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# NO PORT, NO PASSPORT: WHY SUBMERGED STATES CAN HAVE NO NATIONALS

Heather Alexander and Jonathan Simon

*Abstract:* Territorial loss owing to sea level rise presents novel challenges to the international legal order. Nowhere is this clearer than in the case of small island states like the Maldives, Tuvalu and Kiribati, whose very existence is in jeopardy. In our recent article, *Sinking Into Statelessness*,<sup>1</sup> we argue that the principle of presumption of continuity of state existence does not ensure that sinking states shall, or may, retain their legal statehood, because that principle cannot overrule the fact that territoriality is a constitutive feature of legal statehood. Here, we argue that even if, contra our previous conclusion, submerged states retain their legal statehood, territory is nevertheless necessary in order for a state to confer nationality in the sense of the 1954 Convention Relating to the Status of Stateless Persons; that is, for a state to consider someone a national under the operation of its law. In consequence, even granting that a submerged state could exist and have members, its members would need nationality in another state in order to avoid *de jure* statelessness. To establish this claim, we will argue that for a state to consider someone a national under the operation of its law, that state must be capable of complying with the duty to readmit nationals when requested to do so by another state, which requires habitable territory.

## I. INTRODUCTION

The effects of climate change may be seen all over the world, but are nowhere more visible than in small island states like the Maldives, Tuvalu and Kiribati, which owing to sea-level rise may become wholly uninhabitable.<sup>2</sup> This calamity raises a host of unprecedented legal issues. In the words of the International Law Association, who in 2012 established the Committee on International Law and Sea Level Rise, “the issue ... encompasses consideration at a junction of several parts of international law, including such fundamental aspects as elements of statehood under international law, human rights, refugee law, and access to resources, as well as broader issues of international peace and security.”<sup>3</sup> In particular, many

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<sup>1</sup> Heather Alexander & Jonathan Simon, *Sinking Into Statelessness*, 19 TILBURG L. REV. 20 (2014).

<sup>2</sup> Leonard A. Nurse et al., *Small Islands*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY PART B: REGIONAL ASPECTS, CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 1613–1654 (V. R. Barros et al. eds., 2014), [https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29\\_FINAL.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf).

<sup>3</sup> DAVOR VIDAS ET AL., INTERIM REPORT (JUNE 8) OF THE INTERNATIONAL LAW AND SEA LEVEL RISE, JOHANNESBURG CONFERENCE, 2–3 (International Law Association 2016), <http://www.ila->

scholars have argued against recognizing the former inhabitants of small islands as stateless.<sup>4</sup> A formal recognition of statelessness would bring the former inhabitants of small islands under the protection of international statelessness law, including the Statelessness Conventions.<sup>5</sup> As we argue in our article “*Unable to Return*” in the 1951 Refugee Convention: *Stateless Refugees and Climate Change*, displaced stateless persons who are unable to return to their country of former residence will qualify as refugees.<sup>6</sup> It is therefore important to officially recognize stateless former islanders in order that they receive access to these benefits.<sup>7</sup>

In our article, *Sinking Into Statelessness*, we argue that small island states will cease to be states if climate change makes them uninhabitable. This is so because control of habitable territory is a necessary condition of statehood, a fact which cannot be overruled by the principle of presumption

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hq.org/en/committees/index.cfm/cid/1043. See also Davor Vidas, David Freestone, & Jane McAdam, *International Law and Sea Level Rise: The New ILA Committee*, 21 ILSA J. OF INT’L & COMP. L. 397 (2015).

<sup>4</sup> See, e.g., Jenny Grote Stoutenburg, *When do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of ‘Deterritorialized’ Island States*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 57 (Michael B. Gerrard & E. Wannier eds. 2015). See also the writings of Jane McAdam, who has argued for the continued statehood of small islands. See, e.g., JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW nn.1, 144 (2012); JANE MCADAM, ‘Disappearing States’, *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 274 (2010); JANE MCADAM, CLIMATE CHANGE REFUGEES AND INTERNATIONAL LAW 6 (New South Wales Bar Ass’n, Oct. 24 2007); Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011); Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 WASH. J. OF ENV’T L. & POL’Y 1 (2015).

<sup>5</sup> The Convention Relating to the Status of Stateless Persons provides stateless persons with many protections, including property rights, access to the courts, access to elementary education, social security and other rights. See generally, Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117 arts. 12–14. See also Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175. Stateless persons also find protection under many other international instruments, a summary of which may be found in the Institute on Statelessness and Inclusion’s INTERNATIONAL STATELESSNESS LAW: A POCKET EDITION (Wolf Legal Publishers 2014) 47–59. Formal recognition of statelessness also brings an individual under the purview of the Office of the UN High Commissioner for Refugees, which has a mandate to assist stateless persons. See UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS 4 (2014) [hereinafter HANDBOOK]; see also Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28 INT’L J. REFUGEE L. 4, 564–584 (2016).

<sup>6</sup> Heather Alexander and Jonathan Simon, *Unable to Return’ in the 1951 Refugee Convention: Stateless Refugees and Climate Change*, 26 FL. J. OF INT’L L. 531 (2014).

