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# *Soli, Sanguinis* and Sinking States

The legal foundations of upholding the right to nationality in the event of climate change turning sovereign territories uninhabitable

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## Abstract

*The argument of this paper is that the two main principles of nationality law used by nation states are not designed to handle the possible scenario of states sinking due to climate change. With the consequence of its habitants having to seek haven elsewhere, the focus is to illustrate how the application of the principles ius soli and ius sanguinis stand in relation to the universal human right to a nationality in the event of a state becoming uninhabitable and/or physically extinct. The aim is to highlight the flaws inherent in the reading of the principles due to a neglect both of the complex intertwining of the nation states and human rights and due to an understanding of territory as spatially relative. Such aim originates from the notion that the international legal order ought to become more well-adapted to the climate changes ahead for the universal legal rights to remain purposive. Since the principles are established as customary law within the international community, a number of case studies such as the Bikini Atoll and the Swedish Alien Act are presented in order to describe their practical (in)applicability. Inevitably, when discussing potential future scenarios the examination also has to entail a degree of hypothetical reasoning. Such reasoning will here find its bearings in the underlying impetuses of the principles and the concepts permeating them. Theoretically, this paper is inspired by post-structural reasoning arguing that the current interpretation of the two principles are imbued with an implicit understanding of nation states as physically omnipresent and independent of their habitants. The paper contends that such unreflexive Westphalian interpretation and application of nationality law principles risks leading to climatic statelessness and unavoidable violations of rights claimed to be universal. This leads to the conclusion that international law and the understanding of its subjects, simply put, needs to become more environmentally sustainable and reconstructed to fit a world which is physically changing.*

## Abbreviations

| | |
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| AOSIS | Alliance of Small Island States |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| CRPD | Convention on the Rights of Persons with Disabilities |
| ECHR | European Convention on Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| IDMC | Internal Displacement Monitoring Centre |
| IDP | Internally Displaced Person |
| IJCR | International Justice Resource Center |
| IPCC | International Panel on Climate Change |
| LECZ | Low Elevation Coastal Zones |
| OHCHR | Office of the High Commissioner for Human Rights |
| RCP | Representative Concentration Pathway |
| SIDS | Small Island Developing States |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UN-OHRLLS | United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNEP | United Nations Environmental Programme |
| UNGA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| UNSC | United Nations Security Council |
| US | United States |
| WMO | Word Meteorological Organisation |
| WWF | World Wildlife Fund |

# Chapter One: The Extinction of Nations and Nationhood – Introduction to the Thesis

## 1.1. Introduction

Imagine a world where everyone is tearing on Earth in the exact same amount. Someone might drive more, someone might eat more, but at the end of the day their carbon footprints are exactly the same. If something were to happen to the climate of that world, it would be everyone's equally heavy burden to carry. If one corner of the Earth was to become uninhabitable it would indeed be bothersome and sad for those forced to move, but in the world you are imagining now everyone is equal. Therefore, those on the move would be entitled to settle down anywhere they want due to the inalienable human sameness which endures in the collective. Surely the weathers, environments and temperatures are diverse in different areas. Perhaps even alterations in traditions and languages have evolved due to the far distances between them. Nevertheless, one is always considered a part of the whole more than an exclusive member of a small part. Consequently, you would never have to think twice of where to go next if nature had its way and forced you on the move. The laws in place to generate commonality and order are also of course supporting everyone's equal right to belong. Thus, those happening to live in the areas more prone to be affected by climate changes induced by how everyone proportionately has been driving, producing, shopping, travelling and eating are in no danger. Their rights as human beings are as maintained on high altitudes as they are on lower ones.

Now let us return to this world. The rationales from the imaginary one may be argued to exist here, but the reality tells a different and to some extent even opposite story. Although there are human rights supporting the notion of everyone's equality, people are treated differently. As will be emphasised throughout this paper, people cannot expect to become members of a society with reference to their bare humanity. Moreover, while bigger and richer states are contributing with the largest proportion of the pollutions affecting the climate, the smaller and poorer states are the ones threatened by the consequences (WWF, 2020). And as seas are rising, winds are changing and crops are burning as results of climate change, human beings are experiencing their homes turning not only less recognisable but also less inhabitable. In 2018, the predominantly American Indian habitants of Isle de Jean Charles became the first community in the US to be federally sanctioned and moved due to 'climigration' as the region

quickly sinks into the Gulf of Mexico (Matthews, 2019). In 2014, the state of Kiribati bought eight square miles of land of Vanua Levu to use as insurance-territory in case the climate forces Kiribatians on the move. Papua New Guinea has already begun the relocation of the Carteret Island population to its mainland since the group of low-lying atolls are beginning to disappear under the ocean surface (Keating, 2018). Current estimations show that entire populations could be forced away from the homes they once knew before the end of this century (ICCP, 2014a; Park 2011). In academia and political forums, scholars and politicians now recurrently speak of 'sinking states', signalling that landmasses presently referred to as part of sovereign territories are changing their silhouettes and characteristics (McAdam, 2010; Alexander & Simon, 2014; Piguet, 2019). The concerns about what will happen to the populations of nation states becoming physically absent or uninhabitable occupies the minds of an increasing number of scholars, yet the answers remain few.

Although many of those affected by climate change are not likely to be forced out of their domestic nation states, estimations by institutions and scholars indicate that millions of people will be (see e.g. IDMC, 2020; Piguet & Laczko, 2014). The migration of the latter will occur in an international society where rights of individuals have been finely knitted together with the manifestation of physical landmasses in the form of nation states (O'Manique, 1990; Reus-Smith, 2001). 'International society' is here not understood in a strictly Hedley Bullian sense. Instead, I use it to describe an order comprised of all agents such as individuals, nation states, organisations, companies and so forth (cf. Bull, 1977). I am concerned with the uncertainties regarding what legal condition individuals will find themselves in when the territorial land of theirs has vanished. Does existing international law give room for claims to abstract state affiliations so that peoples' right to a nationality can be upheld? Without a habitable domestic state left to assert their belonging to, will they be considered stateless and thus rightless? Will these people be dependent upon other nation states granting them new nationalities? These are questions already raised in the ongoing discussion among international legal scholars, but my attempt here is to introduce a new layer to the discussion. By putting the nationality law principles *ius soli* and *ius sanguinis* (sometimes referred to as '*jus soli'* and '*jus sanguinis'*) under the loupe; which so far has not been done in the climagration discussion, this paper is devoted to make an exploratory and transdisciplinary dive into these queries. Part of this exploration seeks to illustrate how the principles (dys)function in practice when applied to the specific situation of migration due to climate change-induced uninhabitability. This is done in order to expose that the principles are formed in dissonance to the right to nationality

established in the Universal Declaration of the Human Rights (UDHR). Another interrelated part seeks to elucidate the underlying problematiques within the concept of nationality itself, drawing back to its very foundation. This necessitates an investigation of mainstream notions of concepts such as the nation state, sovereignty, human rights and their relevance to the nationality law principles of focus.

What I seek to put on display here is an exploratory junction from both a state perspective and an individual rights perspective where the very centre is argued to be loaded with jurisprudential contradictions. Thus, to 'uphold' one's nationality as formulated in the title of this paper concerns both states' attempts to uphold the concept of nationality as a proof of affiliation and individuals' attempts to uphold their right to a nation state belonging. The paper is not an attempt to apply a praxeological lens and advance from what could be politically possible to implement in international legal sources. Rather, it is an effort to highlight contradictions between current nationality-determining principles, human rights and the future of nation states in a changing climate. A reader looking for easy and achievable solutions to the challenges surrounding climatic statelessness may therefore become frustrated. A reader interested in an alternative interpretation to why statelessness is and is likely to remain a perplexing issue in international law may be less so. I contend that it is on this theoretical meadow one is able to fully critique, assess and ultimately imagine an alternative path or change to the status quo. Thus, it is on field I will remain. Instead of focusing the attention towards neo-conservative and exclusionary politics which repeatedly have broken promises of universal human rights, I attempt to direct the attention to the physicality of states. The focal point concerns the potential room in international law to uphold the right to a nationality when that physicality is crumbling.

### 1.2. Purpose and contribution

As stated in the introduction, the aim is to initiate a critical examination of *ius soli* and *ius sanguinis* in light of the upcoming global challenge of states becoming uninhabitable. A prerequisite in order to achieve such aim is to introduce the two main legal principles of granting nationality and concepts related to them to the discussion of climatic statelessness. The paper could be said to consist of several research questions in place to achieve the higher analytical purpose:

- Which concepts intertwined with *ius soli* and *ius sanguinis* may be of significance in the discussion of climatic statelessness and in what ways?

- In what ways do the principles become troublesome from both the individual rights perspective and the state perspective in an era of sinking states?
- How could the spatial relativity of nation states' territories affect the applicability of the nationality law principles?

The research questions are not numbered nor answered in a chronological order in the paper. This is because I consider them to be overlapping rather than separate. To clarify to the reader why they are posed and how they are relevant to the thesis, it may nevertheless be of value to explain their importance. The first of these questions is addressed in order to situate the principles in a wider context and illustrate their relevance in a debate which is both rights- and climate-related. By illustrating what concepts and structures are interconnected with the principles of focus, an analysis beyond a legal dogmatic reading of them becomes feasible. The second question allows me to present to the reader the multi-layered dysfunctionality of the principles. One such layer is the substantial clash between territorial particularity versus universal rights, which to a large extent also has been touched upon scholars before me (see e.g. Reus-Smith, 2001; Donnelly, 2007; Arendt, 1951/2017). Another layer is the centrality of territory in the form of inhabitable land in order for the principles to function at all. The third question allows me to present not only an analysis rooted in actual events and case studies, but to make a more conceptual exploration of territorial physicality and the importance it has to nationality law and the human right to nationality. Altogether, the questions are related to the research purpose in the way they allow me to introduce, dissect and examine principles that are often addressed in the nationality debate. By answering them, it becomes visible that such debate ought to incorporate considerations of the role of climate change in relation to statelessness.

I remain humble in my attempt of making these queries. The reason for this modesty is the current lack of discussions surrounding *ius soli* and *ius sanguinis* in the specific case of climatic statelessness. Whilst the principles have been discussed extensively in issues relating to statelessness as we currently know it (as a result of for example wars, denaturalisation and law gaps) they have remained unmentioned in recent years' reports and writings about the 'future' kind of statelessness directly related to climate change. As the principles nevertheless remain the foundational pillars of nationality law, I underline the centrality of putting them under the loupe. By analysing their applicability to the situation of there being vanished, sunken or uninhabitable states, the purpose here is to dig deeper into the issue of climatic statelessness

and the legal instruments affecting its being or non-being. The bottom of that deep is here argued to reach down to the very foundational ideas of what a territorial nation state is, consists of and the freedom it has to adopt its own nationality law principles. This argument further stems from the conviction that legal principles constructed within a 'mainstream order' composed of physical and inhabitable nation states ought to be re-examined when such order is being re-shaped.

Nationality is a legal concept, and I want to increase the knowledge of that concept and what it could turn people into if they have to climagrate. As such, the paper may primarily be of interest to legal scholars. However, my hope is that this discussion can contribute with a new layer within the debates already being held and invite other disciplines to the conversation. The layer I offer would indeed depart from the very basis of the enquiries surrounding nationality already established, namely the right to it and the legal and political loopholes depriving individuals of it. However, the potential contribution of this paper is the way it knits previous discussions together with a conversation about the nation state as a physical entity and thus the status of 'belonging' to it as something deeply intertwined with the idea of something highly material. This conversation is inspired by a post-structuralist thought where I am committed to bring up for discussion a transdisciplinary reading of concepts such as sovereignty, human rights and nationality in a changing climate.

### 1.3. Delimitations

As emphasised by David Owen (2018) the discussion concerning the right to have rights raised by Hannah Arendt already in 1951 is by no means superseded. This may be elucidated through the growing body of academic work and political focus on statelessness, but also through the large number of stateless individuals there are globally (UNHCR, 2020). Yet, this further means that delimitations ought to be made in order for a concrete and clear enough argument to be presented within the scope of this thesis.

In light of its purpose, one such delimitation is therefore the light sweep rather than deep dig into the matter of naturalisation. This delimitation was made in order to keep the argumentation focused on nationality law and the abstractions resting within it. As the aim of this paper is to evaluate the principles of *ius soli* and *ius sanguinis*, the cultural, highly politicised and subjective naturalisation process is largely left out of the discussion. However, this should in

no way be understood as a neglect of its importance. Nor does this mean that the paper holds the principles to be objective and non-political. Instead, the stance in this paper is the entire opposite. Naturalisation is indeed believed to be a fundamental part to the issue of statelessness, and as will be touched upon in the paper; the principles are considered to be deeply socially assembled. Although the paper adheres to a transdisciplinary approach and understanding of law, the naturalisation process is simply too diverse and complex to fit within the narrative told here. Thus, leaving naturalisation out of the discussion should be understood as merely a choice of attention.

Another active choice of delimitation is the focus on the right to nationality as found in article 15 of the UDHR. As will be underlined throughout, this right cannot in practice be detached from other human rights as nationality is often the enabler for access to other rights (Arendt, 1951/2017; Kingston 2013). It is arguably also the close connection between the right to nationality and other rights claimed to be universal and inalienable which makes discussions about statelessness worth having. Yet, as the focus here is to critically examine the assumptions permeating the concept 'nation state' and the legal principles of allowing or disallowing affiliation to it, it is article 15 which has here been deemed the most relevant to scrutinise. Another reason to why UDHR is used as the main reference is because that was where the right to a nationality was first proclaimed. It is the foundation for subsequent international covenants which too refer to a right to nationality, and it provides one of the more extensive descriptions of the right among currently existing international sources of normative documents (e.g. Giustiniani, 2016; Piguet, 2019). This does not mean that other sources are irrelevant and they will to some extent be touched upon. Nevertheless, as the paper is an attempt to interpret the socially constructed core of the right to nationality rather than applying a formal dogmatic approach, it has been deemed excessive to dive deep into every source mentioning the right.

A choice has further been made to mainly refer to sea level rise as the consequence of climate change likely to make states uninhabitable. Yet, sea level rise can be detached from other effects of climate change just as little as the right to a nationality can be detached from other rights. Thus, this is obviously an ill-fitting delimitation to make if one seeks to illustrate the full spectra of climate change likely to affect the habitability of the earth (ICCP, 2014a; ICCP 2015b). However, the rising sea level is currently the most demonstrable effect there is of climate change and global warming (McAdam, 2010; Tabucanon, 2014; ICCP 2015b). Therefore, it is arguably a well-suited delimitation if one attempts to make a clear and concise

argument. Since my intended audiences are those who seek to critically engage in the studies of international law and human rights rather than experts of geoscience, I hope I am forgiven by the latter for making this demarcation. As I will attempt to illustrate, the notions of statehood, rights, nationality and the omnipresent physical state are deeply rooted and highly complex. Adding all the complexities of climate change to the mixture risks leading to a too difficult argument to comprehend.

### 1.4. Theoretical considerations

Before proceeding to the central argumentation of the thesis, it may be of value for the reader to make acquaintance with the theoretical considerations and analytical lenses used to approach the topic. Although this is a master thesis in international law, there is little to no legal dogma applied in order to make sense of the right to a nationality and the deprivation of it. Instead, I apply a post-structural lens where I consider law inseparable from other disciplines. With an educational background of both law and international relations, I find myself in a position where I cannot isolate my own knowledge and experiences into separate disciplines. Consequently, both due to the choice of theoretical perspectives and my own experiences, the paper seeks to be transdisciplinary. In the first chapter of the paper, such an approach may become particularly visible as it constitutes an amalgam of disciplines discussing concepts related to nationality.

