2 The concept of refugee resettlement entrenched in international and EU law

2.1 Responsibility sharing through resettlement

Globally, low- and middle-income countries host 83 per cent of the world's refugees and other persons displaced abroad, and more than 70 per cent live in countries neighboring their countries of origin.[52] This 'responsibility by proximity'[53] misconstrues the definition of responsibility sharing, as Peter Sutherland, the former UN Special Representative of the Secretary-General for Migration and Development, warned.[54] All need to accept additional responsibilities to ensure protection for refugees and other forced migrants, and in particular to uphold the fundamental guarantee that refugees will not be expelled to territories in which they will be subject to persecution (see 3.3.1).

Against this backdrop, scholars identified resettlement as a 'burden sharing' or 'responsibility sharing' scheme.[55] Even though burden and responsibility sharing are sometimes used synonymously, they must be distinguished. According to *Hathaway* and *Neve*, responsibility sharing refers to the overall contributions by states towards ensuring refugee protection, while burden sharing refers to contributions by states to the protection

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52 See UNHCR, 'Refugee Data Finder' (as of 16 June 2022) <https://www.unhcr.org/refugee-statistics/> accessed 27 June 2022.

53 See Janine Prantl, Mark J Wood and Michael W Doyle, 'Principles of Responsibility Sharing: Proximity, Culpability, Moral Accountability and Capability' in (June 2022) 110 California Law Review 3, 935 (937f) <https://www.californialawreview.org/print/principles-for-responsibility-sharing-proximity-culpability-moral-accountability-and-capability/> accessed 16 August 2022.

54 See UN, 'INTERVIEW: "Refugees are the responsibility of the world… Proximity doesn't define responsibility." – Peter Sutherland' (*UN News*, 2 October 2015) <https://news.un.org/en/story/2015/10/511282-interview-refugees-are-responsibility-world-proximity-doesnt-define> accessed 16 June 2021.

55 "*The system established by UNHCR to resettle a small number of especially vulnerable refugees in third countries reflects in a modest way the principle of sharing responsibility*", Astri Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action' in (1998) 11 Journal of Refugee Studies 4, 396 (397); see Eddie Bruce-Jones, 'Burden sharing in refugee law' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 71.

of refugees in another state's territory.[56] Resettlement ensures refugee protection through physical transfer of protection seekers to the receiving country and is hence better described as a responsibility sharing scheme rather than that of burden sharing.

Sharing responsibility to protect refugees by means of physical transfer from countries of (first) refuge to a receiving country enables overburdened countries of (first) refuge to (better) cope with large numbers of refugees in their territories, and it enhances their ability to comply with international protection obligations. Therefore, resettlement constitutes a gesture of international solidarity to safeguard generous asylum policies of countries of (first) refuge.[57]

2.1.1 Responsibility sharing at the international level: left to the discretion of states

International authorities mention international cooperation, burden and responsibility sharing. In this regard, the Charter of the United Nations (UN Charter)[58] refers to 'international co-operation'. Its Art 1 para 3 envisages "*international co-operation in solving international problems of* […] *humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms*". The Preamble to the 1951 Convention Relating to the Status of Refugees (Refugee Convention)[59] expressly mentions 'international co-operation' to counteract the problem that "*the grant of asylum may place unduly heavy burdens on certain countries*". Furthermore, the Final Act of the Conference of Plenipotentiaries which anchored the adoption of the Refugee Convention recommends that governments act "*in a true spirit of international co-operation in order that these refugees may*

56 See James C Hathaway and R Alexander Neve, 'Making international Refugee Law Relevant again: A proposal of Collectivized and Solution-Orientated Protection' in (1997) 10 Harvard Human Rights Journal, 115 (144f).

57 See Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' in (2009) 21 International Journal of Refugee Law 3, 387 (398f).

58 See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

59 See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137-220.

find asylum and the possibility of resettlement".[60] Additionally, UN General Assembly Resolutions[61] and several Conclusions of the Executive Committee of UNHCR's Program (EXCOM Conclusions)[62] refer to burden and responsibility sharing. The 2018 Global Compact for Refugees mentions resettlement as a key pillar for refugee solutions.[63] This Compact aims at "*more equitable and predictable burden- and responsibility-sharing*".[64] It anticipates Global Refugee Forums every four years where states announce, amongst others, concrete pledges for resettlement places.[65]

These references indicate a general awareness of an uneven refugee distribution.[66] Nonetheless, burden and responsibility sharing are, for instance, not included in the Refugee Convention's operative sections – thus cannot be considered as effectively binding obligations under international law.

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60 UN General Assembly, 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons', Recommendation D (25 July 1951) <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html> accessed 13 February 2021.

61 See e.g., UNGA, A/RES/55/2 (18 September 2000); UNGA, A/RES/56/151 (11 October 2001); UNGA, A/RES/57/213 (18 December 2002); UNGA, A/RES/59/193 (20 December 2004).

62 See e.g., UNHCR EXCOM Conclusion No 74 (XLV) 'General' (1994) lit h; No 81 (XLVII) 'General' (1997) lit j; No 85 (XLIX) 'International Protection' (1998) lit o; No 89 (LI) 'General' (2000); No 90 (LII) 'General' (2001) lit f; No 95 (LIV) 'General' (2003) lit g; No 98 (LIV) 'Protection from Sexual Abuse and Exploitation' (2003) lit g; No 100 (LV) 'International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations' (2004) lit b; see also UNHCR, 'Conclusions on International Protection: Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion No 1 – 114)', UN Doc HCR/IP/3/Eng/REV 2017 (October 2017) <https://www.refworld.org/pdfid/5a2ead6b4.pdf> accessed 13 February 2021.

63 See UNHCR, Report 'Global compact on refugees', UN Doc A/73/12 (Part II) (13 September 2018) <https://www.unhcr.org/gcr/GCR_English.pdf> accessed 13 February 2021.

64 Ibid para 15; see Michael W Doyle, 'Responsibility Sharing: From Principle to Policy' in Wiebke Sievers, Rainer Bauböck, Christoph Reinprecht (eds), *Flucht und Asyl – Internationale und österreichische Perspektiven* (VÖAW 2021) 15.

65 See Michael W Doyle in Wiebke Sievers, Rainer Bauböck, Christoph Reinprecht (eds), *Flucht und Asyl – Internationale und österreichische Perspektiven*, 15.

66 See Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' in (2009) 21 International Journal of Refugee Law 3, 400.

Since international legal norms "*almost always refrain from providing specifics, leaving it to States to determine the* […] *responsibility-sharing mechanisms*",[67] it is the prevailing opinion that the engagement in resettlement is voluntary. For example, *van Selm* highlighted that "[t]*he establishment and operation of a resettlement programme is voluntary, however, and primarily an administrative and programmatic operation*".[68] Furthermore, according to *Hashimoto*, "[n]*o State has a legal obligation proactively to admit refugees via resettlement who are still outside their jurisdiction nor can a refugee claim a 'right' to be resettled*".[69]

2.1.2 Responsibility sharing at the EU level: mandatory relocation failed

The principle of solidarity and fair sharing of responsibility is incorporated in EU law through Art 80 of the Treaty on the Functioning of the European Union (TFEU)[70]. This principle contains an external component, i.e. between EUMS and third countries, and stipulates positive obligations for EUMS (see 4.1.2.1). Notwithstanding, mandatory resettlement cannot be derived from EU law.[71]

While neither EU nor international law stipulates an obligation to resettle, the Council Decision 2015/1601[72] introduced mandatory quota at the

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67 Tally Kritzman-Amir, 'Not In My Backyard: On the Morality of Responsibility Sharing in Refugee Law' in (2009) 34 Brooklyn Journal of International Law 2, 355 (376); see Alexander Betts and Jean François Durieux, 'Convention Plus as a Norm-Setting Exercise' in (2007) 20 Journal of Refugee Studies 3, 509 (510).

68 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' (European Communities 2004) 17 (emphasis as in original removed).

69 Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' in (2018) 37 Refugee Survey Quarterly, 162 (165).

70 See Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47-390.

71 See Lyra Jakulevičienė and Mantas Bileišis, 'EU refugee resettlement: Key challenges of expanding the practice into new Member States' in (2016) 9 Baltic Journal of Law & Politics 1, 103; see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints*, 298ff.

72 See Council Decision 2015/1601 (EU) establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80-94.

EU level to 'relocate' refugees among EUMS.[73] By definition, relocation involves "*the transfer of an applicant from the territory of the Member State* […] *responsible for examining his or her application for international protection to the territory of the Member State of relocation*".[74] As a purely internal measure, relocation "*from one Member State to another is effectively transferring a refugee within an area which should have a uniform protection for refugees anyway*".[75] In other words, relocation applies to those who have already reached EU territory and are entitled to the respective protection under EU law, while resettlement offers a legal pathway to international protection in the EU and a durable solution for those who cannot remain in the country of (first) refuge.

Council Decision 2015/1601 faced stark opposition from Eastern European states.[76] Slovakia and Hungary filed actions of annulment against this Decision, which were dismissed by the Court of Justice of the European Union (CJEU).[77] In effect, Council Decision 2015/1601 and the previous Council Decision 2015/1523[78] only achieved about one fourth of the targeted relocations.[79] Particularly, the CJEU confirmed that the Czech Re-

73 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, 35.

74 Art 2 lit e Council Decision 2015/1601.

75 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, 36.

76 The decision was adopted on the basis of Art 78(3) TFEU, which provides that "*in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament*".

77 See Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* [2017] EU:C:2017:631.

78 See Council Decision 2015/1523 (EU) establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146-156 (not imposing a mandatory quota).

79 The temporary relocation scheme was officially ceased at the end of September 2017, whereas operations on pending cases were continued until the end of that year. In fact, only 31,503 of the 160,000 expected relocations took place by November 2017; see Commission, 'Relocation: EU Solidarity between Member States' (14 November 2017) <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf> accessed 13 February 2021; see also Darla Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' in (2018) 29 European Journal of International Law

public, Hungary and Poland[80] did not fulfill their relocation obligations.[81] Overall, the implementation of the 2015 *intra*-EU relocation scheme failed and raised doubts regarding the normative force of the principle of solidarity and fair sharing of responsibilities stated in Art 80 TFEU (see 4.1.2.1).[82]

2.1.3 Preliminary conclusion

Resettlement constitutes a means of responsibility sharing (as opposed to burden sharing). Even though international law recognizes the uneven refugee "*burden*" amongst states, calling for co-operation, there is no resettlement mechanism under binding international law. It is left to the discretion of states to bear responsibility by taking a share. At the EU

4, 1173 (1190); Sertan Sanderson, 'EU relocation scheme ends to mixed reviews' (*InfoMigrants*, 26 September 2017) <https://www.infomigrants.net/en/post/5270/eu-relocation-scheme-ends-to-mixed-reviews> accessed 27 June 2022. Further statistics are provided by Asylum Information Database <https://www.asylumineurope.org> accessed 20 March 2021.

80 Poland distinguishes from the Czech Republic and Hungary in terms of legal migration, inasmuch as there was an increase in the number of permits issued by Poland (since 2008), mostly for short-term period/seasonal work. "*If one excludes the large number of permits issued by Poland, the number of permits issued for the purpose of work in the rest of the EU-25 countries decreased from 326,000 in 2011 to 198,400 in 2015 before increasing in 2016 (226,000) and in 2017 (289,000)*", speech of Fabian Lutz, 'Legal migration (focus on economic migration)' (*ULB Odysseus Summer University*, 11 July 2019).

81 In July 2017, the Commission initiated infringement proceedings that were brought before the CJEU; see Commission, 'Relocation: Commission launches infringement procedures against Czech Republic, Hungary and Poland' (*Press release*, 14 June 2017) <http://europa.eu/rapid/press-release_IP-17-1607_en.htm> accessed 13 February 2021; see also Commission, 'Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice' (*Press release*, 7 December 2017) <http://europa.eu/rapid/press-release_IP-17-5002_en.htm> accessed 13 February 2021; see also Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* (Centre of European Policy Studies 2018) 21 <https://www.ceps.eu/wp-content/uploads/2019/01/Commission%20of%20Crisis.pdf> accessed 13 February 2021; in 2020, the Court found that the defendant EUMS infringed their relocation obligations, see Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Republic of Poland, Hungary and Czech Republic* [2020] EU:C:2020:257.

82 See Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' in (2018) 56 Journal of Common Market Studies 1, 3 (6).

level, mandatory refugee distribution between EUMS, i.e. relocation, was attempted but failed. In terms of responsibility sharing between EUMS and third countries through resettlement, a binding obligation does not exist and is also not provided for in the Proposal for a Union Resettlement Framework Regulation (see 4.2.11.1).

2.2 *Defining resettlement*

The Refugee Convention, the most relevant legal instrument with regard to international refugee law, does not define refugee resettlement. It neither addresses the circumstances of a refugee's arrival in the country of refuge or the receiving country, nor does it legally define resettlement. Instead, it applies to all refugees, regardless of whether they arrive in an uncontrolled or controlled manner.[83]

The UNHCR put effort into the conceptualization of resettlement. The legal nature of UNHCR's resettlement definition and standards will be analyzed in the following section. Moreover, light will be shed on the EU and the US legislators' attempts to define resettlement.

2.2.1 The United Nations High Commissioner for Refugees

From UNHCR's perspective, refugee resettlement constitutes one of three durable solutions (see 1.1). Among the durable solutions, resettlement is considered to be the solution which is the least entrenched and implemented in national and/or international law.[84] Against this backdrop, the UNHCR has used its mandate to promote durable solutions (see 2.5.2.1) and has elaborated on a standardized concept of resettlement.[85]

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83 See Marjoleine Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 562 (578).

84 See Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' in (2018) 37 Refugee Survey Quarterly, 162.

85 See Marjoleine Zieck in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, 562.

In its most recent *Resettlement Handbook*,[86] the UNHCR defined resettlement as follows:[87]

> *Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.*

Besides this definition, the *Resettlement Handbook* sets out guidelines for the resettlement process, which aim at ensuring adequate protection of resettlement refugees in line with international law. Whether UNHCR's standards actually spur legal entrenchment of resettlement depends on the acceptance and practice of states. To that effect, international custom determines the standards' legal relevance.[88] To put it differently, it needs to be tackled whether the UNHCR's concept of resettlement, mainly based on the UNHCR *Resettlement Handbook*, has surpassed the status of non-

86 In 1997, the first UNHCR *Resettlement Handbook* was published. A revised version followed in 2004 and the most recent revised edition was published in 2011. It has been recognized as a useful information tool; 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', 11; see also UNHCR, *Resettlement Handbook* (revised ed July 2011) <http://www.unhcr.org/protection/resettlement/46f7c0ee2/unhcr-resettlement-handbook-complete-publication.html?query=resettlementhttp://www.unhcr.org/protection/resettlement/46f7c0ee2/unhcr-resettlement-handbook-complete-publication.html ?query=resettlement> accessed 13 February 2021.

87 UNHCR, *Resettlement Handbook* (revised ed July 2011) 3 (emphasis added); the definition of resettlement included in the IOM Glossary is derived from the definition in the *Resettlement Handbook*: "*The transfer of refugees from the country in which they have sought protection to another State that has agreed to admit them – as refugees – with permanent residence status*", IOM, 'Glossary on Migration No 34' (2019) 184 <https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf> accessed 13 February 2021.

