

NEW ISSUES IN REFUGEE RESEARCH

Research Paper No. 264

Clarifying UNHCR Resettlement A few considerations from a legal perspective

Haruno Nakashiba

Email: nakashib@unhcr.org

November 2013



UNHCR
The UN Refugee Agency

Policy Development and Evaluation Service

**Policy Development and Evaluation Service
United Nations High Commissioner for Refugees
P.O. Box 2500, 1211 Geneva 2
Switzerland**

**E-mail: hqpd00@unhcr.org
Web Site: www.unhcr.org**

These papers provide a means for UNHCR staff, consultants, interns and associates, as well as external researchers, to publish the preliminary results of their research on refugee-related issues. The papers do not represent the official views of UNHCR. They are also available online under 'publications' at <www.unhcr.org>.

ISSN 1020-7473

Introduction*

The resettlement of a refugee to a third country from the country in which he or she first sought asylum is one of the three durable solutions (voluntary repatriation, local integration, and resettlement) that the office of the United Nations High Commissioner for Refugees (UNHCR) is mandated to seek, in addition to its core function of providing international protection to its persons of concern.

Academic studies on refugee resettlement under the auspices of UNHCR are largely classified into three disciplinary approaches. One is a historical approach that examines the evolution of UNHCR resettlement in the macro-political landscape¹. The second approach is anthropological and reveals the micro-politics most specifically related to the identification of refugees for resettlement². The third approach is to examine resettlement from a legal viewpoint; only a few studies have been conducted from this perspective.³

One critique of UNHCR resettlement notes that it ‘lacks a clear definition and it has been manipulated as a major tool for States to apply discretionary policies.’⁴ In particular, the resettlement of African refugees ‘has been shaped by the continuing tension between political imperatives and humanitarian obligations.’⁵ It is also noted that these three durable solutions ‘find loose support from legal instruments and are mainly derived from the regular practice of states and international organisations.’ Consequently, ‘they are embedded in a complex set of political, economic, and strategic interests that often go far beyond humanitarian concerns on refugees’ protection.’⁶

The UNHCR resettlement operates within a complex matrix of human rights, humanitarian and political considerations. It is therefore essential that we carefully analyse the two propositions that have been made: first, that there is no clear definition of resettlement, and second, that resettlement has only loose support from legal instruments. There has been no studies conducted that analysed the resettlement mechanisms in relation to legal frameworks. Close examinations of the definition and the functions of resettlement would achieve more clarity on the UNHCR resettlement.

* I wish to thank Johannes Van Der Klaauw and Yukiko Iriyama for their valuable comments on this paper. I also express my gratitude to William Lipsit for his helpful advice on the first draft.

¹ Troeller 2002, 1991; Bessa 2009.

² See for example: Sandvik 2011; Jansen 2008; Horst 2006

³ The legal approach is often subsumed in the analysis of policies, noting that they are imbedded in international and domestic landscapes. Stanvic (2011) has made one such attempt, focusing particularly on the resettlement of refugees from Africa.

⁴ Bessa 2009

⁵ Sandvik 2010

⁶ Bessa 2009

This paper aims to clarify the UNHCR resettlement first by seeking legal justification to its definition and functions (section 2). Second, by identifying the area of legal disjuncture in the resettlement process and the importance of legal support for resettlement practices to function fully as a tool for international protection (section 3) in the European context. Third, this paper proposes future areas of research focusing on legal aspects of resettlement (section 4).

The definition and functions of resettlement

The UNHCR Resettlement Handbook⁷ presents the following definition of resettlement:

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

Furthermore, resettlement serves three equally important functions⁸:

First, it is a *tool to provide international protection* and meet the special needs of individual refugees whose life, liberty, health or other fundamental rights are at risk in the country where they have sought refuge.

Second, it is a *durable solution* for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration.

Third, it can be a tangible *expression of international solidarity* and a responsibility-sharing mechanism, allowing States to help share responsibility for refugee protection, and reduce problems impacting the country of asylum.

The aforementioned definition of resettlement is indeed a description of the process and conditions of resettlement. However, the definition is simultaneously closely tied to the three functions of resettlement that are defined thereafter. Correspondingly, one way to resolve the possible ambiguity of resettlement is to analyse the definition in light of these functions of resettlement.

The definition of resettlement starts with a sentence that ‘[r]esettlement involves the selection [...] of refugees’. The ‘selection’ of refugees starts with the UNHCR identifying refugee resettlement applicants based on protection principles and therefore provides international protection which falls under the first function of resettlement. Resettlement countries then conduct their own selections. The ‘transfer of refugees from a State in which they have sought protection to a third State’ is a physical relocation process. The resettlement countries must have agreed to ‘admit them as refugees’, and this implies they must have a shared definition with the UNHCR of who is a refugee. The phrase ‘with permanent resident status’ implies that the refugees will have certain rights and protections such that ‘[protect] against *refoulement* and provides a resettled refugee and his/her family or dependants with access to

⁷ UNHCR 2001a; the handbook was then revised in 2004, and the most recent revision was made in July 2011.

