

COMPETING CONTINUITIES: WHAT ROLE FOR THE PRESUMPTION OF CONTINUITY IN THE CLAIM TO CONTINUED STATEHOOD OF SMALL ISLAND STATES?

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While statehood is a central concept of international law, an unambiguous definition of it has so far remained elusive. The unprecedented situation of small island nations threatened by the rise in sea levels has created a novel angle of approach to statehood by challenging the necessity of a territory and population for a state to exist. Legal scholars have identified several elements of state practice and rely heavily on the existence of a strong presumption of continuity of existing states in international law to support a claim to continued statehood beyond the loss of its physical indicia (ie population, territory).

This article delves deeper into the subject by looking at the presumption of continuity and its past, present and possible future uses in international law and state practice. Throughout this exercise, two competing doctrines of continuity are identified and discussed. One defines the presumption of continuity as that which can be described as a type of ratchet effect, preventing the loss of statehood in most limit cases. Alternatively, the sameness doctrine of continuity, rooted in the rich legal scholarship on state continuity, centres on assessing whether a state is the 'same' before and after internal or external changes such as revolutions or territorial changes. The need for this discussion, the relationship between the two doctrines and their respective applications to the context of low-lying island states are then examined.

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I INTRODUCTION

While theoretically striving for justice, legal frameworks are far from impervious to a wide array of external influences. This is particularly true of international law to the point that some might go so far as to question the relevance of even bothering to apply a doctrinal approach to its study, a fortiori in the context of a crisis like climate change. On the other hand, major crises tend to bring to light realities which otherwise lie far removed from public attention and climate change is no exception. A paradox highlighted by the transition to a climate-changed Earth is the fact that some of the states that have least benefited from and contributed the least to the production of greenhouse gases might be among the first victims of the Anthropocene.¹ Low-lying island states ('LLISs') are characterised by their low elevation above sea level and their insularity. This makes them particularly vulnerable to the rise in sea levels caused by climate change which may first render their territory uninhabitable and later result in its physical disappearance. For instance, Tuvalu's highest elevation point is only five metres.² Kiribati, the Marshall Islands and the Maldives are other examples of states for which climate change presents an existential threat, with Kiribati possibly becoming uninhabitable within the next 10 to 15 years.³ As the complex problems faced by LLISs have garnered more attention, the question of the continued statehood of threatened states has been brought to the forefront of legal discussions on statehood. The reason for this lies in international law's traditional approach to statehood, which is closely linked to the existence of physical indicia in the form of population and territory.

Due to both the lack of a fully satisfactory definition of statehood and the novelty of the predicament of LLISs, international legal scholars have shown a considerable amount of creativity in attempting to dissipate some of the uncertainty relating to the continued statehood of an LLIS beyond the loss of its territory and population. Ultimately, the core of current discussions lies in determining whether statehood is flexible enough to accommodate a de-territorialised state.⁴ Using elements of state practice and past legal scholarship, the current discussion seems to indicate that yes, the current framework of international law can indeed accommodate such a possibility.⁵

¹ See generally Davor Vidas, 'Sea-Level Rise and International Law: At the Convergence of Two Epochs' (2014) 4(1–2) *Climate Law* 70, 81–3.

² Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (Research Paper No PPLA/2011/04, Division of International Protection, United Nations High Commissioner of Refugees, May 2011) 1.

³ Ibid; Human Rights Committee, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 2728/2016*, 127th sess, UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) 11–12 [9.10]–[9.12] ('*Teitiota v New Zealand*'). The exact extent of the challenges faced by LLISs is closely tied to the local severity of climate change. The tropical Western Pacific Region has experienced sea level rise rates up to four times the global average between 1993 and 2009: Leonard A Nurse et al, 'Small Islands' in Vicente R Barros et al (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2014) 1613, 1619.

⁴ See generally Susannah Willcox, 'Climate Change and Atoll Island States: Pursuing a "Family Resemblance" Account of Statehood' (2017) 30(1) *Leiden Journal of International Law* 117; Maxine Burkett, 'The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era' (2011) 2(3) *Climate Law* 345.

⁵ See below Part II(A).

The importance of this analysis cannot be downplayed. Accurate legal foresight is key to adopting the right approach to preventing harm to the threatened populations and ensuring their rights in a climate-changed world. Law usually tends to lag behind society, and even more so in relation to the physical world. Here, however, this does not have to be the case. Understanding the challenges to be addressed is one of the keys to mitigating harm and preventing worst-case scenarios from becoming reality. It is here that the present article will attempt to add to the current discussion.

There are different angles from which statehood can be approached and the case of LLISs is particularly complex due to the lack of unequivocal, authoritative guidance. No state has physically disappeared before, and any state practice or legal scholarship relates only indirectly to this novel situation.⁶ This is perhaps why the idea of a ‘fail-safe’ for arguments on the question of continued statehood is so tempting. An existing principle in international law that could tip the scales in favour of continued statehood, should other arguments fail to convince, would provide certainty where there might otherwise be only speculation.

However, such reliance needs to be substantiated by an analysis of proportional strength; otherwise, it risks giving a false impression of solidity to the legal analysis. In the present context, this fail-safe has materialised using the principle known as the presumption of continuity. Currently interpreted as cementing the continued statehood of a small island state beyond the loss of physical indicia, this article challenges the position given to the presumption of continuity in legal scholarship by identifying and discussing two competing doctrines of continuity.

The article proceeds in four steps.

- First, the two doctrines of the presumption of continuity are outlined, as well as their respective position in legal scholarship.
- Secondly, examples of state practice commonly cited in relation to the study of continuity are discussed in context, and their respective implications for both doctrines of continuity are surveyed.
- Thirdly, the relationship of physical indicia with statehood and continuity is examined with the purpose of establishing the scope assigned to continuity by each doctrine.
- Lastly, the article addresses the relationship between the two doctrines of continuity, explores possible overlaps and determines which factors need to be considered if the concept of continuity is to remain applicable in support of the continued statehood of small island states.

⁶ Burkett (n 4) 354. See also United Nations High Commissioner for Refugees, ‘Climate Change and Statelessness: An Overview’, Submission to the Ad Hoc Working Group on Long-Term Cooperative Action, 15 May 2009 <<https://www.refworld.org/docid/4a2d189d3.html>>, archived at <<https://perma.cc/RJA9-MXLP>>.

II A TALE OF TWO CONTINUITIES

A *The Ratchet Effect*

By reviewing the current legal research on the statehood of small island states, one can gain a reasonably good understanding of the presumption of continuity, particularly its assumed application to the hypothetical case of a de-territorialised LLIS. Susannah Willcox has perhaps best encapsulated this doctrine of the presumption of continuity of existing states through the use of an analogy with a ‘ratchet effect’.⁷ According to Willcox, this ‘ratchet effect’ means ‘the status of statehood, once achieved, is difficult to lose’.⁸ Simple and effective, this formulation will be preferred in this article to designate the predominant use of the presumption of continuity in the context of the discussion on the future statehood of LLISs.

Concretely, according to this definition of continuity, an island state’s statehood would not automatically be extinguished with the complete loss of its territory and population, even though these constitute the key physical elements of statehood according to its traditional definition.⁹ The presumed flexibility of the notion of statehood and the existence of the presumption of continuity mean that statehood could allow the existence of a de-territorialised LLIS. James Crawford is often cited as supporting this assumption: ‘there is a strong presumption against the extinction of States once firmly established’.¹⁰

This ‘ratchet effect’ doctrine of continuity has also been endorsed in mainstream scholarship, as reflected by its use in a report of a United Nations High Commissioner for Refugees (‘UNHCR’) expert panel on Climate Change and Displacement,¹¹ or more recently in the International Law Association Committee on International Law and Sea Level Rise’s report.¹² This conception of continuity has also permeated through other areas of international law such as

⁷ Willcox (n 4) 122.

⁸ *Ibid.*

⁹ See *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1 (‘*Montevideo Convention*’).

¹⁰ James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007) 715. This specific citation is widely used throughout literature to support a ratchet-like continuity: see, eg, Lilian Yamamoto and Miguel Esteban, *Atoll Island States and International Law: Climate Change Displacement and Sovereignty* (Springer, 2014) 176; Nathan Jon Ross, ‘Low-Lying States, Climate Change-Induced Relocation, and the Collective Right to Self-Determination’ (PhD Thesis, Victoria University of Wellington, 2019) 153–4; Jacquelynn Kittel, ‘The Global “Disappearing Act”: How Island States Can Maintain Statehood in the Face of Disappearing Territory’ [2014] (4) *Michigan State Law Review* 1207, 1248; Derek Wong, ‘Sovereignty Sunk? The Position of “Sinking States” at International Law’ (2013) 14(2) *Melbourne Journal of International Law* 346, 362; Burkett (n 4) 354.