The thesis draws inspiration from a variation of scholars. I keep the work of Hannah Arendt as a theoretical inspiration close although she is not generally defined as a post-structural scholar. This is because I consider her to provide an abundant account of statelessness. Through her work *The Origins of Totalitarianism* (1951/2017), she brought light to its existence and established many of the foundational arguments in the still ongoing debate. One such argument is that nationality is the right one needs in order to access other rights. Another interlinked argument is that we assume that equality is produced through humans organising, meaning that those alienated and excluded from the group are left out in the wilderness of inequality (see e.g. Owen, 2018). Regarding the construction of human rights, the nation state and the 'morality' believed to be found within it, Christian Reus-Smith's (1997; 2001) notion of constitutional structures has for a long time motivated my continuous exploration of the right to a nationality. The constitutional structures are assemblages of intersubjective principles, norms and beliefs which do not only outline 'morality' or rightful action but also define what a legitimate actor with privileges and rights of its own is. Reading Arendt and Reus-Smith

together has steered my approach to the question of statelessness into an exploration of concept construction. I have found the post-structural critique to offer useful postulations in such investigation. Michel Foucault's reading of power and knowledge illustrates how the continuous production and reproduction of powers and orders can lead to a sense of human rights being part of our molecular genetics (Foucault, 1976/2008a; 1997/2008b). The way he considers the bodies of individuals as extensions of the sovereign's body in *Discipline and Punish* further inspires me to question what happens when the body of the nation state vanishes (1975/2020). The sense of physicality of certain concepts is also highlighted by Félix Guattari, whose work *The Three Ecologies* (1989/2000) has motivated this interweavement of the right to a nationality and climate-induced extinction of states. Guattari considers the social-, mental- and environmental ecologies interconnected. According to him, they are not only affected by objective pollution but also by the passivity and incomprehension stemming from inherent flaws in the order. The view that a reordering and remodelling of our understandings may allow for a space of change is thus useful from both an environmental- and rights perspective:

> It is up to the protagonists of social liberation to remodel the theoretical references so as to illuminate a possible escape route out of contemporary history, which is more nightmarish than ever. It is not only species that are becoming extinct but also the words, phrases, and gestures of human solidarity. A stifling cloak of silence has been thrown over the emancipatory struggles of women, and of the new proletariat: the unemployed, the 'marginalized', immigrants (Guattari, 1989/2000:43-44).

Employing a post-structural theorising of the powers involved to make human rightless while nation states disappear may help illustrate why and how the nationality law principles used by nation states indeed function more nightmarish than ever. More than bringing light to issues of the order, these theoretical considerations also suggest that changes of the status quo are possible. While my explicit aim is not to suggest a praxeological solution, there is an emancipatory interest inherent in the thesis. Therefore, this theoretical project can be placed under the umbrella of critical legal studies.

## 1.5. The research

### *1.5.1. Positioning in relation to previous academic work*

Much of the existing scholarly work on the issue of climatic migration has aimed its attention towards 'the climate refugee'. The discussions have taken on both rights-based-, security- and

responsibility approaches and circulated around a number of questions relating to definitions, regulations and policy responses (see e.g. Biermann & Boas, 2010; Piguet, et. al, 2011; Faist et. al, 2013, Zetter & Morrisey, 2014; Albrecht & Plewa, 2015; Behrman et. al, 2018;). Despite receiving an increased attention, these questions are in no way solved and outdated. Instead, the debate of how to prepare and handle a world in which humans migrate in larger quantities than ever before continues. Scholars remain divided on how to form any international legal instrument to solve such situation. Some consider new legal regimes, some argue for extensions of already existing international conventions and others are stressing that a new international treaty would be deeply inappropriate and problematic (see e.g. Hsiao, 2017; Bier & Boas, 2010; McAdam, 2012; Eckersley, 2015). While some scholars stress differences on the individual level among refugees, internally displaced persons (IDPs), environmental migrants and stateless, others are looking at the broader and arguably more abstract perspectives of power relations and environmental (im)mobility (see e.g. Piguet, 2019; Zetter & Morrisey, 2014).

This being said, I am by no means the first to emphasise climatic statelessness as an issue in international law. Owing to these forerunners, there is a possibility to continue digging where they have already begun and to scrutinise other parts of international law which remain unmentioned. The principles of *ius soli* and *ius sanguinis* are far from unknown in the ongoing debate on statelessness in general (see e.g. Edwards & Van Waas, 2014; De Groot & Vonk, 2018). Yet, if one considers climatic statelessness as a particular form of statelessness bringing light to other construction errors of the international legal regime then much ground to critically explore the principles remains untouched. ‘Untouched’ or ‘uncharted’ is moreover fitting adjectives explaining statelessness and how it is currently treated in international- law and relations. There is no term such as ‘statelessness law’ in use. The scholars nevertheless emphasising its importance are fighting an uphill battle against quick-fix-seekers. Although the academic archives on statelessness grow, so does the number of stateless in the world (Edwards & Van Waas, 2014). Additionally, since climatic statelessness is a ‘future’ large-scale issue academics have had to allocate much space and time explaining it as something even worth focusing on (see e.g. McAdam, 2010; Alexander & Simon, 2014; Albrect & Plewa, 2015; Piguet, 2019). To some degree, I also find it necessary to do so in this paper. The first chapter is somewhat a demonstration of this.

### *1.5.2. Method(s) of the research*

In light of the theoretical considerations described above and with the aim to fulfil the outlined purpose, it is now time to declare a few things concerning the research resulting in this paper. To put it in conventional wordings, one could say that several theoretical methods are deployed here but to different degrees. Bearing in mind the unprecedented situation of large-scale climatic statelessness, the empirical material to establish one's reasoning upon is scarce. The nationality law principles in question here have simply not been fully put to the practical test of handling populations seeking refuge due to uninhabitable nation states yet. If empirical theory is understood as an apparatus of practice description, then there are however examples on which hypotheses can be built. These examples constitute both case studies of climate-related migration and national applications of *ius soli* and *ius sanguinis* in more general terms. Furthermore, the paper entails several reports on climate change from International Panel on Climate Change (IPCC). That being said, there is an evident lack of case law regarding *ius soli, ius sanguinis* and sinking states combined. Therefore, the method of this paper has not been to dig into court records archives. Instead, the futurity aspect of the issue has allowed more room for normative and constructive theories to form the method. Normative theory is here understood as theory giving attentiveness to what *ought* to be and the justifications for it. A clear normative element in this thesis concerns the right to a nationality, sovereignty and the depiction of statelessness as improper. In contrast, constructive theories are concerned with the potential of the current and coming order of things. Due to a critique of the status quo being inherent in the thesis, constructive theory is arguably the bearing wall of this entire research project. Yet, this conventional division between empirical, normative and constructive theory is something I have now used for the sake of clarification more than anything else. The material used and words read have in fact been approached with an understanding of these theories as overlapping and even intertwined. As expressed by Bernhard Peters (1994), I understand legal norms as creating a type of symbolic and intentional social order. Such order in turn establishes substantive actions and merits; procedural legitimacy, acceptance, calculations of who and what is 'good' or 'bad' and so on. This is usually what is considered part of an empirical analysis. Both norms and practice are continuously produced and reproduced through social constructions; we think, speak, act, bargain, influence, agree and resist more or less consciously to maintain or change what is and what is to become. In other words, I see the stubborn separations of normative, empirical and constructive theories as aspirations to tell the story from different angles. Paradoxically, in the attempt of making things clearer the story may then end up further away from what is 'real'. Therefore, in the attempt to anchor this which some

might refer to as a 'theoretical investigation' in the 'real world', a blend of methods has been used to tell the story from *multiple* angles. This goes hand in hand with a post-structuralist approach, in which the foundational stance is that one cannot and should not attempt to make sense of the world from a one-way-street of (see e.g. Guattari, 1989/2000).

This means that *ius soli* and *ius sanguinis* are perceived as socially and normative constructed parts of a dynamic order. The historical, political and legal establishment of the nation state is here argued to permeate that order. Thus, in the analysis of the nationality law principles a method of conceptual interpretation has been used; not solely of the principles themselves but also of concepts relating to them such as human rights, sovereignty, nationality and statelessness. Consequently, the research method cannot be distinguished as solely focusing on either the state perspective *or* the individual rights perspective. Instead, the issue has been approached from both perspectives in order to locate its critical junction. The method of analysing an issue from diverse angles has been inspired by Didier Bigo's (2002; 2018) usage of the Möbius strip. Bigo uses the strip as a metaphor of (in)security. Accordingly, the Möbius strip which lacks an explicit outside and inside illustrates how someone's insecurity may be another's security. These opposing views are illustrated by the fact that depending on from which angle one observes a Möbius strip, it will seem as if it indeed has an inside and an outside. However, an observer from an opposing side of the strip will perceive the sides in an inverted way. Similarly, I use the Möbius strip metaphor to understand rights(less). This method of interpretation makes the 'nation state perspective' and the 'individual rights perspective' fundamentally interconnected in a system where the rights of the nation states could make individuals rightless and vice versa. Therefore, it becomes necessary to not limit the analysis to one of the two perspectives.

Since I claim to make a transdisciplinary reading, the meaning of this asserted method should too be clarified. In line with a post-structural reasoning, bodies, minds and environments cannot be understood in isolation from each other (Guattari, 1989/2000). However, the mainstream separation of subjects into numerous academic disciplines suggests the opposite. In accordance to the conventional division, this paper can be said to consist of material from disciplines such as law, history, philosophy, ethics, anthropology, environmental research, international relations, policy, political theory, development studies, geography and so on. Using a transdisciplinary approach means that no clear divide between these disciplines is upheld and that they are all regarded relevant to the thesis; although it is formally and traditionally defined

as a thesis in law. Hence, transdisciplinary research is here understood as reaching beyond the mainstream division of disciplines. It is the attempt to form an inclusive sphere of understanding where the idea of separable knowledge from 'diverse disciplines' is not supported. This is different to for example interdisciplinary research and multidisciplinary research, where the former seeks to incorporate knowledge from multiple disciplines and the latter is formed by people from multiple disciplines. (see e.g. Baaz, Lilja & Vinthagen, 2018).

### *1.5.3. The process of researching*

It is now time to highlight how the process of research and writing has looked. To begin with, the literature searches have been made during September, October, November and December 2020 in the University of Gothenburg's library. Parts of the material also come from previously collected material in 2018 and 2019 from King's College London's university library. The databases used to find the articles referenced to have been JSTOR, HeinOnline, Cambridge Journals Online, Routledge Handbooks, Oxford Handbooks, Springer Ebook Collection, United Nations Digital Library, United Nations Treaty Collection, World Bank Data and JP Student Migration. The material primarily consists of articles written in English which have been published in internationally recognised journals. Although searches in the library collections have been made in both English and Swedish, material in the latter language proved to be very scarce. Therefore, the absolute majority of the sources used are in English.

I have used a number of keywords in the search for sources. These words can be found in an appendix at the end of the paper. They have been used in different combinations and with supplementing and relevant free-text terms. The keywords were initially gathered from reading Hannah Arendt's *The Origins of Totalitarianism* (1951/2017), Etienne Piguet's article "Climatic Statelessness: Risk Assessment and Policy Options" (2019) in *Population and Development Review* and Heather Alexander's and Jonathan Simon's article "Sinking into statelessness" (2014) in *Tilburg Law Review*. Synonyms to these keywords have also been searched. Search results regarding climate change and climatic migration have been limited to sources from the last ten years, as the topicality of climate change research has been deemed to be of importance. Other searches concerning for example concepts and philosophical interpretations have not been limited when it comes to publication dates. This is because I consider these types of sources to lack the 'expiry dates' environmental research possibly has.

This process of research and finding material should be understood in light of the method(s) and theoretical tools previously underlined. Before commencing the research, I had formed an idea of the research question and what type of lens I preferred to look through when answering it. I acknowledge that with other keywords included in the searches, another analytical lens applied and by concentrating on other concepts, the answer to these research questions could look very different than those I provide.

### *1.5.4. Objectivity*

The aim of the paper is to debunk inherent flaws in nationality law, which necessitates a comment relating to that of objectivity. I consider objectivity in itself as something produced by agents who think, speak and construct it. Michel Foucault's power-knowledge nexus may illustrate how objectivity and facts are understood here. 'Truth' is seen as something assembled not merely through active and conscious choices but through processes of power which in turn permeate our understandings of the world; how it was, is and should become. In this sense, the object of study and the subject studying it becomes inseparable. Consequently, not only the legal scholar but law itself is continuously re-produced within the current order which in turn establishes the 'becoming-order'. Both the legal material and methods used in any so-called jurisprudential reasoning is thus a result of the spatiotemporal positionings of agents and the multiple power structures forming their ideas of what *should* be (1976/2008a). Hence, I believe the closest one may come to objectivity in its mainstream sense is to acknowledge one's own positioning and attempt to be transparent about the assumptions made. Thus, I want to state early on that I do not seek for a 'true' or objective law. On the contrary, this paper is an attempt to disentangle legal principles which are often unreflexively used and referenced to as *if* they were endlessly true. While doing so, I remain an agent within a system filled with postulations unavoidably brought into this paper. The wish that all individuals should be treated equally and a sense of 'fairness' as being desirable permeates me as a human being and legal scholar. Yet, I try to keep in mind Freidrich Nietzsche's words "[o]bjectivity and justice have nothing to do with one another" (1897/1997:136). Calling oneself objective would according to him be to reproduce an ethical superiority camouflaged as historical analysis. This makes me reluctant to categorise this as a project of objective investigation, and suggest that the reader instead consider it a critical exploration.

### *1.5.5. Practical and jurisprudential relevance*

A critic may find this thesis too abstract and theoretical; building on an analysis insufficiently rooted in the world we call 'real'. However, an underlying assumption is that we are constantly constructing and reconstructing theoretical concepts within that real world such as 'nation', 'states' and 'nationality'; thus making theory and reality interconnected (see e.g. Guattari, 2000). Accordingly, this type of theoretical investigation does not equal practical irrelevance. In the words of Cass Sunstein, "[l]aw is a normative enterprise; it is inevitably philosophical. For this reason, the distinction between legal theory and legal practice is at most one of degree" (1995:267).

This brings me to another question, which concerns the jurisprudential relevance of this Master of Laws dissertation. Firstly, I wish to underline that the method observed here suggests that explorations outside of traditional legal dogmatic reasoning of for example historical and political accounts are not problematic. In reference to what previously has been stated, such crossings of discipline-borders may in fact even lead to a more comprehensive illustration of a legal issue. Secondly, the thesis is legal at heart. The emphasis on the right to a nationality, the rightless position of the stateless, the nationality law principles and the sovereign right to apply them all consists of both a legal reasoning and a legal language. It is a type of legal argumentation which will perhaps not find support in current court rooms, but that is not my ambition either. As formulated by Filip Hassellind (2017), it is knowledge *about* law rather than knowledge *in* law which I am concerned with here. Going back to Sunstein's account, the difference between these two fields of knowledge is perhaps not as solid as is sometimes suggested. Regardless, by making a distinction between them I hope that even those perceiving law mainly as a craftsmanship can see the relevance in this type of legal analysis.