⁸ *Ibid.* (emphasis added)

rights similar to those enjoyed by nationals.’ The resettlement countries must provide resettled refugees with ‘the opportunity to eventually become a naturalised citizen’ which is precisely why resettlement can be viewed as offering refugees durable solution which is the second function of resettlement. Finally (third function of resettlement), resettlement ‘can be a tangible expression of international solidarity’ and can ‘share responsibility for refugee protection, and reduce problems impacting the country of asylum’ through the relocation of refugees. The following sections closely examine these functions of resettlement.

The selection of refugees and resettlement needs – an international protection tool

Each refugee resettlement application must normally include a Resettlement Registration Form (RRF).⁹ The RRF is the primary document that the UNHCR submits to resettlement countries and it contains information on resettlement needs and refugee status of individual refugee applicants. The UNHCR Resettlement Handbook states that the information presented on the RRF must be of high quality for a resettlement application to be successful.¹⁰ The UNHCR RRF, as the main document required in resettlement cases, has a two-part structure. The first component presents the refugee applicant’s refugee claim¹¹ and the UNHCR’s conclusion on the individual’s refugee status in relation to the 1951 Refugee Convention. The second component describes the applicant’s need for resettlement which forms the basis for the UNHCR to identify refugees for resettlement.

Since the 1990s, the UNHCR has strengthened protection functions of resettlement which resulted in more streamlined identification of resettlement applicants. In particular, the UNHCR resettlement policy has developed significantly since the turn of the millennium, impacting the resettlement programme both qualitatively and quantitatively. The UNHCR has made rigorous efforts to streamline resettlement case identification as a vital protection tool and to improve its resettlement management and planning apparatus. As a result, resettlement has become a protection tool that identifies categories of individuals who are in need of resettlement as a long-term solution.

The most frequently applied UNHCR resettlement category is the Legal and/or Physical Protection Needs. The Resettlement Handbook (2011a:248) defines that a refugee’s situation must meet one or more of the following conditions to qualify for this category.

- immediate or long-term threat of *refoulement* to the country of origin or expulsion to another country from where the refugee may be *refouled*;
- threat of arbitrary arrest, detention or imprisonment;
- threat to physical safety to fundamental human rights in the country of refuge, rendering asylum untenable.

While it is the responsibility of any contracting State to provide international protection to refugees, it is widely accepted that the UNHCR has a responsibility to monitor and intervene, if necessary, to ensure that such protection is provided. The ‘immediate or long term threat of *refoulement* to the country of origin or expulsion to another country from where refugee may

⁹ The UNHCR Group Resettlement methodology is exceptional to this requirement of individual RRFs (ibid: 233)

¹⁰ UNHCR 2011a: 335

¹¹ Non-refugee stateless person could be considered for resettlement.

be refouled',¹² *i.e.*, a breach of Articles 33 and 32 of the 1951 Refugee Convention, is one of the scenarios requiring legal and physical protection. This category is inclusive of other situations in which basic human rights are at risk, contrary to, *inter alia*, Article 26 (freedom of movement), the restriction of which often results in arbitrary arrest, detention or imprisonment; Article 16 (access to courts); and threats to physical safety and basic human rights, also enshrined in the International Bill of Rights, thus rendering asylum an untenable result.

The UNHCR also identifies Survivors of Violence and/or Torture as a resettlement category based on the understanding that '[r]efugees who have survived torture or violence may have specific needs that warrant resettlement consideration because the trauma they have endured may have a serious detrimental effect on their mental and physical well-being'.¹³

If we seek to understand the detrimental effects of trauma that constitute the basis of this category, we can look to Article 1C (5) of the 1951 Refugee Convention. The 1951 Refugee Convention presents the conditions under which a refugee ceases to be a refugee. Article 1C applies to nationalities whose reasons for becoming a refugee have ceased to exist. However, Article 1C (5) excludes individuals who 'may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in [their] country of origin', commenting that 'it is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee'¹⁴. This resettlement category was established based on the understanding that repatriation is not generally an appropriate solution for survivors of severe violence and/or torture for the same reason.

In addition, the Resettlement Handbook explains that '[t]he situation in the country of asylum may not be conducive to effective support (due to, for example the inaccessibility of appropriate health care, counselling services or stability) and may compound the trauma.'¹⁵ Resettlement is therefore a viable solution for survivors of violence and/or torture because they are not to be expected to repatriate to their countries of origin and because mental health and medical support mechanisms will be more available to them in resettlement countries than in their countries of asylum.

The Women and Girls at Risk resettlement category has elements of the Physical and/or Legal Protection Needs and Survivors of Violence and/or Torture categories with an obvious emphasis on gender-specific needs.¹⁶

- she faces precarious security or physical protection threats as a result of her gender;
- she has specific needs arising from past persecution and/or traumatization;
- she faces circumstances of severe hardship resulting in exposure to exploitation and abuse, rendering asylum untenable;
- there has been a change in the social norms, customs, laws and values resulting in the

¹² UNHCR 2011a

¹³ *Ibid.* 250

¹⁴ UNHCR 2011b

¹⁵ *Ibid.* : 250

¹⁶ *Ibid.* : 265

suspension of or deviation from traditional protection and conflict resolution. This places the refugee woman or girls at such risk that it renders asylum untenable.

