

PERPETUAL STATEHOOD AMID RISING TIDES: THE CASE OF TUVALU AND THE FUTURE OF STATEHOOD, SOVEREIGNTY, AND MARITIME BOUNDS IN THE FACE OF UNPRECEDENTED CLIMATE CRISIS

CAROLINE CRAWFORD*

ABSTRACT

As climate change threatens the physical existence of low-lying island nations, the question of whether a country can retain statehood without territory becomes increasingly urgent. Tuvalu, facing potential submersion by 2050, has amended its constitution to declare perpetual statehood, challenging traditional international legal definitions that link sovereignty to physical territory. This Article examines the legal implications of Tuvalu's declaration and explores whether current frameworks, including the Montevideo Convention, self-governance, the presumption of continuity, the Lotus principle, and the United Nations Convention on the Law of the Sea ("UNCLOS"), can accommodate such a claim. It advocates for legal innovations such as redefining statehood, creating alternative conceptions of sovereignty, or updating UNCLOS to preserve Tuvalu's independence and rights. Ultimately, the Article argues that international law must evolve to recognize the legitimacy of states like Tuvalu in a climate-altered world.

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* Author graduated in 2026 with a J.D. from Boston University School of Law and M.A. in English from Boston University. She also has a B.A. from the University of Notre Dame. The author thanks Professor Rachel Thrasher for her thoughtful feedback and guidance throughout this project.

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I. INTRODUCTION

“We are not drowning; we are fighting,” declared Pacific climate activist Brianna Fruean at the 2021 UN Climate Change Conference (“COP26”),¹ capturing the defiance of Pacific Island nations facing the existential threat of climate change. Yet, as the waves rise higher, the fight for countries like Tuvalu is not only for their survival, but for the very meaning of statehood in a world being reshaped by environmental disasters.

Tuvalu, a nation of just over 11,000 people scattered across nine islands in the Pacific Ocean, is on the brink of disappearance.² With its mean elevation at just two meters above sea level, Tuvalu faces the very real possibility of being submerged by 2050.³ Tuvalu has taken an unprecedented step: amending its constitution to declare perpetual statehood, even in the face of territorial loss.⁴ This bold constitutional amendment seeks to preserve the nation’s sovereignty

¹ *World Leaders Told – “We Are Not Drowning, We Are Fighting”*, SECRETARIAT PAC. REG’L ENV’T PROGRAMME (Nov. 2, 2021), <https://www.sprep.org/news/world-leaders-told-we-are-not-drowning-we-are-fighting>.

² Kirsty Needham, *Sinking Tuvalu Fights to Keep Maritime Boundaries as Sea Levels Rise*, REUTERS (Sept. 24, 2024, 6:00 AM), <https://www.reuters.com/investigations/sinking-tuvalu-fights-keep-maritime-boundaries-sea-levels-rise-2024-09-24/#:~:text=Simon%20Kofe%2C%20a%20former%20judge,of%20Tuvalu%27s%20exclusive%20economic%20zone>.

³ *Id.* (noting Tuvalu’s sea-level rise exceeds 1.5x the global average).

⁴ STEWART FIRTH, *TUVALU’S RESPONSE TO CLIMATE CHANGE 1* (2024), <https://openresearch-repository.anu.edu.au/server/api/core/bitstreams/fl564c19-0646-4a6a-8dd0-7d98ebc32fcd/content>; Kelly Buchanan, *Tuvalu: Constitutional Amendment Enshrines Statehood in Perpetuity in Response to Climate Change*, LIBR. CONG. (Sept. 29, 2023), [https://www.loc.gov/item/global-legal-monitor/2023-09-28/tuvalu-constitutional-amendment-enshrines-statehood-in-perpetuity-in-response-to-climate-change/#:~:text=\(1\)%20The%20State%20of%20Tuvalu,the%20physical%20territory%20of%20Tuvalu;see%20THE%20CONSTITUTION%20OF%20TUVALU%20ACT%202023,pt.1,div.1,%20%24\(1\)\(explaining%20Tuvalu’s%20perpetual%20statehood%20to%20mean%20that%20its%20status%20as%20a%20political%20entity%20persists%20despite%20climate%20change-induced%20territorial%20loss\)](https://www.loc.gov/item/global-legal-monitor/2023-09-28/tuvalu-constitutional-amendment-enshrines-statehood-in-perpetuity-in-response-to-climate-change/#:~:text=(1)%20The%20State%20of%20Tuvalu,the%20physical%20territory%20of%20Tuvalu;see%20THE%20CONSTITUTION%20OF%20TUVALU%20ACT%202023,pt.1,div.1,%20%24(1)(explaining%20Tuvalu’s%20perpetual%20statehood%20to%20mean%20that%20its%20status%20as%20a%20political%20entity%20persists%20despite%20climate%20change-induced%20territorial%20loss)).

and statehood, ensuring that Tuvalu's identity as a nation endures despite the physical disappearance of its land.⁵

The question this raises is profound: Can a country declare perpetual statehood and retain international legitimacy if it loses its physical territory? This Article explores that critical challenge, examining how Tuvalu's declaration challenges traditional definitions of statehood and suggesting that new frameworks are needed to recognize sovereignty and statehood in the face of climate-induced territorial loss. The implications extend beyond Tuvalu, as many island nations face similar existential threats from rising sea levels.⁶ This Article investigates whether international law can adapt to ensure the continued recognition of nations like Tuvalu, which may soon lack physical land but still have a cultural, political, and economic presence.

Tuvalu's perpetual statehood claim challenges the traditional international legal conception of statehood, which relies on physical territory. This Article suggests the need for a new legal framework that can recognize the sovereignty of nations facing territorial loss due to climate change. By critically engaging with existing international legal frameworks and principles such as the Montevideo Convention, self-governance, the presumption of continuity, the *Lotus* principle, and UNCLOS, this Article explores how they can be adapted to address the emerging crisis. Ultimately, the Article proposes the need for a redefinition of statehood, reevaluation of sovereignty, or a renegotiation of UNCLOS. It argues that international law can and must accommodate the unique situation of nations like Tuvalu.

The Article begins by examining Tuvalu's constitutional declaration of perpetual statehood and its ramifications. Next, it explores sources of customary law that could provide a way forward for Tuvalu and similarly affected nations. This section first examines the basic criteria by which states have been recognized as states. It then analyzes the principles of self-determination and the presumption of continuity to demonstrate the constraints territoriality places on statehood. Next, the Article analyzes the *Lotus* principle. It then examines international conventions that could provide Tuvalu a way forward, focusing principally on UNCLOS. Finally, the Article acknowledges the need for an innovative way forward by altering the definition of statehood, constructing an alternative form of sovereignty, or updating UNCLOS. It concludes by recognizing the need for the law to adapt to contemporary climate change concerns.

In a landmark development, the International Court of Justice ("ICJ") issued an Advisory Opinion on July 23, 2025, affirming that states have legal obligations under international law to address climate change and protect the

⁵ See THE CONSTITUTION OF TUVALU ACT 2023, art. 2, § 1; *A Significant Contribution to International Law on Statehood: Former Tuvalu Foreign Minister*, ISLANDS BUS. (Nov. 14, 2023), <https://islandsbusiness.com/news-break/tuvalu-statehood/>.

⁶ Pacific Islands Forum [PIF], *2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise*, ¶ 5 (Aug. 6, 2023), <https://forumsec.org/sites/default/files/2024-05/2023%20Declaration%20on%20the%20Continuity%20of%20Statehood%20and%20the%20Protection%20of%20Persons.pdf> [hereinafter *2023 Declaration*].

environment.⁷ The Court declared climate change an “urgent and existential threat” and emphasized that failure to act may constitute a violation of international law.⁸ Critically, the ICJ recognized that scientific evidence allows greenhouse gas emissions to be attributed to individual states, including both cumulative historical and current emissions.⁹ This attribution enables states harmed by climate change, such as Tuvalu, to invoke legal responsibility against states whose emissions contribute to the threat.¹⁰ For directly affected states like Tuvalu, this creates the possibility not only of demanding an end to harmful acts but also of seeking additional remedies, including reparations or compensation.¹¹ In practice, this could mean that high-emission states have an obligation to support Tuvalu in preventing its disappearance, through measures such as adaptation assistance, protective infrastructure, or other reparative actions. This Advisory Opinion provides a strong international legal foundation for Tuvalu to assert its continued sovereignty and claim recognition of its rights, even as its physical territory faces existential threats.¹²

II. TUVALU’S DECLARATION OF PERPETUAL STATEHOOD

As Tuvalu’s very existence is threatened by rising sea levels, the nation has explored different ways to ensure its continued sovereignty and to establish a legal basis for its continued existence as a sovereign state.¹³ In response to climate change, Tuvalu amended its Constitution to declare its statehood is perpetual, affirming that it will remain a sovereign state even if its physical territory is submerged.¹⁴ Section 2(1) of the Constitution of Tuvalu explains that “[t]he 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.”¹⁵ The Constitution records the maritime coordinates of Tuvalu’s exclusive economic zone and explains that the baseline coordinates of Tuvalu “shall remain unchanged, notwithstanding any regression of the low-water mark or changes in geographical features of coasts or islands, due to sea level rise or other causes.”¹⁶

⁷ See Lukas Schaugg, Natalie Jones & Jeffrey Qi, *Historic International Court of Justice Opinion Confirms States’ Climate Obligations*, INT’L INST. FOR SUSTAINABLE DEV. (July 28, 2025), <https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate-change>. See generally *Obligations of States in Respect of Climate Change*, Advisory Opinion, 115-116, ¶ 404 (July 23, 2025), <https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf> (confirming that international law imposes obligations on states to address climate change and safeguard the environment).

⁸ See *Obligations of States in Respect of Climate Change*, 2025 I.C.J. ¶ 73.

⁹ *Id.* ¶ 429.

¹⁰ See *id.*

¹¹ See *id.* ¶¶ 429-432.

¹² See *id.*

¹³ Needham, *supra* note 2.

¹⁴ *A Significant Contribution to International Law on Statehood: Former Tuvalu Foreign Minister*, *supra* note 5; THE CONSTITUTION OF TUVALU ACT 2023, art. 2, § 1.

¹⁵ THE CONSTITUTION OF TUVALU ACT 2023, art. 2, § 1.

¹⁶ THE CONSTITUTION OF TUVALU ACT 2023, art. 2, § 1.

