



UvA-DARE (Digital Academic Repository)

'Quota refugees': the Dutch contribution to global 'burden sharing' by means of resettlement of refugees

Zieck, M.

Publication date

2011

Document Version

Submitted manuscript

Published in

International Journal of Legal Information

[Link to publication](#)

Citation for published version (APA):

Zieck, M. (2011). 'Quota refugees': the Dutch contribution to global 'burden sharing' by means of resettlement of refugees. *International Journal of Legal Information*, 39(2), 130-164.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755751

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

‘QUOTA REFUGEES’, THE DUTCH CONTRIBUTION TO GLOBAL ‘BURDEN SHARING’ BY MEANS OF RESETTLEMENT OF REFUGEES

Marjoleine Zieck ♥

1. INTRODUCTION

Most refugees who seek asylum in the Netherlands, almost 15,000 in 2009,¹ arrive on their own accord, that is, spontaneously. A minority of refugees, however, is invited to come to the Netherlands: these refugees are known as ‘quota refugees’ after the set number of 500 resettlement places that are made available annually for refugees who are nominated by the United Nations High Commissioner for Refugees (hereafter: UNHCR) and considered to be eligible for resettlement by the Netherlands Immigration and Naturalisation Service.² The Netherlands has a long tradition of supporting the resettlement policy of UNHCR and it considers this support, which is based on ‘solidarity with states which are forced to receive large numbers of refugees’, ‘indispensable’.³

The need for this form of solidarity is indicative of the fact that the international refugee law regime does not cater for an even distribution of responsibilities in this respect. The 1951 Convention

♥ Dr. M.Y.A. Zieck is Professor of International Refugee Law at the Amsterdam Law School of the University of Amsterdam and Professor of Public International Law at the Pakistan College of Law (Lahore, Pakistan). This article is an extended version of a presentation given at the 29th Annual Course on International Legal Information and Law - “Dutch Gateways to International Law” – of the International Association of Law Libraries on 5 September 2010 in the Peace Palace, The Hague.

¹ Centraal Bureau voor de Statistiek, www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2010/2010-3045-wm.htm.

² The reference is to the IND, the *Immigratie en Naturalisatie Dienst*. The number of quota refugees – 2,000 in a four-year period, see para. 8 *infra* – does not include *ad hoc* admissions such as the resettlement of 3,000 refugees from the former Yugoslavia in 1992, and 4,000 Kosovar refugees in 1999 (they are not referred to as ‘quota’ but as ‘invited’ refugees), and much earlier Vietnamese boat refugees (1,118 in 1979, 930 in 1980, 831 in 1981, and 359 in 1982, Letter of the Minister of Foreign Affairs to the Chairman of the Second Chamber of Parliament, 3 December 1984, TK 1984-1985 18389 no. 13 at 5). (Refugees from the former Yugoslavia and Kosovo were given temporary protection rather than asylum or the residence permit that is given to quota refugees.)

³ Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament regarding the policy framework invited refugees 2008-2011, 28 January 2008; see also the answers of the Minister of Justice to questions posed in Parliament, Answers to Parliamentary Questions to MP Fritsma regarding the selection of refugees by UNHCR, 6 January 2010 (answer 3); M. Guiaux, A.H. Uiters, H. Wubs, E.M.Th. Beenackers, *Uitgenodigde vluchtelingen, Beleid en de maatschappelijke positie in nationaal en internationaal perspectief*, WODC, 2008 (hereafter: WODC, 2008) at 11. The number of 500 is considered to be too low by *VluchtelingenWerk Nederland*, a Dutch NGO, which speaks of ‘symbolic burden sharing’, “EU-plan opvang uitgenodigde vluchtelingen: goed initiatief!”, 2 September 2009 (www.vluchtelingenwerk.nl/actueel/eu-plan-opvang-uitgenodigde-vluchtelingen-goed-initiatief.php). More in general, the European contribution to burden sharing by means of resettlement is rather modest: only 9% in 2007, and 6,7% in 2008 of the global total of resettled refugees (about 90% of all resettled refugees are accepted by the United States, Canada, and Australia); this percentage rose to 13% in 2009 albeit not structurally: the increment was due to one-time contributions by France and Germany for Iraqi refugees, see *inter alia*, UN doc. EC/61/SC/CRP.11 para. 8. The European share is expected to increase by virtue of an EU resettlement scheme, see Communication from the Commission to the European Parliament and the Council on the Establishment of a Joint EU Resettlement Programme, COM(2009) 447 final, 2 September 2009; see also the Decision of the European Parliament and of the Council amending decision no. 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC, COM(2009) 456, a decision that results in additional financial support for the resettlement of those categories of persons which are annually identified as common EU resettlement priorities (amounting to 4000 euro per effectively resettled person).

Relating to the Status of Refugees (hereafter: 1951 Convention), the main universal instrument, secures protection for refugees but does not provide for an allocation of responsibility for providing that protection beyond states party at large.⁴ This lack is remarkable since the 1951 Convention was drafted at a time when the physical distribution of refugees by means of resettlement was a familiar phenomenon: it was, however, induced by need rather than ‘burden sharing’.⁵ Although the post-War experience with large-scale resettlement left traces in the 1951 Convention, it did not result in incorporating resettlement as a means to secure a more even distribution of refugees in the world.

Instead of states party to the 1951 Convention, UNHCR has been charged with resettlement of refugees as one of the so-called ‘permanent’ solutions to the problem of refugees it has to seek.⁶ Although UNHCR’s Statute does not indicate that the solution of resettlement remedies the lack of a distributive mechanism that would secure a more just sharing of responsibilities among states,⁷ UNHCR considers resettlement “an important burden and responsibility sharing tool”.⁸ UNHCR is, however, a non-territorial entity as a result of which its securing a more equitable distribution in the sense indicated is wholly dependent on the benevolent discretion of states to offer resettlement places.⁹ This discretion appears to be accompanied by eligibility criteria that exceed those UNHCR applies when it nominates refugees for resettlement, that is, they extend well beyond protection needs.¹⁰

It is submitted that the use of additional eligibility criteria by states, which partake of immigration rather than refugee law, is induced by considering the solution of resettlement in terms of permanent settlement, as a means to end refugee status.¹¹ If, however, resettlement is considered, in

⁴ See para. 4 *infra*. Although the 1951 Convention was supplemented by a Protocol Relating to the Status of Refugees in 1967, the substantive structure of the regime remained the same. The function of the Protocol is the removal of the temporal limitation in the definition of refugee comprised in the 1951 Convention and, along with it, abolishing the possibility of attaching a geographical limitation to the temporal one, see Art. I para. 2 as well as para. 2 on the possibility to maintain existing geographical limitations made on the basis of Art. 1 B (1) sub (b) of the 1951 Convention. Turkey still maintains this geographical limitation as a result of which its obligations under the 1951 Convention do not extend to non-European refugees, on this see M.Y.A. Zieck, “UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks”, 22 *International Journal of Refugee Law* 2010, 593-622.

⁵ Throughout reference will be made to ‘burden sharing’ as the designation that is generally used despite the fact that it is not a very sympathetic one.

⁶ Art. 1, Statute of UNHCR (Annex to UN doc. A/Res/428(V)).

⁷ An alternative form of burden sharing besides resettlement as a means to physically relieve unduly heavy burdened states is targeting development assistance to those states but it is a moot point whether this kind of assistance actually qualifies as responsibility sharing. An example of this form of burden sharing are the Regional Protection Programmes of the EU, see *inter alia*, Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes, COM(2005) 388 final. Resettlement, which is about moving recognized refugees to another country, should be distinguished from allocation procedures regarding the processing of asylum claims, cf. Council Regulation (EC) no. 343/2003 of 18 Feb. 2003 (‘Dublin II Regulation’) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Such allocation procedures require states that observe their obligations in the field of international and human rights law, see the Judgement of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* (Application no. 30696/09) of 21 January 2011 in which the Court judged that removing an Afghan refugee from Belgium to Greece under the Dublin II Regulation violates Article 3 of the European Convention on Human Rights and Fundamental Freedoms.

⁸ UNHCR, “Frequently Asked Questions about Resettlement”, April 2011 at 1; see also the following conclusions of UNHCR’s Executive Committee: no. 22 (1981) sub IV (1), (3); no. 67 (1991); no. 79 (1996) sub (s); no. 85 (2001) sub (jj); no. 90 (2001) sub (k); no. 99 (2004) sub (x), and UNHCR’s Agenda for Protection (UN doc. (UN doc. A/AC.96/965/Add.1)) Goal 3 sub (1) (Better responsibility sharing to shoulder the burden of first asylum countries) and sub (6) (Resettlement as a burden sharing tool).

⁹ “no country is legally obliged to resettle refugees”, UNHCR Resettlement Handbook, November 2004, Ch. 1 at 3; UNHCR, “Frequently Asked Questions about Resettlement”, April 2011 at 1.

¹⁰ UNHCR Resettlement Handbook, Ch. 4, November 2004 at 4. For the applicable criteria, see n. 48 *infra*.

¹¹ B. Nagy, “Article 30”, in A. Zimmermann (ed.), *Commentary on the 1951 Convention relating on the Status of Refugees and its 1967 Protocol*, 2011, 1227-1241: “If resettlement is seen as a durable solution which in essence ends the refugee status and leads to another entitlement to remain on the territory of the resettlement State (immigration, eventually naturalization) ...” (at 1231); but see para. 8 *infra*.

conformity with the current use that is made of this solution by UNHCR as a form of protection of those who cannot be protected adequately in the country of asylum, as a mechanism to secure a second safe country of asylum – a form of protection ‘elsewhere’ - that may, just as asylum granted to spontaneous arrivals, result in permanent residence, there would be no legal justification for the use of eligibility criteria that are extraneous to refugee law: the mere fact that granting resettlement places is a discretionary power entails that the decision to use this power rather than its actual use may be subject to considerations that are extraneous to international refugee law. Whilst resettlement could simultaneously function as a – considering the dearth of available resettlement places: modest - means of burden sharing in particular when disproportionate large numbers of refugees cause incapacity to provide the requisite protection, it would certainly not be its main purpose. Distributive principles would, obviously, continue to play a role among (potential) resettlement states.

