ABHANDLUNGEN / ARTICLES

On the Continuity of Submerged Island States

By *Theodor Schilling*[*]

Abstract: An island State whose territory has become submerged has thereby, according to an austere view, become extinguished. This may well lead to its people becoming stateless. To refute the austere view and thus to avoid this result requires to argue for the submerged State's continuity. An ILC Study Group has developed a number of possible arguments therefor. The most persuasive of them is the "Maintenance of international legal personality without a territory". However, the reasoning the Group has provided is rather elliptic. An intriguing approach to buttressing its argument is to look for a legal theory which defines the State with reference not to its territory but rather to its law and its population. Such a theory has been developed by Felix Somló. Once adapted to a situation in which the government and (parts of) the population of a submerged State function and live on the territory, and with the consent, of a host State, it allows to consider the entity constituted in this way as a peripheral case of the "State". While international law is free to recognise such an entity as a State, it ought to do so for a number of reasons, first among them the normative one to shield the submerged State's people from statelessness.

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A. Introduction

The scenario evoked by the title of this contribution has not yet been fully realised.[1] No island State has become uninhabitable, much less wholly submerged, due to climate change.

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1 Cases in which parts of a State, especially low-lying islands, are threatened to, or have, become submerged may lead to the displacement of the impacted part of the State's population. Those cases are outside the purview of the present article. As *Jenny Grote Stoutenburg*, When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, pp. 57-87, 66, notes it is "[..] unlikely that other States would declare the island State nonexistent as long as it still had a government and some caretakers remained on the island."

This should not be a reason for complacence. In all likelihood, one or the other of the low-lying island States will be under water sometime soon, the Marshal Islands, Kiribati, Tuvalu and the Maldives being prime candidates. While there are efforts to hold back the water, at least to delay the onset of uninhabitability, they will likely not be enough to avoid that result indefinitely. Thus arises the question, much discussed recently, of the position in law, of an island State victim of such developments (hereinafter, for brevity's sake, submerged State) which prima facie endanger its very existence.[2] A Study Group of the International Law Commission (the Study Group) has considered "Possible alternatives for the future concerning statehood" of submerged States: "Presumption as to the continuity of the State concerned", "Maintenance of international legal personality without a territory", and "Use of some [other] modalities."[3] These so-called alternatives do not appear to be mutually exclusive. Rather, the second alternative must be taken to include some of the modalities looked at as a third possible alternative.

This article will focus on the factual and legal requirements a submerged State's continued existence must meet to be justifiably called a "State" and treated as such under international law. It will try to identify an apposite theoretical concept of "State" and to align it with the corresponding international law concept. But first, it will shortly discuss the reasons a continuity of a submerged State is normatively desirable.

B. Normative Reasons for the Continuity of a Submerged State

The State, although the primary person of international law, is not an end in itself. Rather, it ought to be a means to further the human good. Ideally, it is an association "to secure the whole ensemble of material and other conditions […] that tend to favour, facilitate and foster the realization by each individual of his or her individual development".[4] It follows that, normatively speaking, the continuity of a submerged State is desirable, on the collective level, insofar as it is conducive to the human good in general and to the good of its population in particular.[5] This good comprises both immaterial—such as a

2 See e.g. the contributions in *Michael B. Gerrard / Gregory E. Wannier* (eds.), Threatened Island Nations. Legal Implications of Rising Seas and a Changing Climate, Cambridge 2013, and especially International Law Commission (hereafter ILC), Sea-level rise in relation to international law. Second issues paper by *Patrícia Galvão Teles* / *Juan José Ruda Santolaria*, Co-Chairs of the Study Group on sea-level rise in relation to international law, Doc. A/CN.4/752, 19 April 2022, paras. 175 ff.; Additional paper to the second issues paper (2022), Doc. A/CN.4/774, 19 February 2024, paras. 100 ff.

3 ILC, Doc. A/CN.4/752, note 2, Part Two, Reflections on statehood, Chapter V.

4 "[But] we must conclude that the claim of the national State to be a complete community is unwarranted", see *John Finnis*, Natural Law and Natural Rights, Oxford 2011, pp. 147 ff., p. 150. On the question "Why should there be a State?", see *John M. Finnis*, Law and What I Truly Should Decide, American Journal of Jurisprudence 48 (2003), p. 129.

5 Judge *Cançado Trindade*, Separate Opinion, International Court of Justice (hereafter ICJ), Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo

distinctive culture of that population, which is also a human right of its members—as material aspects.[6] Accordingly, many of the propositions made by various authors for providing for the continued existence of a submerged State underline that the respective proposition "preserv[es] the existing State and hold[s] the resources and well-being of its citizens—in new and disparate locations—in the care of an entity acting in the best interest of its people"[7] or to "ensure the proper use of State resources for the benefit of its population".[8] This applies even if, in practical terms, "all [endangered States] are marked by their limited resources".[9]

On the individual level, the continuity of a submerged State is desirable as the consequences of its extinction for the members of its population are dire.[10] As the territory they used to inhabit has become submerged, they need to be received by other States.[11] But they have no obvious legal claim to be so received. They are, although often dubbed climate refugees, not refugees in the sense of international refugee law.[12] Rather, they do not have "any distinct legal status",[13] and have no claim under customary international law.[14]

It is true that an indirect legal claim of such people to be received into the territory of a State party to one or the other human rights treaty[15] may follow, under such a treaty, from the combination of a right to present a demand for international protection or asylum

(Advisory Opinion) [2010] ICJ Rep 403, 553 (para. 77), speaks of "the most precious constitutive element of statehood: human beings, the 'population' or the 'people'".

6 See especially Committee on Economic, Social and Cultural Rights, General comment no. 21, Right of everyone to take part in cultural life, para. 34: "States parties should pay particular attention to the protection of the cultural identities of migrants [..]."

7 *Maxine A. Burkett*, The Nation Ex-Situ, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, p. 90.

8 ILC, Doc. A/CN.4/752, note 2, para. 197.

9 *Burkett*, note 7, p. 110.

10 See ILC, Doc. A/CN.4/752, note 2, Part Three "Protection of persons affected by sea-level rise". See also *Carolin König*, Small Island States and International Law. The Challenge of Rising Seas, Abingdon 2023, pp. 158-171.

11 ILC, Doc. A/CN.4/752, note 2, para. 197.

12 ILC, Doc. A/CN.4/752, note 2, paras. 243, 262 ff.; see also *Brianna Hernandez / Christine Bianco / Zenel Garcia*, Refugees without Recognition: Climate Change and Ecological and Gender Inequality, EJIL:Talk!, 15 August 2024, https://www.ejiltalk.org/refugees-without-recognition-climate-change-and-ecological-and-gender-inequality/ (last accessed on 8 October 2025).

13 ILC, Doc. A/CN.4/752, note 2, para. 234.

14 Some practical solutions to this unsatisfactory situation are offered by *Kate Jastram / Jane McAdam / Geoff Gilbert / Tamara Wood / Felipe Navarro*, International protection for people displaced across borders in the context of climate change and disasters: A practical toolkit, Center for Gender & Refugee Studies, Kaldor Centre for International Refugee Law and Essex Law School and Human Rights Centre (2024); see also Interamerican Court of Human Rights (hereafter IACtHR), Advisory Opinion OC-32/25 of 29 May 2025, Requested by the Republic of Chile and the Republic of Colombia, Climate Emergency and Human Rights, paras. 433 et seq.