<sup>7</sup> UNHCR argues for the formal recognition of stateless persons in order to assure they receive proper treatment under the law. HANDBOOK, *supra* note 5, at 4.

of continuity of state existence.<sup>8</sup> Here, we will argue that a legal entity must control habitable territory in order for any individuals to qualify as its nationals, where “nationals” has the meaning it has in the 1954 Convention Relating to the Status of Stateless Persons (hereinafter “The 1954 Convention”),<sup>9</sup> even if, contrary to the conclusion of our 2014 article,<sup>10</sup> such a legal entity needn’t control habitable territory to qualify as a state. This is not to deny that an entity without territory can have members.<sup>11</sup> The question before us is whether these members qualify as nationals in the sense germane to the assessment of *de jure* statelessness. We argue to the contrary that if these members have no other nationality, they will be *de jure* stateless.<sup>12</sup>

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<sup>8</sup> Alexander, *supra* note 1, at 20. The principle of presumption of continuity of state existence is a principle telling against the creation of new states in the event of a change of government. KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 616 (Librairie Droz 1954). We argue that this principle does not undermine the necessity of control of habitable territory for statehood as it is codified in the 1933 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 L.N.T.S. 19 (Montevideo Convention) art. 1. We make this claim in concurrence with the conclusion of a UNHCR expert meeting at Prato, but in opposition to the conclusions of a UNHCR expert meeting at Bellagio. UNHCR, THE CONCEPT OF STATELESS PERSONS UNDER INTERNATIONAL LAW, SUMMARY CONCLUSIONS (2010); UNHCR, SUMMARY OF DELIBERATIONS ON CLIMATE CHANGE AND DISPLACEMENT, para. 30 (2011).

<sup>9</sup> The Convention defines a (de jure) stateless person as one who is “... not considered a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117. *See also* Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175. As Mark Manly points out, “the definition of a stateless person in the 1954 Convention is more complex than it appears at first glance and has been interpreted in wildly diverging manners.” Mark Manly, *UNHCR’s Mandate and Activities to Address Statelessness*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 95 (Alice Edwards & Laura van Waas eds., 2014).

<sup>10</sup> Alexander, *supra* note 1, at 20.

<sup>11</sup> What form that membership may take is beyond the scope of this paper, but we leave open the possibility that former small island states may continue to play meaningful roles in the lives of their former citizens. *See, e.g.*, Burkett *supra* note 4 at 354. Burkett proposes a sort of trusteeship arrangement with dual “citizenship” in both the small island state and the state of residence. We do not deny that “citizenship” in such a non-state entity would be a valuable membership. We maintain only that it would not negate the need for the establishment of nationality with another state to avoid statelessness.

<sup>12</sup> Some suppose it to be a part of the solution to the problem of displaced islanders that we must allow submerging states to retain their legal identity as states even once they have lost all habitable territory. The upshot of our argument here is that to the contrary this is no solution at all, since there is more to avoiding the status of statelessness and enjoying the right to nationality than being called a national by some deterritorialized entity, even if we agree to count that entity as a state. Continued UN recognition of submerged small islands would be at best an incomplete solution. As a spokesperson for the High Commissioner for Human Rights recognized, “(i)f the islands of Kiribati and Tuvalu disappear beneath the waves...their leaders will have to find ways of reconstituting their states elsewhere, or persuade another government to provide their citizens with passports, welfare and protection. If they can’t do this, these ‘climate change refugees’ will become stateless.” Press Release, Office of the High Commissioner for Human Rights, Press briefing note on Indonesia / Death Penalty and Climate Change and Human Rights, U.N. Press Release (Mar. 6, 2015).

For illustration, suppose that all the governments of the world declared the Lions Club to be a state, and suppose that this made the Lions Club a state.<sup>13</sup> Now suppose that the Lions Club were to pass a law declaring that its members were its nationals. Our claim here is that even then, since the Lion's Club does not have (sovereign) control over habitable territory, this law would not make members nationals of the Lions Club, and therefore would not save them from *de jure* statelessness.

Importantly, ours is the stronger claim that de-territorialized states are unable to confer nationality in such a way as to prevent *de jure* statelessness, not the weaker claim that any nationality conferred by such a state would not be effective. The difference between ineffective nationality and *de jure* statelessness is like the difference between being trapped in a bad marriage and being a widower. In the former case there is an entity, a spouse, who fails to honor the commitments inherent to marriage, while in the latter case there is no living spouse bound by those commitments. Similarly, a state may confer rights upon you and then fail to honor them, withdraw its protection or even persecute you. In this case you may well have a nationality that is ineffective. But if a state has not successfully conferred nationality upon you in the first place, then you are not a national of that state, and if no other state has done so either, you are *de jure* stateless.<sup>14</sup>

Our argument has three components. In §2, we consider the ordinary meaning of the text of the 1954 Convention, read in context and bearing in mind the 1954 Convention's object and purpose.<sup>15</sup> We argue that so understood, to be "considered a national by a state under the operation of its law" is for that state to substantively confer nationality—a requirement distinct from that of a declaration of citizenship. The conferral of nationality involves a substantive transfer of rights and duties, while the mere

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<sup>13</sup> The Lion's Club is an international, secular, non-political service organization. See [www.lionsclubs.org/](http://www.lionsclubs.org/).