PART ONE: POST-WAR RESETTLEMENT AND THE 1951 CONVENTION

2. FAMILIARITY WITH RESETTLEMENT

The 1951 Convention was drafted in the wake of the Second World War, a war that had caused massive displacement and large numbers of refugees. When the war drew to an end, the assumption had been that most of them would want to return home.¹² This turned out not to be the case: many refused to return home, and in 1946 the General Assembly decided that no one with valid objections to return would be compelled to return to his country of origin.¹³ The solution for those refugees was resettlement, a task given to the International Refugee Organization (hereafter: IRO).¹⁴

The resettlement of these refugees (over 1 million persons), who found themselves predominantly in Western Germany, Austria, and Italy,¹⁵ was induced by the recognition that local integration was not an option for those who had suffered from persecution in the Axis states, rather than a desire to relieve them from a refugee burden.¹⁶

Actual resettlement appeared not only to be beneficial for the refugees concerned but in equal measure for the resettlement states,¹⁷ secured by means of the use of selection criteria, such as suitability to the economy of the resettlement state:¹⁸

¹² See M.Y.A. Zieck, *UNHCR and Voluntary Repatriation of Refugees, A Legal Analysis*, 1997 at 41 *et seq.*

¹³ UN doc. A/Res/8(I).

¹⁴ On the IRO, see L.W. Holborn, *The International Refugee Organization, A Specialized Agency of the United Nations, Its History and Work, 1946-1952*, 1956.

¹⁵ See *ibid.* Ch. 20 (“Resettlement”). After more than half a century, tangible traces of the IRO ‘mass resettlement’ can still be found on the internet, see *e.g.* the Application for Permit to Enter Australia of Albanian Mr Assim Ethemi under the care of IRO Beirut, www.vroom.naa.gov.au/print/?ID=18875 < accessed on 8 January 2011 > and the story of the Polish Taler family at www.josephtaler.com/the_immigrants.html (which includes a copy of a decision of the IRO special qualifications (medical) screening board) < accessed on 8 January 2011 >.

¹⁶ Vernant explains the impossibility of the “assimilation of the whole of the refugees in the countries where they are now living” by citing economic, social and political problems, the latter due to discontent and agitation among the refugees, J. Vernant, *The Refugee in the Post-War Period, Preliminary Report of a Survey of the Refugee Problem*, 1951 at 21.

¹⁷ Preceding the war, President Roosevelt had observed that resettling millions of people was a “duty because of the pressure of need” which simultaneously offered an opportunity for taking part in the building of new communities for those who needed them: “Out of the dregs of the present disaster, we can distil some real achievements in human progress”, quoted in Holborn, 1956, *op. cit.* n. 14 *supra* at 366.

¹⁸ See Holborn, 1956 *op. cit.* n. 14 *supra* at 376; see also *ibid.* Appendix II for a few of the agreements that were concluded between the IRO and resettlement states. Remarkable are the provisions pertaining to conditions of expulsion and return to the zone of origin, *cf.* Article 10 of the Agreement concluded with France (Home Territory) and Algeria concerning the selection of refugees and displaced persons of 13 January 1948 (PC/LEG/9) at 613 *et seq.*: “Any refugee admitted into France under this Agreement, who proves to be unsuited to the French economy, may be sent back to the zone from which he came [...]”; likewise Art. 9 of the

“the resettlement of persons coming within the IRO mandate was effected through governmental selection boards, which visited the special centres fitted up by the IRO for the physical, occupational and security investigation of refugees. The criteria adopted by these boards, for which the IRO had no responsibility, were often criticized, and there is no doubt that they were not generally guided by humanitarian principles, the main object of the reception countries being to obtain young, able-bodied and skilled labour”.¹⁹

This skimming practice made resettlement of specialists such as doctors and lawyers so difficult that the IRO referred in that respect to a “virtual embargo against brains” enforced by the resettlement states.²⁰

3. POST-WAR RESETTLEMENT LEFT ITS TRACES IN THE 1951 CONVENTION

The experience with large-scale resettlement did not lead to incorporating this solution in the 1951 Convention despite the recognition that resettlement would be needed. Based on the experience of a substantial influx of refugees fleeing the Spanish Civil War, France wanted to recognize the exceptional nature of the burdens assumed by the receiving states and it accordingly suggested to inserting the following provision in the Preamble to the 1951 Convention:²¹

“But considering that the exercise of the right of asylum places an undue burden on certain countries because of their geographical situation, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation to help to distribute refugees throughout the world”.²²

France explained that this paragraph

“recalled the need for a collective effort to solve the problem of refugees and to help to distribute them throughout the world. The French delegation thought that immigration countries would recognize the exceptional nature of the burdens assumed by the receiving countries, and would understand that in certain States the pressure of population was such that it was impossible to ensure a satisfactory future for refugees”.²³

It was nonetheless not intended to impose on states any obligation with respect to the right of asylum or otherwise,²⁴ but meant to function as a safety or safeguarding clause.²⁵ The proposal met with criticism not so much for its content but on account of the fact that it, in the absence of a corresponding substantive provision in the Convention, would be out of place in the preamble to the

Agreement concluded with Luxemburg concerning the selection of refugees and displaced persons of 9 March 1949 (IRO/LEG/GOV/11) at 638 *et seq.* Expulsion from the resettlement country was, however, rare, *ibid.* at 325.

¹⁹ Vernant, 1951, *op. cit.* n. 16 *supra* at 36.

²⁰ IRO, *The Facts About Refugees*, 1948 at 17; see also Holborn, 1956, *op. cit.* n. 14 *supra*, Ch. 23 (“The Hard Core”).

²¹ UN docs. E/AC.7/SR.160 (18 August 1950) (Rochefort, France) at 26; E/AC.7/SR.166 at 13.

²² UN doc. E/L.81 (29 July 1950) (Rochefort, France). The representative of Mexico (De Alba) observed that the proposal had the merit of seeking to awaken a feeling of collective responsibility, UN doc. E/AC.7/SR.166 (22 August 1950) at 13.

²³ UN doc. E/AC.7/SR.160 at 26.

²⁴ UN docs. E/AC.7/SR/166 at 17 (Rochefort, France); A/CONF.2/SR.31 (Rochefort, France) at 29.

²⁵ UN doc. E/AC.7/SR.166 at 22 (France); ECOSOC, 11th session, 406th meeting, para. 60 (France). It required quite some effort on the part of France to have this particular provision included in the Preamble: the proposal - in amended form, see UN doc. E/AC.7/L.71 - was rejected (UN doc. E/AC.7/SR.167 at 9), subsequently France proposed to insert it again (UN doc. E/L.94) and it was adopted (ECOSOC, 11th session, 406th meeting, para. 113). At the Conference of Plenipotentiaries, the United Kingdom submitted an alternatively worded Preamble that did not contain this provision (UN doc. A/CONF.2/99), but at the request of France, it was reinserted once again, see UN doc. A/CONF.2/SR.31 (29 November 1951) at 24 *et seq.*, and adopted, UN doc. A/CONF.2/SR.33 (30 November 1951) at 10.

Convention. The representative of Canada – with reference to the envisaged cooperation to distribute refugees – formulated the objection as follows:

“it seemed irrelevant, since the draft Convention laid down a series of obligations towards refugees in any country, but contained no article regarding the distribution of refugees. The preamble should surely be directly related to the matter of the Convention. In short, the paragraph amounted to an acceptance of a decision on high policy and was therefore unsuited to form part of a preamble to a convention conferring specified rights on specified categories of refugees”.²⁶

The proposal was consequently not accepted and eventually gave way to the current, much less specifically worded provision:

“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation”.

In conformity with concerns expressed earlier, the reference to geographical proximity as the cause of ‘unduly heavy burdens’ had disappeared and, in addition, the suggested solution of ‘distributing refugees’. Besides being diluted, the final wording is an admission of defeat in the sense that it was not given a substantive counterpart in the Convention,²⁷ unless one considers the obligation of states to cooperate with UNHCR in the exercise of its functions, laid down in Article 35 paragraph 1 of the 1951 Convention,²⁸ as its substantive counterpart.

The incidence of huge disparities was revisited at the Conference of Plenipotentiaries which adopted the 1951 Convention and it led to the adoption of a recommendation in the Final Act: considering “that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position”, the Conference

“RECOMMENDS that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement”.²⁹

This recommendation focuses on refugees rather than on the states that are called upon to host those refugees. The present wording of the recommendation originates in one that actually did address the burden incurred by states:

“RECOMMENDS all governments to undertake jointly with the countries of first reception to bear the costs arising out of the right of asylum in respect of refugees whose lives are in danger”.³⁰

This recommendation, remarkable for its emphasis on expenses, was one among several proposed by The Holy See with a view to “filling certain gaps in the present text of the Convention”.³¹ Although the desire for international solidarity in the discharge of responsibilities relating to the protection of

²⁶ UN doc. E/AC.7/SR.166 at 19 (Meagher, Canada); likewise the representatives of the United States (Henkin) and Belgium (Delhaye), see UN doc. E/AC.7/SR.167 at 9.

²⁷ Worth adding is the proposal of the representative of Belgium to insert the pertinent provision in the operative part of the Convention (UN doc. E/AC.7/SR.166 at 16-17), a proposal that was not considered, most likely on account of the fact that it was never submitted in the form of a formal proposal, *cf.* UN doc. E/AC.7/SR.167 at 8.

²⁸ On Article 35, see M.Y.A. Zieck, “Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of the 1967 Protocol relating to the Status of Refugees”, in Zimmermann, 2011, *op. cit.* n. 11 *supra*, 1459-1510.

²⁹ Recommendation D.

³⁰ UN doc. A/CONF.2/103 (24 July 1951) (The Holy See: Draft recommendations for inclusion in the Final Act of the Conference).

³¹ UN doc. A/CONF.2/SR.34 (30 November 1951) (Msgr. Comte, The Holy See) at 4.