15 On "The Right to Have Rights and Post-World War II Legal Developments" see *Seyla Benhabib*, Exile, Statelessness and Migration, Princeton 2018, pp. 111-115 and 123-124.

at a border crossing into such a State, and thus in its territory,[16] and the prohibition of refoulement derived from the treaty provision protecting the right to life.[17] Forced to leave the State becoming submerged its people, on arriving at the coast of another State, or on being taken aboard a vessel sailing under the flag of another State, have a human right to apply for international protection and, if such protection were to be refused, to appeal that decision nationally and internationally.[18] Once on board, they cannot be denied entry into the national territory of the flag State without examination of each applicant's individual situation as such denial would amount to collective expulsion,[19] prohibited under international human rights law. Once inside the national territory of a host State, they cannot be expelled individually, as to do so would be contrary to the prohibition of refoulement. Such expulsion would endanger (or end) their life, as their former State of residence has become uninhabitable.[20] This applies at least in cases in which there is no other State willing to accept them.[21] While it may be the case that States honour the legal obligation to receive a person displaced by rising waters into their territory often in the breach, the very existence of the corresponding claim contradicts, nowadays, Hannah Arendt's diagnosis of human rights' futility.[22] However, another aspect, underlined by Arendt, of the consequences of a State's extinction for its population is not remedied by human rights law: that they

16 European Court of Human Rights (hereafter ECtHR), M.K. and others v. Poland, 40503/17, 42902/17, 43643/17, 23/07/2020, paras. 10, 179.

17 Human Rights Council (hereafter HRC), Teitiota v. New Zealand, 2728/2016, 7 January 2020, para. 9.3, referenced by ICJ, Obligations of States in Respect of Climate Change, Advisory Opinion, 23 July 2025, paras. 377 et seq., and by IACtHR, note 14, para. 433 n. 734. Referring to ILC, Doc. A/CN.4/774, note 2, para. 238, Judge Aurescu, Separate Opinion to the ICJ Opinion, para. 26, would go beyond the mere prohibition of refoulment to require, "for example, ... an obligation to admit those seeking protection and even to issue temporary residence permits for them".

18 Insofar, the "devastating critique of human rights" (*Alison Kesby*, The Right to Have Rights: Citizenship, Humanity, and International Law, Oxford 2012, p. 3) by *Hannah Arendt*, The Origins of Totalitarianism, London 2017, p. 383 ff., is no longer fully convincing.

19 See ECtHR, Hirsi Jamaa and others v. Italy, 27765/09, 23/02/2012 (GC), paras. 183 ff.

20 See also Principle 9 of the Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, https://disasterlaw.ifrc.org/media/2035 (last accessed on 31 January 2025).

21 On the importance of this aspect see e.g. ECtHR, A. and others v. The United Kingdom, 3455/05, 19/02/2009 (GC), para. 176: "There is no evidence that during the period of the applicants' detention there was [...] any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3. Indeed, the first applicant is stateless and the Government have not produced any evidence to suggest that there was another State willing to accept him."

22 *Arendt*, note 18, pp. 383 ff., 392.

would become stateless[23] and thereby lose any protection a viable State would offer them,[24] including diplomatic protection.[25]

The ultimate normative reasons for looking for a submerged State's continuity thus are, on the collective level, to preserve the immaterial and material good of its population and, on the individual level, to secure the State's ability to shield its population from statelessness.[26] While, in practice, some third States have taken measures to allow (some) persons from some States threatened to become submerged to resettle, at least temporarily, on their territory, both by treaties with endangered States and unilaterally,[27] this does neither resolve the problem of those persons' becoming stateless in the case of the extinction of the submerged State nor eliminate the risk this case poses for the immaterial good that is the distinctive culture of the submerged State's population.

C. "Possible Alternatives For the Future Concerning Statehood" Considered by the Study Group

I. Presumption as to the Continuity of the Submerged State

The first alternative looked at by the Study Group is the presumption as to the continuity of the submerged State.[28] The widely accepted international law definition of a State contains four elements: "a permanent population, a defined territory, government and the capacity to enter into relations with the other states";[29] for the purposes of customary law, the fourth element is widely seen as having been replaced by the State's independence.[30] A State's territory has been claimed to be its defining element;[31] a State's "identity […] in

23 As defined in Art. 1 of the Convention relating to the Status of Stateless Persons (New York, 28 September 1954), United Nations, Treaty Series, vol. 360, No. 5158, p. 117.

24 On stateless people's loss of State protection see *Arendt*, note 18, p. 384. On the different forms of contemporary State protection see *Frédéric Mégret*, The Changing Face of Protection of the State's Nationals Abroad, Melbourne Journal of International Law 21 (2020), pp. 450-469.

25 But see, *de lege ferenda*, Art. 8 para. 1 of the articles on diplomatic protection, Yearbook of the International Law Commission, 2006, vol. II (Part Two), para. 49.

26 According to ICJ, note 17, paras. 364 et seq., "co-operation in addressing sea level rise is not a matter of choice for States but a legal obligation. [...] [This] obligation [...] requires States […] to work together with a view to achieving equitable solutions, taking into account the rights of affected States and those of their populations", see also United Nations High Commissioner for Refugees, Climate Change and Statelessness: An Overview, https://www.unhcr.org/media/climate-change-and-statelessness-overview (last accessed on 31 January 2025).

27 ILC, Doc. A/CN.4/752, note 2, paras. 341 ff.

28 ILC, Doc. A/CN.4/752, note 2, paras. 183-196.

29 Article 1 of the (Montevideo) Convention on Rights and Duties of States.

30 See e.g. *Matthew Moorhead*, Legal implications of rising sea levels, Commonwealth Law Bulletin 44 (2018), p. 710.

31 The importance of territory for a State has recently been stressed in the context of the prohibition of annexations; see *Ingrid Brunk* / *Monica Hakimi*, The Prohibition of Annexations and The Foun-

time is based directly upon the identity of the territory".[32] From there follows the "austere view",[33] near unanimously agreed upon by States[34] and by those publicists who deal with the question, that the loss of its—inhabitable territory leads to a State's extinction.[35] This view is perfectly represented by the German legal term "*Staatsuntergang*" which connotes both (literally) the fact of the State's territory becoming uninhabitable and (metaphorically and technically) the legal consequence arguably following from this fact.

One might object that "international law is prepared to recognise previous facts as continuing"[36] and that the fact that a State once had an inhabitable territory was sufficient to presume, or to sustain the fiction, that that territory continues to exist. But this presumption is rebuttable. The recognition of previous facts is restricted to cases in which there is a realistic chance of the reconstitution of those facts.[37] "Once the chance of a reconstitution of previous facts has vanished and the fiction connected therewith has become implausible the principle of effectiveness requires a legal construction that reflects the factual situation."[38] In the case of a submerged State, the chance of the re-emergence of its territory, or of its becoming inhabitable again, in the foreseeable future is nil.[39] While it may be the case that "the principle of legality supersedes the principle of effectiveness [...] when serious violations of fundamental international norms are involved in the [...] extinction of States",[40] it is very doubtful whether the causation of rising sea levels can be seen as such a violation.[41] The austere view is difficult to avoid if one considers a State's very existence as dependent on its having its proper territory.

dations of Modern International Law, American Journal of International Law 118 (2024), pp. 417-467, 422 ff.

32 *Hans Kelsen*, General Theory of Law and State, Cambridge MA 1945, p. 220.

33 Term used by *Alex Green*, *The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship, The Australian Year Book of International Law 40 (2022), p. 82.

34 *König*, note 10, p. 61, notes "that no State [...] has so far expressed the [...] opinion [...] that a State would not cease to exist when losing its territory".

35 See e.g. *Volker Epping*, Knut Ipsen, Völkerrecht, in: Volker Epping / Wolff Heintschel von Heinegg (eds.), München 2024, § 7 para. 198 (p. 189); According to Berber "a State gets extinct by the physical demise of its territory and its population (author's own translation), see *Friedrich Berber*, Lehrbuch des Völkerrechts, München 1975, p. 250; *Alfred Verdross* / *Bruno Simma*, Universelles Völkerrecht, Berlin 1984, para. 969 (p. 606).

36 *Eberhard Menzel*, quoted from *Berber*, note 35, p. 250 (author's own translation).

37 Ibid.

38 Ibid.

39 "[I]n principle, irreversible"., see ILC, Doc. A/CN.4/752, note 2, para 231.

40 *Stoutenberg*, note 1, p. 59.