Through this constitutional amendment, Tuvalu hopes to maintain its statehood.¹⁷

The Leaders of the Pacific Islands Forum, which includes Tuvalu, endorsed the declaration that the sovereignty and statehood of its members shall continue, and the “rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.”¹⁸ The declaration further called on the international community for support.¹⁹ The Leaders of the Pacific Islands Forum’s declaration explained that “international law supports a presumption of continuity of statehood and does not contemplate its demise in the context of climate change-related sea-level rise.”²⁰ They also pointed to other principles and rights of international law, including the right to self-determination, the right to a nationality, principles of equity and fairness, the duty of cooperation, and permanent sovereignty over national resources.²¹ Accordingly, the declaration maintained that international law and its underlying principles provide a foundation for Tuvalu’s assertion of perpetual statehood.²²

Tuvalu has taken a groundbreaking approach to safeguard its statehood and sovereignty: the construction of a “digital twin” in the metaverse.²³ As its physical territory continues to disappear under the waves, Tuvalu’s government is building a digital copy of the country, “backing up everything from its houses to its trees” with a complete replica generated by a three-dimensional scan.²⁴ The digital version of Tuvalu will also include cultural artifacts “like the sounds of children’s language, dances and festivals, and elder[s]’ stories.”²⁵ The goal of this digital replica is not only to preserve the beauty and culture of the country but also to safeguard the sovereignty and rights of the Tuvaluan people.²⁶ The government has adopted a communication infrastructure that will allow it to

¹⁷ See THE CONSTITUTION OF TUVALU ACT 2023, art. 2, § 1; *Tuvalu Seeks to Retain Statehood if it Sinks Completely as Sea Levels Rise*, GUARDIAN (Nov. 10, 2021, 7:49 PM), <https://www.theguardian.com/world/2021/nov/11/tuvalu-seeks-to-retain-statehood-if-it-sinks-completely-as-sea-levels-rise> (Tuvalu’s foreign minister explains, “‘We’re looking at legal avenues where we can . . . retain our recognition as a state under international law.’”).

¹⁸ 2023 Declaration, *supra* note 6, para. 13.

¹⁹ *Id.* para. 16.

²⁰ *Id.* para. 12.

²¹ *Id.* para. 9.

²² *Id.* paras. 8-9.

²³ Sophie Yeo, *Tuvalu: The Disappearing Island Nation Recreating Itself in the Metaverse*, BBC (Nov. 21, 2024), <https://www.bbc.com/future/article/20241121-tuvalu-the-pacific-islands-creating-a-digital-nation-in-the-metaverse-due-to-climate-change> (explaining how Tuvalu is “going one step further” than yet attempted by similarly situated island states); Kalolaine Fainu, *Facing Extinction, Tuvalu Considers the Digital Clone of a Country*, GUARDIAN (June 27, 2023), <https://www.theguardian.com/world/2023/jun/27/tuvalu-climate-crisis-rising-sea-levels-pacific-island-nation-country-digital-clone> (describing Tuvalu’s approach as “groundbreaking”).

²⁴ *Id.*

²⁵ Kat Wong, *‘Digital Nation’ Tries to Save Itself From Climate Doom*, NAT’L INDIGENOUS TIMES (Dec. 5, 2023), <https://nit.com.au/05-12-2023/8920/digital-nation-tries-to-save-itself-from-climate-doom>.

²⁶ Yeo, *supra* note 23.

“move state affairs like elections, referendums and birth registries online,” enabling the government to continue functioning virtually.²⁷ Tuvalu envisions the project as a potential model of statehood, in which a digital, deterritorialized form of sovereignty could be internationally recognized even in the absence of physical territory.²⁸ However, it underscores its continued commitment to combating climate change and safeguarding its territory through initiatives such as coastal adaptation projects and protective barriers.²⁹

In addition to its “digital twin,” Tuvalu hopes to safeguard its sovereignty and identity by securing its maritime boundaries under international law,³⁰ ensuring continued economic and territorial rights even if the land becomes uninhabitable. Tuvalu’s largest source of revenue is licensing access to its tuna-rich waters for foreign fishing fleets.³¹ According to Deputy Prime Minister Panapasi Nelesone, securing international recognition of Tuvalu’s maritime boundaries as permanent would serve as a vital economic lifeline.³² Tuvalu advocates for amending UNCLOS to allow for permanent recognition of the maritime boundaries of countries whose physical land is disappearing due to climate change.³³ Tuvaluan officials hope to convince the United Nations General Assembly to pass a resolution amending the UNCLOS.³⁴ However, if this is not feasible, the island nation hopes to evolve the law through “individual states signing treaties with neighbours, regional agreements, and the multilateral system responding to test cases.”³⁵ As a start, Tuvalu “insists that all countries forming relations with Tuvalu recognise the statehood of the nation as permanent and its existing maritime boundaries as set.”³⁶ Further, the Australia-

²⁷ Wong, *supra* note 25.

²⁸ Yeo, *supra* note 23 (describing Tuvalu’s attempt to create a digital nation to preserve sovereignty as climate change threatens its territory); see Johnathan Gliboff, *Waterproofing Statehood: Strengthening Claims for Continued Statehood for Sinking States Using “E-Governance”*, 123 COLUM. L. REV. 1747, 1752, 1757 (2023) (arguing that digital statehood “should be recognized as a form of deterritorialized statehood that is strong enough to carry forward the presumption of continuity” and explaining how this would be a new model because it is fully divorced from territorial control).

²⁹ Yeo, *supra* note 23.

³⁰ Needham, *supra* note 2.

³¹ *Id.*; WORLD BANK, TUVALU: PACIFIC ISLANDS REGIONAL OCEANSCAPE PROGRAM – SECOND PHASE FOR ECONOMIC RESILIENCE 3 (2023) (noting how “fishing and fishing licenses provided 53.9 percent of national revenue during 2015-2018.”).

³² Needham, *supra* note 2.

³³ Delf Rothe et al., *Digital Tuvalu: State Sovereignty in a World of Climate Loss*, 100 INT’L AFFS. 1491, 1499 (2024) (“Tuvalu is campaigning for an amendment to the 1982 UNCLOS that stipulates that states will not lose their right to their designated exclusive economic zones (EEZs) due to climate change and rising sea levels.”)

³⁴ Needham, *supra* note 2.

³⁵ *Id.*

³⁶ *Protecting Tuvalu’s Statehood*, FRIENDS EARTH AUSTL. (June 17, 2022), https://www.foe.org.au/protecting_tuvalu_statehood (quoting Tuvaluan minister Simon Kofe).

Tuvalu Falepili Union Treaty reinforces Tuvalu's continued statehood despite the potential physical loss of its land.³⁷

III. SOURCES OF CUSTOMARY INTERNATIONAL LAW THAT COULD PROVIDE A WAY FORWARD

A. *Formation of Customary International Law*

Customary international law arises from the consistent and general practice of states, coupled with *opinio juris*, the belief that such practice is legally required.³⁸ Conventions both reflect these existing customs and help shape them over time by guiding state behavior and signaling what states regard as legally binding.³⁹ The doctrine of specially affected states gives particular weight to the practice and views of states with a special interest or expertise in a given area, such as coastal states in maritime law, when determining whether a customary rule has formed.⁴⁰ Together, state practice, *opinio juris*, and the perspectives of specially affected states form norms that bind the broader international community, extending beyond the obligations of treaties.⁴¹

B. *Traditional Definition of Statehood*

While no universally accepted definition of statehood exists, the most frequently cited one appears in the 1933 Montevideo Convention on the Rights and Duties of States ("Montevideo Convention").⁴² This definition of statehood requires four components: (1) a permanent population, (2) a defined territory, (3) an established government, and (4) the ability to engage in relations with other states.⁴³ The Restatement (Third) of Foreign Relations Law of the U.S.

³⁷ The Australia-Tuvalu Falepili Union Treaty establishes climate-induced migration pathways while affirming Tuvalu's statehood despite potential land loss. Falepili Union Treaty art. 2(2)(b), Austl.-Tuvalu, Nov. 9, 2023 ("[T]he statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise[.]"); Alex Green & Douglas Guilfoyle, *The Australia-Tuvalu Falepili Union Treaty: Statehood and Security in the Face of Anthropogenic Climate Change*, 118 AM. J. INT'L L. 684, 694 (2024) (explaining that the acknowledgement of Tuvalu's continual statehood and sovereignty is the "first publicly binding rejection by any State of the traditional view that inhabitable land is necessary for State continuity.").

³⁸ VAUGHAN LOWE, INTERNATIONAL LAW 60-61 (2007) ("The States engaged in the practice must regard their practice as an expression of a rule of international law . . . This belief in the conformity of the practice with international law is known as the *opinio juris*.").

³⁹ See RESTATEMENT (THIRD) OF FOREIGN RELS. LAW OF THE U.S. § 102(3) (AM. L. INST. 1987) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.").

⁴⁰ North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20).

⁴¹ See *id.*; RESTATEMENT (THIRD) OF FOREIGN RELS. LAW OF THE U.S. § 102(2-3) (AM. L. INST. 1987).

⁴² Michael B. Gerrard, *Statehood and Sea-Level Rise: Scenarios and Options*, 17 CHARLESTON L. REV. 579, 582 (2023).

⁴³ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165

includes the same elements: “Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”⁴⁴ While critics argue that there are additional criteria to the Montevideo Convention requirements to statehood, such as lack of a counterclaim to territorial integrity, and international recognition, these additional criteria still require that the traditional Montevideo Convention requirements be met.⁴⁵ The Montevideo criteria establish a basic minimum standard.⁴⁶

C. *How Territoriality Places Constraints: Principles of Self-Determination and Presumption of Continuity*

As discussed above, territory is central to statehood,⁴⁷ but the principles of self-determination and the presumption of continuity complicate how this requirement is applied, particularly in abnormal cases.⁴⁸ The structure upon which the state is traditionally based is that “a state speaks for its people in international law by virtue of controlling its territory.”⁴⁹ Therefore, territory is typically considered central to sovereignty.⁵⁰ However, international law has long recognized that in certain circumstances a state can extend its legal authority beyond its borders, allowing it to exercise jurisdiction over its nationals even when they are abroad.⁵¹ This example, in which state control over territory is supplemented by control over citizens abroad, illustrates the flexibility in applying the territorial requirement; nevertheless, such examples still assume the existence of some geographic base.⁵² This underscores the challenge Tuvalu

L.N.T.S. 19 [hereinafter Montevideo Convention].

⁴⁴ RESTATEMENT (THIRD) OF FOREIGN RELS. LAW OF THE U.S. § 201 (AM. L. INST. 1987).

⁴⁵ Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT’L L. REV. 101, 108, 113 (2012).

⁴⁶ Michel Rouleau-Dick, *Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?*, 22 MELB. J. INT’L L. 357, 375 (2021).

⁴⁷ See *supra* Section III.B.

⁴⁸ See generally DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION (2002) (arguing that self-determination helps explain departures from traditional statehood criteria in contemporary recognition practice); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed. 2006) (explaining that, although territory is a core element of statehood, a presumption of continuity favors the persistence of states even in exceptional circumstances).

