3 The international law framework for resettlement

3.1 The relevant human rights and refugee law framework

As a first step to assess the interrelation between refugee resettlement and international law, it is necessary to identify the respective normative framework. States enjoy discretion when deciding whether to engage in resettlement.[409] However, when actually conducting resettlement, states must operate within the framework of their international obligations.[410]

Human rights create entitlements for individuals *vis à vis* states. Those entitlements are internationally guaranteed and acknowledged by states as fundamental. They are deemed to be necessary to safeguard human dignity and the development of the person. The acknowledgement of these fundamental entitlements has materialized in a broad framework of universal and regional human rights instruments.[411]

The following considerations are limited to legal issues that are relevant to the resettlement process (see Chapter 5). The analysis comprises major universal human rights instruments, namely the Universal Declaration of Human Rights (UDHR)[412], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[413], the International Covenant on Civil and Political Rights (ICCPR)[414], and the International Convention Against Torture (CAT)[415]. Other pertinent treaties include the United Nations

409 See Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 290.

410 See Marjoleine Zieck in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, 577.

411 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press 2nd ed 2019) 28f.

412 See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

413 See International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

414 See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

415 See International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85.

Convention on the Rights of the Child (CRC)[416], the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[417], as well as the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[418]. Discrimination on the basis of race is specifically addressed by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[419]. The analysis also deals with the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)[420].

Refugees as human beings enjoy protection under the aforementioned human rights instruments. The evolution of general human rights treaties, however, has not rendered refugee-specific rights redundant. The most important international law source for refugee-specific rights is the Refugee Convention and its Protocol. In a nutshell, there is no right to resettlement, but there are rights within resettlement that deserve consideration.

3.2 Extraterritorial application

The obligations of states under international and European human rights and international refugee law when engaging in resettlement depend on the applicability of the respective international instruments. Given that resettlement entails the extraterritorial action of receiving countries in the countries of (first) refuge or in the case of IDPs, the respective home countries, the subsequent analysis of the receiving countries' obligations focuses on the extraterritorial application of human rights, namely the pre-

416 See United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

417 See Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1981, entered in to force 3 September 1981) 1249 UNTS 13.

418 See United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

419 See International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; for instance in Austria, this Convention has the status of Constitutional law [Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BGBl 390/1973].

420 See Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5.

requisite of extraterritorial jurisdiction, before turning to the substantive scope of the respective rights (see 3.3). Other dimensions and principles of jurisdiction in international law, such as jurisdiction of states based on the nationality or protective principle,[421] are not immediately relevant in determining the obligations of receiving countries towards potential resettlement beneficiaries, and will not be the subject of this analysis.

Moreover, for this analysis of human rights obligations, the personal scope of application of human right treaties is neglectable because the majority of human rights guarantees are universal in terms of their personal scope; notably with the exception of, amongst others, the CRC, CEDAW and the UNCRPD, targeting a specific group of vulnerable individuals, and obviously the Refugee Convention, whose personal scope of application is limited to refugees (see 3.2.2.)

3.2.1 Extraterritorial application of human rights

It is undisputed that once an individual finds itself within the territory of a receiving country, this country exercises territorial jurisdiction and is bound to uphold the guarantees under the respective human rights treaties towards this individual.[422] However, whether receiving countries establish jurisdiction through extraterritorial action, for example when selecting resettlement beneficiaries in a country of (first) refuge, constitutes a pertinent legal issue.[423]

421 For further elaborations on different forms of jurisdiction, see Bruno Simma and Andreas Th Müller, 'Exercise and limits of jurisdiction' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 135 (137ff).

422 The jurisdiction of a state as a prerequisite for the application of domestic norms exists within its territory. See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 121; see also Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 3rd ed 2019) 146.

423 See Dirk Hanschel, 'Humanitarian Admission Under Universal Human Rights Law: Some Observations Regarding the International Covenants' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Hart/Nomos 2020) 49 (56f).

3.2.1.1 Legal standard

While formulations and requirements of the respective human rights treaties differ,[424] generally-speaking, they bind states with persons *subject to or within* their jurisdiction.

As a prominent example, Art 2 para 1 ICCPR provides that "[e]*ach State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant*".[425] The Human Rights Committee interpreted this Article expansively in its General Comment No 31. Accordingly, Art 2 para 1 ICCPR requires State Parties to respect and ensure the Covenant rights "*to all persons who may be within their territory and to all persons subject to their jurisdiction*".[426] Moreover, the Human Rights Committee found in *Delia Saldias de Lopez v Uruguay* that "*it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a state party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory*".[427] Indeed, the General Comments and views adopted by the Human Rights Committee

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424 See Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 145; see also Fabiane Baxewanos, 'Relinking power and responsibility in extraterritorial immigration control' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control* (Routledge 2016) 193 (198); see also Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction' in (2018) 19 German Law Journal 1, 43 (45).

425 Art 2 para 1 ICCPR (emphasis added).

426 OHCHR, 'General comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev1/Add.13 (26 May 2004) para 10 (emphasis added) <https://www.refworld.org/docid/478b26ae2.html> accessed 13 February 2021; see Marko Milanovic, 'Extraterritoriality and Human Rights: Prospects and challenges' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control* (Routledge 2016) 53; "*The HRC* [Human Rights Committee]*, relying on the ICCPR, which uses more restrictive language than the ECHR, has in fact adopted a more expansive view of jurisdiction than the ECtHR*", Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' in (2013) 7 Law and Ethics of Human Rights, 47 (51).

427 OHCHR, 'Communication No 52/1979: Delia Saldias de Lopez v Uruguay', UN Doc CCPR/C/OP/1 (1984) para 12.3 <https://juris.ohchr.org/Search/Details/298> accessed 13 February 2021; see Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 306 (322f).

remain legally non-binding, but states are still required "*to at least consider and weigh the reasons*"[428] of non-compliance. The ICJ has supported and fostered the authority of the Committee's decisions.[429] Additionally, the ICJ itself observed in its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that certain human rights instruments, including the ICCPR, the ICESCR, and the CRC, were applicable in the occupied Palestinian territory.[430]

Similarly, in the regional European context, Art 1 ECHR stipulates that the "*High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".[431] The *travaux préparatoires* of the ECHR suggest a broader understanding of jurisdiction that goes beyond jurisdiction in the territorial sense. The initial reference in Art 1 ECHR to "*all persons residing within their territories*" was replaced by persons "*within their jurisdiction*".[432]

Consistently, the European Commission on Human Rights[433] and the European Court of Human Rights (ECtHR) set out criteria for exceptions to the territorial notion of jurisdiction.[434]

428 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 218f.

429 See *Ahmado Sadio Diallo (Republic of Guinea v Democratic Republic of the Kongo)* [2010] ICJ Rep 639 (669, para 66).

430 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (178ff); furthermore, the ICJ acknowledged that *de facto* effective control over areas triggers extraterritorial jurisdiction in *Armed Activities on the Territory of Congo Case (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168.

431 Art 1 ECHR (emphasis added).

432 *MN and Others v Belgium* App No 3599/18 (ECtHR 5 May 2020), para 100.

433 "*High Contracting Parties are bound to secure the* […] *rights and freedoms* [in the ECHR] *to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory but also when it is exercised abroad*", *W v Ireland* App No 9360/81 (Commission Decision 28 February 1983) para 14 (emphasis added).

434 See e.g., *MN and Others v Belgium*, paras 101ff.

3.2.1.2 Relevant ECtHR case law, decisions of other regional courts and UN Treaty bodies

The starting point for the assessment of jurisdiction is territory. The ECtHR highlighted the strong tie between jurisdiction and the own territory of a Contracting State, for instance, in *Ilaşcu*.[435]

Beyond the own territory of a Contracting State, the ECtHR confirmed jurisdiction in *Hirsi Jamaa*,[436] where Italy sent its vessels in international waters. It would, however, be too far-fetched to draw an analogy from the jurisdiction of a vessel's flag state in international waters to extraterritorial selection for resettlement, which usually takes place on foreign territory.

In *M v Denmark*,[437] *Öcalan v Turkey*,[438] and *Al Skeini v UK*,[439] the establishment of extraterritorial jurisdiction on foreign territory was based on physical control over a person. In general, the agents of receiving countries do not exercise physical control over potential resettlement beneficiaries in the course of extraterritorial selection missions. Usually, a resettlement candidate is not physically forced by an officer to take part in a resettlement eligibility interview, and the candidate is free to end the interview and leave. In other words, listening to prospective resettlement beneficiaries on the territory of a third country does not necessarily involve effective control over a person.

In other cases, such as *Cyprus v Turkey*[440], the ECtHR relied on *de facto* control over the territory of another state. These cases also do not apply in the resettlement context. It cannot be claimed that agents of receiving countries exercise *de facto* control over the territory of the country where they select resettlement beneficiaries.

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435 See *Ilaşcu and Others v Moldowa and Russia* App No 48787/99 (ECtHR 8 July 2004) para 33: In this case, the ECtHR confirmed that even the lack of *de facto* control of a state over (parts of) its own territory did not rule out jurisdiction of that state; see also Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 155f.

436 See *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR 23 February 2012).

437 See *M v Denmark* App No 17392/90 (Commission Decision 14 October 1992).

438 See *Öcalan v Turkey* App No 46221/99 (ECtHR 12 May 2005).

439 See *Al-Skeini and Others v United Kingdom* App No 55721/07 (ECtHR 7 July 2011).

440 See *Cyprus v Turkey* App No 25781/94 (ECtHR 10 May 2001) para 77.

Yet, the 'public powers doctrine' as established, e.g., in *Banković*[441] and *Al Skeini*[442], deserves further consideration. In this context, the question raised is whether the implementation of national resettlement policy qualifies as exercise of public powers normally to be exercised by the country of (first) refuge (or home country in the case of IDPs).[443] *Moreno-Lax* proposed to extend the exercise of public powers to situational control, whereby she based her arguments, amongst others, on policy delivery. Her proposition is that extraterritorial policy implementation qualifies as an exercise of state authority. *Dippel* confirmed that granting extraterritorially applicable rights for non-resident foreigners under the domestic law of the granting state amounts to an exercise of authority to the extent that this state applies its national law regulating the specific situation.[444] Applying these considerations to the resettlement selection process leads to the following conclusion: Officials of prospective receiving countries implement the resettlement policy of their sending state on the territory of the country of (first) refuge. By implementing the domestic policy and laws of the sending state, they deliberately exercise public power. The key point is that the officials of the receiving country exercise public power only with regards to the actions and rights related to the implementation of the refugee's sending country's resettlement policy. This is consistent with the approach that the ECtHR took in *al Skeini* that only those specific rights "*relevant to the situation of that individual*" apply.[445]

In addition to the exercise of public powers, the ECtHR required in *Banković* that the exercise of those powers was "*a consequence of military occupation or through the consent, invitation or acquiescence*".[446] In the normal case, the receiving country does not militarily occupy the country of (first) refuge when conducting resettlement selection, but public powers can be exercised through consent or at least *acquiescence*, i.e. acceptance in the

441 See *Banković and Others v Belgium and 16 Other Contracting States* App No 52207/99 (ECtHR 19 December 2001) para 71.

442 See *Al-Skeini and Others v United Kingdom*, para 135.

443 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 189ff.

444 See Annika Dippel, *Extraterritorialer Grundrechtsschutz gemäß Art 16a GG* (Duncker & Humboldt 2020) 38.

445 *Al-Skeini and Others v United Kingdom*, para 137 (the treaty rights can be "*divided and tailored*" by situation). This is in contrat to UN treaty body practice suggesting the application of the full range of treaty rights. 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, 8.

446 *Banković and Others v Belgium and 16 Other Contracting States*, para 71.

form of silence or absence of protest.[447] One can imagine a receiving country using its military bases in a third country to conduct interviews and vetting procedures; for instance, this is current practice between the US and Kosovo with regards to evacuees from Afghanistan.[448] Such military bases are commonly subject to Status of Forces Agreements "*that exclude the territorial state from exercising legal jurisdiction*"[449] over the activities of the sending country. Under such Status of Forces Agreements, the territorial state consents to the exercise of jurisdiction of the sending state.

Even without express agreement between a receiving country and a country of (first) refuge, *acquiescence* can be assumed. *Dippel* pointed out that granting an extraterritorially applicable right does not interfere with the territorial sovereignty of another state, as long as the granting of that right does not entail additional obligations for the foreign country.[450] Resettlement, in principle, meets this requirement since the receiving country takes on protection obligations of the country of (first) refuge rather than imposing additional obligations on that country. On this basis, it can be argued that countries of (first) refuge generally *acquiesce* to the conduct of resettlement selection missions on their territory.[451]

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447 See Ian MacGibbon, 'The Scope of Acquiescence in International Law' in (1954) 31 British Yearbook of International Law, 143.

448 Agreement between the United States and Kosovo (25 August 2021) paras 1-3 <https://www.state.gov/wp-content/uploads/2021/11/21-825-Kosovo-Transit-Afghanistan.pdf> accessed 2 May 2023: "*The United States and the Republic of Kosovo* […] *agree to cooperate regarding efforts to relocate from the territory of Afghanistan into the territory of another State identified individuals*. […] *In furtherance of this cooperation, the Republic of Kosovo agrees to host, on a temporary basis, for up to 365 days identified individuals to facilitate efforts to resettle such individuals on a permanent basis in another location*. […] *The United States agrees to relocate identified individuals to another location within 365 days after the day such individuals arrived in the Republic of Kosovo. Unless otherwise agreed, the Parties expect that the identified individuals will ultimately be resettled by the United States either in the United States or in another location outside of the United States and the Republic of Kosovo*."

449 Sarah Cleveland, 'The United States and the Torture Convention, Part I: Extraterritoriality' (*Just Security*, 14 November 2014) <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> accessed 7 July 2022.

450 See Annika Dippel, *Extraterritorialer Grundrechtsschutz gemäß Art 16a GG*, 38f.

451 See Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to be Delivered' in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018* (Intersentia 2018) 373 (380).

Finally, in *Banković*, the ECtHR required attribution, i.e. the act in question must be attributable to the state acting extraterritorially rather than to the territorial state.[452] Such attribution is given in the course of selection missions conducted by a receiving country's field officers on the territory of a country of (first) refuge or a home country. However, attribution remains questionable when it comes to the mere provision of equipment, training, money, or intelligence by receiving countries to officials of countries of (first) refuge.[453] Furthermore, attribution cannot generally be assumed beyond the actual actions related to the policy implementation of the receiving country.

One contentious point remains. Even if most essential requirements of the 'public powers' doctrine are met in the resettlement context, it is difficult to argue that this doctrine applies directly to resettlement. The ECtHR used the exercise of public powers complementary, either in relation with *de facto* control over foreign territory (*Bankovic*),[454] or physical control over a person (*Al Skeini*)[455].[456] In *MN and Others v Belgium*, where a Syrian refugee family invoked urgent humanitarian reasons to obtain short-term visas via the Belgian embassy in Beirut, the ECtHR upheld the approach that the 'exercise of public powers' cannot be an independent model

452 See *Banković and Others v Belgium and 16 Other Contracting States*, para 71; see also Elspeth Guild and Vladislava Stoyanova in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018*, 380.

453 See ibid 380.

454 See *Banković and Others v Belgium and 16 Other Contracting States*, para 71: "[…] *when the respondent State, through the effective control of the relevant territory and its inhabitants abroad* […] *exercises all or some of the public powers* […]".

455 See *Al-Skeini and Others v United Kingdom*, para 149: "[…] the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. […] In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers […] exercised authority and control over individuals killed in the course of […] security operations, so as to establish a jurisdictional link […]".

456 For example, *Besson* considers the exercise of public powers as one of the constitutive arguments in the spatial as well as in the personal jurisdiction model. See Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' in (2012) Leiden Journal of International Law, 857-884. See also Vladislava Stoyanova, 'M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas' (*EJIL: Talk!*, 12 May 2020) <https://www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas/> accessed 6 July 2022.

without additional elements of personal or territorial physical control. Indeed, the ECtHR confirmed that Belgian authorities exercised public powers when taking decisions concerning the conditions for entry to the territory of Belgium,[457] but it found that this was not enough to establish a jurisdictional link (even though the consent requirement is likely fulfilled in the case of an embassy).

Apart from the 'public powers doctrine', courts (other than the ECtHR) and UN human rights bodies have found common ground in a test that focuses on direct and foreseeable effects on the rights of the person concerned by a specific extraterritorial action.[458] Amongst others, such functional approach was applied by the German Constitutional Court, the Inter-American Court of Human Rights (IACtHR), as well as the Human Rights Committee.

In 1999, the German Constitutional Court made it clear that protection of telecommunications privacy was not restricted to the domestic territory of Germany.[459] Subsequently, in its judgement of 19 May 2020 dealing with the German Act on the Federal Intelligence Service,[460] the Court went beyond its previous decision of 1999, finding that there were no restrictive requirements making the binding effect of fundamental rights dependent on a territorial connection or on the exercise of specific sovereign powers.[461] The Court concluded that "*German state authority is bound by fundamental rights even in relation to actions taken vis-à-vis foreigners in other countries*".[462]

In the same vein, the IACtHR did not limit extraterritorial jurisdiction to instances of physical control over a person or effective control over a territory. In its Advisory Opinion of 15 November 2017, it pointed out

457 *MN and Others v Belgium*, para 112.

458 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, 8.

