



## Afghan Mass Displacement: The American Response in Light of International Human Rights and Refugee Law, and the Need for International Cooperation to achieve a Satisfactory Solution

Janine Prantl,<sup>\*</sup> Tirol/New York

***Abstract:** This contribution addresses issues relevant to the legal status and treatment of evacuees from Afghanistan, many of whom are destined to the United States (US), but temporarily hosted in third countries. This concerns third countries having agreed on temporary hosting arrangements with the US, and lily pad countries in Europe and the Middle East, where evacuees are located in US military bases. Beyond, the future residence status of evacuees paroled in the US remains uncertain. Against that backdrop, the contribution's overall aim is to map out the pertinent international legal framework and apply it in the context of the US response to Afghan mass displacement, which also provides lessons for the broader subject of resettlement and humanitarian admission, and underscores the essential role of international cooperation for the protection of refugees and other vulnerable individuals on the move.*

***Keywords:** Humanitarian admission, refugee resettlement, international refugee and human rights law, international cooperation, Afghanistan*

### I. Introduction

Between the fall of the Afghan government on August 15, 2021, and the end of the United States' (US) withdrawal from Afghanistan on August 31, 2021, tens of thousands were able to flee the country, with nearly 130,000 people evacuated on US aircraft.<sup>1</sup> Particular pressure rests upon the US since many of those seeking to escape Afghanistan have been associated with the US presence in the country, now expecting shelter in the US; along with that comes

---

<sup>\*</sup> Mag. Dr. Janine Prantl, LL.M. (Columbia) is Postgraduate Legal Fellow for the Global Strategic Litigation Council for Refugee Rights at the Institute of European and International Law at the University of Innsbruck. The author thanks Univ.-Prof. MMag. Dr. Andreas Th. Müller, LL.M. (Yale) for his endless support and thoughtful feedback on earlier drafts of this contribution.

<sup>1</sup> See *Feith-Tan*, The Temporary Hosting of Evacuated Afghans in Third Countries: Responsibility Sharing or Externalisation? <https://rli.blogs.sas.ac.uk/2021/09/15/the-temporary-hosting-of-evacuated-afghans-in-third-countries-responsibility-sharing-or-externalisation/> (September 15, 2021).

global criticism that President *Biden's* decision to bring the remaining US troops home from Afghanistan triggered an Afghan 'refugee crisis'.<sup>2</sup> From the political standpoint, US non-compliance with international law would harm the standing of the US in global affairs – especially in consideration that President *Biden* proclaimed US “moral leadership”, including the defense of refugees and a rules-based international order.<sup>3</sup> Against that backdrop, this contribution takes up the underlying legal issues and argues that it is not only crucial *that* the US takes a lead on combatting the humanitarian crisis in Afghanistan, but also *how*.

The right to leave constitutes the starting point. Months after the US withdrawal, many individuals at risk were left behind in Afghanistan.<sup>4</sup> Despite prior assurances, and in contradiction with Security Council Resolution 2593,<sup>5</sup> the Taliban have continuously restricted cross-border movement,<sup>6</sup> amongst others by stopping to issue passports.<sup>7</sup> In this light, the International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup> stipulates under art. 12 para. 2 that “everyone shall be free to leave any country, including its own”; further, the right to leave has been established as a rule of international customary law.<sup>9</sup> Precisely, the substantive scope of the right to leave comprises a positive duty for contracting states to issue travel documents, as well as a negative duty not to restrict exit.<sup>10</sup> Afghanistan ratified the ICCPR.<sup>11</sup> The Taliban exercise *de facto* control over Afghanistan, replacing the former government. “A general *de facto* Government [...] is itself an apparatus of the State, replacing that which existed previously.”<sup>12</sup> On this basis, it can be argued that the Taliban bear responsibility for fulfilling the

<sup>2</sup> See e.g. *Kirişci/Fulya*, Biden's decision to pull troops from Afghanistan risks a major refugee crisis, <https://www.brookings.edu/articles/bidens-decision-to-pull-troops-from-afghanistan-risks-a-major-refugee-crisis/> (April 26, 2021).

<sup>3</sup> See *id.*

<sup>4</sup> See *Gramer/Detsch/Mackinnon*, Those Left Behind in Afghanistan, <https://foreignpolicy.com/2021/10/01/afghanistan-biden-interpreters-special-immigrant-visa-evacuation-state-department/> (October 1, 2021); see also *Hauslohner*, Thousands of Afghans evacuated during U.S. withdrawal awaiting resettlement, [https://www.washingtonpost.com/national/thousands-of-afghans-evacuated-during-us-withdrawal-awaiting-resettlement/2021/11/20/8226ecca-4260-11ec-a88e-2aa4632af69b\\_story.html](https://www.washingtonpost.com/national/thousands-of-afghans-evacuated-during-us-withdrawal-awaiting-resettlement/2021/11/20/8226ecca-4260-11ec-a88e-2aa4632af69b_story.html) (November 20, 2021).

<sup>5</sup> See S.C. Res. 2593 para. 5 [“Notes the Taliban statement of August 27, 2021, in which the Taliban committed that Afghans will be able to travel abroad, may leave Afghanistan anytime they want to, and may exit Afghanistan via any border crossing, both air and ground, including at the reopened and secured Kabul airport, with no one preventing them from traveling”], [https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2593\(2021\)&Language=E&DeviceType=Desktop](https://undocs.org/Home/Mobile?FinalSymbol=S%2FRES%2F2593(2021)&Language=E&DeviceType=Desktop) (August 30, 2021).

<sup>6</sup> See *Lang et al.*, After the Airlift: Protection for Afghan Refugees and Those Who Remain at Risk in Afghanistan, 11, <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21).

<sup>7</sup> See *Gramer/Detsch/Mackinnon*, Those Left Behind, <https://foreignpolicy.com/2021/10/01/afghanistan-biden-interpreters-special-immigrant-visa-evacuation-state-department/> (October 1, 2021).

<sup>8</sup> International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171.

<sup>9</sup> See *Chetail*, International Migration Law (2019) 85 et seqq.

<sup>10</sup> See for passport refusal, ECHR, App. No. 29713/05, *Stamose v. Bulgaria* (November 27, 2012); the importance of passport issuance in the context of the right to leave is also highlighted by *Higgins*, The Right in International Law of an Individual to Enter, Stay in and Leave a Country, Vol. 49 International Affairs 1973, 353 et seq; see also *Guild/Stoyanova*, The Human Right to Leave Any Country: A Right to be Delivered, in *Benedek et al.* (eds.), European Yearbook on Human Rights (2018) 384.

<sup>11</sup> See OHCHR, UN Treaty Data Base: Ratification Status of Afghanistan, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=1&Lang=EN) (September 28, 2021).

<sup>12</sup> *ILC*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, art. 16 para.1 [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); see also *Deen*, Will Taliban Honour UN Treaties Signed by Afghanistan Over the Last 20 Years? <http://www.ipsnews.net/2021/10/will-taliban-honour-un-treaties-signed-afghanistan-last-20-years/> (October 6, 2021).

duties under art. 12 para. 2 ICCPR. Notwithstanding, they keep interfering with the right to leave of untold numbers of Afghan citizens and others seeking to escape Afghanistan, supposedly without any basis provided by law, and without reasonable ground for justification. On top of that, neighboring countries exacerbate the limbo situation by closing their borders (see *infra* section). This, in turn, poses a major practical hurdle to access admission to the US, because under the US Refugee Admissions Program (USRAP), applicants must relocate to a third country, where their applications are being processed – but without travel documents, they are unable to do so.<sup>13</sup> Since the US are not present in Afghanistan anymore, individuals prevented to leave Afghanistan are not under US jurisdiction. A firm US obligation under international law to bring remaining people out of Afghanistan cannot be established. What remains are political commitments and moral responsibility,<sup>14</sup> based on the fact that many of those individuals have *de facto* ties<sup>15</sup> to the US government through their support and work during the war.

The voluntary nature of admission does not free the US from international law obligations once they engage in the process of admitting people from Afghanistan. With regards to individuals who are being processed in third countries, the pivotal question is how the US figures out the implementation of arrangements with temporary hosting countries, such as Albania, Bahrain, Canada, Colombia, Costa Rica, Chile, Ecuador, Guyana, India, Kuwait, Mexico, Netherlands, North Macedonia, Poland, Portugal, Qatar, Rwanda, Singapore, Uganda, and the United Arab Emirates.<sup>16</sup> In addition, thousands of evacuees have been located in US military bases in Europe and the Middle East (lily pad countries). Similar agreements already existed in other contexts. While Austria has now refused the admission of people from Afghanistan, it previously committed to agreement with the US to host Iranian refugees.<sup>17</sup> For Iranian refugees in Vienna, long periods of waiting, usually up to half a year, fed fear and anxiety that

---

<sup>13</sup> See *Farivar*, Few Afghan Refugees Relocating to US Under 'P-2' Program, <https://www.voanews.com/a/few-afghan-refugees-relocating-to-us-under-p-2-program/6394377.html> (January 12, 2021).

<sup>14</sup> See *Doyle/Prantl/Wood*, Principles for Responsibility-Sharing: Proximity, Culpability, Moral Accountability and Capability, California Law Review (forthcoming in spring 2022).

<sup>15</sup> While such approach remains disputed, scholars have argued that the *de facto* ties give rise to obligations to admit under the *non-refoulement* principle, see e.g., *Atal/Salomon*, Why at-risk Afghans have a right of admission to EU member states, <https://www.opendemocracy.net/en/can-europe-make-it/why-risk-afghans-have-right-admission-eu-member-states/> (August 30, 2021).

<sup>16</sup> See *US Department of State*, The United States Conducts Unprecedented Relocation Effort, <https://www.state.gov/the-united-states-conducts-unprecedented-relocation-effort/> (September 6, 2021).

<sup>17</sup> The cases of members of religious minorities in Iran who were eligible for resettlement in the US under the Lautenberg Amendment could not be processed entirely on the ground in Iran. Austria granted short-term visas to those who successfully passed the required documentation review in an initial application process – already taking three to five years. See e.g., *Murphy*, Austria's Kurz says he opposes taking in any more Afghans, <https://www.reuters.com/world/europe/austrias-kurz-says-he-opposes-taking-any-more-afghans-2021-08-22/> (August 22, 2021); *Nia*, Luxembourg slams Austria, Slovenia for refusing to take in Afghan refugees, <https://www.aa.com.tr/en/europe/luxembourg-slams-austria-slovenia-for-refusing-to-take-in-afghan-refugees/2351671> (August 8, 2021); *Aljazeera*, Where does the world stand on Afghan refugees? <https://www.aljazeera.com/news/2021/8/18/which-countries-will-take-in-afghan-refugees-and-how-many> (August 19, 2021);

their own cases would eventually be rejected. Not only were these refugees forced to wait, but they were also unable to take concrete steps to prepare for their future life in the US.<sup>18</sup> Many evacuees from Afghanistan have experienced resembling situations, with expectations that processing could take over a year.<sup>19</sup> How does the sojourn in the mentioned temporary hosting countries impact on the rights of evacuees from Afghanistan, “including their reception conditions and freedom of movement [...], the duration of their temporary hosting, the scale of admission to the US, and the provision of solutions for those who are not granted passage to the US”?<sup>20</sup> Furthermore, what, if any, are the US international legal obligations towards those evacuees while being processed abroad? (See *infra* section III)

Eventually, the legal status of evacuees in the US needs to be clarified. The recourse to humanitarian parole, which is temporary and requires subsequent status adjustment, poses pressing issues. In effect, fast-track admission circumvents refugee status determination – and, to some extent, formal resettlement. Hence, the use of parole power deserves scrutiny in the light international refugee and human rights law (see *infra* section II).<sup>21</sup>

At large, the following analysis identifies the relevant international refugee rights and human rights framework in the context of the US evacuation from Afghanistan, and sheds light on (potential) shortfalls. Yet, the risk of international law violations in the course of humanitarian admission is not only a US phenomenon. As such, the analysis reveals lessons beyond the US – and beyond the evacuation from Afghanistan.

