

INTERNATIONAL LAW AND PRACTICE

Climate Change and Atoll Island States: Pursuing a ‘Family Resemblance’ Account of Statehood

SUSANNAH WILLCOX*

Abstract

‘Climate change inundation’ – the process whereby climate change-related impacts like rising sea levels, higher storm surges, and changing rainfall patterns interact with and exacerbate existing vulnerabilities like poverty, isolation, resource scarcity, and inadequate infrastructure – presents a unique challenge to the territorial, legal, and political infrastructure of low-lying coral atoll island states. This article uses the example of climate change inundation to illustrate some of the shortcomings of the mainstream ‘minimum threshold’ account of statehood. It then proposes an alternative account of the criteria of statehood as a set of overlapping similarities or relationships between state-like entities, drawing on Wittgenstein’s concept of ‘family resemblances’. Although problematic in some respects, this family resemblance account provides a broader conceptual space for assessing the merits of alternative forms of statehood.

Keywords

atoll island state; climate change inundation; family resemblance; statehood; Wittgenstein

I. INTRODUCTION

Contemporary international law works to sustain a state system that operates, with a handful of exceptions, as a ‘radical monopoly’.¹ This system is one in which states exercise territorial jurisdiction and all land is under the jurisdiction of some state;² in which the state is ‘the principal maker and subject of international law’.³ It is primarily states that provide the legal and political infrastructure through which laws are enforced, treaties are negotiated, sovereignty is exercised over natural resources, and claims are brought before the International Court of Justice (ICJ).

* PhD in Public International Law, London School of Economics and Political Science; MSc in Human Rights, London School of Economics and Political Science; BA (Hons) in Philosophy, University of Sydney [susannah.willcox@gmail.com].

¹ A. Kolers, ‘Floating Provisos and Sinking Islands’, (2012) 29 *Journal of Applied Philosophy* 333, at 334. Compare J. Crawford, ‘Sovereignty as a Legal Value’, in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (2012), 121.

² Other than some uninhabitable rocks and a small part of Antarctica. J. Crawford, *Brownlie’s Principles of Public International Law* (2012), 220 and 241–2.

³ M. Lachs, ‘The Development and General Trends of International Law in Our Time’, (1980) 169 *Recueil des Cours de l’Académie de Droit International* 32, at 32.

Without the protection of a state, individual and collective human rights are likely to go unrecognized. As James Crawford observes, ‘it still makes a great difference whether an entity is a state or not’.⁴

Given the centrality of the state to the international legal order, it is perhaps surprising that international law provides no unequivocal definition of what it means to be a state. The most widely recognized definition is found in Article 1 of the Montevideo Convention, which sets out a minimum threshold for statehood.⁵ In order to qualify as a state, an entity must have a permanent population living in a defined territory with an effective government and the capacity to enter into relations with others of its kind. However, this ‘minimum threshold’ account becomes problematic at the margins of statehood, where difficult questions arise about the scope and content of the category of states.

One context in which such questions arise is that of ‘climate change inundation’, the process whereby climate change-related impacts like rising sea levels, higher storm surges, and changing rainfall patterns interact with and exacerbate existing vulnerabilities like poverty, isolation, resource scarcity, and inadequate infrastructure and will eventually leave the territory of small island states uninhabitable, causing the displacement of entire populations.⁶ Among those most at risk are low-lying coral atoll states like Kiribati and Tuvalu in the Pacific Ocean and the Republic of the Maldives in the Indian Ocean.

The issue of climate change inundation demands our attention because of the unique challenge it presents to the state. Without a habitable territory or permanent population, the existence of low-lying atoll island states becomes increasingly uncertain. Various solutions to this problem have been proposed. An atoll island state might, for example, construct artificial islands on which to relocate its population or acquire new land via a treaty of cession that transfers full sovereignty from one state to another.⁷

The proposals considered in this article envisage the transition of an atoll island state to a ‘state-in-exile’ or ‘deterritorialized state’ whose citizens are dispersed across

⁴ J. Crawford, *The Creation of States in International Law* (2006), 31. Compare N. Schrijver, ‘The Changing Nature of State Sovereignty’, (2000) 70 BYIL 65, at 66.

⁵ 1934 Montevideo Convention on the Rights and Duties of States, 165 LNTS 19.

⁶ See further F. Hampson, Expanded Working Paper on the Human Rights Situation of Indigenous Peoples in States and Other Territories Threatened with Extinction for Environmental Reasons, UN Doc. E/CN.4/Sub.2/2005/28 (2005), para. 25; N. Mimura et al., ‘Small Islands’, in M. Parry et al. (eds.), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), 687; UNFCCC Secretariat, *Climate Change: Small Island Developing States* (2005).

⁷ These solutions are not considered in this article. For discussion, see J. McAdam, *Climate Change, Forced Migration and International Law* (2012), Ch. 5; S. Park, ‘Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States’, (2011) UNHCR Legal and Protection Policy Research Series No. 18; A. Soons, ‘The Effects of a Rising Sea Level on Maritime Limits and Boundaries’, (1990) 37 *Netherlands International Law Review* 207, at 230; J.G. Stoutenburg, ‘When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States’, in M. Gerrard and G. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013), 57 at 61–3; D. Wong, ‘Sovereignty Sunk? The Position of “Sinking States” at International Law’, (2013) 14 *Melbourne Journal of International Law* 1, at 38–42. From the perspective of atoll island states, see B. Crouch, ‘Tiny Tuvalu in Save Us Plea over Rising Seas’, *Sunday Mail*, 5 October 2008; R. Ramesh, ‘Paradise Almost Lost: Maldives Seek to Buy a New Homeland’, *The Guardian*, 10 November 2008; M. Ward, ‘Planning to Sink: What Happens if Kiribati Drowns?’, *PBS Newshour*, 27 July 2014.

one or more host states. However, in seeking to decouple statehood from territory, these proposals challenge the ‘minimum threshold’ account of statehood introduced above. If an atoll island state no longer exercises jurisdiction over a defined territory, can it continue to exist as a state? According to the minimum threshold account, the answer must be no. If we are to assess whether the legal status of atoll island states can be preserved even after their territory becomes uninhabitable, we must therefore find some way of understanding statehood that accommodates entities that do not pass the minimum threshold established by the Montevideo Convention.

While recognizing that states hold a privileged legal, political, and cultural position today, this article does not argue that statehood should be preserved at all costs, nor does it advocate any one solution to climate change inundation. Instead, it seeks to problematize the mainstream legal definition of statehood and to suggest an alternative account; one that relies on a series of overlapping similarities between states, rather than a binary distinction between state and non-state. This alternative account is not without its problems. However, in providing a conceptual space in which to assess whether or not an atoll island state can and should remain a state, it offers us a starting point for further discussion.

The article begins by briefly surveying existing international law on statehood, highlighting some difficulties with its general application. Second, it considers whether an atoll island state threatened by climate change inundation can continue to meet the criteria of statehood set out in international law. It appears that, when applied in practice, the minimum threshold account of statehood is problematic both in general and in the specific context of climate change inundation. Third, it puts forward an alternative account of statehood, drawing on Wittgenstein’s concept of ‘family resemblances’. Can international legal doctrine be more readily reconciled with state practice if we understand the criteria of statehood as a set of overlapping similarities or relationships between state-like entities, rather than as a fixed minimum threshold? How might this alternative account apply to atoll island states at risk of climate change inundation? The final section considers some objections to and a possible modification of this proposal.