¹¹ United Nations High Commissioner for Refugees, *Summary of Deliberations on Climate Change and Displacement* (Summary, April 2011) 2 <<https://www.unhcr.org/4da2b5e19.pdf>>, archived at <<https://perma.cc/FG6S-HLL7>>. Park, writing for the UNHCR, also mentions the existence of a ‘strong presumption of continuity for established states’: Park (n 2) 3.

¹² Davor Vidas, David Freestone and Jane McAdam, *International Law and Sea Level Rise: Report of the International Law Association Committee on International Law and Sea Level Rise* (Brill, 2019).

scholarship on the law of the sea.¹³ An often cited study by Maxine Burkett on the possibility of LLISs continuing their existence as de-territorialised states also makes reference to Crawford's influential opus on the creation of states in international law to assert that there exists a 'strong presumption that favours the continuity and disfavors the extinction of an established state'.¹⁴ Crawford in turn cites Krystyna Marek and her 'leading study'¹⁵ as the source of this presumption. Marek's 1954 thesis, despite its venerable age, has retained its relevance to this day and her pioneering work on continuity remains influential in the study of state continuity and identity.¹⁶

In his 2019 thesis, Nathan Ross gives a predominant role to the presumption of continuity, read in conjunction with the right to self-determination, to argue for the continued statehood of LLISs beyond the loss of physical indicia.¹⁷ Jane McAdam briefly mentions the presumption of continuity,¹⁸ as do Rosemary Rayfuse and Emma Crawford who mention it as a relevant principle to the case of LLISs without further assessing its exact role.¹⁹ Hence, it seems clear that while its role is perhaps not universally accepted as a ratchet,²⁰ it is not a stretch to state that the ratchet effect doctrine of continuity has gained widespread

¹³ Kate Purcell, *Geographical Change and the Law of the Sea*, ed Catherine Redgwell and Roger O'Keefe (Oxford University Press, 2019) 229.

¹⁴ Burkett (n 4) 354; Crawford (n 10) 701.

¹⁵ Crawford (n 10) 669.

¹⁶ Indeed, Wong (n 10) 347, for instance, starts his article with a quote from Krystyna Marek's thesis, and Abhimanyu George Jain dedicates four pages to addressing some of the arguments Marek raises. See 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, 19–22. Lauri Mälksoo also cites Marek's 'ground-breaking study' and Crawford to support framing continuity as a presumption: Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Martinus Nijhoff Publishers, 2003) 11, 209.

¹⁷ Ross (n 10).

¹⁸ Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 142.

¹⁹ Rosemary Rayfuse and Emily Crawford, 'Climate Change, Sovereignty and Statehood' (Research Paper No 11/59, Sydney Law School, The University of Sydney, September 2011) 6. Interestingly, in her 2009 article 'W(h)ither Tuvalu? International Law and Disappearing States', Rayfuse does not mention the existence of a presumption of continuity: Rosemary Rayfuse, 'W(h)ither Tuvalu? International Law and Disappearing States' (Research Paper No 2009-9, Faculty of Law, University of New South Wales, 1 April 2009).

²⁰ Vidas, for instance, briefly discusses the presumption of continuity, hinting that the role it is given might not be representative of the actual scope of the principle: Vidas (n 1) 82. Jenny Grote Stoutenburg also alludes to the difference between the continuity vs succession conundrum and the situation of LLISs: Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill Nijhoff, 2015) 303.

acceptance in mainstream scholarship and is routinely mentioned throughout both literature and institutional reports on the question of continued statehood.²¹

Conceptualised as a type of ratchet, continuity has also been linked with the existence of a right to survival of states, as such a right is mentioned briefly by the International Court of Justice ('ICJ').²² Ross, for instance, goes so far as to equate the said right to state survival with the presumption of continuity.²³ While tempting, this argument nevertheless faces a hurdle in the form of the ICJ's decision itself. As discussed by Jenny Stoutenburg,²⁴ the said right of every state to survival is carefully framed by the ICJ within the context of self-defence: '[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the *Charter*, when its survival is at stake'.²⁵ Taking into account the last part of the Court's statement limits the scope of application of the right of every state to survival and curtails its use as a synonym of state continuity. However, framing continuity in this particular manner does provide some insight as to how the presumption of continuity has been described as applying to the case of small island states. Furthermore, framing continuity as a right to survival broadens the scope of continuity beyond a mere 'slowing down' factor, potentially delaying the eventual demise of submerged states. Rather, theorised as a right to survival, the presumption of state continuity renders involuntary state death quasi-impossible. Such a conclusion, in light of the source of a right to survival and of the nature of state continuity as discussed in the present article, appears to be a somewhat ambitious interpretation of the presumption of continuity even if one adheres to the ratchet effect doctrine.²⁶ That the presumption of continuity might delay the loss of statehood seems to be a more representative conclusion deriving from the ratchet effect doctrine of continuity.

Overall, according to the ratchet effect understanding of continuity, states do not die easily. An LLIS could thus maintain its claim to statehood longer than what a strict assessment of statehood according to the minimum threshold contained in the *Montevideo Convention on the Rights and Duties of States* ('*Montevideo Convention*') definition would seem to permit *prima facie*. Despite

²¹ See, eg, 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' (2016) 53 *Canadian Yearbook of International Law* 66, 78; Sumudu Atapattu, 'Climate Change: Disappearing States, Migration, and Challenges for International Law' (2014) 4(1) *Washington Journal of Environmental Law and Policy* 1, 20; Eleanor Doig, 'What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States?' (2016) 21(1) *Tilburg Law Review* 72, 81. See also Veronika Bílková who mentions the ubiquitous presence of the presumption of continuity in the debate on the continued statehood of LLISs: Veronika Bílková, 'A State without Territory?' (2016) 47 *Netherlands Yearbook of International Law* 19, 37–8.

²² *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 263 [96] ('*Legality of Nuclear Weapons*').

²³ Ross (n 10) 134.

²⁴ Stoutenburg (n 20) 357–8.

²⁵ *Legality of Nuclear Weapons* (n 22) 263.

²⁶ For a discussion of the right to survival within the context of small island states, see Stoutenburg (n 20) 356–9.

some notable exceptions,²⁷ most authors simply mention the existence of a presumption of continuity framed as a ratchet effect as a kind of fail-safe for the authors' other arguments supporting the continued statehood of a de-territorialised LLIS. The application of the presumption of continuity is largely framed as a self-evident fact. A closer look at its root in state practice and past legal scholarship unveils a different picture of what the principle does and does not seem to include. Researching state continuity beyond small island states reveals a rich body of scholarship which is only cited piecemeal, sometimes perfunctorily, throughout the discussion of the principle in the context of climate change. How then is continuity defined within that more general context?

B A Sameness Assessment

While continuity is usually discussed in relation to particular cases, one recurring idea is that of 'sameness'²⁸ rather than the quasi-irreversibility of statehood (once attained) argued by the ratchet effect doctrine. The question is not if continuity exists; such a principle is necessary to international law and is a logical and essential counterpart to state extinction and succession.²⁹ Rather, this article argues that the current reading of state continuity within the context of small island states does not correspond to how it has been defined and applied prior to and in parallel with this discussion. Namely, the presumption of continuity emerged as a helpful rule to assess the continued existence of the same state at different points in time in order to dissipate uncertainty about the identity of the current state in relation to a putative prior version. The existence of a presumption of continuity simply means that internal changes in a state need to be sufficiently substantial to trigger the law on state succession and that succession should thus be presumed against. The aim of such a presumption is to increase stability and reduce uncertainty. This is perhaps best explained by Crawford who states that 'the notion of continuity is well established and, given the State/government distinction, is even logically required'.³⁰

Ineta Ziemele explains further:

Continuity becomes an issue when States are subject to significant changes so that the question as to their continuity, extinction or identity arises. In a normal setting, the need to argue the continuity of States does not come up, although the relevant rules and principles which regulate statehood still apply.³¹

Thus, it seems that continuity is the 'by default' state of things. If this were not the case, a new state could potentially arise from any internal change, triggering the law on state succession and thus creating considerable instability. The

²⁷ See especially Ross (n 10) 127–67. Wong (n 10) 362–4 also addresses the assumed role of continuity as a ratchet but nevertheless fails to take into account the possibility raised in the present article of continuity instead being applied as a sameness assessment.

²⁸ Crawford (n 10) 667–8; Ineta Ziemele, 'Acceptance of a Claim for State Continuity: A Question of International Law and Its Consequences' [2016] (9) *Juridiskā zinātne / Law* 39, 43. See also Mälksoo (n 16) 6.

²⁹ See, eg, Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz, 1954) 6–7.

³⁰ Crawford (n 10) 668. Crawford also revealingly characterises succession in relation to discontinuity, illustrating the complementary nature of continuity and succession.

