6 Conclusion

The second Chapter of this monography elaborated on the concept of resettlement and revealed that resettlement constitutes a means of responsibility sharing. Yet, a binding international resettlement mechanism has not evolved. Also, at the EU level, a binding obligation to conduct resettlement does not exist and is not provided for in the Proposal for a Union Resettlement Framework Regulation.

There is no binding definition of resettlement under international law. Despite conceptualization efforts of the UNHCR, its resettlement definition has not reached the status of costumery international law. The Commission has defined resettlement at the EU level. Only lately, in the 2021 AMIF regulation, an explicit reference to resettlement as durable solution can be found. The US understanding of resettlement reflects the idea of providing a durable solution to refugees. The firm resettlement bar takes account of the conditions in the country of (first) refuge and makes eligibility for resettlement dependent on whether firm resettlement has already been provided or is accessible in that country.

History confirms that resettlement has been a vital tool in various contexts where countries of (first) refuge were unable to offer firm resettlement to refugees (e.g. Austria in the course of the influx of Hungarian refugees and Thailand with regard to Vietnamese refugees). It also derives from history that global resettlement efforts have depended on the willingness of prospective receiving countries to resettle. Indeed, US and European policy-makers have pursued similar motives when engaging in resettlement. Besides the humanitarian purpose of resettlement, foreign policy, security and economic interests have impacted their decisions. In this light, critics pointed to the discrepancy between a humanitarian measure and a migration control mechanism. When resettlement entails controlling (the entry of) people and discriminating against particular groups, it not only departs from its humanitarian nature, but also entails potential human rights violations. It is up to the states as the main actors in the resettlement process as well as the UNHCR and other non-state actors to uphold the humanitarian nature of resettlement. This predominantly applies to states facing certain responsibilities under international law towards resettlement beneficiaries.

The first major legal question underlying the third Chapter of this monography referred to the international obligations that must be respected in the course of (EU) resettlement. When states engage in resettlement, they must consider obligations under universal and regional human rights treaties as well as the Refugee Convention and its Protocol. With regards to universal human rights treaties and the ECHR, the analysis revealed that the application of these treaties can exceptionally be triggered by the exercises of jurisdiction in the course of targeted extraterritorial actions during selection missions, namely when a receiving country acts through its state officials and implements its resettlement policy on foreign territory. The basis of the jurisdictional link thereby lies in the control over the targeted actions of policy implementation, and is established only with regards to those rights affected by the specific actions in furtherance of the respective policy and/or application of the domestic law of the receiving country.

As opposed to human rights treaties, most rights under the Refugee Convention are territorially limited and even require a certain level of attachment with the receiving country. Nonetheless, Art 3 (non-discrimination) and Art 33 (*non-refoulement*) Refugee Convention apply extraterritorially if the threshold to establish extraterritorial jurisdiction as applied in human rights treaties is met.

If jurisdiction is established, substantive rights under the respective treaties must be granted to resettlement beneficiaries. First, when receiving countries select resettlement beneficiaries on foreign territory, they may face extraterritorial *non-refoulement* obligations arising from implicit and explicit *non-refoulement* provisions under the CAT, ICCPR, CRC, ECHR and the Refugee Convention. Yet, effective control over *non-refoulement* rights in the course of resettlement selection will only be established in exceptional cases and the *non-refoulement* obligations are primarily left to the state on whose territory resettlement beneficiaries are located. Moreover, resettlement beneficiaries must be granted the right to leave, meaning that migration control policies of receiving countries implemented by countries of (first) refuge must not unjustifiably interfere with such right. In addition, potential resettlement beneficiaries have a right to review a negative selection decision when there is an arguable claim of violation of a right under the ICCPR and/or the ECHR. Besides, the Refugee Convention guarantees any refugee access to courts in all Contracting States. However, refugees are limited to rely on judicial remedies in the respective domestic law. Furthermore, international human rights law offers refugees protection in cases where they are discriminated against other refugees, e.g. in the resettlement selection process or with regards to the

legal status in the receiving country. However, when it comes to issues of discrimination between refugees and nationals of the receiving country, there is no comprehensive protection under international 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 postulate such treatment. Upon arrival on a receiving country's territory, reception conditions must correspond to the rights and freedoms guaranteed under general international and European human rights law as well as the Refugee Convention. Ultimately, receiving countries may not arbitrarily refuse naturalization of a resettled refugee.