88 See Michael Bothe, 'Legal and Non-Legal Norms – a meaningful distinction in international relations?' in (1980) 11 Netherlands Yearbook of International Law, 65 (67).

binding soft law. Soft law standards would not be enforceable in a legal sense.[89]

As a preliminary point, it must be noted that the *Resettlement Handbook* differs from a binding treaty signed by state parties. It constitutes an internal UNHCR document, namely a guide to UNHCR staff, and a "*key reference tool* […] *for resettlement countries, NGOs and other partners*".[90]

Still, (parts of) the *Resettlement Handbook* could become binding as customary international law if (i) a general practice exists and (ii) it is accepted as international law, i.e. *opinio juris*.[91] The first requirement demands "*extensive and virtual uniform*"[92] practice. General practice can be given in case of relevant practice of those states whose interests are especially affected.[93] In the resettlement context, accessible information about state practice mostly comes from a (relatively small) group of receiving countries that accept resettled refugees on a constant basis and in cooperation with the UNHCR. Arguing extensive practice on that basis likely undermines the relevant threshold to be met.[94] As regards uniformity, there is a certain degree of leeway. Uniformity does not mean absolute rigorous conformity, rather consistency is sufficient.[95]

Beyond state practice, the second major requirement of *opinio juris* demands a feeling of states that they are committing to what amounts to a legal obligation.[96] Whether this means acceptance or mere belief that the legal obligation exists is contested among scholars, and some of them argue that *opinio juris* is superfluous.[97] Yet, even under the less restrictive belief-theory, general practice among states remains the main

89 See Chris Inglese, 'Soft law' in (1993) 20 Polish Yearbook of International Law, 75 (77).

90 UNHCR, *Resettlement Handbook* (revised ed July 2011) cover page.

91 See James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 9th ed 2019) 21; see also Chris Inglese, 'Soft law' in (1993) 20 Polish Yearbook of International Law, 81; see also *North Sea Continental Shelf* [1969] ICJ Rep 3.

92 *North Sea Continental Shelf* [1969] ICJ Rep 43, para 74.

93 See ibid 43, para 74; see also Tullio Treves, 'Customary International Law' (MPIL, November 2006) para 36 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393 > accessed 13 February 2021.

94 See Tullio Treves, 'Customary International Law' (November 2006) para 78.

95 See *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 186.

96 See ibid para 207.

97 For an overview of the different positions in the literature, see Christian Dahlman, 'The function of Opinio Juris in Customary International Law' in (2012) Nordic Journal of International Law, 328 (330ff).

indicator that states believe that the norm is valid international law, which demonstrates the interdependence of the two requirements. That being said, *opinio juris* regularly presupposes general practice.

In order to determine whether the above requirements are met, domestic legislation counts among the material sources of custom[98] because it reflects "*what States believe to be the law*".[99] If states implement the definition and guidelines of UNHCR's *Resettlement Handbook* in domestic legislation, those standards determine their national resettlement practice and become relevant practice, provided that the executive branch complies with the domestic legislation.

A comparative study by *Perrin* and *McNamara* (2013)[100] as well as the current versions of EUMS' Country Chapters to the *Resettlement Handbook* revealed that not all EUMS legally implemented resettlement. Those who incorporated resettlement into their asylum and/or immigration laws rarely introduced a legal definition of resettlement. For instance, Section 8 Danish Aliens Act[101] stipulates that resettlement to Denmark takes place based on an arrangement with the UNHCR or a similar international organization; at the same time, Denmark has not implemented UNHCR's resettlement definition, nor has it established any other legal definition of resettlement. Similarly, Finland has not defined resettlement in its Alien Act,[102] and the French Code of the Entry and Stay of Foreigners and Asylum Law does not set out a resettlement definition.[103] Germany currently conducts resettlement on the basis of Section 23 para 4 German Residence Act. It has followed UNHCR's recommendations and has generally recognized the UNHCR standards, but the UNHCR resettlement defi-

98 See James Crawford, *Brownlie's Principles of Public International Law*, 21f.

99 Tullio Treves, 'Customary International Law' (November 2006) para 26.

100 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, Annex 1, 43ff.

101 See Danish Aliens Act <https://www.legislationline.org/download/id/1222/file/4f98cdeb46c52d328c99626728c6.pdf> accessed 13 February 2021; see also Danish Country Chapter to the UNHCR *Resettlement Handbook* <https://www.unhcr.org/3c5e57b07.html> accessed 13 February 2021.

102 See Finish Alien Act <https://finlex.fi/fi/laki/kaannokset/2004/en20040301.pdf> accessed 13 February 2021.

103 See French Code of the Entry and Stay of Foreigners and Asylum Law <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000624655&dateTexte=&categorieLien=id> accessed 13 February 2021.

nition has not been incorporated into German law.[104] And Ireland legally defines a so-called 'program refugee' as a person "*to whom permission to enter and remain in the State for resettlement, or for temporary protection* […] *has been given by the Government or the Minister and whose name is entered in a register established and maintained by the Minister*, […]" in Section 59 Irish International Protection Act 2015.[105] Since program refugees can be admitted either for resettlement or temporary protection, Ireland does not necessarily offer a durable solution to program refugees – but it has transposed essential elements of the UNHCR resettlement definition into its national law. Amongst other rights, Irish law grants program refugees a right to seek employment; engage in any business, trade or profession; and access education and training *to the like extent in all respects as an Irish citizen*. This reflects the UNHCR definition's reference to "*access to rights similar to those enjoyed by nationals*". Another rare example of a legal resettlement definition can be found in Romanian law.[106] The Romanian definition incorporates the main ideas of the UNHCR definition and recognizes the character of resettlement as a durable solution. Furthermore, it expressly mentions UNHCR's pre-determination of refugee status (see 5.2.1). As opposed to Denmark, Finland and Sweden, Romania restricts access to resettlement to Convention refugees.

From this short and rudimentary examination it is discovered that only two receiving countries, namely two of the few countries that regularly resettle and report to the UNHCR, have adopted a resettlement definition at all. Their definitions diverge from each other and from the UNHCR definition.

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104 See German Country Chapter to the UNHCR *Resettlement Handbook* <https://www.unhcr.org/5162b3bc9.html> accessed 13 February 2021.

105 See Irish International Protection Act <http://www.irishstatutebook.ie/eli/2015/act/66/section/59/enacted/en/html#sec59> accessed 18 June 2020; see also Irish Country Chapter to the UNHCR *Resettlement Handbook* <https://www.unhcr.org/3cac29da4.html> accessed 13 February 2021.

106 Accordingly, a refugee in need of resettlement is "*an alien found on the territory of another state who has been recognized as a refugee in accordance with the 1951 Geneva Refugee Convention, or an alien recognized as a refugee by the UNHCR in accordance with Article 1 A of the 1951 Geneva Refugee Convention and Art. 1(2) of its Protocol, who is not benefiting from effective protection, and does not have the possibility of integration in the country of asylum or the possibility of voluntary repatriation to his or her country of origin in conditions of safety and dignity*", Romanian Country Chapter to the UNHCR *Resettlement Handbook* <https://www.unhcr.org/4e2d64679.html> accessed 13 February 2021.

So far, the numerous states from which resettlement should take place have not been mentioned. There are, however, hardly any significant references to resettlement in their national laws. One of the few examples is Turkish law, where resettlement is used in the context of 'conditional refugee status'. In the Turkish case, protection standards for potential resettlement refugees are restricted rather than strengthened. As explicitly stated in Art 62 Turkish Law on Foreigners and International Protection (LFIP)[107], 'conditional refugees' "*shall be allowed to reside in Turkey temporarily until they are resettled to a third country*";[108] but they are, amongst others, excluded from family reunification rights and they have no prospect of long-term legal integration in Turkey.[109]

It seems obvious from all these inconsistencies that a uniform and consistent practice has not emerged. The lack of general practice, in particular the fact that many receiving countries have not implemented the main characteristics of the UNHCR definition into their domestic laws, indicates that states do not consider the *Resettlement Handbook* to be binding international law. Indeed, states initially did not accept the *Resettlement Handbook* as a binding instrument, but rather as a guiding document, which speaks against the existence of *opinio juris*. As a result, the UNHCR resettlement definition and guidelines under the *Resettlement Handbook* cannot be considered as binding customary international law.

The requirements of customary international law are not met, but has the formation process even started? In this regard, the will of states, namely a true belief, voluntarily made with the purpose of starting or influencing

107 Law No 6458 of 2013 on Foreigners and International Protection (as amended 29 October 2016) [unofficial translation] <https://www.refworld.org/docid/5a1d828f4.html> accessed 3 July 2021.

108 This is also indicated on the webpage of the Turkish Directorate General of Migration Management; see <https://en.goc.gov.tr/conditional-refugee> accessed 16 June 2021.

109 For further details on Turkey's reservation and the LFIP, see AIDA & ECRE, 'Country Report: Introduction to the asylum context in Turkey' (last updated 30 November 2020) <https://asylumineurope.org/reports/country/turkey/introduction-asylum-context-turkey/> accessed 16 June 2021; see also N Ela Gökalp Aras and Zeynep Sahin Mencütek, '*Refugee Protection: Turkey Report*', Paper 2020/30 (January 2020) 26 <https://www.researchgate.net/profile/Zeynep-Mencutek/publication/340236818_Refugee_Protection_Turkey_Report_Working_Papers_Global_Migration_Consequences_and_Responses/links/5e7e4ee192851caef4a56b41/Refugee-Protection-Turkey-Report-Working-Papers-Global-Migration-Consequences-and-Responses.pdf> accessed 16 June 2021.

the formation of customary law constitutes a relevant indicator.[110] It is difficult, but decisive to distinguish the aim of creating customary law from the aim of establishing new rules of soft law.[111] Since the nature of the definition and standards set out in the *Resettlement Handbook* are rather defined as guidelines than rules that should become binding on states (at a later stage), it is hard to establish any indication that the formation process of customary international law has started. States have continuously insisted on the voluntary nature of resettlement, and a significant change towards creating binding international obligations in this regard cannot be expected at this point in time.

Another attempt would be to vest normative force into the UNHCR *Resettlement Handbook* by considering it as a binding decision of an international organization. However, the UNHCR as a subsidiary organ of the UN has no legislative competences in the sense of passing normative acts with direct effect and/or primacy over national norms in the legal systems of receiving countries.

It can be invoked that the current version of UNHCR's *Resettlement Handbook* along with its two predecessors "*are the result of extensive round table consultations with governments, NGOs and UNHCR personnel from all over the globe*".[112] This shows that resettlement standards have been subjected to repeated international negotiations. They have been reciprocally endorsed. Thus, the argument that the conduct of resettlement operations by receiving countries constitutes an exclusive domestic affair does not hold true.[113]

The fact remains that the UNHCR resettlement standards are not perceived as 'legal norms', rather they constitute non-binding soft law. This classification is supported by scholars, e.g. *Garnier*, *Sandvik* and *Jubilut* expressly referred to "*UNHCR's soft law*".[114] Specifically, *Garnier* described

110 See Tullio Treves, 'Customary International Law' (November 2006) para 9.

111 See ibid para 29.

112 Kristin Bergtora Sandvik, 'A Legal History: The Emergence of the African Resettlement Candidate in International Refugee Management' in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 46 (61).

113 See Chris Inglese, 'Soft law' in (1993) 20 Polish Yearbook of International Law, 83.

114 Adèle Garnier, Kristin Bergtora Sandvik and Liliana Lyra Jubilut, 'Introduction: Refugee Resettlement as Humanitarian Governance' in Adèle Garnier, Liliana Lyra Jubilut and Kristin Bergtora Sandvik (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 1 (7).

the UNHCR *Resettlement Handbook* as a "*main source of 'soft law' aiming to guide resettlement globally*".[115] The analysis has confirmed that currently, this remains more a matter of guidance than of binding international law. However, not to undermine the value of soft law and its standard-setting nature, UNHCR's *Resettlement Handbook* could still serve as a model in international and EU law making.[116]

2.2.2 The European Union

The Commission defined resettlement in Art 2 Union Resettlement Framework Regulation Proposal. As part of a regulation, once adopted, this definition would have a legally binding effect upon all EUMS. The proposed Article states that

> […] *'resettlement' means the admission of third-country nationals and stateless persons in need of international protection from a third country, to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection*.[117]

The Commission followed the main ideas of UNHCR's resettlement definition. One particularity is the Commission's inclusion of persons from a third country "*within which they have been displaced*", thereby extending the scope of beneficiaries to Internally Displaced Persons (IDPs), i.e. persons who have not left their home countries. By comparison, the UNHCR definition refers to 'refugees' only. IDPs may be in need for international protection for the same reasons as Convention refugees, who are, by definition, outside their home country (see 2.5.4.1). It follows that cases of internal displacement[118] demand for resettlement operations as well.

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115 Adèle Garnier, 'The COVID-19 Resettlement Suspension: Impact, Exemptions and the Road Ahead' (*FluchtforschungsBlog*, 16 June 2020) <https://blog.fluchtforschung.net/the-covid-19-resettlement-suspension/> accessed 13 February 2021.

116 See Daniel Thürer, 'Soft law' (MPIL, March 2019) para 32 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469> accessed 13 February 2021.

117 Art 2 Proposal for a Union Resettlement Framework Regulation (emphasis added) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0468&qid=1605104443607> accessed 3 August 2021.

118 The Guiding Principles on Internal Displacement provide the normative framework for protecting and assisting internally displaced persons. Therein such persons are defined as those "*who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid*

However, implementing the extended scope of the Commission Proposal would entail a significant rise in resettlement needs. The gap between needs and actual resettlements would grow if receiving states were not willing to increase the pledged quotas.

Furthermore, adopted in 2014, Art 2 lit a Regulation 2014/516 (EU) establishing the Asylum, Migration and Integration Fund (AMIF)[119] set out a binding resettlement definition. It stated that resettlement means "*the process whereby, on a request from the* […] [UNHCR] *based on a person's need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside* […]". The residence should be based either on refugee status, subsidiary protection status or "*any other status which offers similar rights and benefits under national and Union law*".

In contrast to the definition in the 2016 Proposal for a Resettlement Framework Regulation (see 4.2.11.2), the 2014 AMIF Regulation did not literally refer to IDPs. Nonetheless, the definition in the 2014 AMIF Regulation included "*any other status which offers similar rights and benefits under national and Union law*". Depending on the national legal situation, IDPs could fall under this category. It should also be noted that subsidiary protection status, a more temporary status than refugee status, was explicitly mentioned (for further elaboration on subsidiary protection status see 2.5.4.1). Yet not all EUMS envisage the resettlement of persons eligible for subsidiary protection (see 5.2.1). The explicit reference and the associated funding could provide an incentive for EUMS to expand the scope of resettlement beneficiaries to persons eligible for subsidiary protection. In the absence of an explicit reference, however, this is less clear for IDPs.

As opposed to the UNHCR resettlement definition, neither the Commission's definition under Art 2 Union Resettlement Framework Regulation Proposal, nor the definition under Art 2 lit a of the 2014 AMIF Regulation mention permanent residence status or (potential) naturalization. This means that the Commission did not necessarily characterize resettlement as a durable solution, but left the door open for resettlement

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the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border", ECOSOC, 'Guiding Principles on International Displacement', UN Doc E/CN4/1998/53/Add2 (11 February 1998) Annex, para 2 <https://undocs.org/E/CN.4/1998/53/Add.2> accessed 20 March 2021.

119 See Regulation 2014/516 (EU) establishing the Asylum, Migration and Integration Fund [2014] OJ L150/168-195.

as a temporary substitution of the country of (first) refuge.[120] In a more recent resettlement definition from December 2019, the Commission still refrained from any express reference to resettlement's role as a durable solution:[121]

> *Resettlement means the admission of non-EU nationals in need of international protection from a non-EU country to a Member State where they are granted protection. It is a safe and legal alternative to irregular journeys and a demonstration of European solidarity with non-EU countries hosting large numbers of persons fleeing war or persecution.*

In this definition the Commission described resettlement as a demonstration of European solidarity towards countries of (first) refuge. Unburdening countries of (first) refuge by taking a share can, in turn, help to (re)establish stable situations and durable settlement opportunities in those countries. The 2019 resettlement definition also exemplifies a terminological problem, namely the usage of the terms 'irregular' *versus* 'illegal'. The Commission's choice confirms the trend of the prevailing usage of the term 'irregular' instead of 'illegal',[122] which is also reflected in the terminology used in this monography.

Eventually, a reference to resettlement as durable solution can be found in the current 2021 AMIF Regulation.[123] It defines resettlement in Art 2 para 8 as "*admission following a referral from the UNHCR of third-country nationals or stateless persons from a third country to which they have been displaced, to the territory of the Member States, and who are granted international protection and have access to a durable solution in accordance with Union and national law*"[124].