This category addresses the special needs of women and girls, particularly the ‘victimization and stigmatization of women survivors of rape, abuse, or other forms of violence’, which is not uncommon, particularly in traditional societies, and can require the immediate removal of the individual in question. This category also addresses domestic violence as a potential reason for resettlement because domestic violence may require a change in location for security reasons. Past persecution and trauma are one of the reasons a woman may be submitted for resettlement under this category: ‘Very often, refugee women who have already been severely traumatized in their country of origin are more vulnerable to being re-traumatized. Latent psychological effects of past torture or trauma, coupled with adverse circumstances in the country of refuge, are likely to exacerbate their state of mental health. Such women may require mental psychological or social counselling or rehabilitation or qualified medical care for any meaningful recovery, and such opportunities may not be readily available in the country of refuge.’¹⁷

While resettlement categories are based on the present situation of the refugee, one of the categories, the Lack of Foreseeable Alternative Durable Solutions, is ‘future-oriented.’¹⁸ ; ‘It balances the quality of asylum in a given country at a given moment against the prospects of enhancing asylum and prospects of local integration or voluntary repatriation within a foreseeable time frame.’¹⁹ Many indicators of whether refugees have meaningful prospects of local integration in the country of refuge are a *de facto* manifestation of the values enshrined in the 1951 Refugee Convention. According to the Resettlement Handbook,²⁰ the indications for prospects of local integration include legal, social and economic protection; issuance of work permits; the inclusion of refugees in local apprenticeship schemes; the significant number of marriages between refugees and members of the local population; and the inclusion on the part of the authorities to grant citizenship to refugees of a specific nationality/category.

As the UNHCR Resettlement Handbook states, the length of stay and prospects for integration are key elements for consideration as a resettlement submission category because ‘[p]rolonged stays in refugee camps (formally defined as five years or more) can increase the risks to which refugees may be exposed, and have negative consequences. Refugee children and adolescents born in the country of refuge that have never known any other environment (refugee camp, urban area) nor seen their homeland are particularly affected. Given their overall situation, these children/adolescents are at risk of becoming a ‘lost generation’.’²¹

The aforementioned four reasons for resettlement are most frequently applied to refugees who are identified and submitted by the UNHCR for resettlement. In 2011, 95 per cent of total resettlement case submissions by the UNHCR were made under these categories (Legal and/or Physical Protection Needs, 46 per cent; Lack of Foreseeable Alternative Durable Solutions, 21 per cent; Survivor of Violence and/or Torture, 18 per cent; and Woman and Girls at Risk, 10 per cent; 2013 GRN). Other resettlement categories such as Medical Needs, Family Reunification and Children and Adolescents at Risk address resettlement needs of

¹⁷ *Ibid.* : 267

¹⁸ *Ibid.* : 288

¹⁹ *Ibid.*

²⁰ *Ibid.* : 290-291

²¹ *Ibid.* : 291.

life-saving medical interventions, reunification of family members and special needs of minors in which resettlement may be the best solution.

In analysing resettlement in relation to the 1951 Refugee Convention, it is important to conclude that resettlement categories are intimately linked to the rights enshrined in the 1951 Refugee Convention.

The transfer of refugees from a State in which they have sought protection to a third State

The first form of resettlement was foreseen as early as the 1936 and 1938 Refugee Conventions; at that time, refugee agencies assumed that ‘there was little likelihood that refugees would be accommodated in the first asylum country’ and ‘[u]nder these arrangements, most persons recognized as refugees were instead expected to resettle in overseas states.’²² The Statute of the Office of the UNHCR, under the Chapter II, 9, stipulates the responsibility of the office that ‘[t]he High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.’

The Statute of the UNHCR refers to resettlement in its Chapter II, 8 (e) ‘Endeavour to obtain permission for refugees to transfer their assets, especially those necessary for their resettlement’ as a part of the protection functions of the High Commissioner for Refugees. The General Assembly Resolution 428 (v) of 14 December 1950 asks for Governments to cooperate with the High Commissioner of his function 2.(g) Permitting refugees to transfer their assets and especially those necessary for their resettlement.

The 1951 Refugee Convention upholds the value of resettlement and its legitimacy through Article 30 (1), States’ obligation to permit refugees to transfer assets to the country to which they have been admitted for the purpose of resettlement and (2) States to give sympathetic consideration to the preceding clause (1), and Article 31 (2) States’ obligation to allow refugees a reasonable period and all the necessary facilities to obtain admission into another country. Articles 30 and 31 assure that individual refugees are legally entitled to devise their own resettlement solutions.²³ Articles 30 and 31 of the 1951 Refugee Convention stipulate the host Government’s responsibility to assure refugees the rights to transfer assets and the time to make arrangements for the purpose of resettlement.

State agrees to admit them – as refugees – with permanent residence status... eventually become a naturalised citizen - A durable solution tool

The 1951 Refugee Convention obligations on States do not emerge until a refugee is physically in the territory. Accepting a refugee for resettlement who is still in a first country of asylum does not in theory trigger the obligations of the country of resettlement until the refugee arrives in its territory. The definition of resettlement, however, stipulates that a country that has agreed to admit refugees shall accord them a permanent resident status²⁴ and that status ensures protection against *refoulement* and provides a resettled refugee and his or her family members or dependants with access to rights similar to those enjoyed by

²² Hathaway 2005: 964

²³ *Ibid.* : 965

²⁴ UNHCR 2011a

nationals²⁵. Resettlement in this manner materializes a situation in which the refugee is transferred to a country in which he or she becomes a permanent resident²⁶ and, moreover, is eventually offered realistic legal provisions to become a naturalized citizen.²⁷ In other words, the opportunity to eventually become a naturalized citizen of the resettlement country is integral in the resettlement process.