459 BVerfG, Order of the First Senate of 14 July 1999 – 1 BvR 2226/94, para 176 [BverfGE 100, 313 (363f) – Telekommunikationsüberwachung I] <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1999/07/rs19990714_1bvr222694.html> accessed 28 March 2021; see Annika Dippel, *Extraterritorialer Grundrechtsschutz gemäß Art 16a GG*, 60f.

460 See BverfG, Judgment of the First Senate of 19 May 2020 – 1 BvR 2835/17 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200519_1bvr283517en.html;jsessionid=616AA65B0D67A6BAEA9FCF97F6FFA0AB.1_cid377> accessed 28 March 2021.

461 Ibid para 88.

462 Ibid para 93.

that extraterritorial jurisdiction was also given when a Contracting State exercised "*effective control over the activities that caused the damage and the consequent human rights violation*".[463]

Finally, the Human Rights Committee highlighted the effective control over the rights of a person in its General Comment No. 36.[464] It pointed out that persons under the jurisdiction of a Contracting State means "*all persons over whose enjoyment of the right to life it exercises power or effective control*".[465] The Committee reconfirmed its approach, among others, in *AS, DI, OI and GD v Italy*.[466]

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463 IACtHR, Advisory Opinion OC-23/17 *The Environment and Human Rights* (15 November 2017) para 104 lit h.

464 See OHCHR, 'General Comment No 36: Article 6 (Right to Life)', UN Doc CCPR/C/GC/36 (3 September 2019) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/36&Lang=en> accessed 13 February 2021.

465 Ibid para 63.

466 OHCHR, 'Communication No 3042/2017: AS, DI, OI and GD v Italy', UN Doc CCPR/C/130/D/3042/2017 (27 January 2021) para 7.8: "*As a result, the Committee considers that the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy, and that they were thus subject to Italy's jurisdiction*". See also Committee on Economic Social and Cultural Rights, 'General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', UN Doc E/C.12/GC/24 (10 August 2017) para 32: "*The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation, and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable*"; see also Committee on the Rights of a Child, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No 104/2019: Sacchi et al v Argentina', UN Doc CRC/C/88/D/104/2019 (8 October 2021) para 10.7: "*Having considered the above, the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the Environment and Human Rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question*." See also Committee on the Rights of a Child, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No 79/2019 and No 109/2019', UN Doc CRC/C/85/D/79/2019 – CRC/C/85/D/109/2019 (2 November 2020) para 9:

Scholars have argued likewise. *Çali* purported in her effective control over the rights of a person doctrine that "*control over someone else's territory or control over person are sub-themes of a more basic, but a more coherent idea: effective control over the rights of a person*".[467] The major idea is that the State Party exercises jurisdiction if the violation of a right is the foreseeable consequence of its extraterritorial action.[468] This is in line with the previously expressed view of *Shaw*. He claimed that jurisdiction related to a state's ability "*to regulate or otherwise impact upon people, property and circumstances*".[469] Similarly, *Pijnenburg* purported that receiving countries exercised jurisdiction "*on account of the effects that their policies have on the rights of intercepted migrants*".[470]

The concept of jurisdiction based on the control over the rights of a person affected by targeted extraterritorial action that implements domestic laws and/or policy is mirrored in a strand of ECtHR cases. In these cases, the Court confirmed the application of the Convention where state authorities directed executive or judicial measures at persons abroad.[471] Specifically, in *Güzelyurtlu and Others v Cyprus and Turkey*, the ECtHR held that jurisdiction was given "*if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of their domestic law*".[472] On the surface, this case may look like a detention case, involving physical control over the person being investigat-

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"[A]*s the State of the children's nationality,* [France] *has the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses*."

467 Başak Çali, 'Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn' (*EJIL: Talk!*, 21 July 2020) <https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/> accessed 27 March 2021.

468 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, 9.

469 Malcolm Shaw, *International Law* (Cambridge University Press 6th ed 2008) 645.

470 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 325.

471 For instance, *Romeo Castaño v Belgium* App No 8351/17 (ECtHR 9 July 2018); *Big Brother Watch and Others v UK* Apps Nos 58170/13 (ECtHR 13 September 2018).

472 See *Güzelyurtlu and Others v Cyprus and Turkey* App No 36925/07 (ECtHR 29 January 2019) para 188.

ed, but it contained fact patterns that deviate from physical control over a person, namely vast information gathering. Specifically, the Cypriot Government submitted that throughout the investigations "[m]*ore than 180 statements had been taken from various persons, including the relatives of the victims, persons who knew or had connections with the victims*".[473] It follows that the ECtHR assumed jurisdiction in a case involving extraterritorial investigations that went beyond physical control over a person.

The ECtHR based its distinction between cases like *Güzelyurtlu and Others v Cyprus and Turkey* and *MN and Others* on the unilateral choice of the individual. In *MN and Others*, the ECtHR rejected the administrative – also referred to as procedural[474] – control exercised by the Belgian embassy agents as "*not sufficient to bring every person* […] *within Belgium's jurisdiction*".[475] The Court made it clear that individuals cannot create a jurisdictional link by submitting an application, thus provoking obligations under the ECHR which would not otherwise exist.[476]

Targeted action of the receiving country, rather than the individual choice, is also the distinguishing factor between resettlement selection missions and (humanitarian) visa applications. In the course of selection missions, the prospective receiving country's action is not initiated by an application of the protection seeker. For instance, German officials came to Addis Ababa for the specific purpose of conducting personal interviews and security checks with prospective resettlement beneficiaries residing in the Jijiga and Dolo Ado camps. Thereby, only a few were invited to meet the German authorities, while several of the resettlement candidates referred to Germany by the UNHCR had already been rejected after initial review.[477] This example shows that the potential receiving country,

473 Ibid para 47.

474 See Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' in (2020) 9 ESIL Reflections <https://esil-sedi.eu/wp-content/uploads/2020/04/ESIL-Reflection-Besson-S.-3.pdf> accessed 6 July 2022.

475 *MN and Others v Belgium*, para 119.

476 See ibid para 123.

477 See IOM, 'First IOM International Charter Flight from Ethiopia Brings 154 Refugees to New Homes in Germany' (18 October 2019) <https://www.iom.int/news/first-iom-international-charter-flight-ethiopia-brings-154-refugees-new-homes-germany> accessed 14 February 2021; see also Bundesamt für Migration und Flüchtlinge 'Äthiopien: Resettlement Mission 2019' in Tagungsdokumentation, *Resettlement und komplementäre Zugangswege: Neue Wege – neue Länder* (Frankfurt am Main 13-14 May 2019) <https://resettlement.de/wp-content/uploads/Dokumentation-Fachtagung-Resettlement-Mai-2019.pdf> accessed 14 February 2021.

Germany in this case, took targeted action on its own initiative. The application for a humanitarian visa at the Belgian Embassy in Beirut in *MN and others* is not a targeted action by Belgium. Moreover, it would be too far-reaching to assume that Belgium had exclusive and/or effective control over any violation of the *refoulement* principle (which was under dispute in *MN and others*) because the applicants could leave the embassy at any time, and in Beirut, they remained subject to the law of Beirut and the executive authority of Beirut officials. On the other hand, if the Belgian Embassy officials had taken concrete actions in application of Belgian law and policy that directly and foreseeably resulted in a violation of the applicants' rights, for example, violating their right to privacy in the course of data collection during a visa interview to which they had been invited, Belgium would arguably have exercised jurisdiction through the targeted actions of its officials.

On account of all these considerations, extraterritorial jurisdiction can be triggered by the exercise of public power on foreign territory through targeted actions of policy implementation, namely the effective control over those rights of a person that are affected by the specific action taken towards an individual in furtherance of the respective policy and/or application of the domestic law of the receiving country.

However, when detaching the question of jurisdiction from territorial and physical control, other ways need to be found, apart from borders, to demarcate when a state is responsible and when it is not. Here, the temporal aspect comes into play, involving the following questions: At what point in time does a state start to exercise control over the rights affected by its policy? And when does it end? It seems obvious that a state does not exercise control over the rights of an individual merely by adopting a certain policy and/or law, because the individual will never be affected if the policy or law is not actually implemented. Since it is the actual targeted action of implementation that makes the relevant difference, jurisdiction arguably starts with the targeted action. Coming back to the example of the German selection missions, the targeted action most probably starts when the state officials identify and consider (or reject) a certain potential resettlement candidate referred to them by the UNHCR for an interview. Conversely, the receiving country, Germany, should no longer be held responsible for human rights violations experienced by those individuals after the German officials have made their decision.

From the perspective of the receiving country, the application of the control over the rights doctrine must not result in responsibility for violations of human rights in cases where its officials are unable to effectively

control the respective right at issue. As a matter of fact, in most cases, resettlement candidates remain subject to the law of the state on whose territory they are located,[478] and the actions of that state cannot be effectively controlled by the receiving state.

3.2.2 Extraterritorial application of refugee law

The territorial scope of the Refugee Convention differs from general human rights treaties because the Refugee Convention is not limited by a jurisdiction clause. When Contracting States engage in extraterritorial action, they must observe the Convention.[479]

However, for the rights under the Refugee Convention, the level of attachment to the receiving country is decisive. Most of these rights inhere only once a refugee is either lawfully staying or durably residing in a receiving country.[480] There is a small number of rights that apply without such qualification. Among those rights, there are "*two core refugee rights*"[481] of general practical relevance, namely Art 3 Refugee Convention, which sets out a rule of non-discriminatory application of the Convention rights (see 3.3.4.2); and Art 33 Refugee Convention, stipulating *non-refoulement* obligations (see 3.3.1.2). These Articles remain completely silent on their territorial scope. From the absence of a defined territorial scope, it cannot be inferred that the application of these Articles is limited to the own territory of the receiving country. The Preamble of the Refugee Convention suggests interpretation in conformity with fundamental rights. It reiterates that the UN envisages to assure refugees "*the widest possible exercise*" of fun-

478 As mentioned above, there may be rare exceptions, for example, when the application of the law of the territorial state is excluded on the basis of an agreement (for example, under a Status of Forces Agreement).

479 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, 5; see also see also Guy Goodwin-Gill, Jane Mc Adam and Emma Dunlop, *The Refugee in International Law* (Oxford University Press 4th ed 2021) 308-313.

480 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 176ff, 219; see also idem in Brian Opeskin, Richard Perruchoud and Jillyann Redpath-Cross (eds), *Foundations of International Migration Law*, 191; see also Vincent Chetail, *International Migration Law*, 178; see also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 524ff.

481 James C Hathaway, *The Rights of Refugees Under International Law*[2], 182.

damental rights and freedoms.[482] It follows that the standard of protection under the general human rights treaties should not be compromised in the context of refugee rights. The consistent approach is therefore to consider jurisdiction as the decisive criterion for the application of Arts 3 and 33 Refugee Convention – just like for the above-mentioned human rights treaties. Scholars confirmed that Art 33 Refugee Convention applies when a person is subject to or within the jurisdiction of a state.[483] Furthermore, the Michigan Guidelines on Freedom of Movement highlight that the duty of *non-refoulement* not only binds states at or inside their borders but also extraterritorially where they exercise jurisdiction.[484] The same has been acknowledged for other Convention rights not subject to a territorial or other level of attachment, including Art 3 Refugee Convention.[485] Consequently, in line with the jurisdictional threshold under general human rights treaties, Arts 3 and 33 Refugee Convention apply extraterritorially in cases where (consular) agents exercise physical control over persons abroad, and in cases where a state exercises significant public power on the territory which it has occupied or in which it is present by consent, invitation or *acquiescence*.[486]

Eventually, the lack of elaboration on the extraterritorial application in the text of the stated Articles of the Refugee Convention can arguably be interpreted as less constraining than the requirement of jurisdiction under other human rights treaties. In this context, *Hathaway* purported that "[t]*he decision generally to constrain the application of rights on a territorial or other basis creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations*".[487] Against

482 See Nula Frei in Constantin Hruschka (ed), *Genfer Flüchtlingskonvention: Handkommentar* (Nomos 2022) Art 3, para 22.

483 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 185f; see also Walter Kälin, Martina Caroni and Lukas Heim in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) Art 33 para 1 Refugee Convention, para 90; see also 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, 5.

484 See University of Michigan Law School, 'The Michigan Guidelines on Refugee Freedom of Movement' (May 2017) para 9 <https://www.refworld.org/docid/592ee6614.html> accessed 14 February 2021.

485 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 193.

486 See ibid 188ff.

487 Ibid 182.

this backdrop, it appears to be even more valid to assume a broad(er) scope of application for Convention rights without express territorial limitation.

3.2.3 Preliminary conclusion

In the resettlement selection process, the question of extraterritorial jurisdiction arises when a receiving country acts through its field officers implementing its resettlement policy during selection missions on foreign territory. The analysis showed that extraterritorial jurisdiction in the course of resettlement selection procedures cannot be clearly deduced from ECtHR case law. Still, a common denominator for extraterritorial jurisdiction can be found in the exercise of public powers on foreign territory through actions of policy implementation, namely the effective control over those rights of a person that are affected by targeted extraterritorial actions implementing the respective resettlement policy of the receiving country.

With regards to refugee rights, only a few rights under the Refugee Convention remain without express territorial limitation. Two of those rights bear relevance in the resettlement context, namely Art 3 (non-discrimination) and Art 33 (*non-refoulement*) Refugee Convention. Since the wording of these Articles remains silent on their territorial scope, interpretative efforts are necessary. Accordingly, these Articles may apply extraterritorially (at least) when the threshold to establish extraterritorial jurisdiction under general human rights treaties is met.

3.3 Substantive rights

Once a human rights treaty or the Refugee Convention applies, attention needs to be drawn to the substantive rights relevant to the course of the resettlement process.

3.3.1 Non-refoulement

Referred to as a fundamental principle governing the admission of non-nationals, human rights law, humanitarian law, refugee law and criminal law endorse the prohibition of *refoulement*. This principle "*includes at a minimum the absolute and underogable prohibition of refoulement toward a state where there is a real risk of torture, inhuman, or degrading treatment or punish-*

ment".[488] In terms of refugee law, *non-refoulement* is explicitly stipulated in Art 33 Refugee Convention.[489] Universal human rights treaties include explicit *non-refoulement* provisions, such as Art 3 para 1 CAT, and implicit *non-refoulement* provisions, namely Art 7 ICCPR, and Art 37 CRC;[490] examples of *non-refoulement* provisions in regional human rights treaties are Art 22 para 8 American Convention on Human Rights (ACHR)[491] (explicit), as well as Art 3 ECHR[492] and Art 5 Banjul Charter[493] (both implicit). In the EU law context, Art 19 para 2 Charter of Fundamental Rights of the European Union (the Charter)[494] sets out an explicit prohibition of *refoulement* and Art 4 Charter provides for an implicit prohibition of *refoulement* (for the applicability of Charter rights see 4.1.2.2).

The difference between explicit and implicit *refoulement* provisions is significant because the wording of explicit *refoulement* provisions may limit the application of the principle. For instance, a *refoulement* prohibition that is literally directed to those who have actually crossed the border of the receiving country is difficult to apply in the resettlement context – apart from its application in the (not less important) scenarios where beneficiaries already find themselves on the territory of the receiving country. For this reason, it is crucial to assess the content beyond the wording by applying the rules of interpretation under Art 31 para 3 lit c Vienna

488 Vincent Chetail, *International Migration Law*, 124; see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 324; see also *Chahal v United Kingdom* App No 22414/93 (ECtHR 15 November 1996) paras 78ff, 96.

489 See Vincent Chetail, *International Migration Law* 119.

490 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 315f.

491 American Convention on Human Rights, OAS Treaty Series No 36 (adopted 22 November 1969, entered into force 18 July 1978) <https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf> accessed 13 May 2021.

492 The principle of *non-refoulement* is not explicitly contained in the ECHR; significantly, the ECtHR considers Art 3 ECHR as providing an effective means against all forms of return to places where there is a risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment; see e.g., *Soering v United Kingdom* App No 14038/88 (ECtHR 7 July 1989).

493 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter).

494 Art 19 para 2 Charter of Fundamental Rights of the European Union [2000] OJ C364/1-22 states: "*No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".

Convention on the Law of Treaties (VCLT)[495] (an analysis of specific *non-refoulement* provisions is provided in the following sections 3.3.1.1 and 3.3.1.2). Beyond treaty law, commentators affirmed the customary law nature of the principle of *non-refoulement*.[496] Some commentators qualified the prohibition of *refoulement* as *jus cogens*.[497]

In practice, a state may violate the *non-refoulement* principle when it does not (fully) assess an individual's risk of being exposed to conditions where his or her right to life, or the prohibition of ill-treatment or torture, are at stake. A *non-refoulement* violation can already be triggered if a state *ought* to have known that it would expose an individual to such conditions,[498] including subsequent *refoulement*.[499] The required standard of the *non-refoulement* principle under customary international law is, for example, reflected in Guideline 3 of the guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries, published by the EU Agency for Fundamental Rights (FRA). It states that third countries "*should not be requested to intercept*

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495 See Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

496 Evelien Wauters and Samuel Cogolati, 'Crossing the Mediterranean Sea: EU Migration Policies and Human Rights' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 102 (105). The customary law nature of *non-refoulement* was acknowledged by non-treaty parties like Myanmar and Bangladesh. See Vincent Chetail, *International Migration Law*, 120ff; see also James C Hathaway, *The Rights of Refugees Under International Law*, 363-370; see also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 345ff.

