13 Journal of Public and Int'l Affairs 23.

159 *ibid.* 23.

international status.<sup>160</sup> The right to self-determination has no exact definition, but it has been considered to encompass social, cultural, political and economic consequences.<sup>161</sup> Article 1 of the United Nations Charter<sup>162</sup> provides that the purpose of the UN is to ensure that friendly relations are developed amongst nations, ensuring equal rights and self-determination.<sup>163</sup>

Shaw asserts that the right to self-determination has affected the traditional criteria for statehood because, in certain instances, a nation's stability and the government's effectiveness do not always need to be satisfied for statehood.<sup>164</sup> Some states have exercised the right to self-determination without specific statehood requirements; one example is the Democratic Republic of Congo, which exercised this right to self-determination without an effective government and was thereafter admitted to the UN.<sup>165</sup> A nation may exercise the right to self-determination at any point where the state believes it should be considered independent.

### State Extinction

Considering some of the most important aspects of statehood, our enquiry turns to the concept of state extinction. It has been asserted that in order for statehood to persist, a state must fulfil the essential criteria of statehood, namely the presence of a population and control over territory.<sup>166</sup> Whilst the requirements of statehood provide a basis for determining whether statehood is present, they are not wholly determinative on their own; other factors, such as politics and recognition, may also play a part. Although recognition plays its part, it is argued that recognition can confirm statehood, but statehood or the lack thereof is a fact regardless of recognition.<sup>167</sup> Consequently, recognition is a political act independent of statehood; however, when states are satisfied that the criteria of statehood are met, it is best practice to recognise a nation as a newly formed state.<sup>168</sup>

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160 Aureliu Cristescu, 'The Right to Self-determination, Historical and Current Development on the Basis of United Nations Instruments' United Nations Submission on Prevention of Discrimination and Protection of Minorities Special Rapporteur on the Right to Self-Determination 8 <<https://digitallibrary.un.org/record/25252?ln=en#record-files-collapse-header>> accessed 22 January 2023.

161 *ibid* 8.

162 United Nations Charter, Date of Adoption 26 June 1945, Entered into force 24 October 1945.

163 Article 1(2) UNCLOS.

164 Shaw (n 112) 187.

165 *ibid* 187.

166 Stoutenburg (n 21) 250, 251. This view is also shared by other authors namely: MCR Craven 'The Problem of State Succession and the Identity of States under International Law' (1998) 9 *Euro Journal of Int'l Law* 159.

167 Erman (n 97) 129.

168 Mileno Sterio, 'Self-determination and Other Theories' in Mileno Sterio (ed), *The Right to Self-Determination under International Law: Selfistans, Secession, and the Rule of the Great Powers* (Routledge 2012) 49.

Stoutenberg asserts that there are three ways a state can lose its statehood: By individual states, by a community of states, or by the ‘organised international community’ such as the UN and loss of membership in the UN.<sup>169</sup> Below, we will consider the thresholds of state extinction according to the traditional requirements of statehood.

### **Thresholds of State Extinction: Analysing the Requirements of the Montevideo Convention**

Stoutenberg notes that the Montevideo Convention was primarily created to provide a set of criteria for statehood; however, it is often asserted that the continued maintenance of the criteria for statehood is essential for state continuity.<sup>170</sup> State continuity, or the presumption thereof, is a critical consequence of statehood, as states often continue despite changes in elements of statehood.<sup>171</sup> Wong notes that state continuity is vital to providing stability, notwithstanding specific changes to the state.<sup>172</sup> However, the presumption of state continuity does not mean that the state continues perpetually despite the absence of fundamental requirements of statehood, such as territory or a population.<sup>173</sup> For instance, if the territory of a state is lost due to sea-level rise or the submergence of the territory results in permanent migration of the population, this defect in statehood is not temporary; it is permanent, as a territory cannot ‘reappear,’ and state continuity cannot remedy this defect.<sup>174</sup> The territory and population requirements of statehood are considered so essential to statehood that a state may not exist in the absence thereof. As Wong asserts:

