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The Atlantis Problem: Statehood Continuity and Climate-Induced Territorial Loss

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Abstract

The mythic nation of "Atlantis" has long captured humanity's collective imagination – a civilisation reclaimed by the indifferent march of the sea.[2] As observed by Abhimanyu George Jain, several "low-lying, small island states" such as the Maldives, Tuvalu and Nauru face a similar threat, as a consequence of man-made climate change.[3] The adversities faced by such states highlight a considerable injustice, especially when you consider that such states have made relatively minor contributions to the climate crisis.[4] In the next 50-100 years, many such states could become entirely submerged.[5] Drawing from Jain's influential work, this article will refer to the at-risk small island states as 'Atlantis States'.

This article examines the implications of such territorial loss in international law, with reference to the concept of statehood and maritime zones. It will also refer to existing treaty and customary law, including the Montevideo Convention. Furthermore, it argues that international law must, as a moral imperative, continue to recognise the existence of submerged states.

Keywords: Atlantis states, climate crisis, international law, statehood, territorial loss

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[2] Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50(1) Stanford Journal of International Law 1, at 3.
[3] ibid
[4] Abhimanyu George Jain (n2).
[5] Abhimanyu George Jain (n2).

Introduction

As Amanda Byers identified, the climate crisis was largely triggered by the industrial activities of 'former European empires'.[6] Furthermore, profits extracted from imperial possessions aided Europe's industrial boom.[7] As stated above, small island states have made negligible contributions to global carbon emissions – yet, such states are among the most vulnerable to the changing climate. For many at-risk states,[8] the loss of statehood in this context would represent a final colonial transfer of power. Thus, it is the basic responsibility of the prevailing international order to safeguard and protect such vulnerable states.

Statehood & Continuity

As noted by Jan Klabbers, "states are the main subjects of international law and are generally considered… sovereign".[9] Thus, for the Atlantis states, a loss of statehood would signify the loss of legal personality and control, as well as territory. When considering statehood, the Montevideo Convention provides a 'starting point'.[10]

Under Article 1 of the Convention, there are four requirements for the existence of a state in international law – (a) 'permanent population', (b) 'defined territory', (c) 'government', and (d) 'capacity to enter legal relations'.[11] In the event of a submergence, the Atlantis states would cease to have a 'defined territory'. As academic commentary has highlighted, the disappearance of land-based territory could have adverse implications for claims to maritime territory.[12] As set out in the United Nations Convention on the Law of the Sea, states are entitled to 'establish a breadth' of their

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[6] Amanda Byer, 'Climate Law from the Interstices: Caribbean SIDS and the Spatial Dimensions of TWAIL' (2023) TWAILR: Reflections 52 < https://twailr.com/climate-law-from-the-interstices-caribbean-sids-and-the-spatial-dimensions-of-twail/> accessed 29, July 2026.
[7] ibid
[8] Amanda Byer (n6).
[9] Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2024) 73.
[10] ibid
[11] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) LNTS 165, art 1.
[12] Ydhan Naidoo, 'The Maintenance of Territorial Sovereignty After Submergence' (2025) OUULJ 14 <https://www.law.ox.ac.uk/sites/default/files/inline-files/7.%20The%20Maintenance%20of%20Territorial%20Sovereignty%20After%20Submergence%20-%20Ydhan%20Naidoo.pdf> accessed 29, July 2026.

territorial sea, 'up to a limit not exceeding 12 nautical miles'.[13] As the convention further provides, the 'normal baseline' is the 'low-water line along the coast'. Thus, as Naidoo identified, the disappearance of these baselines could theoretically impair a State's claim to its maritime territory.

Atlantis States would lose their permanent populations, the displacement of which would flow from the loss of habitable territory. Furthermore, the loss of a permanent population could occur because of 'chronic processes' attributed to the climate-crisis, that diminish or destroy the ability of land to provide essential resources needed for the maintenance of a permanent population.[14] There are therefore two relevant scenarios where climate change related loss can threaten statehood – (1) where a State is completely submerged and (2) where territory remains but has become uninhabitable. The retention of physical baselines in scenario (2) may support the retention of maritime territory it does not, however, remove the wider threat to Statehood. Once a state exists, there is a strong presumption that it continues to exist – the "extinction" of any State is the "exception in international law".[15]