120 See Marjoleine Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' in (2018) 39 Michigan Journal of International Law 1, 19 (105).

121 Commission, 'Resettlement: EU Member States' pledges exceed 30,000 places for 2020' (*Press release*, 18 December 2019) <https://ec.europa.eu/commission/presscorner/detail/de/ip_19_6794> accessed 13 February 2021.

122 See for an elaboration Tobias Klarmann, *Illegalisierte Migration: Die (De-)Konstruktion migrationsspezifischer Illegalitäten im Unionsrecht* (Nomos 2021) 38-50.

123 See Regulation 2021/1147 (EU) establishing the Asylum, Migration and Integration Fund [2021] OJ L251/1-47 (consolidated version of 12 April 2022).

124 Emphasis added.

2.2.3 The United States of America

In the US, eligibility for resettlement depends on the situation in the country of (first) refuge. To that effect, US law describes the situation where an alien is firmly resettled. Only persons who are not firmly resettled in a country of (first) refuge qualify for resettlement to the US. Firm resettlement can be assumed if:[125]

> *prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:*
> *(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or*
> *(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.*

By emphasizing the conditions of residence in the country of (first) refuge, the US firm resettlement bar takes account of situations where fundamental rights of refugees are at risk in overburdened countries of (first) refuge. It reflects the interest of the country of (first) refuge to be relieved in overburdened situations, and the interest of refugees to be protected from serious human rights violations in that country. By the same token, it bars those individuals from international protection in the US who can effectively receive such protection elsewhere – this in turn is a relief for the US.

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125 Section 208.15 Title 8 Code of Federal Regulations 2012 <https://www.govinfo.gov/content/pkg/CFR-2012-title8-vol1/pdf/CFR-2012-title8-vol1-part208.pdf> accessed 13 February 2021.

2.2.4 Preliminary conclusion

As of today, there is no binding definition of resettlement in international (refugee) law. The UNHCR made conceptualization efforts, which however do not go beyond the status of non-binding soft law. Remarkably, as opposed to the UNHCR definition, the Commission attempted to extend the scope of resettlement beneficiaries by generally including IDPs in its Proposal for a Union Resettlement Framework Regulation. US law is unique because it focuses on the conditions in the country of (first) refuge as bar for resettlement eligibility. Thereby, the US implicitly recognizes resettlement as a durable solution for those refugees who cannot find such solution in the country of (first) refuge. In EU legislation, explicit reference to resettlement as a durable solution was only introduced recently through the 2021 AMIF Regulation.

While all three outlined definitions consider resettlement as a tool to protect persons in need who cannot find protection in a respective third country, there is no clear common denominator on the durability and eligibility for resettlement.

For the sake of clarity on the concept of resettlement, the traditional UNHCR definition of resettlement as a durable solution is used as a reference point. In this regard, traditional resettlement is distinct from humanitarian admission, which includes more temporal measures. In terms of the scope of resettlement beneficiaries, all three elaborated definitions include refugees. The potential extension of the scope to other forcibly displaced persons will be discussed in 2.5.4 and 5.2.3.2.

2.3 Historical background and development of resettlement (with focus on the US)

The historical background and development of resettlement helps to clarify the concept of resettlement. The following section shows in which contexts resettlement has been used as a response to forced displacements and reveals which factors have determined international resettlement efforts.

2.3.1 The beginning of systematic and organized resettlement

Globally, organized resettlements to protect vulnerable persons, such as Belarussians fleeing to China after the Russian Revolution as well as Jews

facing persecution by the Nazis, emerged in the period between the two World Wars.[126]

During that time, the US did not pursue what could be described as an immigration-friendly policy. For example, the US did not approve the so-called Emigrants Charter[127] in May 1924. This Charter's focus on equal treatment between nationals and foreigners[128] contradicted the then existing US law on quotas discriminating against populations that were deemed to potentially harm US society and economy.[129]

In the aftermath of World War II, resettlement was soon considered the only viable option to deal with "*21 million displaced people throughout Europe*".[130] Many of the displaced people had valid reasons not to return home, which created a situation that required solutions apart from voluntary repatriation.[131] Against this backdrop, movements of refugees from their country of (first) refuge to other countries started in 1945, under the auspices of the Intergovernmental Committee on Refugees (IGCR).[132]

In the following years, the US – together with Canada, Australia and the free countries of Western Europe – supported the UN in establishing the International Refugee Organization (IRO).[133] From 20 April 1946, the IRO "*provided the vehicle for resettlement, but it could only be successful if each of the member nations agreed to accept a portion of the group for the*

126 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 4.

127 See 'Final Act of the International Conference on Emigration and Immigration' in Giuseppe de Michelis, *Conference international de l'émigration et de l'immigration, Rome 15-31 mai 1924* (Imprimerie de la Chambre des Députés – Raison C Colombo 1925).

128 See Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 54f.

129 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report Nº2 (12 September 2018) 4 <https://www.crisisgroup.org/united-states/002-how-save-us-refugee-admissions-program> accessed 13 February 2021.

130 Ibid 4.

131 See ibid 4.

132 See Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II* (AW Sijthoff 1972) 230.

133 See Vincent Chetail, *International Migration Law*, 58; see also Aristide R Zolberg, 'From Invitation to Interdiction: US Foreign Policy and Immigration since 1945' in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders* (WW Norton Company 1995) 117 (123).

permanent residence".[134] Between 1947 and 1951, the IRO presided over the resettlement of more than one million refugees, 80% of which were resettled to destinations outside of Europe.[135]

The scale of IGCR and subsequent IRO resettlements demanded a legal foundation in the form of resettlement agreements concluded with the governments of receiving countries.[136] IRO's responsibility for determining which individuals were in need of resettlement was a characteristic feature of these agreements. At the same time, governments reserved the exclusive right to carry out the final selection of the resettlement beneficiaries under the respective agreements.[137]

The US recognized that "*pre-war efforts, especially on behalf of Jewish refugees, had been shamefully inadequate*"[138] and altered its restrictive policy. In the following era, "*Congress passed several pieces of legislation to admit large-scale refugee populations*".[139] Strategic considerations and foreign policy played a significant factor in the US decision to resettle refugees.[140] The Cold War, i.e. the geopolitical tension between the Soviet Union and the US with its allies, also impacted US immigration policy. In June 1948, America's first refugee act, the Displaced Persons Act,[141] was signed. The

134 Stephen H Legomsky, *Immigration Law and Policy* (The Foundation Press 1992) 827.

135 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 4.

136 The earliest agreement concerning resettlement to a Western European Country was the Agreement between His Britannic Majesty's Government (Control Commission for Germany), the Belgian Government and the IGCR for the Resettlement in Belgium of Displaced Persons and Refugees in the British Zone of Germany of 13 February 1947, IRO Doc IRO/LEG/GOV/10/Add I, 25 March 1949; for further examples see Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 231ff (233): e.g. the Luxembourg Resettlement Agreement of 9 March 1947, the Norwegian Agreement following the Hungarian exodus in 1956.

137 See Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 233.

138 Thomas Alexander Aleinikoff et al, *Immigration and Citizenship: Process and Policy*, 793.

139 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, 208.

140 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report Nº2 (12 September 2018) 4.

141 See Displaced Persons Act 1948, Public Law 80-774, 62 Stat 1009, Chapter 647.

law provided for the admission of 202,000 persons.[142] In fact, those fleeing from communist or communist-dominated nations were prioritized for refugee status.[143] The amendments of 1950 expanded admission to 400,000 refugees.[144] The Displaced Persons Act "*was followed by additional ad hoc enactments responsive to the imperatives of the cold war*".[145]

2.3.2 Resettlement under the UNHCR

In 1950, the UNHCR followed the IRO.[146] Together with the Intergovernmental Committee on European Migration (ICEM),[147] the UNHCR continued IRO's resettlement tradition[148] and spurred the development of an international refugee regime, culminating in the enactment of the 1951 Refugee Convention. Notwithstanding its leading role in this development, the US was not among the signatories of the Refugee Convention.[149]

The *post*-IRO period with the adoption of the Refugee Convention was marked by a shift away from the past practice of concluding resettlement agreements. The UNHCR and the ICEM operated on a much smaller scale than the IRO because selection practices had already been firmly

142 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 123.

143 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 253 (262).

144 See Stephen H Legomsky, *Immigration Law and Policy*, 828; see also 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, 208.

145 Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 123.

146 This did not imply succeeding to the rights and obligations of the IRO as predecessor; see Marjoleine Zieck, *UNHCR's worldwide presence in the field* (Wolf Legal Publishers 2006) 19.

147 The Intergovernmental Committee for European Migration was established in 1951, originally under the name Provisional Intergovernmental Committee for the Movement of Migrants from Europe; see Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 230.

148 See Stephen H Legomsky, *Immigration Law and Policy*, 829.

149 See Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper n°115 (May 2005) 4 <https://www.refworld.org/pdfid/4ff166f31e.pdf> accessed 13 February 2021.

established and the Refugee Convention made the conclusion of detailed agreements superfluous.[150] The ordinary practice then was that receiving countries demanded the individual refugee to be in possession of a Convention travel document (see Art 28 Refugee Convention) including the usual return clause,[151] which entitled the refugee to return to the issuing state, namely the country of (first) refuge.[152]

2.3.3 Adjustments in US immigration law

The realization of UNHCR's resettlement initiatives in the 1950s and 1960s to reconstruct Europe[153] strongly depended on US admissions.[154] In turn, this required adjustments of the US refugee regime. At that time, US immigration law had not yet contained "*a standing mechanism for bringing refugees into the country, or even recognize the concept of 'refugee'*".[155] US resettlement was largely conducted on an *ad hoc* basis. Three means allowed entry to refugees: (i) visas issued by the President through borrowing against existing quotas, (ii) (time-limited) visas created by Congress without quota, or (iii) parole authority invoked by the President, i.e. the President directed discretionary power to the Attorney General "*to 'parole' any alien into the United States for reasons of emergency or if it were 'deemed*

150 See Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 233.

151 See Annex to the Refugee Convention, 'Specimen Travel Document', para 2 <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+167%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47> accessed 13 February 2021.

152 See Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 234.

153 "[A]*fter the onset of the cold war, under the leadership of Secretary of State George Marshall, the Truman administration began to treat the reconstruction of Europe as a major priority.* […] *Given local conditions, the solution required some sort of resettlement*", Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 123.

154 See ibid 123.

155 International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 5.

strictly in the public interest.'".[156] Parole power became the favored tool.[157] It should be mentioned that the usage of parole power was not regulated by standardized procedures. Furthermore, due to its discretionary nature, parole power was outside the scope of judicial review.[158]

The Refugee Relief Act of 1953,[159] another temporary US measure, allowed non-quota admission of special immigrants in times of international crisis.[160] Over the following three years, it provided for 209,000 non-quota slots.[161] In fact, the Act constituted a "[…] *device to 'encourage' defection of all* [Soviet] *nations and 'key' personnel from the satellite countries*".[162]

2.3.4 The Hungarian exodus

In 1956, the first large-scale resettlement operation, namely UNHCR's "*first major emergency*"[163] took place. It was triggered by the Soviet invasion of Hungary. When the Hungarian revolution was ended on 4 November 1956, Austria had welcomed some 200,000 Hungarian refugees on the condition of rapid resettlement to other countries.[164] The resettlements

156 Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 124.

157 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 5.

158 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 268.

159 See Refugee Relief Act 1953, Public Law 203, 67 Stat 400, Chapter 336.

160 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 265.

161 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, 208.

162 Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 123f.

163 Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (MPIL, January 2013) para 4 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e530> accessed 20 March 2021.

164 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 124; see also Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 33 (36).

started only one week after the first refugee had arrived in Austria.[165] Within three years, about 180,000 Hungarians were resettled to 37 countries.[166] For instance, the Norwegian government dispensed with formal selection and waived the right to return undesirables to Austria. The Norwegian government declared to "*admit for resettlement any Hungarian refugee who – upon having received adequate information on the conditions in the country – freely expressed his desire to go to Norway*".[167] Other European countries, however, only admitted limited numbers of refugees. Thus, relief for Austria could only be achieved through resettlements to overseas countries.[168] The role of the US was particularly important because refugees were reluctant to accept offers from Canada "*as long as there remained hope of gaining asylum in the US*".[169] Despite initial opposition,[170] more than 30,000 Hungarians were paroled in the US.[171] Given the limited number of visas available under the 1953 Refugee Relief Act, the US administration used parole authority.[172] To facilitate integration, the US government initiated a propaganda campaign to counter the hostility of the American public towards Hungarian refugees.[173]

The Hungarian exodus exemplifies that resettlement was "*used both as a politically motivated protection tool and as a measure for sharing the burden*

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165 See Amanda Cellini, 'The resettlement of Hungarian refugees in 1956' in (2017) 54 Forced Migration Review, 7 <https://www.refworld.org/docid/58cbcb314.html> accessed 13 February 2021.

166 Among the European states, Sweden was one of the first respondents to Austria's call for solidarity, whereas Norway first held a domestic debate; see ibid 6ff.

167 Atle Grahl-Madsen, *The Status of Refugees in International Law: Volume II*, 233.

168 See James P Niessen, 'The Culture of Welcome and the January, 1957 Austrian Refugee Quota Proposal' (2016) 11 <https://rucore.libraries.rutgers.edu/rutgers-lib/50546/PDF/1/play/> accessed 13 February 2021.

169 Ibid 10.

170 See Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 36.

171 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, 208.

172 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 124.

173 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 266f.

with Austria".[174] The efforts to resettle Hungarians from Austria are considered one of the most successful demonstrations of international solidarity in response to forced migration.[175] Nevertheless, the claim of Austria's Minister of Internal Affairs at that time, Oskar Helmer, to introduce mandatory resettlement quotas for all 'freedom-loving countries' with a ratio of 1:1000 to their population was not considered in the resolutions passed by the fourth session of the United Nations Refugee Emergency Fund (UNREF) in early 1957.[176]

2.3.5 Towards a more diverse US immigration policy

Upon expiration of the 1953 Refugee Relief Act, the Refugee Escape Act of 1957 followed. In support of US foreign policy interests,[177] it redefined the legal term refugee by including persons who departed from a "*Communist, Communist-dominated, or Communist-occupied area*".[178] Subsequently, Congress passed the Fair Share Refugee Law in 1960,[179] enabling the parole of large refugee groups in the US.[180] The US thereby admitted refugees from European camps in the proportion of one for every refugee resettled by other nations.[181]

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174 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', 7.

175 See Amanda Cellini, 'The resettlement of Hungarian refugees in 1956' in (2017) 54 Forced Migration Review, 6.

176 See UNHCR, 'Report of the United Nations High Commissioner for Refugees', UN Doc A/3585/Rev.1 (1 January 1958) <https://www.refworld.org/docid/3ae68c710.html> accessed 17 June 2021; see also James P Niessen, 'The Culture of Welcome and the January, 1957 Austrian Refugee Quota Proposal' (2016) 12f.

177 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 266.

178 See Section 15 lit c point a Refugee Escape Act 1957, Public Law 85-316, 71 Stat 639; see also Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 124.

179 See Fair Share Refugee Act 1960, Public Law 86-648, 74 Stat 504.

180 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 268.

181 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 124f.

The 1965 Amendments to the Immigration and Nationality Act[182] introduced a shift in US immigration policy towards ethnic and cultural diversification[183], as they ended the national-origin quota prioritizing migration from northern and western European countries. Finally, the US agreed to the definitions and protections set forth in the Refugee Convention as it became party to the 1967 Protocol to that Convention.[184]

2.3.6 The mechanized resettlement of Vietnamese

With the consolidation of power in the Socialist Republic of Vietnam in 1975, an era of mechanized resettlement began. The US perceived it as a moral obligation to admit a large portion of the several thousand people who reached the Thai border in April 1975.[185] This happened under the so-called Orderly Departure Program.[186] The Senate unanimously approved President *Ford*'s request to parole 150,000 Indochinese in the US.[187] When Saigon fell a week later,[188] Congress responded within less than a month by approving the Indochina Migration and Refugee Assistance Act.[189] This Act authorized funds for a massive two-year resettlement program.[190] After the emergency program had expired, the admission rate of Indochinese refugees dropped to a mere 100 per month. Due to calls for additional

182 See The Immigration and Nationality Act Amendments 1965, Public Law 89-236, 79 Stat 911.

183 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 5.