... territory will not “reappear.” Fundamentally, there must be limits to the presumption and a line between a mere defect and a matter which affects the continuity of a state. The concept of the State is premised on control over territory and the purpose of statehood is to ‘ensure that activities within its borders are not regulated by any other State’, hence, territorial control is said to be the ‘essence’ of a state. Just as territory is required for the creation of states, some territory must exist for its survival. Thus, in principle, a permanent loss of territory will fall outside of the scope of a mere ‘defect’ and result in the loss of statehood.<sup>175</sup>

Therefore, some requirements of statehood are considered more important than others. This will be shown to be closely linked to the difference between temporary defects and permanent defects of statehood. The government requirement has traditionally not been as essential to the statehood question as the requirements of population and territory. For example, in Somalia, when President Mohammed Siad Barre was overthrown in January 1991, a civil war broke out, and all structures of the State were disintegrated.<sup>176</sup>

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169 Stoutenburg (n 21) 298.

170 *ibid* 250–251.

171 De la Cuba (n 128) 132.

172 Wong (n 58) 17.

173 *ibid* 21.

174 *ibid* 21–22.

175 *ibid*.

176 De la Cuba (n 128) 149–150.

Wallace-Bruce asserts that Somalia is in a category of its own as all its basic institutions collapsed, which brought into question the very survival of the state.<sup>177</sup> Despite this, statehood persisted. In international law, there is a presumption of state continuity; it is asserted that the reason for the continuity of states in instances where there is a fall of a government is that such incapacity is not permanent, and a defect of this nature may be remedied. Oppenheim notes that a state remains as such regardless of changes to ‘its headship, in its dynasty, in its form, in its rank and title.’<sup>178</sup> Therefore, if statehood ceased to exist with every fall or change of government, it would produce illogical results in international law.

On the contrary, the condition of a state possessing a territory requires territorial sovereignty wherein the state asserts authority over the population.<sup>179</sup> In the absence of a land territory where a government on behalf of a state exercises authority, statehood should cease to exist, as it has been highlighted that territory cannot be reduced to an abstract right.<sup>180</sup> The criterion of territory is also interlinked with other criteria of statehood, including population and independence of a nation, as it is the basis for all of these requirements.<sup>181</sup> This element of statehood is crucial when considering the context of SIDS, as by 2100, some of these states may have uninhabitable land territory, or much of their land territory may be submerged. Where an island or rock becomes even further submerged by rising sea levels, it may affect the ability of the remaining land to be considered territory altogether. Stoutenburg submits that an island may still qualify as land territory for statehood where it is submerged into a rock which is above water at high tide, but not inhabitable by a population.<sup>182</sup> The situation would be different if the territory were submerged under an LTE, which is only visible at low tide, or became wholly submerged.<sup>183</sup>

With the current sea-level rise predictions, it is well within the realm of possibility that islands previously able to sustain human habitation will become uninhabitable or even submerged when the tide is high.<sup>184</sup> In the judgment of *Maritime Delimitation and Territorial Questions between Qatar v Bahrain, Merits, Judgment (Qatar v Bahrain)*, the court asserted that the existing rules of international law do not align with the submission that an LTE is territory like islands are.<sup>185</sup> Islands, including rocks, constitute territory or *terra firma*; however, the law treats LTEs distinctly. The court in

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177 Nii Lante Wallace Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’ (2000) *Netherlands Int’l Law Review* 67.

178 Oppenheim (n 136) para 77.

179 Robert Rotberg, *State Failure and State Weakness in a Time of Terror* (Brookings Institution Press 2003) 6.

180 *Island of Palmas* case (n 138) 829–871.

181 Wong (n 58) 21.

182 Stoutenburg (n 21) 252.

183 *ibid* 252.

184 *ibid* 152.

185 *Maritime Delimitation and Territorial Questions between Qatar v Bahrain, Merits, Judgment*, ICJ Reports 2001, para 206.