When the actors involved in the resettlement process violate the outlined obligations under international law, the ARSIWA and the ARIO provide rules for the attribution of responsibility. The assessment showed that in the context of the resettlement process, certain requirements for attribution, especially the knowledge threshold for receiving countries to establish derivative responsibility due to aid or assistance, are difficult to prove.

The identified pertinent international obligations are also relevant under EU law. In this light, Chapter 4 dealt with the EU legal framework of resettlement. So far, EUMS have engaged in resettlement on the basis of discretionary choices. Still, Art 78 para 1 TFEU requires that EU resettlement legislation must be developed and interpreted in conformity with international refugee law as well as with pertinent international and European human rights. In addition, the principle of solidarity and responsibility sharing (Art 80 TFEU) as well as the principle of consistency (Art 21 para 3 TEU and Art 7 TFEU) apply when regulating and implementing EU resettlement. The relevant rules of EU competence to adopt legislation on resettlement are Art 78 para 2 lit d and lit g TFEU. Art 78 para 2 lit d TFEU allows for the establishment of procedural rules on the resettlement process, including extraterritorial processing. However, this Article does not cover procedures on centralized EU assessment. Art 78 para 2 lit g TFEU can be used in a complementary manner for third-country support to ensure the effective application of international protection obligations.

From an institutional perspective, the EU has financially supported resettlement operations of EUMS through the AMIF. Besides, the EU has provided operational support through the EUAA and its predecessor EASO. The expanded mandate of the EUAA includes binding decision-making power, which can also be relevant for resettlement selection decisions. Conferring such power to the EUAA is covered by the criteria set out in the *Meroni* judgement. While former EASO's advisory opinions lacked

means of review, binding decisions of the EUAA can be subject to review by the CJEU under Art 263 TFEU. Moreover, the empowerment of the EUAA has introduced a shift from assisted processing to common processing.

Eventually, the Proposal for a Union Resettlement Framework Regulation reflects the strive for a permanent resettlement framework. However, similar to the EU-Turkey Statement, the Proposal shows inconsistencies regarding the principle of non-discrimination as well as potential violations of Art 31 Refugee Convention (when penalizing those who tried to enter the EU irregularly by excluding them from resettlement).

In the long term, the arguments in favor of a permanent EU resettlement framework prevail to ensure continued resettlement contributions in compliance with international law. Whether such EU framework will set out a mandatory resettlement quota remains a highly political question. The concept of flexible solidarity has been proposed as a way out of the current political deadlock on the issue of mandatory quotas. In the end, flexible solidarity does not relieve EUMS from obligations under international human rights and refugee law.

Lastly, the comparative analysis of European and US resettlement practices identified the following legal issues throughout the resettlement process that demand contemplation *de lege ferenda*. Starting with the pre-selection of potential resettlement beneficiaries, EUMS and the US rely on the UNHCR as major referral entity. In addition to ordinary UNHCR pre-selection, a future increase of cooperation with NGOs as referral entities as well as the involvement of the EUAA and civil society could open up resources for a more comprehensive and diversified case identification system. Furthermore, the harmonization of EUMS national selection practices would enable more comparable and consistent (high) procedural standards.

Concerning the scope of resettlement beneficiaries, individuals who do not qualify as Convention refugees, in particular people fleeing from war, may equally be in need for resettlement. To that effect, relying on the category of 'forced migrants' in the future scope of resettlement beneficiaries would include "*any individual who, owing to the risk of serious harm, is compelled to leave or unable to return to her or his country of origin*".[1285] In addition, IDPs, who have not been able to leave their country of origin, are relevant target groups *de lege ferenda*. So far, the US, as opposed to most

1285 Kiran Banerjee, 'Rethinking the Global Governance of International Protection' in (2018) 56 Columbia Journal of Transnational Law, 319.

EUMS, has considered IDPs for resettlement, but the groups of eligible IDPs have not been determined based on vulnerability and protection needs. If future EU legislation followed the US approach granting resettlement to IDPs, the eligibility of IDPs for resettlement to the EU would have to be based on objective criteria to avoid interference with the principle of non-discrimination under international law. Precisely, the criterion of integration potential as applied by some EUMS is problematic because it lacks objectivity and fails to account for actual humanitarian needs. It constitutes an additional requirement that has no basis in the Refugee Convention and thus could be a source of discrimination between and amongst (groups of) refugees.