The analysis starts with section two, focusing on the US, namely the legal status and rights of evacuees in the US. Section three addresses legal issues arising for evacuees while they are located in temporary hosting countries, where intensive vetting, uncertainty about future deportation, loss of legal identity, and a risk of dangerous protracted refugee situations affect their rights. The fourth section tackles the problem of responsibility when multiple (state) actors are involved, as is the case with respect to the arrangements between the US and third countries to temporarily host evacuees from Afghanistan. In order to provide a comprehensive picture of the current Afghan mass displacement, and to accentuate its global impact, section five points out the situation in overburdened countries in the region. This, in turn, illuminates the urgent need for international cooperation, amongst others with the European Union (EU) and its Member States, including Austria. The contribution concludes with a summary of the main findings.

---

Prantl, Resettlement im Blick: Warum Österreich mitmachen soll, <https://www.blogasyl.at/2021/11/resettlement-im-blick-warum-oesterreich-mitmachen-soll/> (November 11, 2021).

<sup>18</sup> See *Fee*, Pre-resettlement experiences: Iranians in Vienna, Vol. 54 FMR 2017, 23.

<sup>19</sup> See *Farivar*, Few Afghan Refugees, <https://www.voanews.com/a/few-afghan-refugees-relocating-to-us-under-p-2-program/6394377.html> (January 12, 2021).

<sup>20</sup> *Feith-Tan*, The Temporary Hosting of Evacuated Afghans, <https://rli.blogs.sas.ac.uk/2021/09/15/the-temporary-hosting-of-evacuated-afghans-in-third-countries-responsibility-sharing-or-externalisation/> (September 15, 2021).

<sup>21</sup> See *Posner*, How To Address The Legal Status of Afghan Refugees, <https://www.forbes.com/sites/michaelposner/2021/09/08/how-to-address-the-legal-status-of-afghan-refugees/?sh=7d25a18d572f> (September 8, 2021).

## II. The legal status in the US

The US administration has made remarkable efforts to admit a large number of individuals from Afghanistan under the Special Immigrant Visas for Afghans (SIV) program; Congress enacted this program already in 2009, and due to the current developments, it expanded the program's scope through the adoption of the Emergency Appropriations Act 2021<sup>22</sup>. Overall, SIV holders are eligible for the same benefits accorded to refugees admitted under the USRAP, and they receive access to lawful permanent residence in the US. Some of the evacuees who do not qualify for SIV are eligible for the USRAP, on the basis of a newly created group in the P2 category,<sup>23</sup> i.e., an admission category particularly designed for groups of special concern to the US.<sup>24</sup> Those who do not meet the criteria of the P2 category can still be admitted under the (pre-existing) priority 1, for example on the basis of a referral of the UNHCR.<sup>25</sup> In practice, few Afghan refugees have been admitted under the USRAP. Most of them have been paroled to the US instead.<sup>26</sup> Functioning as fast track for legal entry, admission under parole power initially left parolees from Afghanistan without the same benefits as SIV holders and refugees admitted under the USRAP.

Disproportionate, differential treatment of parolees without a reasonable, objective basis results in prohibited discrimination. International human rights law prohibits discrimination, including among refugees. Specifically, art. 26 ICCPR stipulates: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In addition, the principle of non-discrimination is well established under various other universal human rights treaties, and forms part of customary international law.<sup>27</sup> According to the prevailing opinion, a difference in treatment is not discriminatory when three cumulative conditions are fulfilled, i.e., reasonableness, objectivity, and proportionality to achieve a legitimate

---

<sup>22</sup> Emergency Security Supplemental Appropriations Act 2021, Public Law No. 117-31, <https://www.congress.gov/bill/117th-congress/house-bill/3237> (July 30, 2021).

<sup>23</sup> See *US Department of State*, U.S. Refugee Admissions Program Priority 2 Designation for Afghan Nationals, <https://www.state.gov/u-s-refugee-admissions-program-priority-2-designation-for-afghan-nationals/> (August 2, 2021).

<sup>24</sup> See *Lang et al.*, After the Airlift, 5 <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21); *Posner*, How To Address The Legal Status of Afghan Refugees, <https://www.forbes.com/sites/michaelposner/2021/09/08/how-to-address-the-legal-status-of-afghan-refugees/?sh=7d25a18d572f> (September 8, 2021).

<sup>25</sup> See *Farivar*, Few Afghan Refugees, <https://www.voanews.com/a/few-afghan-refugees-relocating-to-us-under-p-2-program/6394377.html> (January 12, 2021); *Steinbock*, The Qualities of Mercy: Maximizing the Impact of US Refugee Resettlement, Vol. 36 *University of Michigan Journal of Law Reform* 2003, 959.

<sup>26</sup> The legal authority for parole can be found in section 212(d)(5) of the Immigration and Nationality Act and the regulations at 8 C.F.R. 212.5.

<sup>27</sup> See *Hathaway*, *The Rights of Refugees under International Law*<sup>2</sup> (2021) 248.

aim.<sup>28</sup> With regard to art. 26 ICCPR, the Human Rights Committee has accepted categorical distinctions such as citizenship as an inherently reasonable basis upon which individuals may be treated differently. Considering this, the US may justify to prioritize their own nationals. Beyond, the legitimate US interest to maintain system stability can play a role, which requires assessment of the current migrant influx and capacities. Furthermore, differential treatment between refugees and other people on the move from Afghanistan and those coming from other countries could be justified on the basis of different grounds of persecution,<sup>29</sup> or different flight contexts, namely the seriousness of an ongoing conflict, and the emergency due to the danger in the respective home country (or country of first refuge). What is more, scholars pointed to special ties to certain migrant groups based on moral responsibility and colonialism.<sup>30</sup> Most problematic in the light of discrimination are situations in which, for example, two individuals from Afghanistan, both equally meeting the criteria for refugee status, with comparable backgrounds of persecution and flight, receive different rights due to admission under the USRAP system and parole power.

Congress took action to counteract the described differential treatment. On September 30, 2021, it passed the Extending Government Funding and Delivering Emergency Assistance Act, which allows Afghans granted humanitarian parole between July 31, 2021, and September 30, 2022, to be eligible for federal benefits to the same extent as parolees with pending SIV applications, SIVs, and refugees admitted under the USRAP.<sup>31</sup> However, due to the limited time period covered, the question of discrimination of those who were previously or will subsequently be admitted through humanitarian parole remains open. Furthermore, this law does not ensure status adjustment, respectively access to long-term residence for parolees.

Being admitted as parolee entails limitations in terms of family reunification. Even if parolees manage to successfully apply for asylum once they are in the US, and subsequently receive long-term residence status, this takes years, meaning it may likely be too late for exercising the associated right to petition for the admission of family members<sup>32</sup> in imminent danger in Afghanistan or in a country across the region.<sup>33</sup> International law sets out obligations to protect and assist the family as a “fundamental group unit of society”, namely under art. 23 para.

---

<sup>28</sup> See *Chetail*, International Migration Law 148; *HRC*, General Comment No. 15: The position of aliens under the Covenant, U.N. Doc. HRI/GEN/1/Rev.1, para. 8, <https://www.refworld.org/docid/45139acfc.html>; Judge Tanaka highlighted in his Dissenting Opinion in South West Africa Case that equality does not exclude differentiation, South West Africa, Second Phase, Judgement, *ICJ*, Reports of Judgments, Advisory Opinions and Orders 250, dissenting opinion of Judge Tanaka on July 18, 1966.

<sup>29</sup> With regard to Haitians, *Narea* claimed that “the kind of persecution and peril Afghans face in their home country is markedly similar to that faced by asylum seekers arriving on the US-Mexico border”: *Narea*, The Afghan refugee crisis has revealed the artificial limits of America’s will to welcome, <https://www.vox.com/policy-and-politics/2021/9/23/22673658/afghan-refugee-haitian-migrant-border-biden> (September 23, 2021).

<sup>30</sup> See *Achieme*, Migration As Decolonization, Vol. 71 Stanford Law Review 2019, 1509.

<sup>31</sup> Extending Government Funding and Delivering Emergency Assistance Act, Public Law 117-43, <https://www.congress.gov/117/plaws/publ43/PLAW-117publ43.pdf> (September 30, 2021).

<sup>32</sup> See *Legomsky/Thronson*, Immigration Law and Policy<sup>7</sup> (2019) 1622.

<sup>33</sup> See *UNHCR*, UNHCR calls on states to expedite family reunification procedures for Afghan refugees, <https://www.unhcr.org/en-us/news/briefing/2021/10/616935614/unhcr-calls-states-expedite-family-reunification-procedures-afghan-refugees.html> (October 15, 2021).



1 ICCPR – this is also stated in the non-binding art. 16 para. 3 Universal Declaration of Human Rights (UDHR)<sup>34</sup>. In terms of the scope of art. 23 ICCPR, the Human Rights Committee highlighted in General Comment No. 13 that the right to found a family implies “the possibility to procreate and live together”. The possibility to live together, in turn, necessitates the adoption of appropriate measures, “both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.<sup>35</sup> Applying the Committee’s view results in a positive duty of the US under art. 23 ICCPR to ensure the reunification of parolees with their family members who are left behind, without “any discriminatory treatment”<sup>36</sup>.

Furthermore, – even if the newly introduced act grants SIVs, refugees, and parolees from Afghanistan residing in the US federal benefits, along with housing, health care, education, and working possibilities – negative effects on rights to ensure economic, social and cultural participation of Afghans in the US could arise from non-commitment to universal human rights treaties. Besides the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>37</sup> incorporating rights such as to health (art. 12 ICESCR), decent work (art. 6 ICESCR),<sup>38</sup> and education (art. 13 ICESCR), the US has, amongst others, not ratified the Convention on the Rights of the Child (CRC)<sup>39</sup>, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>40</sup>, and the Convention on the Rights of Persons with Disabilities (CRPD)<sup>41</sup>. Still, US law may meet international human rights standards even without ratifying the relevant international law treaties. Also, rights under certain treaties overlap,

<sup>34</sup> “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”, art. 16 para. 3 Universal Declaration of Human Rights, G.A. Res. 217 A(III) (December 10, 1948); see *Nicholson*, The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied, <https://www.unhcr.org/5a8c40ba1.pdf> (January 2018).

<sup>35</sup> HRC, General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, para. 5 <https://www.refworld.org/pdfid/45139bd74.pdf> (July 27, 1990).

<sup>36</sup> *Id.*, para. 9.

<sup>37</sup> International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3.

<sup>38</sup> See *UNHCR*, Guidelines on International Legal Standards Relating to Decent Work for Refugees, <https://www.refworld.org/docid/60e5cfd74.html> (July 2021), which provide an overview and basic legal guidance on the right to decent work. The Guidelines are centered around the Refugee Convention, but also drawn on other human rights and labor rights standards. Further notable authorities include: *ILO*, Recommendation R205 - Employment and Decent Work for Peace and Resilience Recommendation 2017, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---ifp\\_crisis/documents/publication/wcms\\_631491.pdf#:~:text=Recommendation%20No.%20205%20on%20Employment%20and%20Decent%20Work,fragility%20and%20taking%20preventive%20measures%20for%20building%20resilience](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_crisis/documents/publication/wcms_631491.pdf#:~:text=Recommendation%20No.%20205%20on%20Employment%20and%20Decent%20Work,fragility%20and%20taking%20preventive%20measures%20for%20building%20resilience;); *CESCR*, Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2017/1, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2017%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2017%2f1&Lang=en) (March 13, 2017).

<sup>39</sup> United Nations Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3.

<sup>40</sup> See United Nations Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 1249 U.N.T.S. 13.

<sup>41</sup> See United Nations Convention on the Rights of Persons with Disabilities, December 13, 2006, 2515 U.N.T.S. 3.

so that the non-ratification of a treaty does not necessarily free the US from the respective legal obligations. Several rights are also binding under international customary law.