The General Assembly Resolution 428 (V) (14 December 1950) that adopted the UNHCR Statute calls upon Governments to co-operate with the UNHCR in ‘Promoting the assimilation of refugees, especially by facilitating their naturalization’ (2. (e)).

In the European context, in particular, this States’ obligation is formulated in Article 6(4)(g) of the European Convention on Nationality, according to which each State party ‘shall facilitate in its international law the acquisition of its nationality for [...] stateless persons and recognized refugees lawfully and habitually resident on its territory.’²⁸

Article 34 of the 1951 Refugee Convention sets out the obligation of States to endeavour to offer this durable solution to refugees.

Article 34. Naturalization

The 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 changes and costs of such proceedings.

Naturalization has an important consequence with respect to the 1951 Refugee Convention. The international protection needs cease when its surrogate functions are no longer required and when the normal safeguards of national protection are secured and provided. One of the five scenarios in which such a transformation of legal status occurs is when a refugee has acquired a new nationality (Article 1C(3)). This provision does not specify where the new nationality is acquired: that is, from his/her country of first asylum or a third country. Resettlement assures a durable status to refugees; to this end, Article 34 is material.²⁹

²⁵ In particular, ‘[b]ecoming a citizen bespeaks a qualitatively distinct level of acceptance of the refugee by the host state. Once a citizen, not only is the refugee guaranteed the right to remain and to enjoy basic rights as required by the Refugee Convention and general norms of international human rights law, but he or she is entitled also to take part as an equal in the political life of the country’ (Hathaway 2005: 979).

²⁶ Some resettlement countries offer refugee status; other resettlement countries offer permanent residency to refugees when they accept refugees for resettlement.

²⁷ At this point, the distinction between convention status and subsidiary protection status appear to become blurry to the fact that the former entails residency and a more permanent status. The UNHCR concludes by reaffirming that the post-resettlement integration of both convention and subsidiary protection refugees as a durable solution is an important part of the States’ commitment under the 1951 Convention (UNHCR 2007).

²⁸ UNHCR 2007

²⁹ It should be noted, however, that Article 34 does not include non-derogable right in the way that Articles 1, 3, 4, 16(1) and 33 do. The article is not presented as a strong obligation in the sense that ‘[I]t neither requires that state parties ultimately grant their citizenship to refugees, nor that refugees accept any such offer made to them’ (Hathaway 2005, reference omitted).

While Article 34 is not a non-derogable right in the way that Articles 1, 3, 4, 16(1) and 33 are. The article is also not presented as a strong obligation in the sense that ‘[I]t neither requires that state parties ultimately grant their citizenship to refugees, nor that refugees accept any such offer made to them.’³⁰ However, in the definition of resettlement, the provision of Article 34 is worded more strongly. It in fact is a precondition for a State to accept a refugee for resettlement because it assures the durable solution function of resettlement.

International Responsibility Sharing

Frequently used resettlement needs categories such as Legal and/or Physical Protection Needs, Survivor of Violence and/or Torture, Women and Girls at Risk emerged because there are unmet needs and unsecured rights in the first countries of asylum which would be better fulfilled in resettlement countries. The Lack of Foreseeable Alternative Durable Solutions category is applied when a first country of asylum does not envision the assimilation or naturalization of refugees as a promising solution in the foreseeable future. This solution can be provided by another country, *i.e.* by a resettlement country. The 1951 Refugee Convention Article 34 ‘is predicated on a recognition that a refugee required to remain outside his or her home country should at some point benefit from a series of privileges, including political rights.’³¹

One of the functions of resettlement is international responsibility sharing in which countries have agreed on the benefit of the use of resettlement to alleviate each other’s burdens and to reduce the problems affecting the countries of first asylum.³² Thus far, the responsibility sharing mechanism has concretely involved resources and spaces required to provide asylum. In fact, the responsibility sharing function of resettlement should not be viewed as limited to physically relocating refugees and providing asylum.

It is important to note that the rights afforded to refugees by resettlement countries are often more generous than the rights offered by many of the first countries of asylum in which the majority of world’s refugees reside. The transfer of refugees under the resettlement programme fundamentally rests on the promise of better rights. Therefore, there are clear reasons to consider resettlement as realising the values enshrined in the 1951 Convention.

The justifications for the selection and transfer of refugees are rooted in the 1951 Refugee Convention and fall under the statutory responsibilities of the UNHCR, first, as an agency that provides international protection and second, as one that provides assistance with the transfer of assets and with permit applications. There is no controversy regarding these activities.