497 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 316; see also Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' in (2002) 13 International Journal of Refugee Law, 533-558.

498 See *MSS v Belgium and Greece* App No 30696/09 (ECtHR 21 January 2011) para 358: "*In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him*"; see also Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (CH Beck/Hart/Nomos 2014) Art 3 ECHR, para 14; see also William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 96; see James C Hathaway, *The Rights of Refugees Under International Law*[2], 327: "*This risk may also follow from failure of even a carefully designed procedure to take notice of the most accurate human rights data*".

499 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 367.

people on the move before they reach the EU external border, when it is known or ought to be known that the intercepted people would as a result face persecution or a real risk of other serious harm".[500]

Consequently, it arises from the principle of *non-refoulement* that – regardless of whether the refugee status determination procedure takes place at the border or within the territory of the State , certain basic procedural requirements (such as access to an appeal with automatic suspensive effect, where applicable) must be ensured.[501]

Must receiving countries conducting procedures concerning resettlement eligibility and status determination outside their territory uphold these procedural standards? The preliminary analysis about extraterritorial jurisdiction (see 3.2.1.2) suggests that the application of *non-refoulement* obligations under human rights treaties remains exceptional for receiving countries engaging in resettlement selection missions.

500 FRA, 'Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries' (5 December 2016) (emphasis added) 3 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-guidance-reducing-refoulement-risk-0_en.pdf> accessed 14 February 2021; see Nula Frei and Constantin Hruschka, 'Circumventing Non-Refoulement or Fighting "Illegal Migration"?' (*Eumigrationlawblog.eu*, 23 March 2018) <https://eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/> accessed 14 February 2021.

501 See UNHCR EXCOM Conclusion No 8 (XXVIII) 'Determination of Refugee Status' (1977) <https://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html> accessed 6 July 2022; UNHCR EXCOM Conclusion No 30 (XXXIV) 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' (1983) <https://www.unhcr.org/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html> accessed 6 July 2022. See also Sibel Uranues, '"Pushback" – Rechtliches über das "Unwort des Jahres" 2021 (Teil I)' (*Blogasyl*, June 30, 2022) <https://www.blogasyl.at/2022/06/pushback-teil-1/> accessed 6 July 2022. Procedural requirements also arise from the prohibition of expulsion. "*In essence, the prohibition translates to a due process right for each individual to have the act of removal administratively and judicially assessed*." 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, 17.

3.3.1.1 Human rights

The following analysis sheds light on whether specific *non-refoulement* obligations in human rights treaties, namely the CAT, ICCPR, the CRC or/and the ECHR, are applicable during resettlement operations.

3.3.1.1.1 Art 3 para 1 CAT

Art 3 para 1 CAT states that "[n]*o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture*".[502] This Article constitutes an example of an explicit *non-refoulement* provision.

The first element of the general rule on treaty interpretation (Art 31 para 1 VCLT) requires consideration of the ordinary meaning of the terms of a treaty. A literal reading of Art 3 para 1 CAT, namely not to "*expel, return ('refouler') or extradite a person to another State*", holds that this provision covers situations where a resettlement beneficiary has already been transferred to the territory of a receiving country and is then returned to another state, i.e. the country of (first) refuge or the home country. On the surface, returning a person to another state implies that this person has already reached the territory of the returning country. However, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pointed to situations where "*States operate and hold individuals abroad, as in the context of* […] *offshore detention or refugee processing facilities*". He took the position that "[w]*henever States are operating extraterritorially and are in the position to transfer persons, the prohibition against non-refoulement applies in full.* […] *A person under the authority of State agents anywhere cannot be returned when facing risk of torture*".[503]

The purpose of the CAT speaks in favor of extraterritorial applicability. The prohibitions of torture are universal and "[…] *the purpose of the CAT was to 'make more effective' those prohibitions, which were already universal, by creating express obligations on States to prevent, prosecute, and remedy viola-*

502 Art 3 para 1 CAT (emphasis added).

503 OHCHR, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc A/70/303 (7 August 2015) para 38 <https://www.ohchr.org/en/documents/thematic-reports/a77502-interim-report-special-rapporteur-torture-and-other-cruel-inhuman> accessed 5 May 2023.

tions, as the Preamble makes clear. […] *This universal prohibition is illustrated by the number of provisions of the CAT that include no express territorial limit. These include the obligation* […] *not to return individuals to torture (Art 3)* […]".[504] That being said, Art 3 CAT – in contrast to other CAT provisions – does not set an express limit on its territorial scope, which can be interpreted as a manifestation of the universal nature of the prohibitions underlying the CAT.

Besides, "*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*" shall be taken into account (Art 31 para 3 lit a VCLT), including decisions of a treaty organ.[505] In this regard, the General Comments of the Committee against Torture provide interpretative guidance – even though they are not legally binding.[506] With regard to Art 3 CAT, General Comment No 4 (2007)[507] is pertinent. This General Comment supports to extend the wording of Art 3 para 1 CAT to cases of extraterritorial action when a Contracting State exercises jurisdiction. The Committee clarified in its General Comment No 4 para 10 that a Contracting State was bound to the principle of *non-refoulement* "*in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection*".

In line with the above analysis, *Koh*, the (then) Legal Advisor for the US Department of State concluded in his Memorandum of 21 January 2013 that "*exhaustive analysis of all available sources of treaty interpretation requires rejection of an interpretation that would impose a categorical bar against the Convention's extraterritorial scope* […]. *The object and purpose, text and context of the CAT, the negotiating history of the Convention* […] *all support these conclusions*".[508]

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504 Sarah Cleveland, 'The United States and the Torture Convention, Part I: Extraterritoriality' (*Just Security*, 14 November 2014).

505 See Oliver Dörr in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2nd ed 2018) para 76.

506 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 214.

507 See Committee against Torture, 'General Comment No 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22', CAT/C/GC/4 (4 September 2018) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f4&Lang=en> accessed 14 February 2021.

508 Harold Hongju Koh, 'Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed

It can be deduced from interpretation according to the VCLT that Art 3 para 1 CAT applies extraterritorially whenever a jurisdictional link exists (see 3.2.1),[509] provided that "*there are 'substantial grounds' for believing that the person concerned would be in danger of being subjected to torture in a State to which the person is facing deportation*".[510]

3.3.1.1.2 Arts 6 and 7 ICCPR

The ICCPR contains two provisions from which an implicit prohibition of *refoulement* has been derived. First, Art 6 para 1 ICCPR sets out that "[e]*very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*". Next, Art 7 ICCPR (first sentence) stipulates that "[n]*o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*".

The Human Rights Committee interpreted Art 6 ICCPR as a *non-refoulement* obligation in its General Comment No 36.[511] In addition, the Committee dealt with Art 7 ICCPR in its General Comment No 20 as a *non-refoulement* prohibition requiring Contracting States not to expose individuals "*to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement*".[512] With this statement, the Committee abided by the wording of Art 3 para 1 CAT. Eventually, in *Mohammad Munaf v Rumania*, the Committee acknowledged that the prohibition of *refoulement* under Arts 6 and 7 ICCPR did not depend on a physical border crossing. Instead, the Commission considered the exercise of jurisdiction as the main issue.[513]

Conflict' (21 January 2013) 6 <https://www.documentcloud.org/documents/20986585-20130121-dos-torture-convention> accessed 5 May 2023.

509 Committee against Torture, 'General Comment No 4 (2017) on the implementation of article 3 of the Convention in the context of article 22', CAT/C/GC/4 (4 September 2018) para 11.

510 Ibid para 12.

511 OHCHR, 'General Comment No 36: Article 6 (Right to Life)', UN Doc CCPR/C/GC/36 (3 September 2019) para 31.

512 OHCHR, 'General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)', UN Doc HRI/GEN/1/Rev9 (Vol I) (10 March 1992) para 9 <https://www.refworld.org/docid/453883fb0.html> accessed 14 February 2021.

513 See OHCHR, 'Communication No 1539/2006: Mohammad Munaf v Romania', UN Doc CCPR/C/96/D/1539/2006 (21 August 2009) para 14.2 <https://www.re

As regards the answer whether a state exercises extraterritorial jurisdiction during resettlement selection missions, it has already been pointed out that the Human Rights Committee itself referred to the exercise of power or effective control over the right to life of a person as jurisdictional threshold (see 3.2.1). If targeted actions of the receiving country concerning its resettlement policy implementation have direct and foreseeable effects on the *non-refoulement* rights derived from Arts 6 and 7 ICCPR, the receiving country is arguably bound by these provisions, irrespective of whether the individual has already reached their territory.

For climate migrants (see 2.5.4.3), the Human Rights Committee has generally accepted the application of the *non-refoulement* principle in relation to life-threatening conditions caused by climate change. While the Committee rejected the appeal of Ioane Teitiota,[514] it "*accepted, in principle that it is unlawful for states to send people to places where the impacts of climate change expose them to life-threatening risks or a risk of cruel, inhuman, or degrading treatment*".[515] Specifically, the Committee observed that "*it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life*".[516] In the specific case of Ioane Teitiota, the Committee found, however, that Kiribati could still take measures to remedy and prevent harm, though the Committee did not

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fworld.org/cases,HRC,4acf500d2.html> accessed 14 February 2021: "*The main issue to be considered by the Committee is whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under articles 6, 7, 9, 10, paragraph 1 and 14 of the Covenant, which it could reasonably have anticipated.*"

514 See OHCHR, 'Communication No 2728/2016: Ione Teitiota v New Zealand', UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) para 9.11 <https://dem aribus.files.wordpress.com/2020/02/2728-2016.pdf> accessed 19 June 2021.

515 Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement' (2020) 114 American Journal of International Law 4, 708 (708); see also Katharine M Donato, Amanda Carrico and Jonathan M Gilligan, 'As more climate migrants cross borders seeking refuge, laws will need to adapt' (*The Conversation*, 8 June 2021) <https://theconversation.com/as-more-climate-migran ts-cross-borders-seeking-refuge-laws-will-need-to-adapt-159673> accessed 16 June 2021.

516 OHCHR, 'Communication No 2728/2016: Ione Teitiota v New Zealand', UN Doc CCPR/C/127/D/2728/2016 (23 September 2020) para 9.5. See also ibid paras 8.6, 9.4.

clearly specify them. This means that future cases need to clarify when the threshold is met so that no measures can still be taken to prevent a life-threatening situation and, thus *non-refoulement* would apply. In such situations, provided that the conditions for extraterritorial jurisdiction are met, *non-refoulement* obligations could also arise for receiving countries towards climate migrants.

3.3.1.1.3 Art 37 lit a CRC

Art 37 lit a CRC states that "[n]*o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.* […]". The Committee on the Rights of the Child clarified that Contracting Parties to the CRC face an implicit obligation not to return a child to a country when there are substantial grounds for assuming a real risk of irreparable harm. This obligation mainly concerns Arts 6 (right to life) and 37 CRC (stated above) but is not limited to those provisions.[517]

It shall be noted upfront that in the specific context of the rights of the child, the assessment of the risk of irreparable harm must be conducted more thoroughly than with regard to adults.[518]

The Committee on the Rights of the Child did not address extraterritorial *refoulement* obligations in its General Comment No 6.[519] However, it affirmed the extraterritorial application of *non-refoulement* with regard to Art 38 CRC, a provision concerning recruitment and participation in hostilities.[520] While the Committee made reference to "*the borders*" of a state which militates against the application in the resettlement selection process, it also used the expression "*in any manner whatsoever*", which is the wording of Art 33 para 1 Refugee Convention and indicates that the prohibition includes multiple types of state actions (see 3.3.1.2).

Furthermore, interpretation in consideration of other applicable treaties pursuant to Art 31 para 3 lit c VCLT suggests that the extraterritorial application of Art 37 lit a CRC in the resettlement (selection) process is ex-

517 See Committee on the Rights of the Child, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (1 September 2006) 10, para 13 <https://digitallibrary.un.org/record/566055?ln=en> accessed 14 February 2021.
518 See ibid 10, para 27.
519 See ibid 10, para 27.
520 See ibid 10, para 28.

ceptionally possible, subject to the condition that the prospective receiving country exercises jurisdiction.

3.3.1.1.4 Arts 2 and 3 ECHR

In the regional European context, Art 2 para 1 ECHR sets forth that "[e]*veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*". Furthermore, Art 3 ECHR states that "[n]*o one shall be subjected to torture or to inhuman or degrading treatment or punishment*". Both Articles inhere an implicit *refoulement* prohibition.[521] However, this does not answer the question whether a country is obligated to extraterritorially *admit* an individual if the individual would otherwise be subject to treatment contrary to Arts 2 and/or 3 ECHR.

Famously, in the *Hirsi Jamaa* judgement, the ECtHR found that Italy violated Art 3 ECHR and Art 4 Protocol No 4 to the ECHR.[522] Italy should have known that the return of Somali and Eritrean migrants intercepted by Italian ships (on these ships Italy exercised jurisdiction based on the flag principle) in the Mediterranean Sea, i.e. outside Italy's territorial waters, exposed them to the risk of serious human rights violations in Libya and arbitrary repatriation to Eritrea and Somalia.[523]

Furthermore, the ECtHR affirmed that obligations under Art 3 ECHR existed irrespective of any physical border crossing. For instance, in *Al-Sadoon and Mufdhi v United Kingdom*, the Court held that the transfer of detainees from British to Iraqi custody, i.e. a situation of physical *de facto* control, involved a breach of Art 3 ECHR because this transfer exposed

521 See Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (CH Beck/Hart/Nomos 2014) Art 2 ECHR, para 5; see also ibid Art 3 ECHR, paras 13f; see also *Bader and Others v Sweden* App No 13284/04 (ECtHR 8 November 2005) paras 42, 48; see also *Saadi v Italy* App No 37201/06 (ECtHR 28 February 2008) para 125; see also *Tarakhel v Switzerland* App No 29217/12 (ECtHR 4 November 2014) para 122.

522 See Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (entered into force 2 May 1968) ETS No 46.

523 See *Hirsi Jamaa & Others v Italy* App No 27765/09 (ECtHR 23 February 2012), paras 137, 158, 186.

the affected individuals to a real risk of being sentenced to death and executed.[524]

Nonetheless, the ECtHR has yet to refrain from extending the scope of *non-refoulement* under the ECHR to a positive obligation (under the condition that the state exercises jurisdiction) to offer legal pathways such as resettlement. Specifically, it avoided to do so in *ND and NT v Spain*.[525] In this case, the ECtHR dealt with the Spanish policy of 'hot expulsions' of irregular migrants and thereby addressed the prohibition of collective expulsion pursuant to Art 4 Protocol No 4 to the ECHR.[526] The Court denied a violation of this Article because the applicants brought themselves in the situation of collective expulsion and did not make use of the possibility of entering Spain by legal means. At the same time, the ECtHR expressly set out the requirement for Contracting States to "*make available genuine and effective access to means of legal entry*", which allowed "*all persons who face persecution to submit an application for protection*".[527] However, it cannot be implied that this (vague) reference to legal pathways triggers an autonomous positive obligation for prospective receiving countries under Art 3 ECHR. When relying on the applicant's self-caused forfeit by not taking recourse to legal pathways, the ECtHR solely commented on Art 4 Protocol No 4 to the ECHR but refrained from considering Art 3 ECHR.[528] Essentially, Art 4 Protocol No 4 to the ECHR differs from Art 3 ECHR because it does not deal with torture, inhuman or degrading treatment in the country of (first) refuge or in the home country.[529]

Also, in the subsequent case of *Shahzad v Hungary*, where the ECtHR specified the standards set out in *ND and NT*, the Court did not compre-

524 See *Al-Sadoon and Mufdhi v United Kingdom* App No 61498/08, Merits and Just Satisfaction (ECtHR 2 March 2010) para 143.

525 See *ND and NT v Spain* App No 8675/15 and 8697/15 (ECtHR 13 February 2020).

526 See Daniel Thym, 'A Restrictionist Revolution?: A Counter-Intuitive Reading of the ECtHR's ND & NT-Judgment on 'Hot Expulsions' at the Spanish-Moroccan Border' (*Verfassungsblog*, 17 February 2020) <https://verfassungsblog.de/a-restrictionist-revolution/> accessed 15 February 2021.

527 *ND and NT v Spain*, paras 209, 229.

528 See Sarah Progin-Theuerkauf, 'Grenzen des Verbots von Kollektivausweisungen: Das Urteil des EGMR im Fall ND und NT gegen Spanien' in (2020) sui generis, 309 (314, para 26).

529 See ibid 311, para 10. See also Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (*Eumigrationlawblog.eu*, 28 February 2020) <https://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/> accessed 6 July 2022.

hensively comment on Art 3 ECHR. It is notable though, that the ECtHR expressly highlighted the importance that entry points "*secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner*"[530]. Sure, this does not answer the question of extraterritorial *non-refoulement* obligations to admit persons in need for protection. Instead, as regards (extra)territoriality, *Shahzad v Hungary* confronted the ECtHR with a new situation, namely the mirror question of whether expulsion can take place before having crossed the border.[531]

The ECtHR's strong insistence on the access to legal pathways in *Shahzad v Hungary* (and also *MH v Croatia*[532]) could have been interpreted as signaling to Contracting States an obligation to provide legal pathways.[533] However, in *AA and others v North Macedonia*[534], the ECtHR took a more restrictive stance than in *ND and NT* and found the applicants culpable of circumventing legal pathways, even though such pathways were arguably not available in practice.