184 See Protocol to the Convention Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267; see also Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 125f; see also Thomas Alexander Aleinikoff et al, *Immigration and Citizenship: Process and Policy*, 793.

185 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 130.

186 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 6.

187 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 130ff.

188 See ibid 131f.

189 See Indochina Migration and Refugee Assistance Act 1975, Public Law 94-23, 89 Stat 87.

190 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 131f.

resettlements within the State Department, US admissions were extended more generally throughout the 1980s.[191]

In 1978 (global) resettlement declined.[192] At the same time, Vietnamese refugees crossed the high seas to find safety, whereas countries of the Association of South East Asian Nations (ASEAN) started to oppose to admitting boat people from Vietnam.[193] The idea that the Vietnamese could obtain long-term asylum in neighboring countries failed to convince Thailand and Malaysia, who "*made it very clear that they would accept refugees only for temporary asylum, and on condition that they be quickly resettled elsewhere*".[194] Eventually, agreements for temporary asylum in neighboring ASEAN countries and resettlement to third countries were achieved under the initiative of the UNHCR.[195]

Under the initiative of the *Carter* administration, the International Conference on Indochinese Refugees took place in July 1979 in Geneva.[196] Over the course of this Conference, Western states and South East Asian governments re-established consensus on offering entry to Indochinese refugees in exchange for resettlement commitments.[197] The US, together with Canada, Australia, France and some thirty other nations, "*embarked on a huge and costly resettlement programme that was to continue into the 1990s*".[198]

191 See ibid 132.

192 See Garry G Troeller, 'UNHCR Resettlement as an Instrument of International Protection: Constraints and Obstacles in the Arena of Competition for Scarce Humanitarian Resources' in (1991) 3 International Journal of Refugee Law 3, 564 (575).

193 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 6, fn 19.

194 Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 130f.

195 See Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (MPIL, January 2013) para 7.

196 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 134.

197 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper n°253 (February 2013) 5.

198 Gil Loescher, *The UNHCR and World Politics: A perilious path* (Oxford University Press 2001) 207.

2.3.7 The 1980 Refugee Act

Later, the 1980 Refugee Act[199], a significant legislative milestone in the US, was enacted and has remained in force until today. This new legislation shifted the emphasis away from geopolitics.[200] The Refugee Act (formally) eliminated the presumption that all those fleeing from Communist countries were *de facto* refugees, and it finally implemented the Refugee Convention's refugee definition.[201] It established a permanent resettlement program with annual resettlement quotas (the normal flow) and emergency procedures (refugees of special humanitarian concern). The annual ceiling under this Act has since then been subject to executive (presidential) determination, after consultation with Congress.[202] Initially, the Refugee Act was intended to narrow the President's parole power.[203] Actually, "*Congress' intent to establish a geographically and ideologically neutral system of refugee admissions has been undermined*"[204] because the usage of parole power in favor of those fleeing from Communist countries continued.

2.3.8 The disintegration of Yugoslavia

In the 1990s, forced displacement increased in Europe. Due to the disintegration of Yugoslavia, Eastern Europe faced a sudden wave of mass migration. According to the UNHCR, from 1989 to 1992, 2.3 million people

199 See Section 201 para 42 Title II Refugee Act 1980, Public Law 96-212, 94 Stat 102 <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf> accessed 13 February 2021.

200 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 95.

201 See ibid 138f.

202 See Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 281f.

203 See Aristide R Zolberg in Michael S Teitelbaum and Miron Weiner (eds), *Threatened Peoples, Threatened Borders*, 138f; 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, 155 (170f).

204 Kathryn M Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' in (1995) 21 North Carolina Journal of International Law and Commercial Regulation 1, 282.

fled their homes, leading to a significant rise in asylum applications in Western Europe.[205] Remarkably, this so-called Balkan crisis triggered first attempts to encourage solidarity and responsibility sharing among EUMS, including a (failed) German proposal on mandatory refugee distribution (see 4.2.2).[206] In December 1995, when the Bosnian War ended with the signing of the Dayton Peace Agreement, there were still an estimated 1.3 million Bosnian IDPs and 500,000 other refugees displaced in the sub-region, with an additional 700,000 refugees in Western Europe.[207] Instead of urging receiving countries to increasee resettlement contributions, the UNHCR coordinated and facilitated large-scale returns.[208]

2.3.9 The decade of voluntary repatriation and reconceptualization of resettlement

The early 1990s became known as the decade of voluntary repatriation, with decreasing resettlement numbers. In 1979, the resettlement rate, i.e. the percentage of the global refugee population that had access to resettlement, was 5%; it dropped to 1% in 1990 and to 0.25% in 1996.[209] The decreased political interest in resettlement induced a shift of UNHCR's priorities,[210] resulting in the retreat and reconceptualization of resettlement.[211] A 1991 UNHCR paper introduced definitions of concrete categories of

205 See Garry G Troeller, 'UNHCR Resettlement as an Instrument of International Protection: Constraints and Obstacles in the Arena of Competition for Scarce Humanitarian Resources' in (1991) 3 International Journal of Refugee Law 3, 575.

206 See ibid 575.

207 See Guido Ambroso, 'The Balkans at a crossroads: Progress and challenges in finding durable solutions for refugees and displaced persons from the wars in the former Yugoslavia', UNHCR Research Paper nº133 (November 2006) 2 <https://www.unhcr.org/4552f2182.pdf> accessed 13 February 2021.

208 See ibid 3.

209 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 6.

210 See ibid 7.

211 See Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 2 <https://www.unhcr.org/research/working/528e15259/postmillenial-unhcr-refugee-resettlement-new-developments-old-challenges.html> accessed 13 February 2021.

refugees qualifying for resettlement.[212] Developments at the administrative level involved the establishment of the Working Group on Resettlement (WGR) composed of UNHCR representatives and government officials from resettlement partner countries. Furthermore, Annual Tripartite Consultations on Resettlement (ATCR) took place, where selected Non-Governmental Organization (NGO) partners were also invited.[213] The WGR and the ATCR became "*the principal multilateral institutions in which states, UNHCR and non-governmental organisations (NGOs) engage on issues specific to the resettlement of refugees*".[214]

In July 1997, the UNHCR published its first *Resettlement Handbook*. It further developed the categories of refugees qualifying for resettlement introduced in the 1991 paper[215] and "*comprehensively outlined the process, criteria, goals and objectives of the UNHCR programme*".[216] UNHCR's efforts also comprised the establishment of a trust fund through financial contributions from Sweden, Norway, Denmark, Finland and the US.[217] The primary aim to engage new resettlement countries via funding incentives,[218] however, was not achieved.[219]

212 See UNHCR, 'Resettlement as an Instrument of Protection: Traditional Problems Achieving This Durable Solution and New Directions in the 1990s', EC/SCP/65 (9 July 1991) <https://www.unhcr.org/excom/scip/3ae68ccc10/resettlement-instrument-protection-traditional-problems-achieving-durable.html> accessed 13 February 2021.

213 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', 8.

214 Carol Batchelor and Edwina O'Shea, 'The internationalization of resettlement: lessons from Syria and Bhutan' in (2017) 54 Forced Migration Review, 9 <https://www.refworld.org/docid/58cbcb314.html> accessed 13 February 2021.

215 See Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 4.

216 Ibid 3.

217 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', 13.

218 See ibid 13.

219 See ibid 14 (with further references).

2.3.10 Convention Plus

In September 2002, UN High Commissioner for Refugees *Lubbers* pushed the Convention Plus initiative with the "*ambitious goal of adding substantial obligations to the acquis of the* [Refugee Convention] *and the 1967 Protocol* […] *regarding burden-sharing*".[220] This initiative was dedicated to the 'strategic use of resettlement',[221] shedding new light on the benefits of responsibility sharing as an additional function of resettlement.[222] It culminated in a Multilateral Framework of Understanding on Resettlement.[223] This is a non-binding understanding among state parties to use resettlement for the benefit of a greater number of refugees and to conclude special, situation-specific, multilateral agreements.[224] However, Convention Plus failed to provide an answer as to why state parties should engage in responsibility sharing at all. The initiative also failed for systematic reasons.[225] The controversy was that states were not bound to provide durable solutions while the UNHCR was entrusted to do so.[226] Moreover, Convention Plus referred to specific situations rather than providing a normative framework

220 Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' in (2009) 21 International Journal of Refugee Law 3, 387.

221 See UNHCR, 'The Strategic Use of Resettlement', EC/53/SC/CRP.10/Add.1 (3 June 2003) <https://www.unhcr.org/excom/standcom/3edf57cd4/strategic-use-resettlement.html> accessed 13 February 2021.

222 See Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 11.

223 See UNHCR, 'Multilateral Framework of Understandings on Resettlement', FORUM/2004/6 (16 September 2004) <https://www.unhcr.org/protection/convention/414aa7e54/multilateral-framework-understandings-resettlement-emforum20046em.html?query=Multilateral%20Framework%20of% 20Understandings%20on%20Resettlement> accessed 13 February 2021; see also Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' in (2009) 21 International Journal of Refugee Law 3, 405.

224 The designation 'special agreement' derives from Art 8 lit b UNHCR Statute: "*Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection*"; see Marjoleine Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' in (2009) 21 International Journal of Refugee Law 3, 390.

225 See ibid 387.

226 *Zieck* refers to the statement of the Assistant High Commissioner at the High Commissioner's Forum on 20 May 2005 who emphasized durable solutions as being at the very heart of UNHCR's mandate; see ibid 396.

for responsibility sharing.[227] When the initiative was closed in November 2005 "*'generic agreements' had not been created and there were no documents with even the 'soft law' status intended by the High Commissioner*".[228]

2.3.11 The terrorist attacks of 9/11

The USRAP experienced a "*sharp decline following the terrorist attacks of 11 September 2001*".[229] It was completely shut down in the months following the attacks. Nevertheless, on condition to new security requirements and with the involvement of the Federal Bureau of Investigation (FBI), the USRAP continued to operate. The *Bush jr* administration kept admission numbers at a normal level, i.e. not below 70,000 per year.[230]

2.3.12 Harmonization efforts

In parallel, the UNHCR refined and harmonized the common selection criteria in 2004, resulting in the publication of the second edition of the *Resettlement Handbook*.[231] Nonetheless, some traditional resettlement countries, i.e. states with long-standing resettlement programs, such as the US, Australia and Canada,[232] adopted different criteria and alternative entry streams in addition to resettlements based on UNHCR's referrals.[233]

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227 See ibid 395ff.

228 Ibid 394.

229 Donald Kerwin, 'The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum-Seekers, and Others in Need of Protection' in (2012) 31 Refugee Survey Quarterly 1, 1.

230 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 8.

231 See Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper n°265 (November 2013) 4.

232 "*Certain States are considered 'traditional' resettlement States because of their long-standing programmes, namely: Australia, Canada, New Zealand, the Netherlands, the Nordic countries (Denmark, Finland, Norway and Sweden) and the United States of America*", UNHCR, 'Frequently Asked Questions about Resettlement' (September 2013) 6 <https://www.refworld.org/pdfid/4ac0d7e52.pdf> accessed 13 February 2021.

233 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper n°253 (February 2013) 11.

These traditional resettlement countries have continued to resettle refugees outside the realm of UNHCR referrals.[234]

2.3.13 Regained recognition of resettlement

Subsequently, refugee resettlement programs regained recognition.[235] There were various reasons behind this development, such as the appearance of new 'safe' refugees, namely refugees that were considered to less likely pose a security threat to the receiving country; for instance, the Burmese were seen as less 'risky' refugees than those coming from Iraq, Afghanistan and Somalia.[236] A further new development consisted of addressing protracted refugee situations. Protracted refugee situations involved "*refugees who did not benefit from repatriation efforts of the 1990s because the situation in their home countries had not changed sufficiently to enable safe return*".[237] Enthusiasm about repatriation vanished because several major repatriation operations (to Afghanistan, Iraq, and South Sudan) posed difficulties. In 2010, the numbers of returnees reached a 20-year low.[238] Still, resettlement did not gain momentum. While UNHCR resettlement referrals increased, departures were progressively decreasing. In 2013, this resulted in a resettlement gap of 100,000 places.[239]

Further efforts on conceptualizing resettlement and redefining common resettlement criteria resulted in the third (and currently latest) version of the *Resettlement Handbook* in 2011.[240] New resettlement states were slow in adjusting to UNHCR's standards and failed to keep pace with the number of UNHCR referrals. Resettlement was criticized, even within the

234 See Adèle Garnier, 'The COVID-19 Resettlement Suspension: Impact, Exemptions and the Road Ahead' (*FluchtforschungsBlog*, 16 June 2020).

235 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 12; see also Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 6.

236 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 12.

237 Ibid 12.

238 See ibid 12f.

239 See ibid 13f.

240 See Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 4.

UNHCR, for being expensive, time consuming, blocking other solutions and encouraging fraud.[241]

2.3.14 The 2015-2016 refugee crisis

In the course of the refugee crisis 2015-2016, UNHCR referrals increased again. Responses were necessary to unburden the countries in the immediate region surrounding conflicts, given that they hosted 90% of the world's refugees.[242] The UNHCR initiated 'High Meetings on Global Responsibility Sharing', which brought offers to resettle more than 201,000 Syrian refugees.[243] The number of countries offering resettlement or humanitarian admission as part of UNHCR's resettlement program also increased.[244] According to UNHCR statistics, the year 2016 brought a 22% rise in persons referred to as in need for resettlement (compared to 2015). Still, a resettlement gap remained because only 126,291 out of 163,206 refugees actually departed to a receiving country for resettlement.[245]

From the nearly 130,000 UNHCR departures in 2016, 78,340 departed to the US.[246] Nonetheless, security concerns remained after ISIS-inspired terrorist attacks in November 2015 in Paris.[247] In the aftermath of these attacks, tensions between the federal US government and states arose when thirty-one governors expressed the wish to block resettlement for security reasons. For example, "*Texas and Indiana sued to keep refugees away*".[248]

241 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 14ff; see also UNHCR, 'UNHCR receives report on Nairobi' (*Press release*, 25 January 2002) <https://www.unhcr.org/news/press/2002/1/3c513a284/unhcr-receives-report-nairobi-investigation.html> accessed 13 February 2021.

242 See Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' in (2016) 4 Journal on Migration and Human Security 3, 46.

243 See ibid 55.

244 See European Parliament, 'Resettlement of refugees: EU framework' (*Briefing*, April 2017) 2 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589859/EPRS_BRI%282016%29589859_EN.pdf> accessed 13 February 2021.

245 See UNHCR, 'Resettlement Data' (as of 25 February 2019).

246 See ibid.

247 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report Nº2 (12 September 2018) 11f.

248 Ibid 12.

They argued that suspects involved in the Paris terrorist attacks entered Europe with the wave of Syrian refugees.[249]

2.3.15 The Trump administration

President *Obama*, in consultation with Congress, set an exceptionally high admission ceiling of 110,000 for 2017,[250] but President *Trump* obstructed admissions through his Executive Order of 27 January 2017[251] ('Muslim ban'). This order barred nationals from seven Muslim countries and suspended all pending refugee admissions for a 120-day period of security review.[252] As a result, the initial 2017 admission ceiling was reduced to 50,000.[253] The following 45,000 refugee admission ceiling for 2018 meant a drastic cut compared to the 2017 *Obama* ceiling and *ex post*, the 2018 ceiling was never exhausted.[254] For the fiscal year 2019,[255] President

249 See James Y Xi, 'Refugee Resettlement Federalism' in (2017) Stanford Law Review 69, 1197 (1199); see also Ashley Fantz and Ben Brumfield, 'More than half the nation's governors say Syrian refugees not welcome' (19 November 2014) <https://edition.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html> accessed 13 February 2021.