<sup>14</sup> Our use of the term "confer" draws on its use by the International Court of Justice in the *Nottebohm* case, where the Court says: "(n)ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals." *Nottebohm (Liech. v. Guat.)*, Summary Judgement, 1955 I.C.J. 4, 20 (Apr. 6).

<sup>15</sup> Vienna Convention on the Law of Treaties art. 31(1), May 32, 1969, 1155 U.N.T.S. 331.10

declaration of citizenship, in some cases, may not.<sup>16</sup> We do not claim that the contents of the bundle of transferred rights and duties is specified in Article 1 of the 1954 Convention: we allow that these may vary in correspondence with the nationality laws of individual states.<sup>17</sup> However, we contend that certain fundamental norms of international law constrain which rights and duties are transferred.<sup>18</sup> In particular, we contend that if fundamental norms of international law indicate a duty that states have towards other states regarding their nationals, then a state must assume this duty in conferring nationality.

In §3, we identify just such a duty. That is, we identify a fundamental norm of international law indicating a duty that a state has to other states regarding its nationals: the duty to readmit a national should other states request it. Under customary international law, states have a general duty to respect the sovereignty of other states.<sup>19</sup> But the refusal to readmit nationals disrespects the sovereignty of other states, and indeed can amount to the infliction of harm on them.<sup>20</sup> We will first establish this point and then make clear that a state's ability to comply with this duty depends on its sovereign control of habitable territory.<sup>21</sup>

Finally, in §4, we argue that a state that is unable to comply with this duty cannot assume it or be bound by it. This flows from a conceptual truth: no agent or entity may be duty-bound to do something that it cannot possibly

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<sup>16</sup> See HANDBOOK, *supra* note 5, at 23–24; Guidelines on Statelessness No 1: The definition of ‘Stateless Person’ in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, paras. 6, 15–17 (HCR/GS/12/01 2012).

<sup>17</sup> Here we adhere to the principle that nationality laws are the domain of sovereign states. Nottebohm, *supra* note 14.

<sup>18</sup> Convention on Certain Questions Relating to the Conflict of Nationality Law art. 1, Apr. 13, 1930, League of Nations, Treaty Series, vol. 179, p. 89. See also Nottebohm, 1955 I.C.J. at 21–23.

<sup>19</sup> This principle is often referred to as the principle of non-interference. I. BROWNLIE, INTERNATIONAL LAW 312 (7th ed. 2008).

<sup>20</sup> “States . . . are responsible for conditions on their territory which lead to the infliction of harm on other states.” BROWNLIE, *supra* note 19, at 398. “The duty of readmission . . . is also clearly one of the defining features of nationality as a matter of international law.” Alice Edwards, *The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 36 (Alice Edwards & Laura van Waas eds., 2014).

<sup>21</sup> In the conclusion we consider other duties associated with nationality that may hinge on control of habitable territory. For example, we take it to be an open question whether or not a state with members but no territory could exercise diplomatic and consular protection over those members. But we rest our case on the duty of readmission.

do. You cannot be said to have a duty to transmute lead into gold, because you are not physically capable of transmuting lead into gold. This is not merely to say that if you had such a duty you would of necessity fail to discharge it. Rather, it is to say that “ought implies can”: you only assume or are bound by a duty if it is possible for you to successfully discharge it. It follows that for a state to succeed in assuming the duty of readmission of nationals, that state must be capable of actually readmitting those nationals.

So, to summarize: in §§2-3 we argue that for a state to consider any individual a national under the operation of its law is, *inter alia*, for that state to successfully assume the duty of readmission concerning that individual. In §3 we argue that a state without sovereign control over habitable territory cannot successfully assume the duty of readmission concerning anyone. Then in §4 we argue that for a state to successfully assume the duty of readmission of nationals, that state must be capable of actually readmitting those nationals. Taking these claims together, we will conclude that for a state to consider any individual a national under the operation of its law, that state must have sovereign control over habitable territory. Accordingly, even if a submerged Maldives remains a state, the Maldives will be unable to confer nationality to anyone, and its members will be *de jure* stateless.<sup>22</sup>

## II. THE MEANING OF “UNDER OPERATION OF ITS LAW”

Article 1 of the 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as one who is “not considered a national by any state under the operation of its law.”<sup>23</sup> What is the ordinary meaning of the text of this article, read in context and bearing in mind the 1954

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<sup>22</sup> One might worry that even if we are correct, from an advocacy perspective it would be better to maintain the fiction of nationality for those whose states have submerged. We hold that nothing could be further from the truth. The so-called nationals of a deterritorialized state would face potentially enormous limits on their basic rights, including their rights to housing, employment, state protection, and many others. There is an international regime in place to reduce statelessness, while there is no such scheme to ensure the rights of persons who are nationals of a deterritorialized state. Maintaining the fiction of nationality for these persons would only serve to alienate them from the remedies available under the 1954 Convention. Additionally, elsewhere we have argued that stateless persons unable to return to their country of former habitual residence are refugees and, therefore, able to access the protections of the 1951 Refugee Convention. *See, e.g.,* Heather Alexander & Jonathan Simon, “Unable to Return” in the 1951 Refugee Convention, 26 FLA. J. INT’L L. 531 (2014).