This being said, I contend that the relevance of the thesis is not limited to legal practitioners and scholars. It is also a contribution of knowledge which may be of value to other disciplines and parties, such as human rights activists, politicians and academics in fields such as asylum, human development and migration. As I will seek to elucidate throughout the paper, nationality is a multidimensional concept which deserves attention from multiple angles.

### 1.6 Structure

Although the paper has an overarching aim and multiple research questions to meet the objective, it is not structured to answer the research questions in a chronological order. Instead, the paper is divided into four chapters which together create the analytical spectra imperative to see the bigger picture I seek to sketch out. Therefore, after this introductory chapter the paper continues with what I refer to as a legal and conceptual departure. It is named as such since the chapter contains clarifications of great importance for the proceeding argumentation. The reader is first introduced to the construction of the nation state and I explain how I consider it to be fundamentally intertwined with human rights. The human right of focus within this paper on statelessness being the right to a nationality is then described as well as the principles in place to ensure individuals this right: *ius soli* and *ius sanguinis*. Subsequently, the puzzling situation of statelessness is underlined. Hence, already at an early stage of the analysis the principles are suggested to function in dissonance to the human right to nationality due to the construction of the nation state itself. The reader also becomes familiar with the 'new' or 'future' type of statelessness emerging, namely climatic statelessness.

The third chapter begins with a presentation of climate change research stressing the likelihood of nation states becoming uninhabitable due to sea level rise. This is provided to the reader in order to underline that there is a great importance in theorising about the sinking state and climatic statelessness as a phenomenon. What follows is a discussion of whether or not a nation state without inhabitable land is likely to cease being a sovereign entity or not. This is done in order to explore if it really is an issue; in light of the right to a nationality of the nation state's subjects, that some nation state may become physically extinct. The assumption in this paper is that territory being the 'body' of the nation state is fundamental to its survival in the way the notion of the nation state is currently designed. Therefore, it is further argued that the question of what happens to the sunken state's habitants ought to be asked and explored. Consequently, the third and the forth chapter is knitted together and the latter proceeds to investigate how the principles of *ius soli* and *ius sanguinis* would function in a scenario of there being a nation state-no-more. The chapter begins by exemplifying the principles' dysfunction in the case of the Bikini Atoll and the Swedish Alien Act. It then proceeds towards a post structural analysis of 'territory' itself, arguing that the environmental ecology of territory has been neglected in the construction of international law and the fundaments it rests upon. This is contended to become evident not only in the way the absence of answers in international law to the situation of physical relativity is exposed, but also in the way essential keys to human solidarity such as

the customary nationality law principles have been made entirely conditional upon the existence of soil. The paper concludes by suggesting that these dysfunctionalities of *ius soli* and *ius sanguinis* will become increasingly unsustainable as Earth is changing its silhouettes.

# Chapter Two: A Legal and Conceptual Departure

## 2. Statehood and Statelessness in the International

In this part of the paper I elaborate on the concepts upon which international law to a large degree rests upon, namely the nation state, sovereignty and human rights. These concepts are also central pillars in the conversations concerning nationality and the deprivation and/or denial of it which are central to the thesis. Consequently, the nationality law principles *ius soli* and *ius sanguinis* and the issue of statelessness will too be explored more closely. This conceptual departure is written with the conviction that history matters in the way it is connected to and undetachable from the present and future. In contrast to some other parts of the paper in which the recency of referenced material has been deemed significant, the subsections of this chapter are therefore a blend of material from not only different disciplines but also from different ages. Hence, the mixture of times and spaces found within this rather descriptive yet critical chapter is a conscious and sought-after outcome. Accordingly, the intention is not only to establish the foundation upon which the rest of the paper is built but also to illustrate international law's intertwining with other disciplines and schools of thought.

Another accentuation must be made before the discussion continues. It concerns the usage of the terms 'state' and 'nation'. The often misused terminology suggesting that these are synonyms can be troublesome, and I do not intend to partake in the reproduction of the terminological hassle. Firstly, 'state' is defined in article 1 of the 1933 Montevideo Convention. Although the convention is far from universally ratified, it is widely considered customary international law (McAdam 2010; Alexander & Simon, 2014). The article highlights four criteria to be fulfilled in order for "[…] a person of international law […]" to be considered a state. Those are a permanent population, a defined territory, a government and the capacity to enter into relations with other states. I will come back to these criteria later in the paper and explain what relevance they have to the thesis. Secondly, a 'nation' could instead be described

as something a state seeks to form. There is no legal definition of what a nation is. Rather than being defined by borders and political standing, nations are defined by social, historical and cultural criteria. As such, a nation is a social construction in which the group of people within it form a unity around for example religion, language, cultural practices and traditions, values and ethnic identity (Rejai & Enloe, 1969; Cambridge Dictionary 2020). Nations do not take into consideration state borders which in many cases were drawn long after these social constructions came into being. This ultimately means that nations can extend over several states, but also that nations can lack states completely. Examples of the latter are the Kurds, Palestine and Rohingya. Consequently, when one speaks of a 'nation state' this is to suggest that there exist a homogenous group of people forming a sovereign entity with a shared government within a specific territory. In reality, this is a rare phenomenon (Penn State, 2020). Nonetheless, as will be emphasised in the following paragraph the mix-match of the terms in international law and politics suggests that 'nation state' is the concept sought after and fixated with. Therefore, the term 'nation state' will be used to illustrate the legal idea and political archetype of the homogenous state. The term 'state' will occasionally be used for an ease of read and when the argument merely circulates around an autonomous territorial entity.

### 2.1. The 'nation state'

As the term inter*national* law implies, the current legal system governing the relation among nation states and their habitants is fundamentally based upon the premise that there are several self-determining bodies existing in a more or less symbiotic relationship. This sovereignty of nation states is arguably the *grundnorm* of the entire international community (Reus-Smith, 2001). However, as emphasised by historian David Armitage (2013), from what we currently know of the history of human societies, nation states have been exceptions and empires the common rule when it comes to the governing over humans and territories. Furthermore, if we deem the era of empires to have ended through decolonisation and the borders of nation states beginning to blur as globalisation commenced the prime time of nation states lasted from approximately 1975 to 1989. Before and after, Armitage argues that the order has rather been pre- or post-national and nations have rarely if ever fitted within the borders of states. Nevertheless, the strong conviction of the importance and very real existence of the nation state seems to survive. In what follows, I attempt to illustrate how the concept of the nation state came into being and why it is so difficult to detach ourselves from it, although history suggests

that nation states are peculiarities. The argumentation is based upon the premise that we are in fact deeply intertwined with this concept; especially in our understanding of human rights.

The perception of the nation state as *the* ruling entity is often argued to have existed since the Westphalian Peace in 1648, which is traditionally said to mark the 'birth' of the territorial state (Alexander & Simon, 2014). Prior to the peace of Westphalia, kings and emperors were considered to be in the possession of divine, natural rights to rule over the people. As science evolved, the conviction of God-given royal rights began to erode and political individualism started to grow. This eventually led to the formation of territorial states in which people claimed their right to govern and participate. Yet, the old and the new order were fundamentally interconnected in this process of change; neither occurred in a spatiotemporal vacuum nor were born out of a single event (see e.g. Foucault, 1997/2008b). Consequently, the emphasis on the rights of the individual and the strong belief in natural rights to govern merged, leading to the idea that individual rights were as natural as the rights previously held by kings and emperors. In other words, the calls by the masses too originated from the conviction that there were rights assigned to them which had to be respected. These rights became seen as inalienable and universal; part of what it meant to be a human (O'Manique, 1990). This also led to the state being defined as a society of many rather than the property of one, "[…] over whom no one but itself has the right to rule and dispose" as phrased by Immanuel Kant (1795/2005). In other words, the state became what E. H. Carr called a 'group person', or what Thomas Hobbes referred to as an 'Artificial Man' (Carr, 1939/2016; Hobbes 1651/2008). What they meant by this is that the state indeed now consisted of individuals with rights that the state was assigned to protect, but the state also possessed rights of its own. These rights remained very similar if not identical to what kings and emperors had before it, such as the right to rule, exist and defend itself. Yet, to make this 'group person' as effective as possible homogeneity became thought of as necessary. As argued by Patrick Thornberry (1989), this desire sprung out of the idea that the state would be more stable if the people it consisted of were culturally uniform. In other words, it was believed that the 'nation state body' would function better if all its cells (i.e. the humans it consisted of) were fitting parts of the figure and worked towards common goals. For this reason, the pursuit of the 'nation state' began. As emphasised by Armitage (2013), such a mission has been incongruous in the real world where such homogeneity is atypical. Nevertheless, the concept of the nation state is today still founded upon this hypothesised rights holder. It is the institutionalisation of what existed before it and nation states have been granted rights and duties as if they are living and breathing royalties. It is a hypothesis which also

remains effective as long as we believe in its existence (Carr, 1939/2016). As we still speak of for example the sovereign rights of states, the United *Nations* and every state's duty to ensure their people their human rights, the concept of the nation state undoubtedly lives on (Alonso, 1995). We also continue to blend the two concepts of 'nation' and 'state' together as one and it is now the foundation of what we call international law. Moreover, it is deeply knitted together with our understanding of human rights.

### 2.2. The human rights doctrine

Irrespective of any historical accounts suggesting that norms and understandings are evolutionary rather than born *ex nihilo*, human rights are sometimes and highly Western-centred argued to have been established through UDHR. Although declarations in general are not legally binding, UDHR constitutes customary law according to many (see e.g. Hannum, 1996; Government Offices of Sweden, 2008; Amnesty, 2020). As previously emphasised, for others its content is even considered natural (see e.g. Vincent, 1986; UDHR 1948). In contrast, there are those who consider UDHR to be merely an act of idealism or hubris (Posner, 2014). The aim of this paper is not to pick sides in such debate. The stance here is that attempts to establish one sole definition of what human rights are and exactly how and when they were established may even be problematic. The grounds of this position will be further explained in the following paragraph. What has been deemed to be of importance here is instead the level of consensus among agents and whether human rights can be considered norms within the international community regardless of what basis such norms rest upon. This is for obvious reasons difficult to measure, and the closest one may come in the attempt to quantify consensus might be the rather bland and problematic example of signatories. By a vote of 48 to zero and with eight abstaining voters, the UDHR was established in 1948. This is of course a small number of voters in comparison to the world's total number of states. Yet, what has followed since is a large number of legally binding international conventions which has served to either expand, fill in the gaps or codify the content of UDHR. Together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UDHR is part of what is now commonly referred to as The International Bill of Human Rights. The two covenants have over 170 signatories each, arguably illustrating some sort of consensus among nation state parties regarding the importance of UDHR (IJRC, 2018). As emphasised by Jack Donnelly (2007) there is also a

remarkably low number of nation states which have ever made serious claims that the UDHR does not apply to them, which further indicates the existence of a consensus.

The understanding that '[h]uman rights are the rights that everyone has, and everyone equally, by virtue of their very humanity' as phrased by Raymond John Vincent (1986:13) further illustrates how the existence of universal human rights have become somewhat of an axiom. This is not only the case in international law and among states, but possibly also in the international society of individuals. That is at least the case for those who like Vincent assume that rights are retained by human beings due to their nature as humans. This is an assumption essentially grounded upon the notion that natural rights exist; an assumption which I described above as having both historical, sociocultural and religious ancestries. However, even those denying the existence of natural rights have by now a difficult time to downright disregard the significance of the human rights doctrine. While one reason for that could be of moral and/or selfish nature, another could be due to the extensive codification; human rights are now to a large extent positive law. To illustrate, the claim in article 1 of the UDHR stating that '[a]ll human beings are *born* [my emphasis] free and equal in dignity and rights' is fundamentally based upon the conviction that there is a natural universality and inalienability among human beings which should and can be sustained (UNGA, 1948). States' obligations to promote, respect and observe these rights and freedoms are further recognised in the preambles of both ICCPR and ICESCR. Thus, making a clear distinction between natural human rights and positive human rights may no longer be possible. This is, to come back from an earlier statement, why any distinction between positive and natural human rights will not be upheld here.

Instead, these are here considered two sides of the same coin where neither sufficiently can explain the existence of rights considered to be human. Because while the international community of naturalists and positivists, liberals and realists, altruists and egoists continuously emphasise the importance of adhering to human rights, they are repeatedly challenged by the uncomfortable reality of constant violations. Furthermore, changes in perceptions of what is and what is not a human right tell the tale about how the human 'nature' is in fact socially constructed (Donnelly, 1984). One of the most prominent examples of this could be slavery, which went from being widely accepted to become a *jus cogens* crime and considered to be one of the gravest human rights violations to exist (OHCHR, 2002; UDHR 1949). Although slavery still exists in somewhat altered forms, the conversion of acceptance regarding slavery

cannot be satisfactorily explained by solely referring to universality and/or human nature. Instead, what is and what is not a human right seems to be deeply dependent on agencies within societies and the spatiotemporal positionings and trajectories of the subjects who define, admit, adhere to or challenge what is and what is not conceived as a human right (Golder, 2015). Another example of how human rights should be understood as social constructions is the right to a nationality, which will be discussed in the following.

## 2.3. The entitlement to belong

### *2.3.1. Nationality and citizenship – an unfortunate amalgamation*

Before proceeding to a discussion regarding the right to nationality, it may be of importance to clarify another terminological hassle. That is the difference between 'nationality' and 'citizenship'; two complex concepts which tend to become even more complicated by the fact that they sometimes are used haphazardly and as if they were synonyms (see for example UNHCR, 2005; Türk, 2014). 'Nationality' refers to the membership of a nation state. How one acquires it depends on the nation state in question and what principles it applies; principles which I will come back to and explore in closer detail soon. Although defined as a right in article 15 of UDHR, the meaning of nationality per se has no legal definition. When it comes to citizenship, there is no right to it nor definition of the term within international law. However, national legislations usually define it (see e.g. 1 § *lag om svenskt medborgarskap*, SFS 2001:82). It is generally understood as a narrower concept than nationality, and it does not necessarily accompany the latter.. For example, there are nations in which citizenship is received on one's eighteenth birthday whilst nationality is received at birth (e.g. Mexico). Yet, citizenship too represents a legal connection between the individual and a state in the way it establishes rights and responsibilities (The Economist, 2017). Whilst nationality as a status derives directly from the social construction of the nation state as a homogenous entity, citizenship could instead be explained as a political crowning of an individual to participate in the society; it represents the full membership to a state. Accordingly, rights not declared as universal but nevertheless extensively recognised such as for example the rights to vote or run for office are usually granted to those holding *citizenship*. Yet, as argued by Katherine Tonkiss (2017) the reason why these two different concepts tend to be used interchangeably is because we hold on to the social construction of the *nation* state. Thus, we presume that national citizenship is the one way to be a citizen, and thus nationality has become what the UDHR refers to as a foundational right (UDHR, 1948).