⁴⁹ Examples include diplomatic protection and extraterritorial jurisdiction. Karen Knop, *Statehood, People, Government*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 95, 95-97 (James Crawford & Martti Koskeniemi eds., 2015).

⁵⁰ See *id.* at 97.

⁵¹ See Int’l Law Comm’n, Draft Articles on Diplomatic Prot., art. 5, ¶¶ 1-2, U.N. Doc. A/61/10 (Aug. 11, 2006) (“[a] state is entitled to exercise diplomatic protection in respect of an injury to” one of its nationals); Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT’L L. 187, 198 (2014).

⁵² See Int’l Law Comm’n, Draft Articles on Diplomatic Prot., *supra* note 51; Mills, *supra* note 51.

faces: although territory has traditionally been essential to statehood, can principles like self-determination and the presumption of continuity nonetheless provide a legal basis for Tuvalu's continued recognition once its land is lost?

1. Self-Determination

The Leaders of the Pacific Islands Forum's declaration points to the principle of self-determination to underscore their claim that existing international legal standards support perpetual statehood declarations.⁵³ Self-determination refers to the legal right of a people to determine their own future within the international system.⁵⁴ The concept is well-established in international law, recognized as customary international law,⁵⁵ and it is codified in treaties such as the United Nations Charter,⁵⁶ the International Covenant on Civil and Political Rights,⁵⁷ and the International Covenant on Economic, Social, and Cultural Rights.⁵⁸

International law recognizes two forms of self-determination.⁵⁹ Internal self-determination refers to a people's ability to freely pursue their political, economic, social, and cultural development within the framework of an existing state.⁶⁰ It ensures meaningful participation in governance and protection against domination or discrimination, but it does not alter the state's territorial integrity.⁶¹ External self-determination, by contrast, involves the right of a people to separate and establish an independent state.⁶² International law recognizes this form only in exceptional contexts—such as colonial domination, foreign occupation, or systematic denial of internal self-determination⁶³—because it directly conflicts with the principle of territorial integrity.⁶⁴ The

⁵³ 2023 Declaration, *supra* note 6, para. 9.

⁵⁴ *Self Determination (International Law)* [definition], LEGAL INFO. INST., [https://www.law.cornell.edu/wex/self_determination_\(international_law\)](https://www.law.cornell.edu/wex/self_determination_(international_law)); see MANUELA MELANDRI, SELF-DETERMINATION, INTERNATIONAL LAW AND POST-CONFLICT RECONSTRUCTION: A RIGHT IN ABEYANCE 28 (2019).

⁵⁵ Mirza Ljubović, *The Right to Self Determination of Peoples Through Examples of Kosovo and Catalonia: Why is the Secession of Kosovo Acceptable in Modern Public International Law?*, 15 EPIPHANY: J. TRANSDISCIPLINARY STUD. 170, 172 (2022) ("The right to self-determination is today applicable as customary law and is recognized in that form by public international law.").

⁵⁶ *Id.*; U.N. Charter art. 1, ¶ 2.

⁵⁷ International Covenant on Civil and Political Rights, art. 1, ¶¶ 1-3, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁸ International Covenant on Economic, Social and Cultural Rights, art. 1, ¶¶ 1-3, Dec. 16, 1966, 993 U.N.T.S. 3.

⁵⁹ Salvatore Senese, *External and Internal Self-Determination*, 16 SOC. JUST. 19, 19 (1989).

⁶⁰ See RAIČ, *supra* note 48, at 237.

⁶¹ See *id.*

⁶² *Id.* at 289.

⁶³ See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, § 3 (Can.).

⁶⁴ Territorial integrity is the principle that sovereign states have a right to defend their borders and all territory in them from another state. See U.N. Charter, *supra* note 56, art. 2, ¶ 4.

Supreme Court of Canada's opinion in *In re Secession of Quebec* highlights this narrow application.⁶⁵

Against this backdrop, Tuvalu's situation most closely implicates external self-determination.⁶⁶ The existential threat posed by climate change could arguably place sinking islands like Tuvalu within the category of "exceptional" cases.⁶⁷ Tuvalu could arguably possess a theoretical right to external self-determination. Yet even if such a claim is legally recognizable, it remains unclear who bears the responsibility for actualizing that right. Unlike traditional self-determination cases—where one state's actions directly cause another's loss—climate change stems from globally and temporally diffused contributions.⁶⁸ Without a specific state to hold accountable, enforcing Tuvalu's right presents legal and practical challenges.

In other extraordinary self-determination cases,⁶⁹ the remedy is often the responsible state ceding territory to the affected people.⁷⁰ In Tuvalu's case, however, there is no obvious state from which to demand such a concession. Thus, while the right to self-determination might conceptually support Tuvalu's continued existence, it cannot provide its citizens with habitable territory. This

⁶⁵ The case arose when Canada's federal government asked its Supreme Court whether Quebec could unilaterally secede following two independence referenda. The Court held that Quebec had no unilateral right to secede under either domestic or international law. Internationally, the Court recognized that external self-determination is limited to exceptional cases of colonial rule, foreign occupation, or denial of meaningful internal self-determination. Because Quebecers already enjoyed full political rights and cultural protections, no such right applied. *See generally Reference re Secession of Quebec*, [1998] 2 S.C.R. § 3 (Can.).

⁶⁶ Internal recognition is typically realized within the framework of an existing state, through avenues such as democratic participation, cultural autonomy, or local self-governance. Tuvalu already possesses and exercises these rights as a sovereign state, so the challenge it faces is not lack of internal self-determination. Instead, the existential threat of physical disappearance caused by climate change raises the prospect that Tuvalu's people may be left without territory in which to exercise their sovereignty. This makes their claim less about reforming governance within a state, and more about whether international law recognizes a right to preserve or reconstitute statehood externally in the absence of land.

⁶⁷ *See generally, e.g.,* Cara Nine, *Ecological Refugees, State Borders, and the Lockean Proviso*, 27 J. APPLIED PHIL. 359, 362, 372 (2010) (suggesting that ecological refugee states facing total territorial loss retain a right to self-determination that entitles them to be considered for sovereignty over new lands); Milla Emilia Vaha, *Drowning Under: Small Island States and the Right to Exist*, 11 J. INT'L POL. THEORY 206, 211, 218 (2015) (arguing that sinking island states should be understood as possessing a right to continued existence as internationally recognized political entities, even absent territory). *But see Reference re Secession of Quebec*, [1998] 2 S.C.R. § 3 (explaining when external self-determination is permitted in limiting language).

⁶⁸ *See Obligations of States in Respect of Climate Change, Advisory Opinion*, 2025 I.C.J. 187, 421 (July 23).

⁶⁹ Examples include the secession of Singapore from Malaysia in 1965, the secession of Eritrea from Ethiopia in 1993, and the secession of Slovenia from the SPRY in 1991. *See* RAIČ, *supra* note 48, at 314-15 n. 30-32.

⁷⁰ This traditionally takes the form of succession, in which the parent state must cede territory because it has systematically violated the affected people's right to internal self-determination, thereby denying them meaningful control over their political and territorial affairs. *See* RAIČ, *supra* note 48, at 308.

reality underscores the necessity for Tuvalu to develop alternative strategies to safeguard its sovereignty, since self-determination likely will not provide a reliable means forward.

2. Presumption of Continuity

Many scholars examining the challenges faced by Tuvalu and other low-lying island states in retaining statehood and sovereignty despite loss of territory have suggested that the presumption of continuity could provide a viable legal framework and path forward.⁷¹ The Pacific Island Forum themselves cite the presumption of continuity as a legal framework for the legitimacy of their members' claim to continued statehood: "under international law there is a general presumption that a State, once established, will continue to exist and endure, and maintain its status and effectiveness[.]"⁷² However, in international legal scholarship, there exists two competing doctrines of how the presumption of continuity functions: the "ratchet effect" and the "sameness assessment."⁷³

One frequently cited version of the principle of presumption of continuity is what one critic described as the "ratchet effect."⁷⁴ This ratchet effect means that "the status of statehood, once achieved, is difficult to lose."⁷⁵ James Crawford⁷⁶ is frequently cited as supporting this formulation of the presumption of continuity: "There is a strong presumption against the extinction of States once firmly established."⁷⁷ For an island state like Tuvalu, this suggests that its

⁷¹ See, e.g., Rouleau-Dick, *supra* note 46, at 362-63 ("Despite some notable exceptions, most authors simply mention the existence of a presumption of continuity framed as a ratchet effect as a kind of fail-safe for the authors' other arguments supporting the continued statehood of a deterritorialized LLIS."); UNHCR, Summary of Deliberations on Climate Change and Displacement ¶ 30 (Apr. 2011), <https://www.unhcr.org/sites/default/files/legacy-pdf/4da2b5e19.pdf> ("Noting that there is a general presumption of continuity of statehood and international legal personality under international law, it was confirmed that statehood is not lost automatically with the loss of habitable territory nor is it necessarily affected by population movements."); Claudio Grossman, *Developments at the United Nations International Law Commission on Sea-Level Rise*, 39 AM. U. INT'L L. REV. 709, 759 (2024) ("[There is a "need to recognize a strong presumption in favor of the continuation of statehood so that the right to self-determination can be maintained despite sea-level rise."].

⁷² 2023 Declaration, *supra* note 6, para. 8.

⁷³ See generally Rouleau-Dick, *supra* note 46 (identifying the ratchet effect and sameness assessment as two competing doctrines of continuity).

⁷⁴ *Id.* at 360; Susannah Willcox, *Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood*, 30 LEIDEN J. INT'L L. 117, 122 (2017).

⁷⁵ Willcox, *supra* note 74.

⁷⁶ James Crawford (1948-2021) was an Australian international law scholar and judge, serving as a member of the ICJ and authoring seminal works on state responsibility and international legal theory. See generally Martti Koskenniemi & Gerry Simpson, *James Crawford*, in 20 BIOGRAPHICAL MEMOIRS OF FELLOWS OF THE BRITISH ACADEMY 245 (2022) (detailing the life and work of James Crawford).