<sup>23</sup> Convention Relating to the Status of Stateless Persons, *supra* note 5, at art. 1; *see also* Convention on the Reduction of Statelessness, *supra* note 5.

Convention's object and purpose?<sup>24</sup> The object and purpose of the 1954 Convention, as Guy S. Goodwin-Gill puts it, were; "to define a class of stateless persons and secondly, to regulate and improve their status and to assure to them the widest possible exercise of fundamental rights and freedoms."<sup>25</sup> Van Waas states that, "this opening provision of the 1954 Convention is the only place where international law defines the term [stateless]. As such, the definition of statelessness provided by this instrument is widely recognized as the basis for interpreting any reference to statelessness found elsewhere in treaty, legislation or soft law texts."<sup>26</sup> We therefore look to Article 1 of the 1954 Convention to define statelessness, remembering that the purpose of identifying stateless persons is to better assist them and protect their rights.

In referring to "operation of law," the 1954 Convention means the operation of the laws of the state considered together, from international treaty to constitutional and statutory law, to the most intricate and quotidian procedural law, as well as the acts and policies of administrative bodies.<sup>27</sup> We also note that "Under the operation of its law" is not to be confused with "by operation of law" or *ex lege*. The latter refers to the automatic acquisition of nationality. But "under the operation of its law" is meant to include non-automatic means of acquiring or being deprived of citizenship, such as, for example, naturalization.<sup>28</sup> We note, moreover, that there is no salient restriction to requirements that a state may impose on prospective nationals. Rather, the operation of law relating to the acquisition of

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<sup>24</sup> Convention Relating to the Status of Stateless Persons, *supra* note 5, at art. 31(1).

<sup>25</sup> Guy S. Goodwin-Gill, *Convention Relating to the Status of Stateless Persons, 1954: Introductory Note*, U.N. AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://legal.un.org/avl/ha/cssp/cssp.html> (last visited Feb. 25, 2017).

<sup>26</sup> Laura van Waas, *The UN Statelessness Conventions*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 64, 72 (Alice Edwards & Laura van Waas eds., 2014).

<sup>27</sup> Here we adopt UNHCR's position that "[t]he reference to 'law' in Article 1(1) [of the Convention] should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law . . . and, where appropriate, customary practice." HANDBOOK, *supra* note 5, at 12. *See also* R (on the application of Sameda) v. Secretary of State for the Home Department [2015] UKUT 00658 (UK). Despite the role for, e.g., international treaty law, because the Convention does not preclude the relevance of any aspect of municipal law it follows the established rule that "nationality is within the domestic jurisdiction of the State[.]" which "settle[s], by its own legislation, the rules relating to the acquisition of its nationality." *Nottebohm (Liech. v. Guat.)*, Summary Judgment, 1955 I.C.J. 4, 20 (Apr. 6).

<sup>28</sup> UNHCR, Expert Meeting: The Concept of Stateless Persons under International Law Summary Conclusions 3–4 (May 27–28, 2010), <http://www.unhcr.org/4cb2fe326.pdf>. In many states, naturalization requires an affirmative act by both the individual and a State authority. HANDBOOK, *supra* note 5, at 13–15.



nationality is the operation of law binding on states as well as on their nationals.<sup>29</sup>

For illustration of this latter point, consider a case where nationality is not automatic but instead is granted explicitly by some delegated agent, such as by naturalization. What is it exactly that such an agent is delegated to do? The agent is not merely to pronounce a certain course of words or write down a certain name on a piece of paper. The pronouncement is significant only because of the further rights, entitlements and duties it confers. Only in these do we see the genuine “operation of law.” Suppose we had some convention declaring that people are married who are considered to be married by some state under the operation of its law. We would not take this to mean that a couple is married whenever the state had authorized someone to say the words “I pronounce you man and wife” in the presence of that couple, or write them on a designated sheet of paper. Rather, it would mean that a couple is married only where the officiant is authorized to confer upon the couple, with those words, the rights and duties associated with marriage as these operate in the laws of the state, such as visitation rights, tax benefits, inheritance claims, and so on. The package of rights and duties may vary, but some conferral of rights and duties must have taken place.

All that we, by analogy, are claiming here, is that if the state has not conferred the rights and duties associated with marriage, then the couple is not considered to be married by the state under the operation of its law. Marriage is more than a nominal status; it is constructed of various rights and duties. An officiant must not only be authorized to make certain gestures and say certain words during the marriage ceremony, but also to confer thereby the rights and duties associated with marriage, whatever they may be. Likewise, with nationality: to confer nationality it is not enough that a representative of the state makes a certain statement or writes down a course of words declaring an individual to be a national. The representative’s acts must confer the rights and duties associated with

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<sup>29</sup> We note again, in this context, the ruling of the International Court of Justice in the *Nottebohm* case, where the Court says “[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals.” 1955 I.C.J. at 20.

nationality upon that individual.