250 See 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, 170.

251 See Executive Order 13769 'Protecting The Nation from Foreign Terrorist Entry Into The United States' (27 January 2017) <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/> accessed 20 March 2021; see also Executive Order 13780 'Protecting The Nation from Foreign Terrorist Entry Into The United States' (6 March 2017) <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> accessed 20 March 2021.

252 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 15.

253 See Refugee Council USA, 'Where are the Refugees?: Drastic Cuts to Refugee Resettlement Harming Refugees, Communities, and American Leadership' (12 June 2019) 17 <http://www.rcusa.org/report> accessed 13 February 2021.

254 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, 208f.

255 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 2019' <https://www.state.gov/wp-content/uploads/

Trump proposed an even lower admission cap of 30,000 in his report to Congress.[256]

As a response to the former opposition of governors to admit resettlement refugees, the Presidential Executive Order of 26 September 2019 established that "*the State and the locality's consent to the resettlement of refugees under the Program is taken into account to the maximum extent consistent with law.* […] [I]*f either a State or locality has not provided consent to receive refugees under the Program, then refugees should not be resettled within that State or locality* […]".[257] With this Executive Order, the *Trump* administration was the first to grant individual American states a veto to oppose admission of resettlement refugees. In fact, most US governors affirmed their support to continued refugee resettlement.[258]

Eventually, President *Trump* approved a cap of 18,000 for 2020.[259] In that respect, Congress, through its Judiciary Committee, expressed frustration about lacking adherence to the consultation requirement.[260] In

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2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf> accessed 13 February 2021.

256 The *Trump* administration considered further cuts, even down to zero. See Ted Hesson, 'Trump officials pressing to slash refugee admissions to zero next year' (*Politico*, 18 July 2019) <https://www.politico.com/story/2019/07/18/trump-officials-refugee-zero-1603503> accessed 13 February 2021; see also Amanda Taub and Max Fisher, 'Trump's Refugee Cuts Threaten Deep Consequences at Home and Abroad' (*The New York Times*, 11 September 2019) <https://www.nytimes.com/2019/09/11/world/middleeast/bahamas-refugees.html> accessed 13 February 2021.

257 Section 2 Executive Order 13888 'Enhancing State and Local Involvement in Refugee Resettlement' (26 September 2019) <https://www.hsdl.org/?view&did=829794> accessed 13 February 2021.

258 See Muzaffar Chishti and Sarah Pierce, 'Despite Trump Invitation to Stop Taking Refugees, Red and Blue States Alike Endorse Resettlement' (29 January 2020) <https://www.migrationpolicy.org/article/despite-trump-invitation-stop-taking-refugees-red-and-blue-states-alike-endorse-resettlement> accessed 13 February 2021.

259 See UNHCR, 'UNHCR troubled by latest US refugee resettlement cut' (*Press release*, 4 November 2019) <https://www.unhcr.org/news/press/2019/11/5dbd87337/unhcr-troubled-latest-refugee-resettlement-cut.html> accessed 13 February 2021; see also 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 2020' <https://www.politico.com/f/?id=0000016d-bb51-d0d8-af6d-ff79261f0002> accessed 13 February 2021.

260 "*The statute requires the Administration to initiate such consultation prior to the start of each fiscal year by reporting to the Committees, the 'foreseeable number of refugees who will be in need of resettlement', and the 'anticipated allocation of refugee admissions during the fiscal year'. The Administration must also meet 'in person' with*

terms of implementation of this cap, by March 2020, only 7,163 refugees were actually resettled to the US. From 19 March to 29 July 2020, the COVID-19 pandemic led to a suspension of resettlement to the US, except for emergency cases. In the end, 11,814 refugees were admitted in 2020.[261] For 2021, President *Trump* further reduced the ceiling to only 15,000.[262] A substantial shift was expected with the current *Biden* administration. As President-elect, *Biden* committed to "*raising the refugee admissions target to at least 125,000 refugees a year*".[263] The Immigration and Nationality Act (INA)[264], specifically Section 207 lit b INA,[265] provides a legal basis

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the Committees prior to the President making a final determination on the allocation of refugee admissions", Section 1157 lit d para 1 Title 8 US Code; see Committee on the Judiciary, Letter of 13 September 2019 <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/2019-09-13%20Letter%20to%20Admin%20re%20Refugee%20Admissions.pdf> accessed 13 February 2021; see also Committee on the Judiciary, 'Grassley, Feinstein: Congress Requires More Thorough Engagement with State Dept. on Refugee Numbers' (27 September 2017) <https://www.judiciary.senate.gov/press/rep/releases/grassley-feinstein-congress-requires-more-thorough-engagement-with-state-dept-on-refugee-numbers> accessed 13 February 2021; see also Kristie de Peña, 'Congress is letting the administration violate consultation requirements for refugee admissions' (*The Hill*, 26 August 2019) <https://thehill.com/opinion/immigration/458860-congress-is-letting-the-trump-administration-violate-consultation> accessed 13 February 2021.

261 By November 2020, almost 7,000 of the 18,000 places available remained unused. See Adèle Garnier, 'The COVID-19 Resettlement Suspension: Impact, Exemptions and the Road Ahead' (*FluchtforschungsBlog*, 16 June 2020).

262 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 2021'.

263 International Rescue Committee, 'What does a Joe Biden presidency mean for refugees and asylum seekers?' (8 November 2020) <https://www.rescue.org/article/what-does-joe-biden-presidency-mean-refugees-and-asylum-seekers> accessed 13 February 2021.

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

265 Section 207 lit b INA: "*If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a), the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection*."

for a presidential mid-year increase[266] of the annual refugee ceiling.[267] On 16 April 2021, however, President *Biden* announced to keep former President *Trump*'s refugee cap. The argument was that the system had been overwhelmed due to the high numbers of crossings at the Mexican border by unaccompanied minors. This neglects the fact that the US system is historically based on complementary protection, i.e. the admission of asylum seekers at the border does not supplant overseas admission through the USRAP. President *Biden*'s announcement came with backlash from Democrats and human rights activists.[268] In the end, President *Biden* raised the US cap on refugee admissions to 62,500 for the Fiscal Year 2021.[269] For the Fiscal Year 2022, the admission ceiling was increased to 125,000,[270] but around 100,000 places remained unused by the end of that Fiscal Year. On 8 September 2022, the State Department published the report for Fiscal Year 2023. The total resettlement ceiling of 125,000, as well as most regional quotas stayed the same.[271]

2.3.16 Afghan mass displacement and the revival of parole power

Against the backdrop of the withdrawal of US troops and the Taliban regime's take-over of Afghanistan in August 2021, the US administration admitted a large number of individuals from Afghanistan under the Special Immigrant Visas for Afghans (SIV) program; Congress enacted this

266 See International Refugee Assistance Project, 'Refugee Reset: Mid-Year Increase to the US Refugee Admission Target' (28 January 2021) <https://refugeerights.org/wp-content/uploads/2021/01/Refugee-Reset-Mid-Year-Increases-to-the-U.S.-Refugee-Admissions-Target.pdf> accessed 13 February 2021.

267 See International Refugee Assistance Project, 'Refugee Reset: Mid-Year Increase to the US Refugee Admission Target' (28 January 2021).

268 See Zolan Kanno-Youngs, 'After backlash, Biden will increase the limit on refugee admissions' (*The New York Times*, 16 April 2021) <https://www.nytimes.com/2021/04/16/us/biden-refugees-cap.html> accessed 16 April 2021.

269 See Maanvi Singh, 'Biden raises US refugee admissions cap to 62,500 after delay sparks anger' (*The Guardian*, 3 May 2021).

270 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 2022' (20 September 2021).

271 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) <https://www.state.gov/report-to-congress-on-proposed-refugee-admissions-for-fiscal-year-2023/>.

program already in 2009, and due to the 2021 developments, it expanded the program's scope through the adoption of the Emergency Appropriations Act 2021[272]. Overall, SIV holders are eligible for the same benefits accorded to refugees admitted under the USRAP, and they receive access to lawful permanent residence in the US. Some of the evacuees who do not qualify for SIV are eligible for the USRAP, on the basis of a newly created group in the Priority 2 (P-2) category,[273] i.e. an admission category particularly designed for groups of special concern to the US.[274] Those who do not meet the criteria of the P-2 category can still be admitted under the (pre-existing) Priority 1 (P-1) category, for example on the basis of a referral of the UNHCR.[275]

In practice, few Afghan refugees have been admitted under the USRAP. Most of them have been paroled to the US instead.[276] Functioning as fast track for legal entry, admission under parole power initially left parolees from Afghanistan without the same benefits as SIV holders and refugees admitted under the USRAP. Congress took action to counteract the described differential treatment. On 30 September 2021, it passed the Extending Government Funding and Delivering Emergency Assistance Act, which allowed Afghans granted humanitarian parole between 31 July 2021 and 30 September 2022 to receive federal benefits to the same extent as parolees with pending SIV applications, SIVs, and refugees admitted under the USRAP.[277] However, due to the limited time period covered, the rights of those who are subsequently admitted through humanitarian parole remains open. Furthermore, the Emergency Appropriations Act

272 Emergency Security Supplemental Appropriations Act 2021 <https://www.congress.gov/bill/117th-congress/house-bill/3237> accessed 27 June 2022.

273 See 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.

274 See Michael Posner, 'How To Address The Legal Status of Afghan Refugees' (*Forbes*, 8 September 2021) <https://www.forbes.com/sites/michaelposner/2021/09/08/how-to-address-the-legal-status-of-afghan-refugees/?sh=7d25a18d572f> accessed 27 June 2022.

275 See Daniel J Steinbock, 'The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement' in (2003) 36 U. Mich. J.L. Reform, 951 (959).

276 The legal authority for parole can be found in section 212(d)(5) of the Immigration and Nationality Act and the regulations at 8 C.F.R. 212.5.

277 Public Law 117-43 (30 Sept. 2021) <https://www.congress.gov/117/plaws/publ43/PLAW-117publ43.pdf> accessed 2 May 2023.

2021 does not ensure status adjustment, respectively access to long-term residence for parolees.[278]

2.3.17 Attempts towards private sponsorship

Drawing on the Canadian example, the Biden administration has explored private sponsorship for refugees.

To that effect, the Report to Congress on Proposed Refugee Admissions for the Fiscal Year 2022 first mentioned a new Priority 4 (P-4) category to admit privately sponsored refugees, which was finally endorsed in the Report to Congress for Fiscal Year 2023. This category covers "*refugees supported by private sponsors who accept primary responsibility for funding and providing core resettlement services*".[279] A private sponsorship pilot program linked to this category was announced to be launched in early 2022. However, the launch was delayed until January 2023. The pilot program will include a matching component (for refugees who already have access to the USRAP) and an identification component (for refugees referred by sponsors). Groups of individual US citizens or permanent residents, as well as established organizations or formal entities, will be able to apply to serve as sponsors. Sponsorship opportunities include families sponsoring relatives, institutions of higher education sponsoring refugee students, and affinity organizations sponsoring members of their community, such as LGBTQIA+, religious, and veteran organizations.[280]

278 See Janine Prantl, 'Afghan Mass Displacement: The American Response in Light of International Human Rights and Refugee Law, and the Need for International Cooperation to achieve a Satisfactory Solution' in (2022) ALJ, 17 (21f).

279 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) 18.

280 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).

2.3.18 Preliminary conclusion

When US resettlement numbers hit their all-time low, the EU did not sufficiently counteract.[281] Even though the numbers of receiving countries in Europe increased from 16 countries in 2005 to 29 countries in 2019,[282] the numbers of actual resettlement remained low. The implementation of resettlement commitments under the EU-Turkey Statement "*to end irregular migration flows from Turkey to the EU*"[283] went slow. By 2018, after two years, only about 12,476 Syrians were resettled in the EU under this Statement,[284] and even after five years of implementation in 2021, the critics[285] remained harsh (for a detailed analysis on the EU-Turkey Statement see 4.2.10). Moreover, of the 29,500 pledges made by EUMS for 2020, only 11,200 actual resettlements occurred as of late February 2021, i.e. only 38% (for recent EU developments see 4.2.12). In the course of the COVID-19 pandemic, resettlement was suspended,[286] but EUMS have adopted new

281 See Janine Prantl, 'A strong EU resettlement program is more important than ever' (*FluchtforschungsBlog*, 13 May 2020) <https://blog.fluchtforschung.net/a-strong-eu-resettlement-program-is-more-important-than-ever/> accessed 21 February 2021. In August 2022, the Senate introduced the Afghan Adjustment Act, which would establish access to permanent residence for parolees from Afghanistan. At the time of writing, this law has not been adopted. See Danilo Zak, 'Bill Summary: The Afghan Afjustment Act' (*National Immigration Forum*, 11 August 2022) <https://immigrationforum.org/article/bill-summary-the-afghan-adjustment-act/> accessed 3 September 2022.

282 See Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 4.

283 Commission, 'The EU-Turkey Statement: Two years on' (April 2018) <https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf> accessed 17 June 2021.

284 See ibid.

285 See e.g., ECRE, 'EU-Turkey Deal 5 Years on: Fundamentals Remain Unchanged' (19 March 2021) <https://mailchi.mp/ecre/ecre-weekly-bulletin-19032021#edito> accessed 17 June 2021; see also Daphne Panayotatos, 'Undermining Protection in the EU: What Nine Trends Tell Us About The Proposed Pact on Migration and Asylum' (June 2021) 16 <https://www.refugeesinternational.org/reports/2021/6/1/undermining-protection-in-the-eu-what-nine-trends-tells-us-about-the-proposed-pact-on-migration-and-asylum> accessed 17 June 2021.

286 As a response to the temporary hold, seven civil society organizations launched a joint statement in September 2020 urging the EU to revive resettlement efforts. See International Rescue Committee, Caritas Europe, European Council on Refugees and Exiles, International Catholic Migration Commission, Curches' Commission for Migrants in Europe, SHARE Network and Red Cross

procedures to allow for the resumption of the resettlement process, including remote dossier selection, interviewing and orientation.[287] In response to the Afghan mass displacement, the commitments of EUMS remained diverse and comparably small. On 9 December 2021, 15 EUMS agreed to take in 40,000 Afghans through resettlement, humanitarian admission or evacuation programs, with Germany pledging 25,000 places.[288] By comparison, the US committed to 100,000 global places, Canada to 40,000, and the United Kingdom to 20,000.[289]

Overall, resettlement has been used in various contexts and has experienced several ebbs and flows, generally depending on the willingness of the prospective receiving countries to resettle as well as on international events with global impact, such as the Cold War, 9/11, the Covid-19 pandemic, the Taliban take-over in Afghanistan, or the war in Ukraine.[290] In the recent history of resettlement, there has been no serious political aspiration or even discussion to make resettlement a binding obligation under international law. The present lack of permanent and ongoing commitment of receiving countries to engage in resettlement is reflected in the unsolved problem of the resettlement gap, which is evident from the 2021 UNHCR statistics,[291] showing only 39,266 departures out of

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EU Office, 'Joint Resettlement: Resettlement Can't Wait' (21 September 2020) <https://www.ecre.org/joint-statement-resettlement-cant-wait/> accessed 17 June 2021.

287 See Daphne Panayotatos, 'Undermining Protection in the EU: What Nine Trends Tell Us About The Proposed Pact on Migration and Asylum' (June 2021) 12.

288 See Zaini Majeed, 'European Nations To Resettle 40,000 Afghan Refugees To Prevent 'irregular Arrivals'' (11 December 2021) <https://www.republicworld.com/world-news/europe/european-nations-to-resettle-40000-afghan-refugees-to-prevent-irregular-arrivals.html> accessed 24 June 2022.

289 See Priyanka Shankar, 'EU, fearful of refugee crisis, delays response on Afghan asylum' (*Al Jazeera*, 15 October 2021) <https://www.aljazeera.com/news/2021/10/15/eu-fearful-of-refugee-crisis-delays-response-on-afghan-asylum-2> accessed 24 June 2022.