⁷⁷ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 715 (2d ed. 2007). This specific citation is widely used throughout literature to support a ratchet-like continuity. See, e.g., LILIAN YAMAMOTO & MIGUEL ESTEBAN, *ATOLL ISLAND STATES AND INTERNATIONAL LAW: CLIMATE CHANGE DISPLACEMENT AND SOVEREIGNTY* 176 (2014); Jacquelyn Kittel, *The Global "Disappearing Act": How Island States Can Maintain*

statehood would not automatically end even if it were to lose its entire territory and population, despite those being central physical elements under the traditional definition of statehood.⁷⁸ Applied to Tuvalu, this would suggest that the state could retain its legal status even if it were to lose all of its territory and population, which are normally essential elements of statehood.⁷⁹ However, many critics who have adopted ratchet effect theory have theorized that the ratchet effect must nonetheless “first and foremost [be] linked with the minimum threshold account of statehood associated with the Montevideo Convention criteria.”⁸⁰ Since possession of physical territory is part of the “minimum threshold” for Montevideo statehood, this would foreclose to Tuvalu and other states the argument for presumption of continuity once their physical territory no longer exists.⁸¹

The feasibility of presuming Tuvalu’s continuity is further complicated by the fact that there is an alternative doctrinal articulation of the presumption of continuity: the “sameness” assessment.⁸² The sameness assessment views state continuity as the default condition, interrupted only when sufficiently significant internal changes occur to trigger the legal rules governing state succession.⁸³ Issues of continuity arise when a state experiences significant transformations, prompting questions about its ongoing identity, possible extinction, or succession by a new state.⁸⁴

Unlike the ratchet effect, which assumes continuity as a general principle preventing state extinction, the sameness doctrine takes a narrower approach.⁸⁵ It “assumes continuity as a general principle effectively stopping states from going extinct,” but acknowledges that fundamental changes can render a state unrecognizably different, effectively ending its existence.⁸⁶ In Tuvalu’s case, the complete loss of physical territory would likely constitute such a fundamental change.⁸⁷ Under the sameness doctrine, this could mean Tuvalu would no longer

Statehood in the Face of Disappearing Territory, 2014 MICH. STATE L. REV. 1207, 1248 (2014); Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 354 (2011).

⁷⁸ Rouleau-Dick, *supra* note 46, at 360.

⁷⁹ See *supra* Section III.B.

⁸⁰ See Rouleau-Dick, *supra* note 46, at 365; Willcox, *supra* note 74.

⁸¹ See Montevideo Convention, *supra* note 43, art. 1; Rouleau-Dick, *supra* note 46, at 365.

⁸² See Rouleau-Dick, *supra* note 46, at 363; CRAWFORD, *supra* note 48, at 667-68; Ineta Ziemele, *Acceptance of a Claim for State Continuity: A Question of International Law and its Consequences*, 9 LAW: J. U. LAT. 39, 43 (2016); LAURI MÄLKSOO, *ILLEGAL ANNEXATION AND STATE CONTINUITY* 6 (Martti Koskenniemi ed., 2d ed. 2022).

⁸³ Rouleau-Dick, *supra* note 46, at 358, 363.

⁸⁴ See INETA ZIEMELE, *STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA* 118 (2005).

⁸⁵ Rouleau-Dick, *supra* note 46, at 364.

⁸⁶ See *id.*; ZIEMELE, *supra* note 84.

⁸⁷ See ZIEMELE, *supra* note 84 (“Continuity becomes an issue when States are subject to significant changes[.]”).

be considered the same state, and thus, the presumption of continuity would no longer apply.⁸⁸

Rouleau-Dick further emphasizes that the sameness assessment doctrine assumes the physical dimension of statehood as a necessary factual anchor.⁸⁹ This means that under this framework, continuity presupposes the existence of physical territory.⁹⁰ Consequently, Tuvalu, facing the complete loss of its land, would be unable to invoke the presumption of continuity as a basis for its continued statehood if the sameness assessment is the accepted articulation of the principle.⁹¹ Both doctrinal interpretations of the presumption of continuity—the ratchet effect and the sameness assessment—have robust academic support.⁹² However, scholars disagree on which framework courts actually apply when invoking the presumption of continuity, and in practice, courts and international authorities may implicitly apply differing conceptions on a case-by-case basis.⁹³ This doctrinal uncertainty underscores the need for Tuvalu to examine alternative methods for safeguarding its statehood and sovereignty.

3. Governments In Exile and the Presumption of Continuity

One often cited example of statehood without physical territory in which the presumption of continuity applies is governments in exile.⁹⁴ At face value, they seem to provide a precedent for statehood without physical territory, and possibly evidence of a ratchet effect allowing for their continuation.⁹⁵ For example, during World War II, the French government, after the fall of France

⁸⁸ *See id.*

⁸⁹ Rouleau-Dick, *supra* note 46, at 368.

⁹⁰ *Id.*

⁹¹ *See id.* at 367-68.

⁹² *See id.* Rouleau-Dick points to various sources that support each doctrinal articulation, even if they do not use the terms “ratchet effect” or “sameness assessment.” For the ratchet effect, *see, e.g.*, Willcox, *supra* note 74; YAMAMOTO & ESTEBAN, *supra* note 77; Kittel, *supra* note 77; Burkett, *supra* note 77. For the sameness assessment, *see, e.g.*, CRAWFORD, *supra* note 77, at 667-668; Ziemele, *supra* note 82; MÄLKSOO, *supra* note 82.

⁹³ Rouleau-Dick argues that the ratchet effect was invoked in the formulation of the presumption of continuity by the U.N. High Commissioner for Refugees (“UNHCR”) Expert Panel on Climate Change and Displacement and by the International Law Association Committee on International Law and Sea Level Rise’s report. On the other hand, he suggests that Somalia’s statehood remaining legally intact despite mass internal turmoil and the absence of a central government for over a decade, as well as the Baltic states’ restoration of independence following Soviet occupation, illustrate the sameness doctrine. Rouleau-Dick, *supra* note 46, at 360, 366-68 (*citing* UNHCR, Summary of Deliberations on Climate Change and Displacement (April 2011), *supra* note 71); INTERNATIONAL LAW AND SEA LEVEL RISE: REPORT OF THE INTERNATIONAL LAW ASSOCIATION COMMITTEE ON INTERNATIONAL LAW AND SEA LEVEL RISE 42 (Davor Vidas et al. eds., 2018); CRAWFORD, *supra* note 77, at 721-22; ZIEMELE, *supra* note 84.

⁹⁴ *See* Burkett, *supra* note 77, at 356-57; Jane McAdam, ‘Disappearing States’, *Statelessness and the Boundaries of International Law*, 2010 U. N.S.W. L. RSCH. SERIES 2, 9-10 (2010).

⁹⁵ Rouleau-Dick, *supra* note 46, at 369.

in 1940, operated from London as a government in exile.⁹⁶ Despite its lack of control over French territory, it continued to claim authority over France, and after the liberation of France, it was restored to full possessory sovereignty.⁹⁷

However, governments in exile represent a temporary rather than a permanent lack of physical territory.⁹⁸ They continue to claim territory, despite temporary disconnection from it, negating the idea that “their existence is independent from the existence of the physical indicia of statehood.”⁹⁹ Governments in exile offer an example of a nonpermanent disconnection from their territory, not an example of statehood in the absence of physical territory.¹⁰⁰ Therefore, they do not support the idea of statehood without the expectation of eventual physical territory, as would be the case with climate-impacted islands like Tuvalu, which are facing permanent territorial loss.¹⁰¹

Given that current understandings of statehood require some form of connection with existing physical territory,¹⁰² current international conceptions of statehood cannot account adequately for the territorial loss due to climate change of nations like Tuvalu. While the Pacific Island Forum cite the presumption of continuity as a legal framework for the legitimacy of perpetual statehood for states like Tuvalu,¹⁰³ both the ratchet effect and the sameness conceptions of the presumption of continuity likely require connection with the physical indicia of statehood.¹⁰⁴ Further, governments in exile, such as wartime France, represent a temporary rather than permanent disconnection from physical territory.¹⁰⁵ Under these existing understandings of statehood, Tuvalu and similarly situated nations could not claim statehood in the complete absence of physical territory, suggesting a need to look beyond current definitions of statehood as the basis for the international legitimacy of Tuvalu’s claim of perpetual statehood.

D. *The Lotus Principle*

The classical formulation of the *Lotus* principle holds that any conduct not expressly prohibited by international law is considered permissible.¹⁰⁶ This principle demonstrates a consensual approach to international law, suggesting

⁹⁶ See generally Elias Forneris, *René Cassin and the Invention of Free France, 1940-1941*, 20 FRENCH HIST. 1 (2025) (explaining the operation of the French government as a government in exile during World War II).

⁹⁷ *Id.*

⁹⁸ Rouleau-Dick, *supra* note 46, at 376; MÄLKSOO, *supra* note 82, at 246 (describing these situations as involving “sleeping states”).

⁹⁹ Rouleau-Dick, *supra* note 46, at 376; JENNY GROTE STOUTENBURG, DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW 285 (2015).

¹⁰⁰ STOUTENBURG, *supra* note 99.

¹⁰¹ *See id.*

¹⁰² *See* Montevideo Convention, *supra* note 43, art. 1.

¹⁰³ 2023 Declaration, *supra* note 6, art. 8.

¹⁰⁴ Rouleau-Dick, *supra* note 46, at 376.

¹⁰⁵ *Id.*; STOUTENBURG, *supra* note 99.

¹⁰⁶ An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT’L L. 901, 902 (2015) (citing S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, (Sept. 7)).

that “a state’s freedom to exercise its sovereignty is only limited by the prohibitive rules to which the state in question has consented.”¹⁰⁷ According to this formulation, as long as there is no prohibition, a state is free to act at its discretion without requiring a specific authorization to justify its actions.¹⁰⁸

The *Lotus* principle continues to be frequently invoked by those representing states in international disputes.¹⁰⁹ It is considered a landmark of jurisprudence from the 1900s.¹¹⁰ Taking the *Lotus* principle at face value, as many scholars continue to do, it supports the contention that what is not prohibited by international law is permissible.¹¹¹ Such a formulation would initially seem to offer some hope for Tuvalu and other similarly situated countries facing an unprecedented climate crisis, as it could allow these nations to take innovative and unconventional legal actions to address their existential challenges without explicit legal prohibitions. For instance, as mentioned above, Tuvalu aims to adopt a new version of statehood by becoming a digital state, creating a metaverse replica to govern virtually and retain sovereignty and the rights of its people.¹¹² As discussed, although creating a virtual state in the complete absence of physical territory would likely run afoul of current understandings of statehood,¹¹³ the *Lotus* principle’s emphasis on permissiveness in the absence of prohibitive rules could bolster arguments in favor of recognizing such an unprecedented adaptation.¹¹⁴ By focusing on the absence of clear prohibitions against digital statehood, the principle could make it more likely for international law to evolve in ways that accommodate innovative solutions to existential threats like climate change. However, the below criticism and potential decline of the *Lotus* principle suggest that states such as Tuvalu should not expect to rely upon the principle as a key argument for their solution.