A problem one encounters when exploring the literature on statelessness and the concepts of citizenship and nationality is that the interchangeable use of the concepts has been widely replicated and unquestioned (see e.g. Blitz & Lynch, 2011; Belton, 2011; Kingston, 2013). This perplexing reproduction and inaccurate use of the concepts has been highlighted by scholars for decades yet it continues (see e.g. Scott, 1930). Thus, when contributing to the scholarly collection a declaration of one's positioning is in order. While I agree with Tonkiss (2017) when she calls for a reflexive problematisation of nationality as a socially constructed concept, I will not yet take her advice to abandon the term altogether. It will be used in this paper as it seeks to make a dive into the current system of international law and the constructions within it. That system is still frequently referring to nationality, connects it with citizenship and is built to fit the notion of a nation state. That being said, I support arguments calling an end to performances and reproductions of the 'national citizenship'. A post-national approach to memberships and rights could arguably be the way to end statelessness, which is the underlying impetus here (Habermas, 1995; Agamben, 2000: Tonkiss, 2017). Therefore, usage of the term 'nationality' made throughout this paper should not be understood as an acceptance of the status quo. Instead, it should be regarded as an illustration of the enduring and problematic centrality of nationality and the nation state in international law. That being said, references will henceforth primarily be made to nationality and not citizenship, as it is the former which is presumed to create a mare's nest of the entitlement of to belong.

### *2.3.2. The right to a nationality*

Article 15 of the UDHR states that '[e]veryone has the right to a nationality' (UNGA, 1948) and is in literal terms dependent upon the existence of nation states to belong to. Hitherto, this paper has attempted to demonstrate that the existence of such a nation state is a historical product and thus relative rather than an omnipresent fact. Hence, one could call the right to a nationality another social assemblage. This means that the right to a nationality did not appear nor exists in isolation but is intertwined with the emergence of the nation state as we currently understand it and continuously reproduce it. Such comprehension is further illustrated by the United Nations Charter, in which article 1(2) asserts that the purpose of the UN is "[t]o develop friendly relations among *nations* [emphasis added] based on the respect for the principle of equal rights and self-determination of *peoples* [emphasis added]…" (UN, 1945). The article formally accentuates the deep connection still believed to exist between the nation state as an

entity and the people within it, which is ultimately also demonstrated on an individual level through the claim to a nationality as a human right.

On an every-day basis, it is important to be able to prove one's nationality and/or having one when for example travelling, seeking asylum, contacting official authorities, open bank accounts and even so seemingly ordinary things such as signing a mobile phone contract or effortlessly collecting parcels from the post office (see e.g. Asylrättscentrum, 2020; Kommerskollegium, 2020; McAdam 2010). Thus, the ability to identify one's belonging is important for many reasons and what makes the right to nationality particularly remarkable is how it seems to open up the door to access virtually all other human rights (Arendt, 1951/2017; Owen, 2018). This argument goes hand in hand with the idea that the nation state is the insurer of rights and that the rights themselves were born out of it. Hence, belonging to a nation state becomes crucial for individuals (O'Manique, 1990; Reus-Smith, 2001). Despite this, remarkably few international legal documents make reference to the right to a nationality. To illustrate, the content of some of the core human rights instruments will be highlighted here. To begin with, ICCPR article 24(3) asserts every child's right to a nationality but mentions nothing about the right for adults. The Convention on the Rights of the Child (CRC) reiterates this by underlining birth registration in article 7 as a central element in the right to acquire a nationality. Yet, as illustrated in article 8 of CRC states are obliged to respect the right for children to *preserve* their nationality. Nothing is mentioned regarding states' duties to provide for it. To continue, ICESCR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the European Convention on Human Rights (ECHR) remain completely silent on the matter. Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) does mention states' responsibilities to guarantee without discrimination the enjoyment of the right to a nationality. However, Article 1(3) underlines how nothing in ICERD affects state parties' freedom to implement their own legal provisions concerning naturalisation, citizenship or nationality. Accordingly, nation states are not obliged to grant all claimants nationalities but they are obliged to not discriminate in such process. Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD) establishes disabled peoples' right to not arbitrarily be deprived of their nationality and obliges states to recognise their right to one, but there are no mentions of any concession duties. Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) underlines that states are obliged to offer the same right to acquire, change or preserve nationality to women as they offer men. However, it

is not clearly defined anywhere the obligations states have towards the latter. Thus, what may be concluded by this brief exposure is that there is little guidance in international conventions how the universal right to a nationality should be guaranteed by states or demanded by individuals. Instead, the legal mechanism existing to ensure that the right to nationality is upheld takes the form of principles.

### 2.4. Principles of nationality law

Despite the widely recognised importance of the right to a nationality, international law contains no universal doctrine of granting nationality to individuals. Instead, nation states remain free to choose among a limited amount of nationality law principles which one they want to adhere to. This includes the freedom to alter which principle to adhere to through time, combine principles and to alter which ones to apply depending on the type of situation (de Groot, 2006; Van Waas, 2007). Such self-determination is the basis of the entire nation state society, but has also been codified in numerous international conventions. For example, article 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws states that '[i]t is for each State to determine under its own laws who are its nationals […]'. Article 2 states that '[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State'. The custom is to permeate such laws with nationality law principles.

In this section of the paper, the two principles *ius soli* and *ius sanguinis* will be examined. Together with naturalisation and the marriage principle *ius matrimonii*, they constitute the body of principles which is commonly referred to as nationality law (De Vincentiis, 2019). Nationality law is central to a number of other areas of both international- and domestic law such as migration law, human rights law and social law. However, nationality law is also central to the question of the rule of law itself, since it establishes who is and who is not an agent within the domestic legal system (see e.g. Edwards & Van Waas, 2014). This makes knowledge about the principles of nationality law essential. Despite this great importance and impact of nationality law on both nation states and individuals, neither *ius soli* nor *ius sanguinis* are codified in any international legal instruments. Instead, they have been formed out of English common law (*ius* soli) and the Napoleonic Code (*ius sanguinis*) and have spread across the globe to become custom among states (Bauböck et. al., 2018). Because *ius soli* and *ius sanguinis* are fundamentally tied to the territorial state of origin and are currently the most

common principles used among nation states, the attention is given to these two principles solely.

A problem with these principles is that they too have been born out of the interlocking of citizenship and nationality. This has led to an academic bewilderment where the principles are sometimes argued to establish the nationality of individuals and sometimes their citizenship (see e.g. De Groot, G-R. & Vonk, O., 2018; Owen, D., 2018; Solodoch, O. & Sommer, U., 2020). Arguably, the great ambiguity regarding what exactly *ius soli* and *ius sanguinis* determine is a veracious demonstration of the ongoing conceptual inferno. Perhaps due to this, the principles are best understood as granting either *and* both. What I mean by this is that since national citizenship is the prevailing form of citizenship, even those who non-reflexively argue that nationality law principles determine citizenship rights are in fact also referring to nationality (see also Tonkiss, 2017). Owing to this argument, the remainder of this paper will assume and speak of nationality law principles as determinants for nationality.

#### *2.4.1. Ius soli & ius sanguinis – a synopsis*

*Ius soli* translates to 'right of the soil' and is a principle of nationality law which grants nationality to those born within the borders of the state. The principle was the general standard in Europe until the beginning of the nineteenth century and its origin dates back to the creation of early modern European states. Consequently, *ius soli* was and remains fundamentally interconnected with notions of the nation state and its sovereignty (Perelló, 2018). However, during and after the French revolution the exclusivity of *ius soli* became increasingly challenged and a new principle called *ius sanguinis* emerged. *Ius sanguinis* translates to 'right of blood', meaning that nationality is inherited to a child from either one or both of its parents depending on the national application of the principle (Van Waas, 2007). The principle was born out of the idea that not merely the place of birth but one's social, cultural and economic ties to the nation state are of importance in the distribution of nationality. Furthermore, this legal evolution occurred in an intellectual space and time where several disciplines based their reasoning on biological theory. Thus, it was arguably unsurprising that a nationality principle accentuating biological features would evolve and *ius sanguinis* came to mean that the territorial background of one's parents became central for those requesting to be considered French. From the initial discussions of the Constitution in 1799 to the enactment of the French Civil Code in 1804, *ius sanguinis* eventually became the dominant feature of nationality law in the French legal system. Other Western societies too began to adopt the principle in the

following years of the century, elucidating how the revolution's rationales regarding nation state belonging were not limited to France exclusively (Perelló, 2018). While most of the states in the Americas still adhere to *ius soli*, *ius sanguinis* is the dominant principle in Europe (Vink & de Groot, 2012). However, as will be emphasised below, maintaining a dichotomous categorisation between the two principles may no longer be an accurate reflection of reality.

### *2.4.2. A legal concoction of soli-sanguinis*

It has become increasingly common by nation states to not adhere solely to one of the two principles mentioned above but to combine them. As a result, different principles may apply to different types of situations and/or additional requirements have been added to the mixture. Ultimately this tends to complicate the realisation of the right to a nationality, which arguably may be the objective behind constructing such legal concoctions to begin with. For example, some nation states adopting *ius soli* as a general rule have now also introduced requirements necessitating parents to have particular immigration statuses in order for their children to gain nationality. Similarly, there are nation states who commonly adopt *ius sanguinis* which have restricted children's right to gain nationality if their parents are assumed to lack a 'genuine' connection to the state (Van Waas, 2007). The criterion of such genuine connection and thus the confirmation of it as a lawful prerequisite has been established in case law by the International Court of Justice (ICJ) in the *Nottebohm case* (Liechtenstein v Guatemala, 1955). In the following chapters, I will discuss further how these mixed usages of the principles become particularly troublesome in the case of climatic statelessness.

Changes in adherence and applications of the principles may not always happen overnight, but political oscillations have recently been proven capable of challenging the status quo in unpredictable and somewhat hasty manners. A recent example of this is the 45th US President Donald Trump announcing in 2018 that he was considering changing the first section of the 14th Amendment in the US Constitution in order to end *ius soli* in the United States. While his quest to change the Constitution lacked legal basis it did have enough political capital to create a legal controversy out of something previously considered a settled dispute (Mirelli, 2018; Reuters, 2019). Although legal scholars dismissed Trump's proclamation at the time, it eventually led to the commencement of a US Department of Justice project in early 2020 to withdraw certain US (national) citizenships. While the project is officially said to target serious criminals, the lines are blurry and the room for interpretation extensive when it comes to

individuals in risk of being targeted (Prasad, 2020). Another example is Portugal's amendments to its nationality laws in mid 2020. The changes make it easier for some groups to receive Portuguese nationality than previously was the case. These groups include spouses, grandchildren and non-married partners of Portuguese citizens (Homel, 2020). Thus, nationality laws are changing in several nation states and cross-national differences remain. As highlighted by Chiara Strozzi in a report for IZA World of Labor (2017) there is no general convergence towards a more restrictive or liberal approach by nation states in their legal designs. What exists is rather a global mix-match of interpretations of the principles with added prerequisites.

The result of this becomes manifold. On one hand, it limits nation states' responsibilities to grant nationality to those not meeting the requirements built into their legislations and added to their interpretations of *soli/sanguinis*. On the other hand, as nation states continuously change their nationality laws it creates a complex situation of unpredictability and uncertainness among those seeking to claim their right to nationality. Ultimately, individuals risk finding themselves in a cul-de-sac where nationality is not granted to them by anyone (Tobin, 2015). In such an event, individuals may find themselves in a situation defined as statelessness.

## 2.5. Statelessness

### *2.5.1. The historical evolvement of statelessness*

Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. Historically, people have found themselves in the situation of statelessness as a result of for example the rejection of particular populations by nation states, conflict of laws or administrative failures (Piguet, 2019). According to UNHCR (2006), it is often a bewildering blend of political, legal, technical and administrative ingredients which makes a person stateless. It is also regularly defined as a root cause of obstacles to human development and further human rights violations (see also UNHCR 2005; 2011; 2020a). In light of the right to a nationality in article 15 of UDHR and the International Bill of Human Rights, the phenomenon of statelessness may seem perplexing. Yet, if adding a critical evaluation of concepts such as the nation state and human rights to the discussion perhaps statelessness becomes more of a

foreseeable phenomenon; something affecting many of those who are not considered a part of the homogenous majority.

If the concepts of the nation state and human rights illustrated above seem too abstract and intangible to make sense of, Arendt puts them into a context perhaps more clarifying and concrete. In her work *The Origins of Totalitarianism* (1951/2017), she illustrates how decolonisation and the world wars leading to the creation of new nation states and changing borders have given rise to minorities in areas where cultural uniformity simply does not exist. Due to the quest for homogeneity within the nation state these minorities have needed additional legal protection to be able to somewhat safely exist within nation state societies. This is inconsistent to the idea that there are universal and inalienable rights. Additional protection should not be necessary if such rights were granted to everyone automatically. Additionally, Arendt underlines that the new minority treaties established following the First World War only applied to newly created nation states. In the older Western nation states the Westphalian heritage and the Rights of Man persisted. There, human rights had been intertwined with the construction of the nation state as illustrated above. This led to a situation where '[…] no authority was invoked for their establishment; Man himself was their source as well as their ultimate goal. No special law, moreover, was deemed necessary to protect them because all laws were supposed to rest upon them' (p. 380). This meant that no additional protection was established for minorities in already independent nation states; some of them who also stood in the foreground of the establishment of the Universal Declaration of Human Rights and the United Nations. The argument was that minorities were supposed to already have rights due to the fact that they were human. In other words, in historically powerful Western states it was believed that the human rights doctrine did not need any protection- nor enforcement mechanisms. There, everyone was guaranteed their rights as the humans they were (Reus-Smith, 2001).

However, the nationality laws principles applied by nation states have proven to challenge these assumptions profoundly. To draw from what has previously been discussed, the French revolution and the development of *ius sanguinis* is a fitting example of how the subjective elements in the construction of human rights remained neglected and led to a space for exceptions. During and after the revolution, *ius sanguinis* came to mean that individuals having no apparent connection by neither birth nor parents could gain a French nationality just by living in France for a period of time. Yet, in accordance to the spirits of the revolution this

exception primarily applied to outstanding scholars or leaders such as for example George Washington, Thomas Payne and Jeremy Bentham (Perelló, 2018). The space of exception also meant that there were those starting to fall between the chairs; there were those who did not meet the new criteria nor were considered prominent enough to be admitted as members of the nation state. Thus, the number of individuals lacking a nationality began to grow as nation states started to adopt *ius sanguinis*. Although the source of statelessness arguably lies at the very heart of the construction of nation states, Carlos Perelló (2018) uses the *ius sanguinis* rule to illustrate how subjective and relative nationality is. It is a legal way for nation states, now regardless of their age and power, to create statelessness and deprive people of rights by referencing to their own right to choose nationality law principles and consequently also pick and choose who may or may not belong to them.