Overall, the ECtHR has not provided clarity about the existence of an obligation to provide legal pathways. It avoided to deal with Art 3 ECHR in *ND and NT v Spain* and subsequent case law, and it denied jurisdiction in respect of this Article in *MN and others v Belgium* (see 3.2.1). Given these considerations, a definitive answer from the ECtHR regarding the question whether a receiving country is obligated to extraterritorially *admit* a potential resettlement beneficiary if he or she would otherwise be subject to treatment contrary to Arts 2 and/or 3 ECHR is still missing.

530 *Shahzad v Hungary* App No 12625/17 (ECtHR 8 July 2021) para 62.

531 Outside the border fence in Hungary remains a strip of land that is still Hungarian territory, and the Court held that this did not preclude expulsion. See ibid para 49; see also Dana Schmalz, 'Rights that are not Illusory' (*Verfassungsblog*, 9 July 2021) <https://verfassungsblog.de/rights-that-are-not-illusory/> accessed 9 July 2021.

532 *MH and others v Croatia* App Nos 15670/18 and 43115/18 (ECtHR 4 April 2022).

533 See Vera Wriedt, 'Expanding Exceptions? AA and Others v North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways' (*Eumigrationlawblog.eu*, 7 June 2022) <https://eumigrationlawblog.eu/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/> accessed 7 July 2022.

534 *AA and others v North Macedonia* App Nos 55798/16 and 4 others (ECtHR 2nd Section 5 April 2022).

3.3.1.2 Refugee law

Art 33 para 1 Refugee Convention states:[535]

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

The wording of Art 33 para 1 Refugee Convention addresses cases where a receiving country expels or returns refugees to the country of (first) refuge or to their home country.

According to the observations of the English Court of Appeal in the *Prague Airport* case, Art 33 Refugee Convention "*cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier*".[536]

In the earlier *Sale* case[537], the US Circuit Courts and the US Supreme Court dealt with Haitians who were interdicted on the high seas and returned home. The UNHCR submitted an *amicus curiae* brief, claiming that the *non-refoulement* obligation was binding regardless of whether the return decision concerned a person inside or outside the state's territory taking the return decision.[538] The US Supreme Court rejected such broad scope of the principle of *non-refoulement* and concluded as follows:[539]

> […] *a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.*

Subsequently, Judge *Albuquerque* criticized in his Concurring Opinion to the *Hirsi Jamaa* ruling of the ECtHR that the Supreme Court's interpreta-

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535 Art 33 para 1 Refugee Convention (emphasis added).

536 *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 (Eng CA, 20 May 2003) para 31.

537 See *Acting Commissioner, Immigration and Naturalization Service, et al v Haitian Centers Council, Inc* 509 US 155, 113 S Ct 2549 (1993) <https://cdn.loc.gov/service/ll/usrep/usrep509/usrep509155/usrep509155.pdf> accessed 15 February 2021.

538 See UNHCR, *The Haitian Interdiction Case* 1993, Brief *Amicus Curiae* in (1994) 6 International Journal of Refugee Law 85, 94-97.

539 *Acting Commissioner, Immigration and Naturalization Service, et al v Haitian Centers Council, Inc* 509 US 155 (158) (1993).

tion of Art 33 Refugee Convention was contrary to the common rules on treaty interpretation.[540]

> *With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees and departs from the common rules of treaty interpretation.*

Judge *Albuquerque* raised, amongst others, two essential points demonstrating that already the ordinary meaning of the terms of Art 33 para 1 Refugee Convention speaks in favor of extraterritorial *refoulement* obligations. First, he pointed out that unlike most other provisions in the Refugee Convention, the application of Art 33 para 1 Refugee Convention did not depend on the presence of a refugee in the territory of a receiving Contracting State (see 3.2.2). Second, he asserted that the expression "*in any manner whatsoever*" included "*all types of State actions to expel, extradite or remove an alien in need of international protection*"[541] – subject to a state's exercise of jurisdiction.

Even if one is not convinced that the literal text of Art 33 Refugee Convention already includes extraterritorial *non-refoulement* obligations, the purpose of the Refugee Convention supports the argument that extraterritorial *refoulement* obligations can be derived from Art 33 Refugee Convention and directed at refugees who have not left the territory of the country of (first) refuge or their home country yet. According to its Preamble, the Refugee Convention endeavors to ensure refugees "*the widest possible exercise*" of fundamental rights and freedoms. *Kälin et al* contend that an interpretation "*that allowed measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they risk persecution would be fundamentally inconsistent with the purpose of the 1951 Convention and 1967 Protocol*".[542] In this vein, *Hathaway* highlighted that

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540 See Walter Kälin, Martina Caroni and Lukas Heim in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Art 33 para 1 Refugee Convention, para 91; see also James C Hathaway, *The Rights of Refugees Under International Law*, 339; see also *Hirsi Jamaa & Others v Italy*, Concurring Opinion of Judge Pinto Albuquerque, 67.

541 *Hirsi Jamaa & Others v Italy*, Concurring Opinion of Judge Pinto Albuquerque, 68.

542 Walter Kälin, Martina Caroni and Lukas Heim in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Art 33 para 1 Refugee Convention, para 89.

"*the essential purpose of the Refugee Convention is to provide rights to seriously at-risk persons able to escape from their own countries*".[543]

Consequently, the essential purpose of the Refugee Convention would be undermined if Art 33 Refugee Convention was not extraterritorially applicable. As outlined, the prevailing opinion supports that this Article applies extraterritorially where Contracting States exercise jurisdiction (see 3.2.2).

3.3.1.3 Concluding remarks

The overall disputed extraterritorial application of the *non-refoulement* principle[544] suggests that the respective provisions in general human rights treaties and the Refugee Convention show differences, which in turn made it necessary to analyze the provisions separately. The findings revealed interpretative arguments in favor of extraterritorial *refoulement* obligations, provided that states exercise jurisdiction.

Starting with Art 3 para 1 CAT, the mere interpretation of the wording of this explicit *refoulement* provision makes a claim for extraterritorial *non-refoulement* obligations in the resettlement context difficult because at first glance, return "*to another State*" presupposes a prior border crossing. However, the Special Rapporteur as well as the Committee against Torture acknowledged that returns are not contingent on the territory of the returning Contracting State and that this Article applies extraterritorially where that State exercises jurisdiction.

In a similar vein, the Human Rights Committee interpreted the implicit *refoulement* obligations derived from Arts 6 and 7 ICCPR to apply extraterritorially in cases where a Contracting State exercises jurisdiction.

With regard to Art 37 lit a CRC, an implicit *non-refoulement* provision, interpretative guidance from the Committee on the Rights of the Child, together with an interpretation pursuant to Art 31 para 3 lit c VCLT in light of the CAT, the ICCPR and the Refugee Convention indicate that

543 James C Hathaway, *The Rights of Refugees Under International Law*, 338 (emphasis added).

544 See e.g., Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control* (Cambridge University Press 2011); see also Marko Milanovic in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 53-78.

this Article inheres extraterritorial *non-refoulement* obligations once a state exercises jurisdiction.

In terms of the implicit *non-refoulement* obligations under Arts 2 and 3 ECHR, ECtHR case law does not provide definite answers whether a Contracting State is obligated to extraterritorially *admit* (e.g. via resettlement) an individual if the individual would otherwise be subject to treatment contrary to Arts 2 and/or 3 ECHR.

Finally, it is claimed that extraterritorial *non-refoulement* obligations can be deduced from the wording of Art 33 para 1 Refugee Convention. Interpreting this Article in the light of the object and purpose of the Refugee Convention strengthens this argument.

All of the analyzed provisions allow for interpretation in favor of extraterritorial *non-refoulement* obligations. This, however, does not mean that any extraterritorial rejection of admission, namely any non-selection of potential resettlement beneficiaries, constitutes a violation of the *non-refoulement* principle. The core question is whether the receiving country exercises jurisdiction. In most cases, such jurisdictional link cannot be established and the *non-refoulement* obligations are left to the state on whose territory resettlement beneficiaries are located.[545] Still, it cannot be ruled out that in particular situations, the receiving country exercises jurisdiction due to effective control over the resettlement candidate's *non-refoulement* right through targeted actions of its officials that directly and foreseeably affect this right and/or physical control over an individual (e.g. when the individual is deprived of its liberty and held in a certain location, such as a military basis, where the receiving country has exclusive legal authority) during vetting procedures. In such situations, the receiving country might violate applicable *non-refoulement* provisions when deporting individuals who do not pass the vetting process.[546]

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545 As mentioned above, there may be rare exceptions, for example, when the application of the law of the host country is excluded on the basis of a written agreement, such as a Status of Forces Agreement.

546 For example, the US conduct of vetting procedures in Kosovo at Camp Bondsteel. 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, 17-46.

3.3.2 Right to leave and to seek asylum

Forced migrants not only face *refoulement* by (prospective) receiving countries. Even before taking on their journey, home countries as well as countries of (first) refuge might interfere with the right to leave by preventing them from leaving their territory. Moreover, "[t]*he non-refoulement principle* […] *falls short of granting asylum in the sense of permission to enter and remain on the state's territory*."[547] Thus, the question arises whether prospective receiving countries, when implementing resettlement policies on foreign territory, breach the right to seek asylum and the right not to be punished for irregularly entering a country.[548]

3.3.2.1 Human rights

The right to leave the country of one's presence constitutes the prerequisite to seek international protection in a foreign country. In contemporary international law, such right is proclaimed in the non-binding Art 13 para 2 UDHR.[549] In line with the UDHR, the ICCPR, as a binding treaty, reiterates that "*everyone shall be free to leave any country, including its own*".[550] Furthermore, in the European regional setting, Art 2 para 2 Protocol 4 ECHR states that "*everyone shall be free to leave any country, including his own*". Eventually, the right to leave has been established as a rule of customary international law.[551]

In essence, the right to leave is an independent right[552] that exists irrespective of whether there exists a right to enter a specific country of destination.[553] The substantive scope of the right to leave primarily

547 Nikolas Feith Tan, 'International models of deterrence and the future of access to asylum' in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019) 170.

548 See Sabrina Ardalan, 'EU and US Border Policy: Externalisation of Migration Control and Violation of the Right to Asylum' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 282 (308ff).

549 "*Everyone has the right to leave any country, including his own, and the right to return to his country*".

550 Art 12 para 2 ICCPR; see Vincent Chetail, *International Migration Law*, 80.

551 See Vincent Chetail, *International Migration Law*, 85ff.

552 See Elspeth Guild and Vladislava Stoyanova in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018*, 382.

553 See ibid 382, 385.

contains a negative duty not to restrict exit and a positive duty to issue travel documents.[554]

With regard to the implementation of resettlement policies, the right to leave has gained relevance. Receiving countries have developed control policies to prevent irregular migration flows, whereas countries of (first) refuge have acted as gate keepers. This entails that countries of (first) refuge engage in practices that can negatively affect the right to leave, e.g. Libyan coast guards (as a result of EU support to Libya[555], agreements between Libya and Italy[556], and between Malta and Libya); Morocco stopping people crossing into Spanish enclaves of Melilla and Ceuta;[557] or Mali deploying personnel at the border to Niger and Burkina Faso[558].[559] This raises the question whether the right to leave can be addressed to the countries of first refuge and/or to receiving countries.

The right to leave is not absolute. Restrictions of Art 12 para 2 ICCPR must be (i) provided by law and (ii) necessary to protect national security, public order, public health or morals, or the right and freedoms of others.

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554 See for passport refusal *Stamose v Bulgaria* App No 29713/05 (ECtHR 27 November 2012); see also Elspeth Guild and Vladislava Stoyanova in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018*, 384.

555 See Commission, 'EU Trust Fund for Africa: new actions adopted to support vulnerable migrants, foster socio-economic development and improve border management in North of Africa' (14 December 2018) <Commission, 'EU Trust Fund for Africa: new actions adopted to support vulnerable migrants, foster socio-economic development and improve border management in North of Africa' (14 December 2018) <https://ec.europa.eu/commission/presscorner/detail/ro/IP_18_6793> accessed 8 July 2022.

556 Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana (February 2017, renewed in 2020) <https://www.governo.it/sites/governo.it/files/Libia.pdf> accessed 8 July 2022; Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combatting Illegal Immigration (28 May 2020) <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf> accessed 8 July 2022.

557 See 'Morocco: 18 migrants die in attempt to enter Spain's Melilla' (*Al Jazeera*, updated 25 June 2022) <https://www.aljazeera.com/news/2022/6/24/hundreds-of-migrants-storm-border-fence-in-spains-melilla> accessed 8 July 2022.

558 See 'After Mali exit, Niger accepts foreign forces to secure border' (*Al Jazeera*, 18 February 2022) <https://www.aljazeera.com/news/2022/2/18/after-mali-exit-niger-accepts-foreign-forces-to-secure-border> accessed 8 July 2022.

559 See Elspeth Guild and Vladislava Stoyanova in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018*, 377.

Furthermore, restrictive measures must conform with the principle of proportionality.[560] Scholars have agreed that general measures limiting the right to leave on a massive scale are incompatible with the right to leave if no proportionality assessment has been made in relation to the specific individuals affected.[561]

The most obvious addressee for responsibility in case of a respective human rights violation is the state where the individual concerned is physically present and which he or she seeks to leave, i.e. the country of (first) refuge. Besides, receiving countries could become responsible for violations of the right to leave by countries of (first) refuge due to aid or assistance (see 3.4.1).

As counterpart to the right to leave, the UDHR accounts for the right to seek asylum. It was first addressed in Art 14 UDHR, stating that "[e]*veryone has the right to seek and to enjoy in other countries asylum from persecution*". However, this provision is neither legally binding nor has it reached the (secured) status of international customary law.[562] It does not guarantee that asylum is actually granted if the required conditions are fulfilled. Beyond the UDHR, there is no right to seek and be granted asylum in general human rights law.[563] It follows that under international human rights law, individuals in need for resettlement cannot invoke a right to seek for and to be granted asylum in a receiving country.

Being particularly vulnerable, children enjoy protection under Art 22 CRC. According to the Committee on the Rights of the Child, this Article sets out a right for children to access asylum procedures and other

560 See OHCHR, 'General Comment No 27: Article 12 (Freedom of Movement)', UN Doc CCPR/C/21/Rev1/Add 9 (2 November 1999) para 14 <https://www.refworld.org/docid/45139c394.html> accessed 16 February 2021; see also Vincent Chetail, *International Migration Law*, 82.

561 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 321; see also Elspeth Guild and Vladislava Stoyanova in Wolfgang Benedek et al (eds) *European Yearbook on Human Rights 2018*, 393.

562 See Andreas Th Müller, 'Solidarität in der gemeinsamen europäischen Asylpolitik' in (2015) Zeitschrift für öffentliches Recht, 463 (471).

563 See Vincent Chetail, *International Migration Law*, 191. See also Michael Lysander Fremuth, 'Access Denied? – Human Rights Approaches to Compensate forthe Absence of a Right to Be Granted Asylum' in (2020) 4 University of Vienna Law Review 1 Special Issue: Slovenian-Austrian Law Conference, 79 (85ff).

complementary mechanisms providing international protection.[564] Resettlement constitutes such – possible but not mandatory – complementary mechanism. The Committee on the Rights of the Child encourages states to "*provide resettlement opportunities in order to meet all the resettlement needs related to unaccompanied and separated children*".[565]

3.3.2.2 Refugee law

As opposed to human rights law, the Refugee Convention does not expressly state a right to leave but a right to be issued identity papers as well as travel documents. Art 27 Refugee Convention obliges Contracting States to issue identity papers "*to any refugee in the territory who does not possess a valid travel document*". This means that any refugee in the territory of a Contracting State can invoke Art 27 Refugee Convention when he or she is not in the possession of travel documents. Art 27 Refugee Convention also applies to asylum seekers not yet lawfully registered in the territory of a Contracting State who are in need of such document to prove refugee status.[566] Furthermore, a refugee can claim travel documents from a Contracting State under Art 28 para 1 Refugee Convention for the purpose of travel outside their territory. As opposed to Art 27 Refugee Convention, its Art 28 demands lawful stay. Moreover, the latter Article allows a Contracting State to refrain from issuing travel documents if there are compelling reasons of national security or public order.

For the resettlement process, this means that any country of (first) refuge that is party to the Refugee Convention has the obligation under Art 27 of this Convention to issue identity papers to those refugees who do not possess travel documents. Notably, however, Art 27 Refugee Convention does not state the specific nature of identity papers which must be issued.[567] Still, some receiving countries may require travel documents,

564 See Committee on the Rights of the Child, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (1 September 2006) 19, para 66.

565 Ibid 26, para 94.

566 See James C Hathaway, *The Rights of Refugees Under International Law*, 626.

567 Circumvention of documentation obligations is even more problematic considering that a large number of Contracting States reaffirmed their commitment to registration and documentation and individualized status determination in the non-binding Global compact on refugees (GCR) and Global Compact for Migration (GCM). [see GCR para 58 (committing to support States in expand-

which potential resettlement beneficiaries cannot claim from countries of (first) refuge if they are not lawfully present there.