Some critics argue that the *Lotus* principle itself reflects an inaccurate reading of the court’s opinion in *The Case of S.S. Lotus* (“*Lotus case*”).¹¹⁵ There is no clear consensus on the case’s holdings, and various critics have read the decision in dramatically different ways.¹¹⁶ One interpretation challenges the traditional reading of the *Lotus* principle as solely affirming that states may act freely unless prohibited, arguing that this oversimplifies the court’s reasoning.¹¹⁷ Instead, it defends the *Lotus* judgment while rejecting the principle’s common

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT’L L. 71, 71 (2007).

¹¹¹ *See id.* at 72.

¹¹² *See* Yeo, *supra* note 23.

¹¹³ *See* Montevideo Convention, *supra* note 43, art. 1.

¹¹⁴ *See* Handeyside, *supra* note 110, at 72.

¹¹⁵ *See* Hertogen, *supra* note 106, at 903.

¹¹⁶ *See* Handeyside, *supra* note 110, at 72.

¹¹⁷ *See* Hertogen, *supra* note 106, at 917; OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 253 (2005).

interpretation, contending that the court aimed to promote cooperation rather than unchecked state freedom.¹¹⁸ This view suggests that the judgment sought to balance sovereignty with international relationships, advocating for a focus on coexistence and cooperation as key factors in resolving jurisdictional disputes.¹¹⁹

Another interpretation argues that the *Lotus* principle does not flow from the *Lotus* case because of the case's emphasis on the centrality of territory as a fundamental basis for jurisdiction.¹²⁰ This interpretation notes that the case established two principles under which jurisdiction depends upon territoriality. First, "a State cannot exercise [jurisdiction] outside its territory except by a permissive rule derived from international custom or a convention."¹²¹ Second, even in the absence of a specific rule of international law, a state has the power to exercise its jurisdiction within its territory in any matter.¹²² Therefore, although a state is free to act however it chooses within its territory, in order to act outside of its territory, such an action must be affirmatively permitted by international law.¹²³ Given Tuvalu's impending loss of territory, this interpretation poses a significant challenge to its efforts to preserve statehood. If jurisdiction is inherently linked to territoriality, Tuvalu's attempt to function as a sovereign digital state may lack legal foundation under existing international law. Without physical land, it could not assert the territorial jurisdiction that the *Lotus* case reinforces as central to state authority.

Other critics accept the principle as an accurate or plausible interpretation of the *Lotus* case but regard the principle as outdated or retrograde, raising questions about the principle's continued relevance.¹²⁴ In a "world of increasing interdependence," the *Lotus* principle's emphasis on unrestricted state freedom is ill-suited to contemporary global challenges, which increasingly require cooperative legal frameworks.¹²⁵

Critics further point to the ICJ refusal to apply the principle in key relevant decisions as evidence that even if the principle was correct, it is no longer a dominant or guiding rule in international law.¹²⁶ Critics note that the ICJ has rarely invoked the *Lotus* case.¹²⁷ Although the "Court has had plenty of

¹¹⁸ See Hertogen, *supra* note 106, at 917; SPIERMANN, *supra* note 117.

¹¹⁹ See Hertogen, *supra* note 106, at 917.

¹²⁰ See Alvin K. Anil et al., *The Evaluation of Principles Involved in the 'Lotus Case'*, 1 LEGAL LOCK J. 85, 88-89 (2022).

¹²¹ *Id.* at 89 (quoting S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, (Sept. 7)).

¹²² *Id.* at 90.

¹²³ *Id.* at 89-90.

¹²⁴ Hertogen, *supra* note 106, at 903; Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 478, 478-81 (criticizing the Court's reliance on the *Lotus* principle as "anachronistic" and arguing that international law should allow for concepts such as neutrality and toleration, rather than treating everything not expressly prohibited as lawful).

¹²⁵ Hertogen, *supra* note 106, at 920.

¹²⁶ See Handeyside, *supra* note 110, at 73.

¹²⁷ *Id.* at 80-81.

opportunities to interpret” and apply the principle, it has “generally [] chosen not to do so.”¹²⁸ It has only appeared three times in ICJ decisions on the merits, with only one—*Legality of the Threat or Use of Nuclear Weapons* (the “*Nuclear Weapons* case”)—directly referencing it.¹²⁹

The *Nuclear Weapons* case is an advisory opinion examining whether states have the right to threaten or use nuclear weapons under international law. The ICJ quoted the *Lotus* case’s famous language that “restrictions upon the independence of States cannot . . . be presumed.”¹³⁰ However, the Court disposed of this argument by noting that broader principles embedded within bodies of law—in this case, humanitarian law—can serve as a basis for deciding the question.¹³¹ It further suggested that the *Lotus* principle would only apply in the absence of any other principles or rules of law that could be said to restrict a state’s actions.¹³² Yet, by explaining that any “international norms,” which may include international environmental law, human rights law, or obligations to act in “good faith,” can restrict state behavior, the Court left virtually no situations in which there is a likelihood of finding a gap in the law in which anything akin to the *Lotus* principle might operate.¹³³ In explicitly addressing and rejecting the *Lotus* principle, the ICJ signaled that even if the principle was once a viable legal doctrine, it no longer accurately reflects international law or holds any significant place within it.

Even if the *Lotus* principle remains valid and its criticisms are unfounded, it is still unclear whether it would support Tuvalu’s attempt to retain statehood without physical territory. The principle holds that what is not expressly prohibited by international law is permitted.¹³⁴ However, territory remains a core criterion of statehood and a cornerstone of international law.¹³⁵ Accordingly, even under the *Lotus* principle, this fundamental requirement would likely limit Tuvalu’s options. The ICJ’s Advisory Opinion on Kosovo illustrates this limitation: the Court applied *Lotus*-style reasoning to conclude that Kosovo’s unilateral declaration of independence was not unlawful, since international law contained no explicit prohibition.¹³⁶ However, the Court carefully avoided recognizing a positive right to unilateral succession.¹³⁷ Likewise, for Tuvalu, the

¹²⁸ *Id.* at 81.

¹²⁹ *Id.* at 80-81; see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 238-39. (July 8).

¹³⁰ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 238.

¹³¹ See *id.* at 266 (“A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.”); Handeyside, *supra* note 110, at 90.

¹³² Handeyside, *supra* note 110, at 90; see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 239.

¹³³ Handeyside, *supra* note 110, at 90-91; see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 239.

¹³⁴ Hertogen, *supra* note 106.

¹³⁵ See Montevideo Convention, *supra* note 43, art. 1.

¹³⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Reports 403, 436-39 (July 22).

¹³⁷ Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo’s Unilateral*

absence of a prohibition against deterritorialized statehood does not necessarily translate into an affirmative entitlement to preserve statehood without territory, particularly given the fundamental role of territory in defining statehood under international law.¹³⁸

IV. INTERNATIONAL CONVENTIONS THAT COULD PROVIDE A WAY FORWARD

A. *The United Nations Convention on the Law of the Sea (“UNCLOS”)*

Given the fundamentality of territory to statehood,¹³⁹ and the uncertainties surrounding the *Lotus* principle, Tuvalu must consider other ways of maintaining some independence and preserving its existence in the absence of formal statehood. A critical aspect of this effort is the retention of economic rights, even if its land becomes uninhabitable or submerged due to climate change.¹⁴⁰ Tuvalu currently generates most of its national revenue from licensing foreign fishing fleets to access its tuna-rich waters.¹⁴¹ Therefore, recognizing the nation’s maritime boundaries as permanent would provide an economic lifeline for the country.¹⁴² For instance, this revenue could fund Tuvalu’s “digital twin,” which is intended to preserve the Tuvaluan culture and community.¹⁴³

Under UNCLOS, maritime boundaries are determined by baselines drawn from a state’s coastlines.¹⁴⁴ Article 3 allows states to “establish the breadth of [their] territorial sea up to a limit not exceeding 12 nautical miles. . . .”¹⁴⁵ Article 57 provides that a state’s “exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”¹⁴⁶ Except in special cases—such as deltas or other naturally unstable coastlines—the location of a state’s coastline determines its baselines, which in turn define the extent of its territorial and economic maritime boundaries.¹⁴⁷ As sea level rise erodes Tuvalu’s coastlines, and potentially eliminates them altogether, the country loses the legal basis for asserting jurisdiction over its territorial sea and exclusive economic zone.¹⁴⁸ To safeguard these rights, Tuvalu advocates for amendments to UNCLOS to ensure the permanent recognition of

Declaration of Independence, 11 GERMAN L.J. 895, 912 (2010) (“The Court avoided the discussion of secession and self-determination due to its political and contested nature.”).

¹³⁸ See *supra* Section III.B.

¹³⁹ *Id.*

¹⁴⁰ See Needham, *supra* note 2.

¹⁴¹ *Id.*; WORLD BANK, *supra* note 31.

¹⁴² Needham, *supra* note 2.

¹⁴³ Yeo, *supra* note 23.

¹⁴⁴ See Rosemary Rayfuse, *Climate Change and the Law of the Sea*, in INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE 147, 149-50 (Rosemary Rayfuse & Shirley V. Scott eds., 2012).

¹⁴⁵ U.N. Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁴⁶ *Id.* art. 57.

¹⁴⁷ *Id.* art. 7; Rayfuse, *supra* note 144, at 150.

¹⁴⁸ Rayfuse, *supra* note 144, at 150.

maritime boundaries for states experiencing land loss due to climate change.¹⁴⁹ These amendments would provide legal certainty for Tuvalu's maritime zones, even if its physical territory disappears.¹⁵⁰

The legal dilemma posed by sea level rise is whether states may continue to insist upon their existing baselines or whether these lines are “ambulatory, automatically receding landwards as territory is inundated.”¹⁵¹ Scholars disagree on this issue.¹⁵² The 2012 Expert Committee on Baselines argued that coastal baselines are ambulatory as a matter of general international law.¹⁵³ Additionally, many critics suggest that since the permanent fixing of baselines is specifically provided for in two situations, it should be inferred “from the lack of any further reference in the convention to the issue that baselines are not meant to be permanently fixed in other situations.”¹⁵⁴ This interpretation means that island states like Tuvalu could not permanently fix their maritime boundaries.

In contrast, other scholars and Pacific Islands states argue that UNCLOS does not prevent the permanent fixing of baselines.¹⁵⁵ The International Law Commission's Study Group is examining the implications of a sea level rise for international law.¹⁵⁶ Their preliminary findings suggest that “nothing prevents Member States from depositing notifications, in accordance with the Convention, regarding the baselines and outer limits of maritime zones

¹⁴⁹ Needham, *supra* note 2 (noting that Tuvalu is “seek[ing] support from U.N. members for [its] campaign to have its maritime boundaries and statehood recognized as permanent” even if its physical boundaries disappear).