(political) refugees was applauded,³² its inclusion was objected to on account of the financial burden it would entail. The United States representative observed that

“he could not hold out hope that it [the United States Government] would assume further financial commitments after the termination of the International Refugee Organization”.³³

Similar objections were voiced by the United Kingdom:

“While recognizing the validity of the expression therein of the ideal principle that the financial burden and heavy responsibilities of countries of first refuge should be equally shared by all governments, he felt that it was essential the Conference should bear in mind the difficulties which, under present conditions, governments experienced in committing themselves to such an undertaking as that contemplated”.³⁴

The United States thereupon suggested that the relevant recommendation be revised along the lines of the fourth preambular paragraph of the Convention,³⁵ which eventually resulted in the present wording of the relevant recommendation,³⁶ leaving the gap perceived by the Holy See wide open.

The post-war experience with large-scale resettlement did nonetheless leave traces in the 1951 Convention in that it influenced the structure of the 1951 Convention, more precisely, its structure of entitlement. The Convention shares the post-War intention to re-establish faith in human rights,³⁷ and it accordingly ensures the enjoyment of human rights by means of securing a substitute for the state – the country of origin – which (intentionally) omits to provide the requisite protection. In that sense human rights are invariable, and the subject bearing the primary responsibility to observe those rights variable: in principle it should be one’s own state, but when that state fails to deliver, it is substituted for another state, rather than an international organization. This constituted a break with the past in which the IRO had taken care of the protection and assistance of refugees. The new phase, the then United Nations Secretary-General observed,

“[...] will be characterized by the fact that refugees will lead an independent life in the countries which have given them shelter. [...] the refugee[s] will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the country of asylum and will themselves provide for their own needs and for those of their families”.³⁸

The rights that enable economic integration are not, however, granted immediately: the 1951 Convention comprises a rather complex layered system. Most rights are conditional upon a particular mode of lawful presence. This conditionality was induced by the experience of the drafters regarding controlled entry of refugees with which they were familiar by virtue of the large-scale resettlement of refugees after the Second World War, and the uncontrolled entry of new refugee flows immediately following the war. The latter reality induced the phased granting of full protection of the Convention.³⁹ This means that those who enter ‘uncontrolled’, as most refugees do, acquire rights that enable them to become self-sufficient, such as particularly the right to work, after their stay in the country of refuge has become lawful, whilst those who are invited are immediately entitled to the rights which enable them to integrate in the economic system of the country of resettlement.

PART TWO: THE LACK OF A DISTRIBUTIVE MECHANISM

³² *Ibid.* (Von Trutzschler, Federal Republic of Germany) at 6.

³³ *Ibid.* (Warren, United States) at 6.

³⁴ *Ibid.* (Hoare, United Kingdom) at 7.

³⁵ Text quoted above.

³⁶ Recommendation D. UN doc. A/CONF.2/SR.35 (3 December 1951) at 42.

³⁷ See the preambles to respectively the 1951 Convention and the Charter of the United Nations.

³⁸ UN doc. E/AC.32/2 (1950) (Memorandum of the Secretary-General) at 6-7.

³⁹ J.C. Hathaway, *The Rights of Refugees Under International Law*, 2005 at 157.

4. THE LACK OF A BURDEN SHARING MECHANISM IN INTERNATIONAL REFUGEE LAW

The majority of refugees in the world, amounting to 10.5 million persons,⁴⁰ do not arrive in a ‘controlled’ manner, but arrive spontaneously: they flee their country of origin in search of refuge abroad. ‘Abroad’ will usually be the neighbouring country that will indeed be ‘forced’ to receive them. This obligation derives from the prohibition of *refoulement*, the core provision of the 1951 Convention (and the 1967 Protocol that supplemented the Convention) laid down in Article 33 paragraph 1 thereof:

“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”.

This provision secures both the most basic protection of refugees by trumping domestic immigration law regarding entry of aliens, but it causes, simultaneously, huge disparities in terms of distribution.⁴¹ It secures protection by virtue of the fact that once a refugee comes within the jurisdictional orbit of a particular state, that state is bound to observe this prohibition, irrespective of numbers of refugees involved.⁴² From the point of view of refugees this allocation is perfect since it secures their protection but from the point of view of states, this allocation is flawed because it fails to attribute responsibility for protection beyond allocating it to the states party to the 1951 Convention *at large*. By virtue of geographical proximity to the country of origin some states may consequently end up with huge refugee populations, sometimes even disproportionately large when compared with the size of the hosting population or per capita income GDP in the country of refuge. Situations that may be aggravated by other factors such as the condition of the states of refuge: an uneven burden is especially heavy for developing countries, countries in transition, and countries with limited resources.⁴³ Another aggravating factor relates to the root cause of flight: in case a political solution that paves the way for a fundamental change of relevant circumstances in the country of origin that would allow repatriation is not forthcoming, protracted refugee situations may result.⁴⁴ A protracted refugee situation means bearing a protracted burden for the country of refuge. The recurrent and persistent call for burden sharing is, therefore, not surprising.

⁴⁰ That is, early 2009, www.unhcr.org < accessed on 4 January 2011 >. (A figure that does not include the millions of Palestinian refugees under the care of UNRWA.)

⁴¹ In particular when it is coupled to ‘first country of asylum’ objections on the part of third states, *i.e.* rejecting asylum claims on the basis of the fact that protection was and is available in the first state, *cf.* UNHCR, Refugee Protection and Mixed-Migration: The 10-Point Plan in Action: Ch. 8 Addressing secondary movements Reference 3 - UNHCR, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, Feb. 2003, PPLAS/2003/01 at 18-25, and other entry barring practices.

⁴² Regardless of the fact that the opposite view had been ‘placed on record’ when the Convention was drafted: “In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33”, UN doc. A/CONF.2/SR.35 (30 November 1951) (Van Boetzelaer, The Netherlands) at 21. In the absence of objections, this interpretation was accordingly placed on record, *ibid.*

⁴³ *Cf.* the following conclusions of UNHCR’s Executive Committee: no. 81 (1995) sub (j); no. 1999) 87 sub (b); no. 90 (2001) sub (d); no. 93 (2002) sub (c); no. 95 (2003) sub (g); no. 99 (2004) sub (e); no. 100 (2004); no. 102 (2005) sub (k); no. 104 (2005). The figures pertain to the period 1997-2001 but may nonetheless serve to illustrate the point made; in that period, developing countries hosted two thirds of all persons of concern to UNHCR: of these, the least developed countries hosted 35% which means that those states shouldered the biggest burden in terms of GDP, UNHCR, Selected Indicators Measuring Capacity and Contributions of Host Countries, April 2002. In 2009, ten developing countries were responsible for hosting almost half of the world’s refugees, UNHCR Statistical Yearbook 2009, 2010 at 23.

⁴⁴ ‘Protracted refugee situations’ have been defined as those situations that consist of a refugee population of 25,000 persons or more who have been in exile for five years or more in developing countries, FORUM/2004/7 para. 12. *Cf.* Executive Committee conclusion no. 100 (2004) sub (b), (k), (l).

5. RESETTLEMENT FALLS TO UNHCR

Rather than states, UNHCR is charged with ‘resettlement’ or the “planned redistribution” of refugees.⁴⁵ It is, in the language of UNHCR’s Statute, one of the so-called ‘permanent’ solutions UNHCR has been assigned to pursue.⁴⁶ The first one is voluntary repatriation to the country of origin, the second one, in the somewhat archaic language of the Statute, ‘assimilation into new national communities’,⁴⁷ which can either signify local integration in the country of refuge or resettlement in a third state. ‘Resettlement’ is defined by UNHCR as “the transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them - as refugees – with permanent residence status” on account of the fact that their “life, liberty, safety, health or fundamental human rights are at risk in their country of refuge”.⁴⁸ Voluntary repatriation is the generally preferred solution,⁴⁹ and resettlement the solution of last resort:⁵⁰ not so much because it is rather unsettling for the refugee concerned who may be resettled in a third country that differs in every respect from his country or region of origin (the refugee has, beyond refusal,⁵¹ no choice in the matter),⁵² but because there are very few places available,⁵³ most likely because states are under no obligation to offer resettlement places.⁵⁴

⁴⁵ The term ‘planned redistribution’ is of John Hope Simpson, see his *The Refugee Problem, Report of a Survey*, 1939 at 530. A more recent, but less specific designation is that of ‘sharing people’, see M.Y.A. Zieck, “Doomed to Fail from the Outset? UNHCR’s ‘Convention Plus Initiative’ Revisited”, 21 *International Journal of Refugee Law* 2009, 387-420 at 404 for references.

⁴⁶ The qualification ‘permanent’ has since 1979 given way to that of ‘durable’, see UN doc. A/Res/34/60.

⁴⁷ Art. 1, Statute.

⁴⁸ UNHCR, “Frequently Asked Questions about Resettlement”, April 2011 at 1 and 3 respectively. In the previous version of UNHCR’s “Frequently Asked Questions about Resettlement”, dating of 28 September 2009, resettlement was defined as “the transfer of refugees [...] from the country in which they have sought refuge to another state that has agreed to admit them as refugees and/or to grant permanent settlement there” at 1. Specific categories of refugees at risk include women and girls, victims of sexual and gender-based violence, elderly refugees, minors, survivors of torture and violence, groups who are denied refugee status due to the fact that the country of refuge is not a party to the 1951 Convention and/or 1967 Protocol or maintains the geographical limitation as a result of which non-European refugees are not eligible for refugee status (*cf. n. 4 supra*), UNHCR Resettlement Handbook, Ch. 4, November 2004; UNHCR, “Frequently Asked Questions About Resettlement”, April 2011 at 4; and the following conclusions of UNHCR’s Executive Committee: no. 54 (1988); no. 60 (1989) sub (c); no. 64 (1990) sub (a); no. 85 (1998) sub (jj); no. 99 (2004) sub (r); no. 105 (2006) sub (n), (p); no. 107 (2007) sub (h); no. 108 (2008) sub (o). Illustrative for the last-mentioned category is Turkey, see Zieck, 2010, *loc. cit. n. 4 supra*. UNHCR estimates to need 16,930 resettlement places for refugees in Turkey as one of the priority situations in which the strategic use of resettlement can enhance protection, UNHCR Projected Global Needs 2011, June 2010 at 33, 35 (on the strategic use of resettlement, see *infra*).