Importantly, the International Court of Justice has intervened on this matter, specifically in relation to its climate change advisory opinion. The Court recognised the possibility that the Atlantis states would benefit from a strong presumption of continuity and considered that "once a state is established, the disappearance of one of its constituent elements would not necessarily entail the loss of… statehood".[16] The court made reference to the argument that a strong presumption of continuity should apply in this context, however, it fell short of explicitly endorsing this position.[17] Judge Tomka criticised the stance as 'oracular' – since the position would likely raise more questions than answers.[18] Notably, however premature the Court's intervention may have been, there is still the possibility that a new rule will "gather momentum in the

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[13] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 3.
[14] Maxine Burkett, 'The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era' (2011) Climate Law 2, at 347.
[15] Inata Ziemele, 'States, Extinction of' (2007) OPIL <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1111#law-9780199231690-e1111-div1-2>accessed 10 May 2026.
[16] *Obligations of States in Respect of Climate Change (Advisory Opinion)* (ICJ, 23 July 2025) 363.
[17] ibid
[18] *Obligations of States in Respect of Climate Change (Advisory Opinion)* (ICJ, 23 July 2025) (Declaration of Judge Tomka) paras 9-11.

years ahead".[19] As the next section will set out, this momentum could potentially crystallise into a new rule of Customary International Law.

Customary International Law

As provided by Article 38(1)(b) of the ICJ, a customary norm exists where there is an "international custom, as evidence of a general practice accepted as law".[20] There are two constituent elements to consider: State Practice and *Opinio Juris*.[21] This subsection will examine the potential emergence of both elements.

As the ICJ considered in its judgement of the *North Sea Continental Shelf Cases*, a new customary rule may crystallise within a short time. For example, if there has been "widespread and representative participation" that includes states that have been "specifically affected".[22] Small Island Developing States (SIDS) can clearly be regarded as being specifically affected, as the threat of submergence (or loss of habitable territory) represents a unique and severe threat against their continued existence.

(i) State Practice

As Klabbers observed, there is no fixed threshold that must be reached for the existence of a general practice.[23] Indeed, as the ICJ affirmed in the *Asylum* case, there is the possibility of a regional customary norm.[24] This may bear particular relevance where a purported customary norm relates to a precise issue – rules relating to maritime delimitation may not affect landlocked states and allowances can be made accordingly.[25] In this context, as Klabbers notes, custom may understandably be formed "without too many instances of practice".[26] As the International Law Commission identified, "practice" can take various forms, both physical and verbal.[27]

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[19] ibid
[20] Statute of The International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38.
[21] *North Sea Continental Shelf Cases* [1969] ILC Reps 3, at para 77.
[22] ibid, para 73.
[23] Klabbers (n9) 28.
[24] *Asylum (Columbia/Peru)* [1950] ICJ Rep 266, at 276-7.
[25] *North Sea Continental Shelf Cases* [1969] ILC Reps 3, at para 73.
[26] Klabbers (n9) 28.
[27] International Law Commission, 'Draft conclusions on identification of customary international law' (2018) UN Doc A/73/10, conclusion 6

This includes “diplomatic acts and correspondence” and conduct related to the resolutions of an international organisation or to a treaty.[28]

The circumstances faced by the Atlantis states are a matter of ‘juridical novelty’, which are unprecedented in the development of international law.[29] With respect to a potential customary norm, such states can undoubtedly be regarded as specifically affected. Furthermore, an increasing degree of alignment can be identified in the conduct of the Atlantis states. This alignment is clearly reflected in the Pacific Islands Forum’s “Declaration on Preserving Maritime Zones…”, which articulates the position of several island nations. As stated in the declaration (which the Forum adopted unanimously, including Australia, Tuvalu and Nauru), “maritime zones… shall continue to apply, without reduction, notwithstanding any physical changes connected to climate-related sea level rise”.[30] This position was endorsed explicitly by The Organisation of African, Caribbean and Pacific States (which has 79 members).[31]

The Australia-Tuvalu Falepili Union treaty provides further evidence of this increasing alignment. For instance, under Article 2 “the statehood and sovereignty of Tuvalu” will persist, regardless of any potential climate-related sea level rise.[32] The significance of this agreement should not be understated – as noted by Douglas Guilfoyle and Alex Green, it is the first bilateral international agreement to reject the notion that ‘inhabitable land is necessary for State continuity’.[33] While initial practice appeared to be regionally concentrated, the endorsement of trans-continental organisations like the OACPS strengthens the notion of an emerging global norm, recognising the continued existence of Atlantis States.[34]