2. THE ‘MINIMUM THRESHOLD’ ACCOUNT OF STATEHOOD

International law envisages the extinction of a state, through succession, in terms of either merger with or absorption by another state or voluntary or involuntary dissolution followed by the emergence of one or more successor states.⁸ In each case, the territory of one state is taken over by another: succession entails a ‘change in sovereignty over territory’.⁹

⁸ M. Shaw, *International Law* (2008), 208; Crawford, *supra* note 4, at 700–24; L. Oppenheim and H. Lauterpacht, *International Law: A Treatise* (1955), Vol. 1, at 206–7.

⁹ M. Craven, ‘The Problem of State Succession and the Identity of States under International Law’, (1998) 9 EJIL 142, at 145. For example, Art. 2(1)(b), 1978 Vienna Convention on Succession of States in Respect of Treaties, 1946 UNTS 3; Art. 2(1)(a), 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/CONF.117/14.

The issues raised by climate change inundation, however, are ‘markedly distinct’.¹⁰ A loss of habitable territory has not been recognized as a possible cause of state extinction in international law.¹¹ And, in the event that it becomes uninhabitable, the territory of a low-lying atoll island state cannot be absorbed by, merged with, or taken over by another state. Any legal obligations relating to its citizens, treaties, national debt, diplomatic posts, economic exclusion zone, and so on – all of which would typically be assumed by the successor state(s) – risk falling into a legal vacuum.¹² In this context, the existing international law on state extinction, understood in terms of succession, is therefore not particularly helpful.

Given this lacuna, perhaps we must instead identify what makes – and, by analogy, unmakes – a state. The criteria for statehood set out in international law apply to the emergence rather than the extinction of states. However, in the absence of explicit legal rules regarding state extinction in this case, these criteria ‘should presumably govern not merely the legal “creation” of states, but also their “extinction”’.¹³ It is worth bearing in mind, however, that any application of the law to the unprecedented issue of climate change inundation is necessarily speculative.

While statehood has ‘long been the central organizing idea in the international system’,¹⁴ a universally accepted definition has proved elusive. Article 1 of the Montevideo Convention sets out the most widely accepted version of statehood, in which all states satisfy each of the following criteria: a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other states.¹⁵ According to this story, ‘territory, people, and government coincide in the state to produce international law’s map of the world as a jigsaw puzzle of solid colour pieces fitting neatly together’,¹⁶ where each piece passes the threshold set by the Montevideo criteria.

The attractions of this minimum threshold account of statehood are apparent. A clear and concise definition of statehood ensures certainty and predictability, thereby strengthening the rule of law.¹⁷ If statehood is a ‘legal status attaching to a certain state of affairs’,¹⁸ then the Montevideo criteria provide a clear explanation

¹⁰ J. McAdam, ‘“Disappearing States”, Statelessness and the Boundaries of International Law’, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010), 105 at 106.

¹¹ Although it is mentioned in Craven, *supra* note 9, at 159; L. Oppenheim, *International Law: A Treatise* (1905), Vol. 1, at 117–18; Shaw, *supra* note 8, at 208, note 52.

¹² Hampson, *supra* note 6, at para. 12.

¹³ Craven, *supra* note 9, at 159. For Marek, for example, independence is ‘indispensable to the continued existence of a state . . . With its loss, it becomes extinct’. K. Marek, *Identity and Continuity of States in International Law* (1968), 188. See also T. Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’, (1999) 37 *Columbia Journal of Transnational Law* 403, at 435; Wong, *supra* note 7, at 22. McAdam, however, is more cautious: McAdam, *supra* note 7, at 127.

¹⁴ K. Knop, ‘Statehood: Territory, People, Government’, in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (2012), 95.

¹⁵ Art. 1, Montevideo Convention, *supra* note 5. Similar definitions are found in Opinion No. 1 of the Conference on Yugoslavia Arbitration Commission, (1992) 31 ILM 1494; *Deutsche Continental Gas-Gesellschaft v. Polish State*, (1929) 5 *Annual Digest of Public International Law* 11, at 13; G.G. Fitzmaurice, Law of Treaties, UN Doc. A/CN.4/101 (1956), at 107; American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987), at Section 201.

¹⁶ Knop, *supra* note 14, at 95.

¹⁷ Grant, *supra* note 13, at 451 and 454–5.

¹⁸ Crawford, *supra* note 4, at 5.

of what this state of affairs entails. They ‘operate as threshold evaluations’ that determine which entities are included within the category of states and which are excluded.¹⁹

In practice, however, the application of this minimum threshold account is far from straightforward. The criteria it relies on are neither necessary nor sufficient for statehood.²⁰ First, the final criterion – the capacity to enter into relations with other states – is more accurately conceived of as an outcome rather than a requirement of statehood, depending as it does on the recognition of other states.²¹ The criterion of independence is often proposed in lieu of this capacity: ‘the right to exercise [within a given territory], to the exclusion of any other state, the functions of a state’.²²

Second, states have emerged despite the absence of one or more criteria. Croatia and Bosnia-Herzegovina emerged in the early 1990s despite lacking effective control over some of their territory,²³ while Burundi, Rwanda, and others have been recognized as states or admitted to the UN prior to establishing an effective government.²⁴ Several micro-states have also emerged despite ongoing debate about whether or not they pass the threshold for statehood. The Vatican City is the smallest of these, with a territory of just 0.44 square kilometres and a population of around 842.²⁵ It is also unique insofar as residence permits are usually granted on the basis of employment with the Holy See and can be revoked at any time. Duursma concludes that its residents cannot constitute a permanent population within the meaning of the Montevideo Convention, because they lack any common history or stable attachment to a state or territory.²⁶ Nevertheless, the Vatican City is generally recognized as a state.²⁷

Third, even if we accept that all four criteria are necessary for a state to begin its existence, the absence of any of them does not necessarily mean its end.²⁸ Once established, states resist extinction, whether their own or that of other states,²⁹ often

¹⁹ Craven, *supra* note 9, at 159.

²⁰ Crawford, *supra* note 2, at 128.

²¹ M. Craven, ‘Statehood, Self-Determination and Recognition’, in M. Evans (ed.), *International Law* (2010), 203 at 220; Crawford, *supra* note 4, at 61; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (1997), 79.

²² *Island of Palmas Case (United States v. Netherlands)*, (1928) 2 RIAA 829, at 838. Other proposed criteria include self-determination, democratic legitimacy, minority rights protection, legality and self-sufficiency. Craven, *supra* note 21, at 220–21; Grant, *supra* note 13, at 437–52; I. Österdahl, ‘Relatively Failed: Troubled Statehood and International Law’, (2003) 14 FYIL 49, at 50–1.

²³ Craven, *supra* note 21, at 228; Shaw, *supra* note 8, at 201.

²⁴ Crawford, *supra* note 2, at 129; R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 40.

²⁵ As of July 2014. Central Intelligence Agency (CIA), ‘World Factbook’, available at www.cia.gov/library/publications/the-world-factbook/. See also J. Duursma, *Fragmentation and the International Relations of Micro-States* (1996), Chapter 8; R. Jennings and A. Watts, *Oppenheim’s International Law* (2008), 325–9.

²⁶ Duursma, *supra* note 25, at 412. Compare Jennings and Watts, *supra* note 25, at 327.

²⁷ However, the Vatican City’s relationship with the Holy See has implications for its recognition by other states. Duursma, *supra* note 25, at 416–17.

²⁸ UNHCR, IOM and Norwegian Refugee Council, ‘Climate Change and Statelessness: An Overview’, Submission to the 6th Session of the Ad-Hoc Working Group on Long-Term Co-operative Action under the UNFCCC (2009), at 1.