What is more, the Refugee Convention lacks a comprehensive right to seek and to be granted asylum.[568] As a minimum, Art 31 Refugee Convention prohibits Contracting States to "*impose penalties, on account of their illegal entry or presence, on refugees* […] *provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*". Effective implementation of Art 31 Refugee Convention requires clear legislative or administrative action ensuring that penalties are not imposed. While the term 'penalty' is not defined under this Article, consideration of general human rights law suggests a notion going beyond criminal law, focusing on whether the respective measure is reasonable and necessary, as opposed to arbitrary and discriminatory.[569]

In this vein, the UNHCR Executive Committee emphasized that states are required to grant protection seekers access to their territory and to fair and efficient asylum procedures.[570] Also, the Michigan Guidelines on Freedom of Movement point out that states must provide reasonable access and opportunity for a protection claim to be made. Thus, they may not lawfully construct or maintain a physical barrier that fails to provide protection seekers access to their territory.[571]

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ing capacity for registration and documentation); GCM Objective 7, para 23 lit h (undertaking to enable individual status assessments of all migrants).]

568 Some scholars have argued in favor of an implicit right to seek asylum derived from the Refugee Convention; see French delegate cited in Alice Edwards, 'Human Rights, Refugees and the Right 'to Enjoy' Asylum' in (2005) 17 International Journal of Refugee Law, 293 (301); see Sabrina Ardalan in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 308; see also Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Chapters 5 to 7.

569 See Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection' (2001) 193ff <https://www.unhcr.org/en-us/publications/legal/419c778d4/refugee-protection-international-law-article-31-1951-convention-relating.html> accessed 8 July 2022.

570 See UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) 3 <https://www.refworld.org/docid/45f17a1a4.html> accessed 16 February 2021.

571 See University of Michigan Law School, 'The Michigan Guidelines on Refugee Freedom of Movement' (May 2017) para 10.

3.3.2.3 Concluding remarks on the right to leave and to seek asylum

International and European human rights law acknowledges an independent right to leave. This right can be at stake when receiving countries implement resettlement policies in cooperation with countries of (first) refuge. In contrast, refugee law does not include a right to leave. The Refugee Convention recognizes the difficulties faced by refugees in leaving the territory of a country and has for this reason imposed obligations on Contracting States to provide identity papers and travel documents.

A right to seek and be granted asylum in the receiving country is established neither under international human rights nor refugee law. In the context of resettlement, this means that a potential resettlement beneficiary cannot invoke an international right to seek and be granted asylum towards a potential receiving country during selection missions.

3.3.3 Procedural rights

Receiving countries are obliged to grant due process guarantees under international and European human rights and international refugee law in the resettlement process, although this process itself is not regulated through binding international law. Such guarantees are particularly important in the resettlement selection, namely in case of a negative selection decision (see 5.2.3.9).

3.3.3.1 Human rights

A potential resettlement beneficiary who obtains a negative selection decision may want to appeal against it. This raises the question of whether human rights law stipulates a right to an effective review.

As a starting point, it must be noted that the Human Rights Committee and the ECtHR considered that the right to a fair trial does not apply to decisions of entry, stay or expulsion of aliens because they do not include a determination of civil rights or criminal obligations as required under the respective provisions in the ICCPR and the ECHR.[572]

572 See Vincent Chetail, *International Migration Law*, 141.

In this light, Art 14 para 1 ICCPR expressly links due process rights to the determination of "*any criminal charge*" and of "*rights and obligations in a suit at law*":

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

The Human Rights Committee specified in its General Comment No 32 that the right to access a court or a tribunal pursuant to Art 14 ICCPR "*does not apply to extradition, expulsion and deportation procedures*".[573]

Similarly, Art 6 ECHR restricts the entitlement to a "*fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*" to the determination of civil rights and obligations as well as to criminal charges. The non-application of Art 6 ECHR to asylum and other immigration proceedings is supported by case law.[574] For instance, in *MN and Others*, the ECtHR reiterated its previous case law and found that the decision on the entry to Belgian territory in the context of the issuance of humanitarian visas fell outside the scope of Art 6 ECHR.[575]

This means for the resettlement process that Art 14 ICCPR and Art 6 ECHR as such do not provide a sufficient legal basis to challenge a negative selection decision before the court.

Nevertheless, a right to an effective review under the ICCPR and the ECHR exists in situations where there is an arguable claim of violation of rights under the respective treaty.[576] This could be relevant, e.g. in the course of interviews during a resettlement selection mission. For example,

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573 OHCHR, 'General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial', UN Doc CCPR/C/GC/32 (23 August 2007) para 17 <https://www.refworld.org/docid/478b2b2f2.html> accessed 18 February 2021.

574 See *Maaouia v France* App No 39652/98 (ECtHR 5 October 2000) para 40; see also *MN and Others v Belgium*.

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

576 See Vincent Chetail, *International Migration Law*, 141f; see also, e.g. OHCHR, 'Communication No 1477/2006: Maksudov and Others v Kyrgyzstan', UN Doc CCPR/C/93/D/1461,1462,1476 and 1477/2006 (31 July 2008) para 12.7 <https://www.refworld.org/cases,HRC,4a93a0cd2.html> accessed 18 February 2021; see also *GHH and Others v Turkey* App No 43258/98 (ECtHR 11 October 2000) paras 34, 36.

one could imagine assaults by field officers amounting to a violation of Art 3 ECHR.[577]

Under EU law, the Charter provides additional due process guarantees (see 5.2.1).

3.3.3.2 Refugee law

According to Art 16 para 1 Refugee Convention, "[a] *refugee shall have free access to the courts of law on the territory of all Contracting States*". *Elberling* purported that the wording of this Article does not require physical presence of the refugee concerned in any Contracting State.[578] Furthermore, *Hathaway* confirmed that this right is not limited "*to the courts of the country in which the refugee is located*".[579] In fact, refugees can only benefit from whatever judicial remedies exist in a Contracting State. This entails for resettlement that despite the guarantee under Art 16 para 1 Refugee Convention, judicial review of a decision (not) to select a refugee for resettlement remains contingent on the remedies available under domestic law (arguably of the receiving country, i.e. the decision-making country).[580]

3.3.3.3 Concluding remarks

Resettlement refugees cannot invoke Art 14 ICCPR and Art 6 ECHR to challenge a negative selection decision. Still, the ICCPR and the ECHR

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577 When it comes to misconduct by field officers (and also other actors involved), women as potential victims are particularly vulnerable. It therefore deserves mention that in its General Comment No 32, the Committee on the Elimination of Discrimination against Women affirmed the extraterritorial application of the CEDAW, including with regard to violations of private persons and other non-state actors, subject to the condition of jurisdiction. See Committee on the Elimination of Discrimination against Women, 'General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women', UN Doc CEDAW/C/GC/32 (14 November 2014) para 7 <https://www.refworld.org/docid/54620fb54.html> accessed 21 June 2021.

578 See Björn Elberling in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) Art 16 Refugee Convention, para 27.

579 James C Hathaway, *The Rights of Refugees Under International Law* (2005) 645.

580 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 915ff.

acknowledge the right to an effective review when there is an arguable claim of violation of rights under the respective treaty. If, for example, such a right is violated during an interview when the receiving country exercises jurisdiction over a potential resettlement beneficiary through its field officers, then this right to review must be granted. Thus, at least for misconduct during selection interviews, there is protection for potential resettlement beneficiaries in the form of a right to review. Furthermore, Art 16 para 1 Refugee Convention grants any refugee access to courts in all Contracting States, but refugees are limited to the judicial remedies available under the respective domestic law.

3.3.4 Non-discrimination

Discrimination in the resettlement process may occur in multiple forms. In the resettlement selection process, discrimination can happen between (groups of) refugees, e.g. on the basis of their nationality or religion. Specifically, differences in legal status may result in discrimination between resettlement refugees and other refugees. Another source of discrimination derives from the fact that generally the rights of non-nationals, including resettlement beneficiaries, are less comprehensive than the rights of nationals. In this context, discrimination may be an issue during the process of naturalization for resettlement beneficiaries as opposed to other forced migrants (see 5.4.3.4).

The principle of non-discrimination is recognized under Art 1 para 3 UN Charter.[581] It is a well-established principle in international and European human rights law, enshrined in Art 2 UDHR, Arts 2 and 26 ICCPR, Art 2 ICESCR, Art 14 ECHR, Art 1 Protocol No 12 to the ECHR[582] and Art 21 Charter, as well as in international refugee law, namely in Art 3 Refugee Convention.

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581 See Art 1 para 3 UN Charter stipulates that one of the purposes of the United Nations is "[t]*o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*".

582 See Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 1 April 2005) ETS No 177.

3.3.4.1 Human rights

Prominently, Art 2 UDHR stipulates a general prohibition of non-discrimination:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

While the UDHR remains a non-binding instrument, Art 2 UDHR was incorporated in legally binding universal human rights treaties, namely Arts 2 para 1 and 26 ICCPR, and Art 2 para 2 ICESCR.

Art 2 para 1 ICCPR sets forth that each Contracting State shall "*ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*". More precisely, Art 26 ICCPR stipulates:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Similarly, Art 2 para 2 ICESCR states that the Contracting States "*undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*".

Moreover, Art 2 CRC rules out "*any discrimination on the basis of the status of a child as being* […] *a refugee, asylum seeker or migrant*".[583]

583 Committee on the Rights of the Child, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (1 September 2006) 8, para 18.

Based on these provisions, it is recognized that international human rights law prohibits discrimination among and between refugees.[584]

Under European human rights law, the ECHR does not establish a general principle of equality comparable to the UDHR. Art 14 ECHR prohibits discrimination, but its scope of application is limited to the rights and freedoms laid down in the ECHR.[585] This, however, does not presuppose that a respective Convention right applies; it is rather sufficient that the situation at issue falls within the ambit of a Convention right.[586] Furthermore, Art 1 Protocol No 12 to the ECHR contains a general principle of equality. Though to date, this Protocol has only been ratified by twenty Contracting States,[587] and its prohibition of discrimination is restricted to any rights set forth by law. It would therefore only apply if resettlement gained the status of a right under EU or domestic law.[588]

For the assessment whether a respective practice constitutes a discriminatory act violating one of the stated rules, it must be noted that "[d]*ifferential treatment of migrants does not always equal discrimination*".[589] According to the prevailing opinion, a difference in treatment is not discriminatory when three cumulative conditions are fulfilled, i.e. reasonableness, objectivity and proportionality to achieve a legitimate aim.[590]

This is reflected in the Human Rights Committee's General Comment No 15[591] with regard to the ICCPR, and also in the ECtHR's ruling in *Belgian Linguistics* with respect to the ECHR. According to the latter,

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584 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 265ff.

585 See Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: Ein Studienbuch* (CH Beck/Helbig Lichtenhahn Verlag/Manz 6th ed 2016) 627, para 1.

586 See *The Church of Jesus Christ of Latter-Day Saints v Great Britain* App No 7552/09 (ECtHR 28 March 2014) para 30.

587 See Council of Europe, 'Chart of signatures and ratifications of Treaty 177' (as of 10 July 2022) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=Zn0fdiIA> accessed 10 July 2022.

588 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 54 (79, 81).

589 Nikolaos Sitaopoulos, 'Why International Migration Law Does not Give a License to Discriminate' (*EJIL: Talk!*, 20 May 2015) <https://www.ejiltalk.org/why-international-migration-law-does-not-give-a-license-to-discriminate/> accessed 20 February 2021.

590 See Vincent Chetail, *International Migration Law*, 148.

591 See OHCHR, 'CCPR General Comment No 15: The position of aliens under the Covenant', UN Doc HRI/GEN/1/Rev1 (11 April 1986) <https://www.refworld.org/docid/45139acfc.html> accessed 20 February 2021.

a violation of the principle of equality could be assumed if a "*distinction has no objective or reasonable justification*".[592] Even earlier, the issue reached the ICJ. Judge *Tanaka* highlighted in his Dissenting Opinion in *South West Africa (Second Phase)* that equality does not exclude differentiation.[593]

When it comes to differential treatment on the basis of race, such distinction has special significance under international law authorities and has crystallized as discrimination *per se* under customary international law.[594] In this vein, the ECtHR found no objective justification for differential treatment based exclusively (or to a decisive extent) on race or ethnicity in a contemporary democratic society.[595] The Human Rights Committee applied a similar standard.[596]

Nationality constitutes another frequent source of discrimination among and between (groups of) refugees. This is particularly relevant where resettlement or humanitarian admission programs only apply to forced migrants with a certain nationality or are geographically restricted (such tendencies have been evident, for example, in the course of the Russian invasion of Ukraine).[597] As opposed to national origin, nationality is not an enumerated ground in Art 2 ICCPR, but Contracting States must nonetheless base justification of differential treatment on grounds

592 "*Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium* App No 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR 23 July 1968) 30f, para 10.

593 See *South West Africa, Second Phase* (Dissenting Opinion of Judge Tanaka) [1966] ICJ Rep 250.

594 See William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) Chapter 5, 161ff.

595 See *Timishev v Russia* App No 55762/00 and 55974/00 (ECtHR 13 December 2005) para 58; *DH and Others v Czech Republic* App No 57325/00 (ECtHR 13 November 2007) para 176.

596 The Committee found identity checks for the purposes of immigration control to be discriminatory because "*racial characteristics*" were the "*decisive factor*". See OHCHR, 'Communication No 1493/2006: Lecraft v Spain', UN Doc CCPR/C/96/D/1493/2006 (17 August 2009) para 7.4 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/442/84/PDF/G0944284.pdf?OpenElement> accessed 10 July 2022.

597 See Janine Prantl and Ian Kysel, 'Generous, but Equal Treatment? Anti-Discrimination Duties of States Hosting Refugees Fleeing Ukraine' (*EJIL: Talk!*, 2 May 2022) <https://www.ejiltalk.org/generous-but-equal-treatment-anti-discrimination-duties-of-states-hosting-refugees-fleeing-ukraine/> accessed 10 July 2022.

of nationality or citizenship on reasonable and objective criteria.[598] The ECtHR has underscored repeatedly that only "*very weighty reasons*" could justify such differential treatment.[599]

In point of fact, states have invoked distinctions to justify unequal treatment between foreigners and their own nationals.[600] Specifically, with regard to Art 26 ICCPR, the Human Rights Committee has accepted categorical distinctions such as citizenship as an inherently reasonable basis upon which individuals may be treated differently.[601] In this context, *Hathaway* pointed out that "*non-discrimination law has not yet evolved to the point that refugees and other non-citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens*".[602] Prominent examples of rights restricted to citizens are access to public services and the right to take part in elections and referendums (Art 25 ICCPR).[603] Inequalities, e.g., in the form of limited political participation, evidently impede integration.[604]

There are a few indications in EU law accounting for the link between the integration of foreigners and equal treatment with nationals. The Directive concerning the status of non-EU nationals who are long-term residents (Long-term Residents Directive)[605] provides for equal treatment with nationals in certain areas, such as access to employment and self-employed activity; education and vocational training; core benefits of social assistance; and access to goods and services (see Art 11 Long-term Residents Directive).

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598 OHCHR, 'Communication No 196/1985: Gueye v France' (1989) para 9.4 <http://hrlibrary.umn.edu/undocs/session35/196-1985.html> accessed 10 July 2022.

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

600 See OHCHR, 'General Comment No 18: Non-discrimination', UN Doc HRI/GEN/1/Rev9 (Vol I) (10 November 1989) para 8 <https://www.refworld.org/docid/453883fa8.html> accessed 20 February 2021.

601 See ibid para 8.

602 James C Hathaway, *The Rights of Refugees Under International Law*[2], 265.

603 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 524.

604 See Kiran Banerjee, 'Rethinking the Global Governance of International Protection' in (2018) 56 Columbia Journal of Transnational Law, 313 (321).

605 See Directive 2003/109 (EC) concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 amended by Directive 2011/51/EU [2011] OJ L132/1.

3.3.4.2 Refugee law

Under international refugee law, Art 3 of the Refugee Convention constitutes the pivotal provision on non-discrimination. It states that "[t]*he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin*".

With respect to discrimination among refugees, Art 3 Refugee Convention does not contain a general prohibition of discrimination between refugees, meaning that refugee law offers limited protection in this regard. It is therefore described as overridden by international human rights, particularly by Art 26 ICCPR.[606]

Still, Art 3 of the Refugee Convention deserves consideration as it sets a specific threshold in terms of reasonableness. This threshold makes it more difficult for Contracting States to objectively justify differential treatment whenever the subject matter of a differentiation between or among (groups of) refugees is a right expressly guaranteed under the Refugee Convention, since "*these are rights that are explicitly intended to inhere in persons who are refugees simply because they are refugees*".[607] It follows that Contracting States have scarce reasons to justify differential protection of some part of the refugee population.

In terms of equal treatment between refugees and nationals, the UNHCR resettlement definition emphasizes that resettled refugees should have access to rights *similar* to those enjoyed by nationals. The term 'similar' must be distinguished from 'same'. In fact, there is only a limited number of Convention rights demanding the *same* treatment as nationals; for instance, Art 22 para 1 Refugee Convention states that "[t]*he Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education*". At a minimum, Convention States must treat refugees equally in areas where they are obliged to do so.[608]

3.3.4.3 Concluding remarks

Human rights law offers refugees protection in cases where they are discriminated against by other refugees, which is relevant, among others, in

606 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 276.
607 Ibid 289 (emphasis as in original).
608 See Elena Andreevska, 'The Legal Protection of Refugee: Western Balkanas' in (2016) 23 Lex ET Scientia International Journal 2, 85 (88).

the resettlement selection process and with regard to the legal status of resettlement beneficiaries in the receiving country. Concerning discrimination between refugees and nationals of the receiving country, there is, however, no comprehensive protection provided by human rights law. Also, the Refugee Convention does not account for equal treatment between refugees and nationals in a comprehensive manner since only a few rights in this Convention require such treatment. Overall, the lack of equal treatment between resettled refugees and nationals impacts the integration process since the resettled refugees may face substantial hurdles due to the prioritization of nationals – even if the refugees have already obtained long-term residence status.