*Qatar v Bahrain* remarked that an island, including rocks, may claim a territorial sea of their own, and a LTE may not.<sup>186</sup> Therefore, islands are not understood to have the same nature as LTEs and other land territories for the purposes of acquiring territory.

It is also legally impossible to utilise land reclamation efforts to turn a low-tide elevation into an island by way of artificial intervention in order to enable it to be considered a substitute for natural island territory. Clive and Richard Schofield remark that LTEs cannot be ‘upgraded’ to ‘full’ insular status.<sup>187</sup> In such an instance, if an island state were affected by sea level rise, resulting in the complete submergence of its natural territory, the state would not be able to exercise territorial sovereignty over the area. Whilst the territory element of statehood is considered crucial for the maintenance of a state, the population requirement is considered to be the element upon which statehood hinges, as an island state’s population will likely migrate well before the territory disappears.

Rafuse notes that statehood will no longer exist from the ‘time of evacuation.’<sup>188</sup> Many populations residing in small, low-lying island nations may have to relocate to another territory within the next century, and this may not happen uniformly.<sup>189</sup> The population may relocate to many different countries all over the world.<sup>190</sup> A permanent population has to be residing in the territory that is controlled by the state concerned to maintain statehood.<sup>191</sup> Stoutenburg has expressed that populations are not able to exist in exile.<sup>192</sup> While the loss of a population will not take place all at once, there will be a point at which there will be too few citizens remaining to be considered a population capable of maintaining statehood.<sup>193</sup> Stoutenburg asserts that the minimum population of fifty people should be seen as a guideline for the threshold of state extinction; however, the remaining population needs to be permanent to meet this criterion.<sup>194</sup> For instance, if only governmental officials remained on an island, this would be insufficient to meet the requirements of statehood. Therefore, the population criterion required to maintain statehood would be lost by an entire population leaving a territory.<sup>195</sup> This is particularly relevant for SIDS as extreme weather events or other factors can make remaining on an island state impossible, wherein the island, for example, has no food security, lacks fresh water supplies, and important infrastructure becomes submerged. Therefore, it must be

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186 *ibid* 64.

187 Clive Schofield and Richard Schofield, ‘Claims to and From Low-Tide Elevations and Artificial Islands under the Law of the Sea’ (2016) 2009(4) *Asia-Pacific Journal of Ocean Law and Policy* 66.

188 Rosemary Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’ (2009) UNSW Law Research Paper 7.

189 Wong (n 58) 14.

190 *ibid* 14.

191 Lapidoth (n 122) 78.

192 Stoutenburg (n 21) 268.

193 *ibid* 269.

194 *ibid* 269.

195 *ibid* 268.

emphasised that statehood for many island states could hinge on the requirement of a population, which will result in the eventual surrender of any remaining territory.<sup>196</sup>

It is emphasised that population, in conjunction with territory, is considered to go to the very root of the state. The Oxford Dictionary defines a state as ‘a country considered as an organised political community controlled by one government.’<sup>197</sup> Similarly, a country, by definition, is ‘an area of land that has or used to have its own government and laws.’<sup>198</sup> Therefore, these two essential elements of statehood cannot be absent for statehood to persist.

The physical loss of territory and the loss of a population are two intertwined elements of statehood. Therefore, we must consider how the understanding of statehood can be reconsidered for SIDS in the midst of statehood.

While Tuvalu has taken the first step in amending its constitution in an attempt to make its claims to statehood permanent, more action is needed by the international community to ensure that similar action is taken on a much larger scale. It is not enough for one SIDS to make a change within their own national legislation; international law needs to evolve similarly.

## Mitigation Measures and Options for SIDS

The loss of statehood is a fact in customary international law. Still, the act of withdrawal of recognition may illustrate to the international community that a state has ceased to exist. So how, then, can SIDS continue to survive amid a changing climate? Alternative suggestions include association with other states, establishing condominiums, confederations or federations, cession of territory with or without territory, merger with another state, hybrid schemes or joint sovereignty have been put forward to remedy this lacuna within the law.<sup>199</sup> These possible solutions will be briefly considered below.