41 *Stoutenburg*, note 1, pp. 72 ff.; also *Catherine Blanchard*, Evolution or Revolution? Evaluating the Territorial State-Based Regime of International Law in the Context of the Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise, The Canadian Yearbook of International Law 53 (2015), pp. 66, 89 ff.

II. Maintenance of International Legal Personality Without a Territory

However, there is a different "presumption—in practice a strong presumption—[that] favours the continuity and disfavours the extinction of an established State".[42] This presumption may advance, under the Study Group's second alternative—maintenance of international legal personality without a territory—the case for the continuity of submerged States. This alternative takes as its point of departure, as it must, the submerged State's loss of its historic territory. The Study Group addresses this scenario only in one short paragraph and is somewhat coy about what it implies. Based on the exemplary cases it adduces, i.e. the Holy See between 1870 and 1929 and the Sovereign Order of Malta, which both had lost, at least for the time being, their former territory, the implication appears to be that the government of the submerged State continues to exist and takes its seat in the territory of another State (in both exemplary cases, Italy). The submerged State "would continue to […] act on behalf of its population or some of its nationals and ensure the proper use of State resources for the benefit of its population".[43] Thus, the realisation of this scenario requires the invitation by a host State of the government of the submerged State to function, and of (parts of) the latter's population to reside,[44] on the host State's territory.[45] Incidentally, for the host State to invite (parts of) that population to reside on its territory does justice to the invitees' human rights even if the host State has no corresponding obligations.[46] Understood in this way, this scenario might be a plausible way to secure the good of the population of a submerged State, and merits further discussion.[47]

42 *James Crawford*, The Creation of States in International Law, 2nd ed. Oxford 2007, pp. 701, 715, and see e.g. ILC, Doc. A/CN.4/752, note 2, para. 194. Rather cryptically, ICJ, note 17, para. 363, opines that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of ist statehood". *Epping*, note 35, para 7, p. 206 (p. 192), quoting *Georg Dahm*, Völkerrecht, Berlin 1958, p. 85, who speaks of a principle of "strongest possible continuity of the State" (my translation). "Different views were, however, expressed as to whether it was preferable to describe the prevailing legal situation as giving rise to a "presumption" of continuity or whether it was preferable to refer to the existence of a "principle of continuity.": Study Group on sea-level rise in relation to international law. Report, Doc. A/CN.4/L.1002, 15 July 2024, paras. 33 ff.; see also the discussion in *Jean-Baptiste Dudant* / *Géraldine Giraudeau*, Continuity of Statehood for Deterritorialized Nations: A Range of Principles but Few Concrete Prospects, EJIL: Talk!, 21 January 2025, https://www.ejiltalk.org/continuity-of-statehood-for-deterritorialized-nations-a-range-of-principles-but-few-concrete-prospects/ (last accessed on 8 October 2025). They refer to "State practice where it is understood as a 'strong' yet rebuttable presumption".

43 ILC, Doc. A/CN.4/752, note 2, para. 197.

44 ILC, Doc. A/CN.4/752, note 2, paras. 301 (a), 303; ILC, Doc. A/CN.4/774, note 2, para. 112.

45 This is one of the scenarios envisaged by *Rosemary Rayfuse*, W(h)ither Tuvalu? International Law and Disappearing States, University of New South Wales Faculty of Law Research Series, Research Paper No. 2009-9, p. 11.

46 See also Principle 7 of the Sydney Declaration, note 16.

47 See text after note 110 ff.

III. Use of Some other Modalities

Other scenarios the Study Group evokes include the transfer of the sovereignty over a portion of the host State's territory—"However, while this is a valid alternative [for the future concerning statehood] from a legal perspective, it would be very difficult to achieve in practice"—[48] and the cession of a portion of that State's territory without transfer of sovereignty.[49] Further, they include an association of the submerged State with a host State or a (con-)federation between those States.[50] Both would create their own problems: on the face of it, such an action, while extending the protection of the host State to the population of the submerged State, would risk to extinguish the identity and thereby the separateness of that population, even if "a degree of autonomy for the former nationals of the affected island State could be agreed upon beforehand, in order to preserve their cultural and group identity."[51] Also, while "for the disappearing State to merge […] with another State [might] sustain the preexisting maritime zones",[52] it would deprive the population of the submerged State of (parts of) the fruits of the exploitation of those zones. The same applies for the unification with another State, including the possibility of a merger.[53] Scenarios relating to the right of peoples to self-determination evoked by the Study Group[54] can only give colour to any of the other scenarios; the right to self-determination cannot connote a right to (parts of) the territory of another State, or the right to settle, as a group, on such territory, without the latter's consent.[55] In addition to those drawbacks of these scenarios none of them (with

48 ILC, Doc. A/CN.4/752, note 2, para. 198.

49 See ILC, Doc. A/CN.4/752, note 2, paras. 199 ff. See also *Rosemary Rayfuse*, Sea Level Rise and Maritime Zones. Preserving the Maritime Entitlements of "Disappearing" States, in: Michael B. Gerrard / Gregory E. Wannier (eds.), Threatened Island Nations, Cambridge 2013, p. 178. She argues that "as a practical matter, the political, social, and economic ramifications of ceding territory are likely to exceed the capacities—and courage –of existing governments." See also *Andrea Caligiuri*, Sinking States: The statehood dilemma in the face of sea-level rise, Questions of International Law 91 (2022), pp. 23-37, 28-30. The author also discusses the questions of the submerged State leasing territory and of floating States (pp. 30-31).

50 ILC, Doc. A/CN.4/752, note 2, paras. 205-215.

51 ILC, Doc. A/CN.4/752, note 2, para. 216.

52 *Rayfuse*, note 49, p. 178. This presupposes that those zones survive the disappearance of the territory on which their existence is founded. As *Rayfuse*, note 45, p. 12, states, "a strategy that sees [sic] international agreement on the freezing of baselines, at least in the case of island states facing inundation, will be a key element in a disappearing state's ability to utilize its maritime zones as both a bargaining chip and as a means of supporting its continued 'sovereign' existence as well as the continued livelihood of its displaced population." *Caligiuri*, note 49, p. 37, discusses the emergence of "Maritime States" in which the territory is replaced by the various maritime zones based on the State's former, and now submerged, territory. He does not indicate the fate reserved for that State's government and population.

53 ILC, Doc. A/CN.4/752, note 2, para. 216.

54 ILC, Doc. A/CN.4/752, note 2, paras. 225-226.

55 But see *Blanchard*, note 41, p. 114. According to the ICJ's view, "sea level rise is not without consequences for the exercise of [the right to self-determination]": ICJ, note 17, para. 357.

the arguable exception of the transfer of sovereignty)[56] explains how the identity of the submerged State can be seen to survive, against the austere view, the loss of its territory. This applies even to the "Maintenance of international legal personality without a territory" scenario.

D. "The State is the Law" in the Theory of Law and State

I. "The State is the Law" in Relation to one State

An intriguing way to try to avoid the austere view, and to explain the way the identity of the submerged State can be seen to survive, is to consider the question of the relationship between State and law. Hans Kelsen famously claimed that "the community we call 'State' is 'its' legal order",[57] that there is identity of law and State.[58] A legal order, as an instance of the law and thus of an ideal concept, does not obviously and necessarily end because of factual developments such as the submergence of the territory on which it used to be applied. If there is identity of law and State, the same must be true of the latter. In the following discussion of the theoretical relationship between State and law I shall start from the teachings of Kelsen's close contemporary Felix Somló[59] who insisted, against Kelsen, that legal theory must go back to a pre-juridical concept of the existence of law.[60] For him, the "State" is a society formed by habitually obeying the commands of a sovereign.[61] The very core of the "State" thus is its population which can be formed, by law, into a society. "Society" means simply a human group joined by norms.[62] The sovereign is defined, following Austin, as the highest power whose orders are habitually obeyed.[63] Where an order exists, there must be a sovereign.[64] *Vice versa*, "where there is a sovereign, there is

56 *Adolf Merkl*, Die Rechtseinheit des österreichischem Staates (1918), in: Hans Klecatsky / René Marcic / Herbert Schambeck (eds.), Die Wiener rechtstheoretische Schule, Vienna 2010, p. 916, claims that the resettlement of a whole population on a new territory does not necessarily interrupt the legal continuity of its State. In this sense also *König*, note 10, p. 63.