290 See Adèle Garnier, 'The COVID-19 Resettlement Suspension: Impact, Exemptions and the Road Ahead' (*FluchtforschungsBlog*, 16 June 2020).

291 Resettlement submission and departure figures reported by the UNHCR may not match resettlement statistics published by States as Government figures may include submissions received outside of UNHCR processes. UNHCR figures may also include cases in which the UNHCR assisted, i.e. obtained exit permits for humanitarian admissions or family reunion but did not initially submit.

63,190 referrals.[292] The US reluctance in the fiscal years 2018, 2019 and 2020 shows that solely relying on traditional resettlement countries is not enough to catch up and close the gap. The COVID-19 outbreak and the related global health crisis worsened the situation.[293] In the midst of the war in Ukraine, EUMS have been confronted with unprecedented mass displacement and must cope with challenges in their role as neighboring countries of (first) refuge. In the end, durable solutions for those fleeing Ukraine may also depend on resettlement commitments of the US.[294] The "*history of resettlement from Europe provides for legitimate reciprocity demands: the continent could be expected to invest into a system from which it has already benefited in the past*"[295] – and from which it would continue to benefit in current and future crises.

2.4 Functions of and motives behind resettlement

History reveals that resettlement initiatives have served multiple functions and receiving countries have pursued various motives when engaging in resettlement. The most prominent conclusion from the history of resettlement is that resettlement constitutes a crucial means to persuade countries of (first) refuge to open their borders and to keep their borders open. This is exemplified by the outlined major large-scale resettlement operations, specifically the Hungarian refugees in Austria and the Vietnamese refugees in the ASEAN countries, and more recently the mass displacement from Afghanistan. These examples demonstrate that resettlement serves (i) to share international responsibility and (ii) to provide international protection. Conversely, resettlement also serves to manage migration and to shift responsibility to countries of (first) refuge. The insufficient imple-

292 See UNHCR, 'Resettlement Data' (as of 28 June 2022) <https://www.unhcr.org/resettlement-data.html>.

293 "*UNHCR had planned the departure of 70,000 refugees for resettlement in 2020. According to its Resettlement Data Finder, as of June 9,758 refugees had been resettled worldwide*", Adèle Garnier, 'The COVID-19 Resettlement Suspension: Impact, Exemptions and the Road Ahead' (*FluchtforschungsBlog*, 16 June 2020).

294 See Ted Hesson and Kristina Cooke, 'Explainer: Why did the United States resettle only 12 Ukrainian refugees in March?' (*Reuters*, 11 April 2022) <https://www.reuters.com/world/why-isnt-us-accepting-more-ukrainian-refugees-2022-03-16/> accessed 28 June 2022.

295 Gregor Noll and Joanne van Selm, 'Rediscovering Resettlement' in (2003) 3 Migration Policy Institute Insight, 10 <https://www.migrationpolicy.org/research/rediscovering-resettlement> accessed 13 February 2021.

mentation of the 2016 EU-Turkey Statement by EUMS demonstrates that receiving countries did not keep their resettlement promises (see 4.2.10). Functions and motives behind resettlement are interrelated because the functions attached to a resettlement scheme shift according to specific motives of a state to engage in resettlement.[296] Against this backdrop, the following section elaborates on the functions of resettlement as defined by the UNHCR as well as motives pursued by the US and the EU. This is to show the risk that UNHCR's core functions of resettlement are undermined by controversial state motives.

2.4.1 Functions

The UNHCR has followed the concept that resettlement benefits the country of (first) refuge, the receiving country, the home country, and the resettlement beneficiaries. It specified three equally important core functions of resettlement in its *Resettlement Handbook*,[297] namely (i) providing international protection, (ii) offering a durable solution alongside voluntary repatriation to the home country and local integration in the country of (first) refuge, and (iii) expressing international solidarity.

> *First, it is a tool to provide international protection and meet the specific needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge.*
> *Second, it is a durable solution for larger numbers or groups of refugees alongside the other durable solutions of voluntary repatriation and local integration.*
> *Third, it can be a tangible expression of international solidarity and a responsibility sharing mechanism, allowing States to help share responsibility for refugee protection, and reduce problems impacting the country of asylum.*[298]

Feller and *Klug* endorsed achievements of the UNHCR "*in strengthening the functions of resettlement* […]. *Resettlement provided solutions for more than*

296 See Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 288, 305f.

297 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 3; see also Haruno Nakashiba, 'Clarifying UNHCR Resettlement: A few considerations from a legal perspective', UNHCR Research Paper nº264 (November 2013) 2.

298 UNHCR, *Resettlement Handbook* (revised ed July 2011) 3 (emphasis in original removed).

330,000 refugees between 2007 and 2011, and, as a result of its strategic use, it is serving to expand asylum space in a number of host countries and leverage wider protection and solution dividends benefitting the refugee population as a whole".[299] The Social Science principle of path-dependency elucidates the fundamental role of resettlement for the relationship between countries of (first) refuge and receiving countries.[300] *Sewell* explained path-dependency as "*what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point*".[301] *Levi* took a narrower view of this concept by pointing out that "*once a country or region has started down a track, the costs of reversal are very high*".[302]

In this light, several countries of (first) refuge generously and continuously stayed on track to keep their borders open and to offer refugees short-term shelter until they could repatriate or resettle. Nevertheless, camps grew over time. Humanitarian involvement was gradually prolonged beyond immediate assistance as a result of expanded triangular relationships between countries of (first) refuge, donor states and humanitarian actors, such as the UNHCR.[303] That triangle triggered so-called protracted refugee situations, i.e. situations "*which have moved beyond the initial emergency phase but for which solutions do not exist in the foreseeable future*".[304] Generally, such protracted situations entail the risk of becoming unbearable for countries of (first) refuge. Consequently, in view of the prevailing public interests in closing the borders, countries of (first) refuge may close their borders. In other words, if prospective receiving countries neglect their resettlement commitments by blindly relying on countries of

299 Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (MPIL, January 2013) para 99.

300 See e.g., Brendon J Cannon and Hirotaka Fujibayashi, 'Security, structural factors and sovereignty: Analyzing reactions to Kenya's decision to close the Dadaab refugee camp complex' in (2018) 27 African Security Review 1, 20-41.

301 William Sewell, 'Three Temporalities: Toward a Sociology of the Event', CSST Working Paper No 58, CRSO Working Paper No 448 (October 1990) 16 <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/51215/448.pdf?sequence=1&isAllowed=y> accessed 13 February 2021.

302 Margaret Levi, 'A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis' in Mark Lichtback and Ellen Zuckerman (eds), *Comparative Politics: Rationality, Culture, and Structure* (Cambridge University Press 1997) 19 (28).

303 See Dana Schmalz, *Refugees, Democracy and the Law: Political Rights at the Margins of the State* (Routledge 2020) 125.

304 Gil Loescher and James Milner, 'Understanding the challenge' in (2009) 33 Forced Migration Review, 9 <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR33/FMR33.pdf> accessed 13 February 2021.

(first) refuge, they risk that those countries – unexpectedly – close their borders. This in turn aggravates the migratory pressure and encourages uncontrolled border-crossings.

For example, the developments of the Dadaab camp complex in Kenya hosting hundreds and thousands of refugees from Somalia for decades culminated in an unbearable, protracted situation.[305] Nevertheless, Kenya's security concerns were vehemently dismissed. When Kenya eventually made its warnings real, unilaterally closing the Dadaab camp for national security reasons, the international community reacted with shock.[306] The result was that refugees from Somalia were forced to repatriate without adequate information about the conditions in their home country.[307] The example of Kenya demonstrates the consequence of the lack of adequate response from receiving countries to actual humanitarian needs in countries of (first) refuge.[308] In doing so, they have dismissed the stated core functions of resettlement as an international protection tool, a durable solution, and an instrument of international solidarity. In many cases, receiving countries have instead based their decisions to engage in resettlement (or not to do so) on national security interests, "*good economic sense*"[309] and/or international reputation.

2.4.2 US motives

The US has conducted resettlement not only for purely humanitarian purposes, but primarily for foreign policy reasons.[310] This is evident from

305 See Brendon J Cannon and Hirotaka Fujibayashi, 'Security, structural factors and sovereignty: Analyzing reactions to Kenya's decision to close the Dadaab refugee camp complex' in (2018) 27 African Security Review 1, 25.

306 See ibid 32.

307 See Leomoi Ochan, Abikar Abdikadir and Kim HaEun, 'Educating for return: Somali refugees in Dadaab' in (2019) Forced Migration Review, 36-37 <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/leomoi-abikar-kim.pdf> accessed 13 February 2021.

308 See International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 1.

309 Volker Türk, 'Prospects for Responsibility Sharing in the Refugee Context' in (2016) 4 Journal on Migration and Human Security 3, 54.

310 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, 205-225;

the historical outline, specifically from US resettlement during the Cold War period (see 2.3.1).

As an example, the 2017 Report of the Syrian Refugee Resettlement Project highlighted the following political objectives pursued by the US: (i) international leverage, (ii) international credibility, (iii) regional stability, (iv) counter measures against terrorist recruitment, (v) security screening and (vi) economic policy.[311]

According to this Report, US cooperation with countries of (first) refuge, namely with Turkey, Jordan and Iraq, was a vital incentive for offering to resettle Syrian refugees to the US. It seems, however, that the US resettlement offer was not purely motivated by humanitarian concerns but instead by the fact that Turkey, Jordan and Iraq hosted US military bases. Still, US resettlement commitments encouraged these countries of (first) refuge to keep their borders open through international leverage.[312]

Furthermore, the 2017 Report highlighted the US' acknowledgement that resettlement strengthened its international credibility, while withdrawal from resettlement would have induced other countries to abandon their own resettlement pledges.[313] The Report also showed that resettlement contributed to regional stability[314] and accelerated regional conflict resolution.

Moreover, under the Syrian Refugee Resettlement Project, resettlement constituted a means to counter terrorism. The US helped "*to undermine the recruitment efforts of ISIS, al Qaida, and other armed terrorist groups*"[315] by rebutting their propaganda strategy, namely refuting the message that the US and Europe were unwilling to offer protection to persons harmed by the war. From a security policy perspective, the US resettlement program

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see also International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 20.

311 See 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, 155-236.

312 See Refugee Council USA, 'Where are the Refugees?: Drastic Cuts to Refugee Resettlement Harming Refugees, Communities, and American Leadership' (12 June 2019) 9.

313 See 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, 174ff.

314 See ibid 176.

315 Ibid 177.

has required refugees to undergo "*the highest degree of security screening and background checks for any category of traveler*".[316] Syrian refugees, compared to refugees from other nations, were subject to a more enhanced review process.[317] This was confirmed by US government officials, who described the security-focused refugee resettlement screening process[318] as extensive and careful. They emphasized that the resettlement program promoted, instead of undermining, national security interests.[319] What is more, the US benefited economically from resettlement [320] since refugees have "*impressively*"[321] integrated in the US. One study pointed to a tenfold return on investment.[322]

2.4.3 EU motives

The negotiations on a Union Resettlement Framework Regulation revealed various motives behind EUMS' commitment to resettlement (see 4.2.11), "*from value-based to strategic protection considerations in first countries of asylum to foreign policy interests and border management goals*".[323]

Similar to the US, the Commission proposed to add a security angle by linking resettlement to Eurodac. The Commission viewed the access to Eurodac data as incentive for EUMS to engage in resettlement. It would

316 Ibid 178ff.
317 See ibid 180.
318 See ibid 178ff.
319 See ibid 181.
320 See ibid 182.
321 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, 212.
322 See 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, 182; "[T]*he Department of Health and Human Service prepared a draft report that weighed the costs of its resettlement support programs against the benefits that refugees produced for the economy, and found a net benefit to the economy of $63 billion over the period 2005-2014*", International Crisis Group, 'How to Save the US Refugee Admissions Program', Crisis Group United States Report N°2 (12 September 2018) 20.
323 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) 6 <http://aei.pitt.edu/94238/1/pub_8632_euresettlement.pdf> accessed 13 February 2021.

enable them to share data more easily and to obtain better control over EU resettlement entries.[324]

As a result, two conflicting approaches evolved among the EU institutions: While the European Parliament opposed a control-orientated approach towards resettlement, the Council of the EU emphasized the potential to control the numbers and profiles of individuals being granted protection under the new resettlement framework. The Council of the EU further highlighted that resettlement served "*as leverage in political dialogues with third countries*"[325] which in turn enabled the building of sustainable relationships with third countries.[326]

In addition, EU funding under the AMIF was considered an incentive (see 4.3.1). According to stakeholders, EU funding has not only induced the expansion of existing resettlement capacities but also the increase of the numbers of refugees actually resettled.[327] Nevertheless, EU funding has been disproportionately small. *Thielemann* critically reflected upon EU funding by stating that[328]

> *EU resources remain, and are likely to remain, small in comparison to domestic spending in the Member States and unlikely to provide credible incentives for those less affected to make significantly greater protection contributions* […].

2.4.4 Preliminary conclusion

Overall, the motives behind the decisions of US and European policy makers to pursue resettlement are similar.[329] Besides humanitarian interests, their rationale is based on foreign policy, security and economic interests.

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324 See ibid 9.
325 Ibid 10.
326 See ibid 3.
327 See Elona Bokshi, 'Refugee Resettlement in the EU: The capacity to do it better and to do it more', KNOW RESET Research Report 2013/04, 31.
328 Eiko R Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' in (2018) 56 Journal of Common Market Studies 1, 63 (76).
329 See 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, 155-236.

Excessive focus on national security can implicate a shift of resettlement's function from humanitarian protection to migration control. Hereto, *Davitti* pointed out that "*through the administration of humanitarian assistance, the lives of refugees are stabilized, managed and controlled by sovereign power*".[330] To reiterate: The term 'humanitarian' comprises *humanity*, defined as encompassing all mankind, and *humaneness*, defined as a non-cruel attitude towards human beings.[331] When states use resettlement to prevent forced migrants from reaching their border, to control (the entry of) people and to discriminate against particular groups, they apparently undermine the humanitarian function of resettlement.

Indeed, it is important to consider and maintain the difference between resettlement as a protective form of third country processing and other forms of external migration control, where states have started externalizing key elements of their own asylum system to third countries.[332] From a legal point of view, such externalization policies must not result in serious human rights violations. Beyond hard law, scholars suggested that a good faith duty of cooperation and responsibility sharing is implicit in international refugee law and expressed by instruments such as the Global Compact on Refugees (see 2.1.1).[333]

For the US, as a long-term major resettlement contributor who has tailored its resettlement operations around foreign policy and national security interests, it is counterintuitive to proclaim its position as a role model but at the same time neglecting human rights and outsourcing responsibilities.

330 Darla Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' in (2018) 29 European Journal of International Law 4, 1185f.

331 See Dana Schmalz, *Refugees, Democracy and the Law: Political Rights at the Margins of the State*, 121.

332 See David Cantor, Nikolas Feith Tan, Marianna Gkiliati, Elisabeth Mavropoulou et al, 'Externalisation, Access to Territorial Asylum, and International Law' in (2022) International Journal of Refugee Law, 1 (22).

333 See ibid 5f; for wider discussion of responsibility sharing duties, see Rebecca Dowd and Jane Mc Adam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why, and How?' in (2017) 66 International and Comparative Law Quaterly, 863-892.

2.5 Actors in the resettlement process

States are considered the predominant actors[334] in international (migration) law. Although they determine international efforts to resettle refugees, they are not the only actors involved in the resettlement process. When voluntarily committing to resettlement, prospective receiving countries engage in so-called tripartite agreements with countries of (first) refuge and with the UNHCR.[335] Besides the states and the UNHCR, NGOs have also participated in the ATCRs since the 1990s.[336] Additionally, private actors, the receiving communities, and the resettlement beneficiaries themselves have equally shaped the resettlement process.