3.3.5 Reception conditions

The rights analyzed in the following concern the legal status of resettlement beneficiaries after the resettlement selection process. The listed human rights treaties as well as the Refugee Convention oblige receiving countries to grant resettlement beneficiaries specific rights and liberties upon arrival on their territory, which must be reflected in corresponding reception conditions. For the purpose of this analysis, the term 'reception conditions' refers to the full set of measures that a receiving country must grant to a resettlement beneficiary to establish a situation that complies with international human rights and refugee law.[609]

609 Under EU law 'reception conditions' are defined as follows: "*The full set of measures that EU Member States grant to applicants for international protection*" (emphasis as in original), see Art 2 lit f Directive 2013/33 (EU) laying down standards for the reception of applicants for international protection [2013] OJ L180/96-116 (Recast Reception Conditions Directive); see also European Migration Network, 'Asylum and Migration Glossary 7.0' (July 2020) <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/reception-conditions_en> accessed 3 July 2021; definition of 'material reception conditions': "*The reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance*", see Art 2 lit g of Recast Reception Conditions Directive; see also European Migration Network, 'Asylum and Migration Glossary 7.0' (July 2020) <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/material-reception-conditions_en> accessed 3 July 2021.

3.3.5.1 Human rights

A Contracting State must grant rights under the aforementioned universal human rights treaties and the ECHR to all individuals as soon as it exercises jurisdiction (see 3.2.1). Resettlement beneficiaries are subject to the jurisdiction of the receiving country when present on the territory of this country. This means that upon arrival of a resettlement beneficiary on a receiving country's territory, the respective human rights treaties apply. This includes economic, social and cultural rights, covering areas such as health, work, education, housing – and more.

Some of these rights set out territorial requirements in addition to jurisdiction. For instance, Art 12 ICCPR affords freedom of movement and the choice of residence only to individuals lawfully on the territory of a Contracting State.[610] "*The question whether an alien is 'lawfully' within the territory of a state is a matter governed by domestic law*".[611] The admission of a resettlement beneficiary arriving on the territory of a receiving country is usually linked to a legal basis under the domestic law of this country. Not all receiving countries explicitly refer to resettlement in their national laws, but by admitting resettlement refugees, they regularly grant them a status grounded in national immigration law. Thus, in the general case, resettlement beneficiaries fulfill the requirement of being lawfully within the territory of the receiving country. Consequently, receiving countries must grant the rights under Art 12 ICCPR to resettlement beneficiaries once they arrive on their territory. In practical terms, this has significant implications; if receiving countries condition resettlement beneficiaries to a particular location in the initial phase, they must justify such interference with Art 12 ICCPR accordingly.

Furthermore, the CRC deserves discussion in this context. Receiving countries who are Contracting States to the CRC must uphold the rights of a child when dealing with unaccompanied and separated children outside their countries of origin (subject to the condition that they exercise jurisdiction; see Art 2 CRC). In terms of reception conditions, the follow-

610 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 523.

611 OHCHR, 'General Comment No 27: Article 12 (Freedom of Movement)', UN Doc CCPR/C/21/Rev1/Add9 (2 November 1999) para 4; see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Politcal Rights: Cases, Materials and Commentary* (Oxford University Press 3rd ed 2013) 397, para 12.13.

ing obligations under the CRC are particularly relevant: Arts 20[612] and 22 CRC[613] account for special protection and assistance as well as alternative care for unaccompanied or separated children permanently deprived of their family environment, including those outside their home country.[614] Furthermore, under Arts 28, 29 para 1 lit c, 30 and 32 CRC, Contracting States are obligated to ensure access to education during all phases of the displacement cycle.[615] Additionally, Art 27 CRC sets out a right to an adequate standard of living, "*particularly with regard to nutrition, clothing and housing*".[616] Besides, Arts 23, 24 and 39 CRC grant health care protection.

Moreover, when receiving female resettlement beneficiaries, Contracting States to the CEDAW must ensure that the women find themselves in conditions compliant with that Convention. Among others, Contracting States must grant female resettlement beneficiaries equal access to rights like education (Art 10 CEDAW), employment (Art 11 CEDAW), health (Art 12 CEDAW), economic and social benefits (Art 13 CEDAW).

Besides children and women, disabled persons are entitled to special protections, as receiving countries who are Contracting Parties to the UNCRPD face additional obligations under this Treaty. Importantly, the UNCRPD obliges receiving countries to provide reasonable accommodation that accounts for disability-specific needs. Further disability-specific obligations exist, among others, with regard to personal mobility (Art 20 UNCRPD), education (Art 24 UNCRPD), health (Art 25 UNCRPD), habilitation (Art 26 UNCRPD), as well as work and employment (Art 27 UNCRPD). The UNCRPD is even more important against the backdrop

612 "*A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State*."

613 "*States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties*."

614 See Committee on the Rights of the Child, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (1 September 2006) 13f, paras 39f.

615 See ibid 14, para 41. Ibid 14, para 42: "*The unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing leaning opportunities*".

616 Ibid 15, para 44.

that, besides provisions for access to social security (Art 24 para 1 lit b), the Refugee Convention and its *travaux préparatoires* provide little guidance on disability-sensitive interpretation of refugee law.[617]

In addition, from an EU law perspective, EUMS face obligations under the Charter when implementing EU law. Particularly worthy consideration in terms of reception conditions and assistance for resettlement beneficiaries are, amongst others, the right to liberty (Art 6 Charter), the right to education (Art 14 Charter), the freedom to choose an occupation and the right to engage in work (Art 15 Charter), the freedom to conduct a business (Art 16 Charter) and the right to social security and social assistance (Art 34 Charter).

3.3.5.2 Refugee law

Most of the rights under the Refugee Convention demand a further qualification, namely some kind of (legal) relationship to the Contracting State. For example, this is the case for Arts 21 (housing) and 26 (freedom of movement) Refugee Convention. Art 21 Refugee Convention requires lawful stay and Art 26 Refugee Convention demands lawful presence of a refugee on the territory of the receiving country.

According to the prevailing opinion, *lawful stay* can be established through temporary residence status, unless it is not merely a temporary visit.[618] As such, it lies in the very nature of resettlement that resettlement refugees are more than just temporary visitors or refugees in transit. They enter the territory of a receiving country as a consequence of an arranged and controlled transfer, with a view of finding a durable solution to their forced displacement there. It can therefore be deduced that, by definition, resettlement ought to provide a durable solution for refugees.

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617 See Clara Straimer, 'Vulnerable or invisible? asylum seekers with disabilities in Europe', Research Paper No 194 (November 2010) 1 <https://www.unhcr.org/4cd9765b9.pdf> accessed 21 June 2021; see also Mary Crock, Laura Smith-Kahn, Ron McCallum and Ben Saul, *The Legal Protection of Refugees with Disabilities, Forgotten and Invisible?* (Elgar Publishing 2017).

618 See Scott Leckie and Ezekiel Simperingham in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) Art 21 Refugee Convention, paras 45-47.

In terms of *lawful presence*, Art 26 Refugee Convention applies to "*refugees who were admitted to the country*".[619] Lawful presence must be distinguished from lawful stay in the sense that the former implies admission under national immigration law. Such admission is given in the case of resettlement refugees, who are selected and admitted by receiving countries' authorities based on criteria established under national immigration law.

It results that the required levels of attachment, *lawful stay* as well as *lawful presence*, can be met directly upon arrival of resettlement refugees in a receiving country. Thus, even in the initial period upon arrival, receiving countries' interference in refugee rights whose application depends on such a level (or an even lower level) of attachment requires justification.

3.3.5.3 Concluding remarks

Universal and European human rights treaties set out rights and liberties that a receiving country must grant to resettlement beneficiaries as soon as they arrive on this country's territory. The application of most rights under the Refugee Convention hinges upon a certain level of attachment to the receiving country, whereas it has been shown that resettlement beneficiaries likely fulfill the requirements of *lawful stay* and *lawful presence* immediately upon arrival on the territory of the receiving country.

3.3.6 Naturalization

The UNHCR definition of resettlement highlights the "*opportunity to eventually become a naturalized citizen of the resettlement country*".[620] The following question then arises: does the outlined human rights framework and/or the Refugee Convention oblige receiving countries to provide resettlement beneficiaries access to citizenship?

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619 Reinhard Marx in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) Art 26 Refugee Convention, para 45.

620 Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 22.

3.3.6.1 Human rights

Art 15 UDHR sets out that "[e]*veryone has the right to a nationality*" and "[n]*o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality*". As such, the UDHR does not directly create legal obligations for receiving countries, but, for example, the African Court on Human and Peoples' Rights accepted the customary international law nature of Art 15 UDHR.[621] Still, international (human rights) law does not expressly provide for the right to acquire a *particular* nationality, and does not set out specific criteria for the granting of citizenship.[622] The Human Rights Committee clearly asserted "*that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization*".[623] At the same time, the Committee stressed that the principle of equal protection under Art 26 ICCPR implied the prohibition of a denial of citizenship on arbitrary grounds. States may nonetheless refuse citizenship if their decision is based on legitimate grounds, such as national security reasons, even if this entails that the person concerned remains stateless.[624]

In turn, cases of statelessness are particularly protected through the Convention on the Reduction of Statelessness of 30 August 1961. Under this Convention, Contracting States must grant nationality to persons born on their territory. The Convention also regulates the conditions on

621 See African Court on Human and Peoples' Rights, *Robert John Penessis v United Republic of Tanzania* (Judgement) App No 013/2015 (28 November 2019) para 85, which established that the UDHR is part of customary international law, in particular Article 15 on the right to a nationality; see also IACtHR, Advisory Opinion OC-4/84 *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (January 1984) <https://www.refworld.org/cases,IACRTHR,44e492b74.html> accessed 17 August 2022; ibid para 32: "*It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.*"

622 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 535.

623 OHCHR, 'Communication No 1136/2002: Bozov v Estonia', UN Doc CCPR/C/81/D/1136/2002 (25 August 2004) para 7.4 <http://hrlibrary.umn.edu/undocs/html/1136-2002.html> accessed 21 February 2021.

624 See ibid para 7.4; see also Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 537.

which nationality should be granted in other cases.[625] Moreover, the CRC contains a provision that aims at preventing children from statelessness. Its Art 7 states that "[t]*he child shall be registered immediately after birth and shall have* […] *the right to acquire a nationality*".

At the European level, Art 6 para 4 lit g European Convention on Nationality[626] stipulates that each state party shall "*facilitate in its internal law the acquisition of its nationality for* […] *stateless persons and recognized refugees lawfully and habitually resident on its territory*". However, this is only an obligation to *facilitate* the acquisition of citizenship, rather than to *grant* citizenship. Likewise, the ECtHR made clear that "*a 'right to nationality'* […] *or a right to acquire or retain a particular nationality, is not guaranteed by the Convention or its Protocols*".[627]

Overall, international and European human rights law does not prevent receiving countries from refusing naturalization of a resettlement beneficiary, unless the decision relies on arbitrary grounds. It results from the interpretation of the Human Rights Committee that a decision is arbitrary if it is discriminatory. A duty to consider equal protection when granting citizenship is also reflected, e.g. in Art 9 para 1 CEDAW, stating that "*States Parties shall grant women equal rights with men to acquire, change or retain their nationality*". It follows that discriminatory citizenship rules are prohibited under international human rights law.

3.3.6.2 Refugee law

Art 34 Refugee Convention stipulates that "[t]*he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings*". Similar to the aforementioned Art 6 para 4 lit g European Convention on Nationality, this Article sets out an obligation to *facilitate* assimilation and naturalization of refugees but not to *grant* naturalization. The duties under Art 34 Refugee Convention are described as being "*minimalist*".[628] Still, a

625 See Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175; see Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 537.

626 See European Convention on Nationality (signed 6 November 1997, entered into force 1 March 2000) ETS No 166.

627 See *Petropavlovskis v Latvia* App No 44230/06 (ECtHR 13 January 2015) para 73.

628 See James C Hathaway, *The Rights of Refugees Under International Law*[2], 1219.

Contracting State would violate this Article if it refused to provide cogent reasons for denying a refugee access to citizenship. *Grahl-Madsen* pointed out that the wording of Art 34 Refugee Convention ("*shall*") made it clear that this Article imposed a duty on the Contracting States, as opposed to a mere recommendation.[629] In line with this, *Hathaway* purported that it was incumbent upon Contracting States "*at the very least, to provide a good faith justification for the formal or de facto exclusion of refugees from naturalization*".[630]

3.3.6.3 Concluding remarks

In conclusion, there is no international obligation for receiving countries to grant citizenship to resettlement beneficiaries. Still, they must not arbitrarily refuse to naturalize resettlement beneficiaries by discriminating them against others. Furthermore, a child of a resettlement beneficiary born on the receiving country's territory has the "*right to acquire a nationality*" under Art 7 CRC. If no other citizenship comes into consideration, the child would most likely acquire the nationality of the receiving country.

3.3.7 Preliminary conclusion

The analysis of the outlined rights in the respective human rights treaties and the Refugee Convention demonstrated that receiving countries must comply with a firm set of obligations when engaging in resettlement operations.

First, when receiving countries select resettlement beneficiaries on foreign territory, they should consider the principle of *non-refoulement*. There can be exceptional situations where potential resettlement beneficiaries are under their jurisdiction – even in the course of extraterritorial action, and the analyzed implicit and explicit *non-refoulement* provisions allow

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629 See Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37* (Division of International Protection of the UNHCR 1997) Art 34 Refugee Convention, para 2 <https://www.unhcr.org/3d4ab5fb9.pdf> accessed 21 February 2021; see also UNHCR, 'Comments by the United Nations High Commissioner for Refugees (UNHCR) to the Legislative Proposal amending the Citizenship Law', Nr 52/ Lp11 (August 2012)' <https://www.refworld.org/pdfid/57ed07954.pdf> accessed 24 July 2021.

630 James C Hathaway, *The Rights of Refugees Under International Law*[2], 1219.

for interpretation in favor of extraterritorial obligations where receiving countries exercise jurisdiction.

Besides, when receiving countries implement their resettlement policies in cooperation with countries of (first) refuge, both countries must respect the right to leave of the potential resettlement beneficiaries under their jurisdiction, as this right is acknowledged as independent right in international and European human rights law. There is, however, no right to asylum under international human rights and refugee law that potential resettlement beneficiaries could effectively invoke against receiving countries.[631]

When potential resettlement beneficiaries receive a negative selection decision, they can only rely on their right to an effective review under the ICCPR and the ECHR when there is a claim of violation of rights under the respective Treaty, e.g., this concerns human rights abuses that might occur during the interview process as well as procedural guarantees. The Refugee Convention grants any refugee access to courts in all Contracting States, but refugees are limited to the judicial remedies available under the respective domestic law.

In addition, throughout the resettlement process, resettlement beneficiaries are protected from discrimination by other resettlement beneficiaries and groups of (forced) migrants under general human rights law. The Refugee Convention does not impose a general obligation to equal treatment among refugees, and also not between refugees and nationals of the receiving country.

As soon as resettlement beneficiaries arrive on the receiving country's territory, universal and European human rights treaties as well as the Refugee Convention grant certain rights and liberties that must be reflected in the reception conditions for resettlement beneficiaries on the territory of the receiving country.

Ultimately, receiving countries must not arbitrarily refuse to naturalize resettlement beneficiaries by discriminating them against others.

631 Iris G Lange and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Prnciple of Non-Refoulement' in (2021) European Constitutional Law Review, 1 (6).

3.4 Responsibility for internationally wrongful conduct in relation to resettlement policies

Receiving countries face several obligations under international and European human rights law and international refugee law towards (potential) resettlement beneficiaries. These obligations may arise outside the territory of a receiving country through the exercise of jurisdiction during selection missions or upon arrival of the selected beneficiaries on the receiving country's territory. Breaches of international obligations by receiving countries constitute internationally wrongful conduct, for which the respective country shall bear responsibility. In connection thereto, two legal questions concerning the responsibility for breaches of international law arise: First, what are the requirements to hold the prospective receiving country responsible for its internationally wrongful conduct? Second, are there circumstances where the prospective receiving country incurs responsibility for or in connection with internationally wrongful conduct of other (state) actors involved?[632]

The International Law Commission (ILC) codified rules dealing with state responsibility for internationally wrongful conduct. The so-called Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[633] lack binding effect as a treaty.[634] Nevertheless, the generalized concept of state responsibility has reached the status of customary international law.[635]

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632 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 327f.

633 See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (adopted November 2001, ARSIWA Commentary 2001) <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 21 February 2021; see also James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 45; see also Milka Dimitrovska, 'The Concept of International Responsibility of State in the International Public Law System' in (2015) 1 Journal of Liberty and International Affairs 2, 1 (2).