Condominiums, confederations or federations allow multiple states to be separate but to exercise authority over a piece of territory collectively. Condominiums specifically occur where a group of states exercises authority over territory that extends beyond their own territory and are often considered transitional rather than permanent

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196 Wong (n 58) 13.

197 ‘State’ Oxford Learner’s Dictionaries  
[https://www.oxfordlearnersdictionaries.com/definition/english/state\\_1?q=state](https://www.oxfordlearnersdictionaries.com/definition/english/state_1?q=state) accessed 30 September 2023.

198 ‘Country’ Oxford Learner’s Dictionaries  
<https://www.oxfordlearnersdictionaries.com/definition/english/country?q=country> accessed 30 September 2023.

199 UNGA, ILC, Second Issues Paper (n 13) 49.



arrangements.<sup>200</sup> Confederations involve each state retaining sovereignty over its territories with a treaty establishing the confederation, each member retains authority over its citizens.<sup>201</sup> A federation is a complete union of states where each member has the elements of a state.<sup>202</sup> The federation entity would acquire its own statehood, and each member would lose its own individual statehood, with the federation requiring statehood in its own right.<sup>203</sup> However, all of these options assume the existing presence of territory and states coming together in their own right.<sup>204</sup>

Association with other states include a SIDS associating with other states, which creates a partnership rather than a full merger of the two states. An example of this is the Cook Islands and New Zealand.<sup>205</sup> The Cook Islands and New Zealand have a Joint Centenary Declaration that provides that the two states share ‘a mutually acceptable standard of values in their laws and policies,’ and they also provide preferential consideration for citizens of either country to enter and reside in both territories.

Cession of territory would require the formal ceding of territory from one state to another to substitute submerged territory. The transfer of territory may be completed with sovereignty or without sovereignty.<sup>206</sup> This transfer of property would require the agreement between both States, where the cession with sovereignty would result in the ability of the state that is purchasing the land to establish governmental facilities, and regulate their own immunities, privileges and rights, allowing the state to thrive in the territory, maintaining cultural and group identities.<sup>207</sup> The difficulty with this remedy is that it is not certain that other states would agree to such an arrangement, as the ceding state would need to recognise the autonomous power of the resettled state over a portion of land perpetually.<sup>208</sup>

Merger includes unifying one or more states, such as multiple SIDS. The population of the state that is merging with another will be fully incorporated into the population of the other state.<sup>209</sup> Merger is a legally sound solution, but its downfall for SIDS is that the host state must agree to take on the full population of the state it is merging with.<sup>210</sup>

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200 International Law Association, Lisbon Conference 2022, Committee on International Law and Sea Level Rise, Report June 2022, 32 <<https://www.ila-hq.org/en/documents/2022-report-ila-committee-june-2022>> accessed 17 July 2023.

201 *ibid* 32.

202 *ibid* 32.

203 *ibid* 32.

204 *ibid* 32.

205 UNGA, ILC, Second Issues Paper (n 13) 102.

206 *ibid* 49.

207 *ibid* 49.

208 International Law Association, Lisbon Conference 2022 (n 200) 31.

209 UNGA, ILC, Second Issues Paper (n 13) 52.

210 Rayfuse (n 188) 9.

Hybrid schemes combine the various suggestions provided above to create a special arrangement allowing the survival of the state that may become submerged. One example is a joint sovereignty module, such as Bosnia and Herzegovina, which was established by the Dayton Agreement.<sup>211</sup> The population of the territory retains the citizenship of the State as one whole.<sup>212</sup>