⁴⁹ *Cf.* Executive Committee Conclusion no. 90 (2001) sub (j); the Declaration of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN doc. HCR/MMSP/2001/09, 2001, 13th operative paragraph; and, more in general, Zieck, 1997, *op. cit. n. 12 supra* at 3-4, 81-82; M.Y.A. Zieck, “Voluntary Repatriation: Paradigm, Pitfalls, Progress”, 23 *Refugee Survey Quarterly* 2004, 33-54.

⁵⁰ *Cf.* Executive Committee Conclusion no. 67 (1991) sub (g). Hathaway speaks of “the residual role now officially attributed to resettlement”, Hathaway, 2005, *op. cit. n. 39 supra* at 976.

⁵¹ Those who “unreasonably refused” to accept the proposals of the IRO for their resettlement would cease to be the concern of the IRO, see sections D sub (d), Annex I to the IRO Constitution. Declining a resettlement proposal does not figure among the cessation clauses contained in the Statute of UNHCR. Refusal may nonetheless result in no further processing for resettlement or a deferment of the case, UNHCR Resettlement Handbook, November 2004, Ch. 6 at 40.

⁵² “Particular effort should be made to avoid the perception on the part of the refugee that a choice exists in terms of prospective resettlement countries (the ‘travel agency’ syndrome)”, *ibid.* at 39, but see FORUM/CG/RES/05 at 5: wishes as to which country refugees prefer to be resettled to should as far as possible be taken into consideration, a recommendation that was not included in the multilateral framework of understandings on resettlement (FORUM/2004/6), a (non-binding) framework that resulted from the ‘Convention Plus’ initiative of the High Commissioner; on this initiative, see Zieck, 2009, *loc. cit. n. 45 supra*.

UNHCR's success with respect to redistribution is wholly dependent on the discretion of states to offer resettlement states,⁵⁵ few states in practice. Too few,⁵⁶ as a result of which UNHCR cannot but maximize the use of the little that is available, that is, making 'strategic use of resettlement'. The strategic use of resettlement has been defined by UNHCR as follows:

"The planned use of resettlement in a manner that maximizes the benefits, directly or indirectly, other than those received by the refugees being resettled. Those benefits may accrue to other refugees, the hosting State, other States or the international protection regime in general".⁵⁷

Such 'other'-intended albeit additional – protection benefits may, UNHCR indicates, accrue to countries of first asylum, countries of resettlement and entire regions. To confine examples to the former, these would include improving protection, unlocking alternative durable solutions, and decongesting refugee camps.⁵⁸ Such benefits obviously require leverage in the form of substantial numbers of resettlement places.⁵⁹

The effectiveness of resettlement, and in particular the strategic use thereof, suffers in practice from long-drawn bureaucratic procedures despite UNHCR's temporal benchmarks: departure for resettlement within seven days for emergency cases (*i.e.* cases involving immediate life-threatening situations), within six weeks for urgent cases (serious medical risks or other vulnerabilities requiring expedited resettlement), and within twelve months for normal priority cases (that do not involve immediate risks).⁶⁰ The actual pace of resettlement belies those benchmarks: it may take years before a refugee may actually depart to the resettlement state.⁶¹ For medical resettlement needs,⁶² UNHCR

⁵³ The number of resettlement places which are offered annually varies: 29,560 in 2006, 49,868 in 2007, 65,874 in 2008, 84,657 in 2009, and 72,942 in 2010, UNHCR, "Frequently Asked Questions about Resettlement", April 2011 at 5. UNHCR estimates the number of required resettlement places for 2011 to amount to 805,000, UNHCR, "Frequently Asked Questions about Resettlement", 28 September 2009 at 5; UNHCR News Stories, "UNHCR highlights shortage of resettlement places", 5 July 2010. UNHCR estimates that the gap between resettlement needs and available places will result in a shortage of 40,000 places in 2011, UNHCR Projected Global Resettlement Needs 2011, June 2010 at 1 (the figures are confusing; the figure of about 800,000 includes populations whose resettlement is envisioned over a period of several years, *ibid.* at 4). The shortage of 40,000 places in 2011 matches the estimate of unmet needs caused by insufficient capacity for resettlement on the part of UNHCR, *ibid.* at 5.

⁵⁴ See n. 9 *supra*.

⁵⁵ UNHCR indicates that (the strategic use of) resettlement – on which, see *infra* - is not an exclusive responsibility of UNHCR but a shared responsibility between resettlement states, countries of asylum and UNHCR, UNHCR Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 6.

⁵⁶ Numbers declined in the wake of the large-scale resettlement of over 1.2 million Indo-Chinese refugees between 1976 and 1989, and another 49,000 on the basis of the Comprehensive Plan of Action to solve the Indo-Chinese refugee problem, see G. Troeller, "UNHCR Resettlement: Evolution and Future Direction", 14 *International Journal of Refugee Law* 2002, 85-95 at 88-89; UN doc. EC/GC/02/7 para. 1; UNHCR Resettlement Handbook, November 2004, Ch. 1 at 13.

⁵⁷ UN doc. EC/53/SC/CRP.10/Add.1 (2003), para. 6; UNHCR Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, 6-8 July 2010. It can hardly mean that the use of resettlement in the past merely benefited those who were resettled.

⁵⁸ For an enumeration of benefits, see UNHCR Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 4-5.

⁵⁹ Statement of E. Feller at the 58th session of UNHCR's Executive Committee, 3 October 2007 available at www.unhcr.org/admin/ADMIN/4704d4f32.pdf; CCME Conference, "Towards the Common EU Resettlement Scheme – the Road Ahead", Remarks by Erika Feller, Assistant High Commissioner – Protection, 25-28 August 2009 at 5; UNHCR Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 2.

⁶⁰ UNHCR, "Frequently Asked Questions about Resettlement", April 2011 at 8; UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 1.

⁶¹ UN doc. EC/59/SC/CRP.15 para. 8 (not infrequently more than 2 years).

⁶² See for the specific eligibility criteria, UNHCR Resettlement Handbook, Ch. 4, November 2004 at 10.

instituted the ‘Ten or More’ and ‘Twenty Or More’ (TOM) programmes,⁶³ and a number of states, including the Netherlands, reserve places for such medical cases. The processing times are, however, lengthy, and actual processing is, moreover, affected by low acceptance rates:⁶⁴ “Often medical cases incur long processing times, and in several instances refugees have died while awaiting decisions or travel processing”.⁶⁵ For emergency resettlement, UNHCR has about 700 places at its disposal, 95 of which are offered by the Netherlands.⁶⁶

“The problem of access to emergency resettlement is further compounded by procedural constraints such as security screening regulations, which delay decisions on admission to resettlement countries. This combination of factors prolongs the stay of some refugees in some host countries and increases their exposure to protection risks. In some cases refugees have been *refouled* or have died before a decision was made on their case for resettlement”.⁶⁷

In order to nonetheless secure protection for emergency cases - such as refugees at immediate risk of *refoulement*, high profile cases, refugees kept in prolonged detention, and refugees who, as victims or witnesses, are of concern to the International Criminal Court or international criminal tribunals, but also refugees with respect to whom the resettlement country has requested, or UNHCR has decided, not to disclose the final resettlement destination⁶⁸ - UNHCR took recourse to establishing evacuation transit facilities to ensure a temporary safe haven, that is, interim protection, pending resettlement to a third country.⁶⁹ The first, and so far in terms of capacity largest, Emergency Transit Centre (hereafter: ECT) was established in 2008 in Romania with a capacity of 200 refugees, a second one in the Slovak Republic in 2009 (capacity of 100 places), and a third one, in the same year, in the Philippines.⁷⁰

UNHCR nonetheless continues to be plagued by delays. In 2009, the average length of time between the submission of an emergency case and departure for resettlement was 5 months: “As it stands, the refugees concerned are not being resettled on what could be considered an emergency basis, if they are resettled at all”.⁷¹ In addition, UNHCR faces high decline rates by some resettlement states: in 2009, the global approval rate for emergency cases was about 66% but the average approval rate by resettlement countries offering dossier places for emergency cases submitted by UNHCR significantly lower, to wit: 59%, in particular when compared to the approval average for urgent and

⁶³ Cf. Executive Committee conclusion no. 47 (1987) sub (l).

⁶⁴ Cf. for instance the acceptance rate of the Netherlands: 35% in 2005 and 18% in 2006, Information Note: An Overview of medical resettlement needs, and the use of the ‘Ten or More’ and ‘Twenty or More’ (TOM) programmes, Annual Tripartite Consultations on Resettlement, 28-30 June 2007.

⁶⁵ *Ibid.*

⁶⁶ UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 1.

⁶⁷ *Ibid.* at 2; UNHCR Projected Global Resettlement Needs 2011, June 2010 at 10-11.

⁶⁸ UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 2-3; see also UNHCR, Temporary Evacuation Transit Facilities for Onward Resettlement, Annual Tripartite Consultations on Resettlement, 28-30 June 2007.

⁶⁹ UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 4.

⁷⁰ *Ibid.* In addition, Burkina Faso provided an evacuation facility on an *ad hoc* basis, *ibid.* The ECTs are established on the basis of agreements, see *e.g.* the Agreement between the Government of Romania and the Office of the United Nations High Commissioner for Refugees and the International Organization for Migration Regarding Temporary Evacuation to Romania of Persons in Urgent Need of International Protection and their Onward Resettlement, 8 May 2008 (effective as of 21 November 2008; the centre opened three days later): a lengthy agreement which nonetheless does not contain provisions on the legal status (and entitlements) of the transit refugees: they are required to reside in the ECT, travel within Romania is subject to prior approval by the Romanian authorities, and their rights and obligations are established by Romanian law (Art. 2 para. 2): in view of the fact that Romania is a party to the 1951 Convention and 1967 Protocol, and the agreement explicitly indicates that it does not prejudice in any way the obligations Romania incurred under the said instruments, it would seem that refugees in the ECT are entitled to the rights prescribed in the 1951 Convention and 1967 Protocol.