### *2.5.2. Statelessness today*

There are currently two sources of international law focusing primarily on statelessness. In addition to defining what a stateless person is, the 1954 Convention on the Status of Stateless Persons seeks to establish a set of minimum standards which stateless people ought to be ensured. The 1961 Convention on the Reduction of Statelessness is an international mechanism in place to guarantee that individuals' right to a nationality is respected. It is the source which established the right of every child to gain a nationality at birth if it otherwise would be stateless, which has been reiterated in CRC and ICCPR. Furthermore, it requires states to establish a number of safeguards in their own nationality laws in order to prevent statelessness from growing (UNHCR, 2020b). Paradoxically, article 8(3) of the 1961 Convention also allows states to deprive individuals of their nationality if the individuals are disloyal towards the nation state. This for example includes scenarios where an individual has contributed with services to another state which is forbidden according to the nation state's laws, or if the individual has acted in ways which are harmful to the vital interests of the nation state. What these vital interests are remains vague and is subject to national interpretation. Hence, the 1961 Convention underlines the persisting centrality of nation states' interest and limits their responsibilities by ensuring them a right to adopt national laws with room for both interpretations and exceptions (Edwards & Van Waas, 2014). Henceforth, I will refer to the 1954 Convention and the 1961 Convention collectively as 'the Statelessness Conventions'. The establishment of these conventions further mark the differentiation between a stateless person and a refugee, with the latter being defined in the 1951 Refugee Convention. The parting of

'refugee' and 'stateless' is a central moment in the international reaction to statelessness. Whilst refugees became considered an acute issue, statelessness became an issue to handle long-term (Edwards & Van Waas, 2014). This is still the case. The number of parties of each Statelessness Convention remains below 50 % of the total number of UN member states and the right to a nationality remains ambiguous (see UNHCR 2020b). Furthermore, when it comes to climatic migrants specifically, the likelihood of them being considered refugees and thus something to be handled with urgency is small. This is because a prerequisite for being considered a refugee according to the Refugee Convention is that one is fleeing from political persecution (Eckersley, 2015). Since migration due to climate change-induced uninhabitability does not necessitate anything of that sort, the application of the international customary principle of non-refoulement is highly limited too (Albrecht & Plewa, 2015).

Another illustration of how statelessness continues to be a largely neglected issue is the continuously growing number of stateless people in the world. Yet, knowing the exact number is difficult due to a multiplicity of reasons. One important reason is that stateless people, unlike refugees, are rarely registered, documented or granted any legal status (Yamamoto & Esteban, 2014; Connell, 2015). According to UNHCR (2017), less than half of all states in the world keep official track of stateless populations in their territories. Thus, what exists are rough estimations, where scholars have contended that there are between 10 to 14 million stateless people in the world (see e.g. Edwards & Van Waas, 2014; Piguet, 2019). UNHCR tends to keep its estimations vague, often speaking of 'millions' of stateless people but rarely mentioning how many millions there might be (see e.g. UNHCR 2005; 2006; 2020a). In its 2017 Global Trend Report, UNHCR admitted that it had been unable to provide thoroughgoing statistics on statelessness. In the report UNHCR managed to detect only 3.9 million stateless, although the initial estimations were that there are at least 10 million stateless people in the world (UNHCR, 2017). Yet, there are additional problematiques making it even more complex to make realistic estimations of the magnitude of statelessness. These concern how stateless people are being categorised into different types of statelessness called *de jure* and *de facto*. *De jure* stateless people lack nationality and thus a legal identity completely. In contrast, *de facto* stateless are lacking proof of having a nationality. The reasons why the latter do so vary, and may be due to for example illegal residency, irregular migration or lack of the actual documents needed to prove the nationality. Sometimes there is a further distinction made between *de facto* statelessness and *effective* statelessness, where *de facto* means the absence of legal migration status and effective statelessness means that one is unable to prove one's

nationality (Robinson, 2011). Such further distinction will not be made here. In fact, I will not elaborate further which of the categories climatic stateless people are likely to be defined as. This is because I consider it to not be fundamental to the thesis. That being said, it may be an interesting path to explore in the future if different types of statelessness meet different implications when it comes to climate change and the *soli/sanguinis*-problematiques.

### *2.5.3. Statelessness tomorrow*

Scholars have begun to underline that a 'new' type of statelessness may emerge which could affect many people in the future and create extensive legal and political dilemmas. The statelessness they refer to could be described as 'climatic statelessness', although the exact terms used vary among them (see e.g. McAdam, 2010; Yamamoto & Esteban, 2014; Alexander & Simon, 2014; Zetter & Morrisey, 2014: Connell, 2015; Piguet, 2019). In contrast to 'Arendt's statelessness' which arose due to the creation of nation states, this type of statelessness is argued to evolve because of the disappearance of them. What the scholars have in common is that they all ask what will happen to individuals when climate change begins forcing people on the move. While migration due to environmental causes is nothing new in human history per se, it is assumed that climate change-induced migration will pose new challenges on an international scale (Albrecht & Plewa, 2015). Although it would be fundamentally incorrect to refer to climate change as an issue of tomorrow rather than an ongoing process, the scale of statelessness which could derive from it is still a great unknown for the future to tell.

There are multiple powers and angles featured in the discussions of climatic statelessness. One illustrative and extreme angle is that of the 'sinking state' (Alexander & Simon, 2014; Piguet, 2019). Other angles concern for example sudden disasters like tsunamis and storms, slow environmental degradation such as permafrost, droughts and desertification, high-risk zones defined by governments and scientists and climate change-triggered conflicts (Kälin, 2010). The many powers argued to be in play include political, legal, economic and hegemonic socio-cultural norms and traditions, and they become relevant regardless of from which angle one is approaching the question of climatic statelessness (Zetter & Morrisey, 2014; Tabucanon, 2014). In order to make a coherent argument within the limits of a paper of this sort, it becomes necessary to somewhat limit one's focus. Therefore, in the following the angle of the sinking states and the legal power of nationality law principles will be featured. Yet, as the paper seeks

to view the issue in a post-structural light, other powers will inevitably be deemed as relevant and considered fundamentally interconnected with law.

It is time to conclude this departure and begin to explore questions more directly related to climatic statelessness and how *ius soli* and *ius sanguinis* aggravate this type of statelessness in particular ways. As illustrated above, the principles influence multiple areas of law which makes knowledge about them highly relevant. In the following, I will seek to amplify the knowledge about them and their malfunctions by placing them in a future scenario where nation states are sinking. What I hope has been elucidated to the reader so far is the importance to engage in critical explorations of fundamental concepts within international law. Such explorations are rarely if ever prosperous if one seeks for all answers within the discipline of law solely. Instead, a transdisciplinary approach is here appraised in the attempt to make sense of social constructions in the forms of rights, nationality law principles and the phenomenon of statelessness.

# Chapter Three: The Normative Wound

## 3. Breaking the Westphalian Promise – The Extinction of States

The previous chapter is termed conceptual and legal in the way it highlights from a critical view why and how certain concepts and rights are constructed. This chapter is instead called normative in the way it contrasts the presumed desired physical and existing state to the presumed undesired vanished and/or uninhabitable one. The chapter begins by describing the scientifically supported likelihoods of us finding ourselves in the latter situation. It then proceeds with an investigation of there being any modern examples of when nation states have endured although the criteria in the Montevideo Convention have not been met. The 'normative wound' underlined is the centrality of territory; i.e. the body of the nation state, which remains unreflexively understood in international law although such understanding becomes increasingly challenged by climate change. In that sense, this chapter could be said to primarily focus on and explore the abilities of the nation state to uphold nationality in an era of rising sea levels.

### 3.1. Positioning the paper in relation to existing research on climate change

The question of likelihood of states becoming uninhabitable due to climate change is central and must be assessed for the thesis of this paper to be of any relevance. Thus, this section of the paper will summarise some of the recent findings in climate change research pointing towards, and to some extent against, the potential situation of the physical extinction of states. This summary is not in any way intended to be all-encompassing or technical in detail, but rather serves to illustrate whether or not there is any real-world significance in theorising about the hypothetical condition of climatic statelessness. However, as research on climate change is fundamentally based upon predictions of futurity and since its evolvement is greatly intertwined with global changes, trends within human society, averages and extremes, urbanization, population growth, knowledge production, technical advancements among many other factors, it is unlikely that any prediction could tell the entire tale of what is to come (Rebetez, 2011). Consequently, one must turn to the *most realistic* forecasts currently available when theorising about the future unknown. Such forecasts are arguably made by the IPCC which is said to be the world's leading authority in reporting on climate change and its effects (The Royal Society, 2007; UNSG 2018). The UN body was established in 1988 by the United Nations Environmental Programme (UNEP) and the World Meteorological Organization (WMO) and was later also endorsed by the United Nations General Assembly (UNGA). The IPCC regularly publish reports assessing the science on climate change as well as special reports on specific environmental issues (IPCC, 2020). This section of the paper and the following argumentation proceeds from the findings in some of its recent reports.

Repeatedly emphasised in IPCC's reports is the direct connection between climate change and the concentration of greenhouse gases in the atmosphere. The temperature is the main factor that reflects these concentrations, and the concentrations are expected to continuously increase in the following decades. Ultimately, this will also lead to a global increase in temperature (IPCC, 2019a). Although this will affect Earth's regions very differently, some common traits have been identified. The frequency of heat waves, extreme weather and wildfires is likely to rise, leading to direct and imminent danger for humans, other species and destroyed crops and property. There will be a reduction of melt water and changes in rainfall directly affecting the availability of water resources and desertification in some areas. In these changing environmental circumstances diseases, behavioural patterns and socioeconomic conditions are expected to take on new forms and force humans to migrate from where they are currently located (Rebetez, 2011; IPCC 2019a). Although the consequences of climate change are

numerous: many more than can be discussed in this paper, there is one effect in particular which has gained the attention among researches, politicians and the international community as being the main threat against the very existence of state territories. It has made the representative of Palau declare to the UN General Assembly that '[n]ever before in all history has the disappearance of whole nations been such a real possibility' (UNGA, 2008) and it has led the Maldivian government to hold a symbolic cabinet meeting underwater as a call for help from the rest of the world (Reuters, 2009). Furthermore, IPCC has defined it as the primary environmental threat towards the existence of states in the 21st century. The climate change these parties all refer to is the sea level rise.

According to IPCC, it is virtually certain (99 % certain or more) that the sea level will rise. In its fifth assessment report from 2014, IPCC researchers made estimations of *how* much the sea level will rise until year 2100; something which is depending on the $CO_2$ concentration in the atmosphere during the years until then. The IPCC based its calculations on several Representative Concentration Pathways (RCPs) of $CO_2$ concentration, where RCP2.6 (indicating 2.6 $W/m^2$) represented the 'best case scenario' and RCP 8.5 represented the worst. In the situation of RCP2.6, a sea-level rise of 0.28-0.61 meters was estimated (IPCC, 2014). However, such concentration is argued to come from a $CO_2$ increase relative to pre-industrial conditions. These levels are unlikely to become reality in the near future, as our highly industrialised and internationalised society so far has failed to adapt rapidly enough to climate researchers' requests (Hausfather, 2019). The situation of RCP8.5 was instead estimated to result in a sea-level rise of 0.52-0.98 meters (IPCC, 2014). However, in 2019 IPCC published another report in which the 2014 estimations of the sea-level rise had changed. In the new report, RCP2.6 was estimated to lead to a sea level-rise of 0.29-0.59 meters and RCP8.5 to 0.61-1.10 meters by 2100 (IPCC, 2019b). These changes in estimations arguably illustrate the fundamental issue of climate change research; estimations are rarely if ever exact. To some extent, this may also illustrate the potential flaws in making calculations on sea-level rise based on RCP. However, it does not fall within the scope of this paper to critically examine the utility of this calculation method. Instead, the purpose of presenting these shifting forecasts on sea level-rise made by the IPCC is to emphasise that the issue of sea level-rise is estimated to *aggravate* in comparison to previous forecasts as the worst-case scenario is turning worse.

Furthermore, as pointed out by the IPCC the sea-level rise is expected to affect areas very differently depending on their locations, ecosystems and physical forms. Of primary concern

when it comes to the question of *complete* disappearance are small island developing states (SIDS). Studies by the IPCC have shown a sea level-rise of up to four times the global average in parts of the western Pacific, suggesting that there is a very high risk of some SIDS becoming uninhabitable quicker than the global average numbers illustrated above may suggest. This risk is not only a consequence of complete erosion and sinking of land, but is also due to partial erosion leading to loss of natural resource and socioeconomic assets enabling people to actually live in certain areas (IPCC 2014b). Yet, Etienne Piguet, nominated expert in the IPCC's fifth assessment report, underlines that the number of states in danger of becoming completely uninhabitable due to sea level-rise appears quite low at first sight (2019). He argues that only 3 out of 39 members of the Alliance of Small Island States (AOSIS) are likely to become completely uninhabitable based on current calculations. Those states are the Maldives, Tuvalu and the Marshall Island and they are all situated at particularly low sea levels. Piguet adds Nauru and Kiribati to the list due to their geographic conditions which could turn them uninhabitable although a considerable amount of land remains above the surface. In total, approximately 600 000 habitants live in these five states and they face a high risk of losing their nation states in the following 80 years due to sea level rise. However, Piguet underlines that there currently exists no extensive study and/or forecast taking into account *all* components necessary to make proper predictions of the states in risk of becoming uninhabitable. Such components are for example tectonic movements, geographic conditions and locations. Furthermore, the long-term sea level records available from SIDS are very few. This means that it is very difficult to separate sea level rises due to climate change from variations due to tidal cycles, storms, surges and deep ocean swells (ICPP 2014b).

Ultimately, this means that there being 600 000 people in risk of losing their home states in the following years as a consequence of sea level rise is *one* hypothesis. Due to the multiple factors involved in climate change not yet taken into account and the research pointing towards an exacerbation of the worst-case scenarios, there are also several other potential hypotheses. For example, the 150 million people currently living less than a meter above the sea level or the 740-1145 million people predicted to live in low elevation coastal zones (LECZ) by 2100 could be forced to migrate elsewhere by the end of this century. Many of these people are likely to be able to stay in their home states as the geographic conditions allow it (Piguet, 2019; J. Bryan and B.C O'Neill, 2016). However, adding to the equation the multiplicity of factors enabling individuals to settle, form a society and survive on a landmass, the populations of 57 SIDS risk having to forcibly migrate and resettle. 40 of these SIDS are sovereign states and together they

are comprised of approximately 69,3 million people (UN, 2015; The World Bank 2019). Important to once again underline is that these numbers are solely based on calculating the consequences of sea level rise. There is still a great lack of research on the risk of states becoming uninhabitable due to for example an increasing number of wild fires, hurricanes, tsunamis or other environmental forces born out of the climate changes (Piguet, 2019). Thus, the international community could have to face 5 sunken nation states in the following years, but it could also have to face 40 or more. This uncertainty of what exactly is to come whilst the research is showing that at least some nation states' territories *will* disappear is what I seek to underline as crucial to consider in the future development of international law and the human rights doctrine. The promise of an assiduous territorial Westphalian nation state is about to be broken as the risk of state territory extinction is real. The question is solely one of quantity. As underlined by Anthony Oliver-Smith (2013) the difficulty in measuring climate change and environmental migration cannot be used as an argument to dismiss it. If international law is to be updated and prepared for what could come, the predictions of climate research instead ought to be woven into it. Otherwise, international law will be unhelpfully hollow when the effects of climate change become reality.

### 3.2. The continuum of statehood when the climate changes

The paper will now proceed by underlining how ill-equipped international law is to handle the situation described above, which becomes visible in the way it gives so very few answers as to how to conceive a sunken state. Yet, the most fitting place to start when investigating the continuum of statehood is possibly the Montevideo Convention. As previously emphasised there are four criteria in the Montevideo Convention defining a state, namely a territory, a population, a government and the ability to enter into relations with other states. Thus, the fact that the territories of states may vanish due to climate change raise serious questions regarding the continuum of the affected nation states and the nationalities associated with them. One reason why these queries arise is because there is no criterium nor legally defined moment when a state is considered extinct (Piguet, 2019). The customary political- and historical scenario has been that states have vanished due to merger or absorption by another state or complete re-creation leading to new entities. The potential future scenario of states becoming physically inexistent or at least completely uninhabitable is thus a foreign object to the traditions of statehood and to international law as currently constructed. There are no mystical Atlantis-like nations to use as elucidative illustrations of what to come (McAdam, 2010).