Even if a state has different classes of nationality conferring different bundles of rights and duties, we still maintain that it does not suffice for nationality of any class that it is written somewhere that one is a national, unless such a designation confers the minimal bundle of rights and duties associated with that nationality in that state.<sup>30</sup> Such a bundle may include a great many things: authorizing the relevant agency to issue the nationalized person a suitable identity card, authorizing the tax agency to consider the nationalized person a national for tax purposes, authorizing the national to access various forms of social assistance, and so on. All of these functions may constitute the bundle of rights and duties underpinning nationality in that state.<sup>31</sup>

As we indicate above, it is a further question whether the state will in fact honor the rights it has conferred. A state may violate the basic rights of one of its nationals, thereby making that individual's nationality ineffective, but this is not the same as saying the person is not considered to be a national under the laws of that state.<sup>32</sup> We do not contend that the exact character of the bundle of rights and duties associated with nationality is implicit in the text of the definitional clause of the 1954 Convention. The moral of the foregoing is that we must attend to the law of the state in

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<sup>30</sup> *But see* Francesco Costamagna, *Statelessness in the Context of State Succession: An Appraisal under International Law*, in *THE CHANGING ROLE OF NATIONALITY IN INTERNATIONAL LAW* 37, 38 (Alessandra Annoni & Serena Forlati eds., 2013) (stating that de jure statelessness is the “lack of a formal bond.”).

<sup>31</sup> *See* HANDBOOK, *supra* note 5, at 13; WILLIAM E. CONKLIN, *STATELESSNESS: THE ENIGMA OF AN INTERNATIONAL COMMUNITY* 193 (2014); THE EQUAL RIGHTS TRUST, *UNRAVELLING ANOMALY: DETENTION, DISCRIMINATION AND THE PROTECTION NEEDS OF STATELESS PERSONS* 58 (2010).

<sup>32</sup> We do not here enter into a deeper discussion of effective nationality as this is beyond the scope of our paper. For a discussion of effective nationality, see Nottebohm, 1955 I.C.J. at 20. *See also* van Waas, *supra* note 26, at 79; Hugh Massey, *Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness*, (UNHCR Div. of Int'l Protection, LPPR/2010/01, 2010); Lindsey N. Kingston, *Statelessness as a Lack of Functioning Citizenship*, 19 *TILBURG L. REV.* 127 (2014); CONKLIN, *supra* note 31, at 196–202; Jason Tucker, *Questioning de facto Statelessness*, 19 *TILBURG L. REV.* 276 (2014); Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 *INT'L J. REFUGEE L.* 156, 158 (1998). Some speak of nationality without effective nationality as conceptually the same as statelessness, nationality in name only. *See* THE EQUAL RIGHTS TRUST, *supra* note 31, at 53–54, 63–64, 80–83; CONKLIN, *supra* note 31, at 201–02. “[N]ationality which is not effective is of no value to anyone.” THE EQUAL RIGHTS TRUST, *supra* note 31, at 80. We would resist this formulation, as it obscures a difference of fact (which may in some cases point to a difference of remedy) that in cases of ineffective nationality there is a state that actually has conferred the relevant rights and duties while in cases of de jure statelessness there is not.

question as a whole to determine its exact character. Moreover, insofar as there is international law binding on what a state must do with, or for, its nationals, this too must of course constrain the character of the bundle of rights and duties that is transferred with the conferral of nationality.<sup>33</sup> We shall now argue that the duty of readmission of nationals is a special case of this general duty.

### III. THE DUTY OF READMISSION OF NATIONALS

International law requires states to readmit their nationals from other states when requested to do so.<sup>34</sup> Readmission has long formed a core part of the rules governing the international system of states; its procedures are usually set by treaty.<sup>35</sup> Readmission of nationals undergirds international reciprocity and, as a result, we contend, the duty to readmit nationals is a duty that a state assumes in conferring nationality.

States may refuse to readmit their nationals in particular cases, but the fact that states sometimes refuse readmission does not negate that there is a duty of readmission in international law.<sup>36</sup> International law may also place a burden on states to admit non-nationals under certain circumstances—for example, in light of the principle of non-refoulement—but this in no way negates the duty states have to admit their own nationals when requested to do so by another state.<sup>37</sup>

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<sup>33</sup> Convention on Certain Questions Relating to the Conflict of Nationality Law, *supra* note 18, at art. 1; *see also* Nottebohm, 1955 I.C.J. at 21–23.