57 *Kelsen*, note 32, p. 182.

58 *Hans Kelsen*, Reine Rechtslehre, Vienna 1960, pp. 289 ff.

59 *Felix Somló*, Juristische Grundlehre, Leipzig 1917. Somló's work has been allowed quietly to be forgotten but was recently excavated by *Trevor N. Wedman*, Inverting the Norm, Tübingen 2022, pp. 112 ff.

60 *Somló*, note 59, p. 24.

61 *Somló*, note 59, p. 251. For *Kelsen*, note 58, p. 267, a definition of the State is "the legal community constituted by the State legal order". This is so although the identity of the State is based "only indirectly upon the identity of the population living in the territory", see *Kelsen*, note 32, p. 220. See also *Finnis*, note 4, p. 147 ff., who discusses the State as "complete community" and "all-round association", and *Finnis,* note 5.

62 *Somló*, note 59, p. 250.

63 *Somló*, note 59, p. 93. As *Wedman*, note 59, p. 115, remarks, "Somlo gives the Austinian frame a decidedly [...] non-hierarchical flavor".

64 *Somló*, note 59, p. 99 ff.

law as well as State".[65] This definition of the "State" implies that those commands cover a wide field of issues;[66] the "universality of aimed-for purposes"[67] is constitutive of a "State". Prior to the State's submergence, an island State, and its legal order, would presumably fit this definition.

It is only the effective legal order that is the (effective) State.[68] The effectiveness of a legal order is historically contingent. Any hitherto effective legal order may be overthrown by a revolution or *coup d'Etat*[69] or other historic events.[70] Once the legal order is no longer effective, once the specific sovereign (or its successor) is no longer habitually obeyed, it ceases to exist as a normative order. In such a case, the State that it was ends at the same time.

The question is whether the submergence of a State's territory is a historic event overthrowing the State's legal order or whether that order can continue to exist and to be effective in spite of the State territory's submergence.[71] While the legal order of a submerged State cannot be effective on its submerged territory it may still be applied, and be effective, somewhere else. The Kelsenian view on the identity of law and State[72] as well as Somló's view appear to allow a submerged State to continue as such as long as the legal order that it is applied somewhere, that is to say that the specific sovereign's orders are there habitually obeyed to form, or to maintain, the (displaced) society. To maintain its legal personality as a State thus requires, at a minimum, that it has a population and a governing body. As its population needs a place to live and its government a seat, the submerged State must have some territorial basis which however needs not be its own.[73] Rather, as there is today no *terra nullius* (if there ever was one in historic times), this implies the territory of some other State or States. As the required territorial basis of the continuation of a submerged State is necessarily the territory of some other State the meaning of "the State is the law" in situations involving more than one State needs to be considered.

65 Ibid., p. 252 (author's own translation).

66 Ibid., p. 97.

67 "Universalität der Zwecksetzung": *Somló*, note 59, p. 262.

68 *Kelsen*, note 58, pp. 10 ff., 215 ff.

69 See e.g. *Theodor Schilling*, Alec Stone Sweet's "Juridical *Coup d'État*" Revisited: *Coups d'État*, Revolutions, *Grenzorgane*, and Constituent Power, German Law Journal 13 (2012), pp. 287-312.

70 *Merkl*, note 56, p. 916.

71 According to Guilfoyle and Green "the open-ended commitment to Tuvalu's existential resilience in Article 2(b) [of the Australia-Tuvalu Falepili Union] represents the first binding rejection by any State of the view that inhabitable land is necessary for State continuity", see *Douglas Guilfoyle* / *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/ (last accessed on 31 January 2025).

72 This view appears to contradict Kelsen's view on the identity of the State being based on the identity of its territory; see text at note 32.

73 This point is, strangely, not addressed by ILC, Doc. A/CN.4/752, note 2, para. 197.

II. "The State is the Law" relating to a Plurality of States

One aspect of the definition of the (sovereign) "State" requires its sovereign to be the highest power and its commands to cover a wide field of issues.[74] In the present context, this aspect should allow, in principle, to distinguish, in situations involving more than one entity, between the sovereign "State" and non-sovereign entities. It does allow entities to switch, in the wake of historical developments, from one status to the other. Historically, quite a few sovereign States have become part of a federation or other association of States. Such an association will become itself a "State" (thus ending the statehood of its members)[75] if its commands cover a wide field of issues. Otherwise, it will remain a non-State entity and its members, "States".[76]

There are clear-cut historical cases of a federation becoming a "State" and thereby extinguishing the statehood, in Somló's meaning, of its formerly sovereign members. One example is the Free State of Bavaria which, under its 1946 constitution, was an independent State.[77] But Article 178 of that constitution provides that Bavaria will join a future German democratic federal State, which came to pass in 1949. While the law—the constitution—and thus the entity it constitutes, continued, the status of Bavaria changed from an independent to a federated State. Henceforth its commands covered only a restricted field of issues,[78] it lacked a proper sovereign wielding the highest power and therefore ceased to be a "State".[79] Other cases are less clear-cut. The US of A's commands cover a rather narrow field of issues; indeed, it has been said repeatedly to be "little more than an insurance company with an army".[80] It may also be asked whether the US of A is "a" society or rather a conglomerate of different State (California, Texas, […]) societies. In spite of these questions the status of the US of A as a State has rarely been seriously questioned.

Somló concedes, as he must, that it is difficult clearly to distinguish between an association of States which has become a "State" itself and one whose members remain "States".[81] This difficulty demonstrates that there is a sliding scale between the "non-State" associations of States—associations covering only a narrow field of issues—and those associations which have matured into "States"—associations covering a wide field of issues. It follows that the respective associations are not binary opposites but of one kind, and the

74 See text at note 60 ff.

75 *Somló*, note 59, pp. 295 ff.; see also *Merkl*, note 56, p. 916, on the transition from a confederation to a federation.

76 *Somló*, note 59, p. 287.

77 Albeit under Allied—US and French—occupation.

78 See the extensive list of matters under federal legislative power in Art. 73 and 74 of the Basic Law of the Federal Republic of Germany.

79 See *Somló*, note 59, p. 259.

80 See e.g. *Josh Lewis*, An Insurance Company with an Army, The Emory Wheel, 22 February 2017, https://emorywheel.com/an-insurance-company-with-an-army (last accessed on 31 January 2025).

81 *Somló*, note 59, p. 291.

same is true for their respective States members. This conclusion calls into doubt whether a theory of law and State should define the "State", as Somló does, by the width of the field of issues covered by the commands of its sovereign, and therefore deny "non-State" associations, and States members of associations which have matured into States, the status of "State".

III. The Central and the Peripheral Cases of "State"

The apparent contradiction between the conclusion that States, and associations of States, are of one kind whether or not they are sovereign, and the claim that sovereignty is a necessary feature of the "State", can be resolved by applying John Finnis' distinction between the central and the peripheral significance of theoretical terms including the term "State":[82] "[E]xploiting the systematic multi-significance of one's theoretical terms" Finnis "differentiate[s] the mature from the undeveloped in human affairs, [...] the fine specimen from the deviant case, the 'straightforwardly' [...] from the 'in a sense'".[83] Between the central and the more or less peripheral cases there will be differences (and similarities) "for example, of form, function, or content".[84] While Somló aims at giving the widest possible definition of the "State",[85] he appears to fail to do so. The similarity between sovereign and less than sovereign entities (States) is such that it appears arbitrary to exclude from a widest definition of the term the less than sovereign entities. It appears rather that Somló's "widest possible definition" identifies, in sovereignty, one of the aspects of the central case—the Weberian ideal-type—[86] of a "State".