634 The draft has been recognized by the United Nation's General Assembly in Resolution 56/83. However, the draft itself remains only a means for determining the law but not a source of international law in the sense of Art 38 Statute of the International Court of Justice.

635 See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press 3rd ed 2020) 93; see also James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' in (2002) 96 American Journal of International Law 4, 874 (889f);

Art 1 ARSIWA introduces the essential premise that "[e]*very internationally wrongful act of a State entails the international responsibility of that State*". Accordingly, a state can be held internationally responsible for conduct that (i) is attributable to the state and (ii) constitutes a breach of an international law obligation, (iii) provided that there is no reason precluding unlawfulness.[636]

Attribution comes with conduct, which forms an umbrella term for acts and omissions.[637] A state or international organization is responsible for the conduct of its own organs or agents. Additionally, some occasions require the attribution of the conduct of organs or agents of other states, international organizations, NGOs or private actors. There are also situations of so-called dual attribution, where one single conduct is, amongst others, simultaneously attributed to a state and an international organization (see 3.4.2.1). Eventually, derivative responsibility comprises circumstances where responsibility only arises by dint of a connection with the conduct of another state (see 3.4.1) or international organization (see 3.4.2.2).[638]

The following section assesses whether and how international responsibility of a prospective receiving country can be triggered by the conduct of other states, most prominently the country of (first) refuge, international organizations such as the EU, or the UNHCR as a subsidiary organ of the UN, or other non-state actors involved in the resettlement (selection) process.

3.4.1 Responsibility for complicity with the country of (first) refuge

Given recent policy trends of externalized migration control,[639] it is not unusual that receiving countries promise resettlement but in fact prevent

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see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 (160, para 379): The ICJ referred to "*the rules of customary international law of State responsibility*".

636 See James Crawford, *State Responsibility: The General Part*, 49.

637 See Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organization and a Member State' in (2019) 6 Oslo Law Review 3, 178 (181).

638 See ibid 182.

639 See Bill Frelick, Ian M Kysel and Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' in (2016) 4 Journal on Migration and Security 4, 190-220 <https://www.hrw.org/sites/default/files/supporting_resources/jmhs.pdf> accessed 21 June 2021.

potential resettlement beneficiaries from leaving countries of (first) refuge, inflicting […] on their rights, most prominently (but not only) the right to leave. As the implementation of such policies is generally based on close cooperation with selected countries of (first) refuge, they may be complicit in internationally wrongful conduct of those countries of (first) refuge. To that effect, the ARSIWA cover instances of derivative responsibility, i.e. situations where states can be held responsible for their contribution to a breach of international law. Such contribution may take the form of aid or assistance (Art 16 ARSIWA), direction and control (Art 17 ARSIWA) or coercion of another state (Art 18 ARSIWA).

When it comes to cooperation for the purpose of migration control, responsibility triggered by aid or assistance demands special attention.[640] According to Art 16 ARSIWA, a state is internationally responsible if it[641]

> *aids or assists another State in the commission of an internationally wrongful act under the condition that it has (a) knowledge of the circumstances of the internationally wrongful act and (b) the act would be internationally wrongful if committed by that same state*.

The application of Art 16 ARSIWA in the context of resettlement operations induces, for example, international responsibility of the country of (first) refuge for a human rights violation, while the prospective receiving country incurs responsibility for its aid or assistance provided.[642]

First, the applicability of this Article depends on whether the conduct of the country of (first) refuge amounts to internationally wrongful conduct. As mentioned above, such internationally wrongful conduct may consist of a violation of the right to leave (see 3.3.2); but also other rights may be violated, for instance, the right to privacy (Art 17 ICCPR)[643], when au-

640 See Fabiane Baxewanos in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 202.

641 Ibid 202.

642 See Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative Migration Control' in (2020) Human Rights Law Review, 328.

643 In its General Comment No 16, the Human Rights Committee set out the requirement under Art 17 ICCPR that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*; see OHCHR, 'General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation', UN Doc HRI/GEN/1/Rev9 (Vol I) (8 April 1988) para 8 <www.refworld.org/docid/453883f922.html> accessed 21 June 2021.

thorities of countries of (first) refuge track and/or collect data of migrants, sharing them without consent. Notably, the right to privacy is also a particular issue in the course of collaboration between receiving countries and the UNHCR, which is dealt with in 3.4.2.

Second, the prospective receiving country must have provided aid or assistance to the country of (first) refuge. In this context, the ARSIWA Commentary mentions, amongst others, providing an essential facility, or financing the activity in question.[644] *Baxewanos* qualified acts such as "*advice, sponsoring police training, funding detention centers or providing surveillance equipment to third states*" as aid or assistance under Art 16 ARSIWA.[645]

In addition, a causal link must exist between the internationally wrongful conduct committed by the country of (first) refuge and the aid or assistance from the prospective receiving country. Prospective receiving countries indeed support countries of (first) refuge, among others, with surveillance equipment to prevent migrants from leaving the latter. For example, Spain "*provides equipment and training to partner states for border surveillance and enforcement, including the donation of seven patrol boats to Senegal and Mauritania*"[646] for the purpose of impeding irregular migration. In such cases, it must be shown that first, the country of (first) refuge violates, e.g. the right to leave by deterring the migrants, and second, that this breach is causally linked to the equipment and training provided by the prospective receiving country.

Essentially, Art 16 ARSIWA requires "*knowledge of the circumstances of the internationally wrongful act*", meaning that the assisting state must "*be aware of the circumstances making the conduct of the assisted State internationally wrongful*".[647] In order to prove the wrongful intent of a prospective receiving country, it must be shown that this country had actual or near-certain[648] knowledge that the assistance will be used for unlawful purpose

644 See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (ARSIWA Commentary 2001) Art 16 ARSIWA, para 1.

645 See Fabiane Baxewanos in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 202.

646 Nikolas Feith Tan in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law*, 173.

647 See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (ARSIWA Commentary 2001) Art 16 ARSIWA, para 4.

648 See James Crawford, *State Responsibility: The General Part*, 408.

by the country of (first) refuge.[649] While the sufficiency of constructive knowledge ('should have known') has remained contested,[650] the knowledge threshold under Art 16 ARSIWA can be met in situations of 'willful blindness', i.e. the "*deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality*".[651] The presumption that an assisting state is turning a blind eye may strengthen over time if the breach continues and information becomes widespread.[652] If a receiving country takes deliberate action to initiate and enter into arrangements with a country of (first) refuge, and conducts eligibility determination and vetting procedures there, valid arguments exist in favor of 'actual' knowledge about the circumstances in that country of (first) refuge. At least when officials are on site, the receiving country cannot simply turn a blind eye and deny its actual knowledge of ongoing human rights violations.

Eventually, Art 16 lit b ARSIWA demands that the main conduct would be internationally wrongful if committed by the prospective receiving country. The vast majority of states are bound by the rights established under the ICCPR, including, for instance, the above-mentioned right to leave, whereby the concrete obligations of a respective state must still be assessed in the particular case. Generally speaking, regarding the rights

649 See Harriet Moynihan, 'Aiding or Assisting: Challenges in Armed Conflict' (November 2016) 15 <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> accessed 27 August 2022; this might include knowledge about the circumstances and consequences of facilitating the commission of the temporary hosting country's wrongful act, see Maïté Fernandez, 'Multi-stakeholder operations of border control coordinated at the EU level and the allocation of international responsibilities' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control* (Routledge 2016) 238 (254f).

650 See Harriet Moynihan, 'Aiding or Assisting: Challenges in Armed Conflict' (November 2016) 13f; a different approach is taken by Gammeltoft-Hansen and Hathaway, who relied on constructive knowledge, namely situations where a state "*knew or should have known*" about its contribution to an internationally wrongful conduct; see Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in World of Cooperative Deterrence' in (2015) 53 Columbia Journal of Transnational Law 2, 235 (280).

651 Harriet Moynihan, 'Aiding or Assisting: Challenges in Armed Conflict' (November 2016) 14. See also Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 54.

652 See Harriet Moynihan, 'Aiding or Assisting: Challenges in Armed Conflict' (November 2016) 14.

covered by major human rights treaties, such as the ICCPR, this requirement is likely fulfilled.

As a result, migration control practices, which are often linked to unfulfilled resettlement promises, may lead to situations falling under the scope of Art 16 ARSIWA. On the basis of Art 16 ARSIWA, a prospective receiving country can be held responsible in connection with internationally wrongful conduct of a country of (first) refuge. This is subject to a certain knowledge threshold about the occurrence of the wrongful conduct[653] of the country of (first) refuge. In this regard, it is hard to prove that a receiving country *knowingly* assisted the progress of a human rights violation. A receiving country pursuing such policy to control migratory influx could claim that the aid or assistance was intended to stabilize the situation on-site or support the regular migration system rather than to facilitate e.g., violations of the migrants' right to leave.

One specific example is human rights violations committed by the Libyan coast guards. Notably, EU collaboration with Libya has been part of the EU's external migration policy, based on the idea of strengthening external border control through the help of third countries and offering resettlement to the EU as an incentive (see 4.2.7). Instead of increasing their resettlement commitment, EUMS, in this case primarily Italy, have rendered support to the Libyan coast guards preventing departures and intercepting people.[654] In terms of knowledge, *Moreno-Lax* pointed to the fact that malpractices of the Libyan coast guards were widely publicized (e.g. in EUNAVOR MED reports) when Italy donated patrol boats to the Libyan coast guards.[655]

What is more, derivative responsibility in connection with the conduct of another state could be relevant where the refugee resettlement selection process, including security screening and health checks, cannot be conducted in the country of (first) refuge. In such cases, the receiving country may need to reach out to another third country to conduct the necessary interviews and checks there. For example, this is pertinent in the context of Afghan mass displacement, namely US vetting procedures in so-called

653 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (ARSIWA Commentary 2001) Art 16 ARSIWA, para 5.

654 Amnesty International, 'Refugee Rights in 2018' (2018) <https://www.amnesty.org/en/latest/research/2018/12/rights-today-2018-refugees/> accessed 20 June 2021.

655 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' in (2020) German Law Journal, 385 (393).

'lily-pad countries' and other third countries.[656] Already earlier in the past, the US established an agreement with the Austrian government to host Iranian refugees destined for the US while they undergo the necessary procedures.[657] Assuming that the US exercises jurisdiction and violates fundamental rights (e.g. right to privacy in the context of data protection or misconduct by US officials) during the vetting processes on foreign territory, third countries who knowingly provide assistance, e.g. technical support or facilities, could incur derivative responsibility in connection with the violation of fundamental rights by the US.

3.4.2 Responsibility for and in connection with international organizations

Besides the cooperation between prospective receiving countries and countries of (first) refuge, international organizations, most prominently the EU, and the UNHCR as a subsidiary organ of the UN, act as intermediaries. The EU and the UNHCR are involved in the resettlement (selection) process whenever prospective receiving countries transfer specific powers to them.[658] Such empowerment can lead to situations where international organizations exercise those powers "*in violation of human rights that Member States have agreed to uphold*".[659] International organizations have a separate international legal personality for the purpose of exercising the transferred powers. As a result, the acts of international organizations are in principle not attributable to their member states.[660] While prospective receiving countries and countries of (first) refuge are bound by human rights treaties and by customary international law, international organizations may not face the same obligations. Most human rights treaties even do not contain a provision allowing international organizations to become

656 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, 17-46.

657 See Molli Fee, 'Pre-resettlement experiences: Iranians in Vienna' in (2017) 54 Forced Migration Review, 23.

658 See Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control*, 188.

659 Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 262.

660 See ibid 262.

contracting parties. Nonetheless, there are a few exceptions to this general rule. For example, the EU ratified the UNCRPD.[661] Furthermore, the Council of Europe Convention on preventing and combating violence against women (Istanbul Convention)[662] provides for EU accession.[663] Besides, the so far failed attempts of an EU accession to the ECHR,[664] which originally intended only states as parties, deserve mention in this context.[665]

Beyond treaty law, international organizations face international obligations, namely under customary international law and derived from peremptory human rights.

First, customary international law can be extended to international organizations.[666] The obligation of an international organization to comply with customary international law rules relevant to the fulfilment of its tasks implicitly derives from the organization's founding treaty. It can be assumed that the member states did not want to create an entity that is outside the international legal order. In addition, the international organization itself creates customary international law through its actions.[667]

Second, *Kälin* and *Künzli* deduced from Art 53 VCLT[668] that international organizations are prohibited from violating peremptory human

661 See Council Decision 2010/48 (EC) concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35-61.

662 See Council of Europe Convention on preventing and combating violence against women and domestic violence (entered into force 1 August 2014) CETS No 210.

663 The EU has already made attempts with regards to EU's accession to the Istanbul Convention, see Sara de Vido, 'The ratification of the Council of Europe Istanbul Convention by the EU: A step forward in the protection of women from violence in the European legal system' in (2017) 9 European Journal of Legal Studies 2, 69 (69ff).

664 See Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014] EU:C:2014:2454.

665 See Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 78.

666 See Albert Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen' in (1977) 37 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 107 (120).

667 Kirsten Schmalenbach and Christoph Schreuer, 'Die Internationalen Organisationen' in August Reinisch (ed) *Österreichisches Handbuch des Völkerrechts* I (Manz 5th ed 2013) 220f, para 947.

668 "*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a*

rights. Accordingly, if the founding treaty of the international organization conflicts with peremptory norms of international law, it becomes void. This means that "*the charter of an international organization cannot under any circumstances explicitly or implicitly permit its organs or agents to disregard peremptory human rights obligations*".[669]

As a matter of fact, the EU Treaties (see Art 3 para 5, Arts 6 and 21 Treaty on European Union, TEU[670]) and the EU Charter, as well as the UN Charter,[671] expressly proclaim commitment to human rights. Consequently, it would not only be in conflict with Art 53 VCLT, but also fundamentally contradictory in itself if these Treaties authorized the EU or the UNHCR to permit their organs or agents to disrespect human rights with *jus cogens* status. As outlined above (see 3.3.1), *jus cogens* status can be assumed for the principle of *non-refoulement*, at least with regard to torture and inhuman or degrading treatment. In addition, several human rights recognized as customary international law[672] are relevant to the EU and/or the UNHCR in fulfilling their tasks under the respective establishing treaties, and are thus binding upon them. To that effect, the EU and/or the UNHCR must bear responsibility for violations of human rights.

The Articles on Responsibility of International Organizations (ARIO)[673], namely Arts 6 to 9 therein, provide a framework for holding an international organization responsible for the conduct of its organs or agents. Specifically, Art 6 para 1 ARIO states that "[t]*he conduct of an organ or agent of an international organization in the performance of functions of that organ*

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peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

669 Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 79.

670 See Consolidated version of the Treaty on European Union [2012] OJ C326/13-390.

671 According to Art 1 para 3 UN Charter, one of the purposes of the United Nations is "[t]*o achieve international co-operation in* […] *promoting and encouraging respect for human rights and for fundamental freedoms for all* […]".

672 See e.g., Michael Wood, 'Customary international law and human rights' (Working Paper EUI 2016) <https://cadmus.eui.eu/handle/1814/44445> accessed 10 July 2021.

673 See ILC, Draft Articles on Responsibility of International Organizations (adopted 2011) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf> accessed 21 February 2021; see also Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 270.

or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization".

In terms of EU involvement in EUMS' resettlement operations, the staff of EU agencies constitute relevant agents whose conduct is attributable to the EU (for a discussion on accountability mechanisms for EU agencies see 4.3.3).

Regarding UNHCR's role in the resettlement (selection) process, UNHCR's staff and the staff of its implementing partners serve as potential agents. Especially, the attribution of the latter to the UNHCR has proven to be a controversial issue.[674] For instance, *Janmyr* raised arguments in favor of attributing the staff of implementing partners to the UNHCR.[675] She argued that considering the staff of UNHCR's implementing partners as agents of the UNHCR was in line with the core understanding of 'agent' under the ARIO. The meaning of agent under the ARIO can in turn be deduced from the ICJ[676] defining 'agent' as follows:[677]

> [I]*n the most liberal sense, that is to say, any person who, whether paid official or not, and whether permanently employed or not has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.*

The UNHCR usually charges its partner NGOs to perform specific functions, which suggests considering the staff of UNHCR's partner NGOs as agents of the UNHCR. Strikingly, many agreements between the UNHCR and partner NGOs do not consider the partner as agent or staff member of the UNHCR.[678] Nevertheless, in 2009, Special Rapporteur *Gaja* highlighted[679] that exclusion clauses between subcontractors, similar to those between the UNHCR and partner NGOs, did not dispose of

674 See Maja Janmyr, 'Advancing UNHCR accountability through the Law of International Responsibility' in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability* (Routledge 2016) 46 (53).

675 See ibid 47.

676 See ibid 53f.

677 *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 (177).

678 See Maja Janmyr in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability*, 55.

679 See ILC, 'Seventh report on the responsibility of international organizations (prepared by G Gaja, Special Rapporteur)', UN Doc A CN4/610 (2009) para 23 <https://legal.un.org/ilc/documentation/english/a_cn4_610.pdf> accessed 21 February 2021.

the question of attribution under international law.[680] Consequently, it appears plausible to not only consider UNHCR's staff but also the staff of partner NGOs as agents of the UNHCR. As a result, the UNHCR should be held responsible for the conduct of these agents. As *Gaja* pointed out, such agents may act independently, which, however, does not rule out attribution if a factual link exists.[681] To that end, Art 15 ARIO refers to effective control, namely direction and control (see 3.4.3 for elaborations on effective control under Art 8 ARSIWA).