²⁹ Crawford, *supra* note 4, at 715; O. Schachter, ‘State Succession: The Once and Future Law’, (1993) 33 *Virginia Journal of International Law* 253, at 258–60; R. Mushkat, ‘Hong Kong and Succession of Treaties’, (1997) 46 *ICLQ* 181, at 183–7.

regardless of ‘substantial changes in territory, population or government or even, in some cases, by a combination of all three’.³⁰ This implies that there is a kind of ‘ratchet effect’ at work, whereby the status of statehood, once achieved, is difficult to lose.³¹ Kreijen suggests that states ‘may have a complicated birth, but they do not die easily’,³² while Lowe goes so far as to argue that the ‘road to statehood is a one-way street’.³³

The strength of this presumption against extinction or ratchet effect was apparent during the International Law Commission’s (ILC) debate on the draft Declaration on the Rights and Duties of States in 1949. ILC members discussed whether or not to include a first Article to the effect that ‘Each State has the right to exist and to preserve its existence.’³⁴ While some members described this right as ‘a mainspring for other rights to be declared’, others felt that it would be ‘tautological to say that an existing state has the right to exist; that right is in a sense a postulate or a presupposition underlying the whole draft’.³⁵ Whether as an explicit ‘mainspring for other rights’ or an implicit ‘presupposition underlying’ those rights, the message is clear: the right to continue to exist as a state is seen as fundamental to the international legal order of states.

This ratchet effect is said to underpin the stability and order of the international legal system,³⁶ but derives strength from other motivations as well. It may, for example, reflect a reluctance to acknowledge a void in international relations within which it would be difficult for states to carry out transactions or rely on the fulfilment of international legal obligations.³⁷ It may reflect an unwillingness to interfere in the domestic affairs of a state by recognizing its dissolution.³⁸ It may reflect states’ reluctance to recognize that another state is struggling, thereby incurring some obligation to provide assistance.³⁹ Or, in the context of climate change inundation, it may reflect a reluctance to ‘tarnish its own reputation by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion’ from the international community.⁴⁰ Participants in a recent UNHCR expert roundtable similarly insisted that ‘the legal presumption of continuity of statehood needs to be emphasized and the notion and language that [atoll island] states will “disappear” (i.e., lose their international legal personality) or “sink” ought to be avoided’.⁴¹

³⁰ Crawford, *supra* note 4, at 700. Compare W. Hall, *A Treatise on International Law* (1924), 21; Jennings and Watts, *supra* note 25, at 204–5; Oppenheim and Lauterpacht, *supra* note 8, at 153.

³¹ Thanks to Delphine Dogot for suggesting this term.

³² G. Kreijen, *State Failure, Sovereignty and Effectiveness* (2004), 37.

³³ V. Lowe, *International Law* (2007), 165. But see Marek, *supra* note 13, at 5–6.

³⁴ International Law Commission (ILC), Draft Declaration on the Rights and Duties of States: General Debate, UN Doc. A/CN.4/2 (1949), at 259.

³⁵ *Ibid.*

³⁶ For example, Marek, *supra* note 13, at 24.

³⁷ Craven, *supra* note 9, at 159.

³⁸ D. Thürer, ‘The “Failed State” and International Law’, (1999) 81 *International Review of the Red Cross* 731, at 737.

³⁹ Österdahl, *supra* note 22, at 63–4.

⁴⁰ W. Kälin, ‘Conceptualizing Climate-Induced Displacement’, in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (2010), 81 at 102. Compare Wong, *supra* note 7, at 20.

⁴¹ UNHCR, Summary of Deliberations on Climate Change and Displacement (22–25 February 2011), para. 2 (see also para. 30).

We need not wait for climate change to render the territory of atoll island states uninhabitable to find examples of states that continue to exist despite failing to satisfy at least one of the four criteria. Governments operating in exile, for example, continue to be recognized as the representatives of states despite lacking control over a permanent population living in a defined territory.⁴² The continued recognition of so-called ‘failed states’ like Cambodia, Somalia, and the Congo during prolonged periods of crisis indicates that the criteria of an effective government and some level of independence may also be waived for the purposes of ongoing statehood.⁴³ Despite failing to meet one or more criteria of statehood, these ‘fictitious’ states retain their status: ‘their borders and legal personality have not been called into question’.⁴⁴ They remain members of international organizations, their diplomatic relations remain (largely) intact, and the treaties they have previously concluded remain in force.

As these examples demonstrate, ‘a state may not fully meet all the conditions of statehood or its status may otherwise be in some way anomalous, but still merit general recognition’.⁴⁵ It therefore appears that the traditional account of statehood, according to which all states must pass the minimum legal threshold by meeting each of the necessary criteria, is misleading at best.

3. CLIMATE CHANGE INUNDATION AND THE MINIMUM THRESHOLD ACCOUNT

This section applies the minimum threshold account to atoll island states at risk of climate change inundation. It becomes clear that identifying the point at which these states will fail to meet each of the proposed criteria for statehood – and therefore fail to pass the minimum threshold set by the Montevideo Convention – is difficult, if not impossible, providing us with additional incentive to identify an alternative account of statehood.

3.1. Territory

A ‘defined territory’ is seen as integral to statehood. Statehood, Jennings argued in 1963, ‘is inseparable from the notion of state territory’⁴⁶ – a view that is still commonly held today. The principle of territorial control is closely tied to complementary principles of effective government and political independence. As Crawford notes, ‘the right to be a state is dependent at least in the first instance upon the exercise of

⁴² See generally Crawford, *supra* note 4, at 688–95; S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), 115–206.

⁴³ See generally G. Helman and S. Ratner, ‘Saving Failed States’, (1992–93) 89 *Foreign Policy* 3; Kreijen, *supra* note 32; Østerdahl, *supra* note 22; Thürer, *supra* note 38.

⁴⁴ Thürer, *supra* note 38, at 752. Compare Duursma, *supra* note 25, at 118; Grant, *supra* note 13, at 435; Higgins, *supra* note 24, at 40.

⁴⁵ Jennings and Watts, *supra* note 25, at 131–2.

⁴⁶ R. Jennings, *The Acquisition of Territory in International Law* (1963), 7.

full governmental powers with respect to some area of territory’;⁴⁷ thus, the concept of a state is ‘rooted in the concept of control of territory’.⁴⁸

Nevertheless, the threshold test for determining a defined territory is set fairly low. A state is not required to meet any minimum territorial requirement, nor does its territory need to have precisely defined boundaries⁴⁹ or be contiguous. In fact, ‘little bits of state can be enclaved within other states’.⁵⁰ While a state’s territory is usually a naturally occurring surface of the earth, artificially reclaimed land may also count,⁵¹ as may uninhabitable rocks.⁵² As the Vatican City (0.44 square kilometres) and Monaco (two square kilometres) demonstrate, a state’s territory can be nominal at best.⁵³ In fact, cases in which a state persists despite the belligerent occupation of its territory suggest that, ‘Territory is not necessary to statehood, at least after statehood has been firmly established.’⁵⁴

As a criterion of statehood, therefore, territory appears ‘simultaneously indispensable’ and impossible to define.⁵⁵ How much territory must an atoll island state lose before it no longer qualifies as a state? The international law of the sea suggests that only once its territory is completely submerged or reduced to a low-tide elevation will a state no longer satisfy the territory criterion.⁵⁶ Until this occurs, ‘territory which was once connected to land and then submerged by the sea can continue to be regarded as a connected part of state territory’.⁵⁷ However, atoll island states will become largely uninhabitable long before the last of their land is submerged, due to the saltwater contamination of soil and water, unpredictable rainfall patterns, higher storm surges, and so on. We must therefore look to some other criterion of statehood to identify the point at which they will cease to exist.