⁷¹ UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 5.

normal priority cases which stands at 81% and 89% respectively.⁷² In actual figures: in 2009 UNHCR made emergency resettlement submissions for 409 cases – 991 persons – and 223 – 620 persons – were accepted.⁷³ The figures for resettlement through evacuation transit centres do not fare much better: the average processing time for evacuations to the ECT in Romania, for instance, was 28 days, and some refugees had to stay more than six months in transit before they could proceed to a resettlement state.⁷⁴

PART THREE: DUTCH RESETTLEMENT PRACTICE

6. A DISCRETIONARY ACT: OFFERING RESETTLEMENT PLACES

For a long time only 12 states offered resettlement places. Among them, the traditional immigration states such as Australia, the United States, Canada, and New Zealand. UNHCR succeeded in increasing the number of resettlement states to the current number of 24 states.⁷⁵ The Dutch practice of accepting refugees for resettlement started in 1977 when “[t]here was scope for around 200 asylum seekers arriving independently and 550 resettled refugees”.⁷⁶ The admission ceiling was raised to 250 in 1984 until 1987 when it was raised to 500.⁷⁷ In 1999, the ceiling was made more flexible: instead of an annual maximum number of 500 persons per year, 1,500 could be invited per three years.⁷⁸ The average number of 500 has remained the same but with comparable flexibility: 2,000 refugees in a four-year period (2008-2011), a number that includes 30 places for ‘medical cases’ per year.⁷⁹ This number also includes family reunification albeit confined to family members who are known at the moment of selection.⁸⁰ The question is whether the current Dutch practice of offering a fixed number of resettlement places may indeed be characterized as a means, albeit modest, of burden sharing.

⁷² *Ibid.* at 5-6. ‘Dossier places’ are places that are offered merely on the basis of files submitted by UNHCR rather than interviews conducted by the prospective resettlement state. In the TOM programmes, refugees are accepted on a dossier basis, but see the explicit preference of the Netherlands to select medical cases during missions, Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament regarding the policy framework invited refugees 2008-2011, 28 January 2008 at 2.

⁷³ UNHCR, Information Note and Recommendations, Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities, Annual Tripartite Consultations on Resettlement, 6-8 July 2010 at 5.

⁷⁴ *Ibid.*

⁷⁵ UNHCR Projected Global Resettlement Needs 2011, June 2010 at 1. Those 24 states are the following: Argentina, Australia, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Iceland, Ireland, Japan, the Netherlands, New Zealand, Norway, Paraguay, Portugal, Romania, Spain, Sweden, United Kingdom, Uruguay, United States.

⁷⁶ WODC, 2008, *loc. cit.* n. 3 *supra* at 187.

⁷⁷ Letter of the Minister of Foreign Affairs, 3 December 1984, TK 1984-1985 18389 no. 13 at 6.

⁷⁸ WODC, 2008, *loc. cit.* n. 3 *supra* at 13. Actual numbers (of UNHCR resettlement departures to The Netherlands) are: 479 in 2005, 327 in 2006, 425 in 2007, 580 in 2008, and 347 in 2009, UNHCR Projected Global Resettlement Needs 2011, June 2010 at 55.

⁷⁹ Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament regarding the policy framework invited refugees 2008-2011, 28 January 2008; the quota has not always been used fully in the past – e.g. 438 refugees instead of 1500 in the period 1999-2001, 155 in 2002, 189 in 2003 - owing to low acceptance rates of UNHCR submissions caused by insufficient and inaccurate dossiers prepared by UNHCR, the abolishment of resettlement missions in the years 1999-2005, and failure to meeting the applicable eligibility criteria, *ibid.* at 3; see also WODC, 2008, *op.cit.* n. 3 *supra* at 47; Report of a written consultation, TK 2006-2007 19637 no. 1126 at 9 where the discrepancy is explained by the fact that the Netherlands judges the situation in the country of origin (not: refuge) on the basis of assessments of its Ministry of Foreign Affairs rather than proceeds from UNHCR’s judgement. Since 1 January 2005, the practice of selection by means of resettlement missions has been resumed, UNHCR Resettlement Handbook, Country Chapters, The Netherlands, September 2009 at 2.

⁸⁰ The limitation to known family members applies since 2008 following fraudulent family reunification cases; family members who are not known in advance can apply for family reunification outside the resettlement

This question is induced by the observation that the places appear not to relieve states hosting the largest numbers of refugees.⁸¹ In 2008, the Netherlands made resettlement missions to Jordan, Thailand, Tanzania, and Nepal and selected 347 refugees,⁸² whereas the major refugee hosting countries in that year consisted of Pakistan, Syria, Iran, Germany, and Jordan.⁸³

As to Germany: the Dutch quota is in principle not meant to resettle refugees from other western states,⁸⁴ but an exception was made in 2006 when the Netherlands, at the request of UNHCR, selected a number of boat refugees who had been rescued by Spain and Malta in order to indicate to the southern member states of the EU that they do not have to cope with the ‘Mediterranean migration problem’ on their own, and to stimulate ships to continue rescuing boat refugees.⁸⁵

An alternative criterion to that of major refugee hosting countries as ‘unduly heavy burdened states’ is to focus on the number of refugees per 1 USD GDP (PPP) per capita. Proceeding from the year 2008, this criterion yields the following listing: Pakistan (733), Democratic Republic of Congo (496), Tanzania (262), Syria (257), and Chad (230).⁸⁶ Yet another alternative would be to focus on ‘protracted refugee situations’,⁸⁷ that is, situations in which 25,000 or more refugees from the same nationality have been in exile for 5 years or more in a given asylum country.⁸⁸ Although the situations targeted by UNHCR in 2008 were Afghan refugees in Pakistan and Iran, Rohingya refugees in Bangladesh, Eritrean refugees in Eastern Sudan, Croatian and Bosnian refugees in Serbia, and Burundian refugees in Tanzania,⁸⁹ it nonetheless appears to have focussed on Iraqi, Burmese, and Bhutanese refugees that year.⁹⁰ The selection missions undertaken by the Netherlands in the same year appear, in turn, to correspond to those nationalities. Neither the Netherlands, nor UNHCR who nominates the refugees for resettlement, appear to be led by the criterion of unduly heavy burdened states however defined.

Since recognition of unduly heavy burdens appears not to be the decisive criterion, the question arises as to what criterion actually is in awarding resettlement places: it appears to be need for protection and the absence of other durable solutions,⁹¹ *regardless* of the actual distribution of burdens. The decisive criterion, in other words, is the individual refugee and his need for protection.

framework and the regular family reunification criteria will apply to them such as satisfying income criteria, *ibid.* at 7.

⁸¹ Cf. Executive Committee Conclusion no. 90 (2001) sub (k).

⁸² Letter of the Minister of Justice to the Chairman of the Second Chamber of Parliament regarding the use of the quota invited refugees 2008, 4 August 2009. The remaining places are used to grant resettlement places to individual cases proposed by UNHCR which are processed on a dossier basis.

⁸³ UNHCR, 2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced Persons and Stateless Persons, 16 June 2009 at 8. By comparison, Pakistan host 9.6 refugees per every 1000 inhabitants and Australia 1.1 refugee per 1000 inhabitants, J. Tobin, “Australia tops miser ranking on refugees”, 6 August 2010.

⁸⁴ Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament giving account of the 2006 resettlement policy, 28 June 2007.

⁸⁵ *Ibid.*

⁸⁶ UNHCR, 2008 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced Persons and Stateless Persons, 16 June 2009 at 10. By comparison, Australia has 0.6 refugees per GDP per capita, Tobin, 2010, *loc. cit.* n. 83 *supra*.

⁸⁷ Cf. Executive Committee Conclusions no. 90 (2001) sub (k); no. 99 (2004) sub (x).

⁸⁸ See n. 44 and accompanying text *supra*. By way of illustration, in 2004, 64% of the global total number of refugees lived in protracted refugee situations; the average duration of refugee situations was 17 years in 2003, UNHCR, Towards solutions for protracted refugee situations: The role of resettlement, Annual Tripartite Consultations on Resettlement, 29 June 2007.

⁸⁹ UNHCR, Protracted Refugee Situations, High Commissioner’s Initiative, December 2008.

⁹⁰ UNHCR, “Frequently Asked Questions about Resettlement”, 28 September 2009 at 4.

⁹¹ Cf. Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament regarding the policy framework invited refugees 2008-2011, 28 January 2008 at 2, 5. In the past this was different: the focus was on alleviating needs in certain regions as a contribution to the efforts of the international community while for individuals in emergency situations, *i.e.* those running the risk of *refoulement*, ten places were reserved, Letter of the Minister of Foreign Affairs to the Chairman of the Second Chamber of Parliament, 3 December 1984, TK 1984-1985 18389 no. 13 at 6-7.