<sup>34</sup> Edwards, *supra* note 20, at 36. Goodwin-Gill calls the duty to readmit nationals “firmly fixed within the corpus of general international law.” GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 137 (1978). The duty of readmission has a long and established history. *See* H.F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 35, 139 (1959); Maximilian Koessler, “Subject,” “Citizen,” “National,” and “Permanent Allegiance,” 56 YALE L.J. 58 (1946); RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 137 (Martinus Nijhoff ed., 2d ed. 1994) (1983); MICHEL VERWHILGEN, CONFLITS DE NATIONALITES, PLURINATIONALITE ET APATRIDIE 53 (Martinus Nijhoff ed., 2000); LAURIE FRANSMAN, FRANSMAN’S BRITISH NATIONALITY LAW 20 (3rd ed. 2001); Laura van Waas, *Nationality Matters*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 32 (Alice Edwards & Laura van Waas eds., 2014); *see also* Int’l Law Comm’n, Draft Articles on the Expulsion of Aliens, With Commentaries, U.N. Doc. A/69/10 (2014).

<sup>35</sup> *See, e.g.*, Agreement on Readmission, Ger.-Alb., Nov. 18, 2002, 2432 U.N.T.S. 43.

<sup>36</sup> NILS COLEMAN, EUROPEAN READMISSION POLICY: THIRD COUNTRY INTERESTS AND REFUGEE RIGHTS 33 (Elspeth Guild & Jan Niessen eds., 2009).

<sup>37</sup> The right to enter arguably forms part of the protection from refoulement. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 279, 303–04 (2005).

Nationality statuses like British Protected Person (BPP) status, British Overseas Citizen status (BOC) and British National (Overseas) status (BN(O)) appear to be examples of nationality statuses that do not require Britain, the granting state, to admit the holder.<sup>38</sup> The existence of these statuses, we argue, does not negate the duty of states to readmit their nationals. As Fransman points out, the UK claims it has no duty to readmit BPP holders, even in cases where the holder of BPP status has no other nationality and has been expelled from their country of residence.<sup>39</sup> Fransman argues that because British Protectorates were not British soil, BPP status is arguably not a nationality.<sup>40</sup> BPP status was wholly derivative off of recognition as a national by one's local authority. It was more akin to European Union citizenship in that it was supplementary to, rather than a replacement for, a nationality. A person who holds only BPP status today should be considered stateless.

In contrast, in Fransman's opinion, BN(O) and BOC status should be considered types of British nationality, though they are inferior to British Citizenship because they do not entitle the status-holder to enter or reside in the UK.<sup>41</sup> Doesn't the existence of BN(O) and BOC status controvert the argument that a nationality must enable the holder to be readmitted to their country of nationality? Boll argues that Britain's refusal to admit BN(O) status holders "does not contravene the state's obligations vis-a-vis other

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<sup>38</sup> BPP status was granted to persons living in British Protectorates and Protected States. BOC status was granted to Citizens of the UK and Colonies who did not obtain British Citizenship or another nationality at colonial independence. BN(O) was created for certain classes of people from Hong Kong. British Subjects, another type of British nationality, is held by certain Irish citizens. FRANSMAN, *supra* note 34, at 23, 87; *see also* Ian Brownlie, *Relations of Nationality in Public International Law*, 39 BRITISH Y.B. INT'L L. 284, 318–19 (1963); P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 18–20 (Sijthoff & Noordhoff Int'l Publishers B.V. 2d ed. 1979) (1956).

<sup>39</sup> FRANSMAN, *supra* note 34, at 20–21. In *R v. Secretary of State for the Home Department, Ex parte Thakrar*, the UK Court of Appeal held that a holder of BPP status who was otherwise stateless did not have the right to enter the UK after being expelled from his country of residence. *R v. Secretary of State for the Home Department, Ex parte Thakrar* [1974] QB 684 (appeal taken from Eng.). The Thakrar decision has been heavily criticized as a violation of the right to asylum. *See, e.g.*, Geoffrey Care, *The Judiciary, the State, and the Refugee: The Evolution of Judicial Protection in Asylum: A U.K. Perspective*, 28 FORDHAM INT'L L. J. 1421, 1423 (2005); James Crawford, *General International Law and the Common Law: A Decade of Developments*, 76 AM. SOC'Y INT'L L. PROC. 232, 242 (1982).

<sup>40</sup> FRANSMAN, *supra* note 34, at 69, 86–87. Another example is the status of being an American national as opposed to an American citizen. 8 U.S.C. § 1408 (1986).

<sup>41</sup> FRANSMAN, *supra* note 34, at 23, 87.

states” because the holders of BN(O) status also have Chinese nationality.<sup>42</sup> Likewise, many BOC holders have a nationality in a state besides Britain. To resolve the issue of otherwise stateless persons holding one of these statuses, the British government passed a series of laws providing them with British Citizenship.<sup>43</sup> The British government has therefore taken steps to ensure that every person holding British nationality can enter and reside in either Britain or another state.

The issue of readmission was of key importance to the question of whether or not otherwise stateless holders of certain classes of British “nationality” should be granted British Citizenship.<sup>44</sup> By granting British Citizenship to BN(O) holders without another nationality, the UK provided the holders of BN(O) status with the right to enter and reside in at least one state. The history of British nationality law shows the steps taken by the UK to ensure that every holder of British nationality may be deported to either the UK or another state. As Oppenheim put it, “(t)he responsibility of a state may become involved as the result of an abuse of a right enjoyed by virtue of international law.” In this case, the UK has taken steps to prevent its nationality statuses from placing a burden on other states.<sup>45</sup>

We conclude that the duty of readmission is indeed a core component of nationality: for a state to confer nationality on an individual (i.e., for a state to consider an individual a national under the operation of its law), the

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<sup>42</sup> Alfred M. Boll, *Nationality and obligations of loyalty in international and municipal law*, 24 AUSTRALIAN Y.B. OF INT’L L. 37, 62 (2005).