³¹ Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers, 2005) 118 ('*State Continuity and Nationality*').

presumption of continuity, according to the sameness assessment doctrine, consists primarily of a presumption against the creation of a new state where a state already exists,³² notwithstanding cases of self-determination such as the inception of a state through secession. In that latter case, even if a province were to secede from an existing state, the presumption of continuity and the assessment of sameness it implies mean that the ‘parent’ state remains the same state and maintains the same identity prior to and following the secession or change in territory.³³ The case of Bangladesh seceding from Pakistan provides a good example of such a case with the presumption of state continuity meaning here that Pakistan’s identity was not affected by the secession.³⁴

In contrast with Willcox’s statement that ‘the status of statehood, once achieved, is difficult to lose’,³⁵ the sameness doctrine of continuity instead centres on the identity of the state rather than on its claim to statehood.³⁶ In fact, it has been argued that continuity is simply the dynamic dimension of state identity, effectively rendering the two notions inseparable.³⁷ While the relationship between the two concepts has generated a substantial amount of literature, it is worth noting that the different approaches to the distinction *vel non* between identity and continuity, regardless of their stance on the issue, all imply a ‘sameness assessment’ definition of continuity, addressing continuity downstream from its characterisation as either a ratchet effect or sameness assessment.³⁸

Continuity can thus be said to be dependent on the existence of its subject, not constitutive of it. Moreover, at least within this specific understanding, continuity could not logically exist without its subject. Assessing the statehood of an entity must thus be different from assessing its continuity since doing otherwise would result in circular thinking. Cases not falling within the scope of continuity should then be assessed through the lens of succession and extinction, the logical alternative to continuity. In fact, this is how continuity is usually construed: as the opposite to extinction and succession.³⁹ The presumption of state continuity, defined as a sameness assessment, appears to assign a narrower scope to the principle as opposed to the ratchet effect doctrine which assumes continuity as a general principle effectively stopping states from going extinct.

³² Heather Alexander and Jonathan Simon, ‘Sinking into Statelessness’ (2014) 19(1–2) *Tilburg Law Review* 20, 23–4.

³³ That is, unless the change is so substantial that the parent state is found to be extinct, in which case the newly created state becomes the successor, which happened following the USSR’s demise.

³⁴ Ziemele, *State Continuity and Nationality* (n 31) 128.

³⁵ Willcox (n 4) 122.

³⁶ Crawford (n 10) 669.

³⁷ Marek (n 29) 6.

³⁸ For a critical review of the different attempts at defining the relationship between continuity and identity, see Anne Østrup, ‘Conceptions of State Identity and Continuity in Contemporary International Legal Scholarship’ (Conference Paper No 11/2015, European Society of International Law Research Forum, 14–15 May 2015). The relativist or deconstructivist approaches to the identity/continuity dichotomy identified by Østrup either question their value or outrightly dismiss these concepts as irrelevant.

³⁹ See, eg, Mälksoo (n 16) 10.

III CONTRASTING VIEWS

A *Origin Story*

While there are clearly differences between the two definitions of continuity discussed above, a possible reason why this contrast has not been brought to light earlier may be the lack of contextualisation of the presumption of continuity in its ratchet effect iteration.

As discussed earlier, most scholars take into account the presumption of continuity in their assessment of LLISs' continued statehood, but do not discuss its substance or scope.⁴⁰ An exception to this rule is Abhimanyu George Jain, who instead analyses the impact of the loss of territory on the statehood of small island states.⁴¹ Discussing state continuity, Jain correctly contextualises Marek's and Crawford's respective analyses of continuity by acknowledging their reservations about continuity as a general ratchet against state extinction,⁴² while these exact sources are used widely as the starting point of the proponents of the ratchet effect. However, taken out of context, it is easy to see how the ratchet effect doctrine took root in the current debate on LLISs' continued statehood and eventually gained a life of its own.

Notably, the use of the presumption of continuity is firmly rooted in a nation-state centred conception of international law, relying on elements of state practice and literature to substantiate its applicability even if this has so far been almost exclusively in the context of the ratchet effect doctrine. The role or scope of a ratchet effect under a different account of statehood is discussed by Willcox,⁴³ but there is no doubt such ratchet effect is first and foremost linked with the minimum threshold account of statehood associated with the *Montevideo Convention* criteria.⁴⁴ While the concept of the nation-state has been problematised,⁴⁵ it still provides the foundation upon which the future statehood of LLISs is discussed and thus the context within which both doctrines of continuity should be assessed.

B *State Practice*

1 *Fragile States*

Whether framed as a general ratchet or as a sameness assessment, the arguments found to support either doctrine primarily hinge on examples of past state practice. Major changes in the internal components of states are particularly relevant, as they are key to the putative application of the principle to the case of small island states. Exactly which factors are at play when a state 'continues' instead of going extinct is central to defining the scope and application of the presumption of continuity.

⁴⁰ See above Part II(A).

⁴¹ Jain (n 16).

⁴² Ibid 27–8, citing Marek (n 29) 7 and Crawford (n 10) 46, 701–3, 715.

⁴³ See generally Willcox (n 4).

⁴⁴ Ibid 135.

⁴⁵ See, eg, Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) 53–97.

Fragile states (also known as ‘failed states’, although this term has been criticised as inadequate and unhelpful)⁴⁶ are states that fail to fulfil the requirement for an effective government. Somalia is perhaps the best example of such a fragile state, often cited as the ‘*locus classicus* of State failure’.⁴⁷ It lacked a central government from 1991 to 2004 and, despite more than a decade of major internal turmoil, Somalia’s statehood was not challenged, maintaining its membership in the United Nations even while leaving its seat vacant from 1991 to 2000.⁴⁸ While this example is used by proponents of the ratchet effect doctrine, who cite it, rightfully, as a case of continuity,⁴⁹ the continued existence of Somalia appears to be explained somewhat more convincingly by a sameness assessment, where the population and territory provided an empirical basis for a continuation of the status quo of statehood. Crawford supports this assessment of the facts, pointing to the existence of territory and people as compensating for the ‘virtual absence of a central government’ in the case of Somalia.⁵⁰

While the case of fragile states does imply the presumption of continuity, since Somalia remained Somalia despite the major internal changes, the statehood of Somalia itself was never challenged. Why exactly this was so may be open to debate, but a combination of different factors is probable. Crawford, discussing Somalia’s particular situation, categorises it as a ‘cris[i]s of government’, thus not affecting the statehood of entities facing similar internal turmoil.⁵¹ The simple absurdity and complete unacceptability of the alternative, namely, the creation of terra nullius or of a ‘sovereignty vacuum’⁵² due to the absence of a competing claim to sovereignty over Somalia’s territory, is also to be taken into account. As Christian Tomuschat cleverly summarises, ‘[f]or the international community, it is much simpler to carry a man half-dead with it, contending that he is well and alive, instead of issuing a death certificate, which inevitably gives rise to struggles about inheritance.’⁵³

Linking back to the *Montevideo Convention* definition of statehood, cases of fragile states maintaining unchallenged statehood seem rooted more in their presumed sovereignty over a territory and population than in a presumption of continuity. This is not to say that the presumption of continuity does not play a part, but simply that in its embodiment of the status quo, even conceptualised as a ratchet effect, the presumption of continuity’s putative role is arguably dwarfed by the existence of a territory and population. These physical components would have been left in a legal vacuum had Somalia’s statehood been extinguished.

⁴⁶ Alejandra Torres Camprubí, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill Nijhoff, 2016) 212–14.

⁴⁷ Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers, 2004) vol 50, 65.

⁴⁸ *Ibid* 71. See also Ross (n 10) 150–1.

⁴⁹ Ross (n 10) 150–1.

⁵⁰ Crawford (n 10) 223.

⁵¹ *Ibid* 721–2.

⁵² Mariano J Aznar-Gómez, ‘The Extinction of States’ in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C Wellens* (Martinus Nijhoff Publishers, 2012) vol 5, 25, 26. See also Mälksoo (n 16) 203, qualifying the idea of creating terra nullius as ‘obviously absurd’ in the context of his analysis of the Baltic states’ claim to continuity.

⁵³ Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (Martinus Nijhoff Publishers, 2001) 111 [30].

Crawford's further analysis of the situation seems to again confirm the weight of physical indicia in supporting maintained statehood:

In effect whereas in some States (eg Somalia) the existence of territory and people have compensated for the virtual absence of a central government, in the case of the Vatican City the strength and influence of the government — the Holy See — have compensated for a tiny territory and the lack of a permanent population.⁵⁴

This assumption is also emphasised by Marek: 'A State, temporarily deprived of its organs, can be conceived; but the idea of organs deprived of their State is simply inconceivable.'⁵⁵ Marek then goes on to specify that this 'would be the case of a State passing through a temporary period of anarchy: such would also be the case of post-war Germany, in the period following her military defeat'.⁵⁶

Ultimately, the uncontested statehood of a fragile state is reliant on the assumption that there will be a government at some point, that the interruption is temporary due to the existence of physical indicia.⁵⁷ Giving all the credit to the presumption of continuity overestimates its scope of application by ignoring the unacceptability of the alternative to continued existence, and the fundamental difference between interruptions in government and the complete loss of physical indicia.

