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THE WRONGFUL DEATH OF STATES

Sea-Level Rise, Non-Recognition, and the Responsibility Turn in the Law of Statehood

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Introduction

Since its inception, the International Court of Justice has played an important role in preserving the foundations of Statehood and Sovereignty. Article 1 of the Montevideo Convention of 1933 has specifically outlined the essential elements of a state, namely, permanent population, defined territory, government and capacity to enter into relations with other states. One of the greatest instances of the 21st century was when the ICJ in July 2025, declared that the disappearance of one constituent element of statehood “would not necessarily entail the loss of its statehood.”¹ Experts have treated the climate advisory opinion as an end to the ever-lasting debate of “Sinking States”. The ICJ's opinion is best understood not as the end of the sinking-states debate, but as evidence that the debate has long been framed around the wrong question. Over the last three decades, there has been a debate over whether the Montevideo criteria,² once satisfied, must be continuously maintained. The more consequential question lies in the secondary rules. What does the law of state responsibility require when internationally wrongful conduct threatens to extinguish a subject of international law itself?

¹Obligations of States in respect of Climate Change, Advisory Opinion, ICJ, 23 July 2025, finding that “once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.”

²Montevideo Convention on the Rights and Duties of States (1933), 165 LNTS 19, art 1.

The Status Trap

The existing literature — deterritorialized statehood, the “nation ex-situ,”³ the government-in-exile analogy, the presumption of continuity — shares a structural assumption: the threatened state is the passive object of doctrine, and extinction is a fact to which law must adjust. The International Law Commission’s 2025 final report highlighted a clear “strong support” among states for the idea of continuity.⁴ In 2023, the Pacific Islands Forum⁵ reaffirmed that statehood is permanent, and the Court has now validated this stance. Yet, it’s important to remember that a presumption is only a default position—one that can be challenged.

Continuity is considered a benevolent gesture that should instead be treated as an inherent right or entitlement. In today's world, it relies heavily on the goodwill of other states. In some modern-day contexts, the state often relies on continuity, which holds greater power in warfare or warlike situations. Still, in doing so, we fail to answer a key question that must be addressed at the outset: Who is accountable for the situation that requires such a presumption?

EXTINCTION AS INJURY

The advisory opinion confirmed that core climate obligations are owed *erga omnes*.⁶ Breach of those obligations engages the ordinary machinery of state responsibility. It follows that where emissions in breach of international law cause the loss of habitable territory culminating in the physical destruction of a state, that destruction is not a natural fact. It is the result of internationally wrongful acts, and international law has long refused to let wrongdoers harvest the legal consequences of their wrongs. *Ex injuria jus non oritur*. The extinction of a state, on this view, is a legal injury of the highest order: the destruction not of an interest protected by international law, but of a bearer of international legal personality.

³Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 *Climate Law* 345.

⁴ILC, Final Report of the Study Group on Sea-Level Rise in relation to International Law, in Report of the International Law Commission, Seventy-Sixth Session, UN Doc A/80/10 (2025) ch IV.

⁵Pacific Islands Forum, Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise (9 November 2023).

⁶*Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, paras 33–34; Obligations of States in respect of Climate Change (n 1), characterizing core climate obligations as owed *erga omnes*.

NON-RECOGNITION, INVERTED

Article 41(2) of the Articles on State Responsibility obliges states not to recognise as lawful any situation created by a serious breach of a peremptory norm.⁷ Every application of that doctrine — Namibia, northern Cyprus, Crimea⁸ — has policed the unlawful creation or acquisition of territorial situations. None has addressed unlawful destruction. The inversion is the argument: if a state had lost its statehood by the wrongful conduct of any other existing state. Then the other states are barred from treating the existing state as legally extinct. It is the duty of other states not to recognise the state's disappearance, terminate any existing treaty that may cause loss to any party, or recognise the state's maritime zone as international waters. The presumption of continuity hardens into a duty of non-recognition of extinction — owed to the injured state, not extended to it.

REMEDIES

A submerged island cannot be restored, but a legal personality may. When discussing restitution through the judicial system, the majority of the discussion focuses on the maintenance of membership in international organisations, the continuation of depository mechanisms, if part of any treaty, their operation, nationality recognition, and, most importantly, financing the institutional apparatus of de-territorialised governance. The Falepili Union exemplifies bilateral generosity;⁹ the responsibility doctrine reframes such help as abstinence and compensation owed rather than solidarity provided.

THREE OBJECTIONS

1. Cause: A single emitter cannot extinguish a state independently. The International Court of Justice has also said that liability for joint behaviour will only arise when cumulative harm is established. The idea of shared responsibility governs how responsibilities among various actors are distributed.

⁷ILC, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) (ARSIWA), arts 40–41.

⁸Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion [1971] ICJ Rep 16; UNGA Res 68/262 (27 March 2014) on the territorial integrity of Ukraine; UNSC Res 541 (1983) on the 'Turkish Republic of Northern Cyprus'.

⁹ Treaty between Australia and Tuvalu on the Falepili Union (signed 9 November 2023, entered into force 2024)

The Court agreed that blame can attach to cumulative behaviour, and shared-responsibility scholarship provides the apportionment framework.¹⁰

2. Article 41's requirements are unrelated to other international climate agreements and only apply in cases of grave violations of Jus Cogens principles. Self-determination, which is peremptory and clearly refutes forced extinction, is a more conservative approach.¹¹
3. Performativity: Refusing an illegal extension of the state will not govern the proper functioning of the said state, which is why continuity rather than declaration is the solution.

CONCLUSION

The Court's concept of continuity is brittle and depends on other people to support it. States can assert their rights against wrongdoers, demand accountability, halt harm, and restore dignity by shifting responsibilities. International law must take states' assertions of their legal rights seriously, as they will not merely seek compassion when they are in danger.

¹⁰ André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 Michigan Journal of International Law 359

¹¹Vienna Convention on the Law of Treaties (1969), art 53; ILC, Peremptory Norms of General International Law (Jus Cogens), UN Doc A/77/10 (2022), annex, listing self-determination among peremptory norms.