<sup>43</sup> BN(O) holders without another nationality were given British Citizenship in 2009 under the Borders, Citizenship and Immigration Act 2009 and the British Nationality (Hong Kong) Act of 1997. Borders, Citizenship and Immigration Act 2009, c. 11, § 44; British Nationality (Hong Kong) Act 1997, c. 10, § 1. BOC, BPP and British Subject holders without another nationality were given British Citizenship under the Nationality, Immigration and Asylum Act of 2002. Nationality, Immigration and Asylum Act 2002, c. 41, § 4B. BN(O) holders without another nationality were given British Citizenship in 2009 under the Borders, Citizenship and Immigration Act 2009, § 44 and the British Nationality (Hong Kong) Act of 1997. BOC, BPP and British Subject holders without another nationality were given British Citizenship under the Nationality, Immigration and Asylum Act of 2002, § 4B.

<sup>44</sup> In a Session in the UK House of Lords prior to the passage of the 2009 law, Lord Avebury asked about BN(O)s without another nationality being refused entry to Hong Kong. The Minister of State, Foreign and Commonwealth Office replied they had no records of any British nationals (overseas) ever being refused entry to Hong Kong. Hong Kong’s immigration department has told us that it does not keep such figures. In any case, all BN(O) passport holders hold Hong Kong identity cards, and would normally use those to enter Hong Kong. 705 Parl Deb HL (5th ser.) (2008) col. WA34 (UK).

<sup>45</sup> FRANSMAN, *supra* note 34, at 90. See also L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 345 (1926).

state must assume the duty of readmitting that individual should other states request it.<sup>46</sup>

But a state without territory (for example, a submerged state) would be unable to readmit any of its nationals. The ability to act in accordance with the duty of readmission is patently contingent on a state's sovereignty over territory: a state with no territory would have nowhere to readmit its nationals. A non-territorial state could therefore never comply with the readmission requests of other states. Such a "nationality" status would be permanently at odds with one of the basic principles of international law, the duty of readmission, based on the principle of comity, upon which the functioning of the international system of states is founded.<sup>47</sup>

We further argue that a de-territorialized state cannot confer nationality at all, not simply that the nationality conferred would be ineffective. This is because, as we will explain in §4 below, it is a conceptual truth that a state cannot assume a duty that it cannot discharge. From this principle it will follow that de-territorialized states cannot assume the duty of readmission of nationals, since, as we have already noted, de-territorialized states cannot discharge that duty. But since a state must assume this duty in order to consider you a national under the operation of its law, it follows that a de-territorialized state cannot consider you a national under the operation of its law. This is why a state with no territory can have no nationals.

#### IV. *OUGHT IMPLIES CAN*: A STATE MUST BE CAPABLE OF HONORING ITS DUTIES

It is a plausible and widely accepted principle of moral and political philosophy that for an entity to assume a duty it must be able to fulfill that duty. This principle, known as the principle that *ought implies can*, is attributed to Kant.<sup>48</sup> A more familiar formulation of the same idea is that

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<sup>46</sup> See G. R. DE GROOT & O. W. VONK, INTERNATIONAL STANDARDS ON NATIONALITY LAW: TEXTS CASES AND MATERIALS 3 (2016).

<sup>47</sup> Oppenheim, *supra* note 45, at 34-35.

<sup>48</sup> IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON 94 (Allen Wood & George Di Giovanni eds. & trans., Cambridge University Press 1998)(1838); IMMANUEL KANT, CRITIQUE

one is not blameworthy for what one cannot control.

This is not to say that an entity, e.g. a state, that does not honor its duties is not bound by them: sadly, it is all too typical that states do not honor the duties that bind them. We claim only that a state must be capable of honoring its duties if it is genuinely bound by them. This is because no entity can be legally or morally bound to do the impossible.

In support of this claim, suppose for example that I promise to transmute lead into gold. Can I take on such an obligation? Only if I actually have the power to transmute lead into gold. Otherwise, I may have the duty to apologize for making promises I cannot keep, but I do not have a duty to transmute lead into gold. Similarly, suppose I promise to transfer ownership rights of the Brooklyn Bridge to you. Can I take on such an obligation? Only if the bridge is mine to give.<sup>49</sup>

Kant offers a number of derivations of the principle, but it also faces a number of challenges.<sup>50</sup> Some turn on finding a suitable interpretation of “can.”<sup>51</sup> For example, if, due to traffic, there is no way I can get across town in time for the meeting, does this mean I have no duty to attend? Presumably not. But this just shows that the principle concerns a stricter standard of incapability. This is no difficulty in the case of interest to us: a de-territorialized state very clearly is incapable of readmitting nationals, in the strictest sense of incapability of them all: physical impossibility. There physically does not exist a place under the sovereign control of a de-territorialized state where it might put them.