2 *Baltic States*

The case of the Baltic states is perhaps the most extreme application of state continuity yet in international law. Invaded by Joseph Stalin in 1940, Estonia, Latvia and Lithuania effectively ceased to exist for fifty years until the collapse of the Soviet Union in the early 1990s allowed the Baltic states to regain their independence.⁵⁸ Core to their claim to statehood and identity was the idea that these were the same states that were invaded and suppressed by Stalin in 1940, meaning that their existence had merely been interrupted.⁵⁹ By reinstating their suspended constitutions and emphasising *de jure* continuity, the Baltic states aimed to strengthen and emphasise their claim to continuity with the pre-1940 Baltic states.⁶⁰

Key to the Baltic states' claim was also the existence of a clear, identifiable territory and population which provided an unassailable physical anchor to their claim to continuity.⁶¹ Although it can be mostly implicit, the sameness

⁵⁴ Crawford (n 10) 223. The Vatican City's statehood can also be framed as resting on the symbolic fulfilment of the physical criteria of statehood. This hypothesis is supported by the original intention of the Lateran pacts, in which Italy agreed to grant the Holy See sovereignty over a territory in order to be politically sovereign. Granting sovereignty over the Vatican City was agreed to be sufficient in substance to provide a physical basis for statehood: see Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996) 411.

⁵⁵ Marek (n 29) 89 (citations omitted).

⁵⁶ *Ibid.*

⁵⁷ Wong (n 10) 366–7. Matthew CR Craven also credits the absence of a putative successor state to the reluctance of other states to withdraw recognition: Matthew CR Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998) 9(1) *European Journal of International Law* 142, 159.

⁵⁸ Ziemele, *State Continuity and Nationality* (n 31) 18–41.

⁵⁹ *Ibid.* 41.

⁶⁰ *Ibid.*

⁶¹ See *ibid.* 129.

assessment doctrine of continuity consists of evaluating the ‘sameness’ of an entity with the assumption that the physical dimension of statehood provides a factual anchor to the assessment:

[W]e assume continuity of our States even as their governments, constitutions, territories and populations change. International law is based on this assumption. It embodies a fundamental distinction between State continuity and State succession: that is to say, between cases where the ‘same’ State can be said to continue to exist despite sometimes drastic changes in its government, its territory or its people and cases where one State has replaced another *with respect to a certain territory and people*.⁶²

Marek, writing in 1954, already hints at the possibility that the Baltic states might one day come back to life, due to the continued existence of their territory and peoples.⁶³ In her opinion, as long as the reasonable possibility of an ‘*ad integrum restitutio*’ exists, it would be premature to assume the finality of the disappearance of the Baltic states.⁶⁴ She somehow prophetically states that ‘[it] would be a bold thing to assert to-day that the possibility of a restoration of the three Baltic States has finally vanished beyond all hope’.⁶⁵

Also relevant to the case of the Baltic states is the illegality of their annexation to the Soviet Union in 1940. In accordance with the principle *ex injuria jus non oritur*, acknowledging the formal extinction of the Baltic states would have meant giving normative weight to an illegal act of annexation. This approach was explicitly followed by the United States, for instance, and has been reaffirmed by the Baltic states.⁶⁶

The relevance of the Baltic states’ continuity to the present discussion lies in two elements. First is the sheer length of the interruption in their existence. Most cases of continuity address cases of major internal changes.⁶⁷ Claiming continuity after several decades of annexation provides an extreme example of how far continuity can be stretched, although other elements of the Baltic states’ situation certainly played a crucial role in allowing the reinstatement of their existence as mentioned above. Second is the value of this case as an illustration of the sameness doctrine of continuity. Contrary to the competing ratchet effect, which is mostly concerned with the statehood of the entity in question, continuity within the context of the Baltic states was more a problem of identity than status.⁶⁸ Russia’s position that the Baltic states joined the Soviet Union voluntarily in 1940 means that it denied being bound by any pre-1940 treaties with the Baltic states, not that the Baltic states did not enjoy statehood in 1991; Russia explicitly recognised Estonia’s sovereignty in 1991.⁶⁹ Ultimately, the disagreement between the Russian Federation and the Baltic states lies in the

⁶² Crawford (n 10) 667–8 (emphasis added) (citations omitted).

⁶³ Marek (n 29) 415–16.

⁶⁴ Even if, in practice, the length of the Soviet era in the Baltic states has resulted in the impossibility of a full *restitutio in integrum*: see Mälksoo (n 16) 289.

⁶⁵ Marek (n 29) 416. This was indeed one of the core elements of the claim to continuity made by Estonia in 1990; for instance, see Ziemele, *State Continuity and Nationality* (n 31) 27–8.

⁶⁶ Marek (n 29) 399; Ziemele, *State Continuity and Nationality* (n 31) 27–8.

⁶⁷ Crawford (n 10) 667–8.

⁶⁸ Status here refers to the statehood (or not) of the entity discussed.

⁶⁹ Markku Suksi, *On the Constitutional Features of Estonia* (Åbo, 1999) 22; Mälksoo (n 16) 66–9.

former characterising the latter's reinstatements as cases of succession rather than continuity.

3 *Governments in Exile*

Governments in exile have also been cited to support the possibility for a small island state to continue to exist beyond the loss of physical indicia.⁷⁰ Indeed, they seem to provide a precedent for statehood without a territory and population, possibly evidence of a ratchet effect at work in preventing their demise. However, such an interpretation of the continued existence of governments in exile overlooks other principles at play in addition to mischaracterising their status.

First, governments in exile do not exist independently from physical indicia. Underlying the existence of any government in exile is the idea that the said government will eventually return to its territory and population, as well as to its existence as the pre-existing state that it temporarily represents from abroad.⁷¹ Indeed, the legal personality of the government in exile is not independent from the state it claims to represent.⁷² The second element that weighs heavily is the legal position of the insitu authority: 'governments in exile will, as a rule, be established, and more importantly will be recognised as such only if the belligerent occupation is the result of the illegal use of force by the occupant'.⁷³ The principle of *ex injuria jus non oritur*, overriding the principle of *ex factis jus oritur*, again plays a sizeable role in ensuring that the claim of governments in exile, displaced by illegal occupation, is recognised as legitimate by other members of the international community. Not doing so would effectively result in giving normative weight to a violation of a *jus cogens* norm, accepting the consequence of such violation as legal.

Hence, while precedents of governments in exile do indeed provide interesting insights as to how a de-territorialised LLIS could function in practice, several intrinsic differences mean that such cases bear limited relevance for the purpose of defining the presumption of continuity. For instance, even if a ratchet effect had been at play in sustaining the existence of the Belgian government exiled in London during the Second World War, the other elements discussed above are likely to have been decisive in ensuring Belgium's continued existence. Conversely, as there was little doubt that Belgium remained Belgium during this time, the sameness doctrine simply emphasises such a situation as one of continuity, rather than succession.⁷⁴ While not completely irrelevant in such contexts, continuity can hardly be construed as a primary element in assessing the status of governments in exile.

⁷⁰ Burkett (n 4) 356–7; Ross (n 10) 151–3; Jane McAdam, "'Disappearing States', Statelessness and the Boundaries of International Law' (Research Paper No 2010-2, Faculty of Law, University of New South Wales, 21 January 2010) 9 ('Disappearing States').

⁷¹ Mälksoo poetically describes such situations as involving 'sleeping states': Mälksoo (n 16) 300.

⁷² Stoutenburg (n 20) 285.

⁷³ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford University Press, 1998) 219.

⁷⁴ Crawford interprets cases of governments in exile as further illustrations of the necessary distinction between government and state: Crawford (n 10) 34.

4 *Voluntary Extinction and 'Resurrection': Syria*

A unique case of what could only be described as 'continuity of identity without continuity', Syria's voluntary extinction to become part of the short-lived United Arab Republic ('UAR') between 1958 and 1961 (and its subsequent 'resurrection') presents a perplexing situation.⁷⁵ Syria did not claim continuity with its pre-1958 self, but nevertheless regained its identity with no major hurdles or opposition from the international community.⁷⁶ Described by Ziemele as the sole case of a distinction between identity and continuity,⁷⁷ this particular case may seem to present a challenge to the sameness assessment doctrine of continuity. Indeed, if this is how the presumption of continuity applies, why did Syria not claim continuity with its former self?