3.2. Population

Given that increasingly harsh living conditions will displace atoll island populations long before their territory is completely submerged, the loss of a permanent population may ‘provide the first signal that an entity no longer displays the full indicia of statehood’.⁵⁸ However, the population criterion, like that of territory, has

⁴⁷ Crawford, *supra* note 4, at 46.

⁴⁸ Lowe, *supra* note 33, at 138. Compare Malanczuk, *supra* note 21, at 75; S.P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997), 2; Shaw, *supra* note 8, at 199 and 960.

⁴⁹ *Deutsche Continental Gas-Gesellschaft*, *supra* note 15, at 15; *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 32–3.

⁵⁰ Crawford, *supra* note 4, at 47. Crawford cites *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, Judgment of 20 June 1959, [1959] ICJ Rep. 209, at 212–13 and 229; *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6, at 27.

⁵¹ *In re. Duchy of Sealand*, (1989) 80 ILR 683, at 684–5. However, artificial islands do not count. See Arts. 60(1) and (8), 1982 UN Convention on the Law of the Sea (UNCLOS), 833 UNTS 397.

⁵² Although the state is not entitled to an exclusive economic zone or continental shelf in respect of these, per Art. 121(3), UNCLOS, *supra* note 51.

⁵³ CIA, *supra* note 25. See also Duursma, *supra* note 25, at Chapters 6 and 8.

⁵⁴ Grant, *supra* note 13, at 435. Compare I. Shearer, *Starke’s International Law* (1994), 85.

⁵⁵ Craven, *supra* note 21, at 224.

⁵⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, at para. 206. In rejecting the argument that low-tide elevations that do not lie with the territorial sea of an existing state constitute territory, the ICJ finds that ‘The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands.’

⁵⁷ *Duchy of Sealand*, *supra* note 51, at 686.

⁵⁸ McAdam, *supra* note 7, at 124.

no explicit minimum threshold. Tuvalu, with a population of just over 10,000, is already one of the world's smallest states,⁵⁹ and it is unclear how many citizens would need to move elsewhere before it fails to meet the population requirement. The 48 inhabitants of Pitcairn Island have been recognized as holding a right to self-determination and independence,⁶⁰ suggesting that the minimum population threshold, if there is one, is minimal at best.

Ideally, 'the criteria for statehood are interlinked: in principle, the population should inhabit the territory and be under the control of the government'.⁶¹ Yet, in practice, a large proportion of the populations of some island states are nomadic or live abroad, without jeopardizing their statehood.⁶² However, without a permanent population, land cannot serve the functional role of territory: it no longer provides 'the physical basis that ensures that people can live together as organized communities'.⁶³

The question then becomes whether a state fails to meet the population criterion if all but a tiny fraction of its population lives elsewhere. The government of Kiribati has been advised that, even if most of its population resettles elsewhere, 'If we maintain our islands, get some people to live there, and be able to issue passports, we'll still be able to remain a state'.⁶⁴ However, while the Administrative Court of Cologne admitted that the 106 persons claiming to be nationals of the 'Principality of Sealand' could in theory constitute a population (given that 'size [is] irrelevant'), it held that they must also form a dynamic, cohesive community. 'An association whose common purpose covered merely commercial and tax affairs was insufficient'.⁶⁵ This suggests that, even if there is no minimum quantitative requirement built into the population criterion, there may be a qualitative threshold that atoll island states will eventually struggle to meet.

3.3. Effective government and independence

The two remaining criteria – an effective government and independence – are closely interlinked. For Crawford, 'government is treated as the exercise of authority with respect to persons and property within the territory of the state; whereas independence is treated as the exercise, or the right to exercise, such authority with respect to other states'.⁶⁶ In order to count as independent, a state must exist alone within reasonably defined borders and be (relatively) free from the authority of

⁵⁹ Behind the Vatican City (842) and Nauru (9,488). CIA, *supra* note 25. See further Shaw, *supra* note 8, 199.

⁶⁰ UN Doc. A/RES/2869 (XXVI) (1971).

⁶¹ Park, *supra* note 7, at 7.

⁶² For example, around 57 per cent of Samoans and 46 per cent of Tongans live outside of their country of origin. C. Stahl and R. Appleyard, *Migration and Development in the Pacific Islands: Lessons from the New Zealand Experience* (2007), 7. See also Malanczuk, *supra* note 21, at 76.

⁶³ Stoutenburg, *supra* note 7, at 61. Compare Sharma, *supra* note 48, at 4.

⁶⁴ T. Lambourne, Kiribati Secretary of Foreign Affairs, interviewed on D. Carrick, 'Climate Change: The Pacific', *ABC Radio National: Law Report*, 22 November 2011.

⁶⁵ *Duchy of Sealand*, *supra* note 51, at 686.

⁶⁶ Crawford, *supra* note 4, at 55.

any other state.⁶⁷ In order to count as effective, a state's government must have the capacity to maintain authority within its borders and fulfil its obligations under international law.⁶⁸

However, in certain cases – including those of 'failed' statehood discussed above – an effective government may be 'unnecessary ... to support statehood'.⁶⁹ An atoll island state might therefore continue to be recognized as a state despite a 'very extensive loss of actual authority'⁷⁰ or even the temporary absence of an effective government or formal independence.⁷¹ Indeed, in the absence of any competing claim to statehood – as is the case with an atoll island state threatened by climate change inundation – '[i]n many instances the claim to continuity made by the state concerned will be determinative; other states will be content to defer to the position taken'.⁷² Regardless of whether it is understood as constitutive or declaratory,⁷³ recognition will therefore play an important role in determining whether – and to what extent – atoll island states continue to enjoy the rights and competences of statehood. Where states are reluctant to withdraw recognition, an atoll island state is more likely to retain its status as a state, with the capacities this entails, despite the loss of its habitable territory, permanent population, effective government or capacity for independence.⁷⁴

While this section has raised more questions than it has answered, one clear message that emerges from a closer examination of the criteria of statehood in the context of climate change inundation is that there is no clearly identifiable minimum threshold of statehood in international law. On closer inspection, each criterion of statehood lacks a clear scope and limits,⁷⁵ and each is faced with counterexamples. Despite its apparent clarity and simplicity, the traditional account – according to which the status of statehood is allocated to any and all entities that meet a clearly

⁶⁷ *Island of Palmas Case*, *supra* note 22, at 838. A state's independence is not necessarily compromised by the size of its territory or population, nor by its political or economic co-operation with other states. Duursma, *supra* note 25, at 125–6.

⁶⁸ Stoutenburg, *supra* note 7, at 66. See further J.G. Stoutenburg, *Disappearing Island States in International Law* (2015), at Section 4.2.3.

⁶⁹ Crawford, *supra* note 2, at 129. Craven describes effectiveness as a 'moveable feast'. Craven, *supra* note 21, at 226.

⁷⁰ Crawford, *supra* note 4, at 63 and 89. See also Thürer, *supra* note 38, at 752.

⁷¹ Shaw, *supra* note 8, at 203–4. For historical examples, see Park, *supra* note 7, at 6–7.

⁷² Crawford, *supra* note 4, at 668. However, these conclusions have not been tested in the case of climate change inundation. See J.G. Stoutenburg, 'Review of Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives*', (2011) 22 *EJIL* 1196, at 1199.