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OF PURE REASON (Paul Guyer & Allen Wood eds. & trans., 1998) (1781). Many others discuss and defend versions of the principle. *See, e.g.*, JAMES GRIFFIN, *VALUE JUDGEMENT: IMPROVING OUR ETHICAL BELIEFS* (1996). *But see* ROBERT STERN, *KANTIAN ETHICS* 106 (2004); Vladimir Chituc et al., *Blame, not ability, impacts moral “ought” judgments for impossible actions: Toward an empirical refutation of “ought” implies “can,”* 150 *COGNITION* 20 (2016).

<sup>49</sup> It is helpful here to invoke the distinction between positive and negative rights. Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, *UNESCO COURIER*, Nov. 1977, at 29. The Kantian principle is clearest where positive rights are concerned, since generally we are all capable of honoring negative rights, for our part. The distinction is best presented by example: If I grant you the negative right to fly, I grant you the right to not be hindered by me when you attempt to fly. If I grant you the positive right to fly, I grant you a right the honoring of which brings it about that you fly. Clearly the former right is in my power to grant but the latter is not.

<sup>50</sup> STERN, *supra* note 48, at 106–121.

<sup>51</sup> *See, e.g.*, Chituc, *supra* note 48.

Other challenges turn on the idea that the *ought implies can* principle is in tension with the *demandingness* of ethics.<sup>52</sup> But these challenges are more compelling when applied to human duties than when applied to the duties of legal entities like states. Human morality may be an aspiration for the infinite, but politics is the art of the possible.

If *ought implies can* is true for states, then a de-territorialized state cannot assume the duty of readmission of its nationals. But we have argued that assuming this duty regarding an individual is an essential part of what it is to consider that individual a national under the operation of law (in the sense of the 1954 Convention). It follows that de-territorialized states cannot consider anyone a national under the operation of law (in the relevant sense).

## V. CONCLUSION

We have argued that in order for a state to have nationals, it must have sovereign control over habitable territory. We have argued, in particular, that international law requires that states must be capable of readmitting their nationals, but that a de-territorialized state would be unable to meet this requirement.

Our focus has been on the duty of readmission because it is a clear minimal requirement. There are, especially by the standards of contemporary international human rights law, many further obligations that states may incur in granting nationality beyond this clear minimum which also presuppose the sovereign control of territory. Arguably, many of the social and political rights mentioned in international covenants fit this description: without a place to reside, it is unclear how one might work, receive an education or healthcare, etc.<sup>53</sup> Also, arguably, jurisdiction over nationals abroad, and the extension of diplomatic and consular protection is

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<sup>52</sup> See, e.g., IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 62 (1970). Such challenges hinge on the idea that the ethical is a kind of ideal, a point at infinity towards which we strive, though its attainment may be impossible.

<sup>53</sup> See generally International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant for Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.



a right of states which depends on such control.<sup>54</sup>

But we contend that our case is strong enough already, even ignoring these further possibilities: it follows from incontrovertible principles of law that for a state to consider someone a national under the operation of its law, that state must assume the duty to other states of readmitting that person if deported from abroad. But a state cannot assume this duty if it does not control habitable territory, for a state can only assume a duty that it is capable of honoring, and the duty in question can only be honored by a state that controls habitable territory.

We conclude that if the Maldives submerges beneath the sea, those of its nationals who lack citizenship in any other country will be *de jure* stateless, whether or not the international community chooses to continue to recognize the Maldives as a state. Former Maldivian nationals will qualify for recognition as *de jure* stateless under international statelessness law and in particular, under the auspices of the 1954 Convention, whose object and purpose, as we note above, in the words of Guy S. Goodwin-Gill, are to “to regulate and improve [stateless persons’] status and to assure to them the widest possible exercise of fundamental rights and freedoms.”<sup>55</sup> This recognition secures affected persons a number of protections in countries that are signatory to the 1954 Convention. Moreover, as we argue elsewhere, it may render them eligible to qualify as refugees in the sense of the 1951 Convention Relating to the Status of Refugees.<sup>56</sup> In contrast, were deterritorialized Maldivians to retain some nominal “nationality” that came with none of the benefits of a territorial state, there would be no remedy for them under international law.<sup>57</sup>

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<sup>54</sup> It may also be argued that nationality must guarantee the right of abode to individuals as a human right. For example, Protocol 4, Article 3 of the European Convention of Human Rights states; “1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national. 2. No one shall be deprived of the right to enter the territory of the State of which he is a national.” European Convention on Human Rights Protocol 4 art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (amended 2010).

<sup>55</sup> Goodwin-Gill, *supra* note 25.

<sup>56</sup> Alexander & Simon, *supra* note 6.

<sup>57</sup> This is not to suggest that the remedies available under the 1954 Convention (or the 1951 Convention) fill every relevant gap in protection. Even if we are correct there is still every reason to pursue

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further, additional agreements at the regional or the global level in the interest of protecting the rights of those whose nations are at risk of submersion.