7. SELECTION CRITERIA: RESETTLEMENT CONTROLLED BY IMMIGRATION CONCERNS, THE PRACTICE OF ‘CHERRY-PICKING’

Resettlement states, including the Netherlands,⁹² undertake selection missions in order to identify (and interview) refugees who are eligible for resettlement.⁹³ The selection procedure appears not to be confined to identifying those who are most in need of protection but also involve considerations that are part of immigration law, reminiscent of the selection criteria that were applied after the Second World War. The immigration criteria that are used in the selection of refugees for resettlement vary but can be categorized in terms of ‘resettlement’ or ‘integration potential’, ‘public health’, ‘national security’, and other national interests including ‘foreign policy’.⁹⁴ The Netherlands has formulated ‘integration potential’ (willingness and ability to integrate into Dutch society)⁹⁵ as of 2005.⁹⁶ However, preceding that year, comparable considerations played a role, such as a preference for families with children, potential to integrate economically, and specific host states. The Netherlands reserves places for countries of refuge with which it has a development aid relation, such as Kenya.⁹⁷ Also derived from its foreign policy, to which human rights are central, is the focus on those who fear persecution on account of defending human rights in their country of origin.⁹⁸

“UNHCR is therefore encouraged to include as many refugees as possible with a higher profile for submission to the Netherlands. Strictly speaking, these may not always be high profile cases as defined by UNHCR. Submissions might for example include (besides journalists and leaders of political movements) persons with an academic background who have played an active role in the strengthening of democratic institutions and/or civil society in their country, resulting in their justified fear for return”.⁹⁹

⁹² Cf. Nieuwsbericht Rijksoverheid [National news release], Photographs of State Secretary Albayrak during a working visit in Syria, Jordan and Iraq, 27 April - 1 May 2009, 2 June 2009 available at [Foto's: Staatssecretaris Albayrak op werkbezoek in Syrië, Jordanië en Irak](#) [Syrië, Jordanië en Irak - 27 april - 1 mei 2009](#) (visit to a refugee camp in the border area between Syria and Iraq with a view to resettling 80 Iraqi refugees).

⁹³ The Netherlands criteria for resettlement are based on Art. 29 of the Aliens Act 2000 and include eligibility on the basis of the 1951 Convention, Art. 3 of the European Convention on Human Rights and Fundamental Freedoms, humanitarian reasons (*e.g.* persons suffering from traumatic experiences, women at risk, and medical emergency cases, and (extended) family reunion). For additional criteria, see *infra*.

⁹⁴ Cf. FORUM/CG/RES/04 at 7 (“the present trend of categorizing refugees into ‘first class refugees’ and others, which turns into a fight between various resettlement countries in getting the most ‘attractive refugees’”).

⁹⁵ UNHCR Resettlement Handbook, Country Chapters, The Netherlands, September 2009 at 4.

⁹⁶ Letter of the Minister for Aliens Affairs and Integration, TK 2005-2006 19637 no. 1071 at 2. When this criterion was explicitly formulated in 2005, it was to be applied only to those who are admitted on the basis of humanitarian grounds (see n. 93 *supra*) and it would with respect to refugees apply only when there would be clear indications that they would not be able to integrate in Dutch society such as not being prepared to learn Dutch, not being prepared to accept Dutch values and to integrate into Dutch society, having the intention to cause civil unrest, having militant fundamentalist convictions which can lead to unacceptable behaviour, Letter of the Minister for Aliens Affairs and Integration, TK 2005-2006 19637 no. 1071 at 2-3. In 2008, the Research Institute of the Ministry of Justice (WODC) conducted research into the integration of resettled refugees: degree of participation in the domestic labour market, education and criminality, see WODC, 2008, *op. cit.* n. 3 *supra*. See *ibid.* on an elaboration of the notion ‘integration potential’ at 54.

⁹⁷ Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament giving account of the 2006 resettlement policy, 28 June 2007. With respect to ‘medical cases’, the leading criterion is whether the requisite treatment is not available in the country of refuge, treatment should, moreover, result in substantive improvement of the medical condition, Letter of the State Secretary of Justice to the Chairman of the Second Chamber of Parliament regarding the policy framework invited refugees 2008-2011, 28 January 2008 at 2, but see the Country Chapter on the Netherlands – the text of which has been submitted by the Netherlands – in UNHCR’s Resettlement Handbook that explicitly states that the fact that medical treatment is not accessible in countries of asylum is not an argument for resettlement on medical grounds unless access is denied for reasons of race, religion, nationality, membership of a particular social group or political opinion.

⁹⁸ UNHCR Resettlement Handbook, Country Chapters, The Netherlands, September 2009 at 5 (the persons concerned are “very welcome in the Netherlands”, *ibid.* at 6).

⁹⁹ *Ibid.* at 6.

It will not accept persons for resettlement who have a criminal background and/or pose a threat to the national public order, *i.e.* beyond the applicability of Article 1 F of the 1951 Convention.¹⁰⁰

UNHCR expresses concern at the allocation of resettlement places based, in part, on such domestic considerations – including priority attached to certain populations - and constraints rather than actual resettlement needs and priorities.¹⁰¹ Selection of refugees according to integration potential - and other discriminatory, often informal, criteria such as family size, age, health status, ethnicity and religion – “creates inequities and protection gaps, and limits access to resettlement by some of the refugees most at risk, e.g. politically sensitive ethnic groups, single men or large families, and refugees with low education levels, medical needs or disabilities”,¹⁰² resulting in ‘untouchables’, that is, refugees who are in need of resettlement but who are not considered because of age, family size, ethnicity, political convictions, socio-economic status or perceived lack of integration potential.¹⁰³ It is remarkable that UNHCR merely objects to the discriminatory effects of using such restrictive criteria and refrains from commenting on the compatibility of such criteria with international refugee law.¹⁰⁴ Illustrative of this omission is also the stated need to grant resettled refugees “a progressively wider range of rights and entitlements and finally providing the possibility of naturalization”.¹⁰⁵ A need that could equally have been expressed in terms of the need to grant resettled refugees the rights provided in the 1951 Convention, and directly for that matter rather than progressively.¹⁰⁶ Perhaps what bars UNHCR from actually stating this is the ambiguity of the solution itself which is described by UNHCR as ‘*admitting refugees - as refugees - with permanent residence status*’.¹⁰⁷ An ambiguity that is mirrored in the practice of states.¹⁰⁸ UNHCR adds to the confusion by welcoming resettlement from Malta in terms of ‘relocation’, presumably because the refugees concerned are transferred to other European states, that is, remain within the same region.¹⁰⁹

8. RESETTLEMENT PART AND PARCEL OF INTERNATIONAL REFUGEE LAW

¹⁰⁰ *Ibid.* at 4. The decision to reject a submission is not subject to appeal, *ibid.* at 5. The lack of appeal is problematic *per se* but particularly in the light of the observation made by the leader of a Dutch selection mission to Syria in 2009 that ‘the procedure is one of invitation, and hence the choice is ours, nothing more nor less’ [“Het gaat om een uitnodigingsprocedure, dus de keuze ligt bij ons. Niets meer, niets minder”], quoted in K. Kakebeeke, E. Blankevoort, *De Vluchtelingenjackpot*, 2011.

¹⁰¹ UN doc. EC/59/SC/CRP.11 para. 21.

¹⁰² *Ibid.* See also UNHCR, European Council on Refugees and Exiles Biannual General Meeting, 30-31 October 2008 at 2 where “ill-defined notions of integration potential” are stated to put at risk the very foundation upon which UNHCR’s global resettlement activities are built. The use of this particular criterion is nonetheless not rejected, states are rather advised to “consider integration issues flexibly” (*ibid.* at 3); see also *infra*.

¹⁰³ UNHCR Progress Report on Resettlement, UNHCR Standing Committee 42nd session, 23-25 June 2008 at 4 (the qualification of ‘untouchables’ was made by the Assistant High Commissioner - Protection).

¹⁰⁴ *Cf.* UN doc. EC/GC/02/7 paras. 15 (on the importance of discouraging resort to the criterion of ‘integration potential’), 19 (‘integration potential’ should not play a determining role in the consideration of resettlement applications); UN doc. EC/SCP/65 para. 12 (referring to ‘confusion’ in this respect) and para. 20 (“Protection should take precedence over immigration criteria”); UN doc. EC/51/SC/INF.2 para. 27 (those who have been identified as in need of resettlement “should not be denied this possibility because of the perception of what has been called ‘integration potential’”); UN doc. A/AC.96/1038 para. 63 (merely complaining that some states make “excessive use of integration potential in their resettlement assessments”). UNHCR does note that the use of restrictive selection criteria along with lengthy processing times undermine the strategic use of resettlement, UN doc. EC/59/SC/CRP.11 para. 15.

¹⁰⁵ UNHCR, “Frequently Asked Questions about Resettlement”, April 2011 at 10.

¹⁰⁶ See para. 3 *supra*. See also FORUM/2004/6 (Multilateral Framework of Understandings on Resettlement) para. 41 which too omits to refer to the rights that accrue to refugees by virtue of the 1951 Convention and/or 1967 Protocol; see also The Michigan Guidelines on Protection Elsewhere of 2 January 2007.

¹⁰⁷ See quotation in para. 5 *supra* and accompanying footnote; see also UN doc. EC/57/SC/CRP.15 para. 4; UNHCR’s Agenda for Protection (UN doc. A/AC.96/965/Add.1), Goal 5 sub (5).

¹⁰⁸ See para. 8 *infra*.

¹⁰⁹ UNHCR Projected Global Resettlement Needs 2011, June 2010 at 35.

It is submitted that resettlement is part and parcel of international refugee law, and should consequently be distinguished from other forms of (im)migration:¹¹⁰ “Refugee resettlement is distinguished from other forms of migration by the primary consideration of ‘protection and durable solution needs’ above all other concerns”.¹¹¹ Resettlement takes place on the basis of need for protection,¹¹² a need that is formulated in terms of the applicable definition of refugee and lack of adequate protection in the country of refuge in conjunction with the knowledge that alternative solutions, particularly voluntary repatriation, are not available. It, in other words, boils down to exchanging a first state of asylum for a second one. Resettlement of refugees is in many respects no different from admission of refugees who arrive spontaneously as most do: the main difference is that accepting refugees for resettlement on the basis of need for protection requires making an inroad on the accidental distribution of refugees on the basis of geographical proximity, that is, exchanging the first country of asylum for a second one. Dutch practice corresponds with this observation: although resettlement is in principle ‘permanent’,¹¹³ resettled refugees and those who arrive spontaneously are given an identical temporary residence permit (and identical provisions)¹¹⁴ unlike, for instance, refugees in the United Kingdom: invited refugees – ‘gateway refugees’ in UK terminology (derived from its Gateway Protection Programme) – are given the immigration status of indefinite leave to enter upon arrival, which entitles them to permanent residency in the UK whilst other recognized refugees are granted temporary leave to remain in the UK for five years. The British policy takes the different circumstances of arrival as the basis to grant divergent statuses.¹¹⁵

The temporary residence permit – 5 years – need not, according to Dutch law, be extended if repatriation would become a viable option or when cessation of refugee status is warranted on account of changed circumstances in the country of origin: “a full reassessment will take place before it is decided whether a withdrawal of the status will be conducted or that another status will be considered on a different ground”.¹¹⁶ The only difference between resettled and other refugees – that is, those who arrive themselves – is that resettled refugees are admitted as refugees,¹¹⁷ as a result of which they are immediately entitled to the right to work and other rights that enable them to achieve economic self-sufficiency, whilst the other refugees have to await status determination and formal admission before they may enjoy the same rights.¹¹⁸ Both categories have the same prospects for permanent residency and naturalization: if changes in the country of origin do not warrant loss of refugee status, and hence loss of the temporary residence permit, they can apply for an extension of their residence permit and/or naturalization.¹¹⁹ Obviously, the mere fact of a temporary permit and an uncertain tenure may affect actual integration.