The central case of the "State" has two broad aspects: a substantive one, and a formal one. For the analogous case of constitutional government, according to Finnis, the difference between the central and a peripheral case is, under the substantive aspect, primarily their respective moral quality: a central case of such government will be good for human beings.[87] The same is true for the substantive aspect of the central case of the "State".[88] This aspect implies two minimum elements of the formal aspect of the central case of the "State", also implied by the theory of the identity of law and State:[89] there needs to be a population to be supported, and a government to provide that support. Under modern conditions, a third constitutive element of the central case of a "State" would appear

82 *Finnis*, note 4, p. 10.

83 Ibid., pp. 10 ff.

84 Ibid., p. 11.

85 *Somló*, note 59, p. 255.

86 *Finnis*, note 4, p. 9.

87 Ibid., p. 11.

88 See quotation in the text at note 4. See also *Michelle Madden Dempsey*, On *Finnis*'s Way In, Villanova Law Review. 57 (2012), p. 838, and *John Finnis*, Response, Villanova Law Review 57 (2012), p. 928.

89 See text after note 72.

to be that it has a defined territory. A fourth element would be the State's independent sovereignty.[90]

It thus appears that the full central case of a "State" is a State that fulfils those four elements of the formal aspect and is good for human beings (substantive aspect, both immaterial and material). Peripheral cases are those which default on one or the other (or both) of those aspects. States that fulfil the formal aspect of the central case may well default on the substantive aspect: they may include, among other deformations, outright tyrannies, such as Hitler's Germany or Stalin's Soviet Union, which are not good for (most) human beings,[91] as well as cleptocracies—*magna latrocinia*—such as Putin's Russia.[92] But even in the case of such deformations, "there is no point in denying that they *are* instances"[93] of "State".[94]

Somló does not rely on the substantive aspect of the central case of a "State". Neither does he consider it a constitutive element of the "State" to have a defined territory.[95] Rather, his definition of the "State" includes some of what Finnis would consider peripheral cases e.g. a nomadic tribe which in other times may well have been a viable form of human organisation to fulfill the central functions of a State.[96] While this article will apply Finnis' distinction between central and peripheral cases,[97] it will consider "State" as defined by Somló as the central case. Under modern conditions, this definition and the Montevideo definition likely will lead to identical results.

To apply Somló's definition of the "State" to peripheral cases, it must be adapted. In this adapted version, a peripheral case of the "State" is a society formed by habitually obeying commands given by some power and covering a reasonably wide field of issues. One peripheral case would be a non-sovereign but otherwise statelike entity.[98] There used to be and still is a multitude of entities in which the sovereignty required by the central case of "State" is in doubt or lacking. A historical example of such a peripheral case of "State" is the Holy Roman Empire, famously described, in Westphalian times, as *irregulare aliquod*

90 See text at note 74.

91 See *Finnis*, note 4, p. 11.

92 *Augustine of Hippo*, De civitate Dei IV, 4.

93 *Finnis*, note 4, p. 11; author's italics.

94 *Kelsen*, note 58, p. 46, denies the normativity of only the "command" of a single highwayman but not of the *magna latrocinia* on which see Ibid., pp. 50 ff.

95 *Somló*, note 59, p. 254, discussing *Georg Jellinek*, Allgemeine Staatslehre, Berlin 1905, p. 172.

96 *Somló*, note 59, p. 255; *Brunk / Hakimi,* note 31, p. 423.

97 *Finnis* uses his analysis of the central and (some) peripheral cases mainly to be able to restrict his discussion of the law to its central case: in its central case, the law is a force for the human good. In contrast, he shows little interest in the peripheral cases (see *Dempsey*, note 88, p. 831) in which law may be used for instance as an instrument of suppression.

98 But see *Somló*, note 59, p. 281: "sovereignty is an inescapable characteristic of the concept of State [...] a non-sovereign State cannot be." (author's own translation).

corpus et monstro simile[99] (an irregular body much like a mythical beast),[100] and whose sovereignty over its constituent parts was doubtful at best. The same can be said today of the so-called supranational entity that is the EU on the one hand, and its Member States on the other, which are borderline cases between non-State association and State on the one hand, sovereign State and federated State on the other. There may be vassal-like States that have been granted territory (without sovereignty) by their souverain State.[101] The most common example, and the one most relevant, as will be seen, in the resent context, are (federations and) federated States.[102] While those deformations are not central cases of the "State", they may properly be called (peripheral cases of) "States" in the theory of law and State.

What there cannot be is an even peripheral case of a "State" without a population[103] and thus without a society.[104] But the State's population need not be permanent. Even an impermanent human group can be formed into a "society" by habitually obeying the commands of some power, and into a State if that power is sovereign.[105] Under this definition the State of the Vatican City[106] whose impermanent population[107] obeys the commands of the sovereign Pope may well be considered as a central case of the "State". Even during the years 1870-1929 when the Holy See had no territory attached its commands formed its members and employees into a society. Those commands, especially in the form of the *Codex iuris canonici*, covered a wide field of issues. However, the sovereign Pope was, during that period, no temporal sovereign: he was not invested with the highest power over his society. Therefore, the Holy See could be considered, under the theory here applied, as (only) a peripheral case of the "State". Similarly to the Holy See during that period, the

99 *Samuel von Pufendorf*, Die Verfassung des deutschen Reiches (1667) (ed. and transl. by Horst Denzer), Leipzig 1994, c. VI, para. 9 (pp. 198 ff.).

100 English translation by *Andreas Osiander*, Irregulare Aliquod Corpus Et Monstro Simile: Can Historical Comparisons Help Understand the European Union?, Draft paper for the Annual Meeting of the American Political Science Association, 2010 Revised Version, August 2010.

101 Mentioned in ILC, Doc. A/CN.4/752, note 2, paras. 199-201. The two examples discussed Ibid., paras. 202 ff., appear to be rather beside the point. According to *Verdross / Simma*, note 35, para. 395 (p. 235), such States do not exist anymore.

102 See text at note 74 ff.

103 See, for international law, *Verdross / Simma*, note 35, para. 969 (p. 606).

104 See text at note 63.

105 See text at and after note 61.

106 Considered by ILC, Doc. A/CN.4/752, note 2, paras. 113-125, because for some decades it had lost its whole territory but not its position as a subject of international law.

107 ILC, Doc. A/CN.4/752, note 2, para. 124: "a population (comprising persons residing in the Vatican or holding Vatican citizenship empowered to perform tasks of responsibility for the Holy See or the Vatican City itself, and the cardinals residing in Rome or the Vatican City)", and *Friedrich Germelmann*, Heiliger Stuhl und Vatikanstaat in der internationalen Gemeinschaft. Völkerrechtliche Praxis und interne Beziehungen, AVR 47 (2009), p. 147-186, 162.

Sovereign Order of Malta[108] which has jurisdiction over its members[109] whom it forms into a society, while a traditional subject of international law, does not wield the highest power over them and is thus not sovereign. In contrast to the Holy See, it cannot be considered as even a peripheral case of "State" as its commands, in the form of its *Carta Costituzionale*, do not cover a reasonably wide field of issues.

IV. The Continuity of the Submerged State as a Peripheral Case of the "State"

One way to try to avoid the dire consequences of the loss of a submerged State's territory for its population—the way on which this article is focussed—is to look for possibilities of securing its continuity in spite of that loss.[110] Whether a submerged State can continue to exist as "State" depends on what is going to happen to its population and its government. In practical terms, the more or less certain prospect of a more or less imminent loss of a State's territory creates an emergency for which the competent State authorities should, and most likely will, prepare.[111] Such preparation should include the adaptation of the State's legal order to the changes required by that loss[112] and, as a submerged State can only continue to exist on the territory of some other State,[113] also to authorise the government to conclude the necessary agreement or treaty with the State on whose territory it seeks to continue its existence.

It is true that a Nation *ex situ*[114] has been envisaged as a wholly deterritorialised State.[115] However, a State's deterritorialisation can only go so far. Its governing body, or at

108 Considered by ILC, Doc. A/CN.4/752, note 2, paras. 126-137, because it never regained its former, or any other, territory but is still considered a subject of international law.