Determination of refugee status

An element of the definition of UNHCR resettlement that requires careful attention is the phrase ‘State (which has) agreed to admit them – as refugees –’. Determining who is a refugee is not as straightforward as determining the need for resettlement: while it is solely at the UNHCR’s discretion to conclude on the need for resettlement, resettlement countries

³⁰ Hathaway 2005 (reference omitted)

³¹ *Ibid.* : 981

³² UNHCR 2003a

conduct double-screening to determine the refugee status in order to make admission decisions. This double screening practice concentrates on the eligibility determination of refugee status and it also includes non-prejudicial requirements the resettlement country may have.³³

Various refugee categories in resettlement

Refugees recognized by the UNHCR pursuant to its mandate can be considered for resettlement. It is a precondition for a resettlement consideration that the applicant is determined to be a refugee by the UNHCR.³⁴³⁵ The boundary of mandate refugee definition is broader than that of the 1951 Refugee Convention. The Resettlement Handbook notes that ‘it is also important to be aware that many resettlement States restrict their resettlement programmes to refugees recognized under the 1951 Convention. Therefore, the prospects for resettlement are, in reality, often more limited for refugees recognized by UNHCR under one of the broader refugee definitions.’³⁶ As a result, UNHCR staff must ‘seek to identify the basis for eligibility under the 1951 Convention wherever possible.’³⁷

Indeed, the single most frequently considered eligibility criterion for the traditional European resettlement countries³⁸ to make a resettlement admission decision is the Convention refugee status.³⁹ Some countries make it a requirement that this status determination must be conducted at the same standard applied to adjudicate asylum application in those countries (Denmark, Finland, Netherlands, Norway, Sweden and the United Kingdom). There are also special provisions within their respective frameworks for lowering the admission threshold in cases of critical illness (Denmark), in situations in which resettlement yields strategic impacts (Norway), or when the UNHCR’s assessment of refugee status is simply accepted (United Kingdom).

³³ Family size, health status, educational or professional background and religion are the factors that some of the resettlement countries apply to screen resettlement application.

³⁴ Exceptions can be made for non-refugee stateless persons for whom resettlement is considered the most appropriate durable solution, and also for the resettlement of certain non-refugee dependent family members to retain family unity (UNHCR 2011a).

³⁵ UNHCR 2011a

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Traditional European resettlement countries are Sweden, Norway, Finland, Denmark, Netherlands and Switzerland. Other traditional resettlement countries are the USA, Canada, Australia and New Zealand. In more recent years, new countries such as the UK, Ireland and Brazil have initiated regular resettlement programmes.

³⁹ According to the Country Chapters annexed to the UNHCR Resettlement Handbook (2004a and 2011a) and according to the information that has been made available by the respective resettlement countries’ adjudicating ministries on their websites (Danish Immigration Service: <http://www.udlst.dk>; Swedish Migrationsverket: <http://www.migrationsverket.se>; Finnish Directorate of Immigration: <http://www.uvi.fi>; Norwegian Utlendingsdirektoratet: <http://www.udi.no>; Icelandic Directorate of Immigration: <http://www.utl.is> (last visited 16 Jan. 2012).

A progressive development occurred in the European asylum system during the early 2000s⁴⁰: the newly emerged subsidiary protection scheme which the UNHCR was deeply involved in⁴¹ resulted in the expansion of the legally permissible range of refugee admission, including through resettlement. This broadened interpretation of the 1951 Refugee Convention was no doubt a breakthrough for both on-shore asylum and resettlement because it expanded the legal basis for admitting refugees who otherwise may have been considered ineligible under the 1951 Refugee Convention definition, including *prima facie* refugees or refugees in protracted situations.⁴²

At the same time, the act of granting separate subsidiary protection declares that the person is not a refugee in the sense of the word that is advanced by the 1951 Refugee Convention.⁴³ In attempting to justify more egalitarian treatment for those granted subsidiary protection category, scholars have attempted to advocate broadening the definition of refugees that is presented in the 1951 Refugee Convention. These developments reveal that the application of the Convention is subject to interpretation and that there is no single right answer, as is the case with laws in general.

McAdam advocates that ‘under international law, beneficiaries of protection, whether as Convention refugees or otherwise, are entitled to an identical status’⁴⁴. In her argument, she traces the origin of granting the same status to those fleeing situations of armed conflict and communal violence in Article 1A (1)⁴⁵ of the Refugee Convention.⁴⁶ It is significant in her view that the 1951 Refugee Convention does recognize all previous refugee definitions as giving rise to Convention status:

Although eligibility under Article 1A(1) is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant, since they typically protected victims of armed conflict or communal violence. The incorporation of these definitions necessarily broadens the Convention’s conceptual basis of protection ... [and] makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds.⁴⁷

In contrast to McAdam’s reliance on the preceding Conventions to read the 1951 Refugee Convention and recognize a broader category of refugees, the UNHCR Director of

⁴⁰ The 1997 Treaty of Amsterdam provided a detailed legal basis for the harmonization of common asylum and immigration policies among the EU member states. One of the four legal instruments that serves as a foundation for the common European asylum system, the Council Directive 2004/83/EC of 29 April 2004, also known as the Qualification Directive, sets out minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection. This Directive is significant because it established the criteria and distinctive rights for Convention refugees and those who qualify for subsidiary protection status.

⁴¹ The UNHCR was deeply involved in the discussions on the creation of the European Union (EU) common resettlement programme: *See* UNHCR 2009b

⁴² European Council on Refugees and Exiles (ECRE) 2005

⁴³ The set of rights granted to refugee category and subsidiary protection category are different. It has implications to resettled refugees but this topic is beyond the scope of the current paper.

⁴⁴ McAdam 2006

⁴⁵ Article 1A (1) extends the benefits of the 1951 Convention to any person who ‘[h]as been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization (1951 Refugee Convention)’.