As mentioned, status adjustment of those who are paroled in the US has not been ensured through the law recently passed by Congress. The parolees are facing difficulties and uncertainty in terms of access to permanent status in the US, which, in further consequence, impacts their pathways to citizenship. Concerning the access to citizenship, the US has duties under international refugee law. Art. 34 Refugee Convention states that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and reduce as far as possible the charges and costs of such proceedings”. This article sets out an obligation to *facilitate* assimilation and naturalization of refugees, but not to *grant* naturalization. *Grahl-Madsen*<sup>42</sup> pointed out that the wording of art. 34 Refugee Convention (‘shall’) made it clear that the article imposed a duty on the contracting states, as opposed to a mere recommendation. In the same vein, *Hathaway* purported that it was incumbent upon contracting states “at the very least, to provide a good faith justification for the formal or *de facto* exclusion of refugees from naturalization”.<sup>43</sup> It follows that, even if the duties under art. 34 Refugee Convention are circumscribed as ‘minimalist’, the US would violate them if it refused to provide cogent reasons for denying an Afghan refugee access to citizenship.

Additional protection derives from general human rights. The Human Rights Committee stressed that the principle of equal protection under art. 26 ICCPR implied the prohibition of a denial of citizenship on arbitrary grounds. At the same time, the Committee acknowledged that legitimate grounds, such as national security reasons, allowed for a refusal of citizenship, even if this entailed that the person concerned remained stateless.<sup>44</sup>

In sum, while the US may deny citizenship on legitimate grounds, arbitrary denial is prohibited under international law. Applications must be assessed on a case by case basis, and decided upon with cogent and legitimate reasoning. In light of art. 37 Refugee Convention, refugees paroled in the US who have to adjust their status after arrival in the US – and can only gain access to citizenship on the basis of their subsequently adjusted status – must not face impediments resulting in unjustified *de facto* exclusion from citizenship.

### III. Legal issues while present in temporary hosting countries

Not all US evacuees directly land on US soil. As stated, the US has figured out arrangements with several countries, whose levels of commitment to human rights and refugee rights differ, as well as their experience in hosting refugees. The rights of these evacuees are affected in multiple ways while present in temporary hosting countries, namely through (A) offshore

---

<sup>42</sup> *Grahl-Madsen*, Commentary on the Refugee Convention (1997) Art. 34 2nd comment, <https://www.unhcr.org/3d4ab5fb9.pdf>.

<sup>43</sup> See *Hathaway*, *The Rights of Refugees* 989.

<sup>44</sup> See *Kälin/Künzli*, *The Law of International Human Rights Protection* (2019) 537.



screening and vetting procedures; (B) potential deportation and the risk of *refoulement*; (C) their need for documentation to establish legal identity; (D) the reception conditions, and (E) their integration prospects and access to permanent status in the hosting country.

### A. Offshore processing (screening and vetting)

Preliminary, it should be noted that the US serves as a representative example for the practice of offshore processing. However, the externalization of migration policy constitutes a trend that is evident globally, including for Australia<sup>45</sup>, and the EU<sup>46</sup>. Potential inconsistencies highlighted here may also apply to practices of other countries and in other regions.

From an international human rights perspective, the practice of offshore processing is inherently linked to the question whether the processing country, in this case the US, bears the obligation under the ICCPR and/or other universal and regional human rights treaties to protect the rights of individuals abroad.

As a general rule, most universal human rights instruments bind states with regard to persons *subject to or within* their jurisdiction.<sup>47</sup> In that sense, art. 2 para. 1 ICCPR provides that “[e]ach State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and *subject to its jurisdiction* the rights recognized in the present Covenant”.<sup>48</sup> The Human Rights Committee interpreted this article expansively in its General Comment No. 31. Accordingly, art. 2 para. 1 ICCPR requires state parties to respect and to ensure the Covenant rights “to all persons who may be within their territory *and* to all persons subject to their jurisdiction”.<sup>49</sup> What is more, the International Court of Justice (ICJ) prominently estab-

<sup>45</sup> See e.g. *Berlo*, The Protection of Asylum Seekers in Australian-Pacific Offshore Processing: The Legal Deficit of Human Rights in a Nodal Reality, Vol. 17 Human Rights Law Review 2017, 33-71; this practice was criticized in media, see *Doherty*, Australia's offshore processing policy has made the world less safe, not more, <https://www.theguardian.com/australia-news/2020/dec/12/australias-offshore-processing-policy-has-made-the-world-less-safe-not-more> (December 11, 2020).

<sup>46</sup> *Brandt/Higgins*, Europe wants to process asylum seekers offshore – the lessons it should learn from Australia, <https://www.brookings.edu/blog/order-from-chaos/2018/08/31/europe-wants-to-process-asylum-seekers-offshore-the-lessons-it-should-learn-from-australia/> (August 31, 2018).

<sup>47</sup> See *De Schutter*, International Human Rights Law: Cases, Materials, Commentary<sup>3</sup> (2019) 145; *Baxewanos*, Relinking power and responsibility in extraterritorial immigration control, in *Gammeltoft-Hansen/Vedsted-Hansen* (eds.), Human rights and the dark side of globalisation: Transnational law enforcement and migration control (2016) 198; *Kanalan*, Extraterritorial State Obligations Beyond the Concept of Jurisdiction, Vol. 19 German Law Journal 2018, 45; *Hathaway*, The Rights of Refugees<sup>2</sup> 52.

<sup>48</sup> Emphasis added.

<sup>49</sup> *HRC*, General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 10 (emphasis added) <https://www.refworld.org/docid/478b26ae2.html> (May 26, 2004); see *Milanovic*, Extraterritoriality and Human Rights: Prospects and challenges, in *Gammeltoft-Hansen/Vedsted-Hansen* (eds.), Human rights and the dark side of globalisation: Transnational law enforcement and migration control (2016) 53; “The HRC, relying on the ICCPR, which uses more restrictive language than the ECHR, has in fact adopted a more expansive view of jurisdiction than the ECtHR”, *Shany*, Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law, Law & Ethics of Human Rights 2013, 51.

lished in its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that certain human rights instruments, including the ICCPR, the ICESCR, and the CRC, were extraterritorially applicable in the occupied Palestinian territory.<sup>50</sup>

Generally speaking, extraterritorial state jurisdiction has widely been accepted in instances where a state exercises effective control over the territory of another country, or when it exercises physical control over a person.<sup>51</sup> Taking one step further, scholars, such as *Moreno-Lax*<sup>52</sup> and *Hathaway*<sup>53</sup> supported to assume extraterritorial jurisdiction where a state exercises public power. Moreover, *Başak* argued that “control over someone else’s territory or control over person are sub-themes of a more basic, but a more coherent idea: effective control over the rights of a person”.<sup>54</sup> This is, amongst others, in line with the view of *Shaw*, claiming that jurisdiction relates to a state’s ability “to regulate or otherwise impact upon people, property and circumstances”.<sup>55</sup> Similarly, *Pijnenburg* purported that receiving countries exercised jurisdiction “on account of the *effects* that their policies have *on the rights* of intercepted migrants”.<sup>56</sup>

International human rights bodies and courts have agreed with scholarly approaches to broaden the notion of extraterritorial jurisdiction. For example, the Inter-American Court of Human Rights (IACtHR) did not limit extraterritorial jurisdiction to instances of physical control over a person or effective control over a territory. In its Advisory Opinion of November 15, 2017, the Court found that extraterritorial jurisdiction was also given when a Contracting State exercised “effective control over the activities that caused the damage and the consequent human rights violation”.<sup>57</sup> Also the Human Rights Committee applied the effective control over the rights of a person doctrine in General Comment No. 36.<sup>58</sup> The Committee

<sup>50</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ*, Reports of Judgments, Advisory Opinions and Orders, 136, 178 et seqq. (July 9, 2004); furthermore, the ICJ acknowledged that *de facto* effective control over areas triggers extraterritorial jurisdiction in *Armed Activities on the Territory of Congo Case (Democratic Republic of the Congo v. Uganda)*, *ICJ*, Reports of Judgments, Advisory Opinions and Orders 168 (December 19, 2005).

<sup>51</sup> For a general overview see, e.g., *Oxman*, Jurisdiction of States, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1436> (November 2007).

<sup>52</sup> See *Moreno-Lax*, The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”, Vol. 21 *German Law Journal* 2020, 385-416.

<sup>53</sup> See *Hathaway*, The Rights of Refugees<sup>2</sup> 148 et seqq.

<sup>54</sup> *Çali*, Has ‘Control over rights doctrine’ for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it’s Strasbourg’s turn, <https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/> (July 21, 2020).

<sup>55</sup> *Shaw*, *International Law*<sup>6</sup> (2008) 645.

<sup>56</sup> See *Pijnenburg*, Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control, *Human Rights Law Review* 2020, 325 (emphasis added).

<sup>57</sup> *IACtHR*, Advisory Opinion OC-23/17, The Environment and Human Rights para. 104 lit. h (November 15, 2017).

<sup>58</sup> See *HRC*, General Comment No. 36: Article 6 (Right to Life), U.N. Doc. CCPR/C/GC/36, <https://www.refworld.org/docid/5e5e75e04.html> (September 3, 2019).

pointed out that the scope of persons under the jurisdiction of a Contracting State includes “all persons over whose enjoyment of the right to life it exercises power or effective control”.<sup>59</sup>

By detaching the question of jurisdiction from territorial and physical control, we need to find other ways to demarcate when a state is responsible and when it is not, such as the temporal aspect. This involves the following questions: At what point in time does a state start to exercise control over the rights affected by its policy? And when does it end? It seems obvious that a state does not exercise control over the rights of an individual merely by adopting a certain policy or/and law, because the rights of that individual might never be affected if the policy or law is actually not implemented. However, as soon as the actual implementation concerns the situation of a specific individual, e.g., when authorities start reviewing the individual's case, the effective control over the rights of that individual can be established.

Indeed, US officials implement US policy abroad. In order to be admitted to the US, evacuees from Afghanistan have to pass multi-step processes, including intensive vetting.<sup>60</sup> US officials pointed out that Afghans “undergo robust security”, namely “biometric and biographic security screenings conducted by our intelligence, law enforcement and counterterrorism professionals” before they are allowed in the US.<sup>61</sup> Taking the above considerations into account, it is plausible that the US exercises jurisdiction through its officials during the conduct of screening interviews, as the interviewees' rights are controlled by the latter. Consequently, US due process obligations under the respective international human rights treaties apply, encompassing rights such as to independent review, legal assistance, privacy, and proficient translation of claims.

Concerning access to procedural justice, in most cases, refugees and other people on the move cannot invoke the right to equality before courts and tribunals and to fair trial under art. 14 ICCPR. This article is generally restricted to civil or criminal procedures, and therefore does not apply to (refugee) status determination, extradition, expulsion, or deportation procedures.<sup>62</sup> Still, the ICCPR protects the right to an effective review when there is an arguable

---

<sup>59</sup> *Id.*, para. 63.

<sup>60</sup> See *LeBlanc/Hansler*, Here's how Afghan refugees coming to the US are being vetted, <https://www.cnn.com/2021/08/23/politics/afghan-refugee-vetting-biden-administration-siv/index.html> (August 23, 2021).

<sup>61</sup> *Kumar*, As Biden ends mission in Afghanistan, a refugee backlash looms at home, <https://www.politico.com/news/2021/08/30/biden-afghanistan-refugee-backlash-507399> (August 30, 2021).

<sup>62</sup> The HRC clarified in its GC No. 32 that the right to access a court or a tribunal pursuant to art. 14 ICCPR does not apply when “there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control”. The Committee clearly stated that “[t]his guarantee furthermore does not apply to extradition, expulsion and deportation procedures”, *HRC*, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, para. 17., <https://www.refworld.org/docid/478b2b2f2.html> (August 23, 2007).

claim of violation of other rights under this treaty.<sup>63</sup> Furthermore, art. 16 para. 1 Refugee Convention grants any refugee access to courts in all contracting states, but refugees are limited to judicial remedies under the respective domestic law.<sup>64</sup>

As a result, international human rights law obliges the US to, at least, provide its evacuees with the right to an effective review when (other) fundamental rights are arguably violated. This could well occur when US officials operate in temporary hosting countries. One could imagine various situations during the interview process where US officials abuse fundamental rights such as to privacy, freedom of expression, religious freedom, or even the prohibition of torture or inhuman, degrading treatment.