109 See Art. 9 ff. Carta Costituzionale e Codice del Sovrano Militare Ordine Ospedaliero di San Giovanni di Gerusalemme di Rodi e di Malta.

110 While the Study Group discusses at length the "protection of persons affected by sea-level rise" (ILC, Doc. A/CN.4/752, note 2, paras. 227-416), it fails to draw any connection with the question of the continuity of the submerged State. This may indicate that, in the view of the Study Group, the protection of its population does not require the continuity of the submerged State.

111 See e.g., *Burkett*, note 7, pp 109 ff., and ILC, Doc. A/CN.4/774, note 2, para. 113; see also *Robin Beglinger*, Continued Statehood without Territory? The Recent Disappearance of a Swiss Mountain Village Holds Lessons for Small Island Nations, Völkerrechtsblog, 17 October 2025, https://voelkerrechtsblog.org/continued-statehood-without-territory/ (last accessed on 1 November 2025).

112 Michael Miller argues that "Tuvalu amended its constitution […] to state that the nation will maintain its statehood and maritime zones, meaning it will continue to assert sovereignty and citizenship, even if it no longer has any land", see *Michael E. Miller*, A sinking nation is offered an escape route. But there's a catch, The Washington Post, 26 December 2023, https://www.washingtonpost.com/world/2023/12/26/australia-tuvalu-deal-climate-change-pacific (last accessed on 31 January 2025).

113 See text after note 73.

114 *Burkett*, note 7, pp. 89-121.

115 *Andres Raieste et al.*, Government Resilience in the Digital Age, Report by the Oxford Internet Institute (2024), https://www.oii.ox.ac.uk/news-events/reports/government-resilience-in-the-dig

least that body's members, need to function somewhere, and even if its administration were completely digitalised, its data must be preserved on some server somewhere, preferably in a State-owned installation in an agreeable other State,[116] and in any case, the inevitable input into some computer terminal would be a sovereign action permitted as such under international law only with the consent of the State on whose territory the action is done.[117] This applies even if "the establishment of the ex-situ nation [is anchored in a UN structure]".[118] So some consent, whether expressed unilaterally or in an agreement with the submerged State, is necessary even in this scenario. Without such consent the loss of its territory inexorably leads to the extinction of the State.[119]

In the scenario here envisaged, a host State would invite the submerged State's government and (sizeable parts of its) population (the remainder of which presumably would be considered as expatriates) into its territory,[120] by way of an agreement between the two States. Depending on its contents, such an agreement could allow the continuation of a submerged State as a transplanted State, although only as a peripheral case of the "State": in the territory into which it is transplanted as a guest it cannot be the highest power and thus not sovereign within Somló's meaning. Neither can it have the "universality of aimed-for purposes" constitutive of a central-case "State",[121] as its commands to its transplanted population will certainly not cover so wide a field.

According to the attenuated definition of "State" adapted to its peripheral case, the continuity of the submerged State as "State" depends on the continuance of a society formed from (parts of) the population of the submerged State by that (part of the) population's habitual obedience to the laws issued by that State's power. Thus, while the agreement between the submerged and the host State should aim to provide for the future security of the submerged State's population, which is the foremost duty of any State, and more gener-

ital-age/ (last accessed on 31 January 2025), p. 14. Raieste et al. discuss the worst-case scenario that a State "no longer maintained control over its physical territory".

116 Among the recommendations given by *Raieste et al.*, note 115, p. 16, is to "position [...] at least part of the infrastructure beyond their own territorial borders". On Estonia's "Data Embassy" in Luxembourg see e.g. E-Estonia, Data Embassy, https://e-estonia.com/data-embassy-the-digital-continuity-of-a-state/ (last accessed on 31 January 2025), see also Government of the Grand Duchy of Luxembourg, E-embassies in Luxembourg https://luxembourg.public.lu/en/invest/innovation/e-embassies-in-luxembourg.html (last accessed on 31 January 2025).

117 See e.g. *Andreas von Arnauld*, Völkerrecht, Heidelberg 2022, para. 342 (p. 143); *Epping*, note 35, § 7, para. 60 (p. 117); *Dave Siegrist*, Hoheitsakte auf fremdem Staatsgebiet, Zürich 1987.

118 As envisaged by *Burkett*, note 7, p. 110.

119 On the question of a deterritorialised State see also *Derek Wong*, Sovereignty Sunk? The Position of 'Sinking States' at International Law, Melbourne Journal of International Law 14 (2013), pp. 347-391, 385 ff.

120 See text at note 44.

121 See text at note 67.

ally for its immaterial[122] and material good, including "the proper use of State resources for the benefit of its population",[123] this is not enough to secure the continuity of the submerged State and the legal order that it is. Rather, to get that result, the latter must retain some power so that, for certain issues (only), its transplanted population[124] could habitually obey its laws rather than the corresponding laws applying to the general population of the host State among whom they live (while, for other issues, they would habitually obey the laws of the host State). While Somló specifies that it is not possible that more than one power are obeyed habitually by the same people at the same time, this *is* possible if the obedience concerns commands on different fields of law or custom issues.[125] It is one of the constellations conceptualised as legal pluralism.[126]

To secure the continuity of the submerged State as a peripheral case of "State", therefore, the agreement would have to provide for a repartition of competences, over the transplanted population, between the two States, including the kind and extent of power which the transplanted State, and its government, may retain over that population, and the extent to which the host State would allow the transplanted State to legislate for them.[127] The unavoidable flip side of the transplanted State retaining its statehood is the host State's partial renunciation of sovereignty over some of the people living in its territory (i.e. the transplanted population).[128]

In contrast, the agreement must not provide for the naturalisation of the transplanted population by the host State, neither with nor without maintenance of their nationality

122 However, insofar as "vibrant cultures and traditions" are "intimately intertwined with [...] ancestral lands and seas" [ICJ, Public sitting held on Monday 2 December 2024, Verbatim record 2024/35, p. 96 (opening statement by the Republic of Vanuatu, # 2)] a full conservation in the territory of a host State may not be possible.

123 ILC, Doc. A/CN.4/752, note 2, para. 197. See also *Jane McAdam* / *Tamara Wood,* Kaldor Centre Principles on Climate Mobility, International Journal of Refugee Law 35 (2023), pp. 483-507, 495, They argue that "Cross-border relocations [...] entail [...] great [...] complexity, including matters relating to immigration, citizenship, governance and self-determination."

124 *Davor Vidas*, Sea-Level Rise and International Law: At the Convergence of Two Epochs, Climate Law 4 (2014), pp. 70-84, 84. The author argues that "people connected in a community will have to become a de-territorialized subject of international law, with a recognized legal subjectivity under it. The purpose should [...] be […] to serve the legitimate needs of such a group of people due to their unprecedentedly changed situation." But people cannot be deterrioralised.

125 *Somló*, note 59, p. 259.

126 See *Brian Z. Tamanaha*, Understanding Legal Pluralism: Past to Present, Local to Global, Sydney Law Review 30 (2008), p. 395.

127 See ILC, Doc. A/CN.4/774, note 2, para. 113. Some issues which may be covered by the transplanted State's commands are indicated in the text at note 161.