⁷³ On recognition, see, for example, N. Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', (1988–89) 7 *Wisconsin International Law Journal* 51, at 81–4; Craven, *supra* note 21, at 240–6; Crawford, *supra* note 2, at 143–65; Duursma, *supra* note 25, at 110–15; Jennings and Watts, *supra* note 25, at 127–203; Talmon, *supra* note 42.

⁷⁴ On the role of recognition in remedying a failure to meet one or more criteria of statehood, see Duursma, *supra* note 25, at 430; Grant, *supra* note 13, at 447. On recognition in the context of climate change inundation, see W. Kälin and N. Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches', (2012) UNHCR Legal and Protection Policy Research Series No. 39; McAdam, *supra* note 7, at 137–8; Park, *supra* note 7, at 14; R. Rayfuse, 'Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing" States', in M. Gerrard and G. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013), 167 at 177; Stoutenburg, *supra* note 7; Stoutenburg, *supra* note 68, at Chapter 6; Wong, *supra* note 7, at 35–8 and 45.

⁷⁵ '[C]ommon objective operational criteria for the elements of the definition' of statehood are lacking. G. von Glahn and J. Taulbee, *Law Among Nations* (2013), 148.

defined set of minimum criteria – is therefore unconvincing.⁷⁶ Perhaps, rather than its efficacy, its popularity simply reflects ‘the lack of a better model’.⁷⁷

But what if a ‘better model’ could be identified? The following section proposes an alternative account of statehood as a category of state-like entities that share a series of overlapping similarities or relationships rather than a fixed set of characteristics.

4. PURSUING A ‘FAMILY RESEMBLANCE’ ACCOUNT OF STATEHOOD

In *Philosophical Investigations*, Ludwig Wittgenstein examines many of the ways in which language is, or might be, used.⁷⁸ One of his aims is to discover how all of these different uses are related to each other. What is the common feature that makes them all types of the thing that we call ‘language’? It appears that there isn’t one.⁷⁹ Nevertheless, they are connected by an overlapping set of similarities or relationships, in virtue of which we group them together in the category of language.

Wittgenstein explains this by analogy with games.⁸⁰ Things that fall into the category of games do not share some fixed set of characteristics or properties that are unique to them, but we nevertheless recognize them as games. Solitaire and poker involve playing cards. Poker and high jump involve many individual players competing against each other. High jump and football take place in a stadium. Football and tennis are ball games. Many games involve winning and losing, but so do elections and auctions. As Beardsmore explains,

[W]e recognize poker or monopoly as games, not because of the presence of some defining characteristic common to all games, but because they share some (though not all) features with other games, which in turn share some (though not all) features with still other games.⁸¹

Wittgenstein describes this in terms of ‘a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail’.⁸² This network, he suggests, is best captured by the idea of ‘family resemblances’, ‘for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way’.⁸³

The question here is whether the concept of statehood could also be thought of in terms of family resemblances.⁸⁴ On this alternative account, statehood would be

⁷⁶ Compare Craven, *supra* note 21, at 221.

⁷⁷ Grant, *supra* note 13, at 414.

⁷⁸ L. Wittgenstein, *Philosophical Investigations* (1953).

⁷⁹ Other than the fact that all language *is used* as language. For Wittgenstein’s emphasis on the role of use in determining meaning, see *ibid.*, Section 43.

⁸⁰ Wittgenstein, *supra* note 78, at Sections 66–71.

⁸¹ R. Beardsmore, ‘The Theory of Family Resemblances’, (1992) 15 *Philosophical Investigations* 131, at 132.

⁸² Wittgenstein, *supra* note 78, at Section 66.

⁸³ *Ibid.*, at Section 67.

⁸⁴ This has not been proposed by legal scholars elsewhere, although some accounts of statehood as a continuum of state-like entities come close. See, for example, Österdahl, *supra* note 22. Elsewhere, Mark Beissinger argues that the concept of ‘empire’ should be understood in terms of a ‘Wittgensteinian “family resemblance” whose meaning and referents have altered significantly over time’. M. Beissinger, ‘Soviet Empire as “Family Resemblance”’, (2006) 65 *Slavic Review* 294, at 303. Duncan Bell suggests that ‘it is possible to identify a family resemblance in the preconditions considered essential for successful statehood’, but does not elaborate. D.

understood not in terms of a common set of characteristics shared by all states – as per the minimum threshold account – but in terms of a series of overlapping similarities. Norway (1940–1945)⁸⁵ and the Vatican City, for example, both have some capacity for independence. The Vatican City and Somalia both have a defined territory. Somalia and Cuba both have a permanent population. Cuba and Australia both have an effective government. While there is no one common set of characteristics shared by all of these states, they are nevertheless connected by a series of overlapping similarities or family resemblances.

Here, an attempt is made to reclaim the concept of statehood from the difficulties and counterexamples identified earlier. Rather than abandoning statehood as a victim of ‘conceptual stretching’, it might be better understood as a ‘broad family of objects that have altered considerably in form and meaning . . . rather than as a singular phenomenon’.⁸⁶ The category of things that we call ‘states’ is identifiable not by some fixed set of characteristics, but an overlapping series of family resemblances that continue to evolve across time and space, shaped by processes of industrialization, decolonization, urbanization, globalization, migration, fragmentation, secession, and, now, climate change.

In fact, Crawford suggests that the rules of statehood have been ‘kept so uncertain or open to manipulation as not to provide any standards at all’, allowing the concept of statehood to remain flexible enough to incorporate unorthodox entities that do not meet all of the criteria.⁸⁷ ‘To suggest that entities such as “protected states” or “internationalized territories”’, he argues, ‘are a priori excluded from statehood is unjustified and exaggerates the exclusivity of the international legal regime of statehood.’⁸⁸ This suggests that a more open and flexible account of statehood would more accurately reflect state practice and more effectively respond to the changing legal, political, cultural, and environmental demands of the world today. A similar approach is reflected in the work of the ILC, which concluded (with shades of Wittgenstein) that ‘no useful purpose would be served by an effort to define the term “state”’, being content to use it ‘in the sense commonly accepted in international practice’.⁸⁹

As we saw earlier, identifying the point at which low-lying atoll island states will fail to meet the minimum threshold for statehood is difficult. From the perspective of a family resemblance account of statehood, however, this would not be necessary.

Bell, ‘The Victorian Idea of the Global State’, in D. Bell (ed.), *Victorian Visions of Global Order* (2007), 159 at 162. Yael Tamir observes that ‘all members within the category “nation” . . . show some family resemblance’, but does not cite Wittgenstein nor stay true to his understanding of family resemblances. Y. Tamir, *Liberal Nationalism* (1993), 65. James Tully applies Wittgenstein’s family resemblance model to political concepts like cultures and constitutions. J. Tully, *Strange Multiplicity* (1995), 112–13 and 120–2.

⁸⁵ During the Second World War, the Norwegian government operated in exile and the state of Norway therefore lacked effective control or jurisdiction over its territory.

⁸⁶ Beissinger, *supra* note 84, at 297.

⁸⁷ Crawford, *supra* note 4, at 45.

⁸⁸ *Ibid.*, at 88.

⁸⁹ ILC Draft Declaration on the Rights and Duties of States, *supra* note 34, at 259. Shearer similarly argues that, ‘Of the term “state” no exact definition is possible.’ Shearer, *supra* note 54, at 85. Compare Grant, *supra* note 13, at 408; Higgins, *supra* note 24, at 39; Knop, *supra* note 14, at 107.