Special concerns related to status determination and intensive vetting arise in terms of data protection. The collecting and sharing of data of Afghan evacuees can result in violations of the right to privacy, stipulated amongst others under art. 17 ICCPR. Just to name a potential scenario: Data could be stolen from a laptop or other device and then sold. If such data was shared with the Taliban, this would bring Afghan evacuees, including their families, who might still find themselves in Afghanistan, under a life-threatening situation. Indeed, scholars claimed that the Taliban had already taken access to the databases and may have access to the US database indicating who was working for them in what capacities and who they considered 'terrorists'.<sup>65</sup> Moreover, it is a matter of concern that, as the US Department of Homeland and Security (DHS) recognizes, the US possesses data from individuals who will, for various reasons, never set foot in the US. Noteworthy, in a Memorandum of Understanding of 2019 between the United Nations High Commissioner for Refugees (UNHCR) and the DHS, the UNHCR agreed to directly transfer biometric and associated biographic data of refugees referred for resettlement to the US into the DHS's automated Biometric Identification System (IDENT).<sup>66</sup>

The US data gathering practice interferes with art. 17 ICCPR. This can be substantiated, for example, on the basis of the Human Rights Committees observations in General Comment No. 16, highlighting the need for strict controls over data collection, use and storage:

"The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. *Effective measures have to be taken by States to ensure that information concerning a per-*

---

<sup>63</sup> See *Chetail*, International Migration Law 141 et seq; see also, e.g., HRC, U.N. Doc. CCPR/C/93/D/1461, 1462, 1476 and 1477/2006, *Maksudov and Others v. Kyrgyzstan*, para. 12.7 <https://www.refworld.org/cases,HRC,4a93a0cd2.html> (July 31, 2008); ECHR, App. No. 43258/98, *G.H.H. and Others v. Turkey*, para. 34, 36, <https://www.refworld.org/cases,ECHR,3ae6b6f718.html> (October 11, 2000).

<sup>64</sup> See *Hathaway*, The Rights of Refugees<sup>2</sup> 920 et seq.

<sup>65</sup> See e.g., *Guild/Bigo*, Why are you a Refugee? Afghans and the US Identity Database, <https://protectproject.w.uib.no/why-are-you-a-refugee-afghans-and-the-us-identity-database/> (September 14, 2021).

<sup>66</sup> See *DHS*, Privacy Impact Assessment for the United Nations High Commissioner for Refugees (UNHCR) Information Data Share, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis081-unhcr-august2019.pdf> (August 13, 2019).

*son's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.* In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, Whether, and if so, what personal data is stored in automatic data files, and for What purposes. Every individual should also be able to, ascertain which public authorizes or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”<sup>67</sup>

Accordingly, the US must take effective measures to prevent that sensitive information about Afghan evacuees being processed reaches the hands of unauthorized persons, including the Taliban, who could use it to identify individuals affiliated to the US, and subsequently detain these individuals, torture and/or even kill them, which would certainly be against the Covenant.

In principle, interferences in the right to privacy through the dissemination of data in the course of identity checks and security screening are permissible if they reflect legitimate interests of the US. In other words, the US may seek to justify interferences with the rights of the person concerned by invoking, amongst others, national security, or public order interests not to admit certain evacuees who, e.g., committed serious criminal offenses or who have been engaged in political radicalization and terrorism. A measure pursuing such interest must be proportionate to the associated interference with individual rights. First, proportionality requires that the checks are suited to uphold the invoked state interest. Second, it demands that this interest cannot be maintained through less intensive measures. Lastly, the extent of the checks must be overall appropriate in relation to the interference with the rights of the individual being checked.

Similar to security screening, health checks (and other health-related measures, such as measures to prevent the spread of COVID-19, including testing and vaccination) involve interferences with the right to privacy of the individual concerned, any of which must be justified on the basis of a legitimate state interest, in this case public health, and proportionate.

## **B. Risk of refoulement**

Obviously, extraterritorial processing implies that, in the end, the US will reject the admission of some evacuees to its territory. It should not be overlooked that these individuals are at risk

---

<sup>67</sup> HRC, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, para. 10 (emphasis added), <https://www.refworld.org/docid/453883f922.html> (April 8, 1988).

of *refoulement* to Afghanistan, or to a country in the region (see *infra* section), facing subsequent *refoulement* to Afghanistan. The situation in Afghanistan after the Taliban-takeover poses serious threats of inhuman and degrading treatment, and even to the life of those who are returned. This is, amongst others, evident from UNHCR's non-return advisory.<sup>68</sup>

Referred to as a fundamental principle governing the admission of non-nationals, human rights law, humanitarian law, refugee law and criminal law endorse the prohibition of *refoulement*. This principle "includes at a minimum the absolute and underogable prohibition of *refoulement* toward a state where there is a real risk of torture, inhuman, or degrading treatment or punishment".<sup>69</sup> In terms of refugee law, art. 33 Refugee Convention prohibits expulsion or *refoulement*.<sup>70</sup> Multiple universal human rights treaties include explicit *refoulement* prohibitions, such as art. 3 para. 1 International Convention Against Torture (CAT)<sup>71</sup>, and the prohibition of *non-refoulement* can, amongst others, be implicitly derived from art. 7 ICCPR, and art. 37 CRC.<sup>72</sup> Beyond international treaties, the principle of *non-refoulement* forms part of customary international law.<sup>73</sup> Some commentators qualified the prohibition of *refoulement* as *jus cogens*.<sup>74</sup>

As opposed to procedural safeguards in the context of screening interviews, the jurisdictional link to establish extraterritorial *refoulement* obligations of the US is less evident. This would require effective control of the US over the concerned individual's transfer to Afghanistan and/or to a neighboring country where they would face a risk of subsequent *refoulement*. As a general rule, the US cannot effectively control whether a specific hosting country deports Afghan evacuees on its territory. However, the situation with regards to evacuees held in a military base in a 'lily pad' country, where US officials manage the base and effectively exercise physical control over these individuals, must be distinguished. "U.S. military bases overseas are commonly subject to Status of Forces Agreements that exclude the territorial state from exercising legal jurisdiction over U.S. activities."<sup>75</sup> Consequently, jurisdiction based on physical as well as legal or normative control would make the US responsible for assessing the *refoulement* risk before deporting Afghan evacuees.

<sup>68</sup> See UNHCR, Positions on Returns to Afghanistan, <https://www.refworld.org/pdfid/611a4c5c4.pdf> (August 2021).

<sup>69</sup> *Chetail*, International Migration Law 124; *Kälin/Künzli*, The Law of International Human Rights 324; see also ECHR, App. No. 22414/93, *Chahal v. United Kingdom*, para. 78 et seqq., [https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:\[%22Chahal%22\],%22itemid%22:\[%22001-58004%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:[%22Chahal%22],%22itemid%22:[%22001-58004%22]%7D) (November 15, 1996).

<sup>70</sup> See *Chetail*, International Migration Law 119.

<sup>71</sup> International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85.

<sup>72</sup> See *Pijnenburg*, Human Rights Law Review 2020, 315 et seq.

<sup>73</sup> See *Wauters/Cogolati*, Crossing the Mediterranean Sea: EU Migration Policies and Human Rights, in *Mitsilegas/Moreno-Lax/Vavoula* (eds.), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (2020) 105.

<sup>74</sup> See, amongst others, *Pijnenburg*, Human Rights Law Review 2020, 316; *Allain*, The Jus Cogens Nature of Non-Refoulement, Vol. 13 International Journal of Refugee Law 2002, 533-558. This means that virtually all hosting countries are internationally obliged to uphold the *non-refoulement* principle towards refugees and other people on the move from Afghanistan – including hosts who are not signatories to the Refugee Convention (e.g., Pakistan).

<sup>75</sup> *Cleveland*, The United States and the Torture Convention, Part I: Extraterritoriality, <https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> (November 14, 2014).



Evacuees with specifically complex cases have been hosted in a military basis in Kosovo (Camp Bondsteel). Media reported that “the Biden administration is considering sending some of the Afghan evacuees at a US military base in Kosovo back to Afghanistan if they cannot clear the intense vetting process to come to the United States, according to three US officials familiar with the matter.”<sup>76</sup> Yet, in the specific case of the Bondsteel Camp, the Agreement between Kosovo and the US to cooperate regarding efforts to relocate from the territory of Afghanistan into the territory of another State identified individuals indicates that individuals hosted at this Camp are not exclusively controlled by US officials and remain “subject to the Republic of Kosovo laws for the period of their temporary presence”.<sup>77</sup> This weakens a potential jurisdictional link and limits arguments in favor of jurisdiction to physical *de facto* control over the individual concerned.

Most likely, the faith of those who do not pass US vetting, will be left to temporary hosting countries, implicating *non-refoulement* obligations with regards to evacuees present on their territory. In fact, the risk of prohibited *refoulement* to Afghanistan is not limited to countries cooperating under temporary hosting agreements with the US. Pushbacks to Afghanistan have, amongst others, been reported from the countries in Afghanistan’s region, as well as from Turkey,<sup>78</sup> and from EU Member States.<sup>79</sup>

In concrete terms, countries hosting evacuees from Afghanistan would violate the *non-refoulement* principle if they failed to assess and consider an individual evacuee’s risk of being exposed to conditions in Afghanistan, where his or her right to life, or the prohibition of ill-

---

<sup>76</sup> Atwood/Hansler, US considering returning some evacuees who don't pass vetting process to Afghanistan, <https://www.cnn.com/2021/11/18/politics/camp-bondsteel-afghans/index.html> (November 18, 2021); see also Savage, U.S. Struggles With Afghan Evacuees Weeded Out, and Now in Limbo, <https://www.nytimes.com/2021/10/23/us/politics/afghan-evacuees-kosovo.html> (October 23, 2021); Marí, Afghan evacuees in Kosovo de facto detained, <https://kosovotwo-pointzero.com/en/afghan-evacuees-in-kosovo-de-facto-detained/> (September 16, 2021).

<sup>77</sup> Agreement between the United States and Kosovo of August 25, 2021, para. 5, <https://www.state.gov/wp-content/uploads/2021/11/21-825-Kosovo-Transit-Afghanistan.pdf>.

<sup>78</sup> See Lang et al., After the Airlift, 11, <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21).

<sup>79</sup> The example of Austria is most evident, where the European Court of Human Rights (ECtHR) had to stop an anticipated deportation from Austria to Afghanistan. See e.g., Shields, Human rights court stops Austria from deporting Afghan – NGO, <https://www.reuters.com/world/europe/human-rights-court-stops-austria-deporting-afghan-ngo-2021-08-03/> (August 3, 2021); Österreich stoppt Abschiebung nach Afghanistan, <https://www.faz.net/aktuell/politik/ausland/oesterreich-stoppt-vor-laeufig-abschiebung-nach-afghanistan-17468710.html> (August 3, 2021).

treatment or torture, are at stake, and this may even extend to other rights<sup>80</sup>. A *non-refoulement* violation can already be triggered if a state *ought* to have known<sup>81</sup> that such conditions exist<sup>82</sup> in Afghanistan, including subsequent *refoulement*.<sup>83</sup> The worsening of the situation in Afghanistan as a result of the Taliban-takeover, also covering Kabul, is reflected in the growing number of states suspending deportation<sup>84</sup> to Afghanistan (even prior to the takeover), and statements by humanitarian organizations, most notably the non-advisory opinion of the UNHCR. It can hardly be denied that hosting countries ought to know about the risks associated with deportation to Afghanistan.