¹⁵⁰ See *id.*; Press Release, United Nations General Assembly, Sea-Level Rise ‘Finally’ on Global Agenda, General Assembly Hears, as World Leaders Urge Action to Turn Tide (Sept. 25, 2024), <https://press.un.org/en/2024/sea2199.doc.htm> (calling for, *inter alia*, a “treaty recognizing unchangeable Statehood despite eroded coastlines[.]”).

¹⁵¹ Tim Stephens, *Climate Change Adaptation in Marine and Coastal Areas in International Law*, in RESEARCH HANDBOOK ON CLIMATE CHANGE ADAPTATION LAW 254, 267 (Jonathan Verschuuren ed., 2022).

¹⁵² Compare, e.g., Int'l Law Comm'n, Rep. on the Work of Its Seventy-Fourth Session, at 92, U.N. Doc. A/78/10 (2023) [hereinafter ILC Report] (“Members of the Study Group broadly supported the preliminary observations of the Co-Chairs in favour of fixed baselines, considering, *inter alia*, that the United Nations Convention on the Law of the Sea did not prohibit the option of fixed baselines.”), with COALTER G. LATHROP ET AL., BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA: REPORTS OF THE INTERNATIONAL LAW ASSOCIATION COMMITTEE ON BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA 53-54 (2019) (explaining how the International Law Association Committee on Baselines under the International Law of the Sea concluded that the law on the normal baseline, as it stands under UNCLOS, is inadequate to address substantial territorial loss and dictates that territorial loss would erode maritime entitlements).

¹⁵³ See Nitya Labh, *The Legal Threat of Climate Change to Small Island States*, 43 SAIS REV. INT'L AFFS. 39, 41 (2023); LATHROP, *supra* note 152, at 53.

¹⁵⁴ Rayfuse, *supra* note 144, at 150.

¹⁵⁵ ILC Report, *supra* note 152; PAC. ISLANDS F., DECLARATION ON PRESERVING MARITIME ZONES IN THE FACE OF CLIMATE CHANGE-RELATED SEA-LEVEL RISE 3 (2021) [hereinafter PACIFIC ISLANDS DECLARATION], <https://forumsec.org/sites/default/files/2024-05/2021%20Declaration-on-Preserving-Maritime-Zones.pdf>.

¹⁵⁶ Stephens, *supra* note 151, at 267-68; see ILC Report, *supra* note 152.

measured from the baselines and, after the negative effects of sea-level rise occur, to stop updating these notifications in order to preserve their entitlements.”¹⁵⁷ Under UNCLOS, a *recognized nautical chart* is the legal document on which the baselines of a coastal state are declared.¹⁵⁸ However, the convention does not specify the chart’s age or whether it needs to be registered or recognized by an international agency.¹⁵⁹ The language of UNCLOS suggests that a state can use any compliant chart in defining its baselines as long as the state officially recognizes it.¹⁶⁰ Therefore, a persuasive argument exists that a state could legally “fix its normal baselines by recognizing a chart showing such baselines.”¹⁶¹

In 2010, the Pacific Islands Forum published a *Framework for a Pacific Oceanscape*, which encouraged Pacific Island states to submit coordinates and charts delineating their maritime zones to the United Nations (“UN”).¹⁶² Although states are not required to submit their charts to the UN, the forum hoped doing so would secure baselines and maritime zones against future challenge or diminution stemming from climate change.¹⁶³ Tuvalu has done so,¹⁶⁴ and it has become a growing trend among Pacific Island states to publicize and declare their baselines.¹⁶⁵

The issue with this approach is that other states might not necessarily recognize the chart chosen by the coastal state, even if submitted by that state to the UN.¹⁶⁶ However, given the global effect of climate change and the great number of states facing impending coastline recession, more states are expected

¹⁵⁷ Stephens, *supra* note 151, at 268.

¹⁵⁸ Clive Schofield & Andi Arsana, *Climate Change and the Limits of Maritime Jurisdiction*, in CLIMATE CHANGE AND THE OCEANS 127, 142 (Robin Warner & Clive Schofield eds., 2012).

¹⁵⁹ *Id.*

¹⁶⁰ See UNCLOS, *supra* note 145, art. 5 (“Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”).

¹⁶¹ Schofield & Arsana, *supra* note 158.

¹⁶² Labh, *supra* note 153, at 45-46; OFF. PAC. OCEAN COMM’R, 2023 FRAMEWORK FOR A PACIFIC OCEANSCAPE RESULTS FRAMEWORK 21 (2016), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://opocblu.epacific.org/download/24/me-of-framework-for-pacific-ocean-scope-fpo/464/final-fpo-results-framework.pdf&ved=2ahUKEwir9OTE2rWPAXUiD1kFHcLnAEsQFnoECBkQAQ&usg=AOvVaw329qFoWcJ_wq_9bZDdYIQi.

¹⁶³ Labh, *supra* note 153, at 45-46.

¹⁶⁴ Needham, *supra* note 2; Tuvalu, MZN (Maritime Zone Notifications) Released on 06/09/2013, U.N. Doc. M.Z.N.98.2013.LOS (Sep. 4, 2013) [hereinafter Tuvalu, MZN], https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn98ef.pdf.

¹⁶⁵ See Needham, *supra* note 2 (“18 members of the Pacific Islands Forum . . . have declared the region’s maritime boundaries are fixed.”).

¹⁶⁶ Schofield & Arsana, *supra* note 158 (“[O]ther States may not necessarily recognize the chart chosen by the coastal State.”).

to advocate for fixed baselines to ensure their entitlements.¹⁶⁷ This could result in the development of customary international law.¹⁶⁸ The specially-affected states doctrine provides that states specially affected by a rule of customary international law may have a disproportionately large effect on its formation.¹⁶⁹ Therefore, although other states would also likely have to accept the practice, consistent and coordinated efforts of Pacific Island nations, who are among the most directly and severely affected, could play a pivotal role in shaping emerging customary international law that supports the recognition of fixed baselines despite climate-induced territorial loss.¹⁷⁰

A more radical solution would involve amending UNCLOS.¹⁷¹ However, this appears unlikely, despite the fact that the possibility of global sea level rise was not foreseen during its drafting.¹⁷² Although UNCLOS contains procedures for amendment, they have never been invoked,¹⁷³ and there is little appetite for convening a Fourth United Nations Conference on the Law of the Sea.¹⁷⁴

¹⁶⁷ See *id.* at 148 (“The advent of sea-level rise has led to a growing desire on the part of threatened coastal States to fix baselines and the limits derived from them.”); ILC Report, *supra* note 152, at 92 (“Member States [have], in ever-increasing numbers, expressed the contrary view, pointing to an interpretation of the Convention in the sense that it did not forbid or exclude the option of fixing baselines.”); PACIFIC ISLANDS DECLARATION, *supra* note 155, at 3 (“Proclaim[ing] that [the] maritime zones,” of Pacific island states “and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.”); *Pacific Island Leaders Agree to Set Permanent Maritime Borders*, THE MARITIME EXEC. (Aug. 12, 2021), <https://maritime-executive.com/article/pacific-island-leaders-agree-to-set-permanent-maritime-borders#:~:text=The%20leaders%20of%20Pacific%20island,a%20consequence%20of%20climate%20change.>

¹⁶⁸ Labh, *supra* note 153, at 49 (“A leading idea is [for Pacific Island states] to develop a new customary international law which recognizes Pacific Island states’ existing maritime entitlements.”).

¹⁶⁹ Shelly Aviv Yeini, *Whose International Law Is It Anyway? The Battle Over the Gatekeepers of Voluntarism*, 45 MICH. J. INT’L L. 1, 3 (2024) [hereinafter Yeini, *Whose International Law*] (“The [specifically affected states doctrine] provides that states specially affected by a rule of customary international law (“CIL”) may have a disproportionate effect on its formation”); see *supra* Section III.A.

¹⁷⁰ See Shelly Aviv Yeini, *The Specially-Affecting States Doctrine*, 122 AM. J. INT’L L. 244, 244 (2018).

¹⁷¹ See Schofield & Arsana, *supra* note 158, at 148.

¹⁷² *Id.*

¹⁷³ *Id.*; Tomas Heidar, President, Int’l Trib. of the Law of the Sea, Remarks at Symposium: 30th Anniversary of the Entry into Force of the United Nations Convention on the Law of the Sea: The ‘Constitution for the Oceans’ in Light of Emerging Challenges (Sep. 21, 2024), https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/Heidar/IFLOS_KMI_Symposium_TH_210924_Final.pdf (“The Convention provides a number of formal amendment procedures . . . , which are subject to stringent requirements, [and] have never been used.”); see UNCLOS, *supra* note 145, arts. 312-16 (UNCLOS amendment procedure).

¹⁷⁴ See Schofield & Arsana, *supra* note 158, at 148 (“[T]here appears to be scant enthusiasm for a Fourth United Nations Conference on the Law of the Sea.”).

Amending UNCLOS would be preferable for Tuvalu and similarly situated states because even if they can theoretically “permanently” fix their boundaries by recognizing a chart with current baselines, it remains less clear that these baselines would be internationally recognized once the state’s territory was entirely submerged.¹⁷⁵ Even now, island states struggle to enforce their sovereignty over their maritime boundaries, and this issue will likely be exacerbated as the states further shrink.¹⁷⁶ Moreover, under UNCLOS, once an island loses its ability to sustain human or economic life, it would be downgraded to the legal status of a rock.¹⁷⁷ Rocks do not qualify for the same maritime boundaries as islands.¹⁷⁸ Once Tuvalu can no longer sustain human or economic life, as delineated by UNCLOS, it would become altogether disqualified as a source of coastal baselines for maritime zones.¹⁷⁹ Further, the international legal principle that “the land dominates the sea” implies that a state’s maritime entitlements are determined by its physical territory.¹⁸⁰ In *Qatar v. Bahrain*, the ICJ explained that “maritime rights derive from the coastal State’s sovereignty over the land.”¹⁸¹ The reliance on land as the foundation for maritime rights will create legal complexities for Tuvalu.¹⁸² Thus, even if Tuvalu can delay the loss of its maritime sovereignty, under existing international law, it likely cannot retain its entitlements once it possesses minimal or no physical territory.

V. IMAGINING A WAY FORWARD

A. *Need for a Treaty-Based Way Forward*

As demonstrated above, there is currently no principle of customary international law that would allow Tuvalu to retain statehood once it is entirely underwater.¹⁸³ Several clear constraints exist on the concept of perpetual statehood, particularly given the centrality of territory under Montevideo and other conceptions of statehood.¹⁸⁴ Therefore, it seems unlikely that current international law would support Tuvalu retaining statehood in this scenario.

¹⁷⁵ See *id.* at 142.