On this account, in order to continue to qualify as a state, an atoll island state would need to continue to share one or more similarities with other ‘state-like’ entities.

In recent work, legal scholars have suggested various ways in which atoll island states might retain their identity as states in the face of climate change inundation.⁹⁰ While each theorist explicitly or implicitly adopts the traditional minimum threshold account of statehood, the conclusions they reach often lead them in the direction of a more flexible, responsive, family resemblance-type account. Jenny Grote Stoutenburg, for example, sets out to identify ‘the thresholds at which the loss of personal and territorial effectiveness would presumably occur’.⁹¹ However, her analysis does not lead her to conclude that all criteria must be satisfied, but that the cumulative weight of a number of shared criteria may be sufficient to ensure the continued recognition of atoll island states in the face of climate change inundation.

In what follows, several of these proposals are examined from the perspective of a family resemblance account of statehood. The aim is not to assess the relative merits of each proposal but to evaluate the capacity of the minimum threshold and family resemblance accounts of statehood to accommodate them.

4.1. Preserving territory on which to maintain a ‘population nucleus’

An atoll island state might try to ensure that some of its original territory remains habitable by means of ‘hard’ or ‘soft’ defence measures, including building sea walls or nurturing coastal ecosystems.⁹² It could then maintain a ‘population nucleus’ or ‘symbolic presence’ on this remaining territory: a small permanent population that could provide a ‘legal anchor’ to the wider diaspora.⁹³ The President of Kiribati, for example, has suggested relocating his government to Banaba Island, the country’s highest landmass, in order to maintain a population on their territory for as long as possible. ‘I dream that some of us would stay. If we had enough resources, we could build up one of these islands to a height a few metres above sea level to render it a place where we could survive.’⁹⁴

However, the capacity of an atoll island state to continue to satisfy the criteria of a permanent population living in a defined territory is uncertain. Its population will diminish as fresh water becomes scarcer, coastlines erode, infrastructure is destroyed and its citizens gradually emigrate, which in turn may ‘start to erode longer-term claims to continued sovereignty and statehood’.⁹⁵ In the event that it eventually lacks a permanent population and defined territory, an atoll island state will need to rely on other state-like characteristics to maintain its status as a state.⁹⁶

⁹⁰ See, for example, M. Burkett, ‘The Nation *Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’, (2011) 2 *Climate Law* 345; McAdam, *supra* note 7, at Chapter 5; Rayfuse, *supra* note 74; C. Schofield and D. Freestone, ‘Options to Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise’, in M. Gerrard and G. Wannier (eds.), *Threatened Island Nations: Legal Implications of Rising Seas and Changing Climate* (2013), 141; Stoutenburg, *supra* note 7; Stoutenburg, *supra* note 68.

⁹¹ Stoutenburg, *supra* note 7, at 57.

⁹² See, for example, Schofield and Freestone, *supra* note 90, at 152–6.

⁹³ Kälin, *supra* note 40, at 102 and 90–1; Stoutenburg, *supra* note 7, at 65.

⁹⁴ Cited in McAdam, *supra* note 7, at 137.

⁹⁵ McAdam, *supra* note 7, at 159.

⁹⁶ Stoutenburg, *supra* note 7, at 68; L. Yamamoto and M. Esteban, *Atoll Island States and International Law* (2014), 176.

While the minimum threshold account of statehood is unable to accommodate this situation, a family resemblance approach takes into account the fact that an atoll island state might continue to share similar properties with some states (an effective government and independence), even if it eventually does not share certain properties with others (a permanent population living in a defined territory).

4.2. A government-in-exile

Provided that it can find a willing host state, an atoll island state might continue to fulfil the criteria of effective government and independence by establishing a government-in-exile.⁹⁷ While its powers would be circumscribed by the territorial sovereignty of the state within which it operates,⁹⁸ an island government-in-exile could continue to perform certain functions of statehood, including maintaining formal diplomatic relations, concluding treaties, participating in international fora, exercising jurisdiction over its nationals abroad, providing consular services, and issuing passports.⁹⁹ The successful operation of governments-in-exile suggests that ‘the existence of territory, while essential to the original constitution of that entity as a state, is not integral to the exercise of certain governmental functions’.¹⁰⁰

Yet governments-in-exile have thus far operated on the basis that their exile is temporary, and their recognition is premised on the existence of a permanent population and defined territory to which they will eventually return.¹⁰¹ As discussed above, an atoll island state could maintain a ‘population nucleus’ on its remaining territory, thereby retaining some jurisdiction over a defined territory and permanent population. However, in this case, ‘the momentum would not be toward an eventual return home, but toward permanent diaspora’.¹⁰² As islanders gradually resettle and gain citizenship elsewhere, the role of the government-in-exile will diminish over time, undermining an atoll island state’s claim to effective governance and independence.¹⁰³

Again, the traditional minimum threshold account of statehood cannot take us this far: it is unable to account for a government-in-exile in the first place. However, a family resemblance account may also exclude an atoll island state at this point. Without a clearly defined territory, permanent population or effective government in the long-term, the number of similarities or ‘family resemblances’ that an atoll island state shares with other state-like entities begins to diminish, calling into question its continued recognition as a state.

⁹⁷ See generally Talmon, *supra* note 42, at 215ff.

⁹⁸ *Allied Forces (Czechoslovak) Case*, (1941–42) 10 *Annual Digest of Public International Law* 123, at 124.

⁹⁹ Stoutenburg, *supra* note 7, at 69; Stoutenburg, *supra* note 68, at Section 4.2.3.2. Compare Talmon, *supra* note 42, at 16 and 146–9.

¹⁰⁰ McAdam, *supra* note 7, at 135.

¹⁰¹ Park, *supra* note 7, at 6–7; Talmon, *supra* note 42, at 136; UNHCR, IOM and Norwegian Refugee Council, *supra* note 28, at 1; Wong, *supra* note 7, at 21–2.

¹⁰² Stoutenburg, *supra* note 7, at 69.

¹⁰³ McAdam, *supra* note 7, at 136–7.

4.3. ‘Deterritorialized’ statehood

It has been suggested that an atoll island state might continue to exist as a ‘deterritorialized’ state or ‘state-in-exile’, even once it lacks a permanent population residing in a defined territory.¹⁰⁴ Maxine Burkett, for example, proposes the recognition of a new kind of state: the ‘nation *ex-situ*’, a sovereign entity with a body of elected representatives that governs its citizens even as they scatter across the world.¹⁰⁵ A deterritorialized state, Burkett argues, provides a ‘means of conserving the existing state and holding the resources and well-being of its citizens – in new and disparate locations – in the care of an entity acting in the best interests of its people’.¹⁰⁶ It would continue to participate in intergovernmental organizations, provide diplomatic protection and consular services, resolve disputes and protect (some of) the rights of its citizens.¹⁰⁷ Where provision is made for regular elections, its citizens, like other diaspora populations, would continue to vote for political representatives.¹⁰⁸

A deterritorialized state would, therefore, look much like a government-in-exile, with the additional benefit of a permanent legal status that would ensure its ongoing recognition as a state, despite the gradual relocation of its citizens elsewhere.¹⁰⁹ By preserving a ‘vital political and cultural nucleus’ that persists over time, it may also help to ‘ease the rootlessness’ its scattered population face, allowing islanders to sustain a sense of identity arising from their common membership in a deterritorialized state.¹¹⁰ And, in the event that the deterritorialized state continues to exercise jurisdiction over its maritime zones,¹¹¹ the revenue they generate may also help to maintain social, political and legal institutions for the benefit of its dispersed citizens.¹¹²