What is more, effective implementation of the *non-refoulement* principle demands re-assessment of return decisions with regards to the *refoulement* situation, namely consideration of changed circumstances rendering safe and reasonable relocation to Kabul impossible.<sup>85</sup>

### C. Need to establish legal identity

The status and rights of evacuees from Afghanistan residing in temporary hosting countries strongly depend on their legal identity, including documentation. As a matter of fact, many of those fleeing the Taliban do not have (valid) passports, or/and had to burn any documentation proving their connection to the US, because such connection would be life-threatening if it came to the knowledge of the Taliban. In order to re-establish their legal identity, these evacuees depend on the issuance of documentation by the hosting country.<sup>86</sup>

<sup>80</sup> The Committee on the Rights of the Child recognized that Switzerland's proposed removal of an asylum-seeking child and his mother to Bulgaria would imply a direct violation of economic, social and cultural rights under the Convention on the Rights of the Child; see CRC, U.N. Doc. CRC/C/88/D/95/2019, *A.M. v. Switzerland*, <https://www.refworld.org/docid/616435a74.html> (October 6, 2021); Vallandro do Valle, Leaving Just a Crack for Socioeconomic-Based Non-Refoulement, <https://voelkerrechtsblog.org/leaving-just-a-crack-for-socioeconomic-based-non-refoulement/> (November 15, 2021).

<sup>81</sup> The minimal standard for the *non-refoulement* principle under customary international law is reflected in Guideline 3 of the guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries, published by the European Union Agency for Fundamental Rights (FRA). It states that third countries "should not be requested to intercept people on the move before they reach the EU external border, when it is *known or ought to be known* that the intercepted people would as a result face persecution or a real risk of other serious harm", FRA, Guidance on how to reduce the risk of *refoulement* in external border management when working in or together with third countries 3 (emphasis added), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-guidance-reducing-refoulement-risk-0\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-guidance-reducing-refoulement-risk-0_en.pdf) (December 5, 2016); see also Frei/Hruschka, Circumventing Non-Refoulement or Fighting "Illegal Migration"? <https://eumigrationlawblog.eu/circumventing-non-refoulement-or-fighting-illegal-migration/> (March 23, 2018).

<sup>82</sup> See ECHR, App. No. 30696/09, *MSS v. Belgium and Greece*, para. 358, <https://www.refworld.org/cases,ECHR,4d39bc7f2.html> (January 21, 2011): "In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him"; see also Grabenwarter, European Convention on Human Rights: Commentary (2014) art. 3 ECHR para. 14; Schabas, The European Convention on Human Rights: A Commentary (2015) 96; Hathaway, The Rights of Refugees<sup>2</sup> 327: "The risk may also follow from failure of even a carefully designed procedure to take notice of the most accurate human rights data".

<sup>83</sup> See Hathaway, The Rights of Refugees<sup>2</sup> 367; see also Supreme Court of Canada, [2002] 1 S.C.R. 3, 2002 SCC 1, *Suresh v. Canada*, [https://www.refworld.org/cases,CAN\\_SC,3c42bdfa0.html](https://www.refworld.org/cases,CAN_SC,3c42bdfa0.html) (January 11, 2002).

<sup>84</sup> See e.g., European countries halt deportations amid Afghanistan fighting, <https://www.aljazeera.com/news/2021/8/12/list-of-european-countries-halting-afghan-deportations-grows> (August 12, 2021).

<sup>85</sup> See Frapp, When the Facts Change: The triumph of the Taliban in Afghanistan and fresh claims to protection from *refoulement*, <https://rli.blogs.sas.ac.uk/2021/08/18/when-the-facts-change-the-triumph-of-the-taliban-in-afghanistan-and-fresh-claims-to-protection-from-refoulement/> (August 18, 2021).

<sup>86</sup> See See Gramer/Detsch/Mackinnon, Those Left Behind, <https://foreignpolicy.com/2021/10/01/afghanistan-biden-interpret-ers-special-immigrant-visa-evacuation-state-department/> (October 1, 2021).

For refugees, the Refugee Convention obliges contracting states to equip a refugee with means of identifying her or himself (art. 27 Refugee Convention). While art. 28 Refugee Convention sets out the requirement of lawful stay in connection with the duty to provide a travel document, no such limitation is placed on the obligation under art. 27 Refugee Convention. However, the latter article does not state the specific nature of identity papers which must be issued.<sup>87</sup>

Beyond the Refugee Convention, general international human rights law imposes obligations to recognize an individual's legal identity. Art. 6 UDHR stipulates the non-derogable right for everyone to be recognized "everywhere as a person before the law." This is retrieved as binding duty for contracting states under art. 16 ICCPR.<sup>88</sup> Furthermore, legal identity counts among the UN Sustainable Development Goals for 2030.<sup>89</sup> Eventually, the lack of documentation interrelates with the principle of *non-refoulement* (see *supra* point B) as the same can render evacuees from Afghanistan vulnerable to detention and deportation.

It shows that international refugee as well as human rights law entail specific obligations of temporary hosting countries to recognize the legal identity of evacuees. Afghan refugees lawfully staying in a temporary hosting country have the right to receive travel documents. According to the prevailing opinion, *lawful stay* is given in case of temporary residence, provided that it is not merely a temporary *visit*.<sup>90</sup> As such, most arrangements with temporary hosting countries do not indicate a specific time frame<sup>91</sup> and, in practice, the sojourn of refugees from Afghanistan in temporary hosting countries will regularly extend beyond a year, which arguably extends the threshold of a temporary visit of refugees in transit. In addition to this, lawful stay can be implicitly derived from art. 33 Refugee Convention (*non-refoulement*).<sup>92</sup> This is particularly relevant in light of the impossibility of deportation to Afghanistan. As stated, sending evacuees back to Afghanistan entails serious risks of *non-refoulement* violations. Those

<sup>87</sup> Circumvention of documentation obligations is even more problematic considering that a large number of contracting states reaffirmed their commitment to registration and documentation and individualized status determination in the non-binding Global Compact on Refugees (GCR), U.N. Doc. A/73/12 (Part II), [https://www.unhcr.org/gcr/GCR\\_English.pdf](https://www.unhcr.org/gcr/GCR_English.pdf) (August 2, 2018), and the Global Compact for Safe, Orderly and Regular Migration (GCM), G.A. Res. 73/195, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement> (January 11, 2019). [GCR para. 58 (committing to support states in expanding capacity for registration and documentation); GCM Objective 7, para. 23 lit. h (undertaking to enable individual status assessments of all migrants).]

<sup>88</sup> See also Working Group on Enforced or Involuntary Disappearances, General Comment on the right to recognition as a person before the law in the context of enforced disappearances, U.N. Doc. A/HRC/19/58/Rev.1, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-58-Rev1\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-58-Rev1_en.pdf) (March 2, 2012).

<sup>89</sup> Goal 16.9: "By 2030, provide legal identity for all, including birth registration", G.A. Res. 70/1 ("Transforming the world, the 2030 Agenda for Sustainable Development"), [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E) (October 21, 2015).

<sup>90</sup> See *Leckie/Simperingham* in *Zimmermann* (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) art. 21 para. 45-47.

<sup>91</sup> See *Feith-Tan*, *The Temporary Hosting of Evacuated Afghans*, <https://rli.blogs.sas.ac.uk/2021/09/15/the-temporary-hosting-of-evacuated-afghans-in-third-countries-responsibility-sharing-or-externalisation/> (September 15, 2021).

<sup>92</sup> See *Grahl-Madsen*, *The Status of Refugees in International Law II* (1972) 374.

who do not fulfill the requirement of lawful stay can still take recourse to art. 27 Refugee Convention and claim identity documents, albeit the nature of these documents remains at the discretion of the issuing hosting country.

For Afghan evacuees not qualifying as refugees, art. 16 ICCPR incorporates pertinent guarantees to be recognized as a person before the law of the temporary hosting countries. The application of this provision is comparatively limited and unclear. The Human Rights Committee mainly considered the application of art. 16 ICCPR towards the most vulnerable individuals, such as victims of human trafficking, children, and discriminated women.<sup>93</sup> This does not mean that art. 16 is irrelevant for evacuees from Afghanistan in temporary hosting countries. For example, it covers situations like the registration of the birth of children of Afghans residing in a temporary hosting country, the recognition of nationality, and it is also relevant in the context of deportations, namely to ensure that spouses and children in deportation proceedings are treated as individuals whose legal personality is independent from the individual to be deported.

#### **D. Reception conditions**

The time that evacuees from Afghanistan will spend in temporary hosting countries has remained unclear. For some of them, processing will take several months or even years, and some of them will never be admitted to US soil. This reflects the significance of legal status to effectively invoke certain rights in the temporary hosting countries. While evacuees cannot rely on a right to long-term integration, international refugee and general human rights law protect their rights during the sojourn in temporary hosting countries. This includes economic, social and cultural rights, such as to health, work, education, housing – and more.

Health care needs are, amongst others, protected under art. 2 para. 2 and art. 12 ICESCR (right of everyone to the enjoyment of the highest attainable standard of physical and mental health without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status); also, human rights treaties targeting groups of persons in particular vulnerable situations protect health care needs [art. 12 ICESCR, arts 23, 24 and 39 CRC, art. 12 CEDAW, art. 25 CRPD, arts 23 and 24 Refugee Convention<sup>94</sup>].

International human rights law sets out duties of temporary hosting countries to *respect*, *fulfill* and *protect* the right to health of evacuees. More concretely, *respecting* the right to health means that they must refrain from denying or limiting refugees, asylum seekers, and

---

<sup>93</sup> See M. Taylor, A Commentary on the International Covenant on Civil and Political Rights (2020) 457.

<sup>94</sup> Art. 23 and 24 Refugee Convention apply to refugees lawfully staying in the territory of the hosting countries; these provisions require the same treatment as accorded to the hosting country's nationals.

other people on the move (“any person”) access to medical treatment and emergency services.<sup>95</sup> The obligation to *fulfill* comprises, amongst others, the provision of a comprehensive primary health care system, immunization against major infectious diseases (such as Covid-19 vaccines), the provision of adequate nutrition and drinking water, and sexual and reproductive health information and services. Furthermore, obligations to *protect* require equal access to health care and health-related services through third parties.<sup>96</sup> General Comment No. 14 spells out the core obligations<sup>97</sup> under art. 12 ICESCR, framing the minimum standard expected from all temporary hosting countries who are party to the ICESCR. Beyond the core obligations, the right to health remains subject to progressive realization, which implies uncertainty about when an obligation is breached. Obligations remain dependent on a state’s available resources, provided that the state uses its best endeavors.<sup>98</sup> However, temporary hosting countries face limits to invoke their inability to act. If a state has acquired certain knowledge about health risks and does not respond or responds in delay, this lack of responsiveness strongly indicates a violation of the right to health.<sup>99</sup>

In addition, temporary hosting countries who are contracting states to the CRC, CEDAW and/or CRPD must abide by their additional obligations under these treaties and make support available in an appropriate manner tailored to the respective group of particularly vulnerable individuals.

<sup>95</sup> See *Riedel*, The right to Health under the ICESCR, in *Arnauld* (ed.), The Cambridge Handbook of New Human Rights (2020) 109.

<sup>96</sup> See *CESCR*, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 ICESCR), U.N. Doc. E/C.12/2000/4, para. 36 <https://www.refworld.org/pdfid/4538838d0.pdf> (August 11, 2000); *Riedel* in *Arnauld*, The Cambridge Handbook 107 et seq.; *Butler/Sheriff*, The challenge of addressing the health care needs of Afghan evacuees, <https://www.brookings.edu/blog/up-front/2021/10/14/the-challenge-of-addressing-the-healthcare-needs-of-afghan-evacuees/> (October 14, 2021).

<sup>97</sup> *CESCR*, General Comment No. 14, para. 43 <https://www.refworld.org/pdfid/4538838d0.pdf> (August 11, 2000): “(a) access to health facilities, goods and services, on a non- discriminatory basis, especially for vulnerable or marginalized groups; (b) access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger; (c) access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) to ensure equitable distribution of all health facilities, goods and services; (f) to adopt and implement a national public health strategy and plan of action.”

<sup>98</sup> E.g. art. 3 Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention), ETS No. 164: “Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.” See *Kapelańska-Pręgowska*, Inadequate State Response to Protect Life and Health in Times of COVID-19 as a Violation of Human Rights Obligations – the Example of Poland, <https://www.ejiltalk.org/inadequate-state-response-to-protect-life-and-health-in-times-of-covid-19-as-a-violation-of-human-rights-obligations-the-example-of-poland/> (February 7, 2022).