Because of this, answering any question regarding the continuum of statehood when a state sinks is a great challenge and I do not claim to provide any definitive answers to such statehood dilemma. Though, what I will seek to do is highlight some instances where at least one out of four criteria of the Montevideo convention has not been met in order to make more informed estimations. By also making a critical investigation of physical territory and how it is connected to the construction of the nation state, I attempt to provide the reader with a suggestion of what the future holds. The primary attention will be given to the criteria of territory and population since they are the most central to the question of inhabitability, but the others will also be discussed to some extent.

This is a relevant layer to the discussion of the nationality law principles in several ways. For example, if statehood can be assumed to continue for a nation state which is no longer inhabitable the nationality of such nation state can too be assumed to endure. Its nationality laws would then persist and the nationalities granted by it could be expected to be acknowledged as valid by the international community. Although this may or may not be a guarantee for generations to come, a more or less sudden extinction of the physical state would perhaps not necessitate entire populations having to rely on other states' nationality laws in their claim for nationality. If, on the contrary, statehood can be assumed to end as the physical state vanishes then the nationality law principles of other nation states could become crucial for individuals in search of realising their right to nationality.

#### *3.2.1. Loss of territory*

Territory is here understood as *landmass* belonging to a nation state. In other words, when references are made to 'territory' it is understood as a spatial area of soil where a nation state has jurisdictional authority and which is neither air nor sea. Territory is important to this thesis for several reasons. Firstly, *ius soli* and *ius sanguinis* is currently based upon it; the former establishes the nationality to people born within a certain nation state territory and the latter makes nationality inheritable from parents' nation state affiliations. At least so far and as will be discussed more thoroughly soon, the Western-constructed nation state has been presumed to consist of territories (see e.g. Kahn, 2014). Secondly, climate change challenges the presumed omnipresence of territorial landmass. Knitting these components together raises questions such as "could there be a nation state if it lacks sovereign territory?" and "what will

happen to the nationals of such state?". The former question will be explored in this chapter and the latter is reserved for the next.

Article 1 of the Montevideo Convention defines territory as one of four criteria which ought to be met in order for a state to come about. There are no definitions nor requirements in international law of what size a territory must be in order to meet that criterion (Damrosch et. al. 2011). In the case *Deutsche Continental Gas-Gesellschaft v. Polish State* from 1929, the German-Polish Mixed Arbitral Tribunal underlined that the criterion of territory includes no minimum boundaries. In the more recent *North Seas Continental Shelf Cases,* the ICJ reiterated that a sufficient consistency of delimitation or definition of territory is enough to meet the conditions. However, in the scenario of sinking states it is not really a question whether or not the criterion of territory was once met for states like for example Kiribati or Tuvalu; undoubtedly it was. Rather, the question is what happens when the nation state already has been established but the defined landmass which it was once tied to disappears. Much of the modern legal and intellectual tradition defines inhabitable territory as indispensable for a variety of reasons, which suggests that a nation state must always have a territory. This is for example manifested in the human rights doctrine, in which many of the universal rights require a territory. The right to return to one's home state in article 13(2) of the UDHR and article 12(4) of ICCPR is perhaps one of the most prominent examples of this. With no soil to return to, such rights become practically impossible to uphold. As emphasised in chapter one, the very concept of the nation state is founded upon and legitimised by upholding habitants' rights. According to some scholar, it is therefore likely that the loss of territory would equal loss of statehood (see e.g. Heather & Alexander, 2014; Reus-Smith 2001).

The customary principle of presumption of continuity has been brought up against the claim that the sovereign state ends as its territory sinks. Scholars emphasising the applicability of the principle mean that regardless of uninhabitability, a nation state will remain a nation state as long as others recognise it as such (McAdam, 2010; Yaamoto & Esteban, 2014). UNHCR (2011) has underlined the importance of remembering the principle and to avoid using a language that suggests that nation states *can* disappear. However, there are also scholars who are problematising such reading of the principle. As suggested by Heather Alexander and Jonathan Simon (2014), the principle of presumption of continuity cannot be understood as suggesting that sunken states are guaranteed to remain nation states within the international community. They highlight how the principle instead helps to determine whether an established

state is part of a new state or if it is continuous with an old one. Although Alexander and Simon do not go as far as to claim that nation states definitely will not recognise sunken states as sovereign, they underline that there is no international customary principle that recommends that they should. Neither are there any provisions in the Statelessness Conventions concerning how states should act in such instances. Consequently, it seems as if the only guarantee a nation state like Tuvalu currently holds to remain a sovereign entity is international recognition. Heather and Alexander (2014) consider that to be a weak assurance. In contrast, Jane McAdam (2010) deems such recognition to be the cornerstone of international relations; exemplifying that even 'failed' states have remained accepted throughout history in order to maintain economic, technical and political relations. She and other legal experts such as Christel Cournil consider it unlikely that other nation states would suddenly depart from the status quo and stop recognising states which physically perish. Cournil also underlines that the division of the seas into territorial waters could be a possible way for sunken states to remain sovereign bodies as the maritime zones offer control over at least some parts of the earth. She means that this could in turn allow for its citizens to hold on to their passports and nation state belonging (Cournil, 2011; Piguet, 2019). However, sinking states pose great challenges from a Law of the Sea perspective too. As illustrated by Eduardo Jiménez Pineda (2018), maritime zones are drawn and measured in relation to land in accordance to the customary principle of the domination of the land over the sea. Meanwhile, article 76 of UNCLOS establishes that states' delineations of their continental shelves are final and binding. This illustrates how the international regulation of the seas is not designed with the loss of territorial land in mind either, since it too appears ambiguous as soon as the example of vanishing territory is brought into the analysis. Consequently, the guarantee of keeping one's territorial waters once the state sinks is as uncertain as the guarantee to keep the status of statehood once the sovereign's land is gone.

What may be concluded from this is that there are multiple answers to what will happen in the situation of a 'real Atlantis' and whether or not international law is equipped to handle it. Due to a lack of regulations and historical examples, the outcome becomes a range of conflicting guesstimates. However, inhabitability generally requires more than mere land to stand on. This makes the criterion of territory in the Montevideo Convention tightly connected to the other conditions of statehood. By taking more than the loss of actual territory into account one may at least be able to make more qualified guesses of what happens with statehood as the territory sinks.

### *3.2.2. Loss of politics*

The discussions regarding the loss of territorial land are multidimensional and suggest that the criterion of territory cannot be completely isolated from the other criteria in the Montevideo Convention. For example, Stefan Talmon (2011) argues that both the criterion of government and that of capacity to enter into relations with other states can to some degree been fulfilled despite the lack of territory through governments in exile. He underlines that history is filled with examples of governments who have been able to enter treaties, maintain jurisdiction over its nationals and diplomatic relations and much more although the administrations have been located outside of their own nation states. This has included providing passports and other registration documents which have prevented their people from turning *de facto* stateless. However, the scope of jurisdiction for a government in exile is restricted. In the *Allied Forces (Czechoslovak) Case (1941–42) 10 AD No 31, 123, 124* (cited in Talmon), it was observed that an absolute right to govern exists only within one's own territory. Accordingly, the government in exile is somewhat limited by the sovereign rights of the nation state in which the administration resides. Furthermore, government in exile is assumed to be a temporary solution (McAdam, 2010). To illustrate, Somalia had no effective government on site during the late 20th Century until the beginning of the 21st Century. During this time, it was even challenging for many Somalis to obtain official documents and/or verifications which were recognised by other nation states. For example, New Zealand did not accept Somali passports at the time. However, this was a temporary status of the Somali government (Yamamoto & Esteban, 2014). The Somali government's exile has now ended and Somalia remains a recognised nation state by the international community although the government and its allies are accused of both grave human rights violations and highly volatile and *in*effective governance (Human Rights Watch, 2020). The Somali example illustrates two things. On one hand, it shows how a government may be severely 'failing' and operating in exile for a while yet remain a recognised nation state. On the other hand, it shows how the 'quality' of governance from a human rights perspective does not have to be particularly good in order for the international recognition to endure.

However, the numerous examples highlighted by Talmon where the criterion of government and entering into relations with other states have been upheld are non-concordant to the situation of climate change-induced uninhabitability. Permanence is then a fact which cannot be disregarded. Hence, an alternative solution to meet the criterion of government has been suggested by the former president of Kiribati Anote Tong. His proposal is an establishment of

a small government outpost on Banaba Island, which is the highest point of Kiribati. This solution has not yet been practically tested (McAdam, 2010). Therefore, the suggestions of how to meet these Montevideo criteria are filled with question-marks. As will become evident in the following, it may not even be the most crucial basis for sinking states in the question of sovereignty nor for its people to keep their nationality.

### *3.2.3. Loss of population*

In the situation of a state sinking the migration of the population could be assumed to more or less occur in tandem with the administration's exile or repositioning. Therefore, the permanent population-criterion of the Montevideo Convention becomes central in this particular scenario and is not definitely solved through any constructions of tiny parliamentary stations on higher altitudes nor governments residing abroad. McAdam (2010) suggests that it could even be the absence of a permanent population which becomes the primary challenger of the sovereign nation state. Drawing back to what was discussed in chapter two, the sovereign nation state has indeed become a society of many; meaning that the people forming such society is crucial for the nation state's existence. What happens when the cells of the sovereign body abandon it? In case climate change alters living conditions so severely that human migration becomes necessary long before the sea covers the land, McAdam (2010) suggests that it is not the lack of territory nor government on site but the lack of habitants which could end statehood. Paradoxically, this would mean that the migration of the population from a sinking state would be what renders their nation state extinct.

International law provides no exact definition of how large a population ought to be in order to 'count' as a population (McAdam, 2010). For example, there were 12 581 people living in Tuvalu in 2019 (The World Bank, 2020). Furthermore, the requisite of 'permanent' is kept undefined and ambiguous. This may be illustrated by the fact that approximately 56.9 percent of all Samoans live outside of the Independent State of Samoa; meaning that not even the majority of a population ought to live permanently in the nation state in order for it to count as one (McAdam, 2010). However, in a sunken state or at least in a nation state so physically damaged due to sea-level rise that one cannot live there, the population size could be assumed to eventually turn close to zero. In such a situation, it would not be merely due to economic or social reasons a part, the majority or even the entire population leave the territory. The migration would then greatly and even fundamentally have to do with climate change, which

is also why there is an important theoretical distinction between climatic migration and other types of migration (though a practical distinction is perhaps not as easily made) (see e.g. Eckersley, 2015; Albrecht & Plewa, 2015). Although history is filled with examples of population transfers and forced migrations, resettlements due to sinking states remain a glooming issue of the future (see e.g. Ahmad, 2017). No modern nation state has had to transfer its entire people and empty itself of a permanent population. Yet, there are examples of when an entity perhaps does not meet the requirement of a permanent population but is still considered a nation state. A prominent case is the Vatican City. As emphasised by John R. Morss (2016), no one would become stateless if the Vatican City was to vanish or if one's citizenship from there would be terminated. This is because the population of the Vatican City is transient and mainly consists of employees, papal officials and their families. This illustrates how a place on Earth could in fact be considered a nation state even if it lacks a permanent population. However, one ought to remember how the Vatican City is a peculiarity in the international society. It somewhat seems to be the exception that proves the rule that nation states are expected to have permanent populations. Therefore, the answer to what happens to for example Marshallese nationals if the Marshall Islands were to sink is likely to differ to that of the Vatican City.

What I have sought to stress by going through the statehood criterion in the Montevideo Convention is that exceptions occur. There are examples of when it is questionable if the criterion of a permanent population is actually met in what nevertheless is considered to be a nation state. There are also situations where governance and diplomatic relations have sustained despite a lack of physical control over a territory. However, there are *no* historical examples of when a sovereign nation state has remained as such although it no longer consists of a physical territory where its population can reside. This could perhaps suggest that there cannot be a nation state if it lacks territory, but once again; there are no case studies substantiating such an answer. All of this leads to the conclusion that the futures of sinking states and their populations are extremely difficult to anticipate from dogmatic legal-, historical- or political perspectives. Evidentially, they do not provide abounding clues to whether or not states such as Marshall Islands and Tuvalu will remain recognised sovereign entities in 2100. In that way, one could say that the continuum of statehood as the sea level rises is somewhat of a loose cannon in international law. However, instead of searching in its treaties and articles I suggest that the clues lie at the heart of the social construction of the nation state:

### 3.3. Loss of a sovereign body

A nation state can be understood as somewhat of an imaginary person. Legal sources such as article 1 of the Montevideo Convention even use a language endorsing such understanding, as it refers to the nation state as a *person* of international law. As formulated by Philipp Jessup (UNSC, 1948), the presumption of the territorial state remains and stems from the social construction of the nation states as an organic figure; a personified entity. Going back to the discussion of the nation state hypothesised as being a living and breathing entity, the territory could therefore be described as its body (see e.g. Reus-Smith, 2001). Jessup underlines that this construction has made it impossible for us to contemplate nation states as incorporeal spirits (UNSC, 1948). Accordingly, the nation state without its body; i.e. its territory, is arguably 'dead'. While some legal scholars such as McAdam and Cournil (2010; 2011) put faith in the continued existence of nation states through unceasing recognition, the idea of territory as the embodiment of sovereignty challenges such convictions. A sunken state becomes a bodiless abstraction of what it once was. If we continue to use the metaphoric description of the nation state as a person, a complete lack of living cells (i.e. human beings) makes it impossible for such creature to survive. The international community may continue to recognise the uninhabitable nation state like one remembers a deceased friend. Still, the abilities of the vanished to participate, affect, resist, endorse, cooperate and be within the structure inevitably become limited if not even non-existent. According to this rationale, the sunken state once being an active albeit hypothesised agent is likely to become a ghost; continuing to exist merely as a historical and folkloristic 'once upon a time, there was a nation state called…'-example.

As phrased by Guattari (1989/2000) this does mean that it is not only species which are becoming extinct in what sometimes is referred to as the sixth mass extinction on the Earth (see e.g. National Geographic, 2019). Part of the three-dimensional space of soil, sea and air which brings materiality to the otherwise immaterial sovereign and which creates a legal and political space from where populations gain self-referential identities is about to vanish too (see Billé et. al, 2020; Kahn, 2014). As illustrated above, this space has been constructed as something sacred; a foundation for the collective imagination of the shared nation state society. Without such space and without any post-national reconstruction of what is thought to form a society, one may argue that the sunken or uninhabitable nation state means the end of its

statehood and the end of its ability to uphold the nationality of its subjects (see e.g Kahn, 2014). As emphasised by McAdam (2010) in international law, there is no room for a nationality to exist if the nation state does not.

# Chapter Four: Critical Considerations

## 4. *Soli, Sanguinis* & Sinking States

The previous chapter sought to highlight how the sacred, royal territorial sovereign may become dethroned and drowned by sea level rise. The fact that such a scenario is so likely to happen yet so unthought-of is what I argue to be a normative wound in international law. This wound also puts light to the existing legal vacuum regarding how to take care of the affected subjects. Therefore, *ius soli* and *ius sanguinis* will here be argued to be outgrowths and/or infections in that wound; meaning that the legal ways in which people keep or gain new nationalities necessitates the existence of territorial land. Without it, the principles become even more dysfunctional than they already are and the risk of statelessness consequently becomes even higher for those migrating due to climate change than for other migrants. To support this argument, a number of case studies will be briefly presented. These cases include the historical example of the devastation of the Bikini Atoll and the legal example of the Swedish Alien Act. Hence, this third and final chapter can be said to explore in closer detail the individual rights perspective and the critical junction between that perspective and the nation state perspective.