⁴⁶ Melander 2006 in McAdam 2006

⁴⁷ McAdam 2005

International Protection, Türk interprets the 1951 Refugee Convention to be visionary and to have an inherent potential for inclusivity:

The drafters of the 1951 Convention were visionary. For them the refugee notion based on a well-founded fear of persecution was adequate to cover all those in need of international protection owing to a rupture with their country of origin. The definition was meant to distinguish persons who could not safely return to or obtain the protection of their country because of the political situation there – refugees – from others who did not require international protection. *There is no identification of any intention to single out a special class of refugees as more deserving of protection than others. The “broad definition” adopted was understood to cover “all refugee”.* For UNHCR, it has always been understood that the refugee definition was meant to have an inclusive meaning, rather than a restrictive one, in accordance with the fundamental objective of providing international protection to all who need it. This background is important when discussing persons in need of international protection, including beneficiaries of subsidiary protection. And it is against this background that we in UNHCR view our global responsibilities, including our supervisory role, which incidentally is not reduced to the 1951 Convention and 1967 Protocol, but instead covers all conventions for the protection of refugees, including, arguably, the EU asylum instruments.⁴⁸

Many of the resettlement countries' asylum adjudication must remain consistent with national and regional legislation derived from the 1951 Refugee Convention and refugee claims are subjected to a double screening procedure by the UNHCR and country of resettlement during the resettlement process. Under the current processing mechanisms, UNHCR recognized refugees may be granted different status by the different authorities involved in the resettlement process. Refugee applicant identified for resettlement may not be found eligible for the Convention refugee status in the eyes of resettlement countries, even though the UNHCR have confirmed the eligibility under the 1951 Refugee Convention. Similarly, refugees accorded the 1951 Refugee Convention status by their countries of asylum may not be granted the same status by their countries of resettlement. Refugees who fled generalized violence may be determined to simultaneously meet the 1951 Convention grounds by the UNHCR, but they may not be accorded the same status when resettled; they may be granted subsidiary protection instead.

Controlling resettlement admission

Most of the European resettlement countries exercise their discretionary power to place selection criteria in addition to the refugee applicants' refugee status. These additional selection criteria are guided by the countries' domestic interests and desire to manage resettlement. On the one hand, resettlement countries apply humanitarian considerations in certain cases (such as family ties, vulnerable women), just as they do in domestic asylum situations. In some instances, resettlement countries express preferences in accepting women and girls at risk, refugees with acute protection needs and medical needs.

On the other hand, nationality, family size, educational background, work experiences, and health status of refugees are often applied as preconditions. Countries such as Denmark and the Netherlands expressively make reference to integration prospects (language skills,

⁴⁸ UNHCR 2009a

education background, work experience, family situation, network, age, and motivation) as an important element of admission considerations. Many other countries also consider these elements when assessing resettlement cases.

Resettlement countries are thus able to manage the profiles of in-coming refugees through resettlement. Non prejudicial requirements are reflective of the countries' migration policies. Logistical limitations such as available housing in resettlement countries also necessitate specific requirements. This is an area in resettlement where the humanitarian and protection functions are obscured in the absence of a governing legal framework.

It in fact is a challenge associated with resettlement that the protection and other special needs, which are the basis of the identification of resettlement applicants to be prioritized by the UNHCR over millions of others, are not the legal basis for the resettlement countries to accept applicants for resettlement. An applicant who is identified by the UNHCR to have compelling resettlement needs may be declined for resettlement when he or she fails to meet the refugee admission criteria of the resettlement country.⁴⁹ The most appalling scenario is that the refugee applicant is denied resettlement admission owing to non-prejudicial reasons. If the resettlement process operates without shared legal standards, the opportunity for the UNHCR refugees whom the UNHCR has confirmed their needs to achieve this durable solution could be jeopardised.

The rejection of a resettlement application based on refugee status, which the UNHCR has endorsed to meet the 1951 Refugee Convention standards, implies that the country does not share the same interpretation of the 1951 Refugee Convention as the UNHCR. In other cases, refugees may be found inadmissible for non-prejudicial reasons such as lacking integration prospects.⁵⁰ The former issue challenges the UNHCR's 'supervisory role'⁵¹ and the latter questions whether the humanitarian features of resettlement admission are respected above domestic migration-led interests. This disjuncture may sometimes be overlooked, partially because resettlement does provide a durable solution to tens of thousands of refugees.

Areas for future research

It has been validated in this paper that the UNHCR resettlement is a tool for achieving the values enshrined in the 1951 Refugee Convention. The definition and functions of the UNHCR resettlement have roots in legal instruments and the UNHCR's protection mandate. However, the very refugee eligibility criteria or the boundaries of international protection are subject to interpretation and continuous debate. The definition of a refugee and the resettlement countries' obligations to accept 'all refugees' are rooted in the broader debate on the scope of the 1951 Refugee Convention. Resettlement countries select from among the refugee applicants chosen by the UNHCR for resettlement and some of their selection criteria appear arbitrary in view of the international protection doctrine.

In order for the UNHCR resettlement to achieve full functionality as a protection tool, a pertinent topic of research for the UNHCR will be the legal aspects of resettlement, which has seemingly been insufficient or absent. Based on the foregoing arguments in this paper, two areas are identified to merit further investigation:

⁴⁹ It also includes national security concerns.