<sup>99</sup> See European Committee of Social Rights, Complaint No. 72/2011, *International Federation for Human Rights (FIDH) v. Greece*, [https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCDIdentifier%22:\[%22cc-72-2011-dmerits-en%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCDIdentifier%22:[%22cc-72-2011-dmerits-en%22]}) (January 23, 2013); ECHR, Apps. Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, *Brincat and Others v. Malta*, <https://www.globalhealthrights.org/wp-content/uploads/2016/02/Brincat-v.-Malta.pdf> (July 24, 2014).

Even if evacuees are not expected to stay in temporary hosting countries for a long-term period, it is a matter of fact that the duration of their residence remains uncertain, and they need to make a living. Hence, the applicability and scope of the right to decent work and workplace rights, which are stipulated under the Refugee Convention (arts 17-19, 24), as well as under general human rights law (amongst others, art. 11 ICCPR; arts 6 and 7 ICESCR), deserve consideration.<sup>100</sup>

An Afghan evacuee seeking to engage in a short-term job while staying in a temporary hosting country may want to invoke his or her right to wage-earning employment. There are some boundaries to consider, though. Under art. 17 Refugee Convention,<sup>101</sup> which specifically addresses wage-earning employment, Afghan refugees can only claim the same treatment as nationals after a maximum of three years of residency, and in general, the application of this article hinges on the requirement of lawful stay.<sup>102</sup> Consequently, temporary hosting countries may impose restrictions on refugees from Afghanistan, including differential treatment applied to non-nationals for the protection of the labor market. Only after three years, the legal position of Afghan refugees in terms of differential treatment must change. Similarly, the rights to self-employment (art. 18 Refugee Convention) and to practicing liberal professions do not guarantee immediate access to gainful employment for Afghan refugees equal to the own citizens of the respective temporary hosting country. Art. 24 Refugee Convention addresses working conditions and establishes that, in so far as those conditions are covered by the respective hosting state's laws or regulations or controlled by administrative authorities, refugees lawfully staying in that country shall be treated the same as nationals. Provided that the condition of lawful stay is fulfilled (see *supra* point C), temporary hosting countries who are state parties to the Refugee Convention are obligated to grant Afghan refugees the same treatment as nationals regarding remuneration, hours of work, holidays, working from home, minimum age of employment, apprenticeships and training, work by women and youth, the enjoyment of the benefits of collective bargaining, and more. In sum, the protection of Afghan refugees' access to gainful employment, just working conditions and social security in temporary hosting countries under the Refugee Convention is relative and expands on the basis of

---

<sup>100</sup> UNHCR, UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees, <https://www.refworld.org/docid/60e5cfd74.html> (July 2021) provide an overview and basic legal interpretive guidance on the right to decent work. The Guidelines are centered around the Refugee Convention, but also drawn on other human rights and labor rights standards. Further notable authorities include: *ILO Recommendation R205*, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---ifp\\_crisis/documents/publication/wcms\\_631491.pdf#:~:text=Recommendation%20No.%20205%20on%20Employment%20and%20Decent%20Work,fragility%20and%20taking%20preventive%20measures%20for%20building%20resilience.](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_crisis/documents/publication/wcms_631491.pdf#:~:text=Recommendation%20No.%20205%20on%20Employment%20and%20Decent%20Work,fragility%20and%20taking%20preventive%20measures%20for%20building%20resilience.); *CESCR, Duties of States*, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2017%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2017%2f1&Lang=en) (March 13, 2017).

<sup>101</sup> Art. 17 para. 1 Refugee Convention: „The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”

<sup>102</sup> See elaborations on lawful stay in the context of temporary hosting countries (see *supra* point C); UNHCR, Guidelines on International Legal Standards, para. 20, <https://www.refworld.org/docid/60e5cfd74.html> (July 2021).



the legality of presence or residence of the refugee and the length of stay in the temporary hosting country.<sup>103</sup>

The work-related rights under general human rights law, specifically arts 6 and 7 ICESCR, protect all people on the move from Afghanistan. In terms of scope, art. 6 ICESCR encompasses independent self-employment as well as dependent wage-paid work. While it does not include a job guarantee in the sense of an absolute and unconditional right to obtain employment, art. 6 ICESCR ensures the right to access the labor market.<sup>104</sup> On the other hand, no person must be forced into employment.<sup>105</sup> State parties “are required to take steps progressively to realize for everyone within their jurisdiction, comprising nationals and non-nationals (including refugees), the opportunity to gain a living by work freely chosen or accepted, the ability to enjoy just and favourable conditions of work and accessing social protection.”<sup>106</sup> Due to the limits of justiciability of obligations based on “progressive realization”, there are hardly effective means to challenge non-compliance. Concrete, though, is the obligation to non-discriminatory treatment, namely that temporary hosting may limit Afghan evacuees’ access to the labor market only in a non-discriminatory manner, to promote the general welfare in a democratic society, provided it is so determined by law and compatible with the nature of the right to work and rights at work. From that follows that international law allows temporary hosting countries to withhold access to the labor market for Afghan evacuees where there are well-founded indications of security risks, if this is reasonable for the respective state to promote the general welfare in a democratic society. They may exclude evacuees from employment who are justifiably suspected of, or engaged in, activities detrimental to the security of the state.<sup>107</sup> In addition to that, those temporary hosting countries who can be considered as developing countries may lawfully distinguish between nationals and non-nationals, with due regard to human rights and the national economy, but they must not deny the enjoyment of the right to work entirely.<sup>108</sup>

The next question concerns to what extent international law establishes a basis for children on the move from Afghanistan to continue their education in the temporary hosting country, which has already been interrupted by the COVID-19 pandemic, and by conflict and flight. Multiple general human rights treaties and the Refugee Convention reiterate the right to education [art. 13 ICESCR, arts 28, 29 para. 1 lit. c, arts 30 and 32 CRC, art. 10 CEDAW, art. 24

---

<sup>103</sup> See *id.*, para. 15.

<sup>104</sup> *CESCR*, General Comment No. 18: The Right to Work (art. 6), U.N. Doc. E/C.12/GC/18, para. 6, <https://www.refworld.org/docid/4415453b4.html> (February 6, 2006); *UNHCR*, Guidelines on International Legal Standards, para. 9, <https://www.refworld.org/docid/60e5cfd74.html> (July 2021).

<sup>105</sup> See *CESCR*, General Comment No. 18, para. 6 and 11, <https://www.refworld.org/docid/4415453b4.html> (February 6, 2006).

<sup>106</sup> *UNHCR*, Guidelines on International Legal Standards, para. 30, <https://www.refworld.org/docid/60e5cfd74.html> (July 2021).

<sup>107</sup> See *id.*, para. 45.

<sup>108</sup> See *id.*, para. 30.

CRPD, art. 22 Refugee Convention<sup>109</sup>]. In terms of what is sufficiently clear regarding obligations to provide education, temporary hosting countries must make sure that primary education is compulsory and available for free to all children on the move from Afghanistan under their jurisdiction.<sup>110</sup> The obligations concerning secondary education are more blurred. In any case, temporary hosting countries must justify restrictions against the background of the totality of rights provided and based on maximum available resources.<sup>111</sup> Furthermore, the principle of discrimination imposes concrete obligations, irrespective of status.<sup>112</sup> Temporary hosting states are bound to apply this principle in the education context towards the children on the move from Afghanistan that they are hosting.

Given that multiple rights relevant to evacuees from Afghanistan in temporary hosting countries hinge on qualified territorial requirements, such as being lawfully in the territory of the hosting state (e.g., art. 12 ICCPR),<sup>113</sup> it deserves further scrutiny whether the evacuees fulfill such heightened threshold in relation to their temporary hosts. “The question whether an alien is ‘lawfully’ within the territory of a state is a matter governed by domestic law”.<sup>114</sup> Generally speaking, an evacuee arriving on the territory of a temporary hosting country does not enter this country in an irregular manner, or ‘illegally’. Overall, most national immigration laws comprise a legal basis for (temporary) admission of refugees and/or individuals in need for protection. If not admitted on a national immigration law basis, permitted entry implicitly derives from the commitments of the temporary hosting country under the agreement with the US. It follows that, while the situation varies among temporary hosting countries due to divergencies in the respective national laws and agreements with the US, strong arguments speak in favor that evacuees fulfill the requirement of being lawfully within the territory of a temporary hosting country.

In a similar vein, most of the rights under the Refugee Convention demand a certain level of attachment to the contracting state. Besides the mentioned right to receive travel documents and work-related rights, this holds, for example, true for arts 21 (housing) and 26 (freedom of movement) Refugee Convention. Specifically, art. 21 Refugee Convention requires lawful stay<sup>115</sup>, and art. 26 Refugee Convention demands lawful presence of a refugee on the territory of the hosting country.

---

<sup>109</sup> Art. 22 Refugee Convention clearly states that refugees should have the same treatment as nationals with respect to elementary education, and treatment “as favourable as possible, and, in any event, not less favourable than generally accorded to aliens in the same circumstances, with respect to education other than elementary education”; see e.g., *Goldbach/Th.Müller/Prantl* in *Hruschka* (ed.), *Genfer Flüchtlingskonvention: Handkommentar* (2022) art. 22.

<sup>110</sup> See *CESCR*, General Comment No. 13: The right to education (art. 13), U.N. Doc. E/C.12/1999/10, para. 23, <https://www.refworld.org/docid/4538838c22.html> (December 8, 1999).

<sup>111</sup> See *id.*, para. 13.

<sup>112</sup> See *Willems/Vernimmen*, The fundamental human right to education for refugees: Some legal remarks, Vol. 17 *European Educational Research Journal* 2018, 223 et seq.

<sup>113</sup> See *Kälin/Künzli*, *The Law of International Human Rights* 523.

<sup>114</sup> *HRC*, General Comment No. 27: Article 12 (Freedom of Movement), U.N. Doc. CCPR/C/21/Rev.1/Add9, para. 4, <https://www.refworld.org/docid/45139c394.html> (November 2, 1999); see also *Joseph/Castan*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*<sup>3</sup> (2013) 397 para. 12.13.

<sup>115</sup> See point B.

In terms of *lawful presence*, legal doctrine deems art. 26 Refugee Convention “to apply to refugees who were admitted to the country”.<sup>116</sup> Lawful presence differs from lawful stay in the sense that the former implies admission under national immigration law. Like in the context of art. 26 ICCPR, due to varying domestic legislation, it depends on the specific temporary hosting country whether or when such admission under national immigration law is given for evacuees from Afghanistan.

It results that obligations of temporary hosting countries towards evacuees from Afghanistan include – but are certainly not limited to – the right to access healthcare, work authorization, and education. The temporary hosting countries may impose restrictions based on state interests, though, and especially the obligations concerning economic and social rights remain vague. Whether the respective required levels of attachment, e.g., for work-related rights, the right to freedom of movement, choice of residence, and housing, are established immediately upon arrival of evacuees from Afghanistan on the territory of a temporary hosting country varies among the respective temporary hosting countries.

## E. Integration and permanent status

The achievement of a durable solution for refugees fleeing Afghanistan presupposes the opportunity to integrate. For evacuees who are not admitted to enter US territory, the need arises for a permanent solution elsewhere. This implies that the question about international law obligations related to access to long-term residence and citizenship also concerns *temporary* hosting countries (see *supra* section II for the US context).

In general, there is no prohibition under international law to impose restrictions for evacuees from Afghanistan to access long-term residence status and citizenship, but the principle of proportionality, i.e., a general principle under international law, limits the discretion of temporary hosting countries insofar as it demands rational and reasonable means towards achieving a permissible goal, without undue interference with protected rights of the individual concerned.<sup>117</sup> Furthermore, obligations under the ICCPR, the CRC, and the Refugee Convention restrict temporary hosting countries’ decision-making on granting citizenship to people on the move from Afghanistan. This includes an obligation not to deny citizenship on arbitrary grounds, namely to base decisions on cogent, legitimate reasons, which are to be assessed in the individual case. Furthermore, art. 37 Refugee Convention prohibits impediments for refugees from Afghanistan that would result in unjustified *de facto* exclusion from

---

<sup>116</sup> Marx in Zimmermann, The 1951 Convention art. 26 para. 45.