The proceeding discussion suggests that there are inherent contradictions between the nationality law principles and the right to a nationality particularly noticeable in the case of climatic statelessness. To support this argument, the chapter will give more room to the mainstream assumption of physical territory, explore how it permeates the principles and attempt to show how nationalities promised by the principles cannot endure without physical, sovereign land. This is perhaps also where my contribution to the ongoing conversation becomes most visible. The conflicting arrangement of the right to a nationality and the sovereign right trumping the former has been highlighted by scholars many times before me (see e.g. Edwards & Van Waas, 2014; Giustiniani, 2016; Owen, 2018). In the junction between the two we find the nationality law principles which are said to construct national citizens and to uphold individuals' right to belong to a nation state. By proposing that territorial landmass

is crucial for the functioning of the principles, I hope to bring novelty to the climatic statelessness-discussion.

### 4.1. The nationality law principles – life jackets or sinkers?

If I am being frank, Marshall Island will shed no tears from turning uninhabitable. It is not 'Marshall Island the abstraction' which needs to be saved and which poses the most pressing dilemma in this sinking state-discussion. Rather, I am concerned with what happens to the Marshallese, Tuvaluans or other populations who live on territories severely threatened by sea level rise. I have suggested that the sunken nation state is likely to cease to exist as a recognised sovereign entity in this currently very nation state-centred order. This ultimately means that there is a risk of entire populations turning stateless due to climate change, which gives reason to consider the ways in which they could uphold their right to nationality.

The international human rights doctrine suggests that there is an aspiration that people continue to have a nationality. From a human rights perspective, the question of the individual is even primary in relation to that of the sovereign state's continued existence. Yet, nowhere does it say *what* nationality the affected people ought to have; the old (uncertain and perhaps even extinct) one or a new one. Perceptibly, the latter alternative seems to be less of a riddle to solve since the Montevideo criteria will continue to be met by a large number of nation states albeit the predicted sea level rise. The proceeding argumentation will therefore be based upon the premise that a new nation state belonging is desirable over an inexistent one. Making such assumption is problematic for several reasons and cultural insensitivity may be one of the greatest. People from SIDS or other nation states threatened by climate change are not likely to voluntarily give up their nationality since the claim to nationality does not exist in a sociocultural void. There are many cultures in which the soil is considered spiritual and directly connected to the human itself, which is the case in many Pacific Island communities (see e.g. Kälin 2010; Oliver-Smith, 2013; Tabucanon, 2014). Making the assumption that they are better off with another nationality than their 'original' one may therefore be highly inappropriate from an individual perspective. However, it is perhaps also a valid assumption to make from the very same perspective if nationality is considered the key to a life in which as many of the human rights as possible are accessible and sustained. Because in contrast to the nation state which may subsist due to exemptions as illustrated above, Arendt (1951/2017) underlined that there is no such exception allowing people without a nationality to be treated equal to those

who have a national belonging. Instead, individuals without a nationality *become* the exception. It is with the intention to pinpoint options of avoiding such condition I make the assumption that having *a* nationality is currently better than having *no* nationality. That being said, a continuous conversation about sociocultural bonds to soil versus the perpetuation of the right to nationality would be an important and interesting advancement of the proposition made here.

For these reasons, the nationality law principles in place to prevent exceptional cases from arising become of major relevance. However, it is not only public international law nor the law of the sea which have been formed in an order where the physicality of territory has been taken for granted. Virtually all contemporary international law has been created within that order. As emphasised above; even human rights derive from and are finely knitted together with the notion of the sovereign and territorial nation state. Therefore, what will happen to those who may no longer be able to officially refer to themselves as 'Marshallese', 'Tuvaluan' or 'Maldivian' ought to be further investigated. *Ius soli* and *ius sanguinis* become highly relevant for this reason, since they could be said to be the 'keys' to national belonging and to the other human rights. Meanwhile, nation states have their right to adopt whichever of the principles they like. The trend is that individuals now ought to meet a growing number of conditions in order to receive the nationality promised by the principles (De Groot & Vink, 2018). In that way, climatic statelessness is no different from 'mainstream statelessness'; all people attempting to gain a nationality are challenged by principles which require people to meet specific qualifications relating to their past. What I argue makes climatic statelessness particularly challenging is that the ways to avoid statelessness are fewer, because going back is practically impossible yet the principles presuppose the existence of such option. Therefore, while war and oppression as social and mental forces have made millions of people stateless the 'new' environmental force of climate change puts light to another dimension of the issue. To clarify what I mean, I will begin by providing the reader with the case of Bikini Island:

#### *4.1.1. Case study: Bikini Island*

Although the resettlement of the Bikini population on the Bikini Atoll is perhaps not a clear-cut example of climate-induced uninhabitability due to sea level rise, it is still an important case study of environmental migration. The Bikini Atoll belonged to the Marshall Islands and its population was resettled in the mid 1940s because the US decided to make Bikini Island a nuclear testing site. After receiving the information that the island was going to be used for this

purpose, it took less than a month until the entire population of 167 people was moved. The majority was relocated to a US-constructed new village on the island Rongerik which later proved to be a resource-poor and infertile sandbank. Two years later, in 1948, the then nearly starved population was once again relocated to Kili. A third relocation was made in 1978 to Ejit Island. Returning to Bikini Island and the neighbouring islands was not an option as the former had been blown away by bombs such as 'Bravo'; a nuclear bomb 1000 times stronger than the one dropped on Hiroshima and the latter had become highly radioactive due to the testing. The radioactivity also forced the Rongelap, Banaban-, Utrik-, and Ailinginae populations to resettle on other islands (Tabucanon, 2014).

These forced migrations have now made the Bikinians and other Marshallese highly dependent on the US Government. Through several trust funds, compensation funds and agreements, the US has attempted to compensate the Marshallese population for the nuclear tests that destroyed their homes. For example, the Marshall Islands Compact of Free Association allows Marshallese to travel and live in the US without visa requirements. This has led many of the islanders and their descendants to move, work and study in the US (Gwynne, 2012). Some of them have even gained US nationality (Bloom, 2017). As the US adheres to *ius soli,* the children of Marshallese nationals born in the US gain a US nationality. However, the Marshallese nationals who have not been born in the US are highly dependent on the bilateral agreement since they are generally not considered US nationals as a consequence of the nationality laws. As the current Marshallese government is China-friendly, a growing fear is that the Compact will not be renewed in 2023 which would mean that the Marshallese living in the US would lose their legal status allowing them to remain in the US. This could force them back to Marshall Island where the threat of rising sea-levels is tangible (Rust, 2019). Since the Constitution of the Marshall Islands 1978 Art XI, s 1(2)(b) also puts an emphasis on the acquisition of nationality through *ius soli*, these people do not become stateless since their Marshallese nationality remains intact (see e.g. Dziedzic, 2020). This means that although the return to Marshall Island could pose serious issues to those acclimated to a life in the US, it would not render them stateless today. If Marshall Islands were to disappear under the ocean surface in the future however, a great uncertainty regarding their nationality arises. According to the US application of *ius soli*, they would not be considered US nationals and the US has no obligation to make them Americans (see Yamamoto & Esteban, 2014). Although they would have a Marshallese nationality according to the same principle, the absence of territory and habitants of Marshall Islands could mean that nationality from there will fade more or less

suddenly. Thus, the Marshallese are not only hanging by a thread due to the puzzling question of what happens to the sovereign Marshall Islands if its territory sinks. They also face great challenges because there are nationality law principles which are making them ineligible to gain a new nationality from another nation state to which they have developed social, cultural and economic ties.

The case of the Bikini Atoll is evidentially not perfectly fitting to that of the sinking state in the way it was blown away rather than gradually disappearing. In that way, perhaps more sudden yet climate change-induced events such as earthquakes, tsunamis or volcanic outbreaks are more closely comparable to the Bikini case. It does however highlight how the impossibility to return in combination with exclusionary nationality law principles are posing great challenges to the people forced on the move. In the following, I will elaborate further on how the principles are challenging the right to nationality rather than guaranteeing it.

#### *4.1.2. A watertight right? – the practical reality of nationality law and the Swedish Alien Act*

Scholars such as Perelló (2018) seemingly suggest that it was the introduction of *ius sanguinis* to the system of nationality law which made the number of stateless people in the world grow. Undoubtedly, when grounding nationality upon legal parental heritage it affects not only first generations but also generations to come (Yamamoto & Esteban, 2014). For those seeking refuge from a place they can never return to, such rule risks putting individuals into a Catch-22. Although stateless who have fled conflict and oppression also may have done so with a sense of impossibility of return, such impossibility is a matter of fact for populations from sunken states. However, the Bikini Island case illustrates that *ius soli* is not unproblematic from the perspective of climatic statelessness either. The principle becomes treacherous in several ways. Firstly, the 'soil' on which the principle is based upon is subject to international recognition. Perhaps even more so when that soil is no longer visible or inhabitable. Once such recognition fades, the nationality gained from such principle can be assumed to fade too. Secondly, the principle makes it difficult for individuals to 'start over' since it is based upon the situation one found oneself in at birth. While people in time may be able to naturalise into their new home states, they are not legally guaranteed to do so. The right to a nationality simply does not include the right to naturalise (Owen, 2018). Instead, the customary nationality law principles and the human right to a nationality are the only 'guarantees' there are. Yet while a

'clean' application of *ius soli* may assure future generations of climatic stateless to gain nationality, the trend of nation states adding *ius sanguinis*-elements to the mixture obstructs such function (De Groot & Vonk, 2018; Yamamoto & Esteban, 2014).

Translated to some sort of everyday reality, this means that people have to choose carefully where they are to seek shelter in order not to risk falling between the chairs and turn stateless. In a political climate where different versions of *ius soli* and *ius sanguinis* are proliferating and fluctuating, it is for obvious reasons very challenging to make informed and sustainable choices of where to go. Yet, focusing one's attention to individuals' undertakings to ensure themselves new nationalities may be inadequate. Regardless of how informed a Tuvaluan may be about the applicable nationality law principles in its intended nation state of refuge once Tuvalu becomes uninhabitable, the problem boils down to nation states not granting everyone nationalities anyways (Kingston, 2013). Although treaties such as the Stateless Conventions, the 1997 European Convention on Citizenship and other international human rights treaties refer to article 15 of the UDHR and oblige nation states to avoid creating statelessness, the application of the nationality law principles nevertheless enables nation states to be selective and more or less (in)directly create statelessness. Owen (2018) underlines how this represents a legitimacy problem in international law. The deprivation of political standing for individuals has become structural through the principles, which facilitate the absolute autonomy of nation states rather than the individual right to a nationality (De Groot & Vonk, 2018). While at first glance appearing like tools to uphold the right to nationality, *ius soli* and *ius sanguinis* rather function like smoke screens for exclusionary national legislations where the right to nationality is disrespected. The immigration laws of Sweden are suitable illustrations of this when it comes to climatic migrants specifically. In Sweden, the principle of *ius sanguinis* is in use. However, additional elements have been added to the *sanguinis*-mixture. Accordingly, it is not enough to have lived in Sweden the required amount of years to be considered descended from Sweden (for stateless people: four years), but one also needs to have obtained asylum. Although natural disasters are identified as valid reasons to apply and receive Swedish asylum, no one has ever been granted asylum for that reason under the Swedish Alien Act (*Utlänningslagen*, SFS 2005:716) (SOU 2020:54; Albrecht & Plewa, 2015). Moreover, a 'temporary' Swedish Alien Act (SFS 2016:752) now makes climatic migrants ineligible to receive asylum. This is because they are considered 'others in need of protection' rather than clear-cut refugees (Migrationsinfo, 2020). They are, to once again underline the refugee/stateless dichotomy, not a prioritised subject of protection in Sweden.

Whilst the Swedish temporary Alien Act from 2016 has been renewed (see SFS 2019:481) and evidently turns less and less temporary, the future of higher sea levels is sneaking closer and closer. Meanwhile, statelessness is not handled as a here-and-now-issue. Despite much research pointing towards exacerbating scenarios, climate change is not something handled acutely neither. In combination, we have the climatic stateless person; the neglected[2]. As the current Swedish usage of *ius sanguinis* suggests, Sweden is currently a pointless destination in case that person needs a new nationality. What is equally problematic is that the US usage of *ius soli* suggests the same. A conclusion which may be drawn from this is that no one's right to a nationality is watertight when these principles are continuously and unreflexively in use by nation states in the international community. Furthermore, it illustrates how the interweaving of the two normative elements of sovereignty and human rights are inherently contradictory in the modern discourse. It is, as phrased by Reus-Smith '[…] a discourse that seeks to justify territorial particularism on the grounds of ethical universalism' (2001:520).

### 4.2. Territorial particularism versus ethical universalism

As emphasised above, territory is fundamental to international law and to the construction of the nation state. One may even refer to it as its body; something making an otherwise abstract construction tangible. However, it is not only in relation to the question of statehood that territory matters. Migration and climate change are issues having clear territorial dimensions too; people migrate from one territory to another and climate change affects territories in different ways. This calls for a normative understanding and critical examination of territory and what role it plays in the construction of international law. More specifically, I am concerned with the role it plays for the human right to nationality and the nationality law principles. Yet, as underlined by Margaret Moore (2020) conceptualisations and justifications of territory remain relatively unmentioned in academia. In accordance with the Westphalian tradition, territory has been understood more as a historical product establishing sovereignty rather than a spatial and relative element.

The Westphalian way of conceiving territory has enabled the construction of territorial rights. As underlined by Avery Kolers (2009) this construction is deeply perplexing, since the rights-holder (the nation state) cannot be recognised independently of its rights. In other words; while a human being is a human being independently of it having rights or not (which the stateless is a demonstration of), a sovereign territory is identified through its territorial rights. Regardless

of such perplexity, the nation state and its territorial rights are powerful constructions which have remained rather unchallenged and have become established as common knowledge. Consequently, the puzzling rights and powers of the nation state now form our knowledge about the nation state itself (see e.g. Foucault, 1976/2008a; 1997/2008b). The most essential of nation states' entitlements may be the right of jurisdiction. The right to apply and make variations of *ius soli* and *ius sanguinis* become a clear manifestation of this. Yet, neither of these principles are applied in symbiosis with article 15 of the UDHR. Nation states like Sweden and the US seem to have found ways to create loopholes when it comes to both birth-right and blood-right and they are not alone. Millions of people have fallen short in meeting nation states' demands and ambiguous uses of the principles. This troublesome paradox may be defined as a fundamental clash between what Reus-Smith (2001) calls ethical universalism versus territorial particularity. Sylvain Kahn further describes such clash by emphasising how "[t]he territory considered as national is sacred, which makes the idea intolerable or very worrying that it can be populated by communities or individuals who are foreign to it" (2014:21). This is a worry which could be argued to stem from the notion that the population is an extension of the sovereign body (Foucault, 1975/2020; O'Manique 1990). No aliens may be allowed to enter it, because this could cause the nation state to stop functioning (see e.g Arendt, 1951/2017). As the reader might have noticed now, we have come back to the importance of critically engaging in concepts; some of which were described in chapter two. When the hypothesis of the artificial 'man' called the nation state risks invasion, the barricades of exclusionary domestic laws are raised.