128 This would be incompatible with the Montevideo Convention, note 29, Art. 9: "The jurisdiction of states within the limits of national territory applies to all the inhabitants. […] Foreigners may not claim rights other or more extensive than those of the nationals."

of the transplanted State.[129] Were the population to lose that nationality, i.e. were the transplanted State to lose its population, it would *ipso facto* cease to exist.[130] Were they to retain it, the nationality of the host State, as their country of residence, would likely become the effective nationality of the dual citizens. In any case, the law of the host State would fully apply to them, leaving scant room for the transplanted State to issue commands to them, and thereby undermining the case for its continuity.[131]

Factually, the existence of a society requires a certain number of people living reasonably close together. Climate refugees from a submerged island likely would try to meet this requirement if allowed to do so,[132] e.g. by the invitation by a host State.[133] In contrast, if a population was "scattered across the globe",[134] as envisaged by the *ex-situ*-State scenario, it would likely not be able to continue as a society, and thus would not allow for the continuity of the submerged State.[135] Whatever authority were to be concerned with such a dispersed population as a whole—e.g. a trusteeship—[136] would necessarily miss any power to issue commands to them[137] which, if habitually obeyed, could form a society and thereby a "State". It would thus likely not be able to preserve "all other elements of the nation-state that should endure extraterritorially—key among them including the persistence of culture, connections among its people, and the security and well-being of its citizens".[138]

E. The Peripheral Case of "State" in Positive Law

I. The Necessary Condition for Calling an Entity a "State"

Positive law, whether national or international, is free to disregard this, or any, theoretical definition of the central and the peripheral cases of the "State". Still, it should call an entity

129 The Australia-Tuvalu Falepili Union, note 71, does not provide for the Australian naturalisation of Tuvalu citizens.

130 See text at note 103.

131 In contrast, *Burkett*, note 7, p. 116, argues for dual citizenship.

132 According to *Miller*, note 112, "Tuvalu struck a deal with Australia that would allow 280 people a year to move there". On one actual parallel development i.e. the settlement of Somalis in Minnesota, see e.g. Somali-Americans in Minnesota, https://libguides.mnhs.org/somali (last accessed on 31 January 2025).

133 On "diaspora communities" see e.g. *Itamar Mann*, Palestinian Refugees and the Future of Asylum, EJIL:Talk!, 19 November 2024, https://www.ejiltalk.org/palestinian-refugees-and-the-future-of-asylum/ (last accessed on 8 October 2025); *Mégret*, note 24, pp. 462 ff.; *Blanchard*, note 41, pp. 108 ff.

134 *Burkett*, note 7, p. 107.

135 In this sense also *König*, note 10, p. 63.

136 On this scenario see *Burkett*, note 7, pp. 108 ff.

137 The law of citizenship apparently apart, see *Burkett*, note 7, p. 115.

138 *Burkett*, note 7, p. 107.

a State only if it is one in substance: "Yet in the word must some idea be."[139] As the theoretical model of the "State" here discussed, including its peripheral cases, appears to be the widest, least demanding model imaginable, this means that positive law (although it may well use a narrower definition) should call an entity a State only if it is one at least in the attenuated sense of a peripheral case of the concept: it must retain some power so that, for certain issues (only), its transplanted population can habitually obey its laws. Indeed, to avoid a descent into pure fiction, this ought to be the necessary condition for calling an entity a "State".[140]

II. Domestic Law

Federated States are the most common examples of peripheral cases of the "State". As such, a federated State may well be considered a State, under its proper law, and also under the law of the federation of which it is a member. Indeed, domestic State practice in federations regularly, and justifiably, considers the federated States as States. Well known examples are the US of A, Switzerland and Germany.

III. International Law

The widely accepted international law (Montevideo) definition of the State[141] is close to the central case of the "State" as defined by Somló.[142] This definition is generally narrower than the one based on the minimum substance of the theoretical concept of the "State": at least *prima facie*, it excludes peripheral cases. Under international law, federated States, although peripheral cases of the "State", are generally not considered as States.[143] At least in their case, international law's supposed preparedness to recognise previous facts—the federated State's previous sovereignty—as continuing[144] is of no avail. This is so, arguably, not so much because of a supposed implausibility of the reconstitution of the previous facts—there are numerous cases in which federated States have been reconstituted as

139 *Johann Wolfgang von Goethe*, Faust, translated into English, in the original metres, by Bayard Taylor; in the German original: "Doch ein Begriff muß bei dem Worte sein."

140 Insofar as Art. 2(2)(b) of the Australia-Tuvalu Falepili Union, note 71, recognises that "the statehood and sovereignty of Tuvalu will continue [...] notwithstanding the impact of climate change-related sea-level rise" without providing for this necessary condition it envisages a purely fictional (or, at best, virtual) statehood of Tuvalu.

141 See Text at note 29.

142 See text after note 96.

143 See eg *Verdross / Simma*, note 35, para. 395 (p. 234). But the USSR republics Belarus and Ukraine were "curiously" (*Jan Klabbers*, An Introduction to International Institutional Law, Cambridge 2022, p. 103) considered as States with respect to their membership in the UN.

144 See quotation at note 36.

independent States—[145] but rather because of a (supposed) willingness of the federated States to surrender their sovereignty to the respective federation.

IV. The International Law Position of a Submerged State

The austere view, as recorded above,[146] equates the loss of a State's inhabitable territory with its extinction. The theory of State and law allows for the continuity of submerged and transplanted States as (peripheral cases of) "States" insofar as they fulfil the necessary condition for being so called, and thus, if adopted by international law, may offer a way out of this consequence. While a submerged and transplanted State, as a peripheral case of the "State", does not conform to the Montevideo definition, international law may consider whether to treat it, exceptionally, as a State in the same way it arguably treats (roughly) similar constellations. Regularly discussed in this context are the Holy See, governments-in-exile and federated States.[147]

1. The Holy See During the Years 1870-1929

The installation of the government of the submerged and transplanted State in the territory of a host State shows the strongest similarity with the position of the Holy See during the years 1870-1929. The historical State of the Church ended with its debellation in 1870, and the State of Vatican City was created in 1929. Thus, in between those dates there was only the Holy See as a traditional subject of international law, without any territory attached.[148] In accordance with the austere view, its recognised sovereignty was seen as a property of the Holy See as such a traditional subject, not as a State.[149] Effectively, during that period the Holy See's position in international law was not different from that of the Sovereign Order of Malta.[150] In contrast, under the theory here applied, the Holy See could be considered, as discussed above,[151] as a peripheral case of the "State".

It is remarkable that many commentators appear to be prepared to overlook the well-known historical facts and to consider the Holy See during the period in question as an example of a State without a territory.[152] This speaks for a pronounced willingness of those commentators to countenance that a State without its own territory, whose government

145 Especially after the dissolution of the USSR and the FRY.

146 See text at note 33.

147 On which see ILC, Doc. A/CN.4/752, note 2, para. 206.

148 See *Germelmann*, note 107, pp. 148 ff.

149 See *Germelmann*, note 107, pp. 153 ff., 168; *Wong*, note 119, pp. 357 ff.

150 In this sense also *König*, note 10, p. 51; *Caligiuri*, note 49, p. 37. This is somewhat glossed over in ILC, Doc. A/CN.4/752, note 2, paras. 117-121.

151 See text after note 107.

152 ILC, Doc. A/CN.4/752, note 2, paras. 113-125; *Burkett*, note 7, pp. 97 ff.; *Rayfuse*, note 45, p. 10.

functions, and whose population necessarily lives, in the territory of another State, can be recognised as a State by international law.

2. Governments-in-Exile

The installation of the government of the submerged and transplanted State in the territory of a host State shows similarities also with the many instances of governments-in-exile[153] in that there is in both cases a rupture between territory and government, causing the implantation of the latter in some host State. Both governments can play their role as "the 'representative organ' of the international legal persons' state"[154] only if they are accepted as such under international law. This requires them to "have a certain independence" from the host State.[155] In view of the presumably limited resources of the transplanted State[156] its government will likely need some kind of assistance[157] which, if offered by the host State, might be seen as calling its independence into doubt. But as long as it is not "a mere puppet of the host State", "restrictions resulting from the fact that the government is deprived of its home base are not regarded as derogating from its independence".[158]

But this similarity in the position of the respective governments' *ex situ* does not correspond to a likewise similar position of the States they represent. In the case of governments forced to flee their country due to belligerent occupation or illegal annexation the continued legal existence of the State is generally not affected,[159] whereas a State, according to the austere view, gets extinguished by its submersion. Thus, while the similarities between the two cases adumbrated may go some way to argue for the recognition of the government of a transplanted State by international law, they offer an argument for that State's continuity at best indirectly: the continued existence of its government may be seen as testifying to the continued existence of the State.[160]

153 Noted by the ILC, Doc. A/CN.4/752, note 2, many times in passing and especially in paras. 138-154. In para. 423(b) the Study Group proposes the following question: "How can the cases of ... Governments in exile be of use in addressing the topic?", see also *Stoutenburg*, note 1, pp. 68 ff.