For selection decisions, the comparative analysis found that instruments of appeal are scarce. This contradicts international law, where the ICCPR and the ECHR require effective means to appeal decisions when there is an arguable claim of violation of rights under the respective Treaty. Moreover, the right to good administration as stipulated in Art 41 Charter entails that potential resettlement beneficiaries must be granted the right to be heard.

Regarding pre-departure orientation programs, the comparison revealed divergent practices. Future EU regulation could contribute to evening out existing shortfalls and inequalities not only by imposing comparably high standards of pre-departure orientation, but also by ensuring that orientation programs are equally accessible to all refugees. Considerations *de lege ferenda* also need to account for continuity between pre-departure and post-arrival assistance because this kind of practice has already proven successful.

Furthermore, a lesson can be learned from the US public-private partnerships with voluntary agencies, the Volags. With their experience and network, Volags are particularly well suited to match refugee profiles with conditions in the receiving communities. Besides, Volags have supported resettlement beneficiaries arriving in the US in achieving self-sufficiency. The US focus on fast self-sufficiency and labor market entry, combined with meaningful time limits for assistance deserves to be taken into consideration when drafting future EU resettlement legislation. What is more, references in the Refugee Convention and in EU law indicate that the will of resettlement beneficiaries has legal weight in the placement process.

In addition, the analysis of the US' centralized resettlement approach pointed to shortfalls in information sharing and funding. Even if a fully centralized approach is not covered by the current EU Constitutional Framework, similar shortfalls can be avoided *de lege ferenda* in EU resettlement legislation by enhancing information sharing with the local commu-

nities as well as ensuring proactive and tailor-made funding to respond to local needs. In particular, direct EU-level funding for those municipalities willing to admit individuals in need for resettlement is necessary to enable efficient use of open capacities.

Moreover, future EU resettlement should be designed in a way to foster EUMS compliance with their obligations (*de lege lata*) concerning reception conditions upon arrival. In addition, sources of unequal treatment among and between (groups of) refugees, particularly in terms of their legal status, need to be addressed *de lege ferenda* in order to avoid violations of non-discrimination obligations under international human rights law.

Facilitated access to long-term residence status corresponds to resettlement's character as a durable solution. The failure of support from their home countries makes refugees so dependent on long-term residence status. Thus, the recommendation *de lege ferenda* consists of reducing disproportionate hurdles to access long-term residence status by harmonizing the requirements for such status in the EU within the limits established by CJEU case law, i.e. keeping examination to a basic level, refraining from excessive examination costs and accounting for the individual situation of the applicant. Still, EUMS must be afforded the opportunity to have their national values reflected in the content of language and civic integration tests.

Concerning the access to citizenship, CJEU case law determines that EUMS authorities must assess the implications of EU citizenship on the individual applicant when deciding on the granting or refusing of national citizenship of resettlement beneficiaries.

Finally, successful integration and naturalization in the receiving country imply that this country becomes the "*own country*" of a resettlement beneficiary. Ideally, the interests of the resettlement beneficiary and the receiving country become blended during the integration process. On the one hand, the resettlement beneficiary should achieve a durable solution and self-sufficiency, and on the other hand, this country gains interest in keeping the resettlement beneficiary, as he or she has become a beneficial contributor to the receiving economy and society.

Ultimately, it seems too idealistic to assume that increased EU regulatory involvement in the field of resettlement will entirely eliminate human rights abuses. Likely, there will be opposing EUMS preferring to build a fortress instead of setting a sign of solidarity with third countries and protection seekers. Nevertheless, within the scope of its competences, the

EU has regulatory power[1286] to foster human rights compliance in EU resettlement, a previously legally grey area. Supposing the claim that the EU "*affects the lives of many people in ways they perceive as profoundly unjust*"[1287] contains a grain of truth, the EU now has the chance to prove the opposite by developing an EU resettlement policy that positively affects the lives of people within and beyond its external borders.

1286 See Anu Bredford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 288.

1287 Dimitry Kochenov, Gráinne de Búrca and Andrew Williams, 'How just is the EU, or: is there a 'new' European deficit?' (*Verfassungsblog*, 10 June 2015) <https://verfassungsblog.de/how-just-is-the-eu-or-is-there-a-new-european-deficit-2/> accessed 27 March 2021.