Although a deterritorialized state might retain some territory on which a ‘population nucleus’ could remain, this is not a prerequisite for its continuing statehood under this proposal. As Walter Kälin and Nina Schrepfer argue, ‘International law

¹⁰⁴ *Ibid.*, at 138; Burkett, *supra* note 90; I. Kelman, ‘Difficult Decisions: Migration from Small Island Developing States under Climate Change’, (2015) 3 *Earth’s Future* 133, at 137; S. McCullough, ‘A Call for a New International Convention to Safeguard the Human Rights of Citizens of Deterritorialized Asia-Pacific Small Island States’, (2015) 26 *Colorado Natural Resources, Energy and Environmental Law Review* 109; J. Ödalen, ‘Underwater Self-Determination: Sea-Level Rise and Deterritorialized Small Island States’, (2014) 17 *Ethics, Policy and Environment* 225; Rayfuse, *supra* note 74, at 179–80; R. Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’, (2009) UNSW Faculty of Law Research Series No. 9, at 11–12; Stoutenburg, *supra* note 7, at 70–2 and 85–7; Stoutenburg, *supra* note 68, at Section 6.3; M. Vaha, ‘Drowning Under: Small Island States and the Right to Exist’, (2015) 11 *Journal of International Political Theory* 206.

¹⁰⁵ Burkett, *supra* note 90.

¹⁰⁶ *Ibid.*, at 346. Compare Rayfuse, *supra* note 104, at 11.

¹⁰⁷ Burkett, *supra* note 90, at 363ff. But see F. Dietrich and J. Wündisch, ‘Territory Lost: Climate Change and the Violation of Self-Determination Rights’, (2015) 2 *Moral Philosophy and Politics* 83.

¹⁰⁸ See, for example, A. Sundberg, *The History and Politics of Diaspora Voting in Home Elections* (2007). On the diaspora as the ‘present-tense experience of the deterritorialized nation’, see Burkett, *supra* note 90, at 359.

¹⁰⁹ Burkett, *supra* note 90, at 367–9.

¹¹⁰ *Ibid.*, at 363ff.

¹¹¹ This is, however, far from straightforward. In addition to the question of whether maritime baselines can be preserved in the face of rising sea levels, there is also the question of whether a deterritorialized state can continue to exercise jurisdiction over the maritime zones these delimit. For further discussion, see Caron, ‘When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level’, (1990) 17 *Ecology Law Quarterly* 621, at 641–51; Rayfuse, *supra* note 74, at 181–90; Schofield and Freestone, *supra* note 90, at 158–63; Soons, *supra* note 7; Yamamoto and Esteban, *supra* note 96, at Chapter 5.

¹¹² Rayfuse, *supra* note 104, at 11; Soons, *supra* note 7, at 230, note 90. However, on the expense of preserving and managing maritime zones, see Caron, *supra* note 111, at 639–40; Rayfuse, *supra* note 104, at 12–13.

would be flexible enough to provide for the continued existence of such states as non-territorial entities.¹¹³ What is crucial here is that it continues to maintain an effective government and the capacity for independence. Provided that recognition is not withdrawn following the loss of habitable territory and a permanent population, ‘the deterritorialized state could continue to interact as part of the community of nations’.¹¹⁴

However, while a state’s independence can be qualified without its statehood being called into question,¹¹⁵ it is thought unlikely that a state can retain its independence if it permanently resides on the sovereign territory of another state.¹¹⁶ While a deterritorialized state would have a formally recognized legal status, it would remain dependent on the consent of the host state(s) within which its citizens reside and is therefore likely to face many of the constraints imposed on a government-in-exile.¹¹⁷

Yet, as explained at the outset, this article is not concerned with the viability or otherwise of these proposed solutions to climate change inundation. Instead, it questions whether the traditional minimum threshold account of statehood can provide the conceptual space within which to have such a discussion in the first place. Again, as with the previous proposals, this seems unlikely: the minimum threshold approach is unable to account for the existence of a deterritorialized state, let alone provide us with the conceptual tools required to assess its strengths and weaknesses. It therefore appears that a family resemblance account of statehood provides a more flexible, responsive account with the capacity to incorporate both pre-existing and future counterexamples and to adapt to changing legal, geopolitical, social, and environmental conditions. However, this approach is not without its own difficulties. The following section considers several of these.

5. METHOD OR MADNESS?

Having considered the role that a family resemblance account of statehood might play in addressing some of the weaknesses of the minimum threshold account, this section outlines some objections. The first set of problems concern the proper role of a legal account of statehood. What is its relationship to state practice and international relations? Should it be descriptive or prescriptive, idealistic or pragmatic? On the one hand, perhaps the minimum threshold account of statehood is not intended to reflect state practice, but to guide it. On this account, the role of law is to provide consistent, universal rules that ensure certainty and stability, and the counterexamples described earlier are just that: counterexamples that prove the general rule. On the other hand, perhaps the role of law is to evolve in response to changing conditions and threats, rather than to preserve some essential concept of

¹¹³ Kálin and Schrepfer, *supra* note 74, at 39.

¹¹⁴ McAdam, *supra* note 7, at 138.

¹¹⁵ *SS Wimbledon*, PCIJ Rep. Series A No. 1, at 25. On the independence of microstates, see Duursma, *supra* note 25, at Chapters 4–8; Wong, *supra* note 7, at 29–31.

¹¹⁶ Grant, *supra* note 13, at 439–40; Wong, *supra* note 7, at 26–8, 31 and 40–1.

¹¹⁷ Park, *supra* note 7, at 7 and 13–14.

statehood at all costs. On this account, ‘failed’ states, micro-states, governments-in-exile, and deterritorialized island states are not counterexamples but evidence of the need for legal rules that are flexible and responsive to new or unusual demands.

A related problem is that, in doing away with a minimum threshold for statehood, we risk granting states ‘unfettered discretion’ in deciding which entities to recognize, or not.¹¹⁸ By establishing objective criteria, the minimum threshold approach is said to mitigate the abuse of the law by those with power. However, it might also be argued that the minimum threshold approach relies on a set of Western-centric criteria that exclude certain groups – including indigenous, nomadic, and tribal peoples – from statehood anyway, a bias that is concealed behind a façade of objectivity.¹¹⁹

The second set of problems relates to the fit between a family resemblance account and the concept of statehood. First, there is the question of whether a family resemblance model is compatible with an all-or-nothing concept of statehood. Does it imply that some states – that is, those with more shared characteristics – are more ‘state-like’ than others, thereby contradicting the fundamental principle of sovereign equality? While this may intuitively appear to be the case, the answer is no, or at least no more so than the minimum threshold account. According to Wittgenstein’s games analogy, something either is or is not a game, regardless of how many similarities it shares with other games. Football is not more ‘game-like’ just because it shares many characteristics with, say, rugby, and the same is true of states. However, where the minimum threshold approach is unable to account for the fact that a failed – or less ‘state-like’ – state like Somalia is in fact a state, the family resemblance account is. Perhaps it is in fact an unreflective commitment to the minimum threshold approach that clouds our view of ‘counterexamples’ like Somalia, encouraging us to view them as second among equals.