<sup>117</sup> See Crawford, Proportionality, para 1 and 23, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459> (May 2011). For example, the Court of Justice of the European Union set forth in *A v. Staatssecretaris van Veiligheid en Justitie* that States are generally not prohibited from imposing such hurdles, but there are limits under proportionality considerations, especially for excessive measures; see ECJ, C-257/17, *C and A v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2018:876.

citizenship in a temporary hosting country. What is more, state parties to the CRC must decide on the basis of the child's best interest (art. 3 CRC) and ensure that children of evacuees born on their territory obtain a nationality (arts 7 and 8 CRC).<sup>118</sup>

#### IV. The question of responsibility

Given the multiple (state) actors involved in the implementation of arrangements to temporarily host evacuees from Afghanistan, it is necessary to analyze who can be held responsible for respective international law violations.

In this light, the International Law Commission's (ILC's) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>119</sup> deserve scrutiny. In concrete terms, art. 16 ARSIWA addresses derivative responsibility, namely responsibility triggered by aid or assistance.<sup>120</sup> Accordingly, a state is internationally responsible if it "aids or assists another State in the commission of an internationally wrongful act under the condition that it has (a) knowledge of the circumstances of the internationally wrongful act and (b) the act would be internationally wrongful if committed by that same state."<sup>121</sup> The applicability of art. 16 ARSIWA would induce, for example, international responsibility of the temporary hosting country for a human rights violation, while the US would incur responsibility for its aid or assistance provided.<sup>122</sup>

First, art. 16 ARSIWA only applies if the temporary hosting country makes an internationally wrongful conduct. Such internationally wrongful conduct could, amongst others, consist of a violation of the right to leave (art. 12 para. 2 ICCPR), when a temporary hosting country prevents evacuees destined to the US from leaving their territory, or the right to privacy (art. 17 ICCPR)<sup>123</sup>, when authorities of a temporary hosting country track and/or collect data of the evacuees, sharing them without consent.<sup>124</sup> Notably, the right to privacy is also at issue in the context of collaboration, namely data sharing, between the US and the UNHCR. The

<sup>118</sup> See *HRC*, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/130/D/2918/2016&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/130/D/2918/2016&Lang=en) (January 20, 2021).

<sup>119</sup> *ILC*, Draft articles on Responsibility of States for Internationally Wrongful Acts 2001, [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

<sup>120</sup> See *Baxewanos* in *Gammeltoft-Hansen/Vedsted-Hansen*, Human rights 202.

<sup>121</sup> *Id.*, 202; for a detailed analysis of the conditions to be met under art. 16 ARSIWA, i.e., (i) aid or assistance, (ii) nexus, (iii) double obligation, and (iv) mental element, see *Moynihan*, Aiding or Assisting: Challenges in Armed Conflict, 6-26, <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> (November 2016).

<sup>122</sup> See *Pijnenburg*, Human Rights Law Review 2020, 328.

<sup>123</sup> In its GC No. 16, the HRC set out the requirement under art. 17 ICCPR that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*; see *HRC*, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, U.N. Doc. HRI/GEN/1/Rev9 (Vol I), para. 8 <https://www.refworld.org/docid/453883f922.html> (April 8, 1988).

<sup>124</sup> For considerations on the US military sharing data in the context of the mass evacuation in Afghanistan, see *Milanovic*, The International Law of Intelligence Sharing in Multinational Military Operations: A Primer, <https://www.ejiltalk.org/the-international-law-of-intelligence-sharing-in-multinational-military-operations-a-primer/> (October 21, 2021).

pertinent provision for derivative responsibility in such constellation is art. 58 Articles on Responsibility of International Organizations (ARIO)<sup>125</sup>, which extends art. 16 ARSIWA to international organizations.

Second, the US must have provided aid or assistance to the temporary hosting country. The ARSIWA Commentary mentions, amongst others, financing the activity in question.<sup>126</sup> This is particularly relevant because the US announced to fund temporary hosting countries.<sup>127</sup> Furthermore, *Baxewanos* classified acts such as “advice, sponsoring police training, funding detention centers or providing surveillance equipment to third states”<sup>128</sup> as aid or assistance under art. 16 ARSIWA. According to *Moynihan*, art. 16 ARSIWA covers “a broad range of activity”,<sup>129</sup> even beyond material aid.

Third, a causal link must exist between the internationally wrongful conduct committed by the temporary hosting country and the aid or assistance provided by the US. If an assisting state knows that the provided resources will be diverted for illegal purposes, “this in itself suggests the existence of a nexus between the assistance and the illegal act”.<sup>130</sup> In other words, if the US funds a temporary hosting country and/or provides surveillance equipment, knowing that these resources are or will be used to prevent the departure of its evacuees from the temporary hosting country, inflicting on their right to leave, the nexus requirement is met.

Further, art. 16 ARSIWA demands “knowledge of the circumstances of the internationally wrongful act”, meaning that the US must “be aware of the circumstances making the conduct of the assisted State internationally wrongful”.<sup>131</sup> In order to prove the wrongful intent of the US, it must be shown that the US had actual or near-certain<sup>132</sup> knowledge that the assistance will be used for unlawful purpose by the temporary hosting country.<sup>133</sup> While the sufficiency

<sup>125</sup> See *ILC*, Draft Articles on Responsibility of International Organizations 2011, [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf).

<sup>126</sup> See *ILC*, ARSIWA Commentary, art. 16 para. 1, [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>127</sup> *Feith-Tan*, The Temporary Hosting of Evacuated Afghans, <https://rli.blogs.sas.ac.uk/2021/09/15/the-temporary-hosting-of-evacuated-afghans-in-third-countries-responsibility-sharing-or-externalisation/> (September 15, 2021).

<sup>128</sup> *Baxewanos* in *Gammeltoft-Hansen/Vedsted-Hansen*, Human rights 202.

<sup>129</sup> *Moynihan*, Aiding or Assisting, 8, <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> (November 2016).

<sup>130</sup> *Id.*, 10.

<sup>131</sup> See *ILC*, ARSIWA Commentary, art. 16 para. 4, [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>132</sup> See *Crawford*, State Responsibility: The General Part (2013) 408.

<sup>133</sup> See *Moynihan*, Aiding or Assisting, 15, <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> (November 2016); this might include knowledge about the circumstances and consequences of facilitating the commission of the temporary hosting country's wrongful act, see *Fernandez*, Multi-stakeholder operations of border control coordinated at the EU level and the allocation of international responsibilities, in *Gammeltoft-Hansen/Vedsted-Hansen* (eds.), Human rights and the dark side of globalisation (2016) 254 et seq.

of constructive knowledge ('should have known') has remained contested,<sup>134</sup> the knowledge threshold under art. 16 can be met in situations of 'willful blindness', i.e., the "deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality".<sup>135</sup> The presumption that an assisting state is turning a blind eye may increase over time if the breach continues and information becomes widespread.<sup>136</sup> From the point of view that the US took deliberate action to initiate and enter into arrangements with temporary hosting countries, and conducts vetting procedures and/or hosts evacuees in US military bases there, valid arguments exist in favor of 'actual' knowledge about the circumstances in temporary hosting countries. At least when on site, the US cannot simply turn a blind eye and deny its actual knowledge of ongoing human rights violations.

Eventually, art. 16 lit. b ARSIWA demands that the main conduct would be internationally wrongful if committed by the US. Generally speaking, in terms of rights under the ICCPR, such as the right to leave, this requirement is likely fulfilled, presuming that the US and the respective hosting country are both State Parties to the ICCPR.<sup>137</sup>

It results that the arrangements between the US and temporary hosting countries implicate situations where not only the temporary hosting countries would face responsibility for internationally wrongful acts on their territory, but also the US could be held responsible under art. 16 lit. b ARSIWA on the basis of aid or assistance, namely through funding.

## V. Global impact and implications on Europe and Austria

People seeking to flee Afghanistan have been prevented to do so due to border closures, and those who managed to cross the Afghan border have faced flawed protection under international human rights and refugee law in the countries in the region, mostly without prospect to stay.

At the time of writing, Pakistan hosts about three million Afghans. Pakistan does not count among the signatories of the Refugee Convention.<sup>138</sup> Refugees in Pakistan receive registration cards valid for two years. Notwithstanding Pakistan's ratification of the ICCPR<sup>139</sup> and the

<sup>134</sup> See *Moynihan*, Aiding or Assisting, 13 et seq. <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> (November 2016); a different approach is taken by *Gammeltoft-Hansen* and *Hathaway*, who relied on constructive knowledge, namely situations where a state "knew or should have known" about its contribution to an internationally wrongful conduct; see *Gammeltoft-Hansen/Hathaway*, Non-Refoulement in World of Cooperative Deterrence, Vol. 53 Columbia Journal Transnational Law 2015, 280.

<sup>135</sup> *Moynihan*, Aiding or Assisting, 14, <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> (November 2016).

<sup>136</sup> See *id.*, 14.

<sup>137</sup> See *id.*, 330.

<sup>138</sup> For information on the ratification status of the Refugee Convention, see [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en).

<sup>139</sup> For information on the ratification status of the ICCPR, see [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND).



ICESCR,<sup>140</sup> rights such as to education (art. 13 ICESCR), and to property and free economic development (art. 17 UDHR and art. 1 para. 1 ICCPR) are scarcely implemented.<sup>141</sup> Furthermore, Pakistan is party to the CRC,<sup>142</sup> which stipulates under art. 7 para. 1 that children shall have the right to acquire a nationality. As a state party, Pakistan “shall ensure the implementation” of this right (art. 7 para. 2 CRC), but Pakistan’s national law providing access to citizenship for those born in Pakistan falls short of recognizing children with parents from Afghanistan.<sup>143</sup> In terms of the political stance, Pakistan has paused informal consultations over the reception of Afghan refugees and other people on the move along its border.<sup>144</sup> Iran hosts the second largest population of Afghans on the move. As opposed to Pakistan, Iran acceded the Refugee Convention and its Protocol. Formally speaking, registered refugees receive the rights to access education, healthcare, and labor market in Iran. In practice, however, by mid-August 2021, Iran started to keep refugees and other migrants fleeing Afghanistan in the border region in tent camps. The Iranian government clearly emphasized that they could not take more, ordering the denial of entry.<sup>145</sup> Similarly, all northern neighbors – Tajikistan, Uzbekistan and Turkmenistan – tightened border controls.<sup>146</sup>

Beyond immediate neighbors, Turkey is a main host of Afghan migrants, namely a hub for many striving to reach Europe. It ratified the Refugee Convention, but does not apply the extended geographical scope of the Convention’s Protocol, meaning that Turkey only accepts Europeans as Convention refugees *stricto sensu*.<sup>147</sup> Under the Turkish Law on Foreigners and International Protection (LFIP), Afghan refugees can obtain ‘conditional refugee status’.<sup>148</sup> As art. 62 LFIP states, conditional refugees “shall be allowed to reside in Turkey temporarily until

<sup>140</sup> For information on the ratification status of the ICESCR, see [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en).

<sup>141</sup> Refugees in Pakistan can neither buy property nor open bank accounts, or access education; see *Lang et al.*, After the Airlift 11 et seq. <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21); on the right to education, see *supra* section III point D.

<sup>142</sup> For information on the ratification status of the CRC, see [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en).

<sup>143</sup> See *ur-Rehman*, Afghans Flee to Pakistan. An Uncertain Future Awaits, <https://www.nytimes.com/2021/09/08/world/asia/pakistan-afghanistan-refugees.html> (November 1, 2021); *supra* section III point E, fn. 118.

<sup>144</sup> See *id.*; *Lang et al.*, After the Airlift 11 et seq., <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21).

<sup>145</sup> See *Lang et al.*, After the Airlift 12 et seq., <https://www.refugeesinternational.org/reports/2021/9/7/after-the-airlift-protection-for-afghan-refugees-and-those-who-remain-at-risk-in-afghanistan> (September 8, 21).

<sup>146</sup> See *id.*, 13.

<sup>147</sup> Turkey made the following declaration: “The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey”, *UNTC*, Chapter V Refugees and Stateless Persons: Protocol relating to the Status of Refugees, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5#EndDec) (November 30, 2021).

<sup>148</sup> For further details on Turkey’s reservation and the LFIP, see *AIDA & ECRE*, Country Report: Introduction to the asylum context in Turkey, <https://asylumineurope.org/reports/country/turkey/introduction-asylum-context-turkey/> (November 30, 2020).

they are resettled to a third country”<sup>149</sup>. While the introduction of conditional refugee status under the LFIP has significantly diminished the impact of Turkey’s geographical limitation to the Refugee Convention, conditional refugees enjoy less protections compared to refugees under the LFIP. Restrictions concern, amongst others, access to the labor market, documentation, and family reunification rights.<sup>150</sup> At the Turkish border, refugees and other people on the move from Afghanistan have faced harsh controls and treatment, with the risk of being pushed back and subject to unlawful *refoulement* (see *supra* section III point B).<sup>151</sup>

The geopolitical situation and the flawed implementation of international law obligations towards refugees and other people on the move from Afghanistan in the countries in the region underpin the demand for international cooperation, including with Afghanistan’s overburdened neighbors. The UNHCR warned that “[a]ll states – and this applies to countries both within and outside the region – must preserve the right to seek asylum for Afghans arriving through regular or spontaneous means”<sup>152</sup> and called on neighboring countries to keep borders open.<sup>153</sup> A similar scenario already happened with Vietnamese refugees in 1978. When they crossed the high seas to find safety, countries of the Association of South East Asian Nations (ASEAN) started to oppose admitting boat people from Vietnam.<sup>154</sup> The idea that the Vietnamese could obtain long-term asylum in neighboring countries failed to convince Thailand and Malaysia, who “made it very clear that they would accept refugees only for temporary asylum, and on condition that they be quickly resettled elsewhere”.<sup>155</sup> Eventually, agreements for temporary asylum in neighboring ASEAN countries and permanent resettlement in third countries were achieved under the initiative of the UNHCR.<sup>156</sup>

As of December 2021, 85,000 Afghans were living in vulnerable situations in countries nearer the EU, in need for resettlement, and the UN High Commissioner *Grandi* urged the EU to take

<sup>149</sup> Directorate General of Migration Management, Conditional Refugee, <https://en.goc.gov.tr/conditional-refugee>.

<sup>150</sup> See *Ergin*, On the difference that Turkey’s geographical limitation to the 1951 Convention makes in the protection of non-European refugees, <https://rli.blogs.sas.ac.uk/2021/06/22/on-the-difference-that-turkeys-geographical-limitation-to-the-1951-convention-makes-in-the-protection-of-non-european-refugees/> (June 22, 2021); *Gökalp/Mencütek*, Refugee Protection: Turkey Report, 26, [https://www.researchgate.net/profile/Zeynep-Mencutek/publication/340236818\\_Refugee\\_Protection\\_Turkey\\_Report\\_Working\\_Papers\\_Global\\_Migration\\_Consequences\\_and\\_Responses/links/5e7e4ee192851caef4a56b41/Refugee-Protection-Turkey-Report-Working-Papers-Global-Migration-Consequences-and-Responses.pdf](https://www.researchgate.net/profile/Zeynep-Mencutek/publication/340236818_Refugee_Protection_Turkey_Report_Working_Papers_Global_Migration_Consequences_and_Responses/links/5e7e4ee192851caef4a56b41/Refugee-Protection-Turkey-Report-Working-Papers-Global-Migration-Consequences-and-Responses.pdf) (January 2020).

<sup>151</sup> See *Gall*, Afghan Refugees Find a Harsh and Unfriendly Border in Turkey, <https://www.nytimes.com/2021/08/23/world/europe/afghanistan-refugees-turkey-iran-taliban-airport.html> (October 3, 2021).

<sup>152</sup> See UNHCR, UNHCR warns that humanitarian needs in Afghanistan cannot be forgotten, <https://www.unhcr.org/en-us/news/briefing/2021/8/611f61824/unhcr-warns-humanitarian-needs-afghanistan-forgotten.html> (August 20, 2021).

<sup>153</sup> *Id.*

<sup>154</sup> See *International Crisis Group*, How to Save the US Refugee Admissions Program’, Crisis Group United States Report N°26, <https://www.crisisgroup.org/united-states/002-how-save-us-refugee-admissions-program> (September 12, 2018).

<sup>155</sup> *Zolberg*, From Invitation to Interdiction: US Foreign Policy and Immigration since 1945, in *S. Teitelbaum/Weiner* (eds.), *Threatened Peoples, Threatened Border* (1995) 130 et seq.

<sup>156</sup> See *Feller/Klug*, Refugees, United Nations High Commissioner for (UNHCR), para. 7, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e53> (January 2013).

half.<sup>157</sup> On July 9, 2021, EU representatives, the US, the government of Canada and the UN-HCR met at the High-level Resettlement Forum,<sup>158</sup> and the European Commission hosted another special EU High-level Forum on providing protection to Afghans at risk on October 7, 2021 – with the explicit aim “to help as many vulnerable Afghans as possible”.<sup>159</sup> Commissioner *Ylva Johansson* announced on December 9, 2021 that 15 EUMS<sup>160</sup> agreed to take in 40,000 Afghans through resettlement, humanitarian admission or evacuation programs, with Germany pledging 25,000 places.<sup>161</sup> The commitments have remained lopsided, and some of EUMS’ governments, including the Austrian, have rejected the admission of Afghan refugees, mainly on the basis of security interests.<sup>162</sup>

Having said this, Austria declared together with 99 other countries in a Joint Statement published by the US Department of State to “stand ready to assist” Afghan people who “deserve to live in safety, security and dignity”.<sup>163</sup> While the declaration represents political commitment, it does not entail legally binding effect. In the spirit of cooperation and solidarity, renowned Austrian experts demanded that the Austrian federal government should admit at

<sup>157</sup> See *Aljazeera*, EU countries agree to take in 40,000 Afghan refugees, <https://www.aljazeera.com/news/2021/12/9/eu-member-states-agree-to-take-in-40000-afghan-asylum-seekers> (December 9, 2021); *European Council on Foreign Relations*, The fall of the Afghan government and what it means for Europe, <https://ecfr.eu/publication/the-fall-of-the-afghan-government-and-what-it-means-for-europe/> (August 25, 2021).

<sup>158</sup> See *European Commission*, Providing protection through joint leadership: stepping up resettlement and complementary legal pathways, [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_21\\_3628](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_21_3628) (July 9, 2021).

<sup>159</sup> *European Commission* (Ylva Johansson), #TimeToDeliverMigrationEU No.16 - EU High-level Forum on providing protection to Afghans at risk, [https://ec.europa.eu/commission/commissioners/2019-2024/johansson/blog/timetodelivermigrationeu-no16-eu-high-level-forum-providing-protection-afghans-risk\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/johansson/blog/timetodelivermigrationeu-no16-eu-high-level-forum-providing-protection-afghans-risk_en) (October 3, 2021).

<sup>160</sup> Reports indicate that the nations willing to resettle the Afghan refugees are Belgium, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Spain, and Sweden; see *Majeed*, European Nations To Resettle 40,000 Afghan Refugees To Prevent ‘irregular Arrivals’, <https://www.republicworld.com/world-news/europe/european-nations-to-resettle-40000-afghan-refugees-to-prevent-irregular-arrivals.html> (December 11, 2021).

<sup>161</sup> *Aljazeera*, EU countries agree to take in 40,000 Afghan refugees, <https://www.aljazeera.com/news/2021/12/9/eu-member-states-agree-to-take-in-40000-afghan-asylum-seekers> (December 9, 2021); by comparison, the US committed 100,000 global places of resettlement, Canada 40,000, and the United Kingdom 20,000, see *Shankar*, EU, fearful of refugee crisis, delays response on Afghan asylum, <https://www.aljazeera.com/news/2021/10/15/eu-fearful-of-refugee-crisis-delays-response-on-afghan-asylum-2> (October 15, 2021).

<sup>162</sup> See *supra* n. 17; *Shankar*, EU, fearful of refugee crisis, <https://www.aljazeera.com/news/2021/10/15/eu-fearful-of-refugee-crisis-delays-response-on-afghan-asylum-2> (October 15, 2021); *Giuffrida*, Expected Afghan influx reopens divisions over refugees in Europe, <https://www.theguardian.com/world/2021/aug/16/expected-afghan-influx-reopens-divisions-over-refugees-europe> (August 16, 2021); *Joint NGO Statement*, The EU cannot shirk its responsibilities towards Afghans in need of international protection, [https://www.hrw.org/sites/default/files/media\\_2021/09/joint%20Statement%20-%20EU%20Responsibility%20Towards%20Afghans\\_16%20September.pdf](https://www.hrw.org/sites/default/files/media_2021/09/joint%20Statement%20-%20EU%20Responsibility%20Towards%20Afghans_16%20September.pdf) (September 16, 2021). It is important to note that ties through support and work during the war in Afghanistan not only exist to the US. Many of those seeking protection from the Taliban regime have *de facto* ties to European governments; see *Atal/Salomon*, Why at-risk Afghans have a right of admission, <https://www.opendemocracy.net/en/can-europe-make-it/why-risk-afghans-have-right-admission-eu-member-states/> (August 30, 2021).

<sup>163</sup> *US Department of State*, Joint Statement on Afghanistan, <https://www.state.gov/joint-statement-on-afghanistan/> (August 15, 2021).

least 4,450 people from Afghanistan, which would be 0.05 percent of the total Austrian population.<sup>164</sup> As regards the legal basis for such admission, the Austrian Asylum Act 2005 does not comprise a permanent resettlement scheme, or definition of resettlement. However, if Austria would bindingly agree to the admission of vulnerable individuals from Afghanistan, e.g., under a bilateral agreement, it could make use of Section 3a of the Asylum Act 2005<sup>165</sup>, according to which refugee or subsidiary protection status is granted *ex officio* if Austria fulfills its obligations under international law. Neither an application by the person concerned nor a procedure according to the provisions of the Asylum Act 2005 is required. Broadly speaking, and provided that those who fulfill the respective criteria of the refugee definition are indeed granted full refugee status in Austria, this facilitated status recognition could be an effective tool to get the people out of dangerous situations in Afghanistan and neighboring countries.

## VI. Conclusion

The analysis shows that the anticipated arrangements between the US and temporary hosting countries as a response to Afghan mass displacement implicate multiple legal issues under international refugee and general human rights law. This includes interference with fundamental principles, such as the principles of *non-refoulement* and non-discrimination. Moreover, there is established precedent under international law recognizing the essential role of legal identity in the hosting country as a prerequisite for evacuees from Afghanistan to effectively exercise their rights, such as to health, work, education, freedom of movement, housing - and more. Many of the pertinent rights are economic, social, and cultural rights with broad formulations and thus limited justiciability.

From a political perspective, third-country commitment to resettlement and international cooperation are crucial to prevent border closures in the region. The US has taken a lead in evacuating and resettling individuals seeking to escape Afghanistan. Notwithstanding the lack of a firmly established international obligation to extraterritorially admit refugees and other people on the move from Afghanistan, political commitments and moral arguments, namely the flawed protection systems and risks of *non-refoulement* violations by overburdened countries in the region, propound not only US action, but also of the EU and its Member States, including Austria. In this vein, contracting states explicitly recognized in the Preamble of the Refugee Convention that a satisfactory solution to the global refugee problem cannot be achieved without international cooperation, as well as the protection of human rights to the widest possible exercise.

---

<sup>164</sup> *Vienna.at*, Afghanistan: Österreichische Forscher möchten Resettlement-Programm, <https://www.vienna.at/afghanistan-oessterreichische-forscher-moechten-resettlement-programm/7096679> (August 18, 2021).

<sup>165</sup> Asylgesetz 2005, BGBl I 2005/100.