¹⁷⁶ See Labh, *supra* note 153, at 43 (“Pacific Island countries lack the capacity, financially and administratively, to be able to do surveillance [of their maritime boundaries].” (citation omitted)).

¹⁷⁷ *Id.*; see UNCLOS, *supra* note 145, art. 121.

¹⁷⁸ See Labh, *supra* note 153, at 43; see UNCLOS, *supra* note 145, art. 121(3) (“Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”).

¹⁷⁹ See Labh, *supra* note 153, at 43.

¹⁸⁰ *Id.* at 40.

¹⁸¹ Maritime Delamination and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 2001 I.C.J. 40, ¶ 185 (Mar. 16).

¹⁸² Labh, *supra* note 153, at 40.

¹⁸³ See *supra* Sections III, IV.

¹⁸⁴ *Id.*; see Gerrard, *supra* note 42.

Similarly, permanently fixing maritime boundaries, which are generally tied to territory and land features, presents legal and political challenges, as it would require broad international consensus and could conflict with existing understandings of maritime delimitation.¹⁸⁵

Given these limitations, the most viable path forward for Tuvalu is establishing treaty-based solutions, which would create a positive law framework that explicitly recognizes and safeguards the rights of states facing extinction due to climate change. A treaty could codify the rights of disappearing states, ensuring continued international recognition, diplomatic representation, and economic rights despite territorial loss. A treaty-based approach offers the advantage of greater certainty and flexibility, allowing states to negotiate solutions that reflect the evolving realities of climate change while ensuring the stability of international legal principles. Without a binding international agreement, states like Tuvalu risk remaining in legal limbo, experiencing the loss of sovereignty and economic rights, and the erosion of their people's political and cultural identities.

B. *Amending the Definition of Statehood*

One potential way forward for Tuvalu and similarly affected states is to amend the definition of statehood in international law. The current definition, as established by the Montevideo Convention, requires a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.¹⁸⁶ As shown, alternative conceptions of statehood still rely firmly on physical territory.¹⁸⁷ For Tuvalu to retain recognition as a state without physical territory, the definition of statehood would need to be modified to exclude the territorial requirement, at least in cases for specially affected states like Tuvalu, whose disappearance results from climate change. While this could occur through the development of customary international law, a better option may be to create a new treaty that establishes and clarifies the new criteria of statehood.

Altering the definition of statehood would present some ambiguous problems, including questions of precedent, recognition, and the broader implications for international law. Eliminating the territorial requirement could set a precedent for non-territorial entities, such as secessionist movements, to claim statehood, raising concerns about legal stability.¹⁸⁸ However, this could be mitigated if the

¹⁸⁵ See Needham, *supra* note 2; Schofield & Arsana, *supra* note 158, at 142 (noting potential political challenges); Labh, *supra* note 153, at 43 (“Without clear legal protections for these EEZs in light of climate change, islands cannot rely on international law to safeguard their sovereignty against encroachments in the future.”).

¹⁸⁶ Montevideo Convention, *supra* note 43, art. 1.

¹⁸⁷ See Knop, *supra* note 49, at 97; Rouleau-Dick, *supra* note 46, at 366-68; see *supra* Section III.

¹⁸⁸ See generally THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 90-92 (1999) (discussing non-recognition of entities such as Abkhazia, Chechnya, and South Ossetia); JAMES KER-LINDSAY, THE FOREIGN POLICY OF COUNTER SECESSION: PREVENTING THE RECOGNITION OF CONTESTED STATES 39-59 (2012) (examining cases like Northern Cyprus and Kosovo).

treaty specified that exceptions from the traditional criteria of statehood apply only in specific circumstances, like for specially affected island states such as Tuvalu, which face complete territorial disappearance. However, in addition to the basic criteria, many believe there is an additional, *de facto* criterion to statehood: recognition by others.¹⁸⁹ If enough states or key states refuse to acknowledge a non-territorial Tuvalu, its global legitimacy and statehood could be weakened.

Finally, modifying the definition of statehood to accommodate climate-affected states challenges fundamental principles of sovereignty and jurisdiction. Without territory, issues arise regarding law enforcement, jurisdiction over citizens, and effective governance. While digital governance and diaspora-based political structures may offer partial solutions, their viability remains uncertain within current international law. Thus, while amending the definition of statehood could help Tuvalu retain recognition, it introduces complex legal and political dilemmas, such as where does one go to amend such a definition, which would require extensive international consensus, legal reinterpretation, and long-term diplomatic negotiations to overcome entrenched norms and resistance from wary states.

C. *Construction of an Alternative Form of Sovereignty*

An alternative approach to preserving Tuvalu's legal and political identity is the construction of a new form of sovereignty specifically for specially affected states—those facing total disappearance due to sea level rise. Although this form would not grant full statehood in the traditional sense, it could serve as a next-best option that preserves key elements of autonomy, identity, and self-governance. Sovereignty and statehood share common features, such as the ability to govern people and engage in international relations, but they are not interchangeable.¹⁹⁰ Statehood grants access to certain legal rights that sovereignty alone may not, including full participation in international institutions, treaty-making powers, and the legal protections afforded to recognized states.¹⁹¹ Nevertheless, a specially crafted legal status grounded in sovereignty could enable Tuvalu to maintain a distinct international identity, preserve governance structures, and retain certain rights, even in the absence of physical territory. Designing such a status would require innovation in international law, but it may offer a pragmatic and politically feasible pathway for climate-threatened nations to retain their identities, dignity, and decision-making abilities.

One option would be to construct for Tuvalu a form of sovereignty similar to that of Indigenous groups in the United States.¹⁹² In the U.S., federally

¹⁸⁹ See, e.g., Vidmar, *supra* note 45, at 103-04, 107.

¹⁹⁰ See Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 753 (1997) (uncoupling "statehood" from "sovereignty").

¹⁹¹ See GÉZIM VISOKA, *THE DERECOGNITION OF STATES* 214 (2024) (Describing statehood as "the club of sovereign nations with equal rights, opportunities, and privileges.").

¹⁹² The situation of Indigenous groups in the U.S. and elsewhere differs from Tuvalu's, as it arises from a colonialist framework in which Indigenous peoples were dispossessed of their

recognized tribes possess a form of “domestic dependent” sovereignty, which allows them to govern their own affairs, maintain distinct political identities, and exercise jurisdiction over their lands and people, while still existing within the broader framework of the U.S. legal and political system.¹⁹³ These tribal nations have authority over internal matters such as education, law enforcement, and resource management, but ultimately their power is largely subordinated to that of the U.S. federal government.¹⁹⁴ If Tuvalu were granted a defined parcel of land—either by a single state or through a multinational agreement—it could adopt a similar model of land-based sovereignty. While this would not constitute full independence or statehood under current international law, it would allow Tuvalu to preserve its governance structures and cultural practices within a new host state’s legal system. Like tribal nations, Tuvalu could retain certain internal self-governance rights while coordinating with the host state or states for international representation and certain external affairs.¹⁹⁵

This model would not radically redefine legal norms but would still require unprecedented cooperation and a willingness by host states to cede some jurisdiction.¹⁹⁶ Convincing one or more states to offer territory for resettlement and autonomous governance is unlikely. The diffused and long-term nature of responsibility for climate change weakens any single state’s perceived obligation to act, making it improbable that one country—or even a coalition—would shoulder the full political and economic burden of ceding land to a climate-displaced nation.¹⁹⁷

In light of these challenges, another possibility would be to grant Tuvalu a form of sovereignty similar to the recognition afforded to the Romani people in international relations. While the Romani people do not have a formal state, they are recognized as a distinct community with cultural, political, and economic rights under international law.¹⁹⁸ The Romani are the largest ethnic minority in

land and sovereignty. First Nations’ authority is rooted in historical occupation, whereas Tuvalu would require allocation of land and establishment of sub-sovereignty. The key similarity is the outcome: a form of limited sovereignty within a larger political framework.

¹⁹³ See Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT’L L.J. 155, 167-68 (2006); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (“[Indigenous peoples] may more correctly perhaps be denominated domestic dependent nations. . . . Their relations to the United States resemble that of a ward to his guardian.”).

¹⁹⁴ See Lenzerini, *supra* note 193, at 168-69.

¹⁹⁵ *Cf. id.*

¹⁹⁶ The *Australia-Tuvalu Falepili Union Treaty* illustrates state willingness to adapt to climate-induced displacement, providing a concrete example of how a host state can support Tuvalu’s continued governance and identity while accommodating its population. See *supra* note 37 and accompanying text.

¹⁹⁷ See generally William Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105 AM. ECON. REV. 1339 (2015) (analyzing how the global nature of climate change and the free-rider problem reduce the likelihood that individual states or coalitions will take costly action).

¹⁹⁸ Framework Convention for the Protection of National Minorities art. 5, Jan. 2, 1998, C.E.T.S. No. 157 (establishing principles for the protection of national minorities, including the Roma, and their cultural, political, and economic rights).

Europe and possess a long-standing, distinct cultural and historical identity.¹⁹⁹ Having endured centuries of persecution—including slavery, forced migration, and genocide during the Holocaust²⁰⁰—their cultural preservation has been prioritized in certain international frameworks, particularly through the Council of Europe and the United Nations.²⁰¹

While Tuvalu's displacement stems from environmental catastrophe rather than systemic persecution, there may still be a justice-based argument that the international community's failure to mitigate climate change creates a comparable moral imperative to protect Tuvalu's national continuity.²⁰² Like the Romani, Tuvalu could retain international legal recognition as a non-territorial nation with specific rights, including political representation, cultural preservation, and economic management of resources such as its maritime zones, which are vital for its survival.

Creating a new legal status of non-territorial sovereignty would present unique practical challenges. It would require broad international agreement and would likely face resistance from states wary of setting precedents that could support secessionist movements or other sovereignty claims. Tuvalu is not alone in its predicament; other island nations face the threat of territorial extinction due to climate change.²⁰³ As a result, granting such a status to Tuvalu could trigger similar demands from other vulnerable states, making widespread implementation politically and logistically infeasible. In addition, questions of governance—especially the enforcement of laws and jurisdiction—would need to be addressed. Nonetheless, this model offers an alternative path that avoids the politically fraught issue of land transfer while still allowing for national continuity and global engagement.

The Australia-Tuvalu "Falepili Union" Treaty provides a practical precedent for this kind of innovative sovereignty.²⁰⁴ By allowing Tuvaluans to migrate to Australia while Tuvalu retains its legal statehood and maritime rights, the treaty demonstrates that host states can accommodate displaced populations without

¹⁹⁹ A.K.M. Ahsan Ullah, Muhammad Azizuddin, & Jannatul Ferdous, *The Roma Population: Migration, Settlement, and Resilience*, 13 SOC. SCI. 476, 476 (2024).