¹¹⁰ Even when UNHCR proposes incorporating acceptance of refugees in national migration programmes, which is just an attempt to secure more resettlement places, see UNHCR Progress Report on Resettlement, UNHCR Standing Committee, 42nd session, 23-25 June 2008 at 3; UN doc. EC/61/SC/CRP.11 para. 20.

¹¹¹ UNHCR, “Frequently Asked Questions about Resettlement”, April 2011 at 3.

¹¹² See para. 5 *supra*.

¹¹³ WODC, 2008, *op. cit.* n. 3 *supra* at 86.

¹¹⁴ Since an application for asylum can only be lodged in the Netherlands, those who are invited to resettle in the Netherlands have to request asylum upon arrival before they can actually be admitted, but this is considered to be a mere formality, UNHCR Resettlement Handbook, Country Chapters, The Netherlands, September 2009 at 4.

¹¹⁵ Cf. S. da Lamba, “Legal Status and Refugee Integration: a UK Perspective”, 23 *Journal of Refugee Studies* 2010, 415-436 at 416, 425-426; UNHCR Resettlement Handbook, Country Chapters, United Kingdom, September 2007. ‘Mandate refugees’, however, who are exceptionally accepted for resettlement (only if they have close ties with the UK) – they are granted entry clearance rather than being invited – are given refugee status upon arrival in the UK and presumably the same temporary leave to remain as other refugees. On mandate refugees, see UK Home Office, “Mandate Refugees” at www.ukba.homeoffice.gov.uk/ < accessed on 19 January 2011 >; K. Bianchini, “The Mandate Refugee Program: A Critical Discussion”, 22 *International Journal of Refugee Law* 2010, 367-378.

¹¹⁶ UNHCR Resettlement Handbook, Country Chapters, The Netherlands, September 2009 at 4.

¹¹⁷ See n. 114 and accompanying text *supra*.

¹¹⁸ Cf. Case Report Judgment of the Netherlands Supreme Court of 13 April 2007, Oxford Reports on International Law – ILDC 837 (NL 2007), 27 February 2009.

¹¹⁹ The permit for infinite stay is, however, subject to withdrawal on the basis of a criminal conviction for a crime that is punishable by three or more years imprisonment, and on the basis of national security, Art. 35 para. 1 sub (b), (d), Aliens Act 2000.

It should be added that state practice varies in this respect. Argentina, Chile, Norway, and the United States too grant resettled refugees a temporary residence permit but other, major, resettlement states such as Canada, Australia, and New Zealand grant permanent residence permits. The immediate grant of a permanent residence status does not justify using selection criteria that derive from immigration law and the same applies to the grant of a temporary residence permit. The choice of residence status is at the discretion of states but their discretion is limited by obligations deriving from the 1951 Convention both in the sense that circumstances of arrival do not warrant restricting the definition of refugee by means of immigration criteria and in the sense that domestic law should not diminish any entitlements refugees – resettled or not – have under the Convention. In that respect it is worth adding that resettlement as such does not end those entitlements: the cessation clauses in the Convention – that is, the provisions that limitatively enumerate when the 1951 Convention shall cease to apply – do not warrant loss of refugee status on that basis. In fact, not even when the resettled refugee acquires the nationality of the resettlement state: only if he enjoys the protection of the country of his new nationality such loss is warranted.¹²⁰

9. EXCLUSION OF MANDATE REFUGEES

Resettlement is only for the happy few; not just by virtue of the practice of cherry picking nor the fact that very few resettlement places are made available in the world. It is also a consequence of the fact that resettlement of refugees is in principle confined to those who qualify as refugees in the sense of the 1951 Convention definition, a definition that focuses on a well-founded fear of persecution.

UNHCR supports for resettlement individuals who are recognized as refugees under its own mandate. UNHCR's mandate *ratione personae*, once virtually identical to the 1951 Convention definition of refugee, has been expanded by means of General Assembly resolutions as a result of which those who flee human rights violations and situations of generalized violence too qualify as refugees under UNHCR's mandate, not just those who have a well-founded fear of persecution. 'Mandate' refugees are defined as follows:

“all persons who are refugees within the meaning of the 1951 Convention as well as those who are outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order, and who, as a result, require international protection”.¹²¹

The expanded competence *ratione personae* of UNHCR has not been matched by corresponding obligations on the part of most states who consequently adhere to the 1951 Convention definition,¹²² and others may at best qualify for general humanitarian reasons distinct from refugee concerns. Since those who are the concern of UNHCR are therefore not necessarily the concern of states because they apply a much narrower definition of refugee, resettlement is largely confined to those who qualify as Convention refugees.¹²³ The Netherlands does not undertake resettlement missions to states of refuge which host refugees who do not fear persecution. This may explain why the Netherlands omitted to select refugees in Pakistan that applies a broader definition,¹²⁴ even though Pakistan ranks highest on

¹²⁰ Art. 1 C sub (3), 1951 Convention.

¹²¹ UNHCR Resettlement Handbook, November 2004, Ch. 3 at 2.

¹²² See M.Y.A. Zieck, *UNHCR's Parallel Universe, Marking the Contours of a Problem*, 2010.

¹²³ “many States may only consider refugees determined under the 1951 Convention to be eligible for resettlement in their country”, UNHCR Resettlement Handbook, November 2004, Ch. 3 at 5; see also Troeller, 2002, *loc. cit.* n. 56 *supra* at 92-93; UN doc. EC/CG/02/7 paras. 16, 19; see also the call of the Assistant High Commissioner – Protection on states to be flexible on resettlement admissions with respect to refugees in protracted refugee situations where states “may have difficulty articulating a personalised 1951 Convention claim based on current events”, CCME Conference, “Towards the Common EU Resettlement Scheme – the Road Ahead”, 25-28 August 2009; FORUM/2004/6 (Multilateral Framework of Understandings on Resettlement) para. 17 (recommending the selection of refugees who are of concern to UNHCR).

¹²⁴ See M.Y.A. Zieck, “The Legal Status of Afghan Refugees in Pakistan, A Story of Eight Agreements and Two Suppressed Premises”, 20 *International Journal of Refugee Law* 2008, 253-273.

any listing of unduly heavy burdened states. Entangling the protracted situation of Afghan refugees in Iran and Pakistan, as UNHCR intends to do in 2011,¹²⁵ may prove hard to realize when resettlement states refuse to accept those who fall under UNHCR's mandate rather than solely within the terms of the 1951 Convention definition.

PART FOUR: RESETTLEMENT OR RELOCATION?

10. DUTCH RESETTLEMENT PRACTICE

Resettlement as currently practised by the Netherlands is not a form of burden sharing in the proper sense of the term since it does not constitute a means to relieve unduly heavy burdened states from part of their burden. Only at a more abstract level can it be considered to constitute a form of burden sharing in the sense that anything that extends beyond accepting spontaneously arriving refugees would qualify as such. When the focus is not on burden sharing but on the more sympathetic and broader designation of 'responsibility sharing', the Dutch contribution may qualify on account of its focus on need for protection. The refugee law regime has, after all, been designed to protect those who need protection. To accept refugees for resettlement thus partakes of the nature of the regime as intended. Obviously, limiting resettlement places to those who meet criteria that are extraneous to the regime, such as integration potential, detract from this conclusion.

The solution of resettlement is described in UNHCR's Statute as a 'permanent' solution. When resettlement results in admission and a grant of a residence status that does not distinguish the resettled refugees from those who arrive spontaneously, as is the case in the Netherlands, it does not necessarily constitute a permanent solution either. The possibility of extended stay is subject to review and may give way to loss of residence status when circumstances in the country of origin so warrant, alternatively, if the refugee constitutes a danger to the public order or national security. It at best carries the potential of a permanent, or rather durable solution, just as it does for those who arrive spontaneously. The question is whether this liminal stay is necessarily a bad thing. Arguably it is when the intended prospect is a permanent solution. It is not when the resettlement state is considered to be the substitute of the first state of asylum. If resettlement would actually be used to secure a safe second country of refuge, it would benefit from describing it in terms of 'relocation'. Unlike the present practice, it would highlight that those who are thus relocated are refugees, not immigrants or would-be immigrants, who are entitled to enjoy the same rights as those who seek asylum in the same state, that is, the rights which are provided in the 1951 Convention and the 1967 Protocol.¹²⁶ It would, moreover, disqualify the application of any criteria that are extraneous to the eligibility criteria laid down in those two instruments.

11. TAKING RECOURSE TO FUZZY LOGIC

One of the difficulties inherent to the solution of 'resettlement' as currently used, is that it appears to be ambiguous, that is to say, sufficiently ambiguous to generate divergent state practice: some states grant resettled refugees refugee status and a temporary residence permit, others permanent residence status. UNHCR is not giving unambiguous guidance in this respect since it defines resettlement as the transfer of refugees to states that grant them – as refugees - permanent residence. Regardless of what states actually grant, all – as far as could be ascertained – apply to varying extents immigration criteria. When 'resettlement' is viewed through the prism of traditional Boolean binary logic, it is hard to escape the conclusion that resettlement partakes of immigration. After all, it has been qualified as a 'permanent' solution in the Statute of UNHCR and it has to result in assimilation into a new national community. When it is viewed in relation to the other two solutions – local integration and voluntary

¹²⁵ UNHCR Projected Global Resettlement Needs 2011, June 2010 at 28.