⁵⁰ Resettlement countries also reject resettlement applications for national security reasons.

⁵¹ Türk 2001, 2002

The UNHCR and the States jointly adopted the Agenda for Protection, which Goal 1 Objective 6 and 7 testify to the UNHCR's attempts to harmonise the interpretation of the 1951 Convention with the relevant developments in refugee law. Efforts must continue to achieve conceptual and practical equality for all refugees and whose resettlement the UNHCR supports. In the context of in land asylum, Türk has recommended the 'UNHCR's active and meaningful involvement in regional harmonisation efforts' as 'an important way to resolve differences of interpretation on disputed concepts'.⁵² The UNHCR resettlement is a global enterprise which refugees are resettled far beyond regional boundaries. In the context of resettlement, harmonization efforts will include bridging the scopes of regional legal instruments.⁵³ A closer evaluation of resettlement cases with a focus on refugee status in the country of asylum and in the country of resettlement would provide valuable insights into the diverse application of international protection doctrine.

Another area for future research is domestic legislation on resettlement.⁵⁴ A comparative analysis on resettlement practices between the resettlement countries who have domestic legislation on resettlement and those countries who do not will provide insights in to the correlation between the domestic legislation and the protection value of resettlement.⁵⁵ A close examination of domestic legislations governing resettlement would reveal its relationships with the respective country's migration policies.

Conclusion

It has been pointed out that resettlement has no clear definition and it lacks clear legal support and it has often been 'manipulated' in the best interests of the States. This paper proves that resettlement does have legal foundations but the application of the very legal instrument is subject to various interpretations.

This paper proved that each step in the resettlement process has foundations in a legal framework. The identification of refugees for resettlement is guided by the protection mandate of the UNHCR and the 1951 Refugee Convention. A close examination of the UNHCR resettlement categories have revealed that resettlement is a tool for the better realization of the rights enshrined in the Convention, some of which are fundamental (e.g., Article 33). Providing assistance to facilitate the transfer of refugees for resettlement is a statutory responsibility of the UNHCR and an obligation of the contracting States. Finally, providing a durable solution for refugees is an obligation that is expressed in Article 34 of the 1951 Refugee Convention which has even more significance for protracted refugees who have endured refugee status for a long period. The role that resettlement countries play by offering a durable resident permit with an associated favourable set of rights to resettled refugees is a significant step forward toward fulfilling this article, and this is where the significance of international responsibility sharing function of resettlement lies. Resettlement, therefore, is a tool for achieving the values enshrined in the 1951 Refugee Convention.

⁵² Türk 2001

⁵³ A tangible example is a comparison of OAU convention and European convention

⁵⁴ Some countries such as Denmark and Ireland have specific laws that provide legal basis for their resettlement programmes but some others do not.

⁵⁵ See for example, Perrin and Mcnamara 2012

It has long been the case that when States have agreed to admit refugees through resettlement, there is ‘no evidence that whatever openness they have shown – often partial, and usually highly conditional – has been influenced by a sense of legal obligation (rather than, for example, by political or economical calculus, social or cultural affiliation, or a sense of moral responsibility).’⁵⁶

This paper identified first that achieving a shared definition of who is a refugee among the UNHCR, country of first asylum and resettlement countries is identified as a challenge in some cases compromising the protection function of resettlement, although it is an integral component of the UNHCR resettlement. The resettlement process occasionally reveals diverse application of the 1951 Refugee Convention. Refugees accorded 1951 Convention status by their countries of first asylum or 1951 Convention status which the UNHCR has endorsed may be denied the status⁵⁷ or they may be granted subsidiary protection instead.

This is a matter of concern, as it implies diverse interpretations of the 1951 Convention and it results in different sets of rights being accorded to refugees in a hierarchical protection structure. In this scenario, what hinders resettlement to achieve full protection function is the lack of legal basis for countries to consider the UNHCR’s supervisory role within the context of the States’ obligation to the 1951 Refugee Convention.⁵⁸ The resettlement countries also employ immigration-oriented discriminatory criteria to manage the profiles of in-coming refugees through resettlement. It is a practice rooted in their domestic interests which could also compromise the protection function or resettlement.

⁵⁶ Hathaway 2010: 503- 536

⁵⁷ In this case, the refugee’s resettlement application is rejected by the country of resettlement and the UNHCR will need to find another country to re-submit the case.

⁵⁸ Türk (2002:6) points out within the context of UNHCR protection mandate in general that ‘[t]he dichotomy between the UNHCR responsibilities on the one hand and limited obligations formally accepted by certain states on the other remains a major challenge....UNHCR’s supervisory role and corresponding state obligations could be activated as a legal basis to address precisely the protection needs of those categories of persons who are in need of international protection, but, at present, not within the application of the international legal framework of refugee protection’. The paper points out that the above specified dichotomy exists between the UNHCR and countries of resettlement in the resettlement context.