²⁰⁰ See generally *id.* (describing history of the Roma population in Europe); *Strangers in Their Own Land: Romani Survivors in Europe 1945*, NAT'L WORLD WAR II MUSEUM (Sept. 20, 2021), <https://www.nationalww2museum.org/war/articles/romani-holocaust-survivors-1945> (Post-World War II experience); Ved Nanda, *The Plight of the Roma: The Almost-Forgotten Ethnic Group*, 21 WASH. U. GLOB. STUD. L. REV. 57 (2022) (surveying history of the Roma People from initial migration to Europe to post-World War II).

²⁰¹ See Nanda, *supra* note 200, at 66-68.

²⁰² Cf. *id.* at 59-64 (discussing plight of Romani people leading to current legal status).

²⁰³ Tuvalu, Kiribati, the Maldives, and the Marshall Islands are four states most at risk of becoming completely submerged by sea level rise soonest. ALEJANDRA TORRES CAMPRUBI, *STATEHOOD UNDER WATER: CHALLENGES OF SEA-LEVEL RISE TO THE CONTINUITY OF PACIFIC ISLAND STATES* 103 (2016).

²⁰⁴ See Green & Guilfoyle, *supra* note 37, at 684 (noting the "groundbreaking" nature of the treaty in terms of its innovative treatment of state continuity and climate resettlement); Falepini Union Treaty, *supra* note 37.

requiring full territorial continuity.²⁰⁵ While Tuvalu's situation differs from that of the Romani—being driven by environmental rather than historical persecution—the treaty suggests that international recognition of a non-territorial or partially territorial sovereignty is feasible, at least as a starting point for broader experimentation in climate-adaptive legal frameworks.²⁰⁶

Building on this precedent, Tuvalu could pursue this form of transnational recognition by leveraging international institutions and human rights frameworks to formalize its identity as a non-territorial nation. Practically, this might begin with multilateral engagement, such as a resolution at the UN or a regional forum, to affirm Tuvalu's continued legal and political identity even without territory. A dedicated treaty, supported by a coalition of sympathetic states, could codify Tuvalu's rights and obligations as a non-territorial sovereign entity. Alternatively, Tuvalu could build recognition incrementally through customary international law by establishing consistent practice and securing recognition from other states. Though slower, this approach mirrors how populations like the Romani people gained international standing through sustained advocacy, legal innovation, and the moral authority of historical injustice.²⁰⁷ Given Tuvalu's vulnerability to climate change and its international advocacy on environmental issues, it is uniquely positioned to lead the development of new norms for non-territorial sovereignty.

D. Updating UNCLOS

An alternative way forward, and possibly a more feasible solution, is to amend or supplement UNCLOS. As demonstrated above, UNCLOS, in its current form, does not adequately account for the unprecedented challenges that climate change poses to small island states.²⁰⁸ While island nations like Tuvalu have attempted to fix their baselines by submitting coordinates and charts to the UN, and while some scholars argue UNCLOS may permit such practices, these efforts remain vulnerable to international non-recognition.²⁰⁹ In short, the

²⁰⁵ See generally Falepini Union Treaty, *supra* note 37, art. 1(b) (explaining that the purpose of treaty is to “provide the citizens of Tuvalu with a special human mobility pathway to access Australia underpinned by a shared understanding and commitment to ensuring human mobility with dignity . . .”); *id.* art. 2(2)(b) (recognizing that “the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise . . .”); *id.* art. 3(1)(a)-(b) (“Australia shall arrange for a special human mobility pathway for citizens of Tuvalu to access Australia” to “live, study and work in Australia” and “access Australian education, health, and key income and family support on arrival.”); Green & Guilfoyle, *supra* note 37, at 694 (noting the treaty’s “open-ended commitment to Tuvalu’s existential resilience represents the first publicly binding rejection by any State of the traditional view that inhabitable land is necessary for State continuity.”).

²⁰⁶ Falepini Union Treaty, *supra* note 37.

²⁰⁷ See generally Nanda, *supra* note 200 (discussing role of historical injustice in contemporary human rights advocacy before the UN in support of the Romani people).

²⁰⁸ See *supra* Section IV.

²⁰⁹ See Needham, *supra* note 2 (detailing Tuvalu’s diplomatic efforts); Tuvalu, MZN, *supra* note 164; Schofield & Arsana, *supra* note 131, at 142.

existing treaty framework is ill-equipped to protect the long-term maritime entitlements of states whose territory becomes uninhabitable or disappears entirely.

Given these limitations, one alternative—and arguably more robust—approach would be to amend UNCLOS to expressly permit specially affected states to permanently fix their maritime boundaries. Such an amendment would provide legal certainty and formal international recognition of maritime zones, even if a state’s physical landmass is submerged. The 2012 Expert Committee on Baselines under the International Law of the Sea concluded that UNCLOS, as it stands, is insufficient to address substantial territorial loss and does not clearly authorize fixing normal baselines.²¹⁰ It suggested the need for an update to the treaty in light of rising sea levels and emerging threats to low-lying coastal and island states.²¹¹

While this approach may be less desirable from Tuvalu’s perspective—since it could still entail the loss of formal statehood and sovereignty—it would nonetheless offer significant benefits. Chief among these is economic continuity. Fixing their maritime boundaries would allow Tuvalu to continue receiving profits from fishing licenses, its largest form of revenue.²¹² This would provide Tuvalu with the financial resources necessary to support its displaced population, preserve its cultural heritage, and sustain its digital initiatives aimed at maintaining national identity.²¹³ In effect, a fixed maritime zone could serve as the legal and economic scaffold for a post-territorial Tuvalu, maintaining a national identity even in physical dispersal.²¹⁴

Amending UNCLOS would require considerable international coordination and political will. Its amendment procedures have never been used, and as noted, there is “there appears to be scant enthusiasm” for renegotiation.²¹⁵ Scholars like Schofield and Arsana suggest that a more feasible alternative might be the creation of a supplementary agreement—modeled after the 1995 Fish Stocks Agreement²¹⁶—which could allow specially affected states to fix their baselines

²¹⁰ COMM. ON BASELINES UNDER THE INT’L L. OF THE SEA, SOFIA REP. (2012), *reprinted in* COMM. ON BASELINES UNDER THE INT’L L. OF THE SEA, *reprinted in* REPS. OF THE INT’L L. ASS’N COMM. ON BASELINES UNDER THE INT’L L. OF THE SEA 58 (2018) (“The Committee concludes that the normal baseline is ambulatory, moving . . . landward to reflect changes caused by erosion and sea level rise. Under extreme circumstances [erosion] could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.”)

²¹¹ *Id.*

²¹² Needham, *supra* note 2; *Tuvalu: Pacific Islands Regional Oceanscape Program – Second Phase for Economic Resilience*, *supra* note 31 (noting how “fishing and fishing licenses provided 53.9 percent of national revenue during 2015-2018”).

²¹³ See Yeo, *supra* note 23; Wong, *supra* note 25.

²¹⁴ See Needham, *supra* note 2 (quoting Tuvalu Deputy Prime Minister Panapasi Nelesone as saying: “[i]f the international community were to recognize Tuvalu’s maritime boundaries as permanent, it would provide an economic lifeline”).

²¹⁵ Schofield & Arsana, *supra* note 158, at 148.

²¹⁶ The 1995 Fish Stocks Agreement is a supplementary treaty to UNCLOS that implements and elaborates its provisions on the conservation and management of straddling

without amending the core treaty text.²¹⁷ Moreover, while a UNCLOS amendment requires a supermajority and involves a complex process, a supplemental agreement offers a more flexible alternative, as it only needs support from willing states and can move forward even if others opt out.²¹⁸

In the meantime, Tuvalu and other low-lying states may need to pursue a multi-pronged strategy. This could include regional or multilateral agreements affirming fixed baselines among a coalition of vulnerable nations, as well as diplomatic engagement aimed at shaping the development of customary international law. Under the specially affected states doctrine, those states most directly impacted by sea level rise could exert disproportionate influence in evolving a legal norm that affirms fixed maritime entitlements.²¹⁹ If consistent state practice and *opinio juris* emerge, such a norm could eventually be recognized even without formal treaty amendment or supplementation.²²⁰

Ultimately, while the legal obstacles are significant, reforming UNCLOS offers a promising, and arguably necessary, path for protecting Tuvalu's economic lifeline and international legal identity in the face of the existential climate threat. While the aforementioned efforts to preserve more than just economic rights are worthwhile, Tuvalu and other similarly situated states must, at the very least, secure the preservation of their economic rights. This is an essential step that could pave the way for more comprehensive action in the future. Reforming UNCLOS offers a practical strategy that acknowledges the inadequacies of current law while working within international legal structures to create a future for disappearing states.

VI. CONCLUSION

The looming disappearance of Tuvalu presents a profound challenge to traditional notions of statehood, sovereignty, and international law. As rising sea levels threaten to submerge the nation, Tuvalu's legal and political status remains uncertain, highlighting the urgent need for innovative solutions. This Article examined existing legal definitions of statehood, highlighting the centrality of territory to statehood and explaining how Tuvalu is unlikely to retain statehood once it no longer possesses physical territory. The Article then explored the possibility of fixing maritime boundaries. It noted the ambiguity of this issue because even if states can theoretically "permanently" fix boundaries,

and highly migratory fish stocks. *See generally* Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3.

²¹⁷ Schofield & Arsana, *supra* note 158, at 149 (reasoning that "a supplementary agreement to" UNCLOS like the Fish Stocks Agreement "could be used as a model in approaching the fixing of baselines and/or maritime limits.").

²¹⁸ *See* UNCLOS, *supra* note 145, arts. 312-14 (describing amendment proposal procedures); *id.* art. 316(1) (requiring "accession by two thirds of the States Parties" for most amendments to take effect).

²¹⁹ Yeini, *Whose International Law*, *supra* note 169, at 3.

²²⁰ Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 264 (2016); *see supra* Section III.A.

it is not clear that such baselines would be internationally recognized once the state's territory was entirely underwater. This Article then explored several potential paths forward, including redefining statehood, establishing an alternative form of sovereignty, and updating UNCLOS to secure maritime rights. Each option presents opportunities and significant legal and political hurdles, requiring unprecedented international cooperation and legal adaptation.

Ultimately, the fate of Tuvalu will serve as a test case for how the global community responds to climate-induced existential threats. Without proactive legal and diplomatic efforts, Tuvalu and similarly affected states risk territorial loss and erosion of their cultural, economic, and political identities. The international legal framework must evolve to address these emerging challenges, ensuring that vulnerable states are not left in legal limbo. By adapting and assisting disappearing nations in innovative ways, the global community can affirm its commitment to justice, equity, and the protection of those affected by the climate crisis.