However, these remedies all depend on the cooperation of SIDS with other states, some of which are considered temporary arrangements. For instance, the International Law Association's Committee on Sea Level Rise in Relation to International Law (SLRC) has asserted that condominiums, confederations or federations are temporary arrangements that all require the presence of territory.<sup>213</sup> Additionally, mergers, whilst legally sound, require the state that will play 'host' to the state concerned to agree to the absorption of another.<sup>214</sup> The ILC SLRC study group asserts that the issues are 'sensitive' and must be 'addressed with caution.'<sup>215</sup>

It is important to consider a mitigation measure that will allow SIDS to maintain statehood in the absence of the need for cooperation with another state to ensure survival. As such, it is submitted that a legal instrument in the form of a multilateral Convention should be drafted and submitted to the UNGA for further negotiation within a conference setting. A diplomatic conference would allow a draft negotiating text to be considered by subject matter experts in order to obtain input and consideration that may contribute value to a possible multilateral Convention. A multilateral Convention could account for the unique consequences of climate change and sea-level rise for SIDS. A multilateral treaty would be the best way to adjust international law to avoid marginalisation of SIDS due to the vulnerable position these states find themselves in; it would also allow all SIDS to contribute to a solution that will ensure their long-term survival. A negotiated text will also allow the contribution of other states, in addition to SIDS, to come together to provide a mutually acceptable solution that may be used for any states that may face a similar fate as the climate continues to change.

The contents of such draft negotiating text would include the protection of statehood and sovereignty of states despite the submergence of the island territory. Furthermore, such negotiating text would provide for the maintenance of statehood despite the temporary or permanent migration of a population as a result of sea-level rise. It may also include other aspects such as the preservation of maritime zones and consider the other effects of sea-level rise for SIDS, but also for other coastal states.

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211 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes (Dayton Agreement), Date of Adoption 21 November 1995, 35 ILM 75; and UNGA, ILC, Second Issues Paper (n 13) 53.

212 *ibid* 54.

213 International Law Association, Lisbon Conference 2022 (n 200) 32.

214 Rayfuse (n 188) 9.

215 UNGA, ILC, Second Issues Paper (n 13) 102.

## Conclusion

Whilst there are communities presently inhabiting most SIDS, fulfilling the population criterion for statehood, the excerpts of scientific reports cited in this article reveal that this may change within the century. For SIDS, possessing a territory and a permanent population that resides thereon is essential for their survival. The presence of even a small thriving population with a sense of community within a defined territory can be the difference between state extinction and state continuity. The absence of either a population or a territory would result in a state ceasing to exist both *de facto* and *de jure*.

Statehood and the loss thereof are matters of survival for SIDS; therefore, it is asserted that there is an urgent need to address this issue within international law.<sup>216</sup>

Considering the various mitigation measures discussed above, we submit that a bespoke legal instrument in the form of a multilateral Convention should be drafted and adopted to account for the detrimental effects being faced by SIDS as a result of climate change and sea-level rise. Such a Convention would provide certainty to SIDS and entrench essential concepts that aim to settle the issues surrounding rising sea levels and climate change's adverse effects on statehood. It may also further entrench the commitment of states to mitigate climate change, but also recognise the inherent vulnerabilities of SIDS. As highlighted by the United Nations Framework Convention on Climate Change:

Small island developing States (SIDS) have long been recognised by the international community as a special case whose needs and concerns have to be addressed... Although these countries are among the least responsible for climate change, they are likely to suffer most from its adverse effects and could in some cases even become uninhabitable. This is what makes them a special case requiring the help and attention of the international community.<sup>217</sup>

The unique case of SIDS and sea-level rise requires a special solution outside the existing international law remedies. Therefore, within a Convention, it is important to entrench the rights of SIDS to their statehood, despite territory submergence and the migration of their populations. Such a move would be in the interests of equity towards these states and their adverse circumstances.

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<sup>216</sup> *ibid* para 38.

<sup>217</sup> UNFCCC 'Climate Change Small Island Developing States' (2005) 2 <[https://unfccc.int/resource/docs/publications/cc\\_sids.pdf](https://unfccc.int/resource/docs/publications/cc_sids.pdf)> accessed 6 October 2023.

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