154 *Stefan Talmon*, Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in: Guy S. Goodwin-Gill / Stefan Talmon (eds.), The Reality of International Law: Essays in Honour of Ian Brownlie, Oxford 1999, p. 501.

155 Ibid., p. 517.

156 See text at note 9.

157 *Burkett*, note 7, p. 110.

158 *Talmon*, note 154, pp. 519 ff.

159 Ibid., p. 501. On the other hand, under the theory of law and State here applied, a government-in-exile cannot be considered as the sovereign of the occupied or annexed State if its orders are no longer habitually obeyed by its people,

160 Similarly, the "[r]ecognition of the government in exile [may] impl[y] recognition of [a] new State", see *Talmon*, note 154, p. 506.

3. Federated States

The installation of the government of the submerged and transplanted State in the territory of a host State shows similarities especially with the situation of (governments of) federated States. Both the transplanted and the federated State exist on the territory of another entity, the host State and the federation, respectively. Both have, presumably, their proper legitimacy, based on their proper constitutional instruments. Both can issue commands to their population on a more or less wide field of issues which is limited by the complementary field reserved for itself by the entity on whose territory they exist. In the case of a transplanted State, the field of issues to be covered henceforth by its commands, and its width, will be a matter to be dealt with in its agreement with the host State. In the interest of maintaining the transplanted State's ability to form its people into a society this field should cover at a minimum the rules concerning the relation between the State and its people, especially the law of citizenship[161] and the law concerning the formation of the government, especially the law of elections. Important for the formation of a society are also the preservation of their distinctive culture and the law on private law affairs.[162] In the same vein, the transplanted State could also retain the criminal jurisdiction over its people—if the host State were to renounce insofar on its territorial jurisdiction. In practice, as the fields of issue under the respective commands of different federated States diverge widely, all the issues adduced above are also in the province of one or the other federated State.

While these similarities between the two peripheral cases of "State"—the federated State and the transplanted State—could be seen to argue for treating the two cases on a par under international law, viz. not as States,[163] there are also important differences between them. To start with, while a federated State may be presumed to have renounced on its sovereignty voluntarily, the submerged and transplanted State entered into its agreement with the host State quite obviously not of its own free will but under the constraint of circumstances beyond its control. This fact may support the argument that international law

161 Although some restrictions might be agreed to be applied even there. One might think of a prohibition of "Golden passport" schemes on an instance of which see e.g. European Commission, 'Golden passport' schemes: Commission proceeds with infringement case against Malta, Press release of 6 April 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2068 (last accessed on 31 January 2025); see also *Burkett*, note 7, p. 107.

162 Insofar as the transplanted State's private law applies to its people, interesting private international law questions arise as to the law applicable to interactions between those people and the nationals of the host State.

163 See text at note 143.

should be prepared to recognise previous facts—the submerged State's previous sovereign existence—as continuing,[164] in contrast to its position on federated States.[165]

Fundamentally, while the relationship between a federated State and the federation is generally based on the federal constitution and thus on State law, the relationship between the transplanted State and its host is based, in the scenario here envisaged, on a bilateral treaty under international law. Under a federal constitution, the jurisdiction of a federated State—the field of issues in which it can issue commands to its population—is subordinated to the one of the federation whose constitution defines its width and its limits. The jurisdiction of the federated State, and thereby "its" population, is generally defined territorially, and its population are automatically part of the population of the federation.[166] Under the treaty, the jurisdiction of the transplanted State is coordinated with the one of the host State by the treaty setting up their relationship rather than subordinated to it. It is necessarily defined personally, and the citizens of the transplanted State remain aliens for the host State,[167] albeit, presumably, with a special treaty-based status. Within the limits defined by the treaty the transplanted State maintains the sovereignty over its population. Indeed, with the conclusion of the treaty the host State confirms, bilaterally, this sovereignty and the continuity of the submerged State.[168]

4. Interim Conclusion

The result of the comparison of the international law position of a submerged and transplanted State on the one hand and of supposedly similar constellations on the other is somewhat inconclusive. The Holy See's position in the years 1870-1929 is indeed remarkably similar to that of a submerged and transplanted State. However, its international law treatment during that period was not that of a State but of a mere traditional subject of international law, akin to that of the Sovereign Order of Malta. In contrast, governments-in-exile are in no meaningful way similar to a submerged and transplanted State. On the other hand, the similarities between a federated and a transplanted State are very real but counterbalanced by equally real differences. Those differences allow not only to refute an argument for treating a transplanted State in international law on a par with a federated State, viz. not as a State; rather, they go some way to support the opposite argument. In the final analysis, what should be decisive for the question of international law's recognition of a submerged

164 On this recognition see text at note 36. Importantly, in the present context, in contrast to the discussion of the Study Group's first alternative (see text at note 41), the previous fact is not the inhabitability of a territory.

165 See text at note 144.

166 See e.g. Art. 9 S. 2 EUV.

167 See text at note 129.

168 This is also the effect of Art. 2(2)(b) of the Australia-Tuvalu Falepili Union, note 71; see e.g. *Dudant* / *Giraudeau*, note 42. For a parallel argument, see *Epping*, note 35, para. 7, p. 204 (p. 191).

and transplanted State as continuous are the normative reasons for the continuity of the latter identified above.[169] For international law to recognise, as a State, a transplanted State that fulfils the necessary conditions for such continuity[170] is normatively desirable in first line to protect the submerged State's people against statelessness,[171] and then to allow that State to act in their interest, especially by exercising diplomatic protection in their respect. This conclusion, as far as it goes, coincides with the strong presumption favouring the continuity of an existing State.[172]

However, it cannot be denied that it poses important problems for international law to accept Somló's theory of law and State, and thus to replace, in the peripheral case of a submerged and transplanted State, a State's territory as its defining element or characteristic by its population.[173] But if one takes seriously the claim that the population is "the most precious constitutive element of statehood"[174] international law will have to overcome those problems.

F. Conclusion

The very existence of low-lying (island) States is threatened by rising sea levels. If the territory of a State gets wholly submerged or otherwise uninhabitable its population can only survive in the territory of one or more other States. To avoid their becoming stateless they should be allowed to live within the framework of their somehow continuing State of origin. There are numerous proposals of how a State can survive the submergence of its territory. All of them inevitably deal with the fortunes of the submerged State's displaced population, often including the question of avoiding their becoming stateless. However, they generally lack a theoretical concept of the minimum requirements an entity—like a submerged State—must fulfil to be considered a State.

This article considers Somló's definition of "State", adapted to a peripheral case of "State"—a society formed by habitually obeying commands given by some power and covering a reasonably wide field of issues—as the widest, least demanding concept of a "State" imaginable. It argues that a submerged State can continue to exist as a "State", and thus to allow its population to maintain its citizenship, only if that population is formed into (or rather maintained as) a society by habitually obeying the commands of the power represented by the submerged State's government. Factually, this requires the transplant of (a sizeable part of) the submerged State's population and of its government onto the territory of one host State. Legally, it requires an apposite agreement between the

169 Sub B.
170 Identified sub. E.I.
171 See note 129.
172 See quotation at note 42.
173 On some of those problems see *Wong*, note 119, pp. 365-376.
174 See note 5.

submerged State and this host State which allows the former to exercise some governmental authority over its transplanted population. That a submerged State meets these requirements ought to be a necessary condition for international law to consider it as a State. It ought to be also a sufficient condition: international law i.e. the international community of States ought to recognise such an entity as continuation of the submerged State for a number of reasons, especially to save its people from statelessness, thereby making at least some sort of amends for the climate catastrophe by the causing of which they have collectively caused the submergence of the State.[175]

175 "Vanuatu's position is clear: the conduct responsible for this crisis is unlawful under a range of international obligations": Verbatim record 2024/35, note 122, p. 98 (opening statement by the Republic of Vanuatu, p. 5).