References

- Bessa, Thais, 'From Political Instrument to Protection Tool? Resettlement of Refugees and North-South Relations' (2009) *Refugee*, Vol.26, Issue 1, 91-100
- European Council on Refugees and Exiles (ECRE), 'The Way Forward: Europe's Role in the Global Refugee Protection System. Towards a European Resettlement Programme' (2005), available at: <http://www.unhcr.org/refworld/docid/42ba8d754.html> [accessed 9 March 2012]
- Hathaway, James C., *The Rights of Refugees under International Law* (2005) New York: Cambridge University Press
- Hathaway, James C., 'Leveraging asylum' (2010) *Texas International Law Journal*, Vol. 45, Issue 3, 503- 536
- Horst, Cindy, 'Buffis amongst Somalis in Dadaab: the Transnational and Historical Logics behind Resettlement Dreams' (2006) *Journal of Refugee Studies*, Vol.19, No.2, 143-157
- Jansen, Bram J., 'Between Vulnerability and Assertiveness: Negotiating Resettlement in Kakuma Refugee Camp, Kenya' (2008) *African Affairs*, 207/429, 569-587
- Melander, G., 'Refugee Policy Options – Protection or Assistance' (2006) 146-147, in Rystand, G. (ed.) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund: Lund University Press, 1990) cited in McAdam, Jane (2006)
- McAdam, Jane, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) *International Journal of Refugee Law*, Volume 17, Issue 3, 461 – 516
- McAdam, Jane, 'The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection' (2006) *New Issues in Refugee Research* (UNHCR, July 2006)
- Perrin, Delphine and McNamara, Frank, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames' (2012), KNOW RESET Research Report 2012/03, available at : http://www.know-reset.eu/files/texts/00013_20131031130257_knowresetr-2013-03.pdf [accessed 20 November 2013]
- Sandvik, Kristin B., 'Blurring Boundaries: Refugee Resettlement in Kampala – Between the Formal, the Informal, and the Illegal' (2011) at Symposium on Bureaucracy: Ethnography of State in Everyday Life, *Political and Legal Anthropology Review*, 34, 1-22
- Sandvik, Kristin B., 'A Legal History: the Emergence of the African Resettlement Candidates in International Refugee Management' (2010) *International Journal of Refugee Law*, Volume 34, Issue 1, 11 - 32
- Troeller, Gray G., 'UNHCR Resettlement: Evolution and Future Direction' (2002) *International Journal of Refugee Law*, Vol.14, Issue 1, 85-95

Troeller, Gray G., 'UNHCR Resettlement as an Instrument of International Protection: Constraints and Obstacles in the Area of Competition for Scarce Humanitarian Resources' (1991) *International Journal of Refugee Law*, Vol.3, Issue. 3, 564-578

Türk, Volker, 'UNHCR's Supervisory Responsibility' (2001) *Revue Quebecoise de Droit International*, Vol.14, Issue.1, 135-158

Türk, Volker, 'UNHCR's Supervisory Responsibility' (2002) *New Issues in Refugee Research* (UNHCR, October 2002 Working Paper Vol.67)

UN High Commissioner for Refugees, The Strategic Use of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement) 3 June 2003 (2003a) EC/53/SC/CRP.10/Add.1, available at: <http://www.unhcr.org/refworld/docid/41597a824.html> [accessed 9 March 2012]

UN High Commissioner for Refugees, Agenda for Protection, October 2003 (2003b) Third edition, available at: <http://www.unhcr.org/refworld/docid/4714a1bf2.html> [accessed 18 June 2012]

UN High Commissioner for Refugees, Resettlement Handbook (country chapters last updated September 2009), 1 November 2004 (2004) available at: <http://www.unhcr.org/refworld/docid/3ae6b35e0.html> [accessed on 30 January 2012]

UN High Commissioner for Refugees, UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004), 28 January 2005, (2005) available at: <http://www.unhcr.org/refworld/docid/4200d8354.html> [accessed on 15 November 2011]

UN High Commissioner for Refugees, Note on the Integration of Refugees in the European Union, May 2007, (2007) available at: <http://www.unhcr.org/refworld/docid/463b24d52.html> [accessed 26 October 2011]

UN High Commissioner for Refugees, "The Common European Asylum System - A vision for the future", Statement by Volker Türk, Director of International Protection (Stockholm, 3 November 2009, Conference on "The Common European Asylum System: Future Challenges and Opportunities"), 3 November 2009, (2009a) available at: <http://www.unhcr.org/refworld/docid/4af15b672.html> [accessed 4 January 2012]

UN High Commissioner for Refugees, Comments on the European Commission Communication on the establishment of a Joint EU Resettlement Programme and the European Commission Proposal for the amendment of Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013, November 2009, (2009b) available at: <http://www.unhcr.org/refworld/docid/4b0a75e92.html> [accessed 24 May 2011]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, July 2011, (2011a) available at: <http://www.unhcr.org/refworld/docid/4e786d392.html> [accessed 20 June 2012]

UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV.3, (2011b) available at: <http://www.refworld.org/docid/4f33c8d92.html> [accessed 28 September 2013]

Resettlement Country Chapters annexed to the UNHCR Resettlement Handbook:

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter - United Kingdom of Great Britain and Northern Ireland, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9c0119.html> [accessed 25 January 2012]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter -Netherlands, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9bfe1a.html> [accessed 25 January 2012]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter - Norway, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9bfff.html> [accessed 25 January 2012]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter - Sweden, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9c001a.html> [accessed 25 January 2012]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter - Finland, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9bfd1c.html> [accessed 25 January 2012]

UN High Commissioner for Refugees, UNHCR Resettlement Handbook, Country Chapter - Denmark, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb9bfdf.html> [accessed 25 January 2012]