¹²⁶ UNHCR states that "resettlement is not a right of the individual", UNHCR Resettlement Handbook, November 2004 at IV/2, Ch. 8 at 24. Perhaps it is when resettlement is taken to mean relocation with a view to securing the protection sought by those who are seeking asylum.

repatriation – the intended permanency makes sense: the idea is that refugee status gives way to a regular one: either in the country of origin or another state. There is, however, more than merely the text of the Statute.

Resettlement as a final solution in the sense of UNHCR's Statute has historical origins, namely resettlement as implemented in the wake of the Second World War. At the time, resettlement was geared to those who could no longer stay where displacement had left them. It was a solution that was the only available alternative to repatriation: its opposite essentially without any thought that it would at some point give way to repatriation to the country of origin. Those who were resettled were meant to assimilate into new national communities. In this particular setting, taking into consideration that the 1951 Convention had not been drafted yet, considering and implementing the resettlement of refugees in terms of immigration was not outlandish even if practised in a discriminatory manner. The past reverberates in the Statute, and the question is whether this past should still be allowed to exert its influence on the present considering a number of subsequent legal and practical developments - with contrary implications – which have turned 'resettlement' into a fuzzy set, that is, a solution without sharp boundaries,¹²⁷ which is not, incidentally, something that should necessarily be regretted.

First of all, the 1951 Convention was drafted and adopted: many states have since its adoption become party to the Convention.¹²⁸ Secondly, the 1951 Convention is structured the way it is to accommodate different modes of arrival, that is, spontaneous and controlled arrival. The latter, with which the drafters were familiar at the time, left its traces in the Convention: only those who arrive in a controlled manner will benefit immediately from most of the rights it comprises.¹²⁹ Thirdly, those who arrive in a controlled manner, that is, those who are invited, will not solely on that account lose their status as refugee: the 1951 Convention clearly provides that those who have found a new country will only lose their refugee status when they have been given the nationality of that state and enjoy its protection.¹³⁰

Not states but UNHCR has been charged to seek solutions to the problem of refugees. It fell to UNHCR to implement this particular solution.¹³¹ In practice, largely constrained to do so by virtue of scarcity – despite its assuming and invoking the collective responsibility of states party to the 1951 Convention and/or 1967 Protocol¹³² to provide the requisite protection for those in need thereof¹³³ - UNHCR essentially confines resettlement to those refugees with serious protection needs in the

¹²⁷ See n. 139 *infra*.

¹²⁸ As at 23 January 2011, 144 states are party to the 1951 Convention, and 145 to the 1967 Protocol, UNTC.

¹²⁹ The remaining rights, such as exemption from legislative reciprocity and any restrictive measures imposed on the employment of aliens become applicable after a period of three years' residence. With respect to spontaneous arrivals who will not stay in the country of first asylum but move to a third – resettlement - state, Article 30 of the 1951 Convention - on transfer of assets – is applicable, see also Hathaway, 2005, *op. cit.* n. 39 *supra* at 963-964. This provision implies the right to actually leave the country of first asylum, a right that is not always recognized, *cf.* UN doc. EC/61/CRP.11 para. 11 (“there were a number of deplorable instances where refugees faced refoulement in 2009 even though they had been accepted for resettlement by a third country”), for examples, see Zieck, 2010, *loc. cit.* n. 4 *supra* at 599, 613, 617.

¹³⁰ See para. 8 *supra*.

¹³¹ It may rely and invoke the obligation of states to cooperate with it in the exercise of its functions, Art. 35 paragraph 1, 1951 Convention, Art. II, 1967 Protocol.

¹³² The 1951 Convention is predicated on international solidarity, or the notion that states should address refugee protection collectively, Statement of the Assistant High Commissioner - Protection at the 59th session of the Executive Committee at 8. See also the Declaration of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN doc. HCR/MMSP/2001/09, 2001, 8th preambular paragraph, 12th operative paragraph; UN doc. EC/51/SC/INF.2 para. 7. The collective concern for the problem of refugees that induced the creation of the 1951 Convention and the establishment of UNHCR has not been translated into collective responsibility for states party to the 1951 Convention (and/or 1967 Protocol) for the protection of refugees but merely into several responsibility which does, however, include the cooperation that is required to allow refugees to proceed to their resettlement state, see n. 129 *supra*.

¹³³ To the extent that resettlement is needed on account of a failure to provide the requisite protection in the first country of asylum, invoking the collective responsibility of states party to the 1951 Convention and/or 1967 Protocol needs to be balanced by the failure of individual states party to live up to their obligations under these instruments.

country of refuge.¹³⁴ Whilst resettlement is consequently used as a means to secure a second safe country of asylum, UNHCR continues to define resettlement in terms of a permanent solution. This duality is captured neatly in UNHCR's referring to 'resettlement' as both a protection tool,¹³⁵ and a durable solution.¹³⁶ The first question is whether the two should be divorced, and the second question is whether resettlement should invariably be considered in terms of a permanent solution, that is, as a means to end refugee status.

The implied duality appears to imply categorically different needs on the part of the refugees. Obviously, the needs of refugees differ. At the one extreme, refugees may not enjoy protection against *refoulement*,¹³⁷ - UNHCR's emergency cases - and at the other, refugees perhaps do enjoy this protection but structurally lack other basic rights particularly those enumerated in the 1951 Convention, stuck as they are in protracted refugee situations.¹³⁸ The difference in protection needs between those who need immediate protection and those whose needs are less urgent - but only in comparison with the first category - is solely a matter of degree: the plight of the latter only differs gradually from that of the former.

Exchanging the usual binary logic, the logic of extremes, for fuzzy logic¹³⁹ - multi-valued logic - may help to considering resettlement not solely in terms of a permanent solution. Both categories of refugees need relocation: both need a substitute state of asylum that secures the rights provided in the 1951 Convention which comprises the possibility of permanent settlement by means of naturalization and the acquisition of a new effective nationality.¹⁴⁰ When resettlement is viewed as a means to secure protection that is not forthcoming in the state of first asylum, it can no longer be merely considered in bivalent terms but allows varieties related to differing needs of protection and hence as a solution that may need to be a permanent one - such as for those caught in protracted refugee situations - but not necessarily invariably so. In addition, when resettlement focuses, as appears to be the current practice, on serious protection needs, and thus functions as a form of

¹³⁴ According to UNHCR, the primary purpose of resettlement is the provision of individual protection for those who cannot be provided with adequate protection in the first country of asylum, UNHCR Resettlement Handbook, November 2004, Ch. 1 at 4; likewise FORUM/CG/RES/04 at 9.

¹³⁵ UNHCR refers in this respect to resettlement in terms of "a future commensurate with fundamental human rights", UN doc. EC/SCP/65 para. 2.

¹³⁶ See Agenda for Protection (UN doc. A/AC.96/965/Add.1), Goal 5 sub (6); UN doc. EC/GC/02/7 paras. 5, 19.

¹³⁷ See G.S. Goodwin-Gil, J. MacAdam, *The Refugee in International Law*, 2007 at 499; Zieck, 2010, *loc. cit.* n. 4 *supra*, on non-European refugees in Turkey whose protection ultimately depends on the possibility of resettlement; and the current plight of sub-Saharan refugees in Libya, see A. Guterres (United Nations High Commissioner for Refugees), "Look Who is Coming to Europe", *New York Times*, 9 May 2011; a few of those refugees were transferred to the ECT in Romania and will be resettled in the United States and The Netherlands, UNHCR News Stories, "Eritrean refugees arrive in Romanian emergency transit centre from Tunisia", 20 April 2011.

¹³⁸ See E. Ferris, "Protracted refugee situations, human rights and civil society", in G. Loescher, J. Milner, E. Newman, J. Troeller, *Protracted Refugee Situations, Political, Human Rights and Security Implications*, 2008, 85-107.

¹³⁹ 'Fuzzy logic' transcends the Boolean bivalent logic which is confined to the values true and false by allowing values in between such as very true, quite true, not very true: a multi-valued logic. Fuzzy sets are central to fuzzy logic and the durable solutions, alternatively that of resettlement, can be viewed as a fuzzy set, that is, a class with unsharp boundaries. Obviously the theoretical aspects of fuzzy sets and fuzzy logic are not used here other than the idea of a multi-valued logic that appears to make sense when certain notions - such as resettlement in particular - defy being considered and analysed *in abstracto* but rather appear to require a relational context which discloses dependencies that, in turn, yield differentiations that appear to be useful. For instance: in Boolean two-valued logic it would not be possible to argue that resettlement is both a permanent solution and that is it not at the same time, it would lead to a *falsum* (and: *ex falsum sequitur quod libet*). Fuzzy logic allows to validly stating that resettlement is both a permanent solution and that is not: both parts of the statement may be true to a certain degree. On 'fuzzy sets', see L.A. Zadeh, "Fuzzy Sets", 8 *Information and Control* 1965, 338-353; on 'fuzzy logic', see L.A. Zadeh, "Fuzzy Logic and Approximate Reasoning", 30 *Synthese* 1975, 407-428; see also "Understanding Fuzzy Logic: An Interview with Lotfi Zadeh", *IEEE Signal Processing Magazine*, May 2007, 102-105. (Fuzzy logic should be distinguished from probabilistic logic, which, unlike fuzzy logic, accommodates ignorance, that is, limited knowledge or incomplete information.)

¹⁴⁰ See Art. 34, 1951 Convention.

relocation rather than an end to refugee status – which it never is *per se*¹⁴¹ - it would be hard to argue that the plight of those who are invited differs categorically from those who arrive spontaneously. It would be equally hard to justify discriminating among refugees in need of relocation other than in terms of need of protection.

¹⁴¹ See para. 8 *supra*.