One could interpret this as a case of succession, since Syria's 1961 iteration inherited some of the UAR's obligations.⁷⁸ This, however, is not entirely satisfactory, as succession implies a change in identity, and Syria's identity prior to and after its absorption into the UAR was accepted as the same by the international community.⁷⁹ Perhaps a more adequate explanation is that, while not described as such by Syria, the relationship between pre-1958 and post-1961 Syria was simply a case of de facto continuity, a return to the previous status quo. Syria's avoidance of claiming continuity could be explained by its desire to remain bound by the treaties it ratified while being a part of the UAR.⁸⁰ Furthermore, due to the short length of the interruption in Syria's identity, it might have been easier to simply reclaim its identity to avoid triggering a thorny discussion on continuity or succession. The voluntary nature of Syria's temporary dissolution also likely came into play: claiming continuity would have created a rather awkward situation as it could have been understood to imply the complete renouncement of obligations it had committed to while a part of the UAR.

While this might not succeed in dissipating the uncertainty relating to the exact nature of Syria's transitions in 1958 and 1961, describing the situation as a case of de facto continuity seems to be the most plausible characterisation, since categorising this case as one of succession faces the major obstacle of Syria's unchallenged claim to effectively continued (though interrupted) identity. As the presumption of continuity can be formulated as the manifestation of the status quo, one might question whether there is even a need to make a legal claim to continuity for it to apply, as it is the default state of things, a presumption. By avoiding the specific wording of continuity, Syria simply sidestepped categorising the situation in order to allow for more flexibility while still

⁷⁵ Syria's peculiar situation can be contrasted with post-war Austria's successful claim to continuity with pre-Anschluss Austria: see Robert E Clute, *The International Legal Status of Austria 1938–1955* (Martinus Nijhoff, 1962).

⁷⁶ Ziemele, *State Continuity and Nationality* (n 31) 120–1.

⁷⁷ *Ibid* 128.

⁷⁸ See Konrad G Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer Law International, 2001) vol 38, 58–61.

⁷⁹ Syria's membership to the United Nations as an original member was simply resumed: Ziemele, *State Continuity and Nationality* (n 31) 121.

⁸⁰ See generally *ibid*. The intention to de-legitimise the former regime's action could have also played a part in Syria's exit from the UAR, being the result of a coup d'état.

implicitly claiming continuity through its ‘resurrection’ as Syria and not exclusively as a new successor state to the UAR. Additionally, the continuity in nationality observed after the re-emergence of Syria, in line with the presumption of continuity of nationality mentioned by Ziemele,⁸¹ also helps frame the Syrian case as one of continuity rather than succession.

5 *Failed Sameness? Socialist Federal Republic of Yugoslavia ≠ Federal Republic of Yugoslavia*

One of the grounds used to substantiate the ratchet effect doctrine of continuity is the rarity of state extinction in the modern era. In fact, within both the sameness and ratchet effect doctrines, this outcome is framed as implausible since the presumption of continuity weighs heavily against involuntary extinction. There is, however, at least one case of extinction despite a claim to continuity. The dissolution of the Socialist Federal Republic of Yugoslavia (‘SFRY’) in the early 1990s, due to major internal turmoil and the declarations of independence of four of its federal units, is a case of extinction and it does present relevant insights as to the nature of the presumption of continuity. The SFRY was eventually declared extinct by the Arbitration Commission of the Peace Conference on Yugoslavia,⁸² despite the Federal Republic of Yugoslavia’s (‘FRY’) attempt to claim continuity.⁸³

This involuntary dissolution of the SFRY would appear to be somewhat puzzling in light of the ratchet effect doctrine. While Willcox, for example, does not claim that statehood is impossible to lose, the framing of continuity as a ratchet implies that statehood is ‘difficult to lose’.⁸⁴ Willcox also cites Vaughan Lowe as saying that the ‘road to statehood is a one-way street’,⁸⁵ implying that although it might not be an absolute principle, it is as close as can be. How then does an existing state go extinct despite the existence of an entity claiming continuity if there is indeed a ratchet effect at work?

The sameness assessment doctrine provides some explanation as to why the FRY failed in its claim to continuity with the SFRY. Relevant to such a sameness assessment is the fact that the FRY was constituted of only two of the six federal entities formerly constituting the SFRY: Serbia and Montenegro.⁸⁶ The ‘core’ of the SFRY could thus hardly be said to be present to ensure continuity, a reality reflected by the lack of constitutional continuity with the FRY.⁸⁷ This, in conjunction with the absence of a devolution agreement to support its claim to continuity as well as the opposition of other former federal

⁸¹ Ibid 248–50.

⁸² The Commission concluded ‘that the process of dissolution of the SFRY referred to in Opinion No 1 of 29 November 1991 is now complete and that the SFRY no longer exists’: see Maurizio Ragazzi, ‘Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia’ (1992) 31(6) *International Legal Materials* 1488, 1523.

⁸³ Stoutenburg (n 20) 280.

⁸⁴ Willcox (n 4) 122.

⁸⁵ Ibid, quoting Vaughan Lowe, *International Law* (Oxford University Press, 2007) 165.

⁸⁶ Hubert Beemelmans, ‘State Succession in International Law: Remarks on Recent Theory and State Praxis’ (1997) 15(1) *Boston University International Law Journal* 71, 77.

⁸⁷ See generally Crawford (n 10) 671.

entities of the SFRY, seems to have weighed against continuity.⁸⁸ Additionally, the grave humanitarian situation undoubtedly affected the FRY's claim to continuity with the SFRY, prompting members of the international community to deny the former's claim.⁸⁹ This denial of the FRY's claim to continuity may have been the decisive factor in ensuring that the SFRY did not survive its dismemberment.⁹⁰

Exactly which element proved to be the tipping point is very much open to discussion and this remains a contentious event in terms of its legal implications. However, regardless of which element tipped the scale, the presumption of continuity framed as a ratchet fails to present a convincing explanation as to why the SFRY was dissolved despite the existence of a putative 'continuing entity' in the form of the FRY.⁹¹ Tellingly, the fact that the presumption of continuity is conceptualised as a presumption does imply that it is, by nature, not absolute. The case of the SFRY seems to be one where powerful forces weighed heavily enough to reverse the presumption of continuity of existing states which then resulted in the simple, involuntary and irreversible death of the SFRY. Besides its implications for continuity, this failed claim highlights two elements which might need to be factored in when assessing a claim to continued statehood from a small island state: first, the role played by ethical or moral considerations, and second, the weight of recognition in assessing claims to continuity.

C *The Role of Recognition*

One of the fundamental differences between the ratchet effect and the sameness doctrine is the role they respectively afford to recognition. McAdam, for instance, argues that continuity and statehood in the case of LLISs will eventually become subjective, resting upon the claim of the state in question to continued existence, which other states would simply defer to.⁹² A ratchet effect could thus be assumed to prevent the loss of statehood as long as other states recognise the statehood of the concerned entity. Recognition has its limits, however. Endless debates about recognition as being either constitutive or declaratory highlight some of the problems implicit in its use as the decisive element in assessing a legal question.

The argument that a de-territorialised state could continue to survive based on the existence of a ratchet effect ends up relying on circular thinking, since the effect remains largely dependent on its being buttressed by recognition by the international community, which plays a constitutive role compensating for the loss of physical indicia. The argument essentially goes as follows: the ratchet effect would prevent a de-territorialised LLIS from losing its statehood, since the international community would recognise the state's continued statehood, based on the existence of said ratchet effect. If, as discussed in the present article, the

⁸⁸ Beemelmans (n 86) 71, 82.

⁸⁹ Stoutenburg (n 20) 303.

⁹⁰ Crawford (n 10) 670.

⁹¹ This is particularly relevant in light of the ubiquitous references to Crawford's words that a 'State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three', a statement usually cited by proponents of the ratchet effect as reflecting the quasi-immortality of states: see *ibid* 700.

⁹² McAdam, 'Disappearing States' (n 70) 9, citing Crawford (n 10) 668.

ratchet effect's legal foundations were to be challenged, would recognition then still suffice? Conversely, were recognition to be partial or contested, what would then be the status of the de-territorialised LLIS? Similarly, McAdam's assessment that 'the presumption of continuity will apply until States no longer recognise the government [of the state]'⁹³ ends up facing the same problem of reliance on a circular argument, ultimately being dependent on other states effectively recognising the existence of a ratchet effect operating even beyond the loss of physical indicia.