Second, some might object that the family resemblance model is open-ended or over-inclusive, requiring us to recognize as states entities that we would rather not. ‘[S]ince we can always find some resemblance between instances of one concept and those of another’, Anderson argues, ‘family resemblance does not suffice to limit the extension of concepts’.¹²⁰ Paintball, for example, involves paint, but so too does redecorating a house. Chess involves a king and queen, but so does a monarchy. Similarly, all states have a flag, but so do cities, municipalities and football clubs. Even if we restrict ourselves to the criteria set out in the Montevideo Convention, non-state entities like Taiwan, Abkhazia or Tokelau have a defined territory, a permanent population, and an effective government. Would we really want to recognize all of these things as games, or as states? As Grant points out, the ‘central task of a definition is, after all, to isolate its object from others’.¹²¹

Wittgenstein himself embraces this apparent open-endedness. ‘What still counts as a game and what no longer does? Can you give the boundary? No ... (But that

¹¹⁸ Crawford, *supra* note 2, at 127.

¹¹⁹ Grant, *supra* note 13, at 449.

¹²⁰ H. Anderson, ‘Kuhn’s Account of Family Resemblance: A Solution to the Problem of Wide-Open Texture’, (2000) 52 *Erkenntnis* 313, at 313. See also Beardsmore, *supra* note 81; J. Bellaimy, ‘Family Resemblances and the Problem of the Under-Determination of Extension’, (1990) 13 *Philosophical Investigations* 31.

¹²¹ Grant, *supra* note 13, at 435.

never troubled you before when you used the word “game”).¹²² But this sense of indeterminateness is understandably troubling when we are attempting to construct a legal account of statehood. Law is typically binary in nature, relying on clear, fixed boundaries between opposing concepts: legal vs. illegal, guilty vs. not guilty, state vs. non-state, and so on. Then again, as above, it is not that Wittgenstein would deny that we can distinguish clearly between things that fall into the category of ‘games’ and things that do not; merely that we can draw clear boundaries between them based on characteristics that they either share or do not. The same goes for many of the categories central to international law, including – as this article makes clear – that of statehood. Given this, perhaps the family resemblance account is preferable insofar as it is willing to acknowledge this conceptual blurring, rather than insisting that the threshold between ‘state’ and ‘non-state’ is clearly demarcated by a fixed set of criteria.

Or, we might argue that there *is* something shared by all and only states: ‘namely, the disjunction of all their common properties’.¹²³ In the account of statehood set out in this article, the set of common properties shared by all states includes a defined territory, permanent population, effective government, and independence. This is not to say that all states must share all of these properties, merely that this is the common basket of properties from which we can draw in identifying something as a state. We could even take this one step further, requiring that all states possess a minimum number of these properties,¹²⁴ or privileging certain properties that contribute in some way to our particular needs or goals.¹²⁵ For instance, in order to count as a state, an entity might need to satisfy three out of four common criteria or at least two criteria *plus* the recognition of other states.¹²⁶

However, if we are to adhere to a family resemblance account, this response is problematic for two reasons. First, for Wittgenstein, any appeal to the disjunction of common properties is meaningless: ‘One might as well say [of a thread made of overlapping fibres]: “Something runs through the whole thread – namely the continuous overlapping of those fibres”’.¹²⁷ For Wittgenstein, there is no such common basket of properties. Second, in adopting certain requirements about which or how many criteria a state must satisfy, a family resemblance account quickly collapses into a variant of the minimum threshold account of statehood. Instead of insisting that all states must satisfy all criteria, we are simply cashing out the idea of a ‘minimum threshold’ in terms of a minimum number or combination of criteria.

Perhaps, instead, we could take the approach favoured by Thomas Kuhn, who argues that the members of a particular category are distinguished not only by similarity between members of the same category, but also difference from members of

¹²² Wittgenstein, *supra* note 78, at Section 68.

¹²³ *Ibid.*, at Section 67.

¹²⁴ Bellaimy, *supra* note 120, at 33–6.

¹²⁵ *Ibid.*, at 40–3.

¹²⁶ On the constitutive effect of recognition in this sense, see Duursma, *supra* note 25, at 430; Grant, *supra* note 13, at 447; Wong, *supra* note 7, at 36; Yamamoto and Esteban, *supra* note 96, at 183 and 212.

¹²⁷ Wittgenstein, *supra* note 78, at Section 67.

other categories.¹²⁸ The scope of one category is limited when it collides with or mutually restricts a second category. These two categories might be straightforwardly contradictory (e.g. ‘state’ and ‘non-state’) or they might involve one broad category and other specific contrary categories (e.g. ‘state’ and ‘city’ or ‘minority group’). A problem arises, however, when we encounter intermediate objects that fall into two or more categories, like Somalia, Palestine, Taiwan or a deterritorialized island state. For Kuhn, the possibility of grouping objects into categories depends on there being ‘an empty conceptual space between the families to be discriminated’,¹²⁹ a space that is often difficult to find in practice.

Finally, there is the question of whether the minimum threshold account of statehood is worth rescuing from the difficulties discussed in this article. It is, after all, an intuitively plausible approach to take. Are the weaknesses identified evidence of merely a failure to adequately develop and implement the idea of a minimum threshold of statehood, or of the difficulty, or impossibility, of identifying a minimum threshold at all?

If the former, it might be possible to combine the minimum threshold and family resemblance accounts to create a two-pronged approach, where the former applies to the establishment of states and the latter to their continuing existence and potential extinction.¹³⁰ According to this combined account, even if the criteria governing the emergence of states are ‘logically the same’ as those governing their extinction, their application may be different.¹³¹ Once an entity has passed the minimum threshold of statehood, the ratchet effect discussed earlier may prevent them from falling back below this threshold, even if they no longer satisfy one or more criteria – providing that they continue to share certain characteristics with other states. A ‘failed state’, for example, could continue to exist as a state as long as it sustains a reasonably stable population within reasonably well-defined borders, despite no longer having an effective government,¹³² while the reverse might hold for an atoll island state threatened by climate change inundation.

6. CONCLUSION

While international law is often thought to rely on certainty and stability, one of its central concepts – that of statehood – lacks a clear, reliable definition. By raising difficult questions about the ongoing existence of states whose territory is rendered uninhabitable, climate change inundation prompts us to re-examine the legal concept of statehood, challenging us to clarify what we mean when we call something a ‘state’.

¹²⁸ For example, T. Kuhn, *The Structure of Scientific Revolutions* (1970); T. Kuhn, ‘The Road Since Structure’, (1991) 2 *Philosophy of Science Association* 3. See also Anderson, *supra* note 120.

¹²⁹ Kuhn, *Structure*, *supra* note 128, at 197, note 14.

¹³⁰ Compare Österdahl, *supra* note 22, at 60. See also Higgins, *supra* note 24, at 39; Von Glahn and Taulbee, *supra* note 75, at 139.

¹³¹ Craven, *supra* note 21, at 159.

¹³² Österdahl, *supra* note 22, at 60–1.

This article highlights some weaknesses of the traditional minimum threshold account of statehood, both in general and in the specific context of climate change inundation. It identifies a plausible alternative account, drawing on Wittgenstein's concept of family resemblances. However, the usefulness of this family resemblance account is yet to be determined. On the one hand, it is more responsive to changing circumstances and provides a better reflection of the way in which the legal vocabulary of statehood applies to the world. On the other, it may err too heavily on the side of flexibility and suffers from a lack of clarity that is not easily resolvable.

Further work will be needed to identify the purpose and objective of a legal account of statehood, with particular reference to the context of climate change inundation. What is the role of law in determining which entities are categorized as states? Can the family resemblance account answer the objections from indeterminacy raised above? Or should we abandon the search for a definition altogether and simply rely on the way the term 'state' is used in practice, as Wittgenstein – and, indeed, the ILC¹³³ – would have us do?

¹³³ ILC Draft Declaration on the Rights and Duties of States, *supra* note 34, at 259.