NATIONALITY AND THE RIGHT TO ENTER: ASSESSING THE IMPACT OF REFUSAL OF ENTRY FOR THE PURPOSE OF STATELESSNESS DETERMINATION

CECILIA MANZOTTI*

This article considers the legal situation of migrants, including rejected asylum seekers, who are unable to enter what was, until then, regarded as their country of nationality. This is because that country, without explicitly disputing their nationality, either prohibits their entry or de facto prevents them from entering its territory by failing to issue travel documents or respond to requests for consular assistance for organising return. By examining the conceptualisation of nationality in international law on the one hand, and the international legal definition of a stateless person on the other hand, the article argues that the right to enter the territory of one's state is so essential to the concept of nationality that refusal of entry and denial of consular assistance for arranging return should be regarded as evidence that the state does not consider a person as its national. Based on this argument, the article further assesses the suitability of the United Nations High Commissioner for Refugees' guidance on statelessness determination in cases of direct or indirect denial of entry. Ultimately, this contribution aims to clarify the scope of the international legal definition of a stateless person by strongly grounding its interpretation in the conceptualisation of nationality in international law.

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* PhD candidate, School of Law, Politics and Sociology, University of Sussex, United Kingdom. E-mail: c.manzotti@sussex.ac.uk. I wish to thank my supervisors, Professor Nuno Ferreira and Dr Samantha Velluti, as well as the two anonymous reviewers, for their constructive feedback and suggestions.

I INTRODUCTION

The difficulties involved in the readmission of rejected asylum seekers and irregular migrants from Western countries to their countries of origin are well documented in policy documents, academic literature and non-governmental organisation ('NGO') reports.[1] In particular, the identification of migrants and the delivery of travel documents[2] is often described as a 'major challenge'.[3] According to a recent report of the European Court of Auditors, third countries (that is, countries that are not Member States of the European Union ('EU')) rarely confirm the migrant's nationality,[4] and even without openly questioning it, they 'do not often deliver the necessary travel documents or do not reply (on time or at all) to EU Member States' readmission requests'.[5] The Canada Border Services Agency reports that the migrant's or foreign government's lack of cooperation by failing to provide or issue travel documents represents approximately 60% of the impediments to the enforcement of a removal order.[6] Likewise, in Australia, the 'lack of international cooperation, primarily in verifying the identity of returnees and issuing travel documents' is a major obstacle to the return of irregular migrants and rejected asylum seekers to their country of origin.[7] These challenges, which arise regardless of whether a readmission agreement with the migrant's country of origin has been concluded or not,[8] mainly concern forced returns as compared to

1 Although the problem mainly concerns rejected asylum seekers and irregular migrants, regular migrants may also be prevented from repatriating by their putative country of nationality.

2 These include passports, as well as temporary or emergency travel documents (also called 'laissez-passer'), which are only valid for single use. See Maaike Vanderbruggen et al, *Point of No Return: The Futile Detention of Unreturnable Migrants* (Report, Flemish Refugee Action, January 2014) 17.

3 European Commission, *Communication from the Commission to the European Parliament and to the Council: EU Action Plan on Return* (Communication, No COM(2015) 453 final, 9 August 2015) 7. See also European Commission, *Enhancing Cooperation on Return and Readmission as Part of a Fair, Effective and Comprehensive EU Migration Policy* (Communication, No COM(2021) 56 final, 10 February 2021, 4; European Court of Auditors, *EU Readmission Cooperation with Third countries: Relevant Actions Yielded Limited Results* (Special Report, No 17, 2021) 14; European Migration Network, *Challenges and Practices for Establishing the Identity of Third-country Nationals in Migration Procedures* (Synthesis Report, December 2017); Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer Open 2016) 14; Tamás Molnár, 'EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 486, 500.

4 European Court of Auditors (n 3) 39.

5 Carrera (n 3) 14. See also European Court of Auditors (n 3) 38; Vanderbruggen et al (n 2) 17; London Detainee Support Group, *Detained Lives: The Real Cost of Indefinite Immigration Detention* (Report, January 2009) 13; Gregor Noll, 'Rejected Asylum Seekers: The Problem of Return' (Working Paper No 4, Centre for Documentation and Research, United Nations High Commissioner for Refugees ('UNHCR'), May 1999) 1, 3.

6 Canada Border Services Agency, 'Overview of the Removals Program', *Government of Canada, Canada Border Services Agency* (Web Page, 24 March 2021) <https://www.cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/pacp/2020-11-24/orp-vpr-eng.html#s5>, archived at <https://perma.cc/AG9C-787E>.

7 Neil Cuthbert and Jiyoung Song, 'Removal of Failed Asylum-Seekers in Australia: A Comparative Perspective' (Working Paper No 2, Migration and Border Policy Project, Lowy Institute for International Policy, March 2017) 6.

8 ibid.

voluntary returns,[9] as some countries refuse to cooperate in the removal of their nationals.[10]

In other regions of the world, rejected asylum seekers and migrants appear to face similar challenges in obtaining consular assistance to arrange their return. In Egypt and Morocco, for example, rejected asylum applicants are confronted with enormous difficulties in obtaining or renewing travel documents at their embassies,[11] and there is evidence that persons of Eritrean and Ethiopian origin encounter similar problems in other countries as well.[12] Sometimes, embassies refuse assistance outright; other times, they impose impossible conditions for the confirmation of nationality and the delivery of travel documents, such as requiring documents that the person can only obtain in their country of origin, to which they cannot travel without a passport.[13] Asylum seekers believe that their embassy's refusal to assist them is a way of punishing them for having sought asylum.[14]

Most of the time, asylum seekers and irregular migrants arrive in the host country without any valid identification or travel documents. Indeed, establishing their nationality status may prove difficult, especially if they have lived in several countries, were born to parents of one nationality but grew up and lived their entire life in another country, or have been affected by state succession.[15] Sometimes asylum seekers and migrants hold an expired passport of their country of origin or another document indicating their nationality bond with that country. Even in these circumstances, the country's consular authorities may still refuse or indefinitely delay renewing or issuing their passport, often without any explanation.[16] Without a permit to stay in the country where they reside and unable to return to their country of origin, 'unreturnable migrants' are trapped in limbo. Pending deportation, they are often detained.[17] Once they are released for being unable to obtain travel documents within the maximum legal period of detention, they remain in an irregular situation, are often prevented from accessing basic

9 The term 'forced return' is used hereafter to refer to a return that is based on a return decision of the host state, whether it occurs in voluntary or enforced compliance with the obligation to return. Conversely, the term 'voluntary return' is used in this article to refer to a person's return to their country of origin based on their free will. For the definitions of the terms 'forced return' and 'voluntary return' in the global context and in the European Union ('EU') context, see European Commission, 'European Migration Network Asylum and Migration Glossary*', Migration and Home Affairs* (Web Page) definition of 'Forced Return'; European Commission, 'European Migration Network Asylum and Migration Glossary', *Migration and Home Affairs* (Web Page) definition of 'Voluntary Return'.

10 Cuthbert and Song (n 7) 6; European Court of Auditors (n 3) 38–9; Vanderbruggen et al (n 2) 18–21.

11 Louise Thomas, 'Refugees and Asylum-Seekers from Mixed Eritrean-Ethiopian Families in Cairo. "The Son of a Snake Is a Snake"' (Report, Forced Migration and Refugee Studies (FMRS), American University of Cairo, June 2006) 20. See also Eirwen-Jane Pierrot, 'A Responsibility to Protect: UNHCR and Statelessness in Egypt' (Research Paper No 250, UNHCR Centre for Documentation and Research, January 2013) 8; Bronwen Manby, 'Preventing Statelessness Among Migrants and Refugees: Birth Registration and Consular Assistance in Egypt and Morocco' (Paper No 27, LSE Middle East Centre Paper Series, June 2019) 23.

12 Thomas (n 11) 21.

13 ibid 20.

14 Manby (n 11) 23.

15 In the EU context, see, eg, European Migration Network, *Challenges and Practices for Establishing the Identity of Third-country Nationals in Migration Procedures* (Synthesis Report, December 2017) 17.

16 Vanderbruggen et al (n 2) 12.

17 ibid 50.

rights, such as healthcare, work, education and housing, and face the constant threat of immigration detention.[18]

In the literature on statelessness, the condition and legal status of rejected asylum seekers and migrants whose putative country of nationality prevents them from repatriating are rarely examined and investigated in depth.[19] This article intends to address this gap by focusing on the situation of those individuals who are unable to return to, or enter for the first time, their putative country of nationality because that country, without explicitly disputing their nationality, either prohibits their entry or, as more commonly happens, de facto prevents them from entering its territory by failing to issue travel documents or respond to requests for consular assistance in organising voluntary or forced return. This article investigates whether, and to what extent, the fact of being denied entry, either directly or through failure to provide the necessary documents and assistance, may be relevant to determining whether the person holds the nationality of that country. In order to answer these questions, the article examines the way in which the notion of nationality has been conceptualised in international law on the one hand, and the international legal definition of a stateless person on the other hand. In particular, it investigates whether nationality as a concept of international law has a minimum content in terms of individual rights, whether this includes the right to enter and reside in the territory of one's state and the right to consular assistance, and what this implies when it comes to determining a person's nationality status. Ultimately, this contribution aims to clarify the scope of the international legal definition of a stateless person by strongly grounding its interpretation in the conceptualisation of nationality in international law. Throughout the article, the terms 'putative country of nationality' and 'putative national' are used to indicate that the person appears to meet the requirements for nationality under the country's nationality laws, and that until the point of failed state assistance or refusal of entry, there was no reason to doubt that they were nationals of that country. Sometimes these people will even hold a valid or an expired passport or an identification document indicating their nationality.

The article begins by examining how the existing literature on statelessness describes refusal of (re-)entry and denial of consular assistance for arranging return, including delivery of travel documents (Part II). Part III investigates whether nationality as a concept of international law implies any individual rights, and whether these include the right to enter and reside in the territory of one's state and the right to consular assistance. Based on the argument that the right to enter one's own country is inherent in the concept of nationality, Part IV examines the relevance of refusal of entry and denial of consular assistance for arranging return for the purposes of statelessness determination and assesses the suitability of the guidance on statelessness determination developed in this regard by the United Nations High Commissioner for Refugees ('UNHCR'), the United Nations ('UN') agency mandated to address statelessness worldwide. Finally, Part V recommends a progressive interpretation of the international legal definition of a stateless person that includes individuals whose putative country of nationality directly or indirectly prevents them from repatriating, in line with the wording of the definition, the conceptualisation of nationality in international law and the purpose

18 Vanderbruggen et al (n 2) 50–71.

19 As will be discussed in Part II, a few sources consider the situation of rejected asylum seekers and migrants whose putative country of nationality prevents them from repatriating, but do so only incidentally.

of the 1954 *Convention relating to the Status of Stateless Persons* ('*1954 Convention*').[20]

II Refusal of Entry into One's Putative Country of Nationality and Denial of Consular Assistance in Existing Literature

Few sources in the field of nationality and statelessness studies consider the situation and legal status of those who are denied travel documents and consular assistance by their putative country of nationality, and are therefore unable to repatriate. Within this limited literature, three approaches can be identified. The majority of sources describe persons who are denied consular assistance and prevented from entering their putative country of nationality as having an 'ineffective nationality' or being 'de facto stateless' if they do not possess any other nationality (Part II(A)). Others look at the denial of the right to enter one's own country as a human rights violation which does not compromise in any manner either the person's nationality status or the effectiveness of their nationality (Part II(B)). Finally, a tiny minority of scholars suggest that a state's denial of entry and consular assistance to a person who seems to meet the requirements for nationality may be evidence that, in fact, the state does not consider the person as a national (Part II(C)).

A *Ineffective Nationality and De Facto Statelessness*

In the literature on nationality and statelessness, persons who are refused entry to their country of nationality or who are denied travel documents by their consulate are generally described as having an 'ineffective nationality'.[21] If they do not hold any other nationality they are often labelled as 'de facto stateless'. Carol A Batchelor, for instance, includes 'persons who have the nationality of a country but are not allowed to enter or reside in that country' in the '"grey zone" of *de facto* statelessness'.[22] Similarly, Caroline Sawyer and Brad K Blitz define migrants who are unable to return to their country of origin because it refuses to admit them as 'effectively stateless'.[23] While being critical of the de jure–de facto statelessness dichotomy, the NGO Equal Rights Trust describes 'those who are in a foreign land and find themselves without consular protection' as de facto stateless.[24] The NGO refers, in particular, to the situation of individuals 'against whom removal proceedings are instigated, [who] remain non-deportable because their respective consulates do not issue them with travel documents' either because they do not believe that they are citizens of their countries or simply because of arbitrariness and inefficiency.[25]

Although the controversial term 'de facto stateless' has sometimes also been used to denote persons whose nationality is ineffective inside their country of

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20 *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('*1954 Convention*').

21 Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 170 [5.29].

22 Carol A Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1–2) *International Journal of Refugee Law* 156, 173.

23 Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press 2011) 7.

24 *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (Report, Equal Rights Trust, July 2010) 65 ('*Unravelling Anomaly*').

25 ibid.

nationality or whose nationality is undetermined,[26] in its traditional meaning it denotes persons who are outside their country of nationality and are unable — or, for valid reasons, unwilling — to avail themselves of that state's protection, including diplomatic and consular protection and assistance.[27] According to this traditional understanding of de facto statelessness, the inability to return to one's country of nationality is critical to the condition of de facto statelessness. The Conclusions adopted by a UNHCR expert meeting on the concept of stateless persons under international law, for instance, specify that in the definition of de facto statelessness protection refers to 'diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, *including in relation to return to the State of nationality*'.[28] Accordingly, the same document notes that a state's prolonged noncooperation in confirming a person's nationality and facilitating their return can constitute a refusal of protection in this context.[29] Examining the traditional definition of de facto statelessness, which he adopts, Hugh Massey characterises the inability to return to one's country of nationality as the distinctive element of de facto statelessness. In his own words:

> Persons who are unable to return to the country of their nationality will ... always be *de facto* stateless even if otherwise able in part or in full to avail themselves of protection in their host country. On the other hand, persons who are able to return to the country of their nationality are not *de facto* stateless, even if otherwise unable to avail themselves of any form of protection in the host country.[30]

Among those who describe migrants prevented from entering their putative country of nationality as de facto stateless, some claim that the definition of a stateless person contained in art 1(1) of the *1954 Convention* is too narrow, as it only covers persons who are not formally recognised as nationals by any country and leaves unprotected those who have a nationality which is nevertheless ineffective. The focus, they argue, should be on the person's concrete access to protection rather than on the mere possession of nationality.[31]

Although over the years and in different documents UNHCR has used the term de facto statelessness with several, and sometimes diverging, meanings,[32] in its 2014 *Handbook on Protection of Stateless Persons* ('*UNHCR Statelessness Handbook*') — which, albeit non-binding, remains the most authoritative and

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26 See, eg, ibid 56; Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (n 22) 172.

27 Hugh Massey, 'UNHCR and De Facto Statelessness' (Research Paper No 1, UNHCR Legal and Protection Policy Research Series, April 2010) 1–26. The traditional definition of de facto statelessness was endorsed by an expert meeting on the concept of stateless persons under international law convened by the United Nations High Commissioner for Refugees ('UNHCR') in 2010. See UNHCR, *Expert Meeting: The Concept of Stateless Persons under International Law* (Summary Conclusions, 27–8 May 2010) 6 ('Prato Conclusions').

28 'Prato Conclusions' (n 27) 6 (emphasis added).

29 ibid 7.

30 Massey (n 27) 65 (emphasis in original).

31 See especially Carol A Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7(2) *International Journal of Refugee Law* 232. See generally Lindsey N Kingston, 'Worthy of Rights: Statelessness as a Cause and Symptom of Marginalisation' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017); de Chickera, *Unravelling Anomaly* (n 25) 78–80.

32 Massey (n 27) 17–22.

influential guidance on statelessness determination[33] — it embraces the traditional definition of *de facto* statelessness.[34] Accordingly, it describes de facto stateless persons as devoid of diplomatic and consular protection of their country of nationality and unable to repatriate,[35] and specifies that they fall outside of the scope of the *1954 Convention*.[36] However, as will be discussed in Part IV, the *UNHCR Statelessness Handbook* is ambiguous regarding the condition of persons who are denied consular assistance, including the delivery of travel documents, at times suggesting that a state's failure to provide consular assistance and issue travel documents may be evidence of the fact that it does not consider the person as its national.

B *Violations of a National's Human Rights*

Several scholars refuse the category of de facto statelessness as illogical, useless and even detrimental to the identification and protection of stateless persons. They argue that, nationality being a legal concept, statelessness cannot but be a purely legal concept,[37] and maintain that if the international legal definition of a stateless person was properly interpreted, several of those who are generally labelled as de facto stateless would in fact be recognised as de jure stateless.[38] According to these scholars, the violations of a national's rights do not compromise by any means the person's nationality status or the effectiveness of their nationality, as the possession of nationality and the enjoyment of the rights generally accorded to nationals are two distinct issues.[39] Moreover, they argue, considering instances of human rights violations as evidence of de jure or de facto statelessness would water down the core object and purpose of the statelessness protection regime.[40] Therefore, within this approach, a state's refusal of entry and denial of consular assistance to a person who appears to meet the conditions for nationality are generally regarded as violations of a national's human rights , which, as any other human rights violations, do not undermine in any manner the person's nationality status.

Beyond the debate around the notion of de facto statelessness, an analogous view can be found in the field of refugee law, where the authorities' refusal to issue a passport to a national or to let them enter the territory of the state is generally regarded as either denial of protection, or persecution within the meaning of art 1(A)(2) of the 1951 *Convention relating to the Status of Refugees*

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33 UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) ('*UNHCR Statelessness Handbook*'). On the legal nature and force of the UNHCR Statelessness Handbook and other UNHCR guidelines, see, eg, Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 384–7.

34 *UNHCR Statelessness Handbook* (n 33) 5 [7], 44 [123]. At the same time, UNHCR notes that no international definition of the term exists.

35 ibid 58 [167].

36 ibid 44 [123], 58 [167].

37 Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (Institute of Jewish Affairs 1955) 1, 1; Alison Harvey, 'Statelessness: The "De Facto" Statelessness Debate' (2010) 24(3) *Journal of Immigration, Asylum and Nationality Law* 257, 257–58; Jason Tucker, 'Questioning de facto Statelessness by Looking at de facto Citizenship' (2014) 19(1–2) *Tilburg Law Review* 276, 282.

38 See, eg, Amal de Chickera and Laura van Waas, 'Unpacking Statelessness' in Tendayi Bloom, Katherine Tonkiss and Philip Cole (eds), *Understanding Statelessness* (Routledge 2017) 60.

39 ibid 59–60; Prato Conclusions (n 27) 2 [3]; Massey (n 27) 38.

40 ibid 61; Tucker (n 37) 282–4.

('*1951 Refugee Convention*').[41] The UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ('*UNHCR RSD Handbook*') point out that the 'refusal of a national passport or extension of its validity, or denial of admittance to the home territory … may constitute a refusal of protection within the [refugee] definition'.[42] Instead, according to James C Hathaway and Michelle Foster, the denial of the right to enter one's own country amounts to serious harm for the purposes of refugee status determination.[43] Referring to case law from various jurisdictions, Foster and Hélène Lambert argue that, under certain circumstances, either a direct or indirect denial of the right to enter and return to one's country of nationality, 'for example in the form of the discriminatory removal of identification documents', can constitute persecution for the purposes of refugee law.[44] If a nexus is established between the violation of the person's right to enter their own country and one or more of the reasons for persecution listed in art 1(A)(2) of the *1951 Refugee Convention*, then the person may qualify for refugee status.

C *De Jure Statelessness*

While most sources describe those who are prevented from returning to their putative country of nationality and denied consular assistance as nationals of that country, however effective their nationality may be, a small minority of scholars contend that a state's refusal to admit a person may in fact indicate that it does not consider them one of their nationals, within the meaning of art 1(1) of the *1954 Convention*. Investigating the content of the individual right to a nationality, Alice Edwards cautiously suggests that when 'a state denies an individual of the right to enter, re-enter and reside in its territory' this may 'be interpreted as that state effectively denying that the individual is its national'.[45] With similar prudence, Katia Bianchini puts forward that, 'if the rights to return and stay in the State of origin and international protection are ineffective, a finding of statelessness may be the appropriate solution'.[46] This flows from the fact that 'the right to return to and reside in the state's territory' and 'the right to receive international protection' — a term that the author appears to use to refer to both diplomatic and consular

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41 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

42 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/ENG/REV.4 (1979, Reissued 2019) [99].

43 James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 249–52.

44 Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019) 166, 170. See also ibid 170–3; Hélène Lambert, 'Stateless Refugees' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 805.

45 Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 41.

46 Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention Relating to the Status of Stateless Persons across EU States* (Brill Nijhoff 2018) 234 (emphasis omitted) ('*Protecting Stateless Persons*').

protection[47] — are the two essential functions of nationality in international law.[48] Considering the situation of 'a person in immigration detention whose country refuses to acknowledge that he is a citizen and does not cooperate with his removal', Amal de Chickera and Laura van Waas maintain that 'sustained denial of consular protection can be evidence of statelessness (and not merely de facto statelessness)'.[49]

It must be noted that, while claiming that the refusal of entry and denial of consular assistance, or 'international protection', may be evidence that the state does not consider the person as its national, these authors maintain that the violation of other human rights by a person's country of nationality does not compromise their nationality status. In other words, they embrace the approach illustrated in Part II(B) with regard to all human rights except for the right to enter and reside in one's own country, and the right to consular assistance. Regrettably, though, they do not elaborate on why the right to enter and reside in one's country of nationality, and the right to consular assistance would have a special role as compared to the other rights. Additionally, their thesis would benefit from some clarity around the notion of consular assistance and its actual content. In what follows, I endeavour to sharpen and strengthen the argument put forward by these scholars, elaborating on why the refusal of entry and, to a certain extent, the denial of consular assistance, should be regarded as evidence that a state does not consider, or no longer considers, a person as its national.

III THE CONTENT OF NATIONALITY AS A CONCEPT OF INTERNATIONAL LAW

The three approaches discussed in Part II rely on two different conceptions of nationality, although these are rarely made explicit or consciously adopted by the proponents of the three approaches. Those who consider a person who is prevented from entering their putative country of nationality and denied consular assistance as a national whose rights are violated, possibly to the point of making their nationality ineffective, regard the right to enter and reside in the state's territory and the right to consular assistance as generally attached to nationality, but not essential to it. Conversely, those who argue that refusal of entry and denial of consular assistance are evidence that the state does not consider the person as its

47 On the one hand, Bianchini considers the case of a person who is refused assistance to return to their state of origin by the country's national authorities, which would fall under the notion of consular assistance: see ibid 233. On the other hand, she refers to Paul Weis, who uses the term 'international protection' as a synonym of diplomatic protection: see ibid 233 n 153 citing Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff 1979) 6. See also Bianchini *Protecting Stateless Persons* (n 46) 43.

48 ibid 233 n 153.

49 de Chickera and van Waas, 'Unpacking Statelessness' (n 21) 62–3. The same scholars have previously described persons who are denied consular assistance by their putative country of nationality as de facto, and not de jure, stateless. As the main author of the already mentioned report 'Unravelling Anomaly' by the Equal Rights Trust, in 2010, de Chickera labelled those who are denied consular assistance as de facto stateless: see de Chickera, *Unravelling Anomaly* (n 24) 65–6. Although the report criticises the hierarchy between de jure and de facto statelessness and argues that all persons who suffer from an ineffective nationality should be regarded as stateless, it assumes that those who are denied consular assistance fall outside of the scope of art 1(1) of the *1954 Convention*: at 53, 80. Similarly, in 2014, van Waas described those who are outside their country of nationality and cannot invoke its diplomatic or consular protection as not stateless and situated them in a 'small grey area ... where the notion of "de facto statelessness" lingers': see Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 81.

national deem the right to enter and reside, and the right to consular assistance as inherent in the concept of nationality. This Part begins by critically examining these two conceptions of nationality and contextualising them within the broader debate on whether nationality implies any minimum content or, on the contrary, is an empty notion (Part III(A)). It then argues that the right to enter and reside is inherent in nationality as a concept of international law, as distinguished from citizenship as a notion that operates at the domestic level (Part III(B)), and that the delivery of travel documents and any other forms of consular assistance which are necessary for repatriation are an essential component of this right (Part III(C)).

A *The Individual Rights Usually Attached to Nationality: Accidental or Essential Attributes?*

As a legal concept, nationality refers to a legal and political bond between an individual and a state from which reciprocal rights and duties arise.[50] Although the term 'citizenship' is often used interchangeably with 'nationality', according to the traditional perspective of international law, the two terms are not synonyms. As Paul Weis points out in his seminal work, '[c]onceptually and linguistically, the terms "nationality" and "citizenship" emphasize two different aspects of the same notion: State membership. "Nationality" stresses the international, "citizenship" the national, municipal aspect.'[51] While nationality exists at the international level and identifies the individual's relationship with a state for the purposes of international law, citizenship operates at the domestic level, and can be defined as the sum of rights and duties of individuals attached to nationality under domestic law. Both nationality and citizenship are created by municipal law and, in the vast majority of cases, nationality follows from the possession of citizenship.[52] Although the distinction between nationality and citizenship is not always necessary or useful,[53] for the purposes of this article, which is concerned with the outward-looking dimension of the individual–state relationship, I consider it helpful to maintain the traditional distinction between the two terms. As will soon become apparent, this distinction is particularly relevant when it comes to the question of whether nationality implies any minimum content in terms of individual rights.

Two international functions, both pertaining to states, are traditionally attached to nationality: the state's right to exercise diplomatic protection and its duty to

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50 Article 2(a) of the *European Convention on Nationality* — the only multilateral legal instrument containing a definition of nationality — defines nationality as 'the legal bond between a person and a State': see *European Convention on Nationality*, opened for signature 6 November 1997, ETS No 166 (entered into force 1 March 2000). The Inter-American Court of Human Rights described nationality as 'the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state': see *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (*Advisory Opinion*) (Inter-American Court of Human Rights, Series A No 4, 19 January 1984) [35]. In the famous *Nottebohm* case of 1955, the International Court of Justice also defined nationality as a legal bond between an individual and a state and, more controversially, qualified this bond as 'having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties': *Nottebohm (Liechtenstein v Guatemala) Second Phase (Judgment)* [1955] ICJ Rep 4, 23.

51 Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff 1979) 4–5.

52 ibid 59. See also Barbara von Rütte, *The Human Right to Citizenship. Situating the Right to Citizenship within International and Regional Human Rights Law* (Brill Nijhoff 2022) 11–17.

53 Edwards (n 45) 14; Foster and Lambert (n 44) 54; Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 *The American Journal of International Law* 694, 717.

admit its nationals.[54] Under customary international law, diplomatic protection is the procedure by which the state of nationality of a person who suffered an internationally wrongful act seeks to secure the protection of that person and reparation.[55] Diplomatic protection is a right of the state, which it is free to exercise or not.[56] The state's duty to admit its nationals and to allow them to reside in its territory — also generally regarded as a principle of customary international law — corresponds to the state's right to expel aliens from its territory. This latter right flows from the personal and territorial supremacy of states and originates from the fact that a state's refusal to admit its nationals would create a burden on the international community.[57]

While traditionally the attributes of nationality were limited to states' rights and duties, with the development of international human rights law certain individual rights have come to be associated with the concept of nationality. In scholarly literature, the following rights are generally described as flowing from nationality:

- *The right to enter and reside in the state's territory:* this right, corresponding to the state's duty to admit its nationals, is widely viewed as an individual right which is typically attached to nationality.[58] This view is also reflected in the *UNHCR Statelessness Handbook*, which notes that 'at a minimum, such status [ie, nationality] will be associated with the right of entry, re-entry and residence in the State's territory'.[59]
- *The right to consular assistance or protection*:[60] several scholars regard consular assistance or consular protection as an individual right associated with nationality,[61] although it is often unclear what they mean by this term. In fact, the existence of a human right to consular assistance under customary international law and its actual content are controversial, as I will explain.[62]
- *The right to diplomatic protection*: sometimes diplomatic protection is also described as an individual right attached to the possession of nationality,[63]

54 Weis (n 51) 32–49.

55 International Law Commission, 'Draft Articles on Diplomatic Protection with Commentaries' (United Nations 2006) art 1; Chittharanjan F Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 25–26.

56 Amerasinghe (n 55) 26, 79–90. Under the domestic law of some countries, nationals have a right to diplomatic protection, but the state usually has discretion with regard to the extent and actual content of such protection. See Eileen Denza, 'Nationality and Diplomatic Protection' (2018) 65 *Netherlands International Law Review* 463, 467.

57 Weis (n 51) 46–7; HF van Panhuys, *The Role of Nationality in International Law. An Outline* (AW Sythoff 1959) 56; Kay Hailbronner, 'Readmission Agreements and the Obligation of States under International Law to Readmit Their Own and Foreign Nationals' (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 1, 12.

58 Weis (n 51) 45; Hailbronner (n 57) 2–5; Edwards (n 45) 41.

59 *UNHCR Statelessness Handbook* (n 33) 22 [53].

60 The terms 'consular assistance' and 'consular protection' are generally used interchangeably, and no real distinction is made between them: see International Organization for Migration, 'IML Information Note on Consular Assistance' (Information Note, August 2021) 5.

61 Edwards (n 45) 35; Bianchini, *Protecting Stateless Persons* (n 46) 232–33.

62 See below Part III(C).

63 Foster and Lambert (n 44) 209; Bianchini, *Protecting Stateless Persons* (n 46) 113.

although, as discussed, diplomatic protection is a right of the state, not of the individual.[64]

- *The right to political participation*[65] and *the right to social, economic and cultural advancement*:[66] these two rights are sometimes included in the list of rights typically associated with nationality, based on the fact that under international human rights law the right to vote, be elected and take part in the conduct of public affairs can be restricted to nationals[67] and states are allowed to differentiate between nationals and non-nationals when it comes to economic, social and cultural rights.[68] However, based on the distinction between nationality and citizenship just illustrated, it can be argued that the right to political participation, and economic, social and cultural rights pertain to *citizenship*, not *nationality*, since they are typically exercised at domestic level.

Ultimately, only the right to enter and reside in the territory of one's state and the right to consular assistance can be defined as attributes or consequences of nationality as a concept of international law. Indeed, both rights have an intrinsic extraterritorial nature as they concern the relationship between a state and its nationals when the latter are outside the state's territory.[69] Before looking closely at these two rights and their relationship with nationality, which I will do in the next two Parts, I consider the preliminary question of whether nationality implies a core minimum content in terms of individual rights.

While recognising that certain rights of the individual are generally attached to nationality to the point that it may be difficult to distinguish them from the very possession of nationality,[70] virtually all scholars consider these rights as typical consequences or attributes, rather than essential components, of nationality. Indeed, in the legal literature on nationality and statelessness, nationality is mostly understood as a purely empty notion. According to Gerard-René de Groot and Olivier Vonk, for example, 'nationality must be regarded as an "empty" notion, entailing no inherent rights or duties'.[71] Although nationality generally implies certain rights and duties for the individual both at the domestic and the

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64 The confusion may be explained by the fact that some scholars distinguish between a broad concept and a narrow concept of diplomatic protection, the former referring to 'any kind of protection by diplomatic officers of the national state, including consular assistance' and the latter being 'limited to the espousal of claims in international litigation'. However, as noted by Künzli, these definitions fail to acknowledge the fundamental differences between diplomatic protection and consular assistance: see Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 321, 336 ('Exercising Diplomatic Protection'). See also Denza (n 56) 466.

65 Edwards (n 45) 40; Laura van Waas, *Nationality Matters. Statelessness under International Law* (Intersentia 2008) 219.

66 Edwards (n 45) 40

67 *International Covenant on Civil and Political Rights* opened for signature 19 December 1966 999 UNTS 14668 (entered into force 23 March 1976) art 25 ('*ICCPR*').

68 *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(3) ('*ICESCR*').

69 On the intrinsic extraterritorial character of the right to enter, see, *HF and Others v France*, (European Court of Human Rights, Applications No 24384/19 and 44234/20, 14 September 2022) 67 [209].

70 Prato Conclusions (n 27) 2–3; Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* (Hart Publishing 2016) 44 [1.84] ('*Nationality and Statelessness*').

71 Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law. Texts, Cases and Materials* (Wolf Legal Publishers 2016) 35. See also van Panhuys (n 57) 25.

international level, these 'do not form an intrinsic part of the concept of nationality'.[72] Similarly, Eric Fripp maintains that 'insofar as nationality is created and maintained by municipal rather than international law', there is 'no uniform international standard' as to its minimum content.[73] Examining the notions of 'national' and 'without a nationality' in the international legal definition of a refugee, Foster and Lambert agree with Fripp that nationality does not need to be effective (ie, to guarantee certain minimum rights) in order for the person to be considered as a national for the purposes of refugee status determination.[74]

This position has also been embraced by UNHCR in its *Statelessness Handbook*, which states that: '[h]istorically, there does not appear to have been any requirement under international law for nationality to have a specific content in terms of rights of individuals, as opposed to it creating certain inter-State obligations.'[75] It follows that a person's level of enjoyment of rights is totally irrelevant for determining whether they are nationals of a certain country or not.[76] Along the same lines, the Summary Conclusions of the Expert Meeting on the Concept of Stateless Persons ('Prato Conclusions') distinguish between the question of whether a person holds a nationality and the question of whether this nationality is effective, and describe the second issue as not pertinent to the implementation of art 1(1) of the *1954 Convention*.[77] Most scholars agree with this position and accordingly consider the denial of the right to enter and reside in the territory of one's state and the refusal of consular assistance as general human rights violations to be addressed through the dedicated mechanisms, and, at worst, evidence that a person's nationality is ineffective, as previously discussed.[78] The only exception is represented by those few scholars, mentioned in Part II(C), who expressly claim or implicitly assume that the right to enter the territory of one's state and the right to consular assistance are so essential to the concept of nationality that the denial of entry and the refusal of consular assistance may be evidence that a person is not considered as a national by the state.[79]

The view that nationality is an empty notion and that the violation of the rights which are usually attached to it is irrelevant for determining a person's nationality status is generally supported by some or all of the following arguments:

1. In international law there is no consensus as to a minimum content of nationality in terms of individual rights.[80]
2. The rights considered attributes of nationality are sometimes extended to non-nationals, which shows that they are not inherent in the concept of nationality.[81]
3. The fact that certain stateless persons enjoy the rights usually attached to nationality does not make them nationals, as they still lack the legal bond of nationality which enables nationals, unlike stateless persons,

72 de Groot and Vonk (n 71) 37.
73 Fripp (n 70) 51 [1.102].
74 Foster and Lambert (n 44) 112. See also Fripp (n 70) 170 [5.29]–[5.30].
75 *UNHCR Statelessness Handbook* (n 33) 22 [53] n 37.
76 ibid 22 [53].
77 'Prato Conclusions' (n 27) 2. See also Massey (n 27) 38.
78 See Parts II(A), II(B).
79 See Bianchini, *Protecting Stateless Persons* (n 46) 44–45.
80 Fripp (n 70) 51–2 [1.102]–[1.103]; Katia Bianchini, 'The "Stateless Person" Definition in Selected EU Member States: Variations of Interpretation and Application' (2017) 36 *Refugee Survey Quarterly* 81, 88.
81 de Groot and Vonk (n 71) 36.

to challenge possible violations of their rights. Likewise, a national who is denied the rights usually associated with nationality remains nevertheless a national of that country.[82]

4. The rights usually attached to nationality 'do not ensue from the *nature* of nationality, but follow from the *decision* to attach these consequences to nationality and not, for example, to place of residence'.[83]
5. Considering some individual rights as essential to the concept of nationality would encourage 'the notion that by treating a person badly enough a State can rid itself of responsibility for that person'.[84]

With regard to argument 1, in Part III(B) I show that in international law the right to enter and reside in the territory of one's state is deemed as intimately connected to the possession of nationality, although it is not restricted to nationals. As for consular assistance, the other right which is usually regarded as flowing from nationality, in Part III(C), I will discuss whether and to what extent it can be considered as a right inherent in nationality.

Argument 2 has been raised, in particular, in relation to the right to vote, which in some countries has been extended to resident non-nationals at the local level, but can also be applied to the right to enter and reside in the state's territory, since this right is not limited to nationals.[85] This argument is based on a logical fallacy in my view. The fact that certain rights may also flow from conditions other than nationality, such as residency, does not mean that they are not inherent in nationality. An attribute can be inherent in a certain notion and at the same time be common to other notions. What differentiates nationals and non-nationals — who both have the right to enter and reside in their own country — is that in the case of nationals, their right is based on the legal bond of nationality, while in the case of non-nationals, the same right arises from other relevant links they possess with the country.

This leads me to argument 3, according to which labelling nationals whose country of nationality denies them the rights usually attached to nationality as de facto or de jure stateless disregards 'the centrality of the legal bond of nationality', which allows nationals whose rights are violated, unlike stateless persons, to challenge these violations through specific human rights laws and mechanisms. This argument seems to assume that, for those who consider certain rights so essential to nationality that their violation is evidence that the person is not a national, nationality is only established through respect for these rights. In contrast, I maintain that nationality requires both the existence of a formal legal bond between the individual and the state, and the enjoyment of the right or rights inherent in it. If only one of the two elements is present, the person cannot be considered a national of that country.

As for argument 4, defining certain rights as essential attributes of nationality does not mean claiming that they belong to the *nature* of nationality, understood as a sort of metaphysical entity which would exist independently of the human process of law-making, as this objection seems to suggest. As all other concepts and rules of international law, nationality is a human construct and as such it could be conceived differently. Nevertheless, the fact that certain rights usually

82 Tucker (n 37) 278.
83 de Groot and Vonk (n 71) 37 (emphasis added).
84 Harvey (n 37) 260. See also ibid 262–63.
85 See Part III(B).

associated with nationality could have been made dependent on other criteria does not undermine their being essential attributes of the concept of nationality *as this concept has come to be conceived in international law*. At the same time, the nature of nationality as the legal bond between the individual and the state is not totally irrelevant to understanding its intimate relationship with the right to enter and reside in the state's territory, as I argue in the next Part.

Finally, in response to argument 5, I maintain that there is no proof that recognising those who are denied the rights usually associated with nationality as stateless would encourage their countries of nationality to renounce their responsibilities towards them. Moreover, the same objection could also be directed to the refugee protection regime, arguing that granting international protection to those who flee persecution in their countries of origin encourages the latter to avoid their responsibilities towards these persons. However, in both cases the protection of the individual is paramount and should have priority over any other considerations.

Having demonstrated that there are no reasons to refuse the idea that certain rights are inherent in the concept of nationality, in the next two Parts I look specifically at the right to enter and reside in the state's territory and the right to consular assistance, and their relationship with nationality as a concept of international law.

B *The Right to Enter One's Country of Nationality*

The right to enter and reside in one's own country, together with the right to leave any country, including one's own, is codified in a number of general universal and regional human rights treaties. These include the *Universal Declaration of Human Rights* ('*UDHR*'),[86] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[87] *Protocol No 4 to the European Convention on Human Rights*,[88] the *American Convention on Human Rights* ('*American Convention*'),[89] and the *African Charter on Human and Peoples' Rights* ('*African Charter*').[90] Additionally, several specialised human rights treaties, including the *International Convention on the Elimination of All Forms of Racial Discrimination*,[91] the *International Convention on the Rights of the Child*,[92] and the *International Convention on the Rights of Migrant Workers and their Families* ('*ICRMW*'),[93]

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86 *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (10 December 1948) ('*UDHR*') art 13.

87 *ICCPR* (n 67) art 12.

88 *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto*, opened for signature 16 September 1963, ETS No 46 (entered into force 2 May 1968) art 3 ('*Protocol No 4'*).

89 *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 19 July 1978) art 22 ('*American Convention*').

90 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 12 ('*African Charter*').

91 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(i)-(ii) ('*ICERD*').

92 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 10(2) ('*CRC*').

93 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 8 ('*ICRMW*').

restate the right to leave and enter one's own country within their specific scope of application.

This right is formulated slightly differently in the various treaties. In particular, while the *UDHR* refers to the right to *return* to one's own country, the almost universally ratified *ICCPR* and most of the other human rights instruments proclaim the right to *enter* one's own country, making it clear that the right also applies to those who were born outside the country and who have never lived therein.[94] Moreover, *Protocol No 4 to the European Convention on Human Rights*[95] and the *American Convention*[96] circumscribe the right to *nationals* vis-à-vis their *country of nationality*, whereas the other instruments refer more generally to *everyone's* right to enter *their own country*.[97] Commenting on art 12 of the *ICCPR*, the Human Rights Committee has clarified that the scope of 'one's own country' is broader than 'one's country of nationality' and encompasses all those who have special ties with the country. Accordingly, the right may also apply to individuals who have been deprived of their nationality in violation of international law and long-term residents, including stateless persons who have been arbitrarily deprived of the right to acquire the nationality of the country.[98] In practice, though, the legal status of nationality largely remains 'the key to admission and the right to reside in the state's territory'.[99]

While the *UDHR*, the *American Convention* and *Protocol No 4 to the European Convention on Human Rights* assert the right to return in absolute terms, art 12(3) of the *ICCPR* proclaims that '[n]o one shall be *arbitrarily* deprived of the right to enter his own country'.[100] The meaning of 'arbitrarily' has been expounded by the Human Rights Committee in *CCPR General Comment No 27*, which explains that 'the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.'[101] The Committee also notes that, ultimately, 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[102]

The right to enter one's country of nationality is also codified in the constitutions of several countries, directly or indirectly recognised in other sources

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94 UN Human Rights Committee, *General Comment No 27: Freedom of Movement (article 12)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19] ('*General Comment No 27*').

95 *Protocol No 4* (n 88) art 3(2): 'No one shall be deprived of the right to enter the territory of the State of which he is a national.'

96 'No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it': *American Convention* (n 89) art 22(5).

97 See, eg, *ICCPR* (n 67) art 12(4); *UDHR* (n 86) art 13(2); *African Charter* (n 90) art 12(2); *ICERD* (n 91) art 5(d)(ii); *CRC* (n 92) art 10(2); *ICRMW* (n 93) art 8(2).

98 *General Comment No 27*, UN Doc CCPR/C/21/Rev.1/Add.9 (n 94) 6 [20].

99 Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 18. See also ibid 15–21; Hailbronner (n 57) 3; Eric Fripp, 'Statelessness, Inability or Unwillingness to Return, and the "Country of His Former Habitual Residence" as the Country of Reference for the Purposes of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees' (2022) 34 *International Journal of Refugee Law* 327, 331 .

100 *ICCPR* (n 67) art 12(3)(emphasis added).

101 *General Comment No 27*, UN Doc *CCPR/C/21/Rev.1/Add.*9 (n 94) 6 [21].

102 ibid.

of domestic law and generally confirmed by state practice.[103] Furthermore, across UN documents and scholarly literature, the right to enter is described as a fundamental right of nationals.[104] Originally resulting from the state's duty to admit its nationals, which is widely considered as a rule of customary international law,[105] the individual's right to enter one's country of nationality is now commonly regarded as customary international law in itself,[106] and sometimes even as a rule of *jus cogens*.[107]

Importantly, scholars often describe the right to enter the state's territory as deeply connected with, or even inherent in, the concept of nationality under international law. In contrast with those who see nationality as a purely formal concept, Weis claims that nationality implies the state's duty to admit its nationals and the corresponding individual right to enter the state's territory.[108] According to Hurst Hannum, '[o]ne of the functions *inherent* in the concept of nationality is the right to settle and to reside in the territory of the State of nationality'.[109] In 1988, in a study on '[t]he right of everyone to leave any country, including his own, and to return to his country', the Human Rights Commission described the obligation of a state to grant residence to its nationals —and therefore to let them enter its territory in the first place — as '*inherent* in the concept of nationality'.[110] Similarly, John Quigley regards 'the right to inhabit the territory of the State of nationality' as a constitutive aspect of nationality, and explains that '[a]n individual's connection to his or her place of origin has long found protection in law. The link is manifested in the notion of nationality, which is basic to the legal protection of the individual.'[111] As already mentioned, Bianchini describes the right to enter, re-enter and reside in the state's territory as one of the essential functions of nationality in international law,[112] and Edwards defines it 'as the

103 UN Commission on Human Rights, *Analysis of the Current Trends and Developments regarding the Right to Leave Any Country Including One's Own, and to Return to One's Own Country, and Some Other Rights or Considerations Arising Therefrom: Final Report Prepared by CLC Mubanga-Chipoya*, UN Doc E/CN.4/Sub.2/1988/35 (20 June 1988) [201]–[233] ('*Analysis of the Current Trends and Developments*'); John Quigley, 'Mass Displacement and the Individual Right of Return' (1997) 68 *British Yearbook of International Law* 65, 69–70; Hailbronner (n 57) 5; Rosalyn Higgins, 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' in Rosalyn Higgins (ed) *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, (Oxford University Press 2009) vol 1, 447.

104 See, eg, *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) [26]; *New York Declaration for Refugees and Migrants*, GA Res 71/1, UN Doc A/RES/71/1 (3 October 2016, adopted 19 September 2016) 8–9 [42]; Sander Agterhuis, 'The Right to Return and Its Practical Application' (2005) 58(1) *Revue Hellénique de Droit International* 165, 165–69; Weis (n 51) 45–47.

105 *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) [116]; Weis (n 51) 45–46; Hailbronner (n 57) 2–5.

106 Quigley (n 103) 70; Hurst Hannum, *The Right to Leave and Return in International Law and Practice* (Martinus Nijhoff 1987) 60; *Yvonne van Duyn v Home Office* (European Court of Justice, Case No C-41/74, 4 December 1974) 1351 [22]; Chetail (n 33) 163–64; William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 254.

107 Agterhuis (n 104) 171.

108 Weis (n 51) 45, 59–60. See also Quigley (n 103) 68.

109 Hannum (n 106) 60 (emphasis added).

110 *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) [116] (emphasis added).

111 Quigley (n 103) 67.

112 Bianchini, *Protecting Stateless Persons* (n 46) 233 n 153, 234.

essence of nationality as a matter of public international law'.[113] Along the same lines, in *Serrano Sáenz v Ecuador*, a case concerning a national of Ecuador and the United States ('US'), the Inter-American Commission of Human Rights defined 'the right to remain ... and not be deported' as 'an elemental right *inherent* to nationality'.[114] In what remains an isolated judgment, the Commission went as far as to find that Ecuador had violated the claimant's right to nationality by deporting him to the US in violation of extradition procedures.[115]

Indeed, the individual's right to enter and reside in the state's territory is so inherently associated with nationality that, when confronted with their duty to admit their nationals, states generally do not question their obligation to do so, but either dispute, fail to confirm or revoke the person's nationality.[116] However, under international law, a state cannot defeat its duty to admit its nationals and its nationals' right to enter by revoking their nationality.[117] By doing so, it would violate other states' right to expel aliens, and the principle, provided for in most human rights instruments, that a state cannot engage in acts aimed at the destruction of any recognised individual rights and freedoms.[118] Therefore, when the purpose or primary effect of denationalisation is to prevent the person from returning to their country, the revocation of nationality is illegal under international law and the denationalising state is still under the obligation to admit the person to its territory.[119]

To be sure, it is not by chance that such a deep connection exists between the right to enter and reside in the state's territory, and nationality. If territory is one of the constitutive elements of a state,[120] nationality, being a legal bond between the individual and the state, cannot but imply a special connection between the individual and the state's territory. As noted by Gabor Gyulai, '[u]nlike any other right, the entitlement to reside on the national territory ... is indispensable for a nationality to exist as such. All persons need a physical space to live ... therefore if this is denied, nationality cannot even fulfil its most basic role and becomes illusory.'[121] More fundamentally, it can be argued that:

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113 Edwards (n 45) 41 (emphasis added). See also von Rütte (n 52) 337.

114 *Nelson Iván Serrano Sáenz v Ecuador* (Inter-American Court of Human Rights, Report No 84/09, Case 12.525, 4 August 2009) [67] (emphasis added).

115 ibid.

116 Hailbronner (n 57) 5–6; Carrera (n 3) 48; José D Inglés, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country*, UN Doc E/CN.4/Sub.2/220/Rev.1 (1963) 57 ('*Study of Discrimination*'); Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Brill 2009) vol 16, 34.

117 Quigley (n 103) 73–75.

118 Hannum (n 106) 63.

119 *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) [116]; European Court of Human Rights, *Guide on Article 3 of Protocol No 4 of the European Convention on Human Rights: Prohibition of Expulsion of Nationals'* (Guide, 30 November 2022) 8 [19]; *Naumov v Albania* (European Court of Human Rights, Chamber, Application No 10513/03, 4 January 2005) 8.

120 *Convention on the Rights and Duties of States Adopted by the Seventh International Conference of American States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1.

121 Gabor Gyulai, 'Should Nationality Have a "Minimum Content"? — Italian Supreme Court Passes Landmark Decision', *European Network on Statelessness* (Blog Post, 19 September 2014) <https://www.statelessness.eu/updates/blog/should-nationality-have-minimum-content-italian-supreme-court-passes-landmark-decision>, archived at <https://perma.cc/Y8DP-TXBF>.

> if it is accepted that men have a right to travel, as distinct from a right to settle, then it follows that men must needs have a right of domicile in some place to which they can return. ... This is why the natural right to movement is logically connected with the natural right to what we nowadays speak of as 'nationality'.[122]

Those who oppose the view that the right to enter the state's territory is essential to the concept of nationality often refer to the case of the United Kingdom ('UK'), whose nationality law provides for different categories of nationals, of which only British citizens hold the automatic right to enter and live in the UK.[123] The fact that several categories of British nationals do not have the right to freely enter and reside in the country, and are subject to immigration controls like foreigners would refute the point that the right to enter and reside in the state's territory belongs to the essence of nationality.[124] However, the case of the UK is an exception, and as such it does not appear to be sufficient to disprove the statement that nationality implies the right to enter and reside in the state's territory, which reflects the reality in virtually all other countries of the world and is widely accepted in legal doctrine. Furthermore, *at the international level* the status and rights of British nationals who do not have the automatic right of abode in the country under British nationality law are anything but clear. On the one hand, they are not necessarily regarded as nationals of the UK by other countries. The EU, for example, does not consider British nationals who are not British citizens as nationals of the UK.[125] On the other hand, as noted by Rosalyn Higgins, 'whether a passport entitles the holder to claim a right of entry *under international law* is debated. Some would claim that it does. The United Kingdom believes otherwise.'[126]

In sum, a significant body of opinion and state practice corroborates the view that the right to enter and reside in the state's territory is an essential attribute of the concept of nationality under international law. It is therefore surprising that few scholars have suggested that the state's refusal to admit an individual, unlike general human rights violations, should be regarded as evidence that it does not consider them as its national. Before developing this argument, Part III(C) clarifies the content of the other individual right generally regarded as flowing from nationality, the right to consular assistance, and investigates its relationship with nationality and the right to enter.

C *The Right to Consular Assistance*

In the legal literature on nationality and statelessness, the notion of consular assistance is sometimes confused or assimilated with diplomatic protection and its content is often unclear. Although the existence of the legal bond of nationality

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122 Maurice Cranston, 'The Political and Philosophical Aspects of the Right to Leave and to Return' in Karel Vasak and Sidney Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–21 June 1972* (American Jewish Committee 1976) 28. See also Kesby (n 99) 16–21.

123 *Immigration Act 1971* s 2(1), as amended by *British Nationality Act 1981* s 39(2) (United Kingdom) ('*BNA*'). Categories of British Nationality are enumerated in the *BNA*: see, eg, pt I (British Citizenship), pt II (British Overseas Territories Citizenship), pt III (British Overseas Citizenship), pt IV (British Subjects) and pt V, s 38 (British Protected Persons).

124 de Groot and Vonk (n 71) 36; Harvey (n 37) 260. See also *UNHCR Statelessness Handbook* (n 33) 22 [53].

125 'Types of British Nationality', *GOV.UK* (Web Page, 22 January 2014) <https://www.gov.uk/types-of-british-nationality/british-national-overseas>, archived at <https://perma.cc/CQ99-CNUR>. See *R (Manjit Kaur) v Secretary of State for the Home Department* (European Court of Justice, Case No C-192/99, 20 February 2001) [10].

126 Higgins (n 103) 445–46 (emphasis in original).

between the individual and the state is generally a necessary condition for the exercise of both diplomatic protection and consular assistance by the state,[127] the two functions differ in several respects. First, diplomatic protection is an inter-state intervention, that is, diplomatic officials or government representatives act on behalf of the state to defend its interests before the authorities of another state, whereas consular protection is provided by consuls who act on behalf of a national.[128] Second, while diplomatic protection is a remedial measure that is exercised when a violation of international law has occurred, consular assistance is largely preventive.[129] Third, and most importantly for the purposes of this article, under international law, consular assistance is a right of both the state and the individual, whereas diplomatic protection is only a right of the state. As such, diplomatic protection is irrelevant to the present analysis, which is concerned with the individual rights inherent in the concept of nationality.

Consular assistance is 'the aid provided by the consular or diplomatic agents of a State to its nationals abroad'.[130] Details about the actual content of this aid are provided in art 5 of the *Vienna Convention on Consular Relations* ('*VCCR*'),[131] which lists the consular functions permitted under international law.[132] Typically, consular assistance of nationals abroad consists of registering births and other civil acts, issuing and renewing identity and travel documents, arranging for legal representation in case of arrest, detention or expulsion, and facilitating evacuation in case of emergency.[133] Under the *VCCR*, consular assistance is primarily a right of sending states. They have the right to be informed if one of their nationals is arrested or detained in the receiving state, to communicate with and visit their nationals, and to assist them in conformity with their consular functions.[134] However, sending states are under no obligation to provide consular assistance to their nationals and are free to decide how to assist them.[135] As for individuals, the *VCCR* only provides that they have the right to communicate with, and have access to, the consular officers of their country of nationality,[136] and have these notified in case they are arrested or detained.[137]

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127 Annemarieke Vermeer-Künzli, 'Diplomatic Protection and Consular Assistance of Migrants' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 279 ('Diplomatic Protection and Consular Assistance of Migrants').

128 International Law Commission (n 55) 28; International Organization for Migration (n 60) 5–6, 20; Künzli, 'Exercising Diplomatic Protection' (n 64) 333–35; Vermeer-Künzli, 'Diplomatic Protection and Consular Assistance of Migrants' (n 127) 266.

129 International Law Commission (n 55) 28; International Organization for Migration (n 60) 20; Künzli, 'Exercising Diplomatic Protection' (n 64) 332, 336; Vermeer-Künzli, 'Diplomatic Protection and Consular Assistance of Migrants' (n 127) 266.

130 International Organization for Migration (n 60) 3.

131 *Vienna Convention on Consular Relations*, opened for signature 22 April 1963, 596 UNTS 261 (entered into force 19 March 1967) ('*VCCR*').

132 The list is not exhaustive since the last provision of art 5 provides that consular functions may consist of 'performing any other functions entrusted to a consular post by the sending State': ibid art 5(m).

133 International Organization for Migration (n 60) 3.

134 *VCCR* (n 131) art 36.

135 International Organization for Migration (n 60) 7; Stefanie Grant, 'Consular Protection, Legal Identity and Migrants' Rights: Time for Convergence?', *LSE Blog* (Blog Post, 17 May 2019) <https://blogs.lse.ac.uk/mec/2019/05/17/consular-protection-legal-identity-and-migrants-rights-time-for-convergence>, archived at <https://perma.cc/MZ5B-XVYA>.

136 *VCCR* (n 131) art 36(1)(a).

137 ibid art 36(1)(b); Vermeer-Künzli, 'Diplomatic Protection and Consular Assistance of Migrants' (n 127) 275.

Conversely, a proper individual right to *receive* consular assistance can be found in the *ICRMW*,[138] which nevertheless remains poorly ratified and acceded to, unlike the *VCCR*. Under art 23 of the *ICRMW*, migrant workers and their families are entitled to consular protection and assistance whenever their rights enshrined in the Convention are compromised. Moreover, art 16(7) provides that in case of arrest or detention, they have the right to communicate with the consular or diplomatic authorities of their country of origin[139] and to make arrangements with them for their legal representation.[140]

The nature of the right to consular assistance and its actual content under customary international law remains controversial. In the *LaGrand* case, the International Court of Justice ('ICJ') made it clear that, despite being designed as a treaty between states to regulate their relationships, the *VCCR* also gives rise to individual rights, specifically to the right to be informed of consular assistance in case of arrest or detention.[141] What the ICJ defined as an *individual right*, still anchored in the *VCCR*, has now, according to some, crystallised into a *human right*, inherent in all human beings by virtue of their humanity. In particular, in *Advisory Opinion OC-16/99*, the Inter-American Court of Human Rights maintained that the individual right to information on consular assistance in case of arrest or detention in the receiving state is a necessary condition for the right to a fair trial to be effective, and a human right in itself.[142] According to some scholars, the human right to consular assistance also includes consular notification, that is, the right to request that competent authorities of the host state notify the sending state's consular post of the arrest, imprisonment, custody or detention of their nationals, and the right to access consular officers.[143] What is clear, however, is that, in the current state of international law, the right to consular assistance is limited to cases where the individual has been arrested or detained, it does not include the actual provision of assistance, which remains at the discretion of the person's country of nationality,[144] and is primarily a right to be asserted against the host country, rather than the person's country of nationality.[145] Notably, the delivery of travel documents and other forms of assistance for arranging repatriation, which are generally considered as part of the right to consular assistance in the literature on nationality and statelessness reviewed in Part II, are not per se included in the right to consular assistance.

Nevertheless, it can be argued that since passports are necessary to travel abroad and repatriate, states must deliver them to their nationals as part of their

138 *ICRMW* (n 93) art 16(7).

139 ibid art 16(7)(b).

140 ibid art 16(7)(c).

141 *LaGrand case (Germany v United States of America)* (*Judgment*) [2001] ICJ Rep 466, 494 [77].

142 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, (Advisory Opinion OC-16/99)*, Inter-American Court of Human Rights Series A No 16 (1 October 1999) 64 [141].

143 Christina M Cerna, 'The Right to Consular Notification as a Human Right' (2008) 31 *Suffolk Transnational Law Review* 419; David P Stewart, 'The Emergent Human Right to Consular Notification, Access and Assistance' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric* (Cambridge University Press 2020).

144 Frédéric Mégret, 'From a Human Right to Invoke Consular Assistance in the Host State to a Human Right to Claim Diplomatic Protection from One's State of Nationality?' in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2020) 457.

145 ibid 456–59.

obligation to respect, protect and fulfil their nationals' right to leave any country and enter their own country.[146] Indeed, in *General Comment No 27*, the Human Rights Council clearly states that the right to leave any country includes the right to obtain the necessary travel documents,[147] and in scholarly literature and the jurisprudence of international and regional human rights bodies, the delivery of a passport is generally regarded as part of the broader right to freedom of movement.[148] Although there are circumstances in which a state may refuse to issue a passport to one of its nationals, namely if this is provided for in law and is necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, these exceptional situations are extremely limited.[149] Moreover, the person who is denied a passport must be informed of the reasons for the refusal and must be able to appeal such a decision.[150]

It follows that the refusal of a passport with no motivation or for reasons other than those provided for by art 12(3) of the *ICCPR* constitutes a violation of a person's right to enter their own country.[151] The same argument can also be applied to other forms of consular assistance which are critical to the actual implementation of the right to freedom of movement. For the purposes of this article, it is therefore irrelevant what the right to consular assistance exactly entails and whether it is essential to the concept of nationality. Indeed, the forms of consular assistance which are dealt with in this article, namely the delivery of travel documents and other functions necessary for arranging return, are part of a national's right to enter the state's territory, and as such, I argue, inherent in the concept of nationality.

IV Refusal of Entry into One's Putative Country of Nationality and Statelessness Determination

In Part III, I have argued that the right to enter and reside in the state's territory is an essential attribute of nationality, which includes the delivery of travel documents and any other form of consular assistance necessary for effectively exercising this right. In this Part, I apply this argument to statelessness determination, examining the concrete circumstances under which direct or indirect refusal of entry by a person's putative state of nationality can be regarded as evidence that that state does not consider the person as its national. Part IV(A) shows that the way in which authorities competent on nationality matters treat an individual is determinative in establishing their nationality status under art 1(1) of the *1954 Convention*. Part IV(B) examines the specific scenarios in which a state can directly or indirectly prevent its putative nationals from entering its territory,

146 International Organization for Migration (n 60) 3, 11; Grant (n 135).

147 *General Comment No 27*, UN Doc CCPR/C/21/Rev.1/Add.9 (n 94) 3 [9].

148 Hannum (n 106) 20–21, 122; *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) 14 [69]; UN Human Rights Committee, 'Communication No 077/1980: *Lichtensztejn v Uruguay'* UN Doc CCPR/C/18/D/77/1980 (31 March 1983) 171 [8.3]; UN Human Rights Committee, 'Communication No 1107/2002: *El Ghar v Libya'*, UN Doc CCPR/C/82/D/1107/2002 (2 November 2004) 5–6 [7.3]; *HF and Others v France*, (European Court of Human Rights, Applications No. 24384/19 and 44234/20, 14 September 2022) (n 69) 83 [251].

149 *El Ghar v Libya* (n 148) 6 [7.3].

150 *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) 14 [69]; *Study of Discrimination*, UN Doc E/CN.4/Sub.2/220/Rev.1 (n 116) 63.

151 *Analysis of the Current Trends and Developments*, UN Doc E/CN.4/Sub.2/1988/35 (n 103) 14 [69].

and critically assesses the suitability of UNHCR guidance on statelessness determination with regard to these scenarios.

A *'Not Considered as a National by any State under the Operation of its Law'*

Article 1(1) of the *1954 Convention* defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. The phrasing 'under the operation of its law' is key to the implementation of the international legal definition of a stateless person and its interpretation has proved to be particularly controversial among decision-makers.[152] The *UNHCR Statelessness Handbook* devotes several paragraphs to the analysis of this term. First, the *Handbook* explains that 'law' should be understood broadly as encompassing legislation, ministerial decrees, regulations, orders, judicial case law and customary practice.[153] Second, it makes it clear that 'not considered as a national ... under the operation of its law' means that the person is not considered as a national under a state's *law* and *practice*.[154] Accordingly, establishing a person's nationality status 'requires a careful analysis of how a State *applies its nationality laws in an individual's case in practice*', which is 'a mixed question of fact and law'.[155] As the Prato Conclusions also pointed out, '[w]hether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. ... This should be assessed on the basis of national law as well as practice in that State.'[156]

UNHCR further specifies that in cases where state practice is inconsistent with the letter of the law, the former prevails. More specifically, 'where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative'.[157] Similarly, where a response from a foreign authority regarding the nationality status of an individual

> includes reasoning that appears to involve a mistake in applying the local law to the facts of the case or an error in assessing the facts, the reply must be taken on face value. It is *the subjective position of the other State* [emphasis added] that is critical in determining whether an individual is its national for the purposes of the stateless person definition.[158]

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152 Betsy L Fisher, '"The Operation of Law" in Statelessness Determination under the 1954 Statelessness Convention' (2015) 33(2) *Wisconsin International Law Journal* 254, 268–73. On the diverging interpretations of the term 'under the operation of its law' by different judicial authorities in the United Kingdom, see Thwaites' analysis of *Pham v Secretary for the Home Department* [2015] 1 WLR 1591 in Rayner Thwaites, 'Proof of Foreign Nationality and Citizenship Deprivation: *Pham* and Competing Approaches to Proof in the British Courts' (2022) 85(6) *Modern Law Review* 1302.

153 *UNHCR Statelessness Handbook* (n 33) 12 [22]. Moreover, as pointed out by Fisher, the term 'law' should be understood as referring not only to nationality law, but also to other fields of law, such as civil registration law, which may be relevant for determining a person's nationality status: see Fisher (n 152) 263–64.

154 *UNHCR Statelessness Handbook* (n 33) 12 [23].

155 ibid (emphasis added). See also ibid 32 [83].

156 Prato Conclusions (n 27) 3. See also UNHCR, *Expert Meeting: Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality* (Summary Conclusions, 31 October–1 November 2013) ('Tunis Conclusions')' 3 [6].

157 *UNHCR Statelessness Handbook* (n 33) 16 [37].

158 ibid 36–37 [99].

Generally, state practice also prevails when it is at odds with international law, which means that a person who has been stripped of their nationality in violation of international law should not be considered a national for the purposes of statelessness determination.[159]

It has been contended that by introducing 'an expansive concept of statelessness encompassing a zone of arbitrary "operation of" law beyond the borders of the nationality laws and practices of the State in question', the *UNHCR Statelessness Handbook* 'may describe the Statelessness Convention definition over expansively'.[160] However, there are several arguments supporting UNHCR's interpretation of art 1(1) of the *1954 Convention*. First, UNHCR's understanding of the phrasing 'under the operation of its law' is consistent with the ordinary meaning of the term and is in line with the object and purpose of the *1954 Convention*,[161] that is, to assure stateless persons the widest possible exercise of fundamental rights and freedoms, and to regulate and improve the status of stateless persons.[162] Indeed, while an assessment relying solely on the laws of a person's country of origin may indicate that the individual is a national of that country, the state may substantially modify or even blatantly violate the letter of the law in its general practice or in that specific case. Determining the state's position regarding the nationality status of a particular individual is therefore critical to their protection. Additionally, art 1(1) defines a stateless person as someone who is *not considered* as a national *by any State*, and not simply as someone who is not a national under the laws of any country, which suggests that the state's viewpoint regarding the nationality status of a particular individual is decisive. Finally, any attempt to surgically separate the law from the facts appears to be doomed to fail, particularly in the field of nationality law, which 'is often highly contextual and fact-dependent'.[163]

Once it has been established that the state's position or viewpoint is critical to determining whether an individual is a national of a certain country or not, it remains to be clarified what the expressions 'state's position' or 'viewpoint' actually mean. Importantly, UNHCR points out that for the purposes of statelessness determination the state's position is limited to the views of the authorities charged with conferring, withdrawing or confirming nationality in the country.[164] Where nationality is acquired and lost through non-automatic modes, the institution in charge of naturalisation and other procedures for the acquisition and loss of nationality will be the competent authority.[165] In case of automatic acquisition and loss of nationality, 'any State institution that is empowered to make a determination of an individual's nationality status in the sense of clarifying that status, rather than deciding whether to confer or withdraw it', will be competent for the purposes of nationality status determination.[166] Abroad, this function is typically carried out by consular officials, whose position will be

159 ibid 23 [56]. Violations of peremptory norms of international law are a possible exception to this rule: at 23 [56] n 40.

160 Fripp (n 99) 335. See also Fripp, *Nationality and Statelessness* (n 70) 97–98 [1.206], [1.211].

161 See the general rule on treaty interpretation set out in art 31 of the *Vienna Convention on the Law of Treaties* (opened for signature 23 May 1969, entered into force 27 January 1980) 155 UNTS.

162 Fisher (n 152) 263–67.

163 Thwaites (n 152) 1327. See also Fisher (n 152) 276.

164 *UNHCR Statelessness Handbook* (n 33) 13 [27] n 19.

165 ibid 14 [32].

166 ibid 15–16 [36].

critical when the individual seeks assistance to obtain or renew a passport, or clarify their nationality status.[167]

Ultimately, *how the individual is regarded* by the competent authorities manifests itself in *how they are treated* by the same authorities. Considering the specific situation of rejected asylum seekers and migrants, it can therefore be argued that under art 1(1) of the *1954 Convention* the *way in which they are treated* by the consular authorities of their putative country of nationality will generally be decisive in determining their nationality status. But what type of treatment is relevant for determining consular authorities' position regarding a person's nationality status and how should it be interpreted? If the right to enter and reside in the state's territory is inherent in the notion of nationality, as I have argued in Part III, it follows that whenever consular authorities, directly or indirectly, arbitrarily prevent a person from entering the state's territory, their conduct should be regarded as evidence that the state does not consider the person as its national. In the next Part, I develop this argument by examining specific scenarios in which a state can prevent its putative nationals from accessing its territory.

B *Arbitrary Refusal of Entry as Evidence of Statelessness*

States can prevent their putative nationals from entering its territory by refusing to issue or renew their travel documents, ignoring their requests for consular assistance, or the host state's enquiries in case of forced return, or expressly denying them entry. I argue that all three kinds of conduct should be regarded as evidence that the state does not consider the person as its national insofar as they result in the individual being unable to enter the country. This Part examines UNHCR's guidance on statelessness determination in relation to each of these three scenarios, identifying possible gaps and deficiencies. Before doing this, however, two general points can be made.

First, sometimes there may be no evidence of the state's position regarding a person's nationality status until the very moment when the individual seeks consular assistance or the host state contacts the alleged sending state's consular authorities.[168] Other times, there may be evidence, such as an expired passport, that the state previously regarded the person as its national. I maintain that in both cases, the state's direct or indirect refusal to admit the person indicates that the latter does not hold the nationality of that state, whether this state *has never considered* or *no longer considers* them as its national.[169] In other words, it is irrelevant whether *the person is refused entry because they are not nationals of that country* or whether *they are not nationals of that country because they are refused entry*. In either case, arbitrary refusal of entry indicates that, at the time of the determination, the state does not consider the person as its national.

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167 ibid 17 [40]. Although consular authorities operate in close coordination with, and sometimes may simply implement the decisions of, the authorities competent for nationality matters in the sending country, they represent the state in the host country and are generally the only national authority to which a person has access when abroad.

168 As pointed out by de Chickera, the very act of questioning whether an individual is a national or not may be the trigger for a country to arbitrarily deny them of their nationality: Amal de Chickera, 'A Question of "If" and "When" Is Someone Stateless', *European Network on Statelessness* (Blog Post, 22 May 2014) <https://www.statelessness.eu/updates/blog/question-if-and-when-someone-stateless>, archived at <https://perma.cc/T36R-XMR4> ('A Question of "If" and "When" is Someone Stateless?').

169 As recommended by UNHCR, '[a]n individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise.': *UNHCR Statelessness Handbook* (n 33) 20 [50].

Second, although in the case of forced return it may be argued that there is no individual right to enter at play since return is ordered against the individual's will,[170] the human right to enter and reside in the state's territory, as all other human rights, pertains to the individual independently of their intention to exercise it or not at that particular time. This is even more true in the case of a national's right to enter and reside in the state's territory, it being an essential component of the very condition of 'national'. Furthermore, under international law, this right is mirrored by the state's obligation towards other states to admit its nationals, which exists regardless of the individual's willingness to repatriate.[171]

1 *Refusal to Issue or Renew Travel Documents*

As discussed in the previous part, the provision of travel documents by the state is an integral part of the right to leave any country and to enter one's country of nationality, since it is generally essential for the actual implementation of this right. It follows that when consular authorities refuse to issue or renew a passport or another travel document to their putative nationals without any explanation or for reasons other than the few permitted under international law, they de facto deny them the right to enter the country. If this right is inherent in the concept of nationality, as I have argued so far, this ultimately indicates that the state does not consider the person as its national, whether the person was a national until the very moment when their right to enter was violated, or whether they never had such a right as they never held the nationality of that country. As previously discussed, unreturnable migrants are typically denied travel documents by their putative countries of nationality without any explanation or any concrete possibility of appealing such a decision. Under these circumstances, the authorities' refusal to issue a passport should be regarded as evidence that the state does not consider the person as its national.

UNHCR guidance regarding this scenario is ambiguous and vague. On the one hand, the *UNHCR Statelessness Handbook* describes the passport as '*a manifestation of a State's position that the individual is one of its nationals*'[172] and '*proof of nationality*'.[173] Accordingly, in cases of automatic modes of acquisition and loss of nationality and mechanisms that imply the formal act of an individual, the *Handbook* recommends according '*greater weight*' to the view of the authorities responsible for issuing passports and other identity documents attesting to the person's nationality, which abroad are consular authorities.[174] Moreover, paragraphs 42 and 43, which deal with the situation of individuals who are treated inconsistently by various state actors, mention the granting of public benefits reserved to nationals and the delivery of a passport, which generally is also a prerogative of nationals, as examples of treatment that indicates that a state considers a person as its national.

On the other hand, UNHCR refrains from concluding that the denial of these rights is always evidence of a state not regarding a person as its national. Indeed, paragraph 42 claims that the denial of rights generally accorded to nationals 'may

170 Noll (n 5) 23.
171 Coleman (n 116) 31–32.
172 *UNHCR Statelessness Handbook* (n 33) 36 [95] (emphasis added). The same paragraph also states that '[a]uthentic, unexpired passports raise a presumption that the passport holder is a national of the country issuing the passport'.
173 ibid 18 [44] (emphasis added).
174 ibid (emphasis added).

be an instance of a national's rights being violated, the consequence of that person never having acquired nationality of that State, or the result of an individual having been deprived of or losing his or her nationality', '[d]epending on the specific facts of the case'.[175] Unfortunately, though, the *Handbook* does not clarify under what circumstances the denial of rights generally attached to nationality should be regarded as evidence that the person is not a national of that country, rather than a mere violation of their rights.

2 *Failure to Reply to the Individual's Request for Consular Assistance and/or the Host State's Enquiries for Arranging Return*

By failing to reply to requests for consular assistance from a putative national or to the enquiries submitted by the host country for arranging return, consular authorities de facto deny the person the right to enter the state's territory. If the authorities' silence persists, I argue that the humanitarian spirit of the *1954 Convention* imposes an obligation upon states to resolve indeterminacy in favour of the applicant, interpreting the authorities' lack of response as evidence that they do not consider the person as a national.

Although the *UNHCR Statelessness Handbook* does not examine this specific scenario, it considers the similar situation of an individual or a state seeking clarification regarding that individual's nationality status with the competent authorities. Paragraph 41 of the *Handbook* first points out that '[c]onclusions regarding a lack of response should only be drawn after a reasonable period of time'. It then adds that:

> If a competent authority has a general policy of never replying to such requests, no inference can be drawn from this failure to respond based on the non-response alone. Conversely, when a State routinely responds to such queries, a lack of response will generally provide strong confirmation that the individual is not a national.[176]

UNHCR's guidance raises at least three questions. First, what does 'a reasonable period of time' mean? This is an important point that deserves at least some broad guidance.[177] Second, while the rationale behind the recommendation of not drawing conclusions from the authorities' lack of response when they have a general policy of not answering to enquiries about a person's nationality status is understandable, it is questionable whether indefinitely leaving a person in a limbo, when no other evidence is available, is in line with the humanitarian and protective purpose of the *1954 Convention*. Third, as pointed out by de Chickera, it is difficult to reconcile what paragraph 41 says about the impossibility of drawing conclusions from a state's non-reply in case of a state's habitual non-responsiveness with the recommendation contained in paragraph 75 to finalise statelessness determination within six months, extendable to 12 months only if the

175 ibid 18 [42]. See also ibid 18 [43].

176 ibid 17 [41].

177 Katia Bianchini, 'Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom' (2020) 32 *International Journal of Refugee Law* 440, 457; Laura Bingham, Julia Harrington Reddy, and Sebastian Köhn, *De Jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (Open Society Institute 2011) 7.

person's putative country of nationality is likely to provide a substantive response within this period.[178]

3 *Express Denial of Entry*

Under this scenario, I include cases where the state completely prohibits the person from entering and residing in its territory, as well as cases where it requests the putative national, like foreigners, to submit a visa application which is subject to the authorities' discretion, and only allows them to remain in the country for a limited period of time.[179] In both cases, the state expressly denies the person the automatic and absolute right to enter and reside in the country to which nationals are normally entitled. Based on the analysis conducted so far, I argue that, for the purposes of statelessness determination, in both scenarios the state's conduct should be regarded as evidence that it does not consider the person as its national.[180]

The *UNHCR Statelessness Handbook* does not specifically address this scenario. Although, in principle, UNHCR's position could be inferred from its understanding of the concept of nationality and its broader guidance on the interpretation of 'not considered as a national ... under the operation of its law', these are sometimes difficult to reconcile. On the one hand, paragraph 53 of the *UNHCR Statelessness Handbook* maintains that under international law nationality does not have a minimum content in terms of individual rights, as discussed above. That being so, the denial of the right to enter, like the violation of any other human right, does not affect in any manner the person's nationality status. This is further supported by the already mentioned paragraph 99 of the *UNHCR RSD Handbook*, which describes a state's refusal to admit a person to its territory as an instance of refusal of protection, rather than an indication that the person is not a national of that country.

On the other hand, UNHCR seems to implicitly recognise that a person's inability to return to their country of nationality voids their nationality of its essence when it recommends the naturalisation of de facto stateless persons 'where the obstacles to return prove intractable'.[181] Moreover, as discussed in Part IV(A), the *UNHCR Statelessness Handbook* stresses that '[w]here the competent authorities *treat an individual as a non-national*'[182] even though they appear to meet the requirements for the acquisition of nationality, it is their position, and thus *the way in which they treat the individual*, which is critical to establishing their nationality status. Furthermore, paragraph 43 does not exclude that the denial

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178 de Chickera, 'A Question of "If" and "When" is Someone Stateless' (n 168). See also de Chickera and van Waas, 'Unpacking Statelessness' (n 21) 63.

179 See, eg, the case of Cuban migrants who, after more than 24 months abroad, lose the automatic right to enter and reside in Cuba and can only return with the authorities' permission and for a limited period of time: Giulia Bittoni, 'Statelessness in the European Union: *The Case of Cuban Migrants*' (2014) 19 *Tilburg Law Review* 52.

180 A similar argument was used by the Italian Supreme Court of Cassation in a landmark decision concerning a Cuban migrant who had lost his automatic and absolute right of residence in Cuba due to his prolonged stay abroad. The Court ruled that the applicant's condition was equivalent to the condition of a stateless person since he was prevented from reacquiring the rights which constitute the essential core of nationality, including the absolute right of entry and residence in the state's territory: *Ministero dell'Interno v Perez Lozada Lazaro Jorge* [*Ministry of the Interior v Perez Lozada*], Cassazione Civile Sezione I [Civil Cassation Section I], Sentenza n 25212 [Sentence No 25212] (8 November 2013) (Supreme Court of Cassation) (Italy).

181 *UNHCR Statelessness Handbook* (n 33) 59 [168].

182 ibid 16 [37] (emphasis added).

of the rights usually attached to nationality, which certainly include the right to enter and reside in the state's territory, may indicate that a person is not a national of the country, as discussed above. However, not only does this passage fail to clarify under what circumstances the denial of rights commonly attached to nationality would be evidence that the person is not a national, but it also appears at odds with what UNHCR states in paragraph 53 about the content of nationality.

Ultimately, the *UNHCR Statelessness Handbook* considers the situation of persons who are prevented from entering their putative country of nationality only incidentally and is unclear regarding the role that a person's treatment by competent authorities, and that person's resulting access to the prerogatives attached to nationality, should play in the determination of their nationality status.

V CONCLUSION

The identification and delivery of travel documents are major obstacles to the return of rejected asylum seekers and migrants to their countries of origin. Consular authorities often fail to confirm the person's nationality, refuse or indefinitely delay the delivery of travel documents, or ignore the person's or the host country's requests for assistance in arranging return. As a result, rejected asylum seekers and migrants are prevented from returning to their country of origin and, if they are unable to regularise their situation in the host country, end up in a potentially indefinite limbo.

Focusing on the under-explored situation of persons who are directly or indirectly prevented from entering their putative country of nationality, I have argued that the denial of entry and refusal of consular assistance for arranging return, including the delivery of travel documents, should be regarded as evidence that a state does not consider a person as its national for the purposes of statelessness determination. I have based this argument on the wording of the international legal definition of a stateless person and the way in which nationality is conceived in international law. First, I have shown that art 1(1) of the *1954 Convention* requires statelessness decision-makers to consider the state's position, rather than the letter of the law, as determinative in establishing a person's nationality status. For those who find themselves abroad, the position of consular authorities, which manifests itself in the way in which they treat the individual, will thus be critical in determining nationality status. Furthermore, relying on a considerable body of opinion and state practice, I have argued that the right to enter and reside in the territory of one's state, which includes the delivery of travel documents and other consular functions which are necessary for arranging return, is inherent in nationality under international law.

Accordingly, I recommend a progressive interpretation of art 1(1) of the *1954 Convention*, whereby a state's express refusal of entry or failure to provide travel documents and other assistance that results in the person being unable to repatriate should be interpreted as evidence that the state does not consider the person as its national. I also call for the clarification of UNHCR guidance on statelessness determination, which at present is unclear regarding the role that the treatment by the competent authorities of a person's putative country of nationality should play in the determination of their nationality status. UNHCR guidance is also insufficient in addressing situations where the state does not overtly dispute a person's nationality but de facto prevents them from accessing its territory by refusing to issue travel documents or ignoring their requests for consular

assistance. Based on the interpretation of art 1(1) of the *1954 Convention* put forward in this article, several of those who are generally described as de facto stateless would be found to be (de jure) stateless. Although, in principle, possession of a nationality is preferable to recognition as a stateless person, the humanitarian purpose of the *1954 Convention* requires that protection be extended to those who are denied the fundamental right to enter and reside in the state's territory.