Human rights bodies as well as scholars have sought to "*design a regime of international responsibility that would allow for the transfer of powers to international organizations without* […] *reduced protection of human rights*".[682] Importantly, the ECtHR emphasized that Contracting States may not simply evade their obligations to respect Convention rights by transferring powers to international organizations.[683] Nonetheless, international organizations have a separate legal personality and the so-called veil piercing, i.e. holding a state responsible for any violations merely on the basis of its membership of the international organization, generally lacks support in international law;[684] even in the specific contextual framework of the ARIO.[685] This gives rise to the question whether there are particular situa-

680 See Maja Janmyr in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability*, 55.

681 See Georgio Gaja, 'Articles on the Responsibility of International Organizations' (9 December 2011) <https://legal.un.org/avl/ha/ario/ario.html> accessed 21 June 2021.

682 Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 262; see Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, 865ff.

683 See *Matthews v the United Kingdom* App No 24833/94 (ECtHR 18 February 1999); see also *Bosphorus Hava Yollari Turizm ve Tizaret Anonim Şirketi v Ireland* App No 45036/98 (ECtHR 30 June 2004) paras 150-158; see also Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection*, 83; the ECtHR stated in *Beer and Regan v Germany* App No 28934/95 (ECtHR 18 February 1999) para 59, that the decisive factor on whether to grant international organizations immunity from a Member State's jurisdiction was whether the applicants had reasonable means to protect their rights under the ECHR.

684 "*By virtue of their separate legal personality, the basic position under international law is that the acts of international organizations do not without more give rise to responsibility on the part of its members*", James Crawford, *State Responsibility: The General Part*, 189.

685 Just to name an example in the ARIO: Even if Art 62 ARIO foresees international responsibility of a member state for the international wrongful contact of an international organization, it only envisages such responsibility if the member state has expressly accepted responsibility for a particular course of conduct or

tions where the conduct of an international organization's agent provokes the responsibility of (member) states. To frame it in the resettlement context: for instance, can a prospective receiving country under certain circumstances be held responsible for or due to the conduct of UNHCR's staff (or staff of its partner NGOs) during resettlement pre-selection?

3.4.2.1 Dual attribution

The ARSIWA and the ARIO do not exclude dual attribution of the conduct of an international organization's agent to the international organization and to a state. The ECtHR also acknowledged dual attribution in *Al-Jedda v the United Kingdom*.[686]

In the resettlement pre-selection process, dual attribution occurs when an agent or organ of an international organization is simultaneously instructed by a state; for example, when a prospective receiving country instructs UNHCR's staff or staff of UNHCR's partner NGOs. *Johansen* precisely addressed this constellation:[687]

> *A hypothetical example* […] *could be that an UNHCR agent handling resettlement applications from refugees is recruited as spy by a State. The agent in question then copies and transfers sensitive personal data about the refugees whose applications he handles to that State. This irregular collection of personal data is attributable to the UNHCR through organic link, since the agent is acting under apparent authority, while exercising UNHCR*

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led the injured party to rely on its responsibility; see Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organization and a Member State' in (2019) 6 Oslo Law Review 3, 196.

686 Although the ECtHR remained reluctant to confirm the possibility of dual attribution in *Behrami and Behrami v France, and Saramati v France, Germany and Norway* App No 71412/01 and 78166/01 (ECtHR 2 May 2007), it adapted its view in favor of the concept of dual attribution in *Al-Jedda v the United Kingdom* App No 27021/08 (ECtHR 7 July 2011); "*The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations*", ibid para 80; see also Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organization and a Member State' in (2019) 6 Oslo Law Review 3, 188f.

687 See Stian Øby Johansen, 'Dual Attribution of Conduct to both an International Organization and a Member State' in (2019) 6 Oslo Law Review 3, 191.

> *functions. At the same time, this irregular data collection is attributable to the State, which exercises effective control over the agent performing it.*

The relevant rule covering such circumstances of dual attribution is Art 8 ARSIWA. It attributes the conduct of international organizations' agents to the prospective receiving country if that country exercises effective control over the agent, as further explained in the broader context of the attribution of conduct of (other) non-state actors and private actors (see 3.4.3).

3.4.2.2 Derivative responsibility

The ARIO address shared[688] responsibility of states in connection with the conduct of international organizations, i.e. the so-called 'derivative responsibility'. The rules under the ARIO deal with derivative responsibility where the conduct of an international organization's agent directly causes the injury, and the state is responsible for its own wrongful conduct due to a connection with the agent's wrongful conduct attributed to the international organization. The ARIO also provide rules for reverse situations where the direct injury is attributed to the state and the international organization is responsible because of a connection with the state's wrongful conduct (Arts 14, 15, 16 and 17 ARIO).[689]

Coming back to those instances of derivative responsibility where the direct injury is attributed to the international organization, Art 58 ARIO extends the above-mentioned Art 16 ARSIWA to international organizations. Accordingly, the state may be held internationally responsible by virtue of aid or assistance in the internationally wrongful conduct of an international organization. It follows that Art 58 ARIO constitutes the pertinent legal basis to hold prospective receiving countries or countries of (first) refuge responsible in connection with internationally wrongful conduct of the UNHCR.

Prospective receiving countries as well as countries of (first) refuge assist the UNHCR in manifold ways. Specifically, they cooperate with the UNHCR for the purpose of fulfilling its mandate (see 2.5.2.1). The *Resettlement Handbook* states that governments of receiving countries "*have the essential role of establishing and maintaining effective resettlement programmes*

688 See ibid 192.
689 See ibid 195.

[…]".[690] Along these lines, the UNHCR constantly exchanges and collaborates with governments of prospective receiving countries regarding the implementation of particular features of national resettlement programs, including selection criteria and preferences.[691]

A noteworthy example in this context is that countries have cooperated with the UNHCR to facilitate the resettlement of particular populations, such as Syrians or Bhutanese. To that effect, state-led 'core' and 'contact' groups were created as a result of the WGR and ATCR forums. While core groups are advocacy-, policy- and operations-oriented, contact groups are mainly operationally focused.[692] Thus, state-led contact groups are in charge of operational support, such as providing technical equipment.[693] This means that derivative responsibility of states can result from aid and assistance provided by their contact groups to the UNHCR.

The inverse case is certainly also practically relevant in the context of cooperation between core groups and the UNHCR, i.e. the UNHCR provides aid and assistance through operational support, incurring derivative responsibility in connection with a direct injury committed by state agents.

Furthermore, it is particularly important to highlight the role of the UNHCR in collecting and distributing data, including highly sensitive information about potential resettlement beneficiaries provided to receiving countries (see 5.2.3.8). The collecting and sharing of data can result in violations of the right to privacy under Art 17 ICCPR (and also other rights). Data could be stolen from a laptop or other device and then sold to human traffickers; it could be shared with home countries, leading to

690 See UNHCR, *Resettlement Handbook* (revised ed July 2011) Chapter XIII, 386.

691 "*It is important for UNHCR field offices to work closely with* […] *diplomatic representations* […] *of Governments to understand the specific and unique features of each country's resettlement programme*", ibid 393. See also Natalie Welfens and Yasemin Bekyol, 'The Politics of Vulnerability in Refugee Admissions Under the EU-Turkey Statement' in (2021) Frontiers in Political Science, 5 <https://www.frontiersin.org/articles/10.3389/fpos.2021.622921/full> accessed 13 July 2022: "*To an even greater extent UNHCR needs to address and anticipate admission states' selection priorities and practices, in particular the growing importance of security and integration-related criteria.* […] *Although UNHCR's frontline staff are well aware that such requirements further marginalize those wh are vulnerable, the fact that admission states have the final say in the process forces UNHCR to incorporate these aspects in its own assessment.*"

692 See Carol Batchelor and Edwina O'Shea, 'The internationalisation of resettlement: lessons from Syria and Bhutan' in (2017) 54 Forced Migration Review, 9.

693 See ibid 9.

the arrest of family members who still find themselves in those countries. Moreover, one could imagine a young refugee being forced into a sexual relationship due to which he or she contracts HIV. His or her sensitive personal information is likely transferred to receiving countries because of health data-sharing requirements. However, if the same information gets into the hands of the refugee's tribe in his or her home country, this could even lead to death of the refugee at the own hands of that tribe.

Next, it should not go unmentioned that – besides the cooperation with receiving countries – cooperation with countries of (first) refuge is requisite for authorizing "*the entry of interviewing and selection missions, and to facilitate refugee departures including the issuance of exit visas*".[694] For example, if a country of (first) refuge provides aid or assistance by allocating facilities and/or technical equipment to enable UNHCR's conduct of pre-selection interviews with prospective resettlement beneficiaries, derivative responsibility could be triggered. In exceptional cases, countries of (first) refuge themselves pre-identify potential resettlement beneficiaries and refer them to the UNHCR.[695] For example, Turkish migration authorities pursue this practice.[696] As in a regular selection process, such pre-selection may result in various human rights violations, triggering derivative responsibility of the UNHCR, especially if the UNHCR keeps on cooperating with those authorities by rendering some form of assistance, despite the knowledge of malpractices.

Overall, as addressed with regard to derivative responsibility in the context of cooperation between receiving countries and countries of (first) refuge, the knowledge criterion constitutes the main obstacle for the establishment of derivative responsibility. The idea that a receiving country or a country of (first) refuge assists the UNHCR, thereby knowingly facilitating human rights violations (or vice versa), is apparently far-fetched. Nevertheless, particularly in the course of data collection and sharing, problematic situations could arise. Receiving countries heavily rely on and assist in the collection and distribution of data through the UNHCR, and vice versa, the UNHCR relies on pre-selection through countries of (first) refuge like Turkey; if any of those actors renders assistance to its counterpart,

694 See UNHCR, *Resettlement Handbook* (revised ed July 2011) 385.

695 See Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 11.

696 See Natalie Welfens and Yasemin Bekyol, 'The Politics of Vulnerability in Refugee Admissions Under the EU-Turkey Statement' in (2021) Frontiers in Political Science, 4.

albeit being aware of human rights violations, plausible constellations of derivative responsibility arise. Besides the UNHCR, IOM regularly cooperates with receiving countries, for instance Germany, by conducting health checks,[697] which also involves the collection and distribution of sensitive data and might lead to similar scenarios.

Lastly, Art 61 para 1 ARIO contemplates situations where a state, as member of an international organization, transfers competence related to one of its international obligations to an international organization. The state may do so to circumvent that obligation, thereby making the international organization commit an internationally wrongful act.[698] Therefore, Art 61 ARIO stipulates that in such circumstances, the state incurs responsibility, irrespective of "*whether or not the act in question is internationally wrongful for the international organization*". While member states of an international organization are not responsible under Art 61 ARIO when the international organization's internationally wrongful conduct constitutes an unintended result of the state's transfer of competence, the scope of this Article extends beyond situations where member states of an international organization abuse their rights.[699]

Indeed, it remains difficult to prove that prospective receiving countries abuse protection obligations by outsourcing resettlement pre-selection to the UNHCR. Procedural weaknesses in the course of resettlement pre-selection by the UNHCR arguably do not count as a result intended by receiving countries. Even though UNHCR's practice, including its procedural flaws, has met *acquiescence* among receiving countries, it cannot be inferred that procedural flaws are intended. Still, an assessment of the concrete relationship between the specific receiving country and the UNHCR as well as of the individual case is necessary to determine the applicability of Art 61 ARIO.

697 See ibid 9.

698 See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, 865.

699 See ILC, 'Draft Articles on the Responsibility of International Organizations, with commentaries' (ARIO Commentary 2011) Art 61 ARIO, para 2 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf> accessed 27 March 2021.

3.4.3 Attribution of conduct of other non-state actors and private actors

In addition to agents of international organizations, other non-state actors, namely NGOs and private actors, are involved in the resettlement (selection) process. Their conduct can be attributed to the (prospective) receiving country if a special relationship exists. Such relationship is either derived from legal or governmental authority[700] or from effective control.[701]

The term 'governmental authority' is not explicitly defined in the ARSIWA. Nonetheless, the relevant provision in this regard, Art 5 ARSIWA, indicates requirements for the attribution of a non-state actor exercising governmental authority. It stipulates that

> [t]*he conduct of a person or entity which is not an organ of the State* […] *but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*

The ARSIWA Commentary supports the view that attribution pursuant to Art 5 ARSIWA depends on the precondition of "*empowerment by internal law to exercise governmental authority*".[702] Art 5 ARSIWA does not require a demonstration that a private agent acted on state instructions. It is sufficient that the private agent acts in the "*capacity and pursuit of the governmental functions conferred*".[703] In this light, Art 5 ARSIWA "*was specifically included to take account of the growing number of situations in which governmental functions are outsourced or privatized* […]. *In such instances, otherwise*

700 See Arts 4 to 7 ARSIWA.

701 See Arts 8 to 11 ARSIWA; "[W]*hen the relationship between the subject of international law and the acting entity is not well established by law, or when the apparent legal status of an entity is questionable, international law relies on the notion of control as the basis of a factual link between the subject and the acting entity*". Maïté Fernandez in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 247; see also Fabiane Baxewanos in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 202.

702 See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (ARSIWA Commentary 2001) Art 5 ARSIWA, para 7; see also Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control*, 180.

703 Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control*, 184.

private actors may be considered as 'para-statal entities' to the extent that they are empowered to exercise specified elements of governmental authority".[704]

Since receiving countries have scarcely incorporated resettlement in their domestic laws, cooperation with NGOs and/or private actors in the resettlement process is regularly not based on any legally sound empowerment. Hence, Art 5 ARSIWA cannot be generally invoked. Notwithstanding, in the case of the US, cooperation with the Volags is expressly anchored in the Refugee Act (see 2.5.3.1). In that case, a special relationship under Art 5 ARSIWA, namely empowerment by domestic law to exercise governmental authority, can be inferred. For the Volags, the empowerment comprises, among other things, reception and placement of core services, and the distribution of funds to refugees (see 2.5.3.1).

Even without conferral of governmental authority by internal law, attribution of a cooperating NGO's or private actor's conduct to a prospective receiving country can arise from the exercise of effective control by this country under Art 8 ARSIWA. This Article states that "[t]*he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*".

Hobe referred to Art 8 ARSIWA as a "*possibility for achieving NGO accountability*"[705] by attributing the conduct of NGOs to states.[706] Instead of a *de jure* relationship, Art 8 ARSIWA "*depends on* […] *a 'real link' or the de facto power exercised by a state over the private actor in question*".[707] Such *de facto* power or effective control arises (i) where a specific conduct is in fact *authorized* by a state or (ii) where private agents act under the *direction or control* of a state.[708] Concerning authorization, delegation must not be carried out on the basis of national law but "*some degree of formalized agreement or pre-existing authority must be shown in regard to the specific conduct carried out*".[709] As for direction or control, the ICJ set a rather

704 Ibid 180.
705 Stephan Hobe, 'Non-Governmental Organizations' (MPIL, June 2019) para 55.
706 See ibid para 55; see also Fabiane Baxewanos in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 202.
707 Thomas Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control*, 186.
708 See ibid 186.
709 Ibid 187.

high threshold in the *Nicaragua* case,[710] i.e. the requirement of a specific relation between the control and the action or task leading to an unlawful act.

In practice, EUMS closely cooperate with NGOs in the resettlement process; they do so (indirectly) through external referrals as a basis for the selection process (see 5.2), and also directly for the purpose of departure preparation, as well as pre-departure and post-arrival orientation (see 5.3.1); additionally, private actors may be involved in security and health checks, which could trigger responsibility under Art 8 ARSIWA. It is however difficult to argue that the control of a receiving EUMS is directly related to the specific action of an NGO or a private actor leading to a human rights violation in the course of the resettlement process. Ultimately, the applicability of Art 8 ARSIWA depends on the factual circumstances.

3.4.4 Preliminary conclusion

The analysis revealed that the ARSIWA and the ARIO provide means for the attribution of responsibility for or in connection with human rights violations throughout the resettlement process in the triangular relationship between receiving countries, countries of (first) refuge and the UNHCR.

In principle, Art 16 ARSIWA could be invoked to hold a prospective receiving country responsible in situations where a human rights violation of a country of (first) refuge occurs in connection with the aid or assistance of the prospective receiving country. Nevertheless, a closer observation reveals that certain requirements, in particular the knowledge threshold for the receiving country, are hard to establish.

Furthermore, responsibility of a receiving country in the resettlement pre-selection process could be based on dual attribution when an agent of the UNHCR is simultaneously instructed by a state. Art 8 ARSIWA accounts for such situations but only if the receiving country's instruction directly relates to the action of UNHCR's agent leading to the human rights violation.

What is more, cooperation between the UNHCR and prospective receiving countries as well as between the UNHCR and countries of (first) refuge entails various situations that could trigger derivative responsibility

710 See *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

under Art 58 ARIO due to aid or assistance. However, in order to invoke Art 58 ARIO, just like Art 16 ARSIWA, the knowledge requirement must be proved, and the above analysis has demonstrated how difficult it is to prove knowledge.

Ultimately, responsibility under Art 8 ARSIWA can be triggered when receiving countries cooperate with NGOs, e.g. in the course of pre-departure and post-arrival orientation. This Article only covers cases where the control of a receiving country is directly related to the action of an NGO or a private actor leading to a specific human rights violation.