Refugee Flow: A Law and Economics approach

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Vluchtelingenstroom:
Een rechtseconomische benadering

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List of Abbreviations

Common European Asylum System	CEAS
Convention Relating to the Status of Refugees	1951 Convention
Court of Justice of European Union	EUCJ
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Union	EU
European Union Member States	EUMS
General Agreement on Tariffs and Trade	GATT
Human Rights	HRs
International Monetary Fund	IMF
International Organization for Migration	IOM
International Refugee Organization	IRO
International Trade Organization	ITO
Law and Economics	L&E
Refugee Status Determination	RSD
Supreme Headquarters Allied Expeditionary Force	SHAEF
Treaty on European Union	TEU
Treaty on the Functioning of the European Union	TFEU
Union of Soviet Socialist Republics	USSR
United Nations	UN
United Nations High Commissioner for Refugees	UNHCR
United Nations Relief and Rehabilitation Agency	UNRRA
World Trade Organization	WTO
World War I	WWI
World War II	WWII

Introduction

*1. Short Overview**

Since 2011, due to the Syrian civil war, Libya's institutional breakdown, and Eritrea's political unrest, record numbers of migrants have been arriving irregularly at the EU's south-eastern external borders, publicly known as "Europe's refugee crisis."[1] This thesis aims to analytically study the protection of refugee rights by applying an economic analysis to international refugee law and to European asylum law, after highlighting the HRs approach to positive law through case-law study. Its main part offers a L&E model constructed on the assumption that refugees, as well as national States, *might* aim to maximize their net benefits. This research focuses on the most important variables that impact refugee decision-making and the main "push" factors that impact lawmakers in enacting and modifying refugee laws (e.g. the protection of national security and the safeguarding of the national job market). Furthermore, this thesis examines the economic advantages and disadvantages of a centralized supernational asylum law [within *acquis communautaire*] that might result in the elimination of competition between legal orders in asylum law and the removal of negative externalities caused by "asylum shopping." In summary, the "Refugee Crisis" is critically analyzed through a multidisciplinary approach since there is the application of HRs approach as well as L&E methods by also considering case-law study and the positive law.

2. Relevance of the Research

This thesis focuses on a L&E approach to the refugee crisis. Although during 2018, the number of irregular migrants has decreased significantly when compared to the years 2016-2017, the arrival of irregular migrants in the Mediterranean Sea remains a controversial political issue,[2] both at the national and EU levels. For instance, Italy and Greece, as border EU countries, are two of the representative countries, having the highest number of asylum applications.[3] In the summer of 2019, the Italian Parliament voted for a "new," more restrictive, and controversial immigration policy. This policy might not be aligned with international HRs law or constitutional interpretations[4] since Italy should rescue refugees, but the "new" policy classifies it as an administrative offense (new modified

* Part of the academic materials of this chapter have been also used for the scientific paper Koka, Enkelejda, and Denard Veshi. "Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation." European Journal of Migration and Law 21.1 (2019): 26-52 and Koka, Enkelejda, and Denard Veshi. "Illicit Return Practices of Irregular Migrants from Greece to Turkey." *International Journal of Law and Political Sciences* 14.1: 45-51.

[1] Koka, Enkelejda, and Denard Veshi. "Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation." *European Journal of Migration and Law* 21.1 (2019): 26-52.

[2] *Ibrid.*

[3] Eurostat. 2019. Asylum statistics, available on-line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics accessed in April 30th, 2020.

[4] Italian Regional Administrative Court of Lazio, Section III, No. 05479/2019 of 14 August 2019.

Article 6-bis Legislative Decree 286/1998). Moreover, on July 17, 2019, Germany[5] and the Netherlands[6] suspended the application of the "Dublin transfer" (Dublin III Regulation 604/2013) to Greece due to the risk of chain refoulment to Turkey.[7] These events show that the refugee crisis is still a "hot" political and legal issue, not only because the number of asylum seekers during 2019 has increased, [8] but also due to the economic impact of Covid-19 on the economic growth in Europe.[9] In other words, Covid-19 will impact the unemployment rate in the EUMS, which might bring negative effects for asylum seekers or refugees already present. As a result, to protect refugee interests, the role of the UNHCR is still considered fundamental. This is why from a small office of some 30 staff based mostly in Europe in the early 1950s, the UNHCR has now grown into a global organization with a staff of more than 9,300 people working in 123 countries. The principal goal is to explore the "demand" and "supply" of the "refugee market" through the lenses of the field of L&E coupled with the context of the HRs approach. This inquiry aims to suggest a comprehensive model of refugee law, which can be applied in future contexts of new migration flows (e.g. environmental migration). Thus, its importance goes beyond the current ongoing refugee crisis and could be helpful for different target groups, including academia and policymakers.

2. Research Question

The central research question is the following: which policy can simultaneously consider the protection of refugee HRs without needlessly damaging the interests of national States? After reviewing the historical development of the UNHCR and examining the 1951 Convention through an HRs perspective and a case-law study, the central question is divided into the following sub-questions: First, why do national States ratify and comply with the 1951 Convention? And, why have States not built a WTO model for refugee movement? Second, what are the main variables that affect refugees' decision-making processes? Third, under the hypothesis that national States strive to protect the interests of their citizens (via national security, job market, etc.) and in asylum law, where a "market failure" is still present, what are the most important "push" factors that influence lawmakers when enacting and modifying refugee laws? And, which authority shall rule over asylum law, national Parliaments or the EU institutions?

[5] Administrative Court of Munich, 17 July 2019, M 11 S 19.50722, M 11 S 19.50759.
[6] Dutch Council of State, 17 July 2019, 201902302/1/V3.
[7] Koka, Enkelejda, and Denard Veshi. "Illicit Return Practices of Irregular Migrants from Greece to Turkey." *International Journal of Law and Political Sciences* 14.1: 45-51.
[8] Eurostat, note 3.
[9] OECD. 2020. Interim Economic Assessment Coronavirus: The world economy at risk https://www.oecd-ilibrary.org/docserver/7969896b-n.pdf?expires=1587161779&id=id&accname=guest&checksum=520E2A11ABFDEB27BA7CE084FAF38B8E accessed on April 30th, 2020.

3. Methodology

The methods applied here vary according to the questions to be answered. On the "demand" side, i.e. the "rationale" of refugees, after highlighting the HRs approach to positive law, one of the most important novelties of this study is in the incorporation of a L&E model based on the idea that refugees *might* also seek to maximize their net benefits.[10] This model shall also include the information costs because the level of information increases either during the passage through secure transit countries[11] or through continued communication with agents of smuggling.[12] While some groups of refugees do make a clear choice (e.g. resettled refugees, anticipatory refugees, and bogus refugees), for others, speaking about "choice" is a contentious term[13] since persecution, sometimes prompt and unexpected, is the main factor that impacts their decision to flee. On the "supply" side, the protection of domestic interests by national parliaments, this study systematically reviews empirical data while also incorporating the new research conducted on the current "European Refugee Crisis," which peaked in 2015 and 2016.[14] Regarding the third sub-research question, this study examines the legal, political, and economic advantages and disadvantages of a centralized supranational asylum law [*acquis communautaire*] that *might* result in the decrease of competition between legal orders in refugee law[15] due to the individual State's choice entails positive or negative externalities for third countries because it directly affects the flow of migration.[16]

A multidisciplinary approach is applied to refugee law by combining L&E concepts with the ideals of HRs. Chapter I gives a L&E interpretation of historical events, while Chapter II reviews the development of the protection of refugee rights through case-law study. Chapter III explores various explanations for the ratification of and compliance with the 1951 Convention, by incorporating not only the reasons dealing with the interests of the States but also the importance of the protection of refugees' rights. In addition, in the case of the WTO proposal for refugee movement, the thesis clarifies that this part applies only to an L&E approach. This clearly avoids the criticism of this proposal based on moral objections. While Chapter IV presents a micro-model of migration without assuming that refugees are rational agents, Chapter V focuses on the impact that refugees have on host countries without asserting that all refugees bring negative effects or that national States should

[10] Neumayer, Eric. "Bogus refugees? The determinants of asylum migration to Western Europe." *International studies quarterly* 49.3 (2005): 389-410.

[11] Havinga, Tetty, and Anita Böcker. "Country of asylum by decision making or by chance: Asylum-seekers in Belgium, the Netherlands and the UK." *Journal of ethnic and migration studies* 25.1 (1999): 43-61;

[12] Day, Kate, and Paul White. "Decision making or circumstance: The UK as the location of asylum applications by Bosnian and Somali refugees." *GeoJournal* 56.1 (2002): 15-26.

[13] Crawley, Heaven. *Chance or choice? Understanding why asylum seekers come to the UK*. Refugee Council, 2011.

[14] Koka, Enkelejda, and Denard Veshi. "Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation." *European Journal of Migration and Law* 21.1 (2019): 26-52.

[15] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.

[16] Bubb, Ryan, Michael Kremer, and David I. Levine. "The economics of international refugee law." *The Journal of Legal Studies* 40.2 (2011): 367-404.

not protect refugees HRs. Finally, Chapter VI, by applying an economic approach, investigates Article 5 TEU in asylum law, by considering the protection of human rights.

The protection of refugee rights is brought into focus by incorporating the main lessons found in the L&E literature. This necessitates a model that optimizes refugee protection without negatively impacting the main interests of the host countries. This method has pros and cons. It is criticized in HRs literature since it considers persecuted individuals as agents able to conduct a cost-benefit analysis; according to HRs theory, asylum seekers have little to no information regarding the final destination country.[17] Since information is fundamental in calculating a cost-benefit ratio, persecuted individuals cannot be considered as rational agents. On the other hand, the L&E literature argues that the impact that refugees have on the host countries is not considered by the HRs' scholars. According to them, the impact of migration levels on property crime is higher in cases of low attachment of migrants to the local community.[18] In addition, the L&E literature has concluded that a 10% increase in the population share of new migrants is associated with up to a 0.5% reduction in the employment rate (USA)[19] or would reduce native employment rates by 0.2–0.7% (EU).[20] However, the "right" balance between these two different approaches has the opportunity to give a comprehensive view of the topic, which would yield better policy decisions. Thus, this thesis applies L&E methods without rejecting the HRs approach.

4. The Original Contribution

Bringing a multidisciplinary perspective to refugee law, this thesis provides an economic analysis of refugee law. The current debate is updated with a new approach to the refugee crisis by also utilizing a case-law study, HRs literature, and critical reasoning. While the classical literature has applied a HRs approach[21] based on the main case-law of the ECtHR[22] and the CJEU,[23] a comprehensive model of refugee law is suggested here, updated with the most recent economic, political and legal events which can be applied in future contexts of new migration flows (e.g. environmental migration). Thus,

[17] Koser and Pinkerton. *The social networks of asylum seekers and the dissemination of information about countries of asylum.* Home Office, 2002; Robinson, Vaughan, and Jeremy Segrott. *Understanding the decision-making of asylum seekers*. Home Office, 2002.
[18] Bell, Brian, Francesco Fasani, and Stephen Machin. "Crime and immigration: Evidence from large immigrant waves." *Review of Economics and Statistics* 21.3 (2013): 1278-1290.
[19] Card, David. "Immigrant inflows, native outflows, and the local labor market impacts of higher immigration. *"Journal of Labor Economics* 19.1 (2001):22-64.
[20] Angrist, Joshua D., and Adriana D. Kugler. "Protective or counter-productive? Labour market institutions and the effect of immigration on EU natives." *The Economic Journal* 113.488 (2003): F302-F331; Venturini, Alessandra. "Do immigrants working illegally reduce the natives' legal employment? Evidence from Italy." *Journal of population economics* 12.1 (1999): 135-154.
[21] Fischer-Lescano, Andreas, Tillmann Löhr, and Timo Tohidipur. "Border controls at sea: Requirements under international human rights and refugee law." *International Journal of Refugee Law* 21.2 (2009): 256-296; Hathaway, James C. *The rights of refugees under international law*. Cambridge University Press, 2005; Roberts, Anthea. "Righting wrongs or wronging rights? The United States and human rights post-September 11." *European Journal of International Law* 15.4 (2004): 721-749; Bailliet, Cecilia. "The Tampa Case and its Impact on Burden Sharing at Sea." *Human Rights Quarterly* 25.3 (2003): 741-774.
[22] ECtHR, Application nos. 3394/03, 55721/07, and also confirmed by the no. 27765/09.
[23] CJEU, Judgment in Joined Cases C-391/16, C-77/17 and C-78/17.

this research can be useful not only to academia but also to judges, NGOs, and public civil servants charged with the protection and the promotion of refugee rights as well as to design impact assessments of refugee policies.

This original research brings fresh perspectives on refugee law. It gives a L&E interpretation of the historical events by emphasizing the codification of national interests in the international refugee law. Moreover, after uncovering some of the reasons for the "refugee market failure" and discussing the cases of State intervention to reach a quasi-stable outcome, the thesis offers a possible solution by considering the refugee burden-sharing as a scheme that can also avoid the Coasean bargaining between countries. According to the Coase Theorem, negotiations between States may lead to efficient outcomes under three conditions: [24] 1. if an externality affects only a limited number of countries; 2. the property rights have been previously assigned; and, 3. the risk of strategic behavior is mitigated. Unfortunately, in the current refugee crisis, none of these conditions is fulfilled. First, the refugee flow has affected a high number of countries (see Chap. I and II). Second, according to the main L&E literature, the protection of refugees is considered to be an international public good (see Chap. III).[25] In this case, property rights have not been previously assigned. Third, in case of a refugee crisis, the risk of strategic behavior is not mitigated since a State cannot take into account the actions and reactions of neither persecuted individuals nor other States. In other words, as the UNHCR underlines,[26] refugees flee after a calculated consideration of a combination of political, and other reasons (see Chap. II, Sec. 2.1.), which may also include economic reasons (see Chap. IV). Moreover, the mitigation of strategic behavior has been used as one of the main arguments facing the refugee crisis through a regionally-structured system rather than global (see Chap. II, Sect. 5) or individual (see Chap. VI) approaches.

In addition, this scientific contribution draws on new empirical studies of the on-going "Refugee Crisis." Although refugees *might* strive to maximize their net benefits, this research is novel to explore the possibility of "choices" made by refugees at some point in their journey as to their final destination country. This study reveals the importance of information costs on the refugee decision process as well as its role during the trip to the final destination countries by adapting a micro-model of migration to refugees. Although refugees are deemed to be a vulnerable group, internationally protected under Article 1(A)2 of the 1951 Convention, this does not mean that they cannot opt between different options, although their range of possibilities is (very) limited. Within the category

[24] Van den Bergh, Roger. "Towards an Institutional Legal Framework for Regulatory Competition in Europe." *Kyklos* 53.4 (2000): 435-466.
[25] Bubb, Ryan, Michael Kremer, and David I. Levine. "The economics of international refugee law." *The Journal of Legal Studies* 40.2 (2011): 367-404; Betts, Alexander. "Public goods theory and the provision of refugee protection: The role of the joint-product model in burden-sharing theory." *Journal of Refugee Studies* 16.3 (2003): 274-296.
[26] UNHCR. 2000. The State of the World's Refugees 2000FFifty Years of Humanitarian Action. Geneva, Switzerland: United Nations High Commissioner for Refugees.

of refugees, a clear choice can be observed in the case of bogus refugees (individuals that by considering the political crisis in the origin country, although are not persecuted, leave their own country and ask for international protection), resettlement refugees (persecuted individuals who have been declared as refugees and are considered for transfer to other destination countries), and in the case of anticipatory refugees,[27] who are persecuted individuals who generally have a high level of education and skills and can anticipate future events that are going to lead to their persecution. In these cases, they behave similarly to economic migrants, where "pull" factors are important.[28]

Furthermore, it is original to clarify the States' public choice to ratify and comply with the 1951 Convention, under the concept of the "veil of ignorance,"[29] which explains that in the case of future uncertainty, a State chooses international cooperation rather than the maximization of its own net benefits. Concerning the 1951 Convention, the literature on international L&E does not provide concrete reasons for the ratification and compliance with the 1951 Convention. However, these questions may find an answer from various scholars who have critically examined these aspects from an economic[30] and HRs[31] perspective. The 1951 Convention shares similarities with HRs treaties, but at the same time it differs from them since it creates externalities within the immigration laws of a State.[32] Additionally, the thesis considers – through a L&E approach – the proposal of a WTO model for the international refugee movement by comparing the differences between the liberalization of trade movement and the restriction of refugee law.

Moreover, based on information costs, this scientific contribution makes a distinction between refugees that make a clear choice (eg. bogus refugees, anticipatory refugees, and resettled refugees) and the others. Based on this distinction, the impact on host countries is different. While resettled or anticipatory refugees do not affect host countries, the others, according to their particular skillsets and the socio-economic conditions of host countries, impact negatively on national security or labor market of host countries. Therefore, policy suggestions should also take into account the variety of these effects without considering all types of refugees identical. These policies are even more

[27] Johansson, Ruhe. "The refugee experience in Europe after World War II: some theoretical and empirical considerations." *The Uprooted: Forced migration as international problem in the post-war era* (1990): 227-269.
[28] *Ibrid*.
[29] Rawls, John. *A theory of justice*. Harvard university press, 2009.
[30] Weiss, Edith Brown, and Harold K. Jacobson. *Engaging Countries: Strengthening Compliance with International Accords*. MIT Press, 1998; Koh, Harold Hongju. "The New Sovereignty: Compliance with International Regulatory Agreements. By Chayes Abram and Chayes Antonia Handler. Cambridge MA, London: Harvard University Press, 1995. Pp. xii, 404. $49.95." *American Journal of International Law* 91.2 (1997): 389-391; Downs, George W., David M. Rocke, and Peter N. Barsoom. "Is the good news about compliance good news about cooperation?." *International Organization* 50.3 (1996): 379-406; Burley, Anne-Marie Slaughter. "International law and international relations theory: a dual agenda." *American Journal of International Law* 87.2 (1993): 205-239.
[31] Hathaway, Oona A. "Why do countries commit to human rights treaties?." *Journal of Conflict Resolution* 51.4 (2007): 588-621; Neumayer, Eric. "Do international human rights treaties improve respect for human rights?." *Journal of conflict resolution* 49.6 (2005): 925-953; Hathaway, Oona A. "Do human rights treaties make a difference?." *The Yale Law Journal* 111.8 (2002): 1935-2042; Henkin, Louis. "International law: politics and values." *Developments in International Law* 18 (1995).
[32] Salehyan, Idean. "The externalities of civil strife: Refugees as a source of international conflict." *American Journal of Political Science* 52.4 (2008): 787-801.

important now due to the economic impact of Covid-19 on the job market of host countries, which will lead to unemployment that might increase (property) crime, according to the Becker[33] model and the composition of the current refugees accepted in the EU.

With this intention, this thesis goes beyond the latest research by exploring the advantages and disadvantages of an EU competence in asylum law through economic methods. Although other scientific contributions have investigated the advantages and disadvantages of an EU asylum policy by using economic methods,[34] by also including the public choice theories of federalism such as the Swiss and Canadian models, this thesis synthesizes, reviews, and analyzes some of the most important economic theories such as the "race to the bottom," the Tiebout argument (especially the evolutionary efficiency and the importance of information costs), the Coasean bargaining, the risk of strategic behavior, the "free-riding" incentive, and transaction costs in regard to asylum law. These theories are commonly used in cases with a transboundary nature of a specific issue, which produces international (negative) externalities.[35] It should be emphasized that this paper deals with the optimal level of the EU centralization of asylum policy in general and does not focus solely on the current refugee crisis. Therefore, this contribution can also be used in the case of future migration crises (i.e. climate refugees).

5. Structure

In brief, the chapters are structured as follows: Chapter I offers a short overview of some of the most important international organizations protecting refugee rights during the twentieth century by giving an innovative L&E interpretation to these events. In particular, it focuses on the UNHCR by applying a historical approach as well as some input from the L&E perspective. Chapter II examines the main articles of the 1951 Convention through the application of a case-law study and a HRs approach in the context of the L&E literature. Concrete examples are included as well from national constitutions of EUMS. The chapter further demonstrates that facing the refugee crisis through a regionally-structured system is closer to Pareto optimality as compared to the global one. Chapter III explores the reasons to ratify and to comply with the 1951 Convention. In other words, given the economic impact of the national law of refugee protection, the following two questions are addressed: 1) why do States sign the 1951 Convention? and 2) why do States comply with it? By asserting the importance of the WTO model for trade liberalization, the chapter questions if it is possible to build

[33] Becker, Gary S. "Crime and punishment: An economic approach." *The Economic Dimensions of Crime*. Palgrave Macmillan UK, 1968. 13-68.

[34] Fernández-Huertas Moraga, Jesús, and Hillel Rapoport. "Tradable refugee-admission quotas and EU asylum policy." *CESifo Economic Studies* 61.3-4 (2015): 638-672; Monheim-Helstroffer, Jenny, and Marie Obidzinski. "Optimal discretion in asylum lawmaking." *International Review of Law and Economics* 30.1 (2010): 86-97; des Places and Deffains, note 15.

[35] Faure, Michael. "Regulatory Competition vs Harmonization in EU Environmental Law" in Esty, Daniel C., and Damien Geradin. *Regulatory competition and economic integration: comparative perspectives*. Oxford University Press, 2001.

a WTO model for international refugees. Chapter IV analyzes the empirical studies regarding refugees' decision processes and the main variables that affect them by further dividing refugees into several groups such as anticipatory refugees, bogus refugees, and resettled refugees on one side and genuine refugees on the other. Hence, Chapter V demonstrates the impact which refugees have on host countries (ie. the labor market, property or violent crimes, and terrorist activities) and proposes different policy recommendations, while also considering Covid-19's impact on the economy of the host countries. The final chapter, Chapter VI, discusses the principle of subsidiarity in asylum law. More specifically, by applying an economic approach, it examines the need for the incorporation of asylum standards to attain the goal established in Article 5 of the TEU.

6. Gender and Sex Dimensions

This investigation includes and discusses both dimensions of gender and sex. For instance, one of the protections of persecuted individuals is the "membership of a particular social group" (Article 1A(2) 1951 Convention), which has been interpreted to include the protection of the LGBTQI community[36] (ie. the gender dimension) as well as to protect women who are not treated equally in some countries with a totalitarian regime or patriarchal system (ie. the sex dimension). Concretely, by applying a HRs approach and legal ontology, Chapter II discusses different case law dealing with the protection of vulnerable groups such as pregnant women or members of the LGBTQI community. Moreover, the effect that migrants have on national security does depend on an individual's gender since there is a general belief that men are more criminally inclined than women.[37] To illustrate, Chapter IV shows the division between different types of crimes and the share of foreigners in the national prisons of the host countries by also distinguishing between male and female migrants. This thesis includes the results of different empirical studies that take into account the gender/sex dimension as well as all the cases of protection of persecuted individuals based on gender/sex discrimination.

[36] La Violette, Nicole. "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity': a Critical Commentary." *International Journal of Refugee Law* 22.2 (2010): 173-208.
[37] Barber, Nigel. "The sex ratio as a predictor of cross-national variation in violent crime." *Cross-Cultural Research* 34.3 (2000): 264-282.

Chapter I

The Recent History of The Legal and Institutional Treatment of Refugees and the Creation of the UNHCR

This chapter offers a short overview of some of the most important international organizations that protect refugee rights during the twentieth century. In particular, it focuses on international organizations, such as the Allies who created the Supreme Headquarters Allied Expeditionary Force, the United Nations Relief and Rehabilitation Agency, the International Refugee Organization, and the United Nations High Commissioner for Refugees. In addition, insights are given by applying an historical approach as well as some inputs through the law and economics perspective. By briefly examining some of the most important UNHCR Executive Committee's Conclusions of the 1980s, this chapter demonstrates the codification of the States' interests on the background of the protection of refugees' human rights. Thus, the law and economics insights could better explain the interpretation of the historical events in the second part of the twentieth century since it underlines the shift towards sustainable refugee solution.

Key words: League of Nations, mass displacement, refugees, restrictive asylum policies**,** UNHCR.

1. Introduction

As long as there have been wars, there have been refugees.[1] Yet it wasn't until the twentieth century, after several wars that finally refugee movements became an international political issue[2] since these movements changed the previous balances and shares between different nationalities by creating externalities. As a result, the protection of these vulnerable groups required international protection and different treaties codified the fundamental HRs of refugees.

Before delving into the analysis of refugee law and its development from an L&E point of view, some background is merited of the main events of this part of history in the twentieth century surrounding the creation of an international permanent organization for the protection of refugee rights. This chapter provides a short overview of some of the most important events without analyzing in detail the entire history of the evolution of refugee rights. The focus here is only on the creation of the most significant international organization of the last century. In particular, Section II briefly examines the events from the creation of the Office of the High Commissioner for Refugees by the

[1] Cushman, Thomas. *Handbook of Human Rights*. Routledge, 2012.
[2] Joly, Danièle, Lynette Kelly, and Clive Nettleton. *Refugees in Europe: The hostile new agenda.* Minority Rights Group, 1997.

western governments and the League of Nations to the formation of the United Nations High Commissioner for Refugees (UNHCR). In addition, Section III explores the work of the UNHCR in the second part of the twentieth century by applying some critical thinking about the cold war and the protection of refugees after the fall of the Iron Curtain in 1989. In the conclusions, the expansion of the UNHCR's work is underlined.

The innovative part of this chapter stands in the L&E interpretation of some of the most important historical events of the twentieth century by giving an alternative view of them. While the classical literature has applied a HRs approach,[3] this chapter aims to also consider some L&E insights. There are three types of durable solutions for refugees: voluntary return or repatriation, settlement in the country of asylum, and resettlement.[4] The settlement in the country of asylum and resettlement – which are the two types of 'exilic' bias[5] – underline the refugee's right to seek asylum.[6] On the contrary, voluntary repatriation points out the protection of the national interests of host countries, although it is internationally justified to consider the refugee's right to return back at his/her origin country. This shift has been emphasized in different documents published by the UNHCR during the 1980s, such as the Executive Committee's Conclusion No. 22 (XXXII) published in 1981, Conclusion No. 40 (XXXVI) published in 1985, and Conclusion No. 58 (XL) published in 1989 as well as the Agenda for Protection of 2002.

To sum up, although the protection of refugee rights has been a concern for several centuries, the history of international protection of persecuted individuals de facto starts only with the creation of the Office of High Commissioner for Refugees by the western governments and the League of Nations in 1921. In addition, this historical overview helps the reader to better understand the shift of the approach towards the massive influx of refugees: from an 'exilic' bias, aimed at protecting the refugee's right to seek asylum, to an international approach that also protects the national interest of host countries. In other words, the historical overview is relevant for L&E because it can further explain the criticism done to the 1951 Convention in the second half of the twentieth century and in the new millennium (see Chap. II; in particular, Sect. 5), the reasons for the ratification of or compliance with the 1951 Convention (see Chap. III), the current approach that national Governments

[3] Fischer-Lescano, Andreas, Tillmann Löhr, and Timo Tohidipur. "Border controls at sea: Requirements under international human rights and refugee law." *International Journal of Refugee Law* 21.2 (2009): 256-296; Hathaway, James C. *The rights of refugees under international law*. Cambridge University Press, 2005; Roberts, Anthea. "Righting wrongs or wronging rights? The United States and human rights post-September 11." *European Journal of International Law* 15.4 (2004): 721-749; Bailliet, Cecilia. "The Tampa Case and its Impact on Burden Sharing at Sea." *Human Rights Quarterly* 25.3 (2003): 741-774.

[4] Aleinikoff, T. Alexander. "State-centered refugee law: From resettlement to containment." Immigration & Nationality Law Review 14 (1992): 186.

[5] Coles, G. *The human rights approach to the solution of the refugee problem: a theoretical and practical enquiry*. Nova Scotia: Institute for Research on Public Policy, 1988.

[6] Aleinikoff, note 4.

have towards refugees (see Chap. V), as well as understanding the advantages and disadvantages of the common supranational (or international) asylum law (see Chap. VI).

2. The Recent History of The Legal and Institutional Treatment of Refugees and the Creation of the UNHCR: the First Half of the Twentieth Century

Refugee protection has a long history, dating back centuries. However, the history of international protection starts with the League of Nations.[7] In 1921, Western governments and the League of Nations created the Office of the High Commissioner for Refugees. This was the first multilateral coordinating mechanism for dealing with refugees.[8] International cooperation brings several benefits. First, from a political science standpoint, collective action is slightly positive[9] because national governments can justify their oftentimes unpopular actions of accepting refugees as a consequence of international agreements.[10] Second, from an economic perspective, international cooperation in the management of the influx of refugees avoids peak costs for individual countries because, theoretically, the burden is distributed among many countries.[11] Third, the L&E literature suggests that in the case of international cooperation, externalities for third countries (countries which are not part of that public choice) decrease (see Chaps. III and VI). [12]

In 1933, after eleven years of work, the League of Nations adopted the *Convention Relating to the International Status of Refugees*, where the principle of non-*refoulement* was recognized (Article 33).[13] Its goal was to deal with the refugee flow coming from Russia. Later, its scope was broadened to include the protection of persecuted individuals coming from Greece, Turkey, Bulgaria, and Armenia. The withdrawal of Germany, Japan, and Italy from the League of Nations and the

[7] Jaeger, Gilbert. "On the history of the international protection of refugees." *International Review of the Red Cross* 83.843 (2001): 727-738.
[8] Loescher, Gil, Alexander Betts, and James Milner Seymour, Claudia. *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the Twenty-first Century*. Routledge, 2008.
[9] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.
[10] Vink, Maarten. "The limited Europeanization of Domestic Asylum Policy: EU Governments and Two-Level Games." Paper presented at the first YEN Research Meeting on Europeanisation, Workshop IV 'Europeanisation of Domestic Policies', 2-3 November 2001, Siena.
[11] Noll, Gregor. *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection*. Martinus Nijhoff Publishers, 2000.
[12] des Places, et al, note 9.
[13] Article 33 of the *Convention Relating to the International Status of Refugees* states "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country."

failure to resolve the Manchurian and Ethiopian conflicts during the 1930s were considered the main "push" factors for the collapse of the Office of the High Commissioner for Refugees.[14]

Towards the end of WWII, the Allies created the Supreme Headquarters Allied Expeditionary Force (SHAEF).[15] Its aim was to facilitate the return of people to Eastern Europe and the Soviet Union. The repatriation of refugees to Eastern Europe and the Union of Soviet Socialist Republics (USSR) continued until 1946, when it became apparent that repatriated citizens were persecuted in their home countries.[16] During the first period of the Cold War, the management of the influx of refugees was used as an argument against Communist ideology.[17] While Western countries underlined the refugees' personal freedom to choose according to their individual values, the Eastern Bloc countries considered them a potential threat to the reputation of their newly established regime. According to the leaders of the Eastern Bloc countries, there were no valid reasons for opposing return; those who resisted repatriation were war criminals or traitors.[18]

After the establishment of the United Nations (UN) in 1945 following the aftermath of WWII, SHAEF was replaced by the United Nations Relief and Rehabilitation Agency (UNRRA).[19] The US government was its main contributor, financing more than 70% of its budget. Nevertheless, the US decided to formally terminate its funds. As a result, in 1946, the UNRRA was replaced by the International Refugee Organization (IRO). Again, the main funder was the US government, financing around two-thirds of the IRO's budget.[20] Its scope was limited to the management of refugees coming from Eastern Europe.

The IRO enhanced refugee rights in several ways.[21] First, the international community emphasized the right not to be repatriated against one's personal will. Second, the fear of political persecution was recognized. Third, and most importantly, there was a shift in the nature of refugee rights. Before 1946, refugee rights were protected as group rights. The Refugee Status Determination (RSD) was based on the fact that a person was member of a *group* persecuted in the country of origin. During the Cold war, the membership of a political group was highlighted. With the establishment of

[14] Loescher, et al., note 8.
[15] Proudfoot, Malcolm Jarvis. *European refugees: 1939-52: a study in forced population movement*. Northwestern University Press, 1956.
[16] Loescher, et al., note 8.
[17] *Ibrid*.
[18] Fassmann, Heinz, and Rainer Münz. "European east-west migration, 1945–1992." *International migration review* 28.3 (1994): 520-538.
[19] Do not confound UNRRA with UNRWA, (the United Nations Relief and Works Agency for Palestine Refugees) focused on the Palestine refugees.
[20] Klemme, Marvin. *The inside story of UNRRA: an experience in internationalism; a first hand report on the displaced people of Europe*. Lifetime Editions, 1949.
[21] Holborn, Louise Wilhelmine. *The international refugee organization, A specialized agency of the United Nations: Its history and work, 1946-1952*. Oxford University Press, 1956.

the IRO, refugee rights were considered *individual* rights. In addition, the RSD was to be determined individually. In 1948, this was codified in Article 14 of the Universal Declaration of Human Rights.[22]

In the late 1940s, the UN started to consider the possibility of replacing the IRO with the United Nations High Commissioner for Refugees (UNHCR). This was formalized in 1952. While other international organizations, such as the Office of High Commissioner for Refugees, SHAEF, UNRRA, and IRO, each had a different focus to deal with refugee flows in a certain area at a certain time, the UN decided to build a permanent international organization. The continued refugee flows created difficulties for political agendas of different Western governments. The individual State choice entails positive or negative externalities for third countries because it directly affects the flow of migration (see Chap. III). The principal theory of L&E is that externalities are a market failure.[23] Since the "refugee market" could not be regulated by itself, a permanent solution was needed. This strategy also considers the advantages and disentanglements of a higher authority than the national State to govern the protection of refugees (see Chap. VI).

The 1951 Convention recognizes the temporal restriction established first in the Statute of the Office of the High Commissioner for Refugees,[24] in addition to an added geographical restriction: the signatory countries had the option to choose to deal only with refugees "owning to events in Europe" or "owing to events in Europe and elsewhere" (Article 1(B) of the United Nations Convention relating to the Status of Refugees; the 1951 Convention).[25] While Article 14 of the Universal Declaration of Human Rights established a right to asylum, the 1951 Convention imposes only a principle on non-*refoulement*: the right of refugees not to be returned to a country where they risk persecution.

In 1956, the Hungarian crisis refugee crisis broke out. The USSR invaded Hungary and refugees from Hungary fled to Austria and Yugoslavia.[26] With the goal to bypass the temporal restriction, [27] the new High Commissioner of that time (1956– 1960), Mr. Auguste Lindt, stated that the causes of the flight of Hungarians could be found in the events before 1951. Since it was an emergency, in the first phase, the UNHCR considered them temporarily as refugees by leaving the individual RSD to a later stage. The Hungarian crisis was managed successfully.

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[22] Article 14 of the Universal Declaration of Human Rights states 'Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

[23] Cooter, Robert, and Thomas Ulen. *Introduction to Law and Economics*. Pearson Education, 2007.

[24] Jackson, Ivor C. "1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection, The." *International Journal of Refugee Law* 3 (1991): 403.

[25] It is really interesting to highlight that a member state has the opportunity to choose between "owning to events in Europe" or "owing to events in Europe and elsewhere". Although the majority of the member state have ratified the 1951 Convention with the absence of the geographical limitation, some exceptions can be found. These are Congo, Madagascar, Monaco, and Turkey. UNHCR. 2011. Reservations and Declarations to the 1951 Refugee Convention.

[26] Mócsy, István I. *The Uprooted: Hungarian Refugees and Their Impact on Hungary's Domestic Politics, 1918-1921*. East European Monographs, 1983.

[27] Article 1A(2) of the 1951 Convention states 'As a result of events occurring before 1 January 1951' by establishing a temporal restriction.

With the process of decolonization, the work of the UNHCR became more difficult. While Western countries were the major donors of the UNHCR, the organization did not always protect the interests of Western powers. For instance, in contrast to their interests, the new members of the UN demanded that the UNHCR deal with refugees coming as a consequence of decolonization and succeeded. According to the political science literature, international peace organizations are "a significant forum for establishing the limits of donor influence".[28]

Between 1955-1957, more than 85.000 Algerian refugees flew to Tunisia. While the French government considered Algeria as an integral part of the State of France and denied the UNHCR's intervention, in May 1957, the Tunisian government formally asked the UNHCR to intervene. The UNHCR decided to intervene by relying on the 1956 precedent. While in the case of Hungary the temporal restriction was avoided through a broad legal interpretation, the Tunisian case was the first case outside Europe (bypassing the geographical restriction).[29] The geographical restriction was formally abrogated with the signature of the 1967 Protocol.

Several authors – such as Bem, Jackson, and Goodwin-Gill – have considered this abrogation legally unnecessary for several reasons. First, the 1951 Convention already gives countries the possibility to reject the geographic limitation.[30] Indeed, within the signatory countries, only Congo, Madagascar, Monaco, and Turkey have chosen the geographic limitation. [31] Second, European States were willing to protect refugee rights regardless of the geographic limitation.[32] Third, the UN members were invited to send representatives for drafting the 1951 Convention[33] since – from an L&E standpoint – the management of refugees entails negative (or positive) externalities for other countries (see Chaps. III and VI).[34] However, according to the UNHCR, this amendment was necessary in order to overcome the dominant interpretation of the 1951 Convention by newly decolonized States that considered the Convention as Eurocentric.[35]

To sum up, this section analyses some of the most important events surrounding the creation of the UNHCR by also briefly considering the political justification for the derogation from the geographic and temporal limitation established in the 1951 Convention.

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[28] Jenkins, Rob. *The UN Peace-building Commission and the Dissemination of International Norms*. Crisis States Research Centre, 2008.

[29] Article 1B(1) of the 1951 Convention states 'For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either: (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951", by establishing a geographical restriction.

[30] Bem, Kazimierz. "The Coming of a 'Blank Cheque'—Europe, the 1951 Convention, and the 1967 Protocol." *International Journal of Refugee Law* 16.4 (2004): 609-627; Jackson, Ivor C. *The refugee concept in group situations*. Martinus Nijhoff Publishers, 1999.

[31] UNHCR, note 20.

[32] Bem, note 30.

[33] Goodwin-Gill, Guy S., and Jane McAdam. *The refugee in international law*. Oxford University Press, 2007.

[34] Rotte, Ralph, Michael Vogler, and Klaus F. Zimmermann. *Asylum migration and Policy coordination in Europe*. Volkswirtschaftliche Fakultät. Ludwig-Maximilians-Universität München, 1996.

[35] UNHCR, High Commissioner Schnyder to Mr Stavropoulos, *Memorandum by the United Nations High Commissioner for Refugees on the Report of the Colloquium on Legal Aspects of Refugee Problems held in April 1965 in Bellagio (Como), Italy*, 6 Aug. 1965, Folio 136, 16/1/3 AMEND, Series 1, Fonds 11.

3. The Work of the UNHCR in the Second Part of the Twentieth Century

During the 1960s and 1970s, the UNHCR expanded its mandate. However, the 1980s ushered in a new era of restrictions. This can be deduced by analying the differences between the UNHCR Executive Committee's Conclusion 22 (XXXII) published in 1981, Conclusion No. 40 (XXXVI) published in 1985, and especially Conclusion No. 58 (XL) published in 1989[36] as well as the Agenda for Protection of 2002.

Large-scale migration influxes frequently create serious problems for host countries (Chapter I.2 Conclusion No. 22 (XXXII) – 1981) since, in the grand majority of the cases, irregular migrants enter the host countries "without the prior consent of the national authorities or without an entry visa, or without sufficient documentation normally required for travel purposes, or with false or fraudulent documentation" (Point A Conclusion No. 58 (XL) – 1989). Burden-sharing and international co-operation should be directed towards facilitating voluntary repatriation (Chapter IV Conclusion No. 22 (XXXII) – 1981), which should be promoted by the international community (Point B Conclusion No. 40 (XXXVI) – 1985). Voluntary repatriation should be the preferred solution compared to the settlement in the country of asylum and resettlement (Point D.ii Conclusion No. 58 (XL) – 1989) since within the group of asylum seekers, a large majority is comprised of persons who have left their home country for reasons other than persecutions (Point B Conclusion No. 58 (XL) – 1989); reasons that are identical to economic migrants (see Chap. II). The increase of "bogus" refugees could be proved also by the "fraudulent documentation and their practice of willfully destroying or disposing of travel and/or other documents in order to mislead the authorities in the country of arrival" (Point H Conclusion No. 58 (XL) – 1989). The burden-sharing (in the form of bilateral or multilateral agreements) and repatriation have also been underlined by the Agenda for Protection of 2002, which also considered the interest of States as well as the previous Executive Committee's Conclusions. Thus, there is a clear shift towards refugees' durable solution: from an 'exilic' bias, aiming to protect refugee's right to seek asylum, to an international approach that also underlines the national interest of host countries.

There are two main possible explanations for this shift which might be connected: the economic recession of the late 1970s and early 1980s, and the election of right-wing conservative governments in many Western States that led to restrictive asylum policies in many countries. Economic recessions usually bring large-scale unemployment, where foreigners are often seen as

[36] Sztucki, Jerzy. "The conclusions on the international protection of refugees adopted by the executive committee of the unhcr programme." *International Journal of Refugee Law* 1.3 (1989): 285-318.

competitors on the labor market in the public's opinion.[37] This adverse attitude towards foreigners can have an impact on the refugee recognition rate (refugee status according to the 1951 Convention plus humanitarian status recognized by national policies), as it was empirically tested in Switzerland.[38] Studies have also demonstrated that a high unemployment rate exerts an adverse effect on the number of asylum seekers.[39]

In addition, border control and restrictive asylum policies increase migration costs, especially in the case of persecuted individuals that enter the final destination country illegally and ask for international protection there. However, there is disagreement in the economic literature regarding the nature of this impact (positive or negative) as well as the significance of these policies (see Chap. IV).[40] The ideological orientation of governments is thought to impact refugee policy, whereby right-wing governments have more restrictive policies. However, some academic literature questions the significance of the right-left government dichotomy for national migration policy (see Chap. IV).[41]

In accordance with these restrictive policies, some countries, led by France,[42] considered some parts of airports to be international zones.[43] This policy is based on the theory that the international rule of law, which also includes the prohibition on *refoulement*, is suspended in international zones.[44] This practice has been criticized by international legal scholars since "no international norm permits these zones to be considered as non-territorial spaces where the rule of law would not be implemented".[45]

Furthermore, some Western European Countries (such as Denmark in 1983; Germany, the UK, and Belgium in 1987; and then in the Schengen Convention in 1990) established penalties for agents who smuggle individuals into the country and for carriers by land, sea, and air of

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[37] In contrast, the empirical study conducted in 2010 stated that immigrants were not viewed as competitors or as source that decrease national wage. This study covered the United States, Canada, United Kingdom, France, Germany, Italy, Spain and the Netherlands with approximately 1,000 adults interviewed in each country. Amelie, F. Constant and Klaus F. Zimmermann. *International Handbook on the Economics of Migration.* Edward Elgar, 2013.

[38] Holzer, Thomas, Gerald Schneider, and Thomas Widmer. "Discriminating Decentralization Federalism and the Handling of Asylum Applications in Switzerland, 1988-1996." *Journal of Conflict Resolution* 44.2 (2000): 250-276.

[39] Thielemann, Eiko R., Does Policy Matter? On Governments' Attempts to Control Unwanted Migration (November 2003). IIIS Discussion Paper No. 9. Available at SSRN: https://ssrn.com/abstract=495631 or http://dx.doi.org/10.2139/ssrn.495631; Neumayer, Eric. "Asylum Destination Choice What Makes Some West European Countries More Attractive Than Others?." *European Union Politics* 5.2 (2004): 155-180.

[40] Hatton, Timothy J. "The rise and fall of asylum: What happened and why?." *The Economic Journal* 119.535 (2009): F183-F213; Monheim, Jenny. "Human trafficking and the effectiveness of asylum policies." *German Working Papers in Law and Economics* 2008.1 (2008): 3; Böcker and Havinga, Tetty, Asylum Migration to the European Union: Patterns of Origin and Destination (1997). Luxembourg: Office for Official Publications of the European Communities, 1998. Available at SSRN: https://ssrn.com/abstract=2633536 or http://dx.doi.org/10.2139/ssrn.2633536

[41] Gudbrandsen, Frøy. "Partisan influence on immigration: The case of Norway." *Scandinavian Political Studies* 33.3 (2010): 248-270; Schneider, Gerald, and Thomas Holzer. *Asylpolitik auf Abwegen: nationalstaatliche und europäische Reaktionen auf die Globalisierung der Flüchtlingsströme.* Leske and Budrich, 2002.

[42] The French Constitutional Council limited the possibility to set up transit zones (Constitutional Council, Decision no. 92-307 DC of 25 February 1992).

[43] Hatton, note 40.

[44] For instance, this theory has been used by the USA government concerning the 'extraterritoriality' of its base at Guantanamo.

[45] des Places, et al, note 9.

undocumented arrivals.[46] This is essentially decentralization and "privatization" of border control.[47] Private companies dealing with transportation conduct all security checks in order to avoid fines by destination States for carrying undocumented persons. Some authors have argued that these rules might be in conflict with the 1944 Chicago Convention on International Aviation and with Article 31 of the 1951 Convention.[48]

These deflecting measures from the mid-80s might be explained through an economic analysis of law. Regulatory competition in refugee law began as destination countries aimed to attract the lowest possible number of refugees by creating the so-called "race to the top" (see Chap. VI). In refugee law, a player (destination country) may earn more (regardless of whether refugees increase or decrease the total society welfare) by rejecting refugee claims and thereby pushing refugees to choose other destination countries rather than hosting them.[49]

The restrictive asylum procedure might have given some positive results during the 1980s by decreasing the number of asylum seekers since during this period the main type of migration was south-to-north migration. However, by the late 1980s, asylum migration also included east-to-west migration. Some authors[50] explain the peaks of refugees as consequences of historical events. For instance, the peak of refugees in 1992 came after the fall of the Berlin Wall and the collapse of the Soviet Union. As a result, these eventual positive outcomes vanished and a need for a central body to coordinate asylum law was indicated. [51] Based on empirical data, the total recognition rate (the rate of successful refugee status claims) decreased from over 50% in 1982 to less than 20% in 1990.[52] According to Hatton, this is the result of two main factors: the increase in numbers of "bogus" refugees and tougher asylum policies, especially those that limit access to the territory. [53]

I would like to suggest additional factors that may explain this decrease. First, the end of the first part of the Cold War, which removed the attractiveness of persecution for political reasons,[54] might have impacted the recognition rate. As stated before, during the first period of the Cold War, the management of the influx of refugees was used as an argument against Communist ideology.[55]

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[46] Borjas, George J., and John Crisp. *Poverty, International Migration and Asylum. Studies in Development Economics and Policy.* Palgrave Macmillan, 2005.
[47] Cruz, Antonio, *Shifting responsibility: carriers' liability in the member states of the European Union and North America*. Trentham Books and School of Oriental & African Studies, 1995.
[48] des Places, Segolene. *Evolution of asylum legislation in the EU: Insights from regulatory competition theory.* Robert Schuman Centre for Advanced Studies, 2003.
[49] Suhrke, Astri. "Burden-sharing during refugee emergencies: The logic of collective versus national action." *Journal of refugee studies* 11.4 (1998): 396-415.
[50] Hatton, note 40; Monheim, note 40.
[51] Deakin, Simon. "Legal Diversity and Regulatory Competition: Which Model for Europe?." *European Law Journal* 12.4 (2006): 440-454.
[52] Hatton, note 40.
[53] Hatton, note 40.
[54] Martin, David A., ed. The New Asylum Seekers: Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law. Vol. 10. Martinus Nijhoff Publishers, 1988.
[55] Loescher, et al., note 8.

Second, the economic recession, as well as the election of right wing conservative parties leads to a portrayal of migrants as competitors for the job market or as individuals that might increase criminality (see Chap. V). Third, the new approach to a durable solution that stresses repatriation rather than an 'exilic' bias[56] might also explain this data. This could imply that refugees who do not have objective proof of persecution (see Chap. II) may decide to not leave their own home country since migration is costly and includes several costs (see Chap. IV).

With the end of the Cold War in 1989, international cooperation between the two blocs became much easier. Early on in the post-cold war period, the UNHCR took steps to expand the scope of its mandate in response to the evolving needs of refugees and returnees. By applying the concept of *humanitarian relief*, governments began to address the root causes of mass displacement.[57]

While the 1980s was a decade of restrictive asylum policies, the 1990s was a decade of voluntary repatriation and further direct and indirect restrictive policies. Western countries gradually increased adaptation costs by restricting the right to work permits[58] and by decreasing social welfare for refugees.[59] In addition, they introduced the notion of "manifestly unfounded claims". [60] Nevertheless, this approach did not have a significant effect on the number of asylum seekers since in order to avoid the application of the notion of "manifestly unfounded claims" persecuted individuals lied about their countries of origin.[61] Furthermore, in order to increase repatriation, the conditions in the home country did not have to improve "substantially" but only "appreciably."[62] Moreover, repatriation no longer had to be a *strictly* voluntary decision by refugees.[63]

In the latter half of the 1990s, due to the fact that refugees were seen as creating negative externalities for international security, the UNHCR expanded its mandate by intervening in cases of migration caused by internal conflicts within countries.[64] The scientific literature demonstrates that internally displaced persons react to similar circumstances that make a person classify as a refugee.[65] Fundamentally, refugees are people who leave their home countries to avoid persecution. In addition,

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[56] Aleinikoff, note 4.
[57] Beamon, Benita M., and Stephen A. Kotleba. "Inventory modelling for complex emergencies in humanitarian relief operations." *International Journal of Logistics: Research and Applications* 9.1 (2006): 1-18.
[58] For instance, UK withdrew the permission to work for asylum seekers in 2002. The UK government followed the German law of 1997 and the French law of 1991. Barthel, Fabian, and Eric Neumayer. "Spatial dependence in asylum migration." *Journal of Ethnic and Migration Studies* 41.7 (2015): 1131-1151.
[59] van Ours, J. C., and Milan Vodopivec. *Shortening the potential duration of unemployment benefits does not affect the quality of post-unemployed jobs: Evidence from a natural experiment.* IZA Discussion Papers, No. 2171.
[60] Byrne, Rosemary, Gregor Noll, and Jens Vedsted-Hansen. "Understanding refugee law in an enlarged European Union." *European Journal of International Law* 15.2 (2004): 355-379.
[61] Hatton, Timothy J. "Seeking asylum in Europe." *Economic Policy* 19.38 (2004): 6-62; Böcker and Havinga, note 40.
[62] Chimni, Bhupinder Singh. "The meaning of words and the role of UNHCR in voluntary repatriation." *International Journal of Refugee Law* 5.3 (1993): 442-460.
[63] *Ibrid.*
[64] Lucas, Robert EB. *Internal migration in developing countries: handbook of population and family economics.* Boston University, 1994.
[65] Richmond, Anthony H. "Reactive migration: Sociological perspectives on refugee movements." *Journal of refugee Studies* 6.1 (1993): 7-24.

several variables impact on the refugee's choice to leave his origin country. Similarly, internally displaced persons leave their residences to escape from persecution and might become refugees.

During this period, the concept of *human security* was developed.[66] This concept was first introduced by the United Nations Development Programme in 1994 and was later incorporated into the foreign policy agendas of States such as Canada, Sweden, and Norway. The focus of the protection of displaced people rights was on the individual human being rather than the nation-state, and, thus, providing a basis for action under Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) of the UN Charter.[67] As a result of the expansion of the UNHCR's mission, in 1996, refugees constituted only about 50 percent of the population dealt with by the UNHCR.

During the first decade of the new millennium, host countries, such as Turkey and Pakistan, did not receive a high amount of financial support from the international community. [68] The UNHCR tried to convince the Western European countries to increase their donations launching the Global Consultations on International Protection and the "Convention Plus".[69] However, these initiatives failed. The failure might be the result of the fact that in the last decades of the twentieth century, refugees were often victims of violence or natural disasters, rather than ideological persecution,[70] which was one of the main aims of the 1951 Convention.

In recent years, a new refugee crisis has unfolded. The term "European refugee crisis" emerged in 2015 when increasing numbers of irregular migrants from North Africa and the Middle East made the journey to the European Union (EU) to seek asylum, traveling across the Mediterranean Sea or through South-Eastern Europe. In order to face this crisis, the UNHCR is strongly cooperating with the EU and with national governments.

In summary, this section shows the evolution of UNHCR's in the second part of the twentieth century. While the 1960s and 1970s were the decades of the expansion of the UNHCR's mandate, the 1980s was a decade of restrictive asylum policies, and the 1990s was a decade of (voluntary) repatriation and further direct and indirect restrictive policies. In the last decade, a new refugee crisis has started and the UNHCR is strongly cooperating with the EU institutions as well as with the national governments.

[66] Alkire, Sabina. *A conceptual framework for human security*. University of Oxford, 2003.
[67] Loescher, et al., note 8.
[68] *Ibrid*.
[69] *Ibrid*.
[70] Mertus, Julie. "The state and the post-Cold War refugee regime: new models, new questions." *International Journal of Refugee Law* 10.3 (1998): 321-348.

4. Conclusions

Although the protection of refugee rights has been a concern for centuries, the history of international protection of persecuted individuals started in 1921 with the creation of the Office of High Commissioner for Refugees.

Early in the twentieth century, several international organizations protecting refugee rights were created such as the SHAEF, the UNRRA, the IRO, the UNHCR, each evolving into the other. While the IRO codified a shift in the nature of refugee rights, from a group right to an individual right, the UNHCR is the first international permanent organization conceived for the protection of Refugee rights. In addition, international refugee rights were established for the first time in 1933 in the Convention Relating to the International Status of Refugees, and then in 1948 reinforced in the Universal Declaration of Human Rights. In 1951, the 1951 Convention established geographical and temporal restrictions. Only due to the thoughtful work of high commissioners were these limitations abrogated *de facto* in addition to the *de jure* abolishment of the geographical restriction with the signature of the 1967 Protocol.

During the second half of the twentieth century, UNHCR's work faced several refugee movements. As a result, from a phase of expansion during the 1950s and 1960s, the 1980s and the 1990s were characterized as a phase of migration restrictions as well as repatriation. This could be explained by examining the policies that national governments apply toward refugees and the economic impact refugees have on the national labor market and national security of the host countries (see Chap. V). Some L&E insights might help to interpret the shift toward a durable refugee solution, which was also internationally codified by the different UNHCR Executive Committee's Conclusions of the 1980s. Moreover, the historical analysis can better explain the "new" L&E proposals of refugee-burden sharing suggested by different scholars and more recently by EU institutions (see Chap. II).

Over the past decades, the nature and scope of the UNHCR's work has expanded from an international organization dealing with the legal assistance of refugees to that of material aid operating in the countries of origin where refugees are just one group within the broader mission of the UNHCR. From a small office of some 30 staff based mostly in Europe in the early 1950s, the UNHCR is now a global organization with a staff of more than 9.300 people working in 123 countries. This increase could also be explained by taking into account the advantages that a common supranational or international policy towards refugees has compared to the individual State behavior (see Chap. VI).

words, although the 1951 Convention applies a HR approach and protects refugee rights, part of it could also be interpreted through some reflection by L&E scholars.

2. The Definition of Refugee in the 1951 Convention

This section gives a comprehensive legal analysis of the interpretation of Article 1(A)(2) of the 1951 Convention as well as by briefly avouching the constitutional right to asylum in the EU-27 Member States. In addition, Section 2.1. demonstrates the blurry dichotomy between "economic migrants" and "refugees" through a case-law study. Moreover, Section 2.2. explicates the interpretation of the concept of "safe country" as it is one of the most common concepts used by national policies to decrease the number of refugees.

The 1951 Convention is considered an authoritative source of international law,[22] codifying international refugee law.[23] It is ratified by 145 out of the 193 UN members (75% of all countries). According to international relations theory, States are expected to join international treaties as long as the benefits outweigh the costs. [24]

Article 1(A)(2) states that the term "refugee" applies, among others, to any person who:

> *"As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

The main contribution of the 1951 Convention is this precise definition of a refugee. Other international documents have recognized a descriptive and general definition of a refugee.[25] The role of the judge is to ascertain refugee status, not to attribute it to an individual.[26] A refugee is such *per se,* not because a judge or other officials assigned him this status; in other words, the refugee status is an *ipso jure* status.[27]

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[22] In September 2019, there were 146 State parties for the 1951 Convention and 145 State parties for the 1967 Protocol. This number is much higher compared to the other two most important international documents; the OAU Refugee Convention ratified from 45 countries and the Cartagena Declaration on Refugees ratified from 10 countries. This is a pure legal positivist approach since in international law countries must give their consent to apply a certain treaty. It should be remembered that a persecuted individual can be a protected migrant based on: refugee status (international law); subsidiary protection (EU law); other protected person (national law); or, quota refugee (international treaties).

[23] Jackson, Ivor C. "The 1951 Convention Relating to the Status of Refugees: A universal basis for protection." *International Journal of Refugee Law* 3.3 (1991): 403.

[24] Kelley, Judith G., and Jon CW Pevehouse. "An opportunity cost theory of US treaty behavior." *International Studies Quarterly* 59.3 (2015): 531-543; Goldsmith, Jack L., and Eric A. Posner. *The limits of international law.* Oxford University Press, 2005. See also Chap. III.

[25] Hathaway, James C. "The Evolution of Refugee Status in International Law: 1920—1950." *International & Comparative Law Quarterly* 33.2 (1984): 348-380.

[26] Wouters, Cornelis Wolfram. *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture.* Intersentia, 2009; UNHCR, Handbook, note 2.

[27] Jaeger, Gilbert. "Refugee Asylum: Policy and Legislative Developments." *International Migration Review* 15.1-2 (1981): 52-68.

The treaty does not include an explicit right to asylum. Nevertheless, the right to asylum can be understood as presumed by the Convention for several reasons. First, the 1951 Convention prohibits *refoulement* (Article 33). As a result of this prohibition, the international community agrees that refugees have the right to temporary residence in the host country until a final decision regarding their claims has been made.[28] Secondly, as mentioned above, refugee status is an *ipso jure* status. Thirdly, the 1951 Convention cites in its preamble the 1948 Universal Declaration of Human Rights; its Article 14 establishes the right to asylum.[29]

Therefore, scholars consider the "right to asylum" as an "empty right," i.e. a right without a corresponding duty.[30] Since there is no "right to asylum," it follows that there is no "right to seek asylum." Nonetheless, under international law, States have the duty to not block this right.[31] So, States cannot reject or expel refugees from their countries before concluding a process of recognition of their refugee status.[32]

The 1951 Convention recognizes the discretion of States to set up national procedural rules governing the determination of refugee status. Thus, although the refugee status is an *ipso jure* status[33] and the 1951 Convention establishes the general definition of refugee, still, States have the discretion to establish specific rules in order to ascertain, not to assign, refugee status. Thus, some scholars have argued that the international rule of law[34] has been eroded by the implementation at the national level of detailed rules governing refugee status.[35]

Not all migrants are entitled to recognition as refugees; only people that have "a well-founded fear" can be entitled to refugee status. Scholars have debated whether "fear" should be qualified based on a personal subjective perspective or whether it should be based only on objective elements. Some have pointed out that fear is, by definition, "a subjective condition" or "a state of mind."[36] This approach was expressed by the Israeli representative in the *ad hoc* Committee on Statelessness and

[28] Coleman, Nils. "Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law." *European Journal of Migration and Law* 5.1 (2003): 23-68.
[29] Article 31 of the Vienna Convention on the Law of Treaties attributes importance to the 'object and the purpose' of the international agreement. The traditional method to understand the treaty's purpose is to rely on the preamble.
[30] Noll, Gregor. "Seeking asylum at embassies: a right to entry under international law?." *International Journal of Refugee Law* 17.3 (2005): 542-573.
[31] Goodwin-Gill, Guy S., and Jane McAdam. *The refugee in international law.* Oxford University Press, 2007.
[32] Lauterpacht, Elihu and Daniel Bethlehe. *The scope and content of the principle of non-refoulement: Opinion.* Cambridge University Press, 2003.
[33] Jaeger, note 27.
[34] In the case of refugee rights, the main documents for the international rule of law are the 1951 Convention and the 1967 Protocol.
[35] Kneebone, Susan. *Refugees, asylum seekers and the rule of law: Comparative perspectives*. Cambridge University Press, 2009.
[36] Robinson, Jacob. "The Status of Refugees in International Law. Volume II: Asylum, Entry and Sojourn. By Atle Grahl-Madsen." *American Journal of International Law* 67.4 (1973): 823-823.

Related Problems on 17 February 1950;[37] it is also the position of the UNHCR,[38] and of some academics.[39]

In contrast, the official position of the *ad hoc* Committee on Statelessness and Related Problems was that "fear" can be recognized only based on objective circumstances.[40] This position is supported by a procedural legal theory standpoint, as a refugee's state of mind is difficult to be ascertained. Although criminal law is based on determining the accused state of mind, the ascertainment of refugee status, which is an *ipso jure* status, is eventually done by judges of the civil sessions and not by criminal judges.

In addition, the perception of fear (subjective definition) might be disproportional and unequal not only because people react to external events in dissimilar manners but also because of a lack of information (information costs) (see Chap. IV). Furthermore, the I suggest that, from an L&E perspective, the objective approach regarding fear might be considered more efficient as it gives disincentives asking for international protection of asylum seekers who cannot prove it.

Article 1(A)(2) states that the act of persecution, which is the basis for the refugee status, should usually be attributed to a country. This includes not only cases where these acts are conducted by public organs (*de jure* or *de facto*), or public organs controlled by the State,[41] but also cases where the persecution has been conducted by individuals acting within sovereign territory of a State,[42] or by groups acting in a context where there is no longer any State authority (such as Somalia).[43] The aim of the 1951 Convention is to protect refugees and not to attribute illegal acts to a certain State.

The protection of victims of non-State actors is also based on Protocol II of 1977 (Protection of Victims of Non-International Armed Conflicts). However, the threshold for intervention in internal conflict is that the "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of a contracting party's territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Article 1(1)). This high threshold established in Article 1(1) Protection of Victims of Non-International Armed Conflicts is explained in international L&E literature. The 1951 Convention is the result of bargains among

[37] Mr. Robinson stated that 'fear' should include 'emotional and sentimental reasons' among the motives why a person might be unwilling to return to his or her home country. It entails that refugee status is extended also to Jewish people who did not want to return to Germany because of their 'horrifying memories', and not because of fears of undergoing 'future' persecution.
[38] UNHCR, Handbook, note 2.
[39] Zimmermann, Andreas, Jonas Dörschner, and Felix Machts. *The 1951 Convention relating to the status of refugees and its 1967 protocol: A commentary.* Oxford University Press, 2011.
[40] The Ad Hoc Committee on Statelessness and Related Problems 17 February 1950 stated that 'well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion' means that a person has either been actually a victim of persecution or can show good reasons why he fears persecution'.
[41] The International Court of Justice (ICJ) has applied the principle of overall control (for example, ICJ, judgment of 27 June 1986, 'Military and Paramilitary Activities in and against Nicaragua'; ICJ, judgment of 26 February 2007, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide').
[42] Cherubini, Francesco. *Asylum law in the European Union.* Routledge, 2014.
[43] Spanish Tribunal Supremo, decision of 6 October 2005, Recurso No. 2098/2002. US Court of Appeals, Seventh Circuit, decision of 26 September 2011, Rasa Jonaitiene and Marius Bubenas v. Attorney General, the Australian Refugee Review Tribunal 1209185.

States. A player (State) would never intervene if the counterparty was able to reciprocate. Thus, this provision releases players (States) from any commitment where the insurgent forces are unable to reciprocate.

It should be further mentioned that the US does not grant a status of refugees in cases of persecution by non-State actors.[44] In contrast, some EU Member States have established some form of *de facto* protection, such as the *Duldung* in Germany, the F status in Denmark, human rights reasons in Italy, etc.[45]

Another requirement for granting the refugee status is that the applicant is "outside the country of his former habitual residence" (Article 1(A)(2)). This policy is justified through an economic interpretation of the law. It eliminates the costly processes required if persecuted individuals do not successfully enter the destination countries.[46] Moreover, this notion has been interpreted as the country of citizenship.[47] Therefore, in cases of multiple citizenships, persecuted individuals must prove that in all these countries they fear future persecutions. Additionally, in cases that citizens have moved from their places, but remain within their countries of origin, they are not eligible for recognition as refugees.[48] Nonetheless, according to the UNHCR this is true only if the zone is "secure."[49] Lastly, stateless individuals have the right to be granted refugee status since Article 1(A)(2) also includes the phrase "his former habitual residence."

Article 1(A)2 of the 1951 Convention specifies several grounds for the persecution that entitles a person to refugee status. These are considered the "push" factors in the countries of origin that force their local citizens toward asylum migration. The first type of persecution is on the grounds of race, often being considered ethnic persecution.[50] However, the European Court of Human Rights (ECtHR) specifies the distinction between "race" and "ethnicity" by stating that "race is rooted in the idea of biological classification" and "ethnicity has its origin in the idea of societal groups."[51] The second type of persecution is on the grounds of religion. A clear example is when an individual is

[44] Izrailev, Mikhail. "A New Normative Approach for the Grant of Asylum in Cases of Non-State Actor Persecution." *Cardozo Journal of International & Comparative Law* 19 (2011): 171. For instance: in the USA, Lleshanaku v. Ashcroft, 100 Fed. Appx. 546, 549 (7th Cir. 2004)

[45] des Places, Segolene. *Evolution of asylum legislation in the EU: Insights from regulatory competition theory*. Robert Schuman Centre for Advanced Studies, 2003.

[46] Alien Migrant Interdiction, United States Coast Guard, available on line http://www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp accessed on April 30th, 2020.

[47] Goodwin-Gill, et al., note 31.

[48] In the famous English case of R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre (European Roma Rights Centre). It should be noted that if the screening is conducted at the refugee own State of origin, this is not a violation of article 33(1). Nevertheless, the host country might be partly responsible for violation of article 40(1) if the State has ratified that the Refugee Convention is applied to all the territories of international relation.

[49] UNHCR. 2003. Guidelines on International Protection No. 4: 'Internal Flight or Relocation Alternative' Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees. For instance, an Albanian citizen cannot claim his refugee status while he is still in Albania. However, according to UNHCR, a Syrian citizen can claim his refugee status in Syria if he is in a zone that is declared as not secure.

[50] Cherubini, note 42.

[51] ECtHR, applications nos. 55762/00 and 55974/00.

prohibited from becoming a member of a religious group.[52] The third type of persecution is on the grounds of nationality; under a textual interpretation of the 1951 Convention, "nationality" was understood as "citizenship." The UNHCR[53] and case-law[54] have adopted a broader approach by overlapping "nationality" with "race." For instance, the US Court of Appeals has granted the refugee status to a Guatemalan citizen based on "the grounds of race persecution," although he actually "was persecuted on account of his "ethnicity," a category which falls somewhere between and within the protected grounds of "race" and "nationality."[55]

The fourth type of persecution is when someone is a member of a group holding a particular political opinion; this notion originally aimed to grant refugee rights to people coming from the communist bloc. Actually, this was the main goal of the 1951 Convention, and indeed its definition is broad.[56] However, refugees must prove their membership of a political party.[57] However, States can refuse refugee status if applicants have committed political crimes, as established by Article 1F (see Chap. V, Sec. 4.1).

The last type of persecution is on the grounds of membership of a specific social group. This is a residual notion applied to grant refugee protection to individuals that have been persecuted for reasons other than race, religion, nationality, or political affiliation. Examples of such cases include homosexual persons in totalitarian regimes;[58] people with HIV-positive status in paternalistic or conservative societies;[59] a Chinese family that had more than one child when China had a one-child policy;[60] a woman who "voluntarily" agreed to be smuggled into a foreign country as part of a prostitution trafficking operation since it is the only option for her survival.[61]

A review of the EU-27 national constitutions reveals the different applications of Article 1(A)2 of the 1951 Convention, even in the framework of such a close community of States. Thirteen out of the EU-27 make no mention of the right to asylum in their national constitutions. In Austria,

[52] UNHCR. 2004. Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees.
[53] UNHCR, Handbook, note 2.
[54] US Court of Appeals, Ninth Circuit, decision of 8 June 1999, Mildred Yesenia Duarte de Guinac and Mauro Josè Guinac Quiej v. Immigration and Naturalization Service.
[55] *Ibrid.*
[56] Goodwin-Gill and McAdam, note 31.
[57] Federal Court of Canada, decision of 17 July 1998, Makala v. Minister of Citizenship and Immigration.
[58] New Zealand: Refugee Status Appeals Authority of New Zealand, decision of 7 July 2004, Refugee Appeal No. 74665/03, RSAA; UK: Vraciu Immigration Appeal Tribunal (11559) (1994, unreported). In contrast: Belgium: Conseil du Contentieux des Etrangers, 31 March 2010, X tegen de Commissaris-generaal voor de vluchtelingen en de staatlozen; Australia: Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs; UK: Golchin Immigration Appeal Tribunal (7623) (1991,unreported).
[59] Canada OPK (Re), No. U95-04575 [1996] CRDD No 88, 24 May 1996
[60] Alston, Philip. "Conjuring up new human rights: A proposal for quality control." American Journal of International Law 78.3 (1984): 607-621. Australia: Chen Shi Hai, note 21. In contrast: Canada: Cheung [1993] 2 FC 314; 153 NR 145; 19 Imm LR (2d) 81 (FCA), at 325.
[61] Canada: PYM (Re), No. U98-01933 [1999] Convention Refugee Determination Division (Canada) (CRDD) No. 163, 3 June 1999, at para. 24; HDO (Re), T98-17677 [1999] CRDD No. 116, 26 May 1999, at para. 24; and NWX (Re), T99-01434 [1999] CRDD No. 183, 25 August 1999.

the "right to asylum" has been recognized as one that needs a decision of a *special* court – the Asylum Court. The other countries have acknowledged the "right to asylum" as a constitutional right.[62] Some argue that these countries are conveying the image of a State highly protective of HRs in order to increase their status in the international political arena.[63]

However, protections differ from the lowest form of protection to the highest. For example, in Poland, Spain, and Romania, the national constitutions delegate to the legislature the task of laying down the terms under which citizens from other countries and stateless persons may enjoy the right to asylum. In contrast, Italy's constitution includes the right to asylum, which is recognized not only on political grounds but also on the actual exercise of democratic constitutional freedoms. In addition, there are differences among the countries in levels of protection according to different criteria and/or different grounds of persecution.

While not all EU-27 national constitutions establish persecution on the grounds of race (23/27), nationality (22/27), or membership of a specific social group (23/27), all EU-27 national constitutions recognize the right to non-discrimination based on religious or political grounds.

A possible reason of why all the EU-27 national constitutions recognize the right to non-discrimination based on religion might be understood through the study of refugee protection through a historical approach. It is thought that the first modern recognition of the right to asylum occurred in 1648, with the Peace of Westphalia.[64] It included several agreements that ended several wars, such as the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Republic of the Seven United Netherlands. Refugees were recognized as a minority group who share the same religious affiliation, which differs from that of their local monarchs. Nevertheless, in contrast with today, refugee rights were group rights and not individual rights. A similar argument might be applied in the case of recognition by all the 27 (central written constitutions) of the EU Member States of the persecution based on political grounds since, as

[62]While in the United Kingdom of Great Britain and Northern Ireland which is no longer part of the EU, in Belgium, in Cyprus, in Denmark, in Estonia, in Finland, in Ireland, in the Netherlands, in Malta, in Latvia, in Lithuania, Luxemburg, in Slovakia, in Sweden, the constitutional right to asylum is absent. In Austria, detail rulings have been established for Asylum Court, but nothing has been established regarding the 'right to asylum'. In Poland (article 56), in Spain (article 13) and in Romania (article 18) the law shall lay down the terms under which citizens from other countries and stateless persons may enjoy the right to asylum. The right to asylum has been recognized only to 'persons persecuted on political grounds' in Germany (article 16a, section 1); 'to foreigners persecuted for their convictions or activities in defense of internationally recognized rights and freedoms' in Bulgaria (article 28); to people 'prosecuted for non-political crimes and activities contrary to the fundamental principles of international law' in Croatia (article 33); to stateless people 'being persecuted for the assertion of their political rights and freedoms' in Check Republic (article 43); to people 'who are subject to persecution for their commitment to human rights and fundamental freedoms' in Slovenia (article 48); to person who is 'persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds' in France (article 53-1); to foreigners and stateless persons 'who are the object, or are under grave threat, of persecution as a result of their activities in favor of democracy, social and national liberation, peace among peoples, freedom or rights of the human person' in Portugal (article 33, section 8); 'being persecuted .. due to their racial or national identities, affiliation to a particular social group, or to their religious or political persuasions' in Hungary (article 15); to foreigner that in his home country 'the actual exercise of the democratic freedoms guaranteed by the Italian constitution' are denied in Italy (article 10).

[63] Sugden, Robert. "On the economics of philanthropy." *The Economic Journal* 92.366 (1982): 341-350.

[64] Betts, Alexander, Gil Loescher, and James Milner. *The United Nations High Commissioner for Refugees (UNHCR): The politics and practice of refugee protection.* Routledge, 2013.

mentioned above, the goal of the 1951 Convention was the protection of persecuted individuals from the Communist Bloc.

The diversity among EU Member States' constitutions might be related to the economic effects deriving from the acceptance of refugees. Applicants who are recognized as refugees in EU host countries are entitled to several rights. National lawmakers have the competence to establish detailed rules in order to implement these rights, which entail high costs for national budgets. In recent years, there has been an increase of public funds allocated for refugees.[65] For instance, the EU budgets for refugees during 2015 and 2016 have increased by more than 200%.[66] In 2015, Germany spent 0.46% of its national GDP for reception and procedural costs, in addition to €359 per refugee for the monthly financial allowances/vouchers.[67] A narrow interpretation of international norms ruling refugee status and of the principle of non-*refoulement* decreases the number of foreign applicants recognized as refugees. It follows that States spend less for temporary protection or for the protection of refugee rights in short and medium terms or for their integration.

In fact, some potential positive economic effects of accepting refugees might become visible in the long run. Refugees could also be a significant economic factor for an increase in national GDP.[68] In general, refugees have a young average age, which might positively affect the labor market of non-qualified jobs[69] since their employability is closely linked to their exploitability.[70] In recent decades, Europe has begun to age. In 2019, the top-three origin countries were: Syria, Afghanistan, and Venezuela, while the top-three asylum countries were: Spain, Germany, and France.[71] One of the main factors impacting age is the total fertility rate. According to the CIA,[72] the total fertility rate in these origin countries [Afghanistan (4.82), Syria (2.9), and Venezuela (2.26)] is (much) higher than the EU average (1.59) or than in the main destination countries [France (2.06), Spain (1.51) or Germany (1.47)]. This may affect national law-makers if they think in long terms: for instance, in 2015, Germany opened its borders for Syrian refugees.

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[65] OECD. 2017. Migration Policy Debates, available on-line https://www.oecd.org/els/mig/migration-policy-debates-13.pdf accessed on April 30th, 2020. Kancs, d'Artis, and Patrizio Lecca. "Long-term social, economic and fiscal effects of immigration into the EU: The role of the integration policy." *The World Economy* 41.10 (2018): 2599-2630.

[66] European Commission. 2016. Eu budged for the Refugee Crisis, available on-line http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/eu_budget_for_the_refugee_crisis_20160210_en.pdf accessed on April 30th, 2020.

[67] Massa, Isabella. *Untangling the data–Assessing the accuracy of official refugee-related costs in Europe*. Overseas Development Institute, 2016.

[68] International Monetary Fund. 2016. The Refugee Surge in Europe: Economic Challenges.

[69] Legomsky, Stephen H. "Immigration, Federalism, and the Welfare State." *UCLA Law Review* 42 (1994): 1453.

[70] Neuman, Gerald L. *Strangers to the Constitution: immigrants, borders, and fundamental law*. Princeton University Press, 2010.

[71] Eurostat. 2020. Asylum statistics, available on-line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics, accessed on April 30th, 2020.

[72] Central Intelligence Agency. 2020. The world Factbook, available on-line: https://www.cia.gov/library/publications/the-world-factbook/fields/356.html, accessed on April 30th, 2020.

Moreover, several economic studies have demonstrated that after a few years of residence in the host countries, refugees earn more than "economic migrants." [73] Other empirical research has shown that while refugees have escaped from their home countries and will invest their human and economic capital in the host countries, economic immigrants will eventually invest their earnings in their countries of origin.[74] Chap. V shows the effect that migration has on the national labor market by concluding that the highest impact is registered in agriculture, food-processing, construction, and textile industries.[75] The literature agrees that consumers pay attention to the country-of-origin, which strongly impacts on their behaviours.[76] By considering that the migrant workforce has become a *de facto* component of many States' policies,[77] especially those in the low-skilled workforce, [78] EU legislators may also consider this variable when they decide first instance decisions. For example, in 2019, among the EU Member States, Spain (66.2%) had the highest share of positive first instance decisions out of the total number of first instance decisions.[79] Spain produces more than 12% of the EU-28 total agricultural output,[80] is one of the top-five largest EU food and drink producers by turnover,[81] and is one of the main suppliers in the textile industry.[82]

These long-term positive economic effects that might explain, through an L&E approach, the crystallization of the right to asylum in some national basic laws. In fact, politicians are more concerned about short and medium terms since this has a direct impact on future elections.[83] To avoid

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[73] Cortes, Kalena E. "Are refugees different from economic immigrants? Some empirical evidence on the heterogeneity of immigrant groups in the United States." *Review of Economics and Statistics* 86.2 (2004): 465-480; Dustmann, Christian. "Differences in the labor market behavior between temporary and permanent migrant women." *Labor Economics* 4.1 (1997): 29-46; Rivera-Batiz, Francisco L. "English language proficiency and the economic progress of immigrants." *Economics Letters* 34.3 (1990): 295-300.

[74] Borjas, George J. "Assimilation, changes in cohort quality, and the earnings of immigrants." *Journal of labor Economics* 3.4 (1985): 463-489; Carliner, Geoffrey. "Wages, earnings and hours of first, second, and third generation American males." *Economic Inquiry 18.1 (1980): 87-102.*

75 Taran, Patrick A., and Eduardo Geronimi. *Globalization, Labor and Migration: Protection is Paramount.* International Labor Office, 2003.

76 Balabanis, George, and Adamantios Diamantopoulos. "Domestic Country Bias, Country-of-Origin Effects, and Consumer Ethnocentrism: a Multidimensional Unfolding Approach." *Journal of the Academy of Marketing Science* 32.1 (2004): 80-95; Verlegh, Peeter WJ. *Country-of-Origin Effects on Consumer Product Evaluations.* 2001; Al-Sulaiti, Khalid I., and Michael J. Baker. "Country of Origin Effects: a Literature Review." Marketing Intelligence & Planning (1998); Maheswaran, Durairaj. "Country of Origin as a Stereotype: Effects of Consumer Expertise and Attribute Strength on Product Evaluations." *Journal of Consumer Research* 21.2 (1994): 354-365; Schaefer, Anja. "Consumer Knowledge and Country of Origin Effects." *European Journal of Marketing* (1997); Chao, Paul. "Partitioning Country of Origin Effects: Consumer Evaluations of a Hybrid Product." *Journal of International Business Studies* 24.2 (1993): 291-306.

77 Legomsky, note 69.

78 Neuman, note 70.

79 Eurostat. 2020. First Instance Decisions on Asylum Applications , available on-line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Decisions_on_asylum_applications, accessed on April 30th, 2020.

80 Eurostat. 2019. Statistical Factsheet, available on-line: https://ec.europa.eu/info/sites/info/files/food-farming-fisheries/farming/documents/agri-statistical-factsheet-eu_en.pdf , accessed on April 30th, 2020. Please notice that during 2019, there were 28 EUMS.

81 Eurostat. 2018. Data & Trends, EU Food & Drink Industry, available on-line: https://www.fooddrinkeurope.eu/uploads/publications_documents/FoodDrinkEurope_Data_and_Trends_2018_FINAL.pdf, accessed on April 30th, 2020.

82 European Commission. 2018. Trade Report Comparison Per Year, available on-line: https://circabc.europa.eu/sd/a/8ac98104-0aae-46a8-acea-396c9a36bfd2/EDW%20-%20ITI%20TEX%20-%20Trade%20YTD%20Report%20NC%20Product%203rd%20Level%20Groups%20-%2009%20September%20-%20Textiles.pdf, accessed on April 30th, 2020.

[83] Biglaiser, Gary, and Claudio Mezzetti. "Politicians' decision making with re-election concerns." *Journal of Public Economics* 66.3 (1997): 425-447. In contrast: Sears, David O., et al. "Self-interest vs. symbolic politics in policy attitudes and presidential voting."

asylum policies that focus on the short term by fulfilling the politicians' interests, the right to asylum has been established in national (rigid) constitutions. As a result, the constitutional norms will affect the asylum rules (Kelsen pyramid of norms). In other words, rules established by law receive their validity from a higher standard, which is established in norms codified in basic laws. Thus, a hierarchical order is formed[84] between laws and constitutions.

To summarize, different EU-27 basic laws have applied a dissimilar approach to the right to asylum. However, all of the EU-27 national constitutions recognize the right to non-discrimination based on religion or persecution based on political grounds, since this is the direct result of past lessons. Additionally, the majority of them establishes the right to non-discrimination for other cases. The absence of a uniform constitutional approach in all the EU-27 Member States could also be explained through the economic impact that refugees have on the host countries (see Chap. V).

2.1. The Difference between "Economic Migrant" and "'Refugee"

The main characteristic of economic migrants is the fact that they leave their homes voluntarily.[85] Their main driving incentive is the regional or international wage differentials.[86] As a result, in contrast with refugees, they are not entitled to receive international protection. The dichotomy of traditional literature on migrants is between "voluntary economic migrants" and "involuntary political refugees."[87] However, nowadays, this distinction is not so clear because many fraudulent economic migrants have tried to be classified as refugees.[88] Moreover, some authors have also proposed other notions, such as "forced migrants" or "economic refugees."[89]

The International Association for the Study of Forced Migration defines "forced migration" as "the movements of refugees and internally displaced people (those displaced by conflicts) as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects."[90] This definition of "forced migration" includes people who are entitled to recognition as a refugee.

Sometimes, the difference between forced migrant and non-migrant is challenging. For instance, when the displacement is mandated by the government for purely military strategy

American Political Science Review 74.3 (1980): 670-684. According to this paper, in voting behavior, longstanding symbolic attitudes (such as ideology, party identification, and racial prejudice) have major effects than short-term self-interest.
[84] Kelsen, Hans. *Pure Theory of Law.* Univ of California Press, 1967.
[85] Jackson, note 23.
[86] Czaika, Mathias. *The Political Economy of Refugee Migration and Foreign Aid.* Palgrave Macmillan, London, 2009.
[87] Martin, Susan F. *Global migration trends and asylum.* UNHCR, 2001; Menjívar, Cecilia. "History, economy and politics: Macro and micro-level factors in recent Salvadorean migration to the US." *Journal of Refugee Studies* 6.4 (1993): 350-371.
[88] Tuitt, Patricia. *False Images: Law's Construction of the Refugee.* Pluto Press, 1996.
[89] Helton, Arthur C., and Eliana Jacobs. "What is Forced Migration." *Georgetown Immigration Law Journal* 13 (1998): 521.
[90] International Association for the study of Forced Migration, Mission of the IASFM, available on-line http://iasfm.org accessed on April 30th, 2020.

Chapter VI*

EU Regulatory Competition in Asylum Law

Abstract:

This chapter deals with the principle of subsidiarity in asylum law. More specifically, by applying an economic approach, this contribution examines the need for incorporation of asylum standards to attain the goal established in Article 5 of the Treaty on the European Union. In other words, this research utilises an economic methodology to investigate the application of the subsidiarity principle to asylum law by considering economic criteria for both centralisation and decentralisation. This chapter does not execute a comprehensive normative analysis but rather aims to uncover the advantages of regulating asylum policy at the EU level. In addition, the contribution presents two different types of harmonisation. In conclusion, the chapter discusses the advantages of a centralised EU policy that allows for competition between Member States.

1. Introduction

The idea of regulatory competition is not new.[1] If a law can be considered as a "product," economists will, in general, accept the advantages of the competition between legal orders,[2] and many legal scholars have criticised this for two main reasons. Firstly, legal rules also influence other parties that stand outside the strict, narrow, contractual relationship.[3] Secondly, legal scholars argue that the concept of "competition" is opposed to the concept of "sovereignty."[4]

From a L&E standpoint, the competition between legal systems should be examined against its benefits and costs according to some constitutional benchmarks, namely: freedom, equality,

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[1] Already in the nineteenth-century there were debates about competition between jurisdictions in the matter of company law. See: Saville, John. "Sleeping Partnership And Limited Liability, 1850–18561." *The Economic History Review* 8.3 (1956): 418-433.

[2]Some economists dispute the benefits coming from competition between legal order. Werner Sinn has stated that competition between legal orders constitutes a duplication of market failure. See, for example: Sinn, Hans-Werner. *The new systems competition*. John Wiley & Sons, 2008.In addition, Paul R. Krugman suggests that competition applied to national economies is a 'dangerous obsession'. Krugman, Paul. "Competitiveness: a dangerous obsession." *Foreign Affairs* 73 (1994): 28-44.

[3]Peters, Anne. "The competition between legal orders." *International Law Research* 3.1 (2014): 45-65.

[4]Schaefer, Jan Philipp. *Die Umgestaltung des Verwaltungsrechts: Kontroversen reformorientierter Verwaltungsrechtswissenschaft.* Mohr Siebeck, 2016; Kirchhof, Paul. "Freiheitlicher Wettbewerb und staatliche Autonomie-Solidarität." *ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* 56 (2005): 39-45. However, it must be noted that national parliaments are not the only law-makers. In other words, national parliaments do not have an exclusive legislative power. Within the EU Member States, all countries shall apply EU law. In addition, States take part in international agreements. When they ratify them – or in case of a monist system like e.g. the Netherlands there is no need either for ratification – international law is part of national law. Moreover, in order to give more power to sub-units, legislative decentralization has been established. Furthermore, the role of Constitutional Courts that – generally – have the power to declare unconstitutionality or abrogative referendums should be underlined.

democracy, social principle, and the public interest.[5] According to some of the literature, competition between legal orders enhances freedom,[6] fosters democracy,[7] and may also indirectly generate wealth.[8] However, other studies argue that legal competition challenges the concepts of equal protection and also hurts the public (general) interest.[9]

This chapter does not aim to examine the literature regarding the advantages and disadvantages of competition between legal orders in general. Instead, it focusses on the principle of subsidiarity in asylum law, which was formally introduced in the Single European Act of 1992. In particular, this contribution studies the need for the harmonisation of asylum laws to attain the goal established in Article 5 of the Treaty on the European Union (TEU) through the application of an economic approach. This chapter focuses on the European region for two main reasons. First, a regionally-structured system is closer to the Pareto optimality as compared to the global approach (see Chap. II, Sect. 5). Second, the European refugee crisis of 2015-2016 is the most recent in the shock supply of foreigners (see Chap. I, Sect. 3), which affects the labor demand or crime rate in the host countries (see Chap. V).

In other words, this contribution utilizes an economic methodology to investigate the application of the subsidiarity principle in asylum law. It examines the current literature regarding the application of this principle in public law in addition to applying the theories of public law scholars dealing with the optimal level of regulation within the federal systems of Switzerland and Canada. The research centres on the example of environmental law for two main reasons. Firstly, environmental law is part of public law, as is asylum law. Secondly, in the case of cross-border pollution within environmental law, the choices of a Member State impacting the others resemble similar considerations of asylum law. In asylum law, the restrictive policy of a State might influence the flow of migration through the same argument of externalities.[10]

This scientific contribution has the following structure. Section 2 elaborates on the three main "push" factors that have been employed by the EU as arguments for the centralisation of asylum law. Section 3 considers the criteria for centralisation and decentralisation again with regard to asylum issues. In particular, section 3 discusses the Tiebout model and the transboundary externalities, the problem of the "race to the bottom," the reduction of transaction costs, and the importance of the protection of human rights. Section 4 compares the two different types of integration of asylum law,

[5]Peters, note 3.
[6]Weber, Max, Siegmund Hellmann, and Melchior Palyi. *Wirtschaftsgeschichte. Abriss Der Universalen Sozial-und Wirtschafts-Geschichte.* 1923.
[7]Olson, Mancur. "The logic of collective action: Public goods and the theory of groups, second printing with new preface and appendix (Harvard Economic Studies)." (1971).
[8]Peters, note 3.
[9]Kirchhof, Paul. Gemeinwohl und Wettbewerb. Gedruckt, 2005.
[10] Bubb, Ryan, Michael Kremer, and David I. Levine. "The economics of international refugee law." *The Journal of Legal Studies* 40.2 (2011): 367-404.

by highlighting the benefits of the common European asylum policy that establishes a minimum standard for harmonisation. In the conclusion, the chapter reviews the main literature which suggests there are advantages of a centralised European Union (EU) policy that also allows for competition between Member States.

The novelty of this Chapter rests in synthesizing, reviewing, and analyzing some of the most important economic theories in the context of refugees – such as the 'race to the bottom', the Tiebout argument (especially, the evolutionary efficiency and the importance of information costs), the Coasean bargaining, the risk of strategic behaviour, the 'free-riding' incentive, and transaction costs – in regard to asylum law. These theories are commonly used in the cases of transboundary nature of a specific issue, which produces international (negative) externalities. Furthermore, it should be emphasized that this Chapter deals with the optimal level of the EU centralization of asylum policy in general and does not focus solely on the current refugee crisis. Therefore, this contribution can also be used in the case of future migration crisis (i.e., climate refugees).

2. EU Asylum Policy: Harmonization of Common Standards

Until now, the EU has been active with respect to asylum law by enacting different regulations and directives, in addition to rethinking EU asylum law in light of the current refugee crisis.[11] The EU has established not only common EU asylum standards but has also integrated the procedural asylum rules. Clear examples of common European law defining asylum standards are the Reception Conditions Directive[12] and the Qualification Directive.[13] In addition, procedural harmonisation is set out in the Asylum Procedures Directive[14] and in the Dublin Regulation,[15] which prescribe fairer, quicker and higher quality asylum decisions, determined by the responsible EU Member State.

The EU has laid out different reasons for legislative action at the EU level with respect to asylum law. This section analyses the three main "push" factors that have been considered by the EU through the application of economic methodology and legal reasoning. While the first two "push"

[11] