5 The resettlement process

5.1 European and US resettlement practice in comparison

The following section offers a comparative analysis of European and US resettlement practice. The purpose of this comparison is to identify legal issues throughout the resettlement process that demand solutions *de lege ferenda*. First, this section discusses how EUMS and the US select potential resettlement beneficiaries. Second, it sheds light on the transfer of selected resettlement beneficiaries to the EU and the US, including pre-departure and post-arrival orientation as well as placement. Third, the analysis shows whether and how (long-term) integration of resettled individuals is fostered within the EU and in the US. This also includes the possibilities for the resettled individuals to become citizens of an EUMS, and thereby obtain EU citizenship, compared to possibilities to become US citizens.

Recent attempts to conceptualize the resettlement process, i.e. "*the entire implementation process, starting with the resettlement programs and its resettlement goals*"[1038], were made by *Schneider*. Similarly, the following analysis sheds light on the operational level, namely the implementation of the resettlement process, but it goes beyond *Schneider*'s contribution by adding a legal perspective to practical and policy questions. The following analysis focuses on those stages of the resettlement process where legal questions arise, in other words, where the rights of (potential) resettlement beneficiaries are likely to be affected. For this reason, the analysis starts with the pre-selection by the UNHCR and ends with the naturalization and its potential legal implications for re-resettlement, namely a right to return to the initial home country.

1038 Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 6.

5.2 Selection

Selecting resettlement beneficiaries means "*identifying refugee applicants based on protection principles*",[1039] such as equal treatment, *non-refoulement* and due process. In the majority of cases, the UNHCR pre-selects persons in need for resettlement, subsequently referring them to national authorities, who take the final selection decision. As a general rule, individuals seeking protection in a third country have neither a right to apply nor to be selected for resettlement.[1040]

5.2.1 Selection procedures and practices of the UNHCR and EUMS

While EUMS follow diverse national selection practices, they work together with the UNHCR, who identifies and interviews persons in need for resettlement.[1041] The UNHCR pre-selects refugees and other forced migrants based on objective needs and refers them to prospective receiving countries.[1042] Eligibility for a referral to a prospective receiving country requires: firstly, the recognition as a refugee or as a person of concern to the UNHCR;[1043] secondly, a general assessment of the prospects for

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1039 Haruno Nakashiba, 'Clarifying UNHCR Resettlement: A few considerations from a legal perspective', UNHCR Research Paper nº264 (November 2013) 2.

1040 See Annelisa Lindsay, 'Surge and selection: power in the refugee resettlement regime' in (2017) 54 Forced Migration Review, 11 <https://www.refworld.org/docid/58cbcb314.html> accessed 28 February 2021; see also Recital 19 Proposal for a Union Resettlement Framework: "*There is no subjective right to be resettled*"; see also Luc Leboeuf and Marie-Claire Foblets in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 27: "*EU resettlement programmes do not allow individuals to directly petition European authorities to obtain humanitarian admission to Europe on grounds relating to protection*".

1041 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 22 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_resettlement_synthesis_report_final_en.pdf> accessed 28 February 2021.

1042 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 216; see also Annelisa Lindsay, 'Surge and selection: power in the refugee resettlement regime' in (2017) 54 Forced Migration Review, 11.

1043 Besides refugees, persons of concern to the UNHCR include returnees, stateless persons and, under certain circumstances, IDPs; exceptions can also be made for certain non-refugee dependent family members to retain family unity; see UNHCR, *Resettlement Handbook* (revised ed July 2011) 76.

durable solutions in favor of resettlement as the most appropriate solution; and thirdly, a match with one of the seven submission categories of the UNHCR.[1044]

The seven UNHCR submission categories target particularly vulnerable groups and refer to (i) legal and/or physical protection needs, (ii) survival of violence and torture, (iii) medical needs, (iv) special risk faced by women and girls, (v) family reunification, (vi) special needs of children and adolescents and (vii) the lack of foreseeable alternative durable solutions.[1045] These categories are coupled with priority levels, i.e. emergency, urgent and normal priority.[1046]

According to UNHCR's resettlement data from 2018, UNHCR referrals were primarily based on legal and/or physical protection needs (28%), followed by survival of violence and torture (27%). In 2019 (between January and October), the categories legal and/or physical protection needs, and survival of violence and torture constituted the most relevant categories (31%).[1047] These two categories remained the major submission categories in 2020. In 2022 (from January to June), the legal and/or physical protection needs category was again the category with the most submissions (39%).[1048] The overall trend within the last four years shows that legal and/or physical protection needs constituted the most common reason for being identified as in need for resettlement. In order to be assigned to the legal and/or physical protection needs category, a refugee or person of concern to the UNHCR must, among other things, be facing an immediate or long-term threat of *refoulement* to the country of origin or expulsion to another country from where he or she may be refouled.[1049] It follows that the criteria for this important submission category particularly reflect the role of resettlement as a means "[…] *to guarantee protection when refugees*

1044 See Eva Lutter, Vanessa Zehnder and Elena Knežević, 'Resettlement und humanitäre Aufnahmeprogramme' in (2018) Asylmagazin, 31; see also UNHCR, *Resettlement Handbook* (revised ed July 2011) 3, 173; see also Garry G Troeller, 'UNHCR Resettlement: Evolution and Future Direction' in (2002) 14 International Journal of Refugee Law 1, 87.

1045 See UNHCR, *Resettlement Handbook* (revised ed July 2011) Chapter VI.

1046 See ibid 246-250; see also Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 62.

1047 See UNHCR, 'Resettlement Data' (as of 19 December 2019).

1048 See UNHCR, 'Resettlement Data' (as of 20 July 2022).

1049 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 248.

are faced with threats which seriously jeopardize their continued stay in a country of refuge".[1050]

Ideally, selection is "*associated with entitlements under law and* […] *mechanisms to vindicate claims in respect of those entitlements*".[1051] Such ideal situation has not been perfected in the UNHCR pre-selection process, though. In fact, UNHCR's *Resettlement Handbook* only addresses a few rights available to refugees and other potential resettlement beneficiaries by express reference, such as the right to object to a particular interpreter and to stop the interview if the refugee feels that he or she is being misunderstood or needs a break.[1052] Some rights are further derived from the so-called Resettlement Registration Form (RRF). The UNHCR submits this form to a prospective receiving country. Accordingly, during the interview with UNHCR officials, the prospective resettlement beneficiary must be given an opportunity to correct or clarify information that will later appear in the RRF. However, if the RRF review determines that the individual is not eligible, he or she has no possibility of appeal and will not be referred to any prospective receiving country.[1053] Otherwise, a positive RRF review leads to further examination by the authorities of the prospective receiving country obtaining the RRF. Prior to such examination, the identified individual must consent[1054] to the referral of the RRF to that country.[1055] In practice, lacking consent will likely interrupt further processing of a case for resettlement to the prospective receiving country suggested to obtain the RRF. At the same time, withholding consent does not entail that the potential resettlement beneficiary has a legal claim to be referred to another receiving country.

According to a 2016 study of the European Migration Network (EMN), the majority of EUMS required that the UNHCR had previously recog-

1050 Ibid 247.

1051 Arthur C Helton, 'What Is Refugee Protection' in (1990) 2 International Journal of Refugee Law, 119.

1052 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 318.

1053 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 62.

1054 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 124, 238; notably, this 'right to consent' is established in the *Resettlement Handbook*, which constitutes a guideline that has not reached the status of binding international custom (see 2.2.1).

1055 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 62.

nized potential resettlement beneficiaries as refugees. Notwithstanding, most EUMS re-assessed the status of the prospective resettlement beneficiaries referred by the UNHCR.[1056] In the face of EUMS doubting the credibility of UNHCR's interviews, they have preferred selection missions with personal interviews over dossier-only selection (see 2.5.1).[1057]

Inconsistent interpretation and application of the refugee definition further complicate cooperation between the UNHCR and receiving countries in the resettlement selection process. While UNHCR's resettlement definition uses the term 'refugee' without explicit reference to the Refugee Convention, the *Resettlement Handbook* emphasizes the application of the Convention's refugee definition.[1058]

Adherence to the Refugee Convention is not only an issue in terms of selection criteria ('positive' or 'inclusion' criteria that have to be met in order to *include* an individual in the scope of eligible persons), but also in terms of exclusion grounds (negative or 'exclusion' criteria that *exclude* eligibility – mostly assessed during security and medical screening) (see 5.2.3.7). For the latter, it has been shown that exclusion from resettlement due to prior attempts to enter the EU illegally under the EU-Turkey Statement contravenes Art 31 Refugee Convention (see 4.2.10).[1059] In any event, the application of selection criteria and/or exclusion grounds beyond the realms of the Refugee Convention likely leaves Convention refugees without recognized legal status and rights resulting therefrom. The Refugee Convention not only protects refugees arriving spontaneously

1056 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 23.

1057 It has been claimed that UNHCR's interviews do not provide a sufficient basis for adequate decision-taking; see Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 174.

1058 "*Although UNHCR applies both the 1951 Convention definition and the broader refugee definition when examining eligibility for refugee status, it is important for resettlement consideration to seek to identify the basis for eligibility under the 1951 Convention. In practice, it may be more challenging for UNHCR to resettle a refugee recognized only under the broader refugee definition, as many States do not have provisions to accept refugees who do not meet the 1951 Convention criteria*", UNHCR, *Resettlement Handbook* (revised ed July 2011) 21.

1059 See ibid 89-103.

and seeking asylum, but also (resettlement) refugees arriving with prior authorization in a more controlled manner.[1060]

In practice, EUMS have applied selection criteria beyond vulnerability and objective protection needs, including their integration potential,[1061] i.e. selection on the basis of, amongst others, "*age, education, work experience and language skills*".[1062] The use of such criteria implies that receiving EUMS draw distinctions between (groups of) refugees. Against this backdrop, obligations of equal treatment must be taken into account. The potential for integration is usually (at least implicitly) based on an enumerated ground under Art 2 ICCPR, such as language or national and social origin, meaning that the threshold for justification is particularly high. Accordingly, when differentiating in their treatment, receiving EUMS must show that their differentiation is reasonable and objective, and that they are following a legitimate purpose.[1063] The positive impact of integration for the receiving country as well as the individual concerned could indeed be considered as an important reason. However, when invoking such reason, EUMS face a heavy burden[1064] to explain it, and the reasons must be "very weighty"[1065]. Moreover, distinctions based on race are in any case prohibited under international law (see 3.3.4.1). In this light, the *Resettlement Handbook* states that selection "*should not be based on the desire of any specific actors, such as the host State, resettlement States, other partners or UNHCR staff themselves*"[1066] and that resettlement should take account of

1060 See Marjoleine Zieck in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, 579.

1061 Denmark has even incorporated this into legislation; see Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 28.

1062 Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 23.

1063 See OHCHR, 'General Comment No 18: Non-discrimination', UN Doc HRI/GEN/1/Rev9 (Vol I) (10 November 1989) para 13.

1064 The Human Rights Committee stated that "*different treatment based on one of* [the enumerated grounds] […] *places a heavy burden on the State party to explain the reason.*" OHCHR, 'Communication No 919/2000: Mr. Michael Andreas Müller and Imke Engelhard v Namibia', UN Doc CCPR/C/74/D/919/2000 (26 March 2022) para 6.7.

1065 See *Gayusuz v Austria* App No 17371/90 (ECtHR 16 September 1996) para 42; *Koua Poirrez v France* App No 40892/98 (ECtHR 30 December 2003) para 46; *Andrejeva v Latvia* App No 55707/00 (ECtHR 18 February 2009) para 87.

1066 UNHCR, *Resettlement Handbook* (revised ed July 2011) 216.

"*the prohibition of racial discrimination* [which] *is part of general international law*"[1067].

EUMS have followed divergent approaches to whether to consider persons eligible for subsidiary protection for resettlement. A majority of EUMS "*include the possibility to resettle persons who would meet the conditions to be granted subsidiary protection*" (for instance, Denmark, Finland, Sweden), whereas some EUMS, such as the Czech Republic, Hungary and Romania, firmly rely on the Refugee Convention's refugee definition.[1068] Furthermore, the resettlement of IDPs constituted a contentious issue between EUMS and the Commission in the course of the negotiations for the Resettlement Framework Regulation Proposal (see 4.2.11.4).

Similar to UNHCR's pre-selection decision, there are examples of (prior) EUMS where selection decisions cannot be challenged through an appeal. As of 2020, the Czech Republic, Denmark, Finland, France, the Netherlands, Norway, Portugal, Sweden and the United Kingdom expressly refrained from providing remedies against a negative resettlement selection decision.[1069] Likewise, the Proposal for a Union Resettlement Framework Regulation falls short of granting a prospective resettlement beneficiary the right to appeal against a negative decision (Art 10 para 6 Proposal).[1070]

As shown in 3.3.3.1, rejected resettlement candidates cannot invoke Art 14 ICCPR and Art 6 para 1 ECHR for access to courts to appeal against a negative selection decision. In this light, *de Boer* and *Zieck* addressed the lack of means to appeal resettlement selection decisions and reiterated that the right to a fair trial pursuant to Art 6 ECHR was not violated because the resettlement selection process fell outside the scope of this Article.[1071] Notwithstanding, the right to an effective review under the ECHR and the ICCPR cannot be denied when there is an arguable claim of violation of rights under the respective treaty. As elaborated in 3.3.3.1, this is relevant

1067 Vincent Chetail, *International Migration Law*, 143; see e.g., International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

1068 See Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 22; see also European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 23.

1069 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 71.

1070 See ibid 60.

1071 See *MN and Others v Belgium*, para 137.

in case of abuses by field officers during selection interviews that amount, e.g. to a violation of Art 3 ECHR.

Furthermore, in terms of EU law, *de Boer* and *Zieck* pointed to Art 47 Charter (right to an effective remedy and to a fair trial).[1072] Unlike Art 6 ECHR, Art 47 Charter does not only refer to court proceedings related to civil rights and obligations or criminal charges.[1073] This Article is, however, restricted to disputes which have their basis in EU law. It follows that Art 47 Charter would only apply if resettlement became an established right under EU law.[1074]

Ultimately, *de Boer* and *Zieck*[1075] addressed Art 41 Charter. This Article provides the right to good administration, including a right to be heard and to be treated impartially and fairly.[1076] Art 41 Charter does not require resettlement to become a well-established right under EU or national law. Although the wording of Art 41 Charter refers to EU institutions, bodies and agencies, the Court of Justice[1077] applied the right to good administration as a general principle of EU law also to EUMS' actions.[1078] Given that the Charter may apply extraterritorially (subject to the condition that EUMS are implementing EU law; see 4.1.2.2), EUMS are bound to guarantee the right to good administration when interviewing potential resettlement beneficiaries during selection missions.

1072 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 79, 81.

1073 See Rudolf Streinz in Rudolf Streinz (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 47 Charter, para 2.

1074 See Hermann-Josef Blanke in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta* (CH Beck 5th ed 2016) Art 47 Charter, para 3.

1075 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 79, 81.

1076 See Rudolf Streinz in Rudolf Streinz (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 41 Charter, para 8f; see also Matthias Ruffert in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta* (CH Beck 5th ed 2016) Art 41 Charter, para 13ff.

1077 See Case C-277/11 *MM v Minister for Justice Equality and Law Reform* [2012] EU:C: 2012:744, paras 81-89.

1078 See Matthias Ruffert in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta*, Art 41 Charter, para 9; see also Rudolf Streinz in Rudolf Streinz (ed), *EUV/AEUV Kommentar*, Art 41 Charter, para 7.

Finally, in the case of a positive selection decision, most EUMS do not require the selected beneficiaries to sign a formal agreement stating their commitment and willingness to be resettled. Only the Czech Republic, Slovakia and Italy have demanded resettlement beneficiaries to confirm their commitment.[1079] In a similar vein, Section 8 para 5 Danish Aliens (Consolidation) Act stipulates that the Alien "*signs a declaration concerning the conditions for resettlement in Denmark*". Still, it needs to be contemplated whether these approaches amount to a genuine right to consent. As mentioned with regard to consenting to the submission of the RFF to a specific receiving country, the individual concerned will generally have no alternative because he or she has no right to negotiate or change the conditions. If he or she does not agree to the conditions, there might be no resettlement at all.

5.2.2 US procedure and practice

In the US, the 1980 Refugee Act sets out a permanent framework for refugee resettlement. Accordingly, the US President annually determines a total number of refugees to be admitted. This determination requires mandated consultations with the US Congress, and unforeseen emergencies can implicate an increase of admissions.[1080] The Immigration and Nationality Act (INA)[1081] specifies that – within the scope of these presidential determinations – the Secretary of Homeland Security may admit any refugee who is (i) not firmly resettled in any foreign country, (ii) of special humanitarian concern to the US and (iii) admissible (see Section 207 INA).[1082]

Admission for resettlement to the US depends on *refugee* status determination. The definition of refugee in the 1980 Refugee Act corresponds to the definition in the Refugee Convention (see 2.5.4.2). Contrary to this, various Attorneys General, in their powerful role as head of the US Justice Department, continued to invoke their parole authority "*on a blanket*

1079 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 27.

1080 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 University of Michigan Journal of Law Reform, 957.

1081 See Immigration and Nationality Act 1952 <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> accessed 13 February 2021.

1082 See Stephen H Legomsky and David B Thronson, *Immigration Law and Policy* (The Foundation Press 7th ed 2019) 1149.

basis", paroling groups in the US that did not qualify as refugees under the Convention. The parole authority under Section 212 lit d para 5 INA was eventually amended by Section 602 lit a Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[1083] This amendment introduced a limitation to use parole authority only "*for emergent reasons or for reasons deemed strictly in the public interest*". Furthermore, parole authority must be exercised "*on a case-by-case basis for urgent humanitarian reasons or significant public benefit*" (Section 602 lit a IIRIRA). Due to this limitation of parole authority, "*the executive branch today has no clearly-defined statutory authority to bring into the United States a large group of people who face dangers other than persecution*".[1084]

As a general rule, an individual is only eligible for resettlement to the US if he or she cannot be considered as *firmly resettled* in another country.[1085] This requirement accounts for situations where the person concerned received an offer of permanent resettlement in another country before arriving in the US, eliminating the need for resettlement in the US (see 2.2.3). Substantially and consciously restricted conditions of residence in that other country, however, preclude a situation of firm resettlement. Furthermore, firm resettlement must not be confused with the safe third-country concept. According to the latter, US law permits the Department of Homeland Security (DHS) to remove asylum applicants to third countries – irrespective of whether they will be firmly resettled there.[1086]

Regarding the *admissibility* requirement, it is notable that exclusion grounds such as labor certification, public charge or certain documentation requirements do not apply to refugees. In addition, the Attorney General has discretionary power to waive most other admissibility requirements (see Section 207 lit c para 3 INA).[1087] This means that US law addresses the special situation of refugees who are, for example, regularly unable to meet documentation requirements because they had to leave

1083 See Immigrant Responsibility Act 1996 <https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf> accessed 27 March 2021.

1084 Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1391.

1085 See Section 208.15 Title 8 Code of Federal Regulations 2018.

1086 The requirements under US law for removing an applicant to a safe third country are the existence of a bilateral or multilateral agreement and certain minimum safeguards (Section 604 lit a IIRIRA; Section 208 lit a para 2 INA); see Stephen H Legomsky and David B Thronson, *Immigration and Refugee Law and Policy*, 1292.

1087 See ibid 1149.

their documents behind, lost them while fleeing or because their home country no longer issues them documents. Also, it comes naturally that refugees would find it difficult to meet the criterion of not being a public charge, given that they regularly come unprepared and have yet to navigate through the US labor market.

The annual presidential allocation includes admission numbers by region, but it does not set out specific criteria for the refugees to be admitted within the regions. Since the designated numbers per region hardly cover all refugees in need, further criteria are necessary. Selection is therefore based on the so-called processing priorities,[1088] i.e. categories of prioritized individuals or groups eligible to enter the US under the USRAP.[1089]

Priority one covers *Individual Referrals*, i.e. refugees with compelling protection needs referred by the UNHCR, a designated NGO or a US embassy.[1090] The cases under this priority align with the aforementioned UNHCR submission categories,[1091] and indeed most of the individual referrals are made by the UNHCR.[1092]

Priority two deals with *Group Referrals*. It allows specific groups of special concern to the US to directly access the USRAP, including groups of IDPs.[1093] Each year, the specific groups are listed by the Department

1088 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 University of Michigan Journal of Law Reform, 957f.

1089 Traditionally, there are four main categories. For Fiscal Year 2023, a fourth category for privately sponsored refugees has been introduced for the first time. Its implementation remains to be seen and depends on the launch of a private sponsorship pilot program expected for the end of calendar year 2022. See US Department of State, Department of Homeland and Security, Department of Health and Human Services, 'Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023' (8 September 2022).

1090 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 University of Michigan Journal of Law Reform, 959.

1091 See Jessica H Darrow, 'Working It Out in Practice: Tensions Embedded in the US Refugee Resettlement Program Resolved through Implementation' in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 95 (102f).

1092 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 University of Michigan Journal of Law Reform, 959.

1093 Exceptionally, in-country processing is also available for individual UNHCR referrals under priority 1. As the annual Report for 2023 lays out: "*In El Salvador, Guatemala, and Honduras, UNHCR refers to the USRAP cases of vulnerable*

of State's Bureau of Population, Refugees, and Migration (PRM) after consultation with NGOs and other entities.[1094] In the fiscal years 2020 and 2021, direct access was granted to (i) certain members of religious minority groups in Eurasia and the Baltics, and to (ii) certain Iraqis associated with the US.[1095] In addition, as a response to the taking over of Afghanistan by the Taliban regime after US group withdrawal, Afghan nationals were designated as a priority group in August 2021.[1096]

Priority three encompasses *Family Reunification*, namely "*access to members of designated nationalities who have immediate family members in the United States who entered as refugees or were granted asylum (even if they subsequently gained LPR status* [lawful permanent resident status] *or naturalized as US citizens)*".[1097] Participation is open to parents, spouses and unmarried children under the age of 21 of a US-based asylee or refugee. As additional avenue for family reunification, within two years of admission, a refugee admitted to the US may request so-called "*following-to-join benefits*" for his or her spouse and/or unmarried children under the age of 21 who were not previously granted refugee status.[1098]

The US, like most EUMS, does not merely rely on UNHCR's pre-screening interviews. In order to ensure that the referred refugees meet one of the US admission priorities, potential resettlement refugees are once more pre-screened overseas in US Resettlement Support Centers (RSCs). Besides re-checking UNHCR's pre-selection, i.e. referrals under priority one, individuals who do not meet the criteria of priorities two or three

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individuals identified by a consortium of NGOs. Cases with the most extreme protection needs may be transferred to Costa Rica for refugee processing under a tripartite Memorandum of Understanding between the Government of Costa Rica, UNHCR, and IOM; all other cases are eligible for in-country processing for resettlement to the United States." US Department of State, Department of Homeland and Security, Department of Health and Human Services, 'Report to Congress on Proposed Refugee Admissions for Fiscal Year 2023' (8 September 2022) 13.

1094 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 University of Michigan Journal of Law Reform, 979.

1095 See US Department of State, 'US Refugee Admissions Program Access Categories' <https://2017-2021.state.gov/refugee-admissions/u-s-refugee-admissions-program-access-categories/index.html> accessed 20 July 2022.

1096 US Department of State, 'US Refugee Admissions Program Priority 2 Designation for Afghan Nationals' (2 August 2021) <https://www.state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals/> accessed 20 July 2022.

1097 US Department of State, 'US Refugee Admissions Program Access Categories'.

1098 See ibid.

are removed without an interview with Refugee Officers from DHS' US Citizenship and Immigration Services (USCIS).[1099]

Following pre-screening, USCIS assesses the eligibility of potential resettlement beneficiaries for resettlement through personal interviews. A USCIS officer's decision cannot be appealed. Reconsideration of the case can only be requested if new or previously unavailable information is present, and it is at the discretion of the USCIS officer who conducted the original screening interview to grant a new interview. The DHS/USCIS provides a so-called Request for Review Tip Sheet[1100] that assists in this process. If the resettlement candidate successfully passes the interview process, he or she becomes formally recognized as refugee by DHS/USCIS; but this only entails conditional approval for resettlement. The prospective resettlement refugee still has to undergo medical examination and pass multiple security checks. Moreover, the US Customs and Border Protection (CBP) must confirm admissibility to the US. It performs initial vetting based on documentation of resettlement candidates already approved and scheduled to travel to the US by air. The CBP also conducts additional background checks upon arrival at a US port of entry. Only after passing these series of security checks, an individual is finally admitted to the US as a refugee.[1101]

5.2.3 Analysis

The depiction of European and US resettlement selection showed the following points of issue: The first question concerns UNHCR's credentials as referral entity. Second, the comparison revealed differences in the national approaches among EUMS, and between EUMS and the US, regarding status determination. Third, the US priority system means prioritizing certain groups with ties to the US. Fourth, the prerogative of family reunification entails legal issues, e.g. the scope of family, that need to be clarified for future EU resettlement. Fifth, EUMS have applied the integration potential as additional selection criterion that goes beyond vulnerability and the objective resettlement needs. Sixth, the outlined US con-

1099 See Refugee Council USA, 'Resettlement Process' <https://rcusa.org/resettlement/resettlement-process/> accessed 27 March 2021.

1100 See USCIS, 'Request for Review Tip Sheet' <https://www.uscis.gov/humanitarian/refugees-asylum/refugees/request-review-tip-sheet> accessed 27 March 2021.

1101 See USCIS, 'Refugee Processing and Security Screening' <https://www.uscis.gov/refugeescreening#Enhanced%20Review> accessed 27 March 2021.

cept of firm resettlement raises the question whether an individual's firm resettlement in a third country should bar that individual from further resettlement. Seventh, exclusion grounds from resettlement deserve particular attention in terms of their compatibility with international refugee law. Eighth, extensive screening practices need to be assessed because they may trigger (unjustified) interferences with individual rights of the persons concerned. Ninth, there are lacking or insufficient means to appeal a negative selection decision, and lastly, the legal value of a resettlement beneficiary's right to consent deserves further reflection.

5.2.3.1 Referral entities

The US and EUMS both operate on the premise that the UNHCR plays a major role in the identification of resettlement cases. EUMS generally rely on referrals by the UNHCR, similar to what the US does in its priority one. Several EUMS, namely Austria, France, Hungary, Slovakia and Luxembourg (until 1997) have additionally relied on NGOs as referral entities.[1102] Correspondingly, the US' priority one also covers individual referrals by NGOs. This makes the UNHCR an important but not singular referral entity.

The UNHCR must comply with the refugee law and human rights framework outlined in Chapter 3 – particularly the principles of *non-refoulement* (see 3.3.1) and equal treatment (see 3.3.4), as well as procedural rights (see 3.3.3). The fact that the UNHCR itself is not a state actor does not relieve the UNHCR from responsibility to comply with obligations under international law (see 3.4.2).

To ensure the required legal standard, the UNHCR shall not be "*the only referral entity, or the only body preparing dossiers*".[1103] Allowing NGOs and other non-state actors to make referrals in addition to those provided by the UNHCR opens up resources and offers a diversified and more comprehensive case identification, namely capacity to properly assess the specific situation of and conditions faced by potential resettlement benefi-

1102 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 27.

1103 Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 10.

ciaries. This is necessary to guarantee compliance with the aforementioned human rights and refugee rights. For example, the principle of *non-refoulement* demands a careful risk assessment, which is enhanced by first-hand information through NGOs' direct field work. Also, compliance with the principle of non-discrimination is fostered by direct engagement with potential resettlement refugees. NGO involvement helps to ensure more comprehensive case identification because they regularly visit refugee camps or other refugee accommodations and can identify cases at place that may otherwise be overlooked. Eventually, procedural rights could be strengthened, which are likely at odds if there is scarce capacity and time for engagement with the potential resettlement beneficiaries.

Overall, NGOs regularly have more capacity to closely engage with refugees in the field because they do not have to deal with global migration issues at large. They rather concentrate on certain regions. Moreover, the cooperation between the UNHCR and NGOs, specifically staff loaning from NGOs, has already become established practice. In terms of responsibility, it has been shown that the conduct of the staff of NGOs may be attributed to the UNHCR (see 3.4.2).

In addition to NGOs, the EUAA could become a crucial actor in case identification and function as (pre-)referral entity for future EU resettlement. Compared to its predecessor EASO, EUAA's decision-making power and overall mandate are expanded. Specifically, the EUAA can engage in vulnerability assessments, which is important for the identification of resettlement candidates (see 4.3.2). However, the actual effectiveness of additional accountability mechanisms under the EUAA Regulation has yet to be tested (see 4.3.3). From the perspective of international law, namely the ARSIWA and ARIO, the conduct of the EUAA experts could – depending on the specific circumstances – be attributed to the EU and/or the responsible state in the event of rights violations (see 3.4.3).

5.2.3.2 Status determination

With regard to (refugee) status determination, EUMS as well as the US have insisted on re-assessment of UNHCR's pre-determination on the basis of their national practices. It follows that prospective resettlement beneficiaries must undergo a more or less rigorous status determination process, depending on the prospective receiving country which they are referred to by the UNHCR.

Harmonization of EUMS' national practices - namely the requirements, contents, reporting and recording of selection interviews – would enable a more objective analysis, thereby establishing comparably high procedural standards among EUMS. Harmonization efforts on the conduct of personal interviews have already been made for the internal EU asylum *acquis*, namely in Arts 15 to 17 Asylum Procedures Directive. This means that already *de lege lata*, the principle of consistency between external and internal EU asylum policy (Art 7 TFEU and Art 21 para 3 TEU; see 4.1.2.3) demands that EUMS guarantee the threshold set under Arts 15 to 17 Asylum Procedures Directive for interviews in the resettlement selection process.

Moreover, harmonization of EUMS' divergent scopes of resettlement beneficiaries would streamline the eligibility criteria for resettlement to the EU. *De lege ferenda*, harmonization in favor of including persons eligible for subsidiary protection would be the solution that most consistently reflects the internal EU asylum *acquis*. The subsidiary protection status constitutes an EU law specificity to fill protection gaps and to refine the restrictive refugee definition of the Refugee Convention (see 2.5.4.1). Moreover, protection gaps could be filled by further pursuing the current attempts of the Commission to include IDPs in the scope of resettlement beneficiaries (see 2.2.2), as IDPs might be equally in need for resettlement, even though they do not meet the definition of refugee under the Refugee Convention.

With a view to filling protection gaps in the global refugee regime, US scholars proposed an expansion of the refugee definition. One inspiring approach was taken in the so-called Model International Mobility Convention. It goes beyond the concept of a refugee and defines a broader group of 'forced migrants', "*including any individual who, owing to the risk of serious harm, is compelled to leave or unable to return to her or his country of origin*"[1104]. 'Harm' would not only cover generalized armed conflict and mass violations of human rights, but also threats resulting from environmental disasters, enduring food insecurity, acute climate change or other events seriously disturbing public order.[1105] In light of the considerations on groups that are potentially in need for resettlement (see 2.5.4.3), this broadened definition of forced migrants reflects the realities of persons having to leave their home countries more comprehensively than the restrictive refugee definition of the Refugee Convention. It would thus

1104 Kiran Banerjee, 'Rethinking the Global Governance of International Protection' in (2018) 56 Columbia Journal of Transnational Law, 319.

1105 See ibid 319.

be an apt starting point to reconsider and adjust the scope of resettlement beneficiaries *de lege ferenda*.

5.2.3.3 Resettlement of prioritized groups

The US Priority Two for Group referrals is not based on criteria that comprehensively reflect individual vulnerability and objective humanitarian needs. In the last fiscal years, the US prioritized a few selected religious groups, such as Jews, and certain categories of one specific nationality, Iraqis. The additional designation of Afghan Nationals in 2021 is largely limited to certain Afghans who worked with the US. In fact, the US has designated groups that rely heavily on resettlement, and also represent a response to acute humanitarian crises and mass displacements such as from Afghanistan. However, distinctions are obviously made on grounds of religion and nationality. Additionally, distinctions are based on the former work for, or other ties to the US. Overall, the prioritization reflects US foreign policy interests.

Indeed, preferential treatment by a State Party for its own citizens was acknowledged by the Human Rights Committee. This does not mean that foreigners can be treated differently because of their national origin, religion, or nationality without justification. As outlined, the distinctions on grounds such as of religion or national origin require a particularly high threshold for justification, because these grounds count among the enumerated grounds under the ICCPR. Also, for nationality, State Parties must base justification of differential treatment on reasonable and objective criteria.[1106]

In terms of the US prioritization, a legitimate goal could be, for example, the benefit of faster self-sufficiency and integration of individuals that already have ties to the US. One could also imagine (more complex) reasons, such as special moral obligations towards those who served the US.[1107] Even if such reasons would be weighty, it appears unreasonable to rely, for example, solely on the Afghan nationality. Specifically, it is not plausible to exclude non-Afghans who are equally affected by the

1106 OHCHR, 'Communication No 196/1985: Gueye v France' (1989) para 9.4.

1107 In this light, *Tendayi Achiume* pointed to compelling claims to national admission based on colonialism. See E Tendayi Achiume, 'Migration as Decolonialization' in (2020) 71 Stanford Law Review, 1509-1574.

humanitarian situation in Afghanistan and served for or have ties to the US, just like their counterparts with Afghan citizenship.

Moreover, the US policy of including groups of IDPs in Priority Two is remarkable, but this extended beneficiary scope is – again – limited to designated groups or individuals who find themselves in a particular country, thus likely opening up another source for discriminatory treatment. By comparison, the Commission attempted to include IDPs generally in its 2016 Proposal for a Union Resettlement Framework Regulation (see 4.2.11.4). With a view to including IDPs in the scope of EU resettlement *de lege ferenda*, Art 78 para 1 TFEU requires the EU to adopt an approach that complies with the principle of equal treatment as incorporated in the ECHR, ICCPR and other pertinent universal human rights treaties. Distinctions between IDPs from different countries would only comply with the principle of non-discrimination if the mentioned justification requirements were met.

5.2.3.4 Family reunification

Until 2021, the US Priority Three for family reunification followed the approach of Priority Two, i.e. prioritizing certain groups from designated countries. By comparison, the 2016 Commission Proposal includes a new category of family members of third-country nationals, stateless persons or EU citizens legally residing in an EUMS, making them potentially eligible for resettlement (Art 4 lit b number ii). As such, this category would be more inclusive than the (former) US approach.

As a general rule, international law protects the family as a "*fundamental group unit of society*", namely under Art 23 para 1 ICCPR – this is also stated in the non-binding Art 16 para 3 UDHR. In terms of the scope of Art 23 ICCPR, the Human Rights Committee highlighted in General Comment No 13 that the right to found a family implies "*the possibility to procreate and live together*". The possibility to live together, in turn, necessitates the adoption of appropriate measures, "*both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons*".[1108] Applying the Committee's view results in a positive

1108 OHCHR, 'General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) para 5 <https://www.refworld.org/pdfid/45139bd74.pdf> accessed 21 July 2022.

duty of Contracting States, including EUMS and the US, to ensure the reunification of resettlement beneficiaries with their family members who are left behind, without "*any discriminatory treatment*".[1109]

Under Art 78 para 1 TFEU, the EU legally committed to develop its policy in accordance with relevant universal human rights treaties. Against this backdrop, a non-discriminatory approach in family reunification must be pursued for future EU resettlement. A non-discriminatory approach requires that family reunification must not be limited to specific groups of individuals with a certain nationality or religious belief, unless distinction on such ground is justified. For example, one could imagine prioritized family reunification with family members who find themselves in certain countries where they are exposed to a serious risk of harm (amounting, e.g. to violations of Art 3 ECHR); also, the above-mentioned integration considerations as well as ties based on decolonialization could be invoked. Otherwise, however, differential treatment based *purely* on grounds of nationality must be justified by reasonable and objective criteria.

Consistently, EU policy promotes the right to family life (Art 7 Charter) and takes into consideration the thresholds set by the internal EU asylum *acquis*, especially the Family Reunification Directive.[1110] The standard requirements for family reunification under this Directive are (i) a residence permit valid for at least one year, (ii) reasonable prospects of obtaining permanent residence, (iii) residence of the family members outside the territory when the application is made (although EUMS can derogate from that rule), and (iv) no grounds for rejection, such as public policy, security or health (see Arts 3, 5 and 6 Family Reunification Directive). In addition, EUMS may demand integration measures (Art 7 para 2 Family Reunification Directive).

Under the Family Reunification Directive, a waiting period of two years of lawful stay of the sponsor may be required before family reunion takes place (Art 8 Family Reunification Directive). This waiting period of two years is similar to the two-year waiting period for the US 'following-to-join benefits'. Effective application of the right to family life would be facilitated by reducing the waiting period *de lege ferenda*. Aside from formal waiting periods, this entails that receiving countries must avoid circumvention through informal waiting periods as, for example, Ireland did. It introduced a one-year waiting period after status recognition, which was

1109 Ibid para 9.

1110 See Directive 2003/86 (EC) on the right to family reunification [2003] OJ L251/12-18.

problematic according to a 2017 issue paper published by the Council of Europe because "*status determination is often protracted in Ireland, and sometimes takes years*".[1111] In addition, other procedural hurdles like onerous evidential requirements or tight deadlines are likely to interfere with the right to family reunification.[1112]

Moreover, subsidiary protection status is regularly linked to waiting periods for family reunification longer than two years.[1113] This means differential treatment between refugees and individuals with subsidiary protection status. As explained in 2.5.4.1, subsidiary protection status comes with the expectation that the stay of the individual concerned will be limited in time, i.e. that the individual will return once the danger in the home country no longer exists. As opposed to refugees, persons eligible for subsidiary protection do not flee because of persecution on account of a protected ground; rather, they flee harmful situations, such as civil war, where the duration is difficult to estimate and which can end relatively fast, in the sense that safe conditions prevail again in their home country. This is also why subsidiary protection status depends on the regular review of the situation in the home country. It follows that, while there are similarities, the positions of refugees and persons eligible for subsidiary protection are not identical. Yet, whether a situation constitutes a comparable situation for purposes of establishing discrimination is both fact-specific and contextual. The ECtHR does not require identical situations, but relative similarities.[1114] The Human Rights Committee has likewise suggested the fact-specific nature of evaluating whether two groups are *de facto* the same or different for purposes of evaluating discrimination.[1115] Against this backdrop, it seems more correct from the perspective of international

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1111 Council of Europe, 'Realising the right to family reunification of refugees in Europe' (7 February 2017) 40 <https://familie.asyl.net/fileadmin/user_upload/pdf/PREMS_052917_GBR_1700_Realising_Refugees_160x240_Web.pdf-1.pdf> accessed 27 March 2021.

1112 See ibid 41.

1113 See Commission, 'EMN Ad-Hoc Query on BE AHQ on the waiting period for family reunification for beneficiaries of subsidiary protection' (requested on 10 August 2016) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/2016.1096_-_be_ahq_on_the_waiting_period_for_family_reunification.pdf> accessed 27 March 2021.

1114 See *Fábián v Hungary* App No 78117/13 (ECtHR 5 September 2017) para 121; see also *Clift v the United Kingdom* App No 7205/07 (ECtHR 22 November 2010) para 66.

1115 See OHCHR, 'Communication No 864/1999: Alfonso Ruiz Agudo v Spain', UN Doc CCPR/C/76/D/864/1999 (31 October 2002) para 7.2 <http://www.w

non-discrimination law not to make a blanket distinction on the basis of refugee or subsidiary protection status when it comes to the future regulation of waiting periods for family reunification in the course of EU resettlement. Rather, it would be more appropriate to take into account the factual situation in the home country and the likeliness of a return to that country.

A resettlement beneficiary's interest in family reunification must be balanced with conflicting public interests of the receiving environment, namely the reception capacity. A complete abolishment of the waiting period seems to be the ideal solution in light of the right to family life, but such ideal solution is prone to lack practical feasibility; particularly in situations where receiving countries and communities are already overwhelmed by the number of those who have actually arrived, not to mention having to host all their family members. Within this framing, Art 8 Family Reunification Directive includes the possibility for EUMS to derogate from the two-year waiting period and set a longer period of no more than three years, provided that their national legislation takes account of their reception capacity. Correspondingly, in a 2011 Green Paper addressing the right to family reunification, the Commission acknowledged that the reception capacity may be one of the factors to consider when deciding upon an application for family reunification. Still, by way of derogation, receiving EUMS must not ignore the factual circumstances of a specific case.[1116]

Waiting periods are inevitable from a practical point of view. Once this period has elapsed, a different question concerns the concept of family, i.e. whether only the nuclear family or also additional family members should be considered for family reunification by means of resettlement. *Di Filippo* deals with this issue in the context of the Dublin system. He argues in favor of a wide notion of family:[1117]

> *In contrast to some European countries, in many countries of origin, relatives are as important in family life as the core family members, due to*

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orldcourts.com/hrc/eng/decisions/2002.10.31_Ruiz_Agudo_v_Spain.htm> accessed 21 July 2022.

1116 See Commission, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735 final, 5.

1117 Marcello Di Filippo in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 212.

> *the cultural concept of family and the related moral obligations of mutual assistance and care. Moreover, on occasions when the original nuclear family may be dispersed or deceased, the only form of family life available to the asylum seeker may be represented by a cousin, an aunt or an uncle, a nephew or a grandparent. Finally* […] *the closeness to persons coming from the same familiar milieu – regardless of how old individuals at stake are – may prove to be fundamental for psychological welfare and propensity to establish a collaborative and fruitful relationship* […] *with the surrounding environment.*

Apparently, the Commission acknowledged the need for a broadened notion of family in the resettlement context. The 2016 Proposal for a Union Resettlement Framework Regulation includes couples who are not married as well as minor children of unmarried couples. Furthermore, the Proposal expressly refers to siblings (Art 5 lit b number ii Proposal, first and second bullet point). The Commission also included the possibility to resettle family members "*who are dependent on their child or parent for assistance as a result of pregnancy, a newborn child, serious illness, severe disability or old age*" (Art 5 lit b number ii Proposal, fifth bullet point). This proposed scope of family goes beyond US law.

In this context it is important to point to the risk of circumventing a broad notion of family by simultaneously restricting the scope of care givers for a 'dependent person'. For example, in Art 24 Migration Management Regulation Proposal as part of the 2020 New Pact on Migration and Asylum, the Commission did not mention spouses and siblings as care-giving supporters for dependent applicants. Such approach could lead to situations where those dependent on family support would be deprived of enlarged reunification possibilities.[1118]

Politically speaking, broadening its definition of family in future EU legislation on resettlement involves persuading EUMS that a broad notion of family is beneficial rather than burdensome. The benefit consists of faster and more sustainable integration. Resettlement beneficiaries will more likely become active contributors to the community of a receiving EUMS if their demand for family life is satisfied. Indeed, some restrictions might be necessary to achieve political support, such as prioritizing the

1118 See Francesco Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact' (*Eumigrationlawblog.eu*, 20 October 2020) <http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/> accessed 27 March 2021.

nuclear family before other relatives and/or requiring proof of the capacity to take care of the respective family member or relative.[1119]

Moreover, as a specific issue, it needs to be taken up *de lege ferenda* what happens when a child comes of age during the resettlement (selection) process. While the determination of the age of majority is left to EUMS, the Family Reunification Directive does not refer to national law regarding the date when the condition of majority must be satisfied. This means that EU law should have a uniform interpretation on how to determine that date. In *BMM*, the Court of Justice considered the date of submission of the application for entry and residence as the date to be taken into account to determine whether a family member of a sponsor is a 'minor child'.[1120] However, there is no date equivalent to the date of submission of the application for entry and residence in the resettlement context, because individuals generally cannot apply for resettlement. Under the internal EU asylum *acquis*, a minor irregularly arriving in the receiving country can apply for entry and residence immediately upon arrival or already at the border (see Art 3 para 1 Asylum Procedures Directive). Accordingly, in the resettlement context, the arrival on the territory of the receiving country could be the relevant point in time for the determination whether resettlement beneficiary has reached the age of majority.

5.2.3.5 Potential to integrate

The Commission and EUMS have both considered integration-related criteria to select resettlement beneficiaries. The Commission included the integration potential in the 2016 Proposal for a Union Resettlement Framework Regulation (see 4.2.11.4).

According to *Bamberg*, the inclusion of the integration potential as selection criterion "*is part of an ongoing shift from a value-based to an interest-based approach*".[1121] Such a shift is not merely a European phenomenon. In the US, the 1980 Refugee Act was originally intended to abolish integra-

1119 See Marcello Di Filippo in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 212.

1120 See Joined Cases C-133/19, C-136/19 and C-137/19 *BMM, BS, BM and BMO v État belge* [2020] EU:C:2020:577.

1121 Katharina Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', Discussion Paper European Migration and Diversity Programme (26 June 2018) 12.

tion-based selection. Admission to the US "*has not been predicated on the extent to which individual refugees are work ready*"[1122] even though, upon arrival, the US program has forced self-sufficiency and rapid labor market entry. Notwithstanding, for its referrals to the US, the UNHCR "[…] *may also take into account certain criteria that enhance a refugee's likelihood of successful assimilation and contribution to the United States*".[1123] For example, the Report to Congress on Proposed Refugee Admissions for Fiscal Year 2018 proclaimed close cooperation with the UNHCR "*to ensure that, in addition to referrals of refugees with compelling protection needs, referrals may also take into account certain criteria that enhance a refugee's likelihood of successful assimilation and contribution to the United States*."[1124] It highlighted that "[s]*uccessful assimilation of refugees into US society directly benefits refugees, asylees, and communities, while it also serves the national interest of the United States by helping to establish a safe and secure homeland. Assimilation facilitates the ability of refugees and asylees to make positive contributions to the United States and the communities where they live.*"[1125] Particularly remarkable here is the usage of 'assimilation' (absorbing into the mainstream culture), as opposed to 'integration' (joining of cultures). By contrast, previous US refugee guidelines used 'integration',[1126] which underscores the shift from value to interest-based selection.

The above stated language used by the US points out valid arguments in favor of the integration potential from the perspective of receiving countries, and even from the perspective of resettlement beneficiaries. One main consideration is that enhanced integration of resettlement beneficiaries in the receiving community serves the interest of the resettlement

1122 Jessica H Darrow in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance*, 102.

1123 Ibid 113.

1124 US Department of State, Department of Homeland and Security, Department of Health and Human Services, 'Report to Congress on Proposed Refugee Admissions for Fiscal Year 2018', 8 <https://s3.documentcloud.org/documents/4063604/Report-to-Congress-Proposed-Refugee-Admissions.pdf> accessed 22 July 2022.

1125 Ibid 52.

1126 See The World staff, 'Refugees to be assessed on ability to 'assimilate'' (*The World*, 18 October 2017) <https://theworld.org/stories/2017-10-18/refugees-be-assessed-ability-assimilate> accessed 22 July 2022. See also Lauren Wolfe, 'The Trump Administration Wants Refugees to Fit In or Stay Out' (*Foreign Policy*, 12 October 2017) <https://foreignpolicy.com/2017/10/12/the-trump-administration-wants-refugees-to-fit-in-or-stay-out/> accessed 22 July 2022.

beneficiaries, as well as the receiving countries. It allows resettlement beneficiaries to contribute and positively impact their social and professional environment. Moreover, successful integration is in the interest of national security and the maintenance of public order in the receiving country.

Legally speaking, the potential to integrate has no basis in the Refugee Convention, thus constituting an additional requirement to the existing requirements of the refugee definition. Its assessment comes with large discretion. What this means in terms of practical implementation is exemplified by German authorities, who themselves admitted that there are no fixed criteria when determining the "*prospect*"[1127] of integration. As such, the lack of clearly established criteria raises the risk of discrimination in the course of arbitrary decisions (see 3.3.4.1). In addition, the determination of the potential to integrate may involve that potential resettlement beneficiaries are confronted with uncomfortable questions like, how often do you pray, or, would you save the life of a terrorist? Such questions may trigger further interferences with human rights, such as the right to privacy (Art 17 ICCPR) or/and the right to freedom of thought, conscience and religion (Art 18 para 1 ICCPR).

Overall, the views on the integration potential remain controversial, and there are plausible arguments from both sides. Notwithstanding this controversy, if the integration potential criterion is applied, the limits under human rights and refugee law and in particular the principle of equal treatment (see 3.3.4) must be upheld. The main challenge for future EU resettlement therefore consists of reducing discrimination resulting from integration-based selection of resettlement beneficiaries. To that end, improvements *de lege lata* could be made through the introduction of clearly defined criteria and adoption of guidance for assessment.

The UNHCR plays an important role in this regard. The above-quoted US language exemplifies that receiving countries work closely with the UNHCR to assess the likelihood of integration of resettlement candidates. Notwithstanding the receiving countries' interests in the admission of individuals who are more likely to integrate, the UNHCR must uphold the humanitarian purpose of its work – in accordance with its Statute (see 2.5.2.1). Consistently, in its *Resettlement Handbook*, the UNHCR states that the usage of the integration potential "*should not negatively influence the se-*

1127 Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 15.

lection and promotion of resettlement cases."[1128] In the end, many vulnerable forced migrants have no other option than to resettle and to demonstrate their willingness to cope with integration challenges.[1129]

5.2.3.6 Firm resettlement

As opposed to the European approach, US law bars individuals from protection if they are firmly resettled in any other country. By comparison, EU law and national laws of EUMS rely on the safe third country principle for accelerated returns. The safe third country principle, however, does not make returns conditional on a third country's former offer of permanent settlement, or a durable solution.

The following practical example illustrates the difference between firm resettlement as applied in the US, and the safe third country condition under EU law: An Egyptian, having fled to Turkey, would likely be denied international protection in the EU without individual assessment of his claim. In contrast, in the US, he would not be barred from refugee status on the basis of firm resettlement if he could, for instance, prove that he only lived in Turkey on a tourist visa without any legal avenue or prospect of indefinite residence in that country.

It has been shown that individual assessment is essential especially with regard to the *non-refoulement* principle (see 3.3.1). In contrast to the safe third country principle, the firm resettlement bar is less prone to automatic returns without assessment.[1130] In light of the *non-refoulement* principle, it would thus be more consistent to reconsider the third country principle *de lege ferenda* and rely on firm resettlement instead. This would allow EUMS to refuse admission in situations where an applicant has access to a durable solution elsewhere, while at the same time following an approach that is more consistent with the *non-refoulement* principle.

1128 UNHCR, *Resettlement Handbook* (revised ed July 2011) 245.

1129 See Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 14f.

1130 For guidance on the application of the firm resettlement bar, see USCIS, 'RAIO Combined Training Program: Firm Resettlement' (20 December 2019) <https://www.uscis.gov/sites/default/files/document/foia/Firm_Resettlement_LP_RAIO.pdf> accessed 24 August 2022.

5.2.3.7 Exclusion grounds

Another contentious issue is where a receiving EUMS excluded individuals in need for international protection from admission to their territory on the basis of their previous irregular entry. Specifically, the EU-Turkey Statement prioritized individuals for resettlement who had not irregularly stayed in or attempted to irregularly enter the territory of an EUMS (see 4.2.10). In the same vein, the 2016 Proposal for a Union Resettlement Framework Regulation excludes such irregular migrants from resettlement (see 4.2.11.4).

US law as such does not set out a similar exclusion ground.[1131] Yet, when the number of irregular crossings at the US-Mexican border reached a peak in fall 2022, the US launched a private sponsorship program for displaced Venezuelans that excludes, among others, individuals who have crossed irregularly into the US, or unlawfully crossed the Mexican or Panamanian borders after the program's announcement.[1132]

Excluding refugees from international protection for reasons that are not covered by international refugee law, namely the exclusion grounds in the Refugee Convention (Art 1 F), interferes with the principle of equal treatment among and between (groups of) refugees under international human rights law, unless such exclusion is justified on the basis of reasonableness, objectivity and proportionality to achieve a legitimate aim. From the Commission's and the EUMS' standpoint, the legitimate aim behind such exclusion is to prevent smuggling and trafficking.

Indeed, the Refugee Convention does not obligate a state to admit an individual from a third country merely because this individual meets the refugee definition. However, it explicitly prohibits punishment on account of illegal entry (Art 31 Refugee Convention) – and exactly such punish-

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1131 In effect, the system established by the US and Mexico has blocked access in the US to international protection. For instance, asylum seekers have been required to make an appointment with Mexican immigration officials in order to meet CBP requirements. See Sabrina Ardalan in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 282, 303; "*Through a bilateral security program, called Merida Initiative, the US has already contributed millions of dollars to the development of technology, personnel training and infrastructure for border security at both the northern and southern borders, as well as airports and ports*", ibid 285 and 289.

1132 See USCIS, 'Process for Venezuelans' (as of 19 October 2022) <https://www.uscis.gov/venezuela> accessed 15 November 2022.

ments which would be effectuated by excluding refugees from resettlement on account of their prior illegal entry. Under EU law, it constitutes a primary law violation (Art 78 para 1 TFEU) to develop and interpret secondary law contrary to Art 31 Refugee Convention (see 4.1.2.2).

5.2.3.8 Security screening and health checks

Security screening implies interferences with fundamental rights of the individual concerned, as it affects the private sphere of this individual, most prominently protected by European human rights law under Art 8 ECHR and Art 7 Charter. While interferences with ECHR rights may be justified on the basis of a limited number of legitimate interests of a Contracting State such as national security and public order, the Charter is not limited in this regard. Art 52 para 1 Charter contains a general clause stating that any limitation of a Charter right "*must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*". So, for Charter rights, EUMS may invoke further legitimate interests, such as the interest not to admit individuals who committed criminal offenses like tax fraud or individuals with a record that indicates that they are prone to abuse the social welfare system of the receiving country as well as individuals who might engage in political radicalization in the receiving country.

In any case, a measure pursuing such interest must be proportionate to the associated interference with individual rights. First, proportionality requires that the checks are suited to uphold the invoked legitimate interest of the state. Second, it demands that the legitimate interest of the state cannot be maintained through less intrusive measures. Lastly, the extent of the checks must be overall appropriate in relation to the interferences with the rights of the potential resettlement beneficiary being checked.

The Refugee Convention takes account of security interests of the receiving country as it provides "*a system of checks and balances that take into account both the security interests of states and the protection of refugees*".[1133] Refugees and asylum seekers must abide by the laws of the receiving country and may be prosecuted there. Where due process is followed,

1133 Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' in (2016) 4 Journal on Migration and Human Security 3, 51.

refugees posing a risk to national security or public order may be subject to detention,[1134] cancellation or revocation of refugee status, extradition or even expulsion,[1135] provided that they would not be at risk of facing serious harm in the country to which they are returned.[1136] Consequently, the Refugee Convention equips Contracting States with tools to protect national security and public order even after a resettlement refugee has been admitted.

From a political point of view, increased security checking constitutes a manifestation of an overall policy shift to prioritize national security. In this regard, *Davitti* raised concerns that the language used by EU officials contributed to the creation of an image of the arriving refugees as potential terrorists. She pointed out that "*whilst the situation at the southern borders was depicted as a humanitarian emergency demanding immediate intervention, those same refugees* […] *were simultaneously portrayed as a potential security threat*".[1137] Accordingly, the superficial usage of humanitarian and emergency language provided the EU with the opportunity to engage in externalized migration control.[1138]

In terms of health screening, medical examinations allow for a comprehensive picture of the prospective resettlement beneficiary's health status, which is not only important for the assessment of the respective individual's vulnerability. In essence, it enables preparedness for special needs and treatment during the journey as well as upon arrival. Similar to security screening, health screening involves interferences with fundamental rights of the individual concerned and such interferences must be justified and proportionate. In the context of health screening, justification can be based on the right to health. The crucial point is whether the specific measure is proportionate, namely that the interference in the private sphere is not excessive in relation to the health protection that it enables.

1134 Restrictions on the movement of asylum seekers are allowed, including detention, if necessary in circumstances prescribed by law and subject to due process safeguards; e.g. in case of strong reasons for suspecting links with terroristic acts or violence; see Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' in (2016) 4 Journal on Migration and Human Security 3, 51.

1135 See Art 32 Refugee Convention.

1136 See Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' in (2016) 4 Journal on Migration and Human Security 3, 51.

1137 Darla Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' in (2018) 29 European Journal of International Law 4, 1179.

1138 See ibid 1179.

One particular issue in the context of screening concerns the protection of personal data. A remarkable example in this regard is a Memorandum of Understanding of 2019 between UNHCR and DHS, where the UNHCR agrees to directly transfer biometric and associated biographic data of those refugees who it refers to the US for resettlement into the DHS's automated Biometric Identification System (IDENT). It is a matter of concern that, as DHS recognizes, under this scheme, the US could come in the possession of data from individuals that will, for various reasons, eventually never set foot in the US.[1139]

For EUMS (subject to the condition that they are implementing EU law), an obligation to protect personal data derives, amongst others, from Art 8 Charter. This Article demands the fair processing of data "*for specified purposes and on the basis of the consent of the person concerned*". Denmark can be considered as a best-practice example. Section 8 para 5 Danish Aliens (Consolidation) Act expressly requires an alien's consent to the health information being transmitted.

5.2.3.9 Right to appeal the selection decision

Eventually, future EU resettlement legislation should ensure that negative decisions of the UNHCR in the pre-selection phase, as well as selection decisions of national authorities of the receiving country, can be appealed. Incorporating the right to appeal when there is an arguable claim of violation of rights under the ICCPR and/or the ECHR constitutes an act of compliance with international law (see 3.3.3.1). This means that appeal options must go beyond the current US approach, i.e. allowing for review in cases where unknown circumstances arise and where the officer who conducted the previous interview grants such review at his or her discretion. This approach would violate international law if, for instance, a potential resettlement beneficiary was deprived of effective review despite having experienced (other) human rights abuses in the course of his or her selection interview, exceeding, for example, the required threshold under Art 7 ICCPR. An officer who conducted the interview and abused human

1139 See US Department of Homeland and Security, 'Privacy Impact Assessment for the United Nations High Commissioner for Refugees (UNHCR) Information Data Share', DHS/USCIS/PIA-081 (13 August 2019) <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis081-unhcr-august2019.pdf> accessed 11 July 2021.

rights of the potential resettlement beneficiary during the interview will most likely be biased in his or her review decision.

Furthermore, it is relevant for resettlement to the EU that the right to good administration, which is stipulated in Art 41 Charter and established as a general principle of EU law, demands that EU agencies as well as EUMS grant prospective resettlement beneficiaries several procedural safeguards, including the right to be heard (see 5.2.1).

5.2.3.10 Resettlement contract

Lastly, the practice of some EUMS to ask for express consent of selected beneficiaries to be resettled to their territory, deserves further consideration.

The Refugee Convention acknowledges the relevance of the refugee's will. In this regard, *Moreno-Lax* claimed that the Refugee Convention endorsed a refugee's discretion about whether and where to seek international protection.[1140] For instance, Art 31 para 2 Refugee Convention sets out an obligation of Contracting States to "*allow* […] *refugees a reasonable period and all the necessary facilities to obtain admission into another country*". Moreover, Art 1 C Refugee Convention repeatedly uses the term 'voluntary' in relation to the cessation of refugee status. Accordingly, such cessation regularly involves a discretionary choice of the refugee. Against this backdrop, *Moreno-Lax* concluded that refugees enjoy certain discretion regarding where they may properly claim international protection.[1141]

In terms of EU law, the Temporary Protection Directive accounts for the will of refugees. Its Art 25 para 2 stipulates that "[t]*he Member States concerned* […] *shall ensure that the eligible persons* […] *who have not yet arrived in the Community have expressed their will to be received onto their territory*".[1142] Eventually, Art 9 Commission Proposal on a Union Resettlement Framework Regulation expressly refers to the consent of resettlement beneficiaries. It states that "[t]*he resettlement procedures* […] *shall apply to*

1140 See Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of the Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects – The Hague Academy of International Centre for Research* (Martinus Nijhoff 2015) 665 (691-695).

1141 See ibid 692.

1142 See Ségolène Barbou des Places, 'Burden Sharing in the Field of Asylum: Legal Motivations and Implications of a Regional Approach' (2012) 16f.

third-country nationals or stateless persons who have given their consent to be resettled and have not subsequently withdrawn their consent, including refusing resettlement to a particular Member State". These provisions confirm that the consent of resettlement beneficiaries has legal weight. Specifically, under the proposed Resettlement Framework Regulation, resettlement beneficiaries would have a right not to be resettled to a particular EUMS without their consent.

In practice, the right to consent must not amount to a so-called *pactus diabolic*, limiting the beneficiary's rights by imposing certain conditions on the beneficiary that he or she cannot refuse due to fear of not being resettled at all. The legal standard that most closely describes such a situation is duress. Here analogies could be drawn from contract law.

5.2.4 Preliminary conclusion

The UNHCR constitutes the major referral entity for resettlement to the US as well as to the EU, but increased involvement of NGOs would offer additional resources for a comprehensive case identification in the future. Differences in status determination are a source of discrimination among and between (groups of) refugees. Applying different standards to refugees and persons eligible for subsidiary protection status does not amount to discrimination, provided that their situations are factually not comparable. From a policy perspective, harmonization efforts *de lege ferenda* are desirable. For example, only a few EUMS account for persons eligible for subsidiary protection. Additionally, IDPs should generally be included in the scope of resettlement beneficiaries as opposed to the US approach of prioritizing only some groups of IDPs. Eventually, extending the scope of resettlement beneficiaries to 'forced migrants' would include "*any individual who, owing to the risk of serious harm, is compelled to leave or unable to return to her or his country of origin*".[1143] In terms of family reunification, the Commission proposed a broadened scope of family in the Proposal for a Union Resettlement Framework Regulation, which goes beyond the US approach. In the light of Art 7 Charter, it is consistent to follow the Commission's broadened understanding of family *de lege ferenda*. Considering the potential to integrate when assessing eligibility for future EU resettlement can result in discrimination among and between

1143 Kiran Banerjee, 'Rethinking the Global Governance of International Protection' in (2018) *56* Columbia Journal of Transnational Law, 319.

(groups of) refugees if such assessment is arbitrary. It has been shown that the application of the integration potential remains controversial, and that there are reasonable arguments from the perspective of states in favor of its application. Next, the US approach that firm resettlement in a third country bars individuals from being eligible for resettlement to the US, deserves consideration *de lege ferenda*. As regards exclusion grounds for resettlement to the EU, it is, from a legal perspective, not prohibited *per se* to go beyond the grounds allowing for exclusion of refugee status under the Refugee Convention. However, penalizing refugees who attempted to enter the EU irregularly by excluding them from resettlement violates Art 31 Refugee Convention. Security and medical screening entail interferences with fundamental rights of those who are screened. This requires justification, i.e. a legitimate aim in the interest of the state and a proportionality test. The analysis showed that several EUMS do not provide the possibility for potential resettlement beneficiaries to appeal a negative selection decision. Such approach likely violates international law, namely in cases where the resettlement beneficiary has an arguable claim of a violation of another right under the ICCPR and/or the ECHR. The current US approach does not sufficiently account for this requirement under international law. In terms of EU law, the Charter, which applies during selection missions outside the EU when an EUMS implements EU law, grants the right to good administration and includes a right to be heard for the prospective resettlement beneficiary. Moreover, a right to consent to resettlement to a specific receiving country can be deduced from the Refugee Convention. As regards EU law, the Commission envisaged a right to consent in the Proposal for a Resettlement Framework Regulation.

5.3 Pre-departure, arrival and placement

Forced migrants identified as in need for resettlement cannot choose their receiving country.[1144] The only choice they have is denying resettlement outright by withholding their consent to be referred to a specific receiving country (see 5.2.1). For this reason, it is important to equip selected resettlement beneficiaries with accurate information about the process and

1144 See Annelisa Lindsay, 'Surge and selection: power in the refugee resettlement regime' in (2017) 54 Forced Migration Review, 12.

the receiving country to which they are admitted.[1145] *Fratzke* and *Kainz* emphasized that "[p]*redeparture orientation programmes … are intended to build refugees' confidence and feelings of control, as well as their ability to cope with unfamiliar situations and to navigate everyday life in the resettlement country*".[1146] The majority of resettlement programs include pre-departure and post-arrival services, usually under the guidance of the IOM.[1147]

5.3.1 Programs of EUMS

Correspondingly, most European resettlement programs encompass pre-departure orientation. According to a 2019 Migration Policy Institute (MPI) report, thirteen out of twenty-one European countries[1148] conducting resettlement through the UNHCR in 2017 provided some form of pre-departure orientation.[1149]

The content of orientation programs typically comprises travel information and guidance regarding the rights and obligations of refugees in the resettlement process. The 2019 MPI report carried out that beyond this core content, Norway and Finland launched language training sessions and Germany prepared skill profiles to facilitate employment after arrival.[1150]

Most EUMS offer pre-departure orientation after having made their selection decision, prior to departure. According to the 2019 MPI report, Sweden was the only EUMS delivering the full pre-departure program already during selection interviews.[1151] Furthermore, there are significant differences between EUMS regarding the length of their orientation programs, ranging from a few hours to several days.[1152] The Netherlands stand out as they split pre-departure orientation in three separate courses: an

1145 See William Lacy Swing, 'Practical considerations for effective resettlement' in (2017) 54 Forced Migration Review, 4 <https://www.refworld.org/docid/58cbcb314.html> accessed 27 March 2021.
1146 Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 1.
1147 See ibid 1; see also William Lacy Swing, 'Practical considerations for effective resettlement' in (2017) 54 Forced Migration Review, 5.
1148 Including EUMS and states of the European Economic Area (EEA).
1149 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 6.
1150 See ibid 14, 17.
1151 See ibid 17f.
1152 See ibid 16.

initial course taking place about twenty weeks before departure; a second course twelve weeks before departure focusing, among other things, on the municipality where the refugee will live; and finally, a third session three weeks before departure explaining characteristics of accommodation and housing.[1153] These sessions are typically held in-person. In addition, the Netherlands has supplied MP3 players for their one-hour-per-day 12-day language training sessions.[1154] As opposed to the Netherlands, Finland used online seminars as early as in 2016.[1155]

EU level funding for pre-departure orientation is provided through the AMIF. For example, the AMIF Implementing Decision of April 2017 explicitly mentioned "[p]*re-departure and post-arrival support for the integration of persons in need for international protection in particular when having been resettled from a third country*".[1156] This reference implies that funding of pre-departure programs and subsequent measures enhancing the integration of resettlement beneficiaries counted among the Commission's priorities for the AMIF. The Commission continued in this vein and pointed to pre-departure integration measures and post-arrival measures in the Action plan on Integration and Inclusion 2021-2027.[1157]

On-site pre-departure assistance and the subsequent transfer to the receiving country are commonly carried out by the IOM, based on bilateral agreements or contracts with EUMS.[1158] Only the Netherlands solely tasked national authorities with the design and the delivery of its pre-departure and post-arrival programs. Some EUMS used blended programs involving manifold actors, such as subnational authorities, civil-law societies and higher education institutions alongside the IOM. For example, Norway collaborated with so-called 'cross-cultural trainers' being

1153 See Dutch Country Chapter to the UNHCR *Resettlement Handbook* <https://www.unhcr.org/3c5e5925a.pdf> accessed 30 July 2020.

1154 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 14.

1155 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 27f.

1156 Commission, Implementing Decision on the adoption of the work programme for 2017 and the financing of Union actions in the framework for the Asylum, Migration and Integration Fund, C(2017) 2572 final, 20 <https://ec.europa.eu/research/participants/data/ref/other_eu_prog/home/wp/amif-awp-2017_en.pdf> accessed 27 March 2021.

1157 See Commission, Communication 'Action plan on Integration and Inclusion 2021-2027', 7.

1158 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 28.

former resettlement beneficiaries themselves or having an immigration background.[1159]

For the internal placement of resettlement beneficiaries, several EUMS, such as the Czech Republic, Estonia, Finland, Germany, the Netherlands or Poland, adopted dispersal schemes among their respective components to avoid concentration in certain areas.[1160] By contrast, Austria, Belgium, Bulgaria, France, Hungary, Italy and Luxembourg have refrained from reverting to any form of internal geographical distribution to accommodate protection seekers within their territory.[1161] Despite geographical distribution, placement criteria applied by EUMS include the commitment of municipalities, availability of housing, preferences of admitted resettlement refugees (only acknowledged by Bulgaria) as well as economic considerations and personal circumstances of the specific resettlement beneficiary.[1162]

Several – but not all – EUMS equally offer immediate support after arrival to resettlement beneficiaries and other beneficiaries of international protection, but specific measures of some EUMS prioritize resettlement beneficiaries. For instance, according to the 2019 MPI report, Belgium provided tailor-made assistance and intensive support for up to twenty-four months for particularly vulnerable resettlement beneficiaries only. Finland prioritized resettlement beneficiaries in terms of housing assignments.[1163] The overall range of immediate support from EUMS was similar, from food supplies and interpretation services to medical examinations. Several EUMS granted financial support through a weekly or monthly allowance for varying durations.[1164] Noteworthy, in the two crucial areas of housing and freedom of movement, some EUMS imposed significant restrictions.[1165] What is more, age-appropriate protection and care deserve special attention.[1166]

1159 See ibid 20, 27f.

1160 See Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 506.

1161 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 31.

1162 See ibid 31.

1163 See ibid 29.

1164 Ranging from a minimum of 6 weeks in Ireland to as long as needed e.g. in Belgium, Germany and the Netherlands; see ibid 30f.

1165 See ibid 32f.

1166 In this regard, The UN Committee on the Rights of the Child announced in October 2021 that Spain had violated the rights of unaccompanied migrant

5.3.2 US program and practice

The US has conducted overseas Cultural Orientation (CO) programs in RSCs in more than forty countries of (first) refuge.[1167] PRM provides funding and contracts with intergovernmental, international and US-based agencies[1168] to conduct the CO. As opposed to EUMS, predominantly relying on the IOM for the delivery of pre-departure programs, the US primarily works with two Volags, the International Rescue Committee and Church World Service.[1169] In addition, US embassies and other government entities provide CO.

All refugees older than 15 years and conditionally approved for resettlement to the US are eligible to receive CO. However, childcare obligations, logistical problems, and class size regularly hinder participation or make CO attendance possible for only one family member. Refugees may attend CO at any point in time between their approval for resettlement and their departure for the US. The length of CO differs. For example, in 2014, it varied between six and 36 hours, depending on the location.[1170] Currently, according to the Report to Congress on Proposed Refugee Admissions for FY 2023, CO takes place "*usually one week to three months before departure*" and "*generally lasts from one to five days*".[1171]

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and asylum-seeking children in 14 cases since 2019. OHCHR, 'Spain's age assessment procedures violate migrant children's rights, UN committee finds' (13 October 2020) <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26375&LangID=E> accessed 21 June 2021.

1167 For fifteen years (until 2015), the Cultural Orientation Resource (COR) Center served as the national technical assistance provider on overseas as well as domestic refugee orientation. Its activities comprised the training of trainers, development of print, audiovisual, and web resources, outreach to receiving communities, assessment of orientation, research on impact and results of pre-departure and post-arrival refugee orientation as well as pre-departure English language instruction and exchange of information; see Center for Applied Linguistics, 'Immigrant & Refugee Integration' <http://www.cal.org/areas-of-impact/immigrant-refugee-integration> accessed 27 March 2021.

1168 The International Catholic Migration Commission, the IOM, and the International Rescue Committee, HIAS and Church World Service.

1169 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 22.

1170 See Cultural Orientation Resource Center, 'Overseas CO' <http://50.116.32.248/index.php/providing-orientation/overseas> accessed 22 August 2020.

1171 US Department of State, Department of Homeland and Security, Department of Health and Human Services, 'Report to Congress on Proposed Refugee Admissions for Fiscal Year 2022' (20 September 2021) 22.

The content of overseas CO was manifested in the Overseas Cultural Orientation Objectives and Indicators,[1172] a multi-year joint effort of governmental agencies, Volags and other stakeholders. The Cultural Orientation Resource Exchange (CORE),[1173] a technical assistance program, works to ensure consistent messages, trains resettlement staff to deliver CO and provides additional material for resettlement beneficiaries to engage in self-learning. Above all, the US pre-departure orientation puts emphasis on communicating the expectation that the resettlement beneficiaries seek and obtain rapid employment to become self-sufficient, reflecting the overall goal of the USRAP.[1174] In order to achieve that goal, the US expanded on English language training, which has proven successful since "*tests with participants in the US predeparture English programme show that refugees improved their knowledge of English and retained what they learned after they were resettled, even if their departure was delayed*".[1175]

In parallel with the CO, the preparation of the actual transfer to the US starts with the RSC sending a request for confirmation of placement capacity. The Refugee Processing Center, a part of the State Department, manages the assessment of placement capacity in coordination with the nine Volags.

The responsible Volag determines where in the US a resettlement beneficiary will live.[1176] "*Factors considered as part of the process include health, age, family make up, and language of the refugee, as well as the cost of living and the availability of job opportunities, housing, education, and health services*".[1177] The responsible Volag makes all necessary arrangements for the reception of resettlement beneficiaries in the local community, while the IOM, in cooperation with the RSCs, takes care of travel coordination and medical checks. In countries of (first) refuge where the IOM is not present, US embassies or the UNHCR organize the travel. Upon receipt of the IOM travel notification, the responsible Volag prepares the welcome of

1172 See ibid.
1173 See <https://coresourceexchange.org/> accessed 2 May 2023.
1174 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 5.
1175 Ibid 13f.
1176 See James Y Xi, 'Refugee Resettlement Federalism' in (2017) Stanford Law Review 69, 1205.
1177 Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 5 <https://www.migrationpolicy.org/research/how-are-refugees-faring-integration-us-and-state-levels> accessed 27 March 2021.

a resettlement beneficiary at the airport and transportation to housing at their final destination.

Post-arrival CO is provided by staff at local resettlement agencies. "*For example, state health care coverage is explained as refugees learn how to access and pay for health services; refugees are introduced to the local public school system and learn about customary student behavior and expectations of parental involvement; and refugees learn about the amenities and services available in their new communities.* [...] *Laws and responsibilities are also a focus*."[1178] The so-called Reception and Placement (R&P) period, where resettlement beneficiaries receive initial core services from resettlement agencies (including housing, furnishings, clothing, and food, as well as assistance with access to medical, employment, educational, and social services) is limited to three months after arrival.[1179] Regarding financial assistance, the Volags receive a one-time grant from the federal government for each resettlement refugee under their responsibility, which they then distribute to the resettlement beneficiaries.[1180]

To pay for the travel costs to the US, resettlement beneficiaries receive an interest-free travel loan from the PRM in a program administered by the IOM. Six months after arrival in the US, loan repayment starts.[1181]

5.3.3 Analysis

The treatment of selected resettlement beneficiaries before and during the transfer to the receiving country as well as upon arrival constitutes a key factor impacting the resettlement beneficiaries' opportunities of setting up

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1178 US Department of State, Department of Homeland and Security, Department of Health and Human Services, 'Report to Congress on Proposed Refugee Admissions for Fiscal Year 2022' (20 September 2021) 23.

1179 See US Department of State, 'Reception and Placement', <https://www.state.gov/refugee-admissions/reception-and-placement/> accessed 17 September 2022. See Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 7. See also Gregor Noll and Joanne van Selm, 'Rediscovering Resettlement' in (2003) 3 Migration Policy Institute Insight, 22.

1180 See Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 7.

1181 See American Immigration Council, 'An Overview of US Refugee Law and Policy' (8 January 2020) <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy> accessed 27 March 2021; see also Refugee Council USA, 'Resettlement Process'.

their new lives in this country. US and European resettlement programs comprise divergent orientation services, placement and reception processes.

5.3.3.1 Pre-departure orientation

The pre-departure orientation programs offered by EUMS differ from the US CO program. At the same time, pre-departure orientation varies among EUMS themselves. The differences affect manifold aspects of pre-departure orientation. Specifically, divergent contents, lengths, formats, and actors of EUMS' pre-departure orientation programs create unequal opportunities for resettlement beneficiaries to set up their new lives in the EU. Multiple external and specific refugee-related factors impact the practical feasibility and implementation of pre-departure orientation.[1182] Even if these factors require national programs to remain flexible, common reference points are indispensable to create a more equal starting situation for resettlement beneficiaries destined to the EU *de lege ferenda*. For that matter, it stands to reason that the extensive cooperation between EUMS and the IOM in the wake of pre-departure orientation makes the IOM a promising actor to implement further harmonization of the divergent national programs. It is worth mentioning that as a general principle under EU law, the principle of subsidiarity must be considered when harmonizing pre-departure programs of EUMS at the EU level. Apparently, not all decisions about the content and design of pre-departure orientation for resettlement in a specific EUMS can better be taken at the EU level than by the EUMS themselves. That being said, it would be mistaken in the light of the subsidiarity principle to anticipate detailed harmonization of country-specific content of cultural orientation.

When harmonizing the content of future pre-departure orientation, the following points should be considered: Travel information is crucial since many resettlement beneficiaries are taking a plane for the first time; a clear description of the living conditions in the receiving country is equally important to avoid frustration emerging from unfulfilled expectations; and intensive language training sessions as included in the US, and also in some of EUMS' pre-departure programs have proven successful. Other means to foster integration of resettlement beneficiaries are the prepara-

1182 See Susan Fratzke and Lena Kainz, 'Preparing for the unknown: Designing effective predeparture orientation for resettling refugees' (May 2019) 20.

tion of skill profiles for job applications and guidance on access to further education in the receiving country.

Concerning the format of pre-departure orientation, the example of Finland offering online courses, as well as self-learning through the US CORE program, induce considerations *de lege ferenda* on remote pre-departure preparation. What is more, the CORE stands out as it offers translations of its Welcome Guide Textbook in various languages.[1183] Remote preparation and self-learning could be of value in emergency cases and/or where time and capacities are limited.[1184] The 2020 COVID-19 outbreak demonstrated the relevance of remote learning during public health crises. Conversely, there are valid reasons not to generally switch to remote pre-departure orientation. As such, it deprives resettlement beneficiaries of personal contacts with trainers and case workers, as well as other resettlement beneficiaries destined to the same receiving country. Besides, practical issues concerning, amongst others, electricity, stable internet access and appropriate hardware render remote pre-departure orientation less practical or even impossible in some countries of (first) refuge. This means that online courses are a valuable format for pre-departure orientation if technically feasible and used in an appropriate manner, or rather in emergency or crisis situations. Overall, they should not replace in-person courses at large.

In the light of the principle of equal treatment (see 3.3.4), future EU legislation on resettlement must ensure equal access to orientation programs for all resettlement beneficiaries. As mentioned, Art 2 para 1 ICCPR prohibits discrimination among refugees on grounds such as language or national origin. It follows that receiving EUMS would have to justify access restrictions to pre-departure orientation on such grounds, namely, they would have to justify differential treatment between resettlement beneficiaries coming from a specific country or speaking a particular language.

Equal access to pre-departure orientation is particularly relevant in case of families to be resettled. For example, Austria's past resettlement efforts comprised two-day trainings with childcare available during the sessions.[1185] Especially mothers could be deprived of participation if no childcare service was offered during pre-departure training. The resulting

1183 These include Amharic, Arabic, Burmese, Chin, Dari, Farsi, French, Karen, Kinyarwanda, Kirundi, Nepali, Russian, Somali, Spanish, Swahili, Tigrinya and Vietnamese. The Welcome Guide Textbook is available at: <https://coresourceexchange.org/welcome-guides/> accessed 23 November 2022.

1184 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 27f.

1185 See ibid 27f.

lack of pre-departure information would arguably weaken their starting position when arriving in the receiving country.

Another worthwhile future policy goal consists of establishing continuity between pre-departure and post-arrival assistance. A means to achieve continuity would be, for instance, engaging the same institution for language sessions in the course of pre-departure orientation and in the receiving country upon arrival. In addition, cooperation of workers at place in the countries of (first) refuge with the receiving community is crucial to avoid disruption in the resettlement process. This can be achieved by collecting and sharing detailed information about the prospective resettlement beneficiaries.

5.3.3.2 Placement

Empirical data confirms that the placement of resettlement beneficiaries has a significant impact on integration outcomes. For example, a 2018 study on the determinants of refugee naturalization in the US revealed that "*refugees are systematically more likely to naturalize when initially placed in locations with low unemployment rates and dense urban settings*".[1186]

In addition, the resettlement beneficiaries themselves contribute to sustainable integration. Empirical evidence showed that not involving refugees in the placement process and resettling them in communities where they had no intention to live increased the likeliness of failure in areas such as education and employment.[1187] "*A frustrated, poorly integrated and under-employed refugee is a problem not only for the person involved, but also for the host community: Such situation is a lose-lose one* […]".[1188] Consequently, neglecting preferences of resettlement beneficiaries encourages secondary migration instead of sustainable integration.[1189]

In fact, placement decision-making and internal distribution systems substantially differ between EUMS and the US. In 2010, *Thielemann et*

1186 Nadwa Mossaad et al, 'Determinants of refugee naturalization in the United States' in (11 September 2018) 115 PNAS 37, 9175 (9178).

1187 See Will Jones and Alexander Teytelboym, ''Matching' refugees' in (2017) 54 Forced Migration Review, 25.

1188 Marcello Di Filippo in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 201.

1189 See ibid 200f.

al compared EUMS' internal distribution systems with the US system as follows:[1190]

> *Compared to the USA, EU Member States base their decision on governmental directives, may they be federal, regional, or municipal level. In the USA, however, non-governmental organizations (nine agencies plus the State of Iowa) decide how to disperse the resettled refugees across the States.*

In the US, the nine Volags determine the placement of resettlement refugees. *De lege ferenda*, policy considerations towards the inclusion of voluntary agencies in the placement process are promising for future resettlement to the EU. The US example demonstrates that the staff of Volags has experience with a huge range of profiles of resettlement beneficiaries and, at the same time, they engage in close contact with host communities within a well-established network throughout the US. This experience and network confirm the ability of Volags to match the resettlement-beneficiary-profiles with the conditions in the receiving communities. Overall, the US concept of assigning Volags to support self-sufficiency encourages resettlement beneficiaries to become active contributors, who positively impact the receiving community.

Against this backdrop, it follows for future EU resettlement that the establishment and expansion of a network of voluntary non-governmental agencies would be a desirable policy objective. Such agencies could contribute to the placement process to improve the matching of profiles of resettlement beneficiaries with the respective receiving communities. Additionally, community engagement, including the involvement of private sponsors in referral and placement processes, constitutes a model that has gained increased attention, both in Europe and the US.[1191] Ultimately, it is desirable to strengthen the resettlement beneficiaries as valuable actors in these communities.

1190 Eiko R Thielemann et al cited in Jesus Férnandez-Huertas Moraga and Hillel Rapoport, 'Tradable Refugee-admission Quotas and EU Asylum Policy' in (2015) 61 CESifo Economic Studies 3, 646; see Eiko R Thielemann et al 'What system of burden-sharing between Member States for the reception of asylum seekers?' (European Parliament 22 January 2010) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/419620/IPOL-LIBE_ET(2010)419620_EN.pdf> accessed 27 March 2021.

1191 See Janine Prantl and Stephen Yale-Loehr, 'Let Private Citizens Sponsor Refugees' (*NY Daily News*, 15 October 2022) <https://www.nydailynews.com/opinion/ny-oped-let-private-citizens-sponsor-refugees-20221015-dtepnanthfegnpf6anjirwt3by-story.html> accessed 23 November 2022.

5.3.3.3 Cooperation with local governments and receiving communities

The work of voluntary agencies depends on political and civic commitment at the local level. In this light, the US federal government has been criticized for undermining local needs, conditions and concerns on multiple tiers. First, pre-resettlement information provided by the federal government to receiving communities has proven insufficient. As a result, the receiving communities could not adequately prepare for the resettlement beneficiaries' arrivals. Second, federal funding is reactive, i.e. dictated by the number of refugee arrivals over the last two years. Hence, in case of sudden influx, communities lack adequate resources. Third, federal assistance for receiving communities does not consider the education level, health condition and/or psychological background of a resettlement beneficiary allocated to this community.[1192]

To counter these policy issues, *Xi* recommended giving states and local communities more weight in the placement decision.[1193] With a view to increasing EU involvement in the field of resettlement, the two most significant takeaways from *Xi*'s contribution are that enhanced information sharing between the EU and the local level as well as proactive and tailor-made allocation of EU funding should become a priority *de lege ferenda*.

It also deserves a mention that in 2015, European local governments played a substantial role in filling gaps in the national provision of reception services for individuals in need for protection, which renders *Xi*'s arguments to better account for local communities' concerns even more relevant. Indeed, European cities and municipalities have called for further involvement in migration policy, including at the EU level. There are prominent examples of local government initiatives for the reception of refugees in Europe, amongst other things transnational city partnerships, such as Eurocities and Solidarity Cities. Also, the cooperation between local regions and networks of church associations, civil society and NGOs has proven successful, for instance in Italy, the Community of Sant'Egidio.[1194]

1192 See James Y Xi, 'Refugee Resettlement Federalism' in (2017) Stanford Law Review 69, 1229.

1193 See ibid 1234.

1194 See Tihomir Sabchev and Moritz Baumgärtel, 'The path of least resistance? EU cities and locally organised resettlement' in (February 2020) 63 Forced Migration Review, 38-40 <https://citiesofrefuge.eu/sites/default/files/2020-02/sabchev-baumgartel-fmr.pdf> accessed 27 March 2021.

De lege ferenda, supporting local government initiatives through direct EU funding "*could represent the path of least resistance to more far-reaching reforms of the EU migration governance system*".[1195] On that basis, *Sabchev* and *Baumgärtel* identified two main driving factors designed to minimize political tensions in and among EUMS. First, security concerns of central governments have to be satisfied before authorization of resettlement. Second, central governments will more likely agree with local resettlement initiatives if they do not have to bear the costs of initial reception and short to medium-term integration into local communities. So, it was suggested that municipalities should receive direct EU funding to realize their initiatives.[1196] Given that significant EU funds were channeled to central governments, who failed to meet their commitments in the end, it appears that channeling EU funds to the municipalities who are able and willing to admit refugees could be a promising tool to empower the local actors and gain additional reception capacity.

To take it one step further, is it politically desirable to grant local governments a right to veto, i.e. to refuse admission, or to select whom they want to admit? Concerns that a veto would drastically reduce the number of admissions, e.g. because local governments would refuse admission for security reasons, were refuted by the continued commitment of US governors to admit refugees in response to the former President *Trump*'s Executive Order of 26 September 2019 (see 2.3.15).

In the EU context, the numerous pro-admission initiatives show that local support in favor of admission exists. Legally speaking, EU law demands considerations in terms of the subsidiarity principle. Indeed, situations are conceivable where local entities are better suited to assess how many people/refugees in need of protection they can accommodate and who could best integrate in the particular environment. Nevertheless, human rights and refugee law set limits to a potential right to refuse admission: e.g. such approach must comply with the *non-refoulement* principle, and it must not lead to unjustified discrimination. Eventually, the idea of solidarity supports that not one community can bear the whole burden alone. As elaborated in 4.1.2.1, a right to generally refuse all admissions would not be permissible under Art 80 TFEU.

1195 See ibid 39.
1196 See ibid 40.

5.3.3.4 Reception conditions

Interaction with local governments and receiving communities constitutes an essential prerequisite to establishing the reception conditions required under international law for resettlement beneficiaries in due time. Even though resettled refugees cannot rely on a right to long-term integration, they have several rights under international human rights law and refugee law concerning their sojourn in the receiving country. As shown in 3.3.5, these rights apply immediately after arrival in the receiving country.

This is also required under EU law. As outlined above, EUMS are bound to the Charter when implementing EU law – irrespective of whether they are acting outside their territory. In this light, the implementation of the AMIF Regulation arguably triggers the applicability of the Charter in the resettlement selection process (see 4.1.1.2). It follows that in the course of AMIF funded resettlements, EUMS must grant the Charter rights even before and during the travel as well as immediately upon arrival of a resettlement beneficiary on their territory. Therefore, the point in time when a particular EUMS starts to implement resettlement under the conditions of the AMIF is crucial; when an EUMS at a certain point in time acts outside the AMIF, and ceases to implement EU law, the applicability of the Charter is not given.

5.3.4 Preliminary conclusion

The current differences in pre-departure orientation programs of EUMS demonstrate that policy efforts are necessary *de lege ferenda* to establish equal opportunities for resettlement beneficiaries coming to the EU. This is even more important since equal treatment among and between (groups of) refugees must be granted under international law. From an EU law perspective, Art 78 para 1 requires compliance with prohibitions of discrimination under the Refugee Convention and other pertinent human rights treaties. Moreover, the principle of subsidiarity sets legal limits in the sense that detailed EU-level harmonization of pre-departure programs would not align with this principle. What is more, it derives from international refugee law and EU law that the will of refugees has legal weight when it comes to the decision where he or she will actually be placed. A lesson to be learned from the US is that the receiving community should be involved in the resettlement process through enhanced information sharing between the EU and the local level as well as proactive and tailor-made EU

funding. The efforts to include the receiving community are also necessary to achieve compliance with international law by providing the required reception conditions to resettlement beneficiaries immediately upon arrival. Finally, integration policy considerations and considerations in light of the principle of subsidiarity suggest granting local governments a right to refuse admission and/or select whom they want to admit. Yet, the EU law principle of solidarity (Art 80 TFEU) speaks against a right to generally refuse admission (as laid out by the CJEU addressing incompliances with EU's internal relocation scheme; see 4.1.2.1).

5.4 Long-term integration and naturalization

Receiving countries are not obligated to offer long-term integration to individuals whom they have granted international protection.[1197] This stems from the fact that the Refugee Convention does not include a right to permanently integrate[1198] as refugee status is meant to be temporary.[1199] The temporary nature of refugee status emanates from clear cessation rules under the Refugee Convention. Accordingly, the refugee status ceases to exist when the circumstances in the country of origin allow for return (Art 1 C paras 5 and 6 Refugee Convention). On the other hand, refugee status can also end by naturalization in the receiving country (Art 1 C para 3 Refugee Convention).[1200]

As a matter of fact, EUMS pursue different approaches in granting refugees long-term residency and citizenship. Likewise, the political views of scholars on how fast refugees should gain permanent residence status and/or access to citizenship have been divided.[1201] For example, *Miller* opposed the immediate award of long-term residence status and fast access

1197 See Guy S Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 1983) 225.

1198 See Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper nº115 (May 2005) 8.

1199 See Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' in (2018) 39 Michigan Journal of International Law 1, 104.

1200 See Marjoleine Zieck in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, 579.

1201 See David Owen, 'Refugees, EU Citizenship and the Common European Asylum System A Normative Dilemma for EU Integration' in (2019) Ethical Theory and Moral Practice, 347 (348f).

to citizenship. In his view, it could not be assumed that all refugees chose to "*identify politically with the society that takes them in*".[1202] By contrast, *Owen* opted in favor of rapid naturalization. He purported that refugees were *de facto* stateless since they were effectively unable to exercise their right of diplomatic protection and their right to return (to their home country). Accordingly, the receiving country "*stands in loco civitatis to them and must reflect this standing in its treatment of their claims*".[1203] Otherwise, refugees would be deprived of the ability "*to conduct their lives against the background of a right to secure residence of a state*"[1204] and plan their future in the long run, which in turn would discourage them from becoming self-sufficient.

5.4.1 EU law and practice of EUMS

Similar to the Refugee Convention, EU (secondary) law does not set out a duty to achieve long-term integration of refugees or persons eligible for subsidiary protection. While focusing on the definition of basic rights and obligations arising from refugee and subsidiary protection status, EU law remains silent on *how* to accomplish integration in the receiving EUMS. On that account, EU level harmonization of the legal status of protection seekers in EUMS has brought about extensive but not complete equality within the EU.[1205] In particular, resettlement beneficiaries face inequalities regarding their legal status. The two contrasting approaches of EUMS are to either treat resettlement refugees as refugees with only the *prospect* of permanent residency, or as migrants with immediate permanent residency.[1206]

1202 David Miller, *Strangers in our midst* (Harvard University Press 2016) 135f.

1203 David Owen, 'Refugees, EU Citizenship and the Common European Asylum System A Normative Dilemma for EU Integration' in (2019) Ethical Theory and Moral Practice, 349.

1204 Ibid 350.

1205 See Martin Nettesheim, 'Migration im Spannungsfeld von Freizügigkeit und Demokratie' in (2019) Archiv des öffentlichen Rechts, 358 (398, 401).

1206 E.g. refugees who are resettled to Sweden immediately receive a permanent residence permit irrespective of their status; Denmark and Finland grant a five-year stay permit to resettled refugees; see Marjoleine Zieck in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, 577.

Significant inequalities exist between resettlement beneficiaries and protection seekers admitted through humanitarian admission programs. In terms of the latter, EUMS admit persons in need for international protection under the assumption that they will likely return to their home country within a short period of time (probably not exceeding two years). Consequently, beneficiaries of humanitarian admission programs regularly obtain residence permits with limited duration. By contrast, protection seekers admitted under traditional resettlement schemes are granted a longer period of residence or even immediate permanent residence status.

Moreover, some EUMS apply different waiting periods for permanent resident status to resettlement refugees and other refugees (having crossed the border irregularly).[1207] Beyond waiting periods, refugees in many receiving EUMS face the hurdle of additional requirements, such as language proficiency or cultural and/or historical knowledge ('civic knowledge') about their receiving country in order to obtain a permanent residence permit and/or maintain residency. For example, the CJEU ruled in *A v Staatssecretaris van Veiligheid en Justitie* on the validity of a Dutch law provision requiring a civic integration examination. The Court found that the Dutch law provision did not contradict the Long-term Residents Directive,[1208] meaning that the examination of civic knowledge is not forbidden *per se*. However, such examination must not exceed the level of basic knowledge and costs must remain reasonable. Also, the specific circumstances of the third-country national at issue must be considered.[1209]

Differences among EUMS arise regarding integration assistance and social welfare, with treatment in Ireland constituting a prominent example.[1210] While the Irish Government made considerable efforts to provide Syrian resettlement beneficiaries with housing, financial aid, education and health services, only marginal support was given to asylum seekers.[1211]

1207 See Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 31-34; see also European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 29f.

1208 See Case C-257/17 *C, A v Staatssecretaris van Veiligheid en Justitie* [2018] EU:C:2018:876, paras 63f.

1209 See ibid paras 63f.

1210 See Natalia Pestova, 'Differential treatment of refugees in Ireland' in (2017) 54 Forced Migration Review, 45-47.

1211 Asylum seekers in Ireland "*are awaiting decisions on their protection claims and are accommodated in open prison conditions under the system called Direct Provision*

Still, EMN reported in 2016 that integration and welfare support in twelve EUMS was "*overall the same*" for resettlement refugees and other refugees.[1212] It was common practice in most EUMS that resettlement refugees received, amongst others, permanent access to mainstream health services on the same scale as other refugees. Furthermore, the 2016 EMN study revealed that all EUMS engaging in resettlement provided educational support and/or vocational training to resettlement refugees just like they did for other refugees. Hungary and Poland stood out as they offered specialized services such as support for elderly or disabled people only to resettlement refugees and not to other refugees.[1213]

There is a general awareness of EUMS that the pursuit of a durable solution implies equal treatment between resettlement beneficiaries and their own nationals. Pursuant to *Perrin* and *McNamara*, in 2013, several EUMS provided the same rights to resettlement refugees and national citizens in terms of health care, social welfare, access to education and employment.[1214] Yet, international law does not require equality between foreigners and own nationals with regard to all rights (see 3.3.4). After all, pursuing a policy of equal treatment between natives and foreigners promotes integration.

A significant step towards equality with citizens of the receiving EUMS is achieved by long-term residence status under the Long-term Residents Directive, which includes resettlement beneficiaries with refugee or subsidiary protection status. They can access long-term residence status under this Directive after five years of legal residence in the receiving EUMS.[1215]

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under which asylum seekers are not allowed to work, study or cook for themselves", ibid 45.

1212 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 34.

1213 See ibid 34f.

1214 E.g. Belgium, the Czech Republic, Denmark, Finland, France, Germany, Ireland, the Netherlands, Portugal, Romania, Slovenia, Spain, Sweden, UK; see Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 57ff.

1215 In order to acquire long-term residence status, the Long-term Residents Directive expressly "*requires the presence of the person concerned in the relevant territory to go beyond a mere physical presence and that it be of a certain duration or have a certain stability*", namely to "*reside…legally and continuously for five years immediately prior to the submission of* [his or her] *application, subject to the periods of absence permitted under Article 4(3) of that directive*" Case C-432/20, *Landeshauptmann von Wien* [2022] EU:C:2022:39, para 33.

This status is essential for the integration of resettlement beneficiaries because it guarantees a degree of equal treatment with citizens of the receiving EUMS, amongst others, in terms of employment, education, social security, assistance and protection, and housing. It also facilitates the prospect of moving to another EUMS, and protects long-term residents against expulsion.

Under the Long-term Residents Directive, resettlement beneficiaries could lose their long-term residence status due to absence from the EU territory or the territory of the receiving EUMS. First, Art 9 para 1 Long-term Residents Directive sets forth that long-term residence status can be lost or withdrawn, amongst others, "*in the event of absence from the territory of the Community for a period of 12 consecutive months*".[1216] Second, according to Art 9 para 4 Long-term Residents Directive, long-term residents can lose their status after six years of absence from the EUMS that granted it.[1217] In a case concerning absence from EU territory, the CJEU ruled that in order to interrupt such absence, "*it is sufficient for the long-term national concerned to be present* […] *in the territory of the European Union, even if such presence does not exceed a few days.*"[1218] Given that the two instances of loss of status due to absence are regulated under the same Article and subject to the same exceptions, systematic interpretation suggests that the CJEU ruling on the meaning of absence equally applies to cases where the potential loss of status traces back to six years absence from the EUMS that granted the status is at issue.

Regarding integration in the specific receiving EUMS, the liberal stance of the CJEU on the absence rule remains questionable. It seems to conflict with the idea that resettlement beneficiaries should establish self-sufficiency and a durable solution in the receiving EUMS that admitted them. On the other hand, when considering integration in the EU as a form of (gradual) equality with EU citizens, it seems consistent to enable resettlement beneficiaries with long-term residence status to reside in another EUMS or leave the EU without having to fear the loss of legal status. Yet, absence

1216 EUMS *may* stipulate in their national laws that "*absences exceeding 12 consecutive months or for specific or exceptional reasons*" do not lead to loss or withdrawal.

1217 Long-term residence status from one EUMS is also lost once it is obtained from another EUMS after residing there.

1218 Case C-432/20, *Landeshauptmann von Wien* [2022] EU:C:2022:39, para 45. See Steven Peers, 'Residents of everywhere?' (*EU Law Analysis*, 26 January 2022) <http://eulawanalysis.blogspot.com/2022/01/residents-of-everywhere-cjeu-rules-on.html?m=1> accessed 24 July 2022.

from the territory of the receiving EUMS can also not be completely disregarded in the context of citizenship. Indeed, some EUMS provide for the loss of national citizenship, and thus EU citizenship, due to absence (together with additional factors). For developments *de lege ferenda*, the judgment of the CJEU must be followed and implemented by EUMS. In addition, from the perspective of legal certainty, there is a need to clarify the meaning of "*a few days*". What is more, situations of abuse of short interruption of absence should be regulated in future legislation, as the CJEU has not yet taken a concrete position on this.[1219]

Aside from the loss of long-term residence status, resettlement beneficiaries could face involuntary cessation of refugee status in the receiving EUMS. For instance, refugees from Somalia who were resettled to Denmark via UNHCR's resettlement program lost their protection status when conditions in Somalia changed. In this case, it was criticized that the loss of refugee status was based on the changed conditions in Somalia *in general* rather than on a specific assessment of the circumstances in connection with the particular refugee at issue (Art 1 C para 5 Refugee Convention).

Notwithstanding the demand to apply the status cessation rules under the Refugee Convention on a case-by-case basis, the preliminary question is whether these rules cover resettlement refugees at all.[1220] *O'Sullivan* approached the issue by pointing to the already mentioned tension, i.e. on the one hand refugee status is temporary, on the other hand, the aim is to achieve durable solutions for refugees, such as resettlement. Concerning future EU resettlement, Art 78 para 1 TFEU requires the EU legislators at least not to impose stricter rules than the cessation rules of the Refugee Convention – also with regard to resettlement refugees.

By way of successful long-term integration, refugee and long-term residence status ends with naturalization in the receiving EUMS, although resettlement beneficiaries have no right to attain citizenship under international law (see 3.3.6). Over the course of past resettlement programs, all EUMS granted resettlement beneficiaries a right to apply for naturalization according to the requirements and procedures under national law.[1221] Generally, these national requirements include a certain "*residential time*

1219 See Steven Peers, 'Residents of everywhere?' (*EU Law Analysis*, 26 January 2022).

1220 See Maria O'Sullivan, 'Can States cease the protection status of resettled refugees?' (*Asylum Insight*, November 2019) <https://www.asyluminsight.com/maria-osullivan#.Xd0yrndFzt4> accessed 27 March 2021.

1221 See European Migration Network, 'Resettlement and Humanitarian Admission Programmes in Europe – what works' (9 November 2016) 35f.

plus a combination of language, character and finance conditions which may be more or less demanding".[1222] *Owen* compared ordinary naturalization procedures with those for refugees and concluded that EUMS facilitated access to citizenship for refugees compared to other migrants. First, while some EUMS required renunciation of prior nationality in their ordinary naturalization procedures, they acknowledged that this was not justified in the case of refugees. Second, there was a tendency among EUMS to reduce or even remove waiting periods for refugees.[1223] Third, while fourteen EUMS applied a residency requirement of more than six years in their ordinary naturalization procedure, seven thereof reduced that requirement for refugees to six years or less.[1224]

Naturalization in an EUMS encompasses EU citizenship. According to Art 20 para 1 TFEU "[e]*very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*".[1225] In fact, the competence to set the requirements for granting and terminating citizenship has remained a national competence of EUMS. Notwithstanding, the relationship between national and EU citizenship implies obligations for EUMS. In this light, EUMS must comply with the principle of sincere cooperation under Art 4 para 3 TEU. It contains a positive obligation for EUMS to take "*any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*". EU citizenship rights are rights "*arising out of the Treaties*" that must be granted by the EUMS. The last sentence of Art 20 TFEU para 2 states that [t]*hese rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder*".[1226]

1222 David Owen, 'Refugees, EU Citizenship and the Common European Asylum System A Normative Dilemma for EU Integration' in (2019) Ethical Theory and Moral Practice, 350.

1223 E.g. Bulgaria, Czech Republic, France, Ireland and Sweden.

1224 See David Owen, 'Refugees, EU Citizenship and the Common European Asylum System A Normative Dilemma for EU Integration' in (2019) Ethical Theory and Moral Practice, 351f; see also Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 57ff.

1225 See Yuval Dvir, Paul Morris and Miri Yemini, 'What kind of citizenship for whom? The 'refugee crisis' and the European Union's conceptions of citizenship' in (2019) 17 Globalization, Societies and Education 2, 208 (211).

1226 E.g. Directive 2004/38 (EC) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77-123.

Against this backdrop, the CJEU interfered in the national policy field of citizenship and invoked the direct relationship between EU citizenship and national citizenship. The most prominent case of CJEU interference in this regard is the *Tjebbes* case. *Tjebbes* concerned the issue of cessation (as opposed to initial denial) of national citizenship, but it also underscored the overall need for EUMS authorities to consider the direct impact on the status of the individual as EU citizen when deciding upon national citizenship. The Court affirmed former case law by stressing that[1227]

> *while it is for each Member State, having due regard to international law, to lay down the conditions for acquisition and loss of nationality, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the latter.*

Subsequently, the Court set out a requirement for competent national authorities and courts to "*determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned*".[1228] With this in mind, the Court went further than in its previous rulings by specifying that competent authorities had to undertake an individual assessment, taking account of a "*serious risk, to which the person concerned would be exposed, that his or her safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection*".[1229] Remarkably the wording used by the Court resembles the *raison* behind the principle of *non-refoulement* – even if in an attenuated way.

By applying the considerations of the CJEU in *Tjebbes* to the resettlement context (this is only an analogy, because in the resettlement context the granting of citizenship constitutes the initial focus – only after that, a potential withdrawal could come into question), the following conclusions can be deduced: The competent authorities of the receiving country must carry out an individual assessment when granting citizenship. In other words, automatic refusal of national citizenship would contradict CJEU case law. Furthermore, in their assessment, EUMS must consider

1227 Case C-221/17 *Tjebbes and others v Minister van Buitenlandse Zaken* [2019] EU:C:2019:189, para 30.
1228 Ibid para 40.
1229 Ibid para 46.

various aspects of the specific situation of the resettlement beneficiary, in particular the risks for safety and freedom to which the individual concerned would be exposed in case of refusal of citizenship.

5.4.2 US law and practice

In the US, long-term integration measures are scarce. This traces back to the US resettlement program that pressures resettlement beneficiaries to rapidly enter the labor market and achieve self-sufficiency.[1230] While Volags track short-term employment indicators of resettlement beneficiaries within the first 90 to 180 days upon their arrival, there is hardly any documentation on whether resettlement beneficiaries succeed in integrating in the US in the long-term.[1231] After eight months, resettlement beneficiaries are expected to transition to (economic) self-sufficiency.[1232]

Legislation evidences the pressure on refugees to find and accept work, as Section 412 lit e para 2 subpara C Refugee Act determines sanctions in case of resistance:[1233]

> *In the case of a refugee who—*
> *(i) refuses an offer of employment which has been determined to be appropriate either by the agency responsible for the initial resettlement of the refugee under subsection (b) or by the appropriate State or local employment service,*
> *(ii) refuses to go to a job interview which has been arranged through such agency or service, or*
> *(iii) refuses to participate in a social service or targeted assistance program referred to in subparagraph (A)(ii) which such agency or service determines to be available and appropriate,*

1230 See Jessica H Darrow in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance*, 105.

1231 See Nadwa Mossaad et al, 'Determinants of refugee naturalization in the United States' in (11 September 2018) 115 PNAS 37, 9175.

1232 The Volags "*work with the refugees to ensure that within eight months they are employed*", Joanne van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US' in (2003) 4 Journal of International Migration and Integration 2, 169f.

1233 Section 412 lit e para 2 subpara C Refugee Act (emphasis added); see also Jessica H Darrow in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance*, 104.

> *cash assistance to the refugee shall be terminated (after opportunity for an administrative hearing) for a period of three months (for the first such refusal) or for a period of six months (for any subsequent refusal).*

To elucidate the purpose and impact of the self-sufficiency target, *Darrow* used the following quote of a Volag refugee worker:[1234]

> *The amount is not enough for you to live. They know you cannot survive on this money; this is temporary. After a short time they will be asking you, "Why is it taking so long to find a job?" The money is small because the government has no money to pay everyone to sit at home and do nothing, so you must work hard.*

From a legal standpoint, pressuring refugees to achieve independence from governmental funds by minimizing the timeframe for funding contradicts the 1980 Refugee Act. This Act initially stated that "*the federal government would cover all public assistance program costs incurred by states for the first 36 months a refugee was in the United States*".[1235] The thirty-six months mentioned therein have gradually been decreased to today's limit of eight months for Refugee Cash Assistance and Refugee Medical Assistance.

After that period, refugees are subject to the limited regular US welfare system. Accordingly, only needy families obtain assistance up to five years (Temporary Assistance for Needy Families) and low-income individuals, who are aged, blind, or disabled are eligible for up to seven years of assistance (Supplemental Security Income).[1236] An aggravating factor is that, in practice, sources of federal funding have proven insufficient for resettlement beneficiaries to cover their living. Hence, there is a growing reliance on state and local sources, resulting in differential treatment due to the significant differences among the public benefit programs of individual states. For example, in 2017, a refugee family of three in New York received about USD 500 less in Temporary Assistance for Needy Families per month than in Texas.[1237] Nevertheless, it was claimed that the extensive network of the nine Volags helped to redress state-to-state inequalities.[1238] Overall, the extent of federal and state funding programs remains subject to political debate, but it becomes legally relevant if refugees

1234 Ibid 108.
1235 Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 10.
1236 See ibid 8.
1237 See ibid 11.
1238 See ibid 20.

face discrimination, and/or are forced to live below the standards required under international law.

Besides the short period of assistance, a lack of insurance coverage has barred refugees from accessing health care in the US. In this regard, the 2014 Affordable Care Act,[1239] known as Obamacare, represented a significant regulatory overhaul, expanding health insurance coverage. In particular, Medicaid and the State Children's Health Insurance Program introduced coverage for individuals with limited incomes.[1240] Between 2014 and 2017 in which the Affordable Care Act was in force, it had caused a significant decrease of immigrants without health insurance;[1241] for example, in 2015 there were 16% less uninsured non-citizens than in 2010.[1242] This notwithstanding, the percentage of immigrants without health insurance remained much higher than among US citizens. Compared to 9.1% of US citizens, 53.5% of immigrants did not benefit from health insurance in 2015.[1243]

Moreover, becoming self-sufficient within eight months comes with the challenge that resettlement beneficiaries have to apply for adjustment to lawful permanent resident (LPR) status after being physically present in the US for one year,[1244] as stipulated in the INA and in certain other federal laws.[1245] The adjustment to LPR status is informally referred to as

1239 This Act was challenged by former Republican-lead states and the former *Trump* administration. On June 17, 2021 the US Supreme Court dismissed the challenge meaning that Obama Care remains in place; see *California et al v Texas et al* 593 US __ (2021) <https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf> accessed 18 July 2021.

1240 See Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 8.

1241 See ibid 18.

1242 See Jim P Stimpson and Fernando A Wilson, 'Medicaid Expansion Improved Health Insurance Coverage For Immigrants, But Disparities Persist' in (2018) 37 Health Affairs 10, 1656.

1243 See Adam Gaffney and Danny McCormick, 'The Affordable Care Act: implications for health-care equity' in (2017) 389 The Lancet 10077, 1442 (1445).

1244 See USCIS, 'I am a refugee or asylee… How do I become a US permanent resident?' (October 2013) <https://www.uscis.gov/sites/default/files/USCIS/Resources/D3en.pdf> accessed 27 March 2021.

1245 See Section 209 INA – Adjustment of Status of Refugees; Section 212 INA – Excludable Aliens; Section 209.1 Title 8 Code of Federal Regulations – Adjustment of status of refugees; USCIS Policy Manual, Volume 7, Part A, Adjustment of Status Policies and Procedures; USCIS Policy Manual, Volume 7, Part L, Refugee Adjustment.

applying for a 'Green Card'.[1246] In this process, refugees are exempted from several grounds of inadmissibility, including inadmissibility due to public charge.[1247] Yet, obtaining a Green Card constitutes a costly and lengthy process.[1248] The fee for adjustment of status amounts to over USD 1,000.[1249] Exemptions only exist for younger and elderly applicants.[1250] As of July 2022, the processing of an application for adjustment of status could take up to 39 months.[1251]

On the one hand, the US offer resettlement beneficiaries access to permanent residency after only one year and exempt them from grounds of inadmissibility that they may not be able to fulfill in their special situation as a refugee. On the other hand, however, the precondition of paying

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1246 The following requirements must be met by a refuge to be eligible for a Green Card: (i) proper file of Application to Register Permanent Residence or Adjust Status (Form I-485); (ii) admission into the US as a refugee under Section 207 of the INA; (iii) physical presence in the US at the time when filing the application (generally, if a refugee has a pending application and leaves the US without an advance parole document, he or she will have abandoned his or her application); (iv) physical presence in the US for at least one year after admission as a refugee at the time of filing the application; (v) no termination of refugee status; (vi) no former grant of permanent resident status;(vii) admissibility for LPR or eligibility for a waiver of inadmissibility or other form of relief (the reasons for inadmissibility are listed in Section 212 lit a INA; certain grounds of inadmissibility do not apply to refugee adjustments); see USCIS, 'I-485, Application to Register Permanent Residence or Adjust Status' <https://www.uscis.gov/i-485> accessed 27 March 2021; see also USCIS, 'Green Card for Refugees' <https://www.uscis.gov/greencard/refugees> accessed 27 March 2021.

1247 This ground of inadmissibility involves that an alien is inadmissible to the US under Section 212 lit a para 4 INA because he or she is likely at any time to become a public charge. In other words, the use of public benefits could pose a barrier to the adjustment of the legal status. "*Inadmissibility on Public Charge Grounds*" has been subject to debate and was blocked by preliminary injunction. Ultimately, it applies since February 2020; see USCIS, 'Inadmissibility on Public Charge Grounds' (14 August 2019) <https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf> accessed 27 March 2021; see also USCIS, 'I-485, Application to Register Permanent Residence or Adjust Status'.

1248 See International Rescue Committee, 'How immigrants and refugees become US citizens' (3 July 2018) <https://www.rescue.org/article/how-immigrants-and-refugees-become-us-citizens> accessed 27 March 2021.

1249 See Citizen Path, 'Adjustment of Status Package Fees' <https://citizenpath.com/adjustment-of-status-fee/> accessed 27 July 2022.

1250 See USCIS, 'I-485, Application to Register Permanent Residence or Adjust Status'.

1251 See USCIS, 'Check Case Processing Times' <https://egov.uscis.gov/processing-times/> accessed 27 July 2022.

a relatively high fee after that short period in the US and the lengthy processing time pose substantial obstacles undermining the access to LPR status. First, it is difficult to imagine that resettlement beneficiaries have generally become self-sufficient after only one year and can afford a fee of more than USD 1,000 dollars without facing a considerable financial setback. Second, they likely have to live in uncertainty for up to two and a half years, neither being allowed to leave the country nor knowing whether they can stay there in the long run, which, in effect prolongs the one-year waiting period.

Once LPR status has been obtained and integration has been solidified, the US recognizes the opportunity for refugees to apply for naturalization. In its original understanding, naturalization means the conferral of "*citizenship to proud and thankful immigrants*"[1252] in a courtroom by a judge. According to Art I Section 8 para 4 US Constitution, Congress is competent to "*establish an uniform Rule of Naturalization*". The Immigration Act of 1990 transferred the authority to grant citizenship from the courts to the Attorney General, i.e. the USCIS acting on behalf of the Secretary of Homeland Security. Still, most applicants are required to take the final oath in court, and courts maintain jurisdiction to review naturalization denials (Section 310 INA).[1253]

Currently, Green Card holders upon the age of eighteen are eligible to apply for citizenship after five consecutive years in the US as LPR or three years if married to a US citizen[1254] (Sections 316 lit a, 318, 319 lit a INA).[1255] Resettlement refugees enjoy facilitated access to citizenship because their five-year-waiting period already starts running when they

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1252 Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1539.

1253 See ibid 1539.

1254 The LPR must meet the following conditions: (i) age of at least 18 years; (ii) good moral character; (iii) ability to read, write and speak basic English; (iv) understanding of the principles and ideals of the US Constitution; (v) basic understanding of US history and government; (vi) oath of allegiance to the US; see International Rescue Committee, 'How immigrants and refugees become US citizens' (3 July 2018); see also Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1545ff.

1255 "*The applicant must 'reside' continuously in the United States during the five-year period immediately preceding the filing of the application, all after admission as LPR; must be 'physically present' in the United States for at least half that period; and must 'reside' continuously in the United States from the filing of the application to the grant of naturalization*", Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1546.

enter the US (instead of when they adjust to LPR status). In other words, their first year counts toward the five-year-waiting period even though their status can be adjusted to LPR only after one year.[1256]

Like the adjustment of status, the naturalization procedure is lengthy and costly. For 2022, the filing fee for citizenship amounted to USD 1,170[1257] and the estimated processing time was about 12.5 months.[1258] The fees can be halved for certain low-income naturalization applicants.[1259] Strikingly, the costs for naturalization are similar (and may even be slightly lower) than for adjustment to LPR status. With this comes the following contradiction: While resettlement beneficiaries pay about the same amount to apply for naturalization, which is based on their voluntary decision, they have to pay a relatively high fee for the Green Card, i.e. a requirement to maintain their legal status in the US and prevent involuntary return after only one year. On that account, the US fees for LPR status appear to be disproportionately high.

At the beginning of the naturalization process, applicants must give their fingerprints and take photographs for the purpose of multiple background checks. Those passing these checks are invited to an in-person interview with an USCIS officer. This interview includes an examination of civic knowledge and language.

The required civic knowledge is described as "*knowledge and understanding of the fundamentals of the history, and form of the government, of the United States*" (Section 312 lit a para 2 INA). The USCIS officer typically asks applicants up to ten questions (from a list of one hundred), covering principles of American democracy, systems of government, geography, rights and responsibilities, and history. Applicants must answer six of the ten questions correctly to pass the test.[1260]

In terms of language, Section 312 lit a para 1 INA requires the applicant to demonstrate "*an understanding of the English language, including an ability*

1256 See Nadwa Mossaad et al, 'Determinants of refugee naturalization in the United States' in (11 September 2018) 115 PNAS 37, 9176.

1257 See USCIS, 'N-600K, Application for Citizenship and Issuance of Certificate Under Section 322' <https://www.uscis.gov/n-600k > accessed 27 July 2022.

1258 See USCIS, 'Check Case Processing Times' <https://egov.uscis.gov/processing-times/> accessed 27 July 2022.

1259 See USCIS, 'Our Fees' <https://www.uscis.gov/forms/our-fees> accessed 27 March 2021.

1260 See International Rescue Committee, 'How immigrants and refugees become US citizens' (3 July 2018).

to read, write, and speak words in ordinary usage".[1261] Certain applicants are exempted from the English requirement because of age or/and length of permanent residency (Section 312 lit a para 2 INA). However, this waiver does not affect the civic knowledge requirement.[1262] Only physical or mental disability may allow for waiving both the English and the civic knowledge test (Section 312 lit b para 1 INA). Finally, successful applicants must take an oath of allegiance to the US at a public ceremony before receiving their certificates of naturalization.[1263]

The value of US citizenship goes beyond freedom from immigration laws, the right to be in the US and diplomatic protection. Citizenship enables naturalized resettlement beneficiaries to petition for the admission of certain family members as immigrants. Petition rights can also be derived from LPR status, but only with limitations, including numerical quotas. Beyond that, federal and state laws restrict the status of non-citizens in various ways. For instance, LPRs cannot obtain certain state professional licenses.[1264] This shows that the US does not guarantee comprehensive equality between resettlement beneficiaries and its own citizens – even the LPR status does not change this. Again, such differential treatment arguably complies with US non-discrimination obligations under the ICCPR, because the Human Rights Committee has accepted citizenship as an inherently reasonable basis upon which individuals may be treated differently (see 3.3.4.1).

Eventually, naturalized resettlement beneficiaries may want to return to their home country. In this light, the question arises whether and how returning to the initial home country impacts US citizenship. In *Afroyim v Rusk*, the US Supreme Court interpreted Section 1 of the Fourteenth Amendment to the US Constitution as giving every citizen "*a constitutional right to remain a citizen* [...] *unless he voluntarily relinquishes that citizenship*".[1265] Still, Section 349 lit a INA lists specific reasons for expatriation. These reasons were subject of the 1990 Announcement of the US Department of State. The State Department declared in its Announcement that the expatriation grounds did not entail a loss of citizenship *ex lege*.

1261 Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1547.
1262 See ibid 1547.
1263 See International Rescue Committee, 'How immigrants and refugees become US citizens' (3 July 2018).
1264 See Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1622.
1265 Ibid 1605.

Rather, all individuals would be presumed to "*intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to routine declarations of allegiance to a foreign state, or accept non-policy level employment with a foreign government*". With that Announcement, the State Department clarified that in order to surrender US citizenship, individuals either had "*to affirm that intention in writing to a US consular officer or to formally renounce* [...]".[1266] This reflects a general discomfort of the US government towards expatriation, not only in cases where it would result in statelessness.[1267]

5.4.3 Analysis

Laws and practice in Europe and the US indicate that resettlement beneficiaries face various challenges to access and maintain long-term residence and citizenship status. On that basis, there are three key challenges to stimulate long-term integration *de lege ferenda*: First, the reduction of differential treatment where there is no objective and reasonable justification; second, the elimination of excessive examination requirements and/or fees; third, the reconsideration of rules on the loss of legal status.

5.4.3.1 Temporary approach versus long-term integration

It is evident from the outlined European and US resettlement policies that long-term integration approaches significantly differ among EUMS and even amongst American states. The major issue comprises the conceptualization of resettlement either as a temporary protection tool versus a long-term integration measure, or durable solution.

The issue is of political nature and can be explained as follows: Governments are seemingly more prone to justify temporary admissions towards their electorate, i.e. the receiving community, than long-term integration and naturalization of third-country nationals. This traces back to the fact that the electorate feels less threatened by foreigners when they are only temporarily admitted.[1268] Furthermore, governments appear to disregard

1266 Ibid 1614.
1267 See ibid 1614f.
1268 See Jürgen Fijalkowski, 'Optionen und Spielraum europäischer Zuwanderungspolitik — Ein Essay' in Alfredo Märker and Stephan Schlothfeldt

the negative impacts of temporary protection on the lives of protection seekers who might suffer from a so-called warehouse effect. This was critically addressed by *Bruce-Jones*:[1269]

> *To keep newly arrived people separate from the labour economy and other facets of social citizenship and participation, is ultimately a form of warehousing. Temporary protection, whilst it arguably coaxes states to provide certain forms of relief up-front, would trap refugees into lives 'on hold'. The eventual forced return of migrants to countries of origin would threaten to break apart supportive networks and family bonds accrued in host countries, which will have, in the meantime, become home for these people.*

As some governments became aware of these negative impacts, High Commissioner *Grandi* expressed hope for a decisive shift towards a sustainable long-term approach in the course of the Global Refugee Forum in Geneva in December 2019.[1270]

5.4.3.2 Economic benefits

Beneficial aspects of long-term integration in the receiving country are predominantly linked to an economic rationale. In other words, from the receiving country's perspective, economic arguments speak in favor of long-term integration. The US practice relies on self-sufficiency and labor market entry, which has proven to be economically beneficial. For example, in 2016, labor force participation and employment rates of resettle-

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(eds), *Was schulden wir Flüchtlingen und Migranten?: Grundlagen einer gerechten Zuwanderungspolitik* (Springer 2002) 19-44; see also e.g. call by Chancellor Angela Merkel for asylum seekers and refugees to return to their home country, Marcel Leubecher, 'Warum die meisten Flüchtlinge Merkels Appell nicht folgen werden' (*Die Welt*, 1 February 2016) <https://www.welt.de/politik/deutschland/article151744427/Warum-die-meisten-Fluechtlinge-Merkels-Appell-nicht-folgen-werden.html> accessed 27 March 2021.

1269 Eddie Bruce-Jones in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law*, 77.

1270 See UNHCR, 'Global Refugee Forum pledges collective action for better refugee inclusion, education, jobs' (*Press release*, 18 December 2019) <https://www.unhcr.org/news/press/2019/12/5dfa56b54/global-refugee-forum-pledges-collective-action-better-refugee-inclusion.html> accessed 27 March 2021.

ment refugees in the US exceeded those of the overall US population.[1271] Furthermore, a 2015 study conducted in the area of Ohio revealed that added economic value emerged from high self-employment rates among refugees.[1272] Nonetheless, the short period of assistance and the related time pressure to enter the labor market deprived refugees of the opportunity to search for jobs matching their qualifications. Even though past employment rates showed that refugees were more likely to be employed than US-born people, refugees were also more likely to accept low-skilled jobs despite holding a bachelor's degree.[1273]

From the US experience, the following conclusion can be drawn for future EU resettlement legislation: Granting resettlement beneficiaries a more relaxed transition period would allow them to prepare for and take job opportunities according to their profile, which would in turn result in an overall more beneficial outcome – not only for the resettlement beneficiaries themselves but also for the economy of the receiving country and EU's internal market as a whole – thus creating a win-win situation. This corresponds to the previous statement of the Commission that the aim should be to enable economic productivity of migrants.[1274] The Com-

1271 See Donald Kerwin, 'The US Refugee Resettlement Program – A Return to First Principles: How Refugees Help to Define, Strengthen, and Revitalize the United States' in (2018) 6 Journal on Migration and Human Security 3, 213.

1272 See US Together, Community Refugee & Immigration Services, World Relief Columbus and City of Columbus, 'Impact of Refugees in Central Ohio' (2015) <https://www.crisohio.org/wp-content/uploads/2016/04/IMPACT-OF-REFUGEES-ON-CENTRAL-OHIO_2015-SP_I.pdf> accessed 27 March 2021; see also Initiative of the Harvard Immigration and Refugee Clinical Program, 'Fulfilling US Commitment to Refugee Resettlement: Protecting Refugees, Preserving National Security, & Building the US Economy through Refugee Admissions' in (2017) 5 Texas A&M Law Review, 183.

1273 See Michael Fix, Kate Hooper and Jie Zong, 'How Are Refugees Faring: Integration at US and State Levels' (June 2017) 18.

1274 See Yuval Dvir, Paul Morris and Miri Yemini, 'What kind of citizenship for whom? The 'refugee crisis' and the European Union's conceptions of citizenship' in (2019) 17 Globalization, Societies and Education 2, 214. Specifically, in its 2016 Action Plan on the Integration of Third Country Nationals, the Commission made it clear that social integration had to be realized by offering migrants meaningful opportunities to participate in the economy and society of the receiving EUMS. See Commission, Communication 'Action Plan on the Integration of Third Country Nationals', COM(2016) 377 final, 5.

mission re-emphasized this goal in the 2020 Recommendation in a New Pact on Migration and Asylum.[1275]

5.4.3.3 Harmonization of permanent residence status

De lege lata, Art 4 Long-term Residents Directive states that EUMS shall grant long-term residence status to third-country nationals, including refugees and persons eligible for subsidiary protection,[1276] after five years of legal and uninterrupted stay in an EUMS. Five years are a comparatively long period given that in the US, refugees have to (or may) apply for an adjustment to LPR status already after one year. As regards consistency within EU law, the five-year requirement under the Long-term Residents Directive aligns with the requirements for EU citizens to gain permanent residency in another EUMS under Art 16 para 1 EU Citizenship Directive.

De lege ferenda, valid arguments speak in favor of introducing a waiting period shorter than five years for resettlement beneficiaries to become permanent residents of an EUMS. First, earlier recognition of long-term residence status corresponds to the very character of resettlement as a durable solution. Second, refugees, unlike EU citizens, do not usually have social support from their home country. Thus, they depend on the long-term residence status because this status usually implies social rights. Finally, the prospect of earlier long-term residence status can be an incentive for beneficiaries of international protection to refrain from unauthorized secondary movement. To that effect, the Commission proposed in its New Pact on Migration and Asylum to amend the Long-term Residents Directive so that beneficiaries of international protection would obtain long-term residence status after three years of legal and continuous residence instead of the usual five years.[1277]

Furthermore, Art 5 Long-term Residents Directive sets out additional requirements for permanent residence status, such as a stable and regular source of income, health insurance and, if so required by an EUMS, inte-

1275 See Commission, Communication on a New Pact on Migration and Asylum, 27.

1276 In 2011, the Long-term Residents Directive was amended to include persons eligible for international protection.

1277 See Commission, Communication on a New Pact on Migration and Asylum, 6.

gration measures.[1278] As indicated above, the CJEU upheld the Dutch law provision requiring a civic integration examination[1279] (see 5.4.1). By comparison, refugees in the US do not have to undergo examination to obtain an adjustment of their residence status to LPR. They only have to do so for naturalization. Still, there is no compelling reason for condemning the CJEU's approach to accept examination of *basic* civic and/or language knowledge as a requirement for permanent residence status, hence before naturalization – unless costs are excessive.

In terms of costs, the US fees of more than USD 1,000 for adjusting to LPR status are relatively high compared to the EU average, although the fees to apply for permanent residency significantly vary throughout the EU; by the end of 2019, costs for citizenship applications varied from less than EUR 100 (Hungary, Spain, Latvia, Estonia, Luxembourg, the Czech Republic, Portugal, and Slovenia) up to EUR 1,100 in Lithuania – the fees in the former EUMS UK even amounted to EUR 1,345.[1280] Given these variations among EUMS, the question of EU harmonization arises. Such harmonization must be reflected in light of the principle of subsidiarity. Is the EU really in a better position than the EUMS to determine these costs than EUMS? Very strong arguments against EU regulation are the differences in social assistance, living costs, and the general economic situations in the EUMS. The EUMS themselves are arguably in the best position to determine the application costs according to these specifics.

To conclude, valid policy arguments speak in favor of (i) shortening the waiting period for resettlement beneficiaries to become permanent residents of an EUMS to less than five years; and (ii) harmonizing the requirements to obtain long-term residence status through future EU resettlement legislation. Concerning the latter, the CJEU has already established that there are limits for national particularities. Accordingly, examination must be kept to a basic level, must not involve excessive costs and must account for the individual situation of the applicant.

1278 Art 5 para 2 Long-term Residents Directive states: "*Member States may require third-country nationals to comply with integration conditions, in accordance with national law*", Koen Lenaerts and Piet van Nuffel, *European Union Law*, 325, para 10-014.

1279 See Case C-257/17 *C, A v Staatssecretaris van Veiligheid en Justitie*, paras 63f.

1280 See Andrew Henderson, '5 Most Expensive Residency Applications in Europe' (last updated 26 December 2019) <https://nomadcapitalist.com/2017/11/06/most-expensive-residency-applications/> accessed 27 July 2022.

5.4.3.4 Naturalization

In the ideal case, the long-term residence status of a resettlement beneficiary ends with his or her naturalization in the receiving country. As highlighted above, international refugee law, namely Art 34 Refugee Convention, instructs states to facilitate access to citizenship for refugees. The refugees' special need for access to citizenship is rooted in the very definition of a refugee as being unable or unwilling to avail him or herself of the protection of his or her home country.

It follows from *Owen*'s findings that in general, EUMS facilitate the access to citizenship for refugees compared to other third-country nationals. Nevertheless, they follow different, i.e. more or less restrictive policies. In this light, the CJEU clarified that national authorities must conduct individual assessments of the implications of denial of EU citizenship rights when deciding upon national citizenships.

Similar to most EUMS, the US prioritizes the naturalization of refugees in comparison to other immigrants. A 2018 study on naturalization rates assessing the full population of refugees resettled in the US between 2000 and 2010 showed that resettlement refugees in the US were significantly more likely to acquire citizenship than immigrants entering from other programs.[1281] In general, statistics disclosed that resettlement refugees had a relatively high naturalization rate compared to other immigrants to the US, which reflects a less restrictive citizenship policy towards refugees. For instance, resettled refugees benefit from a shorter waiting period: Unlike for other immigrants, already their first year in the US, before adjustment to LPR status, counts.[1282]

5.4.3.5 Re-resettlement

Naturalization impacts the freedom of movement, i.e. the right to leave and enter a country. The freedom of movement not only becomes an issue when an individual wishes to leave the country of (first) refuge in order to be resettled to a receiving country, but also *vice versa*, i.e. in case the naturalized resettled individual wishes to return to his or her initial home

1281 See Nadwa Mossaad et al, 'Determinants of refugee naturalization in the United States' in (11 September 2018) 115 PNAS 37, 9178.

1282 See Stephen H Legomsky and David B Thronson, *Immigration Law and Policy*, 1546.

country. The relevant question in terms of the latter is: To what extent can a receiving country justifiably interfere with the right to leave of resettled and naturalized individuals?

Art 12 para 2 ICCPR determines that any country, including the "*own country*", must grant a right to leave. After and arguably before naturalization, a receiving country can be considered as one's "*own country*". This holds particularly true where the respective resettlement beneficiary has established special ties to that country.[1283] If, notwithstanding such special ties to the receiving country, the (naturalized) resettlement beneficiary wants to return to his or her initial home country, he or she is likely to contravene the interests of the former. Especially, the receiving country as the new "*own country*" may have an interest in restricting a resettled naturalized individual's right to leave, because it has invested in his or her long-term integration. Since the right to leave is not absolute, the receiving country may restrict it under certain conditions and in line with the principle of proportionality (see 3.3.2). Under Art 12 para 2 ICCPR, such restrictions can only be based on the grounds of national security, public order, public health or morals, or the rights and freedoms of others. The mere reason that the receiving country "*invested*" in the integration of resettlement beneficiaries and has an interest to keep them as contributors to its economy and society would therefore not be sufficient.

Unjustified derogations from the right to leave may, amongst others, be induced through the expatriation policy of the country of new citizenship. The US constitutes a liberal example in this regard. From an EU law perspective, the above-mentioned CJEU case law makes it clear that the potential loss of national citizenship of an EUMS needs to be assessed in the light of EU citizenship, and with due consideration of risks for the safety and liberty of the individual concerned.

Finally, not all resettlement beneficiaries actually pursue the goal of naturalization. For instance, Palestinians actively denied resettlement offers,

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1283 See Rutsel Martha and Stephen Bailey, 'The right to enter his or her own country' (*EJIL: Talk!*, 23 June 2020) <https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/> accessed 27 March 2021; "*The scope of "his own country" is broader than the concept 'country of his nationality'. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien*", OHCHR, 'General Comment No 27: Article 12 (Freedom of Movement)', UN Doc CCPR/C/21/Rev1/Add9 (2 November 1999) para 20.

invoking their collective rights as people because they feared never being able to return to their initial home country.[1284]

5.4.4 Preliminary conclusion

Economic arguments speak in favor of a policy approach that preserves the originally intended long-term integration character of resettlement. A future policy that introduces clear and harmonized requirements for long-term residence status as well as naturalization would help to make resettlement beneficiaries contribute to the local communities. Moreover, harmonization likely decreases discriminatory practice, which is necessary to foster compliance with international law. Notwithstanding, from an EU law perspective, subsidiarity considerations have to be taken into account, especially when it comes to the regulation of specific requirements such as the determination of costs or the content of examinations. Eventually, even naturalized resettlement beneficiaries may want to leave their new home country to return to their prior home country. In such situations, the receiving country as the new home country must not restrict the right to leave of the resettled refugee unless on the basis of legitimate grounds and in line with the principle of proportionality.

1284 See Anne Irfan, 'Rejecting resettlement: the case of Palestinians' in (2017) 54 Forced Migration Review, 68 (70f).