In contrast, the sameness doctrine implies a different role for recognition, limiting its relevance to a confirmation *vel non* of the sameness of the state in question at different points in time. In cases of continuity, like the re-emergence of the Baltic states, recognition can provide a useful tool for assuming continued existence, or its absence, as in the case of the FRY. Marek or Ziemele's opinion that recognition operates within existing norms seems to best define the role of recognition in cases of state continuity,⁹⁴ following the sameness doctrine. While it might not alone and of itself ensure continuity, recognition can provide a useful tool for assessing sameness, and if positive, 'facilitate the concrete manifestation of such survival'.⁹⁵ Accordingly, if one follows the sameness doctrine, the role of recognition is limited to the scope of the presumption of continuity. It would thus be unlikely, if not impossible, for recognition alone to supersede the complete loss of physical indicia for instance, as this could be said to fall outside of the scope of the sameness doctrine of continuity.⁹⁶ Going further, Heather Alexander and Jonathan Simon state:

If recognition were constitutively sufficient for statehood, then if the community of nations, for whatever reason, decided to recognise a boiled egg as a state, then that boiled egg would be a state. But this is absurd. It follows that no amount of recognition extended to some entity could guarantee that that entity were in fact a state.⁹⁷

It seems safe to say that while recognition can, within certain boundaries, provide a useful tool for assessing claims of continuity, it cannot create or sustain statehood out of thin air, nor can the presumption of continuity, even when framed as a ratchet effect. Underlying the inherent limitations of recognition as a tool for assessing continued statehood is the weight of statehood's physical indicia. Indeed, even if states are legal creations, their existence and relevance in a world largely populated by international organisations, transnational corporations and NGOs remain deeply rooted in the physical reality of their existence. Although the proponents of the de-territorialised state option portray it as largely obsolete, the need for physical indicia is very much at the core of the legal fiction of the state.

⁹³ McAdam, 'Disappearing States' (n 70) 9.

⁹⁴ Marek (n 29) 160–1; Ziemele, *State Continuity and Nationality* (n 31) 126.

⁹⁵ Marek (n 29) 160.

⁹⁶ See below Part III(D)(1).

⁹⁷ Alexander and Simon (n 32) 24.

D *Scope(s) of Application*

The physical elements of statehood are key to setting tentative boundaries to the scope of the concept of continuity, at least if conceptualised as a sameness assessment. Implicit to the notion of 'sameness' is the existence (or not) of a common core upon which that sameness can be assessed,⁹⁸ an extra-legal anchor that exists beyond the legal obligations and relationships of the state, a unique identity.⁹⁹ It is inherent to cases where questions of continuity arise that this core has gone through various changes or faced different challenges, but this core of population and territory seems to be an implicit requirement to apply continuity (or succession for that matter).¹⁰⁰ Derek Wong, for instance, implicitly acknowledges this:

Difficult issues would also arise where a government is able to exercise effective control, loses control and subsequently regains it. Without the presumption of continuity, a state could have periods of extinction and revival, followed by extinction.¹⁰¹

By effectively acting as a presumption against the creation of a new state, the presumption of continuity ensures that this does not happen. The example of the Baltic states discussed above provides an excellent example of the relevance of such a core upon which continuity can be assessed.¹⁰² Post-war Austria's claim to continuity with pre-Anschluss Austria also highlights the relevance of resting such a claim on the similarity in territory and population.¹⁰³

The ratchet doctrine of continuity instead adopts a broader approach to the issue. While not necessarily constructed so as to turn states into immortal creatures, it assumes state death to be highly unlikely and, to a certain extent, differentiates between state inception and continued statehood.¹⁰⁴ As discussed above, under this understanding of continuity, recognition gains a quasi-constitutive weight. The implicit outer boundaries of the ratchet effect would thus be defined by the (de-)recognition of the de-territorialised state at an undetermined time after the physical indicia of statehood are no longer fulfilled. However, this shift towards recognition fails to engage fully with the role of the physical foundations of statehood¹⁰⁵ and risks overlooking the role of the latter in the application of the presumption of continuity to the case of small island states. Moreover, the ratchet effect doctrine relies on the presumption of continuity to argue the obsolescence of the orthodox definition of statehood. This, however, mischaracterises the relationship between physical indicia, statehood and continuity.

⁹⁸ Crawford (n 10) 671. This concept of an essential core or nucleus is already present in William Edward Hall's analysis of the role of territory in matters of continuity and identity: William Edward Hall, *A Treatise on International Law* (Clarendon Press, 1890) 18–19.

⁹⁹ Craven (n 57) 160.

¹⁰⁰ Crawford (n 10) 667–8.

¹⁰¹ Wong (n 10) 364.

¹⁰² See above Part III(B)(2).

¹⁰³ Clute (n 75) 109.

¹⁰⁴ See, eg, Ross (n 10) 242.

¹⁰⁵ Willcox instead opts for an alternative approach to defining what a state is: Willcox (n 4) 127–32.

1 *Physical Indicia and the Minimum Threshold Account of Statehood*

The traditional definition of the state is found in the 1933 *Montevideo Convention on the Rights and Duties of States*, and is usually taken as a starting point to discuss the continued statehood of small island states.¹⁰⁶ Inadequate and heavily criticised for its failure to provide a workable definition,¹⁰⁷ the popularity of the *Montevideo Convention* definition and its generally accepted status as representative of customary law nevertheless make it hard to dismiss.¹⁰⁸ Indeed, were it completely and thoroughly outdated, international law would have certainly moved on. Rather, it seems more plausible that while the *Montevideo Convention* fails to provide a satisfactory definition, it nonetheless sets a minimum standard that allows enough flexibility for it to be favoured by states.¹⁰⁹ Although it fails at clarifying certain limit cases, its minimum threshold still provides a basic outline of which criteria a state is expected to fulfil to be a member of the club.¹¹⁰ Rather than characterising it as a comprehensive and watertight definition,¹¹¹ one can still extract significance from some of its elements by linking it with what is generally considered the root of states' existence and legitimacy: population and territory. By focusing primarily on what the *Montevideo Convention* definition fails to do, it is easy to overlook what it does succeed in doing: providing a minimum threshold, regardless of how unhelpful it is in clarifying certain unclear cases.¹¹²

Arguably, part of the relevance of the *Montevideo Convention* definition lies in its reflecting customary international law and its statement that the existence of a state is rooted in fact.¹¹³ Beyond the ad nauseam references to the Peace of Westphalia as the watershed moment of the sovereign state's domination on the international level, it remains that the territoriality of the state is at the core of its victory over its competitors during the centuries that led to its eventual triumph.¹¹⁴ While the monopoly of states on international lawmaking has since eroded, one can hardly declare states as irrelevant. Borders and domestic legal orders remain central to international governance; the recent fight against COVID-19 is only the latest example of borders being more than meaningless

¹⁰⁶ Wong (n 10) 353. See also Mälksoo (n 16) 41.

¹⁰⁷ Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 403; Wong (n 10) 354.

¹⁰⁸ David Harris, *Cases and Materials on International Law* (Sweet & Maxwell, 7th ed, 2010) 92; Mälksoo (n 16) 13.

¹⁰⁹ Crawford (n 10) 45.

¹¹⁰ Jan Klabbers, *International Law* (Cambridge University Press, 2013) 73.

¹¹¹ The fact that it is not used as the basis for the complete dismissal of the definition. This approach overlooks the continuing position of the *Montevideo Convention* definition in international law, regardless of its well-known and thoroughly discussed flaws. The fact that such a supposedly 'bad' definition still holds a predominant position testifies to the existence of at least some relevant elements among the outdated requirements. Its ubiquitous presence in legal scholarship emphasises further that fact: see, eg, Bílková (n 21) 43.

¹¹² This indeed seems to be the consequence of a minimum threshold set too low; it fails to reach the theoretical desired threshold of an effective definition, which could clarify any case of disputed statehood.

¹¹³ Interestingly, art 1 of the *Montevideo Convention* was adopted with very little debate, in stark contrast with the attempts at defining the state that were to follow: see Grant (n 107) 416.

¹¹⁴ Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton University Press, 1994) 151–80.

lines on a map. States are legal fictions, but only to a certain extent; they retain a firm grasp on the physical world even today, regardless of how much some want to believe that the sovereign state is dead.

Essentially, the core of the discussion on continuity lies in its relationship with physical facts. Can the presumption of continuity supersede the factual disappearance of some or all the components of a state as the ratchet doctrine seems to imply? Were this to be the preferred understanding of continuity, it would effectively frame the presumption of continuity as the hypothetical primary constitutive element of a de-territorialised state, in contrast with the sameness doctrine, which instead limits the scope of continuity to matters of identity. The weight given to the different elements of the *Montevideo Convention* definition is also crucial, as the non-fulfilment of one criterion might not have as wide-ranging consequences as others. Here, the case of fragile states is of particular importance, since it is cited by proponents of the ratchet effect doctrine as highlighting the flexibility of the notion of statehood and the possibility of retaining statehood despite the complete loss of one of its elements.¹¹⁵ Although this instance of state practice is discussed above in the context of continuity, its implications as to the weight given to government as an element of statehood is relatively clear: a state does not necessarily need a government to continue existing, or, even to become a state.¹¹⁶ Wong attributes this flexibility of the government criterion to the temporary nature of such events; the underlying assumption being that ‘there will be a government at some point’.¹¹⁷ Hence, this leeway does not mean that all *Montevideo Convention* criteria are to be assessed similarly.