2.5.1 States

There are three types of states involved in resettlement, namely the home country of the resettlement beneficiaries, the country of (first) refuge, and the receiving country.

Home countries determine the very beginning of a resettlement beneficiary's journey because, in essence, several home countries interfere with the right to leave one's own country by preventing its citizens from fleeing abroad (see 3.3.2). Moreover, IDPs are individuals who have not left their home country, but they may equally be in need for resettlement (see 2.2.2). The resettlement of IDPs implies that receiving countries also conduct selection missions in home countries. Furthermore, the conditions in home countries are decisive for considering voluntary repatriation from a country of (first) refuge as an alternative to resettlement; also, after resettlement to the receiving country, a resettlement beneficiary may seek voluntary repatriation to his or her home country.

Apart from home countries, countries of (first) refuge are crucial actors in the resettlement process. Protection seekers flee from their home countries to a country of (first) refuge. Their presence on the territory of the country of (first) refuge entails the responsibility of this country to

334 See Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 33.

335 See Kristin Bergtora Sandvik in Jan Wouters et al (eds), *Accountability for Human Rights Violations*, 298.

336 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 7.

comply with protection obligations under international law. Since countries of (first) refuge are often overwhelmed by massive refugee influx, resettlement constitutes a means to ease the burden. The essential role of countries of (first) refuge must not be underestimated since receiving countries need to conduct selection missions on their territories and – just like the home countries – the countries of (first) refuge may impede the resettlement process by refusing to grant resettlement beneficiaries the right to leave (see 3.3.2).[337]

Eventually, resettlement depends on the willingness of receiving countries to accept a refugee for legal stay within its territory, "*in accordance with its laws and regulations*".[338] Each resettlement country has its own regulations and procedures with respect to the resettlement of refugees. Receiving countries decide whether they accept resettlement cases referred by the UNHCR. When deciding upon UNHCR's referrals, state authorities use two general bases, i.e. (i) dossier only and (ii) selection missions.[339] When a receiving country selects on a dossier only basis, it refrains from conducting a direct interview with the refugee. The receiving country thereby either specifies from which refugee population it wishes to receive dossier submissions or leaves this to the discretion of the UNHCR. Receiving countries consistently conduct personal interviews with potential resettlement beneficiaries. These interviews typically take place during resettlement selection missions in the countries of (first) refuge or home countries.[340] In addition to UNHCR referrals, some receiving countries also admit individuals for resettlement on other bases.[341]

As shown, receiving countries have the power to decide if and how to resettle persons in need for protection. Beyond the national level, receiving countries influence how resettlement-related issues are tackled at the international level. As a general rule, receiving countries who regularly engage

337 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 385: "*Collaboration between resettlement partners extends across the resettlement continuum, from identification and referral in the field, to processing, acceptance and travel, and to reception and integration in a third country*."

338 Ibid 361.

339 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', 176.

340 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 354.

341 See Margret AM Piper, Paul Power and Graham Thom, 'Refugee Resettlement: 2012 and Beyond', UNHCR Research Paper nº253 (February 2013) 11.

in resettlement on the basis of UNHCR referrals are full members of the WGR/ATCR process (see 2.3.9).[342]

2.5.2 United Nations High Commissioner for Refugees

After the IRO, the UNHCR has marked the evolution of resettlement from the aftermath of World War II until today (see 2.3.2). Resettlement constitutes an essential part of UNHCR's mandate because the UNHCR is determined to work with states on durable solutions to the global refugee problem.[343]

2.5.2.1 Legal basis, mandate and funding

The UNGA Resolution 319 (IV) of 3 December 1949, based on Art 22 UN Charter[344], established the UNHCR as a subsidiary organ of the UN General Assembly. The Statute of the Office (UNHCR Statute)[345] laid down UNHCR's original mandate, adopted through UNGA Resolution 428 (V) of 14 December 1950. In 1958, the UN's Economic and Social Council (ECOSOC) followed the request of the General Assembly under the UNGA Resolution 1166 (XII) and established an Executive Committee to advise the work of the UNHCR.[346] It still exists and consists of representatives from UN Member States or members of any UN specialized agency; meetings take place in annual plenary sessions.[347] In 2003, another Resolution (UNGA Res 58/153) removed the initial temporal limitation of UNHCR's mandate, authorizing the UNHCR to continue its work "*until the refugee problem is solved*". Subsequently, through the adoption

342 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 386.

343 See Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (MPIL, January 2013) paras 97ff.

344 "*The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions*".

345 See Statute of the Office of the United Nations High Commissioner for Refugees (14 December 1950) <https://www.unhcr.org/4d944e589.pdf> accessed 13 February 2021.

346 See ECOSOC Resolution 672 (XXV).

347 See Dana Schmalz, *Refugees, Democracy and the Law: Political Rights at the Margins of the State*, 122; see also UNHCR, 'The Executive Committee's origins and mandate' <https://www.unhcr.org/executive-committee.html> accessed 13 February 2021.

of numerous UN General Assembly and ECOSOC resolutions, the scope of UNHCR's mandate was broadened without formal amendment of its Statute, with the outcome that the UNHCR has a "*somewhat fragmented legal basis*".[348]

Art 8 lit c UNHCR Statute makes the UNHCR competent to assist in "*assimilation within new national communities*". Principally, the UNHCR is tasked with "*providing international protection to refugees and working with States to seek permanent solutions to their plight on a non-political and humanitarian basis*".[349] The requirement of cooperation[350] between governments and the UNHCR explicitly and implicitly derives from Art 8 UNHCR Statute. UNHCR's authority to directly conclude treaties with states (Art 8 lit b UNHCR Statute[351]) constitutes a remarkable tool to foster its cooperation with states as well as among states, particularly in the resettlement context. For example, the UNHCR played a crucial role in achieving agreements between ASEAN countries and receiving countries to stimulate the resettlement of Vietnamese refugees (see 2.3.6).

UNHCR's actual scope of action to foster cooperation strongly depends on the commitment and political will of states. In fact, Art 8 UNHCR Statute limits its functions to tasks of promotion, assistance, and facilitation.[352] To put it in other words, the success or failure of the UNHCR hinges on the states' endeavors. This means that UNHCR faces the challenge to reconcile dependency on state partners with its non-partisan nature.[353] According to Art 2 UNHCR Statute UNHCR's work shall be of an "*entirely non-political character*". The subsequent phrase clarifies the object of its work, namely that it "*shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees*". Accordingly, UNHCR's "*entirely non-political character*" means that the UNHCR is determined

348 Erika Feller and Anja Klug, 'Refugees, United Nations High Commissioner for (UNHCR)' (MPIL, January 2013) para 39.

349 Ibid para 3 (emphasis added).

350 The cooperation requirement is legally anchored in the UNHCR Statute, and UNHCR's practice has broadly met the *acquiescence* of states. See Volker Türk, 'The UNHCR's role in the supervising international protection standards in the context of its mandate' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 39 (58).

351 "*Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection*".

352 See Marjoleine Zieck, *UNHCR's worldwide presence in the field*, 26.

353 See Dana Schmalz, *Refugees, Democracy and the Law: Political Rights at the Margins of the State*, 121f.

to serve humanitarian and social purposes rather than (other) political objectives of receiving countries. As opposed to other UN organizations, the UNHCR financially depends on donor states.[354] It is crucial that the UNHCR remains independent even if funded by receiving or other countries. In this light, UNHCR's discretion constitutes a vital tool to uphold its non-political character, meaning that the UNHCR, rather than the donor states, decides the distribution of resources. Art 10 UNHCR Statute allows the UNHCR to distribute resources among private and public agencies "*which he* [the High Commissioner] *deems best qualified to administer such assistance*". While UNHCR's dependency on donors entails power imbalance, voices in the literature nonetheless highlight the role of the UNHCR as 'agenda setter' and 'counterweight', defending the larger interests instead of the interests of individual states.[355]

2.5.2.2 The UNHCR and the US

The US has traditionally opposed to autonomous international institutions. It has been concerned about the delegation of power to international organizations, including the UN.[356] Accordingly, the US considered the UNHCR a progressive but powerless agent of the state, namely "*a mechanism through which states act*".[357] Initially, the US did not intend to assign an operational role to the UNHCR. Instead, the US limited the functional

354 See Kristin Bergtora Sandvik in Jan Wouters et al (eds), *Accountability for Human Rights Violations*, 295.

355 See Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 16; see also Adèle Garnier, 'Migration Management and Humanitarian Protection: The UNHCR's 'Resettlement Expansionism' and its Impact on Policy-Making in the EU and Australia' in (2014) 40 Journal of Ethnic and Migration Studies 6, 942 (954): refers to the "*significant autonomy*" of the UNHCR; see also Bhupinder S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' in (1998) 11 Journal of Refugee Studies 4, 350 (368): describes the UNHCR as "*guardian of the larger interests of the coalition which establishes and sustains it, not the individual interests of its members. This often brings the organization in confrontation with even its more powerful members*".

356 See Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', in (2000) 54 Legalization and World Politics 3, Special Issue, 'International Organization', 421 (438).

357 Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 34.

scope and independence of the UNHCR by establishing and funding own American-led refugee organizations whose mandates directly overlapped with UNHCR's mandate.[358] Notwithstanding, over the years, the US has continuously cooperated with the UNHCR to support UNHCR's operations. The US is a major UNHCR donor state. The 2022 statistics on contributions to UNHCR programs revealed that the US contributed the most, followed by Germany, the EU, Japan and Sweden.[359]

2.5.2.3 The UNHCR and the EU

The EU and its EUMS have gradually opened their attitude towards UNHCR's involvement. While France and Belgium took quite a narrow view on UNHCR's functions when submitting the first concrete proposal on its creation in 1949,[360] its influence on the policies of EUMS today is significant. The UNHCR participated in the EU harmonization process, namely the development of the CEAS, through legal opinions on draft texts as well as substantial background information.[361] It took part in the drafting of the 2016 Commission Proposal for a Union Resettlement Framework Regulation and is explicitly mentioned therein. In its explanatory memorandum, the Proposal highlights that the "*UNHCR has over the past years urged the Union and its Member States to increase commitments to receive refugees through sustainable resettlement programmes*".[362]

Furthermore, the Proposal's Recital 27 states that "[g]*iven the expertise of UNHCR in facilitating the different forms of admission of persons in need of international protection from third countries, to which they have been displaced, to Member States willing to admit them, UNHCR should continue to play a key role in resettlement efforts conducted under the Union Resettlement Framework*".[363] To that end, Art 8 para 2 Proposal specifies that the admission of protection seekers shall be recorded in "*practical cooperation arrangements*

358 See ibid 35.
359 See UNHCR, 'Contributions' (as of 29 June 2022) <https://reporting.unhcr.org/contributions> accessed 29 June 2022.
360 See Marjoleine Zieck, *UNHCR's worldwide presence in the field*, 19f.
361 See Volker Türk in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law*, 45.
362 Commission, Proposal for a Regulation establishing a Union Resettlement Framework, 2.
363 Emphasis added; see Luc Leboeuf and Marie-Claire Foblets, 'Introduction: Humanitarian Admission to Europe' in Marie-Claire Foblets and Luc Leboeuf

among Member States, […] *and with third countries, and UNHCR or other partners*".

2.5.2.4 Criticism and shortfalls

The extent of UNHCR's involvement has been critically reflected among scholars,[364] asserting shortfalls in UNHCR's resettlement practice. *Loescher* stated the following major issues: (i) poor UNHCR case identification causing a resettlement backlash; (ii) the need to clarify procedures; (iii) the related responsibilities; (iv) incidences of fraud and misuse as well as (v) the absence of an autonomous resource base.[365] Furthermore, *Smrkolj*[366] highlighted due process concerns, namely a lack of judicial review mechanism, whereby states accepted that cooperation with the UNHCR implied procedural inconsistencies. She also pointed to the lack of binding force of UNHCR's Mandate Refugee Certificates,[367] which left states with a leeway to disregard them.[368] This implies that individuals seeking international protection usually have no means to legally enforce the recognition of their refugee status by the UNHCR before national authorities or courts.

(eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Hart/Nomos 2020) 11 (26).

364 See Janine Prantl, 'The UNHCR in 2021: Refugee Resettlement as a Challenge of Underfunding, Power Imbalance and Impartiality' (*Völkerrechtsblog*, 20 July 2021) <https://voelkerrechtsblog.org/the-unhcr-in-2021-refugee-resettlement-as-a-challenge-of-underfunding-power-imbalance-and-impartiality/> accessed 7 August 2021.

365 See Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 43.

366 See Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in (2008) 9 German Law Journal 11, 1779-1803.

367 "*UNHCR Offices should issue a UNHCR Refugee Certificate to every individual who is determined in UNHCR mandate RSD procedures to meet the criteria for refugee status, including family members/dependents who are determined to be eligible for derivative refugee status*", UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', Unit 8, 8-1 <https://www.refworld.org/pdfid/42d66dd84.pdf> accessed 13 February 2021.

368 See Maja Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination' in (2008) 9 German Law Journal 11, 1786f, 1802.

Ultimately, critiques claimed that the UNHCR has expanded and developed in a sense that it "*has compromised its capacity and willingness to provide protection and has put the agency at the mercy of a much broader set of political and strategic calculations*".[369] Such development is problematic in light of the aforementioned Art 2 UNHCR Statute, requiring UNHCR's work to be of an "*entirely non-political character*". Even though UNHCR's mandate comprises cooperation with states, thus being inevitably confronted with political interests, its work must focus on the humanitarian and social needs.

2.5.3 Other non-state actors

Besides the UNHCR, other non-state actors[370], namely NGOs[371], have been increasingly active in the resettlement process at the global, regional and sub-regional levels.

Overall, there are five stages in the resettlement process where NGOs can "*have a stake*":[372] (i) the referral stage, (ii) the placement decision, (iii) the greeting on arrival, (iv) the provision of integration and social services and (v) the involvement in policymaking. The involvement of NGOs has benefitted resettlement in various aspects. As opposed to the UNHCR, these non-state actors do not have to deal with the full enormity of a refugee crisis. They generally have more resources available to verify

369 Gil Loescher, 'The UNHCR and World Politics: State Interest vs Institutional Autonomy' in (2001) 35 The International Migration Review 1, Special Issue, 'UNHCR at 50: Past, Present and Future of Refugee Assistance', 49.

370 *Wagner* described non-state actors as "*a superordinate concept that encompasses all those actors that are not State*[s]", Markus Wagner, 'Non-State Actors' (MPIL, July 2013) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1445?rskey=0oAy0H&result=1&prd=MPIL> accessed 13 February 2021.

371 According to the Organization for Economic Co-Operation and Development (OECD) the term 'NGO' "*may include profit-making organisations, foundations, educational institutions, churches and other religious groups and missions, medical organisations and hospitals, unions and professional organisations, co-operatives and cultural groups, as well as voluntary agencies*", cited in Stephan Hobe, 'Non-Governmental Organizations' (MPIL, June 2019) para 2 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e968?rskey=LXvy3A&result=1&prd=MPIL> accessed 13 February 2021.

372 Joanne van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US' in (2003) 4 Journal of International Migration and Integration 2, 157 (162ff).

case merits on site in countries of (first) refuge or home countries in order to find the most vulnerable cases of refugees in need for resettlement. It has even become a well-established practice that NGOs support the UNHCR by loaning resettlement staff.[373] In addition, NGOs can rely on private funding earmarked for resettlement.[374] This means that unlike the UNHCR, they are not dependent on donor states. One major drawback, however, is that the question of "whom to hold responsible for misconduct" becomes more complex with the involvement of NGOs in the process. In particular, it needs to be tackled whether the acts of NGO staff can be attributed to states and/or the UNHCR (see 3.4.3).

2.5.3.1 Voluntary resettlement agencies in the US

From a US perspective, voluntary agencies have traditionally played a crucial role in the various stages of the resettlement process.[375] The US resettlement model is based on public-private partnerships between the government and voluntary non-profit resettlement agencies. The 1980 Refugee Act (Sections 301 lit b para 7 and 412 lit b) provides the legal basis for this relationship.[376] The Office of Refugee Resettlement (ORR), located in the Department of Health and Human Services (HHS), is authorized to fund cooperative agreements with nine voluntary agencies,[377] known as 'Volags'.