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[28] ibid
[29] Cait Storr, ‘Islands and the South: Framing the Relationship between International Law and Environmental Crisis’ (2016) 27 EJIL 2, 519-540, at 523.
[30] Pacific Islands Forum, ‘Declaration on Preserving Maritime Zones in the Face of Climate Change-Relates Sea-Level Rise’ (Adopted at the 51sr Pacific Islands Forum, 6 August 2021).
[31] Pacific Islands Forum, ‘10th OACPS: Samoa PM Mata’afa says OACPS can be unstoppable’ (17 December 2022) <https://forumsec.org/publications/10th-oacps-samoa-pm-mataafa-says-oacps-can-be-unstoppable>accessed 24 May 2026.
[32] Australia-Tuvalu Falepili Union Treaty (signed 9 November 2023, entered into force 28 August 2024), art 2.
[33] Douglas Guilfoyle and Alex Green, ‘The Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change … and China?’ (EJIL: Talk!, 28 November 2023) <https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>accessed 24 May 2026.
[34] Pacific Islands Forum (n31).

These examples reflect a broad trend in favour of recognising statehood continuity in this context. There is strong evidence of an emerging practice to the effect that (1) climate-related sea level rise will not reduce maritime zones and (2) more broadly, the statehood and sovereignty of Atlantis states will persist, notwithstanding such sea level rise.

(ii) *Opinio Juris*

In the *North Sea Continental Shelf* Cases, the ICJ found that the general practice must be coupled with 'evidence of a belief that this practice is rendered obligatory by…law'.[35] Thus, a customary norm can be distinguished from a practice informed by 'courtesy, convenience or tradition'.[36]

As concluded by the International Law Commission, the resolutions of international organisations do not, in isolation, create customary norms.[37] However, such resolutions 'may provide evidence for… the existence… of a rule of customary international law'.[38] Furthermore, 'conduct in connection with resolutions' can evidence *opinio juris*.[39] The Pacific Islands Forum Declaration falls within this category. The declaration does not simply reflect a desire for existing maritime zones to persist; it claims a legal basis – stating that the position is "supported by… the convention and the legal principles underpinning it".[40] The member states that unanimously adopted the declaration, were making a legal claim. Thus, their conduct in supporting the resolution provides evidence of *opinio juris*.

Furthermore, treaty provisions can provide evidence of *opinio juris*.[41] As discussed above, the Australia-Tuvalu Falepili Union Treaty provides, in clear language, that the statehood and sovereignty of Tuvalu will persist, even in the event of total submergence.[42] It signifies Australia's continued recognition of the state of Tuvalu.

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[35] *North Sea Continental Shelf Cases* (n14), para 77.
[36] ibid
[37] ILC (n21) 12.
[38] ILC (n21) 12.
[39] ILC (n21) 10.
[40] PIF (n30).
[41] ILC (n21) 10.
[42] Australia-Tuvalu Treaty (n32).

The treaty provides clear evidence of Australia's acceptance of this position (as a matter of law).

This developing *opinio juris* was supported by the ICJ, in its advisory opinion.[43] The decisions of the ICJ provide a 'subsidiary means' for determining the "existence and content" of customary norms.[44] The ICJ's position, that territorial loss does not necessitate the loss of statehood carries weight in this context.[45] While Judge Tomka was sceptical of this position, his opinion ultimately accepts the possibility that a new customary norm may crystallise.[46] Thus, as Guilfoyle and Green observed, even sceptics must "concede that the tide is changing".[47] There is increasing evidence to support the 'existential resilience' of the Atlantis states.[48]

Conclusion

There can be little doubt that the Atlantis states face a position of extreme peril – particularly resulting from the prospect of submergence. The treatment of such states, in the development of international law, must recognise the vulnerable nature of their predicament and their limited roles in the creation of the climate crisis.

Under the Montevideo criteria, a prospective state must have a defined territory. However, once a state has been established there is a strong presumption of continuity. As the ICJ has recognised, this presumption could extend to the Atlantis states. There is considerable evidence to support the existence of an emerging rule of customary international law, which would recognise the continued statehood and sovereignty of the Atlantis states.

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[43] ICJ (n16).
[44] ILC (n21), conclusion 13.
[45] ICJ (n16).
[46] ICJ (n16).
[47] Guilfoyle and Green (n33).
[48] ibid