Another element of state practice used to illustrate the non-necessity of territory and the strength of the presumption of continuity as a ratchet is the case of governments in exile.¹¹⁸ However, this would be true if the governments in exile did not claim any territory, which is not the case. As discussed above in Part III(B)(3), the weight of *jus cogens* norms and of other principles of international law heavily diminishes the purported role played by the presumption of continuity. Consequently, the clear link between governments in exile with a defined population and the territory from which they are temporarily disconnected (as the notion of exile indeed implies) clearly negates the claim that their existence is independent from the existence of the physical indicia of statehood. The legal personality of a government in exile is not independent from the state it claims to be, and its existence removed from the state it represents is, in Marek’s words, ‘simply inconceivable’.¹¹⁹

Hence, for the purpose of defining a working scope to the presumption of continuity, the ratchet effect doctrine assumes a wide, general scope of application. The sameness doctrine instead limits the scope of continuity to the

¹¹⁵ Ross (n 10) 150.

¹¹⁶ The case of Congo’s hurried independence from Belgium in 1960 is particularly striking: see Crawford (n 10) 56–8. The fourth criterion listed in the *Montevideo Convention*, ie the capacity to enter into relation with other states, is not discussed in the context of this article as it is broadly considered outdated or irrelevant: at 61–2.

¹¹⁷ Wong (n 10) 366–7.

¹¹⁸ Ross (n 10) 151–3; Burkett (n 4) 356–7; McAdam, ‘Disappearing States’ (n 70) 10–11. See also McAdam, *Climate Change, Forced Migration and International Law* (n 1818) 135–8.

¹¹⁹ Marek (n 29) 89; Stoutenburg (n 20) 285.

clarification of the identity of a state, excluding matters of statehood and status. Hence, while the ratchet doctrine relegates the *Montevideo Convention* definition to an outdated fiction for the purpose of assessing continued statehood, these matters simply fall outside of the scope of continuity under the sameness doctrine. The reason for the latter is simple: in order to assess sameness, there needs to be an object to such assessment, and the existence of that object is defined under a different set of rules (arguably the *Montevideo Convention* definition) which overlaps with the sameness assessment only in so far as a similarity in a common core can contribute to assessing continued identity. Under this doctrine, the law on state continuity thus cannot supersede the normative framework applying to statehood, as these are different in nature and fundamentally distinct.

This is clearly reflected in the work of Professor Krystyna Marek, whose research has contributed substantially to the study of continuity and state identity.¹²⁰ While Marek discusses in depth the question of state continuity, she explicitly dismisses the idea that continuity could override the physical disappearance of a state:

Traditional doctrine generally seeks to simplify the problem by affirming that a State becomes extinct with the disappearance of one of its so-called ‘elements’, — territory, population, legal order. With regard to the material elements of a State, the argument is so obvious as to be unnecessary. That a State would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (eg an island which would become submerged) can be taken for granted. But with regard to the real and decisive problem the traditional view leads nowhere. A State — it is said — ceases to exist when its legal order (or ‘government’ as is sometimes said) ceases to exist. But this is precisely the question: *when* does the legal order cease to exist? For there can be no doubt that it is around this question that the whole problem centres, and that it is precisely this question which is juridically relevant.¹²¹

The role of continuity is thus defined as a tool for clarifying the sameness of the state in light of changes in its internal elements, mainly its legal order, not as an immortality pill overriding the loss of territory and population. Marek simultaneously emphasises physical indicia as being essential to statehood while declaring unhelpful the inclusion of government as a criterion of statehood, presciently hinting at the case of so-called ‘failed states’. Numerous cases of succession and continuity have arisen since Marek wrote in 1954,¹²² but, while the body of state practice has grown, the problems and principles she describes are still relevant to the current discussion and help define the scope of continuity. Indeed, her opinion is still commonly discussed and cited in current scholarship.¹²³

Marek’s insights concerning the importance of material indicia are also pertinent to a key element of the ratchet effect doctrine, namely, the idea that the

¹²⁰ Marek (n 29).

¹²¹ Ibid 7 (citations omitted) (emphasis in original). This view in relation to continuity overriding the physical disappearance of state is supported by Craven (n 57) 159.

¹²² See Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 695–700.

¹²³ See, eg, Wong (n 10); Jain (n 16); Mälksoo (n 16).

rules applying to the creation of states do not apply to the continuation of states.¹²⁴ In other words, the threshold required to become a member of the club of states is substantially different from that required to remain a member. This approach to statehood is illustrated by the considerable leeway afforded to existing states in the fulfilment of the traditional constitutive elements of statehood. While seemingly supported by state practice on the question,¹²⁵ this interpretation of state practice fails to fully consider the weight of physical indicia as an anchor for statehood. Indeed, while the government criterion is only applied loosely, if at all,¹²⁶ the need for physical indicia, both at inception and during a state's continued existence, cannot be dismissed easily. The lack of discussion on such a need in the literature prior to the case of LLISs is not due to the accessory nature of physical indicia, but rather to the self-evident nature of such a requirement for entities that remain fundamentally rooted in their exclusive claim to a piece of the earth's emerged mantle.

Whether at its birth or throughout its life, the need for a state to maintain at least a symbolic physical existence cannot be underestimated. Novelty indeed presents challenges to the interpretation of international law. However, the fact that the need for an element of statehood has always been taken for granted and thus left relatively undiscussed in this precise context does not automatically result in its being irrelevant and easily waived as a requirement for continued statehood. The implied leap required to conceptualise a state without a territory cannot be justified by the presumption of continuity alone. Rather, stretching statehood beyond territoriality represents such a fundamental shift that reliance on a relatively narrow principle such as the presumption of continuity, never framed as constitutive of statehood hitherto, appears both very optimistic and perhaps even hazardous. The purpose of the present article is to challenge the bases of the current debate on the continued statehood of LLISs beyond the complete loss of territoriality. This particular assumption is why the reliance on the presumption of continuity could be counterproductive for the development of an accurate legal forecast and for work on possible solutions for the people who are or will be displaced. States are first and foremost territorial entities; ignoring this fact risks the creation of major blind spots with potentially disastrous consequences for those who are most vulnerable. This is not because the implementation of the ratchet effect doctrine in itself would be a negative outcome, but rather because an over-reliance on the presumption of continuity could prove counterproductive if the latter is eventually deemed largely inapplicable to the situation of LLISs.

IV BRIDGING THE GAP

Discussing the presumption of continuity in this light inevitably raises the question of overlap and the possibility of reconciling the two doctrines discussed. Since both doctrines share common roots and invoke similar elements

¹²⁴ See, eg, Ross (n 10) 242.

¹²⁵ See above Part III(B)(1).

¹²⁶ The case of Somalia discussed above in Part III(B)(1) is perhaps the most well-known example of such flexibility. Congo's uncontested accession to statehood in 1960 is another instance of the loose application of the need for a government: Crawford (n 10) 56–8.

of state practice, is the gap separating them too wide to bridge? One could even go further and ask: are there really two different doctrines of continuity?

Here the answer can only be speculative. As we do not know if Schrödinger's unfortunate cat is alive or dead until we open the box, it is impossible to accurately assess the nature of continuity in the context of small island nations without an adequate body of state practice. Even if legal scholarship on the matter may bear a certain normative weight, it is far from invulnerable to challenges by states. Moreover, certain claims to continuity can only be assessed accurately *ex post facto*, such as the Federal Republic of Germany's claim to continue the German Reich's identity, which found a conclusive answer only following the German reunification.¹²⁷ Until then, competing theories and doctrines remain speculative. Nonetheless, it is still possible to attempt an answer.

First, yes, there seems to be two different understandings of the presumption of continuity. As demonstrated above, one can identify discrepancies between how continuity has been applied outside of the discussion on small island states, and the role it has been given as the ultimate fail-safe to arguments supporting continued statehood beyond the loss of physical indicia. Alternatively, it may be that a solid case can be built to support a ratchet-like presumption of continuity. However, if such arguments exist, they are not to be found in the current literature on the subject. As shown here, the existence of a ratchet effect preventing the loss of statehood is not as easily framed as a self-evident fact as one may believe after reviewing what has been written on the subject to date.

This highlights perhaps the single most important point of this analysis, which is the asymmetry between the widespread use of the presumption of continuity and the comparative lack of a solid foundation to ground its use as a ratchet effect in the context of LLISs. Consequently, what is problematised in the present article is not the possibility that the ratchet effect doctrine would successfully help secure the statehood of a de-territorialised LLIS (which would be a positive development, particularly compared to the logical conclusion of prioritising the sameness doctrine of continuity, ie the loss of statehood). Rather, it is the outcome of a scenario in which current legal forecasts present a conclusion (ie the possibility of de-territorialised statehood based on the existence of a ratchet effect), with a confidence that is later proved to be overstated by a hostile use of the sameness doctrine to undermine the use of the presumption of continuity to support an LLIS's claim to de-territorialised statehood.