International law and the human rights doctrine somewhat challenge the territorial particularity, as they inflict on the sovereign right to do precisely as one likes at all times. But they are both legal areas intertwined with the idea of nation state and when it comes to nationality law principles, the domestic autonomy is kept intact. This is evident in the way UDHR nor any other international legal source determine which nation state should uphold an individual's right to a nationality. Since the territorial right and the very idea of territory as the sovereign's body remain so powerful, "[t]he right [to a nationality] amount[s] to nothing more than an emphatic statement of principle without clear content" (Giustiniani, 2016:8). Thus, in the collision between ethical universalism and territorial particularity; the body of the individual versus the body of the nation state; David versus Goliath, the latter wins. The phenomenon of statelessness could be argued to overtly confirm this. In that sense, the nationality law principles could be seen as the bones of the territorial particularity. It keeps the body of the

nation state upright, as the principles are the ultimate legal tools of inclusion and exclusion. Undoubtedly, this outcome is desirable from a nation state perspective. Simultaneously it strips humans of their rights; humans which are the very constructors and re-constructors of the nation state itself. To make sense of this paradox, it may be helpful to apply Didier Bigo's metaphor of the Möbius strip (2002; 2018). We may then think of sovereign territory as constituting the strip. On one side of it, the hypothesised person called 'the nation state' stands. On the other side stand individuals who seek yet not meet the qualifications of nationality. Whereas one will conceive the strip as a source of rights, the other will experience it at a rights-depriver. Thus, while one gains rights through the established construction of territory, the other becomes rights(less). Although the International Bill of Human Rights in some instances obliges nation states to act in specific ways for the sake of the individual and consequently converts who is the rights(less), the stubborn avoidance to adopt uniform nationality rules grants nation states the right to exclude. Consequently, the idea of an inalienable, ethical universalism evanesces.

### 4.3. Territorial relativism and the forgotten ecology

Although territorial particularity is suggested to constitute a social construction outplaying the idea of ethical universalism, everything is brought to its head when one reconsiders territory itself. Since the conventional view of sovereign territory does not take into account the spatial relativity of landmass, climate change leading to a rise of the sea level poses a great problem to what international law seems to suggest is an invincible sovereign (see McAdam, 2010). In order to make sense of how territory is in fact an unfixed and multidimensional space, Harvey Starr (2005) suggests that we ought to revisit the mainstream understanding of it. The jurisprudential assumption of territory as an omnipresent entity is evidentially unsustainable in light of rising sea levels and should instead be acknowledged as just one of its many representations. Anthony Galton leaves it in clear wordings: '[e]verything I see on a map can be described as geographical information. It is obvious that such information comes in many different forms. Representing a town by pacing a small circle at a specific location on the map is quite different from showing the extent of woodland by colouring areas of the map green' (2001:173). Through these words, Galton puts light to the fact that even something so seemingly factual as earth itself has socially constructed dimensions and is filled with different meanings and representations. Simply put, territories are not given and neutral.

In a quote originally by Foucault but with the word 'state' exchanged with 'territory' Stuart Elden further illuminates how '[t]erritory is not a universal; Territory is not in itself an autonomous source of power. Territory is nothing else but the effect, the profile, the mobile shape of a perpetual territorialisation or territorialisations […] Territory is nothing else but the mobile effect of a regime of multiple governmentalities' (2013:18; Foucault, 2008:77). Thus, territory can be understood as multidimensional space continuously shaped by agents who speak of it, place circles on maps, exploit woodlands and unresponsively observe while some of the green parts on the maps turn blue. It is neither a passive gimmick of political struggle nor a static tool of political action. Instead, it is a construction continuously shaped by- and in itself shaping the order. This understanding of territory could also be argued to illustrate how the three ecologies of the social, mental and environmental described by Guattari (1989/2000) are interconnected. Accordingly, territory is not merely an objective and material entity. Rather, it is also a social and mental space in the way it constitutes the source of rights for both individuals and sovereigns, a home, a cultural place, a source of language production, a place of belonging and much more. However, it is also an environmental space. Since the environment is interconnected with the social and mental according to Guattari, this means that territory and its social and mental dimensions are inevitably also stimulated by forces of nature. In other words, territory (*soil*) is not merely a *social* construction tied to the nation state or the foundation for the nationality law principles. It is also environmental. This has to be kept in mind in order for any human notion to function long-term and in symphony with nature.

Nonetheless, the environmental ecology has evidentially been neglected in the construction of territory in international law and such neglect will eventually lead to significant problematiques. This does not only become evident when assessing the Montevideo Convention's criteria of what a nation state is, the UNCLOS provisions of how to divide the oceans nor the human right to return to a territory. Nation states' employment of nationality law principles making soil central and human rights entangled with it without the faintest suggestion of what to do when nature comes washing in is an example of this which ultimately jeopardises individuals access to other human rights. Possibly, it is the neglect of the entire environmental dimension of territory which so far has hindered legal scholars from making anything but guesstimates of what happens to a nation state and its nationals as the sea level rises. If territory was accepted not only as a space filled with *social* or *mental* ecologies or constructions such as nation states, human rights and principles but also as a space of environmental ecology prone to physical transformation, the sinking state would perhaps not

pose as great of an issue to international law. However, since depicting the nation state as something socially constructed and not static is a still ongoing project it seems to be even further away to establish a general acceptance of territorial relativism.

### 4.4. *Soli* without soil and a sustainable development of international law

While much of the previous critique of *ius soli* and *ius sanguinis* has emphasised how the principles have become tools for the sovereign rather than guarantors for individuals' right to a nationality (see e.g. De Groot & Vonk, 2018; Yamamoto & Esteban, 2014; Owen, 2018), a reflexive analysis of territory suggests there are more issues inherent to the principles than the clash between two rights subjects. The latter exhibits that there are inherent flaws in the mainstream understanding of what territory has been, is and may become. Since its spatial relativity exposed by climate change has not been taken into account in the construction of international law, the question is what may happen to a right based on soil (either one's own or one's parents) if the very soil itself proves to be inconstant. Conceivably, the principles could only function as a guarantor of nationality as long as territory remains a fixed entity where one can be born. Because as the Bikini case illustrates, the problem of applying *ius soli* only occurs when Marshall Islands is presumed to have sunken. Only then the grand confusion arises and the guesstimates begin. As the Swedish application of *ius sanguinis* and its additional requirements demonstrates, such laws create statelessness and thus violate international conventions first when the impossibility to return is a fact. Before the dramatic forecasted changes induced by climate change take place, the status quo is kept intact and the depiction of territory as a solid and corporal sovereign unit seemingly needs no reconsideration. Before lawyers, politicians and others acknowledge that there is an additional ecology outside human minds and lives which is playing on the very same field, *ius soli* and *ius sanguinis* can continue to make people stateless due to the reason that nation states have sovereign rights.

Evidentially, the principles are far from unproblematic even before introducing the post-structural proposition that territory is something more than plain land and even something more than a metaphoric depiction of a sovereign's body. The reader might now even ask what the value is of incorporating such an ostensibly unfathomable image of territory into the discussion. If territory is indeed nothing else but rootless outcomes of multiple governmentalities; both of social, mental and environmental nature, what is the point of theorising about it and how do we make use of it? Well, perhaps territory should not be made use of in the way it currently is.

Perhaps it should not be central to humans and their right to access other rights for the very reason that it is too complex and fuzzy. Territory is both far more and much less than the property of the nation state, a place of birth and a source of rights. If the human rights doctrine is to remain purposive in a changing climate, knitting the right to belong together with something else than soil is perhaps the most sustainable solution. Without a reconsideration of where to place the key to human rights instead of in territory, it will indeed '[…] not only [be] species that [become] extinct but also the words, phrases and gestures of human solidarity' (Guattari, 1989/2000:43-44). The grim condition of statelessness tells the tale about how these reconsiderations should be made *before* and not *after* states begin turning uninhabitable (see Biermann and Boas, 2010). Although some territorial nation states may soon be beyond saving, human solidarity should not necessarily have to be. However, the way in which human rights, territories and nation states have been intertwined in a process neither beginning nor ending with the Peace of Westphalia, the creation of United Nations or any other single event suggests that it is not enough to re-define nationality in an international covenant or by adding a paragraph to the Statelessness conventions. Rather, nature has begun calling for an entire restructuring of the current and becoming. If international law is to be sustainable seen from the entire spectra of ecologies affecting human life, it is going to have to adapt to winds of change, melting ice and rising seas. The nationality principles currently in place are highly counterproductive in relation to such aim, as they are some of the most nightmarish customs seen from a solidarity perspective yet possibly some of the most complex customs unlikely to change overnight. This is because they serve the purpose of the homogenous and territorial nation state; a perplexing artificial creature born and bred by humans beings themselves. Possibly, the answer therefore lies at the heart of the rights(less) is observing as the source of its rights; nation state territory. A post-national approach and the exchange of nationality as the enabler of other entitlements is perhaps the solution to this nightmare (see e.g. Habermas, 1995; Agamben, 2000: Tonkiss, 2017). After all, the nation state is a peculiar idea which could be replaced by another one, not only in theory.

Many stones are left unturned as the reader reaches the end of this paper. Nationality has multiple dimensions and many of them deserve more attention in research, from lawyers, politicians, organisations and other agents within the international society. Nationality's importance as an determinant of identity in migration law, the provider of a sense of belonging and the conservator of cultural legacies are for example important angles which have not been given attention here. The distinction between and meaning of *de jure* and *de facto* climatic

stateless in light of the nationality law principles has not been scrutinised either. Thus, sociocultural bonds, differences in positions among stateless and the multiple practical usages of nationality in diverse legal areas combined with this reading of *ius soli* and *ius sanguinis* are prospective paths to walk down. So are also alternative conceptions of territory, its substitutions in a changing climate and the unavoidable question of praxeological solutions to a large-scale future climatic statelessness. In other words, there is much more to explore regarding the perplexing, soil-centred 'nationality'.

### 4.5. Conclusion

Let us return to the world we imagined in the very beginning. What I have sought to underline throughout this paper is a number of notions and how they stand in relation to that world contra our one. Firstly, the autonomy of the nation state and human rights among people of the imagined world are ideas which have come to permeate international law here too. Whilst the ideal and sought-after outcome may be identical in both places, in this world we have come to fail in generating universality and equality among subjects. I have suggested that this has to do with the paradoxical nation state hypothesis and the inherent contradiction between territorial particularity and ethical universalism. Although there are countless of examples of alienation, inequality and disproportion exposing such failure, the focus here has been to accentuate how the application of nationality law principles in concoction with climate change create inequality and the condition of both place- and rightlessness. In other words, climatic statelessness illustrates how neither Earth's resources nor UDHR's provisions are distributed equally amongst everyone. The '*if* something were to happen to the climate-scenario' in the imaginary world has further been stressed as a '*when*-scenario' here due to the sea level rise. Even though larger industrial states emit substantially more carbon dioxide than SIDS, the latter are disproportionately affected by the climate change it generates. In the best of worlds, a loss of territory due to such changes would mean that these people could move freely elsewhere. The nationality law principles *ius soli* and *ius sanguinis* refutes that such freedom exists in this world. The principles are manifestations of how difference rather than sameness is maintained. As they unreflexively reference to *soil* as the key to access nationality, populations from SIDS on low altitudes are facing a future-unknown as their soils are beginning to vanish.

To summarise, the second chapter of this paper provided the reader with explanations of Western conceptualisations of the nation state, human rights and the ways constructed to access them. These have now become part of customary international law in the form of nationality

law principles. The chapter also described the phenomenon of statelessness and how inclusions and exclusions to the nation state due its construction have given room for statelessness to emerge. By highlighting these concepts and explaining them in closer detail, the research question of what concepts are intertwined with *ius* soli and *ius sanguinis* was answered. This legal and conceptual mapping was provided in order to underline how the international order is built upon social constructions rather than anything static, inalienable and universal although international law gives no hints of such relativeness. The third chapter continued to contradict any notions of perpetuity by presenting scientific evidence that the very territory to which nation states, human rights in general and nationality in specific have been tied to risk vanishing in the near future due to sea level rise. A subsequent question raised in the chapter was whether or not the current construction of the nation state could endure without territory, population and the other criteria in the Montevideo Convention which defines what a state is.

After exploring the legal-, historical- and political examples (or rather accentuating the lack thereof) of nation states enduring as such despite lacking inhabitable space, the image of territory as the sovereign's physical body and a revisit to the notion of the nation state as an artificial (hu)man suggested to the reader that the loss of territory would mean the loss of statehood in the contemporary and prevailing order. The fourth and last chapter then turned the attention to what may happen to the subjects of such nation state-no-more. The first part of the chapter provided the reader with the case study of the Bikini Island to illustrate how *ius soli* as a principle of nationality law is an uncertain source of nationality in the case Marshall Islands were to sink. A subsequent part suggested that *ius sanguinis* function very similarly and the example of the Swedish Alien Act was used to illustrate this. Both principles were described as becoming particularly troublesome for both the sinking nation state and the climatic migrant for several reasons. Firstly, they were underlined as being deeply intertwined with the nation state whose continued autonomy is highly questionable if it stops meeting the Montevideo criteria of territory. Secondly, they were argued to become problematic for the observable reason that the option of returning or referencing one's belonging to a physically present nation state would have become difficult if not even impossible. In the attempt of explaining where this dysfunction stems from and to advance the argument further, a post-structural reasoning concerning how territory may be understood brought light to its multidimensionality, relativity and the social-, mental- and environmental ecologies resting within it.

This revealed territory as highly complex and abstract despite its physical traits; although it historically and legally seems to have been perceived solely as a material given. *Ius soli* and *ius sanguinis* were argued to be clear manifestations of this unreflexive assumption, as they tie the very important (from both a nation state- and individual perspective) right to a nationality to physical soil exclusively. Since climate change makes territory's relativity increasingly tangible, I concluded the paper by suggesting that if human rights are to remain purposive it makes little sense to ignore the environmental spectra of human life in the construction of principles fundamental both the nation state and the individual as rights subjects. This argument took the reader back to what was discussed chapter two; where human rights and the nation state were argued to be intertwined. Consequently, the paper could be said to end where it also began. This hopefully elucidated the impossibility of detaching oneself from the structure one is in yet the importance of always attempting to do so. The climatic stateless person reminds us of why.

[…]
But as years go by
we wonder why
the shoreline is not the same.
The things we knew
as always true
somehow do not remain.
The breakers break on higher ground
the outer palms are falling down.
The taro pits begin to die
and the village elders wonder why.
[...]

(Resture, Kiribati, n.d.)

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**Allied Forces (Czechoslovak) Case**

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## Appendix 1 – Keywords

Citizenship
Climagrate
Climagration
Climate change
Climate migration
Climatic refugee
Environmental displacement
Extinct states
Hannah Arendt
Human right
Inalienable
Ius soli
Ius sanguinis
Kiribati
Nation state
Nationality
Nationality law
Nationality principles
Rightless
Sea level rise
Sinking states
Small Island Developing States
Sovereignty
Stateless
Statelessness
Tuvalu
Universality

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