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373 See Melonee Douglas, Rachel Levitan and Lucy W Kiama, 'Expanding the role of NGOs in resettlement' in (2017) 54 Forced Migration Review, 34 (35); see also Amy Slaughter, 'How NGOs have helped shape resettlement' in (2017) 54 Forced Migration Review, 32 (32f).

374 See ibid 35.

375 See Joanne van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US' in (2003) 4 Journal of International Migration and Integration 2, 169.

376 See Anastasia Brown and Todd Scribner, 'Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States' in (2014) 2 Journal on Migration and Human Security 2, 101.

377 Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, US Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, World Relief Corporation; see <https://www.acf.hhs.gov/orr/grant-funding/resettlement-agencies> accessed 13 February 2021.

Mutual Assistance Associations (MAAs) constitute another important pillar of the USRAP. MAAs are community-based groups frequently established by people who arrived in the US as resettled refugees and who wish to help others integrate in the local community in the long run.[378] Beyond the provision of services, Volags and MAAs engage in advocacy and lobbying tasks.[379]

Even though as opposed to Canada, private refugee sponsorships are not formally anchored in US Immigration Law, the concept of community-based sponsorships to support refugees without federally appropriated funds was already explored by the Reagan administration.[380] This so-called Public Sector Initiative nonetheless discontinued in 1996. Inspired by practices in Canada and other countries, new initiatives to engage in private sponsorships for forcibly displaced individuals came up in the US as well. For example, as a response to Afghan mass displacement after the Taliban take-over, the Sponsor Circle Program was launched in the fall of 2021.[381] A similar program called 'Uniting for Ukraine' followed in spring 2022, enabling the admission of privately sponsored Ukrainians and family members fleeing the Russian invasion through parole.[382]

378 See Gregor Noll and Joanne van Selm, 'Rediscovering Resettlement' in (2003) 3 Migration Policy Institute Insight, 23.

379 See ibid 23.

380 See Vasudha Talla (with the assistance of IRAP and Human Rights First), 'Private Sponsorship of Refugee Resettlement in the United States: Guiding Principles and Recommendations' (October 2016) <https://www.humanrightsfirst.org/sites/default/files/Private_Sponsorship_of_Refugees_in_the_United_States_White_Paper.pdf#page=3> accessed 29 June 2021; see also National Immigration Forum, 'Explainer: Private Sponsorship Programs for Refugees' (25 April 2022) <https://immigrationforum.org/article/a-guide-to-private-sponsorship-for-refugees/> accessed 29 June 2022.

381 See US Department of State, 'Launch of the Sponsor Circle Program for Afghans' (25 October 2021) <https://www.state.gov/launch-of-the-sponsor-circle-program-for-afghans/> accessed 29 June 2021.

382 See USCIS, 'Uniting for Ukraine' (April 2022) <https://www.uscis.gov/ukraine> accessed 12 August 2022.

2.5.3.2 From state-orientation to greater NGO-involvement in Europe

Europe's resettlement traditions are more state-orientated compared to those of the US. *Van Selm* portrayed the differences in refugee assistance in (four) European states and the US:[383]

> *The Netherlands, Finland and Sweden and the UK all see the provision of most services (as for accepted asylum seekers) as part of the welfare state system. The systems are all of the from-the cradle-to-grave type. And where the cradle to grave happens to be does not matter in determining that while legally resident in the states in question there will be a lifejacket of welfare support to some degree.* […] *The US, meanwhile, takes a sink-or-swim approach. The voluntary agencies are made formal partners in a process that offers (limited) support using government money (as well as charitable donations), in part because the system is such that no other structures are in place to assist citizens with what they need to survive*.

The situation described by *van Selm* dates back to 2003. Recent developments indicate that the involvement of non-governmental actors has gained momentum in Europe. As observed by *Arakaki*, "*participation in the legislative, judicial and administrative processes relating to the application of treaties*", namely the Refugee Convention, "*is no longer confined to states*"[384] and the UNHCR. The Commission has formally recognized the contributions of NGOs in EU policy-making through different instruments, such as consultations through Green and White Papers, Communications, advisory committees, business test panels and ad hoc consultations.[385] For example, in its Proposal for a Union Resettlement Framework Regulation, the Commission expressly mentioned a campaign "*led by the International Organization for Migration (IOM) and five non-governmental organisations active in the field of refugee protection*".[386] The Commission reinforced its en-

383 Joanne van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US' in (2003) 4 Journal of International Migration and Integration 2, 171.

384 Osamu Arakaki, 'Non-state actors and UNHCR's supervisory role' in James C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013) 286 (291).

385 See Matthias Freise, 'NGOs in the European Union' in Thomas Davies (ed), *Routledge Handbook of NGOs and International Relations* (2019) 433-447.

386 Commission, Proposal for a Regulation establishing a Union Resettlement Framework, 2 (emphasis added); the organizations to which reference is made are Amnesty International (AI) <https://www.amnesty.org/> accessed 13 Febru-

deavors towards collaboration with NGOs in 2020, recommending NGO involvement in the different stages of the resettlement process "*from identification of those in need of international protection in the non-EU country to integration following their arrival*".[387]

Since the peak of asylum-seekers in 2015, community sponsorship models have been established and piloted in several EUMS.[388] Under the New Pact on Migration and Asylum, the Commission highlighted its commitment to support civil society cooperation and private refugee sponsorships.[389] In its 2020 Recommendation on legal pathways to protection in the EU, it literally invited EUMS "*to put in place or expand community sponsorship schemes that aim to ensure better and faster integration and social inclusion of those granted international protection in the host societies and improved public support by creating more welcoming and inclusive societies*".[390] Furthermore, the Commission mentioned the benefits of community sponsorship schemes in the Action plan on Integration and Inclusion.[391] Such schemes "*not only help Member States increase the number of places for people in need of protection (through resettlement, humanitarian admission and*

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ary 2021, Churches Commission for Migrants in Europe (CCME) <http://www.ccme.be> accessed 13 February 2021, European Council on Refugees and Exiles (ECRE) <https://www.ecre.org> accessed 13 February 2021, International Catholic Migration Commission (ICMC) <https://www.icmc.net/icmc-unhcr-resettlement-deployment-scheme> accessed 13 February 2021, Save me <https://www.saveme.org.in/ngo/> accessed 13 February 2021.

387 Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, C(2020) 6467 final, 9, para 14.

388 For example, Germany, Ireland, France, Italy, Belgium and (former EUMS) UK. See European Parliament, 'Community sponsorship schemes under the new pact on migration and asylum' (*Briefing*, June 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690675/EPRS_BRI(2021)690675_EN.pdf> accessed 29 June 2022.

389 Commission, Communication on a New Pact on Migration and Asylum, 22f: "*The EU will also support Member States wishing to establish community or private sponsorship schemes through funding, capacity building and knowledge-sharing, in cooperation with civil society, with the aim of developing a European model of community sponsorship, which can lead to better integration outcomes in the longer term*."

390 Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 9, para 14.

391 See Commission, Communication 'Action plan on Integration and Inclusion 2021-2027', COM(2020) 758 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0758&from=EN> accessed 19 July 2022.

other complementary pathways) but also to successfully integrate them into welcoming host communities, that are aware of and prepared for their arrival".[392]

2.5.4 Resettlement beneficiaries

The discretionary nature of resettlement entails that the scopes of resettlement beneficiaries vary among receiving countries (see 5.2). In order to determine the (minimum) rights of resettlement beneficiaries under international and EU law, it is necessary to define and differentiate legal core categories of potential resettlement beneficiaries.[393]

UNHCR's resettlement definition makes *refugees* the target group for resettlement. It expressly refers to the admission "*as refugees*", but it lacks specifications on the meaning and legal status of (resettlement) refugees.

The Refugee Convention contains the most internationally recognized legal definition of 'refugee'. It differs from the usage of 'refugee' in everyday language.[394] The term 'refugee' under the Refugee Convention[395] is defined "*on only five distinct categories*",[396] namely persecution or a well-founded fear of persecution on account of (i) race, (ii) religion, (iii) nationality, (iv) membership in a particular social group, and (v) political opinion.

The refugee definition under the Refugee Convention is restrictive because it limits protection to these five grounds of persecution. It does not cover individuals who are forced to flee for other reasons than those mentioned in the Convention. Especially individuals trying to escape war regularly fail to meet the Convention's definitional criteria, even though

392 Ibid 20.

393 See Fulvio Attina, 'Tackling the Migrant Wave: EU as a Source and a Manager of Crisis' in 70 Revista Espanola de Derecho Internacional, 49 (53).

394 See *Goodwin-Gill* gives an overview of the evolution of the definition 'refugee'; see also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 3rd ed 2007) Chapter 2, 15-49.

395 According to Art 1 A para 2 Refugee Convention, the term refugee refers to "*any person who owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*".

396 Michael J Parrish, 'Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection' in (2000) 22 Cardozo Law Review, 223 (224).

they may be in need of international protection and a durable solution, including resettlement.

As an additional requirement, the person persecuted or fearing persecution on account of at least one of these categories must be outside his or her home country and unable or unwilling to avail him- or herself of the protection of the home country. As mentioned before, IDPs who have not left their home country are not covered by the Refugee Convention – even if they fear persecution on account of one of the stated categories.

2.5.4.1 Refugee and subsidiary protection status in the EU

In terms of the definition and substantive rights of refugees, EU legislation follows the Refugee Convention. Art 2 lit d Qualification Directive[397] implements the definition of the Refugee Convention:

> '[R]*efugee' means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it* […].

Serving as a complement to the restrictive refugee definition in the Refugee Convention, the specific EU law development of *subsidiary protection status* embodied in the Qualification Directive is remarkable. It provides special protection for individuals not qualifying as refugees under the Refugee Convention.[398] Recital 33 Qualification Directive stipulates that "[s]*ubsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention* [Refugee Convention]". The need to offer protection beyond refugee status primarily arises from EUMS' human rights obligations, namely the principle of *non-refoule-*

397 See Directive 2011/95 (EU) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9-26.

398 See Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 490.

ment (see 3.3.1). Subsidiary protection status is based on the idea that an individual must not be returned to a country where it would face serious harm.[399] Against this backdrop, Art 2 lit f Qualification Directive defines the term 'person eligible for subsidiary protection' as[400]

> *a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm* […] *and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.*

Generally, the rights and entitlements of individuals eligible for subsidiary protection are more limited than those of refugees.[401] Moreover, the nature of subsidiary protection status is more temporary than refugee status: Eligibility for subsidiary protection has to be re-examined and the status renewed.[402]

Despite the introduction of the subsidiary protection status, "*a comprehensive and systemic consolidation of all protection possibilities within interna-*

399 See Dieter Kugelmann, 'Refugees' (MPIL, March 2010) para 36 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e866> accessed 4 July 2021.

400 Serious harm in the sense of Art 15 Qualification Directive consists of: (i) the death penalty or execution; or (ii) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (iii) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

401 Even if the right on *non-refoulement*, on information, on access to education, on unaccompanied minors, on access to accommodation, on freedom to movement within the EUMS and on repatriation apply without distinction, remaining provisions define a lower level of benefits for subsidiary protection status beneficiaries; see Hemme Battjes, *European Asylum Law and International Law*, 490f.

402 Art 16 Qualification Directive stipulates that "[a] *third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required*".

tional law"[403] has not been achieved. EUMS continue to apply various types of non-harmonized complementary protection statuses.[404]

Resettlement is also characterized by diverse approaches. Only a number of EUMS have considered persons eligible for subsidiary protection as resettlement beneficiaries (see 5.2.1). Under the proposed Resettlement Framework Regulation, all EUMS would have to include them as well as IDPs who, similarly to persons eligible for subsidiary protection, do not meet the refugee definition but might equally be in need for resettlement (see 4.2.11).

2.5.4.2 US refugee definition

The 1980 Refugee Act incorporated the Refugee Convention's refugee definition in US law, even today providing the legal basis for the USRAP. As a general rule, persons eligible for resettlement to the US must meet the refugee definition under the Refugee Act (see 5.2.2).[405]

> *The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation* […] *may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*

With the Refugee Act of 1980, the US legislator intended to eliminate any discrepancies with the Refugee Convention. Yet, *Fitzpatrick* claimed that

403 Evangelia (Lilian) Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 191 (198).

404 See ibid 198.

405 Section 201 para 42 Title II Refugee Act 1980, Public Law 96-212, 94 Stat 102.

the US practice remained discriminatory and inconsistent with the object and purpose of the Refugee Convention and the Protocol. The Refugee Act then still provided for discretionary admission to the US through parole power. Persons fleeing from communist countries were prioritized for admission through parole.[406] The discretionary parole power conferred to Attorneys General led to arbitrary decisions. Even after the restriction of parole authority in 1996 (see 5.2.2), the criteria for exercising parole power have remained blurred. A revival of parole power usage can be witnessed in the context of the 2021/22 mass displacements from Afghanistan and Ukraine (see 2.3.16).

By comparison to the EU approach, subsidiary protection status is alien to US law. Under US law, withholding of removal accounts for *non-refoulement* situations and protects individuals who do not meet the refugee definition from forced return. However, unlike subsidiary protection status, withholding of removal is not linked to an automatic right to remain; there is no possibility to directly access permanent residence status and there is no entitlement to most federally funded benefits.[407]

2.5.4.3 Climate migrants

The ongoing climate change also creates the need for resettlement of so-called 'climate migrants'.[408] According to the World Bank, by 2050, climate change will drive 143 million people in Latin America, Africa and South Asia – especially from poor regions, which actually have contributed little to global warming – to leave their homes. Yet, only in rare cases individuals experiencing climate-induced forced displacement meet the requirements to qualify as refugee under the Refugee Convention, because

406 See Robert Kogod Goldman and Scott M Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law' in (1983) 5 Human Rights Quarterly 3, 302 (323).

407 See Dree K Collopy, *AILA's Asylum Primer* (7th ed American Immigration Lawyers Association 2015) Chapter 2.

408 "*Environmental migrants are not covered by the 1951 Geneva Convention Relating to the Status of Refugees* [Refugee Convention]*, which is designed to protect those fleeing persecution, war or violence. The UN agencies most involved in refugee rights, the UN Refugee Agency (UNHCR) and the UN Development Programme, agree that the term 'climate refugee' should not be used to describe those displaced for environmental reasons*", WH, 'Why climate migrants do not have refugee status' (*The Economist*, 6 March 2018) <https://www.economist.com/the-economist-explains/2018/03/06/why-climate-migrants-do-not-have-refugee-status> accessed 13 February 2021.

this definition does not acknowledge climate change. Even if the Refugee Convention does not apply, governments might still risk violations of the principle of *non-refoulement* under international human rights law by sending people back to situations where climate change has created life-threatening conditions (see 3.3.1.1.2).

2.5.5 Preliminary conclusion

The resettlement process depends on the willingness of receiving countries to admit refugees from a country of (first) refuge or, in the case of IDPs, from their home country to their territory. The UNHCR cooperates with receiving countries, countries of (first) refuge and home countries in order to facilitate resettlement. Amongst others, the UNHCR is competent to formalize the cooperation with and between these countries by concluding treaties. While the UNHCR financially depends on state donors, its humanitarian and social work shall be of an "*entirely non-political character*". In addition, the resettlement process regularly involves cooperation with (other) non-state actors. The US has traditionally relied on public-private partnerships with Volags, primarily tasked to spur self-sufficiency in resettled refugees. In addition, to expand capacities, the US government has currently been exploring the potential of private refugee sponsorships. In resettlement to the EU, NGO involvement and community and private sponsorship models are growing as well. Eventually, resettlement beneficiaries constitute the focal point in the resettlement process. Besides refugees, who are explicitly mentioned in UNHCR's resettlement definition as beneficiaries, there are other (groups of) individuals who may be in need for resettlement.