Therefore, before resting further arguments on the presumption of continuity, either the arguments supporting the ratchet effect need to be clarified to a degree proportional to the role given to continuity by its proponents, or alternatively, the gap between the two doctrines needs to be addressed. Not doing so risks dangerously weakening further reasoning, as well as potentially opening the door to challenges to the continued statehood of a de-territorialised LLIS. Even

¹²⁷ Mälksoo (n 16) 36–7. Mälksoo characterises the German reunification as an 'extralegal' phenomenon, a political development.

continuity in its sameness iteration is far from removed from politics, despite its narrower scope and partially self-evident character.¹²⁸

The dynamic relationship between the two doctrines is perhaps best illustrated using hypothetical State A, an LLIS which finds itself unable to claim sovereignty over a territory or population. State A may claim continued statehood based on a ratchet effect interpretation of the presumption of continuity, as defined in Part II(A) above. However, because State A's statehood is now mostly reliant on its recognition by other states, it may be easy for State B to disregard State A's statehood by claiming that state practice and prior scholarship support continuity as a sameness assessment rather than a ratchet effect. As a result, State B could ignore any statehood-related prerogatives claimed by State A on the basis that State A's statehood is inexistent due to the absence of the traditional criteria of statehood required by international custom. Were State B to be an influential and weighty actor in the international community, the legal personality of State A would then become relativised, possibly politicised to the point of being more a hindrance than an advantage for State A to represent the interests of its displaced population.¹²⁹

The situation of LLISs is peculiar in that it offers a window of opportunity for preparedness and strategising. Discussions can take place now before they become a matter of life and death for vulnerable states. Consequently, thorny questions such as the scope and nature of the presumption of continuity are better assessed in the current context of an academic article than in the broader forum of international relations.

As this and other analyses remain largely scholarly speculations, it is also likely that the context within which an LLIS would need to substantiate its claim to de-territorialised statehood would be substantially affected by the uncertainty inherent to a climate-changed world. While the nature and range of this climate-induced uncertainty remain impossible to predict, a careful analysis of the relevant legal norms *now* is crucial to their applicability *later*, when the stakes may be multiplied by a variety of factors. The approach adopted by this article may appear rather conservative in its outlook, failing to engage with the unique nature of the climate crisis. However, this is a corollary effect of the goal of this contribution, which is to be relevant now, not once the statehood of an LLIS hangs in the balance. One can only be hopeful that a climate-changed world will allow for more flexibility and provide a favourable environment for de-territorialised statehood, but this cannot be relied upon. As the former president of Kiribati, Anote Tong, highlights, it is better to 'plan for the worst and hope for the best'.¹³⁰

¹²⁸ Addressing the realist's position on the Baltic states' claims to continuity, Mälksoo (n 16) 268 (emphasis in original) summarises it as such: '*De facto*, there is "continuity" only to the extent that power can guarantee it'.

¹²⁹ Such a scenario intentionally excludes the possibility of alternative types of non-statehood international legal personality, such as that enjoyed by *sui generis* entities such as the Sovereign Military Order of Malta or the Holy See: see, eg, Alberto Costi and Nathan Jon Ross, 'The Ongoing Legal Status of Low-Lying States in the Climate-Changed Future' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer, 2017) 101, 123–6.

¹³⁰ Kenneth R Weiss, 'Before We Drown We May Die of Thirst' (2015) 526 *Nature* 624, 626.

Secondly, the possibility that both doctrines of continuity can be reconciled should not be dismissed. In fact, this outcome is necessary if continuity is to remain a key element in claims to de-territorialised statehood. Part of the gap this article seeks to fill is that the ratchet effect doctrine of continuity neither acknowledges nor addresses the sameness assessment doctrine. To build sound foundations for further scholarship using continuity, the chasm between the two doctrines must be bridged. This need is perhaps more acute due to the extent to which the sameness doctrine has dominated the study of continuity hitherto, notwithstanding the situation of LLISs. In fact, it may even be misplaced to refer to the sameness doctrine as a doctrine at all, since it appears that this is the firmly established definition of continuity rather than one of several interpretations of continuity.¹³¹ One may thus need to qualify the ratchet effect doctrine as requiring a change in paradigm rather than an alternative reading of the state practice and scholarship on the issue.¹³²

Alternatively, the approach adopted by a specific threatened state can be adjusted to take into consideration the possible limited scope of the presumption of continuity. For instance, Stoutenburg's conclusion that statehood is possible as long as symbolic physical indicia, such as a population nucleus, are recognised by the international community, could present a *modus operandi* for a small island state to pre-empt challenges to its statehood.¹³³

International law is dynamic, and international norms evolve. Further discussion on continuity may eventually help clarify the respective roles and relationship between the two doctrines of continuity discussed here. Using the consecrated analogy with a living tree used in 1929 by the Privy Council in its decision to grant women the right to vote in Canada,¹³⁴ the evolution of the presumption of continuity into a ratchet effect could be framed as a natural progression of the principle. However, before that branch can be fully attached to the tree's existing branches and trunk, its position and connection with the tree need to be clarified with regard to the branch it connects to: the sameness doctrine. The normative weight of legal scholarship alone might struggle to tip the scales if undermined by gaps left unaddressed. Before a way forward emerges, the substantial body of existing legal scholarship on continuity needs to be reconciled with the use of, and scholarship on, continuity in the context of LLISs. In short, the achievement of a 'continuity of continuities' appears to be one of the possible remedies needed to bridge the gap identified by this article. Conversely, this is but one of the relevant elements to the discussion on the continued statehood of LLISs. The role of legitimacy and the right to self-determination could also be key in substantiating statehood beyond the possible loss of territorial sovereignty.¹³⁵

¹³¹ While clearly the source of abundant literature and debate, the key contentious elements of the study of continuity hitherto lay more in the relationship of continuity with succession and identity than in the existence *vel non* of a putative ratchet effect: see Østrup (n 38) 2–3.

¹³² Alternatively, a fundamental change in how statehood is approached could achieve the same goal, as discussed by Willcox through her proposal for a 'family resemblance' account of statehood: see Willcox (n 4) 127–32.

¹³³ Stoutenburg (n 20) 448.

¹³⁴ *Edwards v Attorney-General of Canada* [1930] 1 DLR 98, 106–7, 112–13.

¹³⁵ See generally Ross (n 10).

V CONCLUSION

This article originally set out to discuss what it defines as two different doctrines of continuity. One is described as the ratchet effect doctrine, according to which the principle known as the presumption of continuity essentially acts as a ratchet, preventing existing states from going extinct despite sometimes major internal changes. This approach to continuity has been shown to be mostly confined to the ongoing discussion on the continued statehood of de-territorialised small island states. While the ratchet doctrine invokes several elements of state practice and legal scholarship, a closer examination of these arguments reveals, in certain cases, a degree of conflict between the meaning they are given, and their meaning once taken together with their context.

Where the present article hopes to contribute to the current debate is in its interpretation of the doctrine of sameness, which, instead of framing the presumption of continuity as a ratchet, understands it as a sameness assessment. According to this doctrine of continuity, the presumption of continuity is a core principle of international law, as also argued by the ratchet effect doctrine. However, instead of applying to the status of the state in question, the sameness doctrine limits the scope of continuity to questions of identity: is state X the 'same' legal entity as it was before changes in its constitutive elements? By looking at the elements of state practice often cited to support the ratchet effect, such as the existence of fragile states or governments in exile, the current article argues that, when properly contextualised, the state practice on the subject does not support the existence of the ratchet effect mentioned by legal scholarship on the question of the statehood of small island states. Instead, there seems to be only limited evidence of the existence of such a ratchet effect as it is currently assumed to apply to the hypothetical case of a de-territorialised island state.

The study of international law is a venerable art, and the political nature of the questions it aims to address has sometimes curtailed the ambition of international legal scholars. This is particularly true of the study of statehood. It is thus not surprising that the opening of a new front in the long-drawn-out attempt to bring statehood fully within the grasp of international law would result in endeavours to challenge the traditional understanding of the notion. While the efforts to secure continued statehood for a de-territorialised LLIS are commendable, doing so without embracing the unpredictable nature of the international arena risks unnecessarily jeopardising such efforts. A first step in bolstering the arguments currently brought forward to support continued statehood would be to take a deeper look at the dynamics involved. The interpretation of international law does not happen in a vacuum, and crises are tremendous catalysts. The Anthropocene and the major changes it brings will shake international law to its core and bring about a fresh opportunity to look at some of the underlying mechanisms at play. On a short-term basis, discussing and including these dynamics may hopefully help prevent the creation of blind spots in the analysis of continued statehood. Ultimately, one hopes avoiding these pitfalls may mitigate the consequences of abstract legal reasoning and international politics on the lives of those who must grapple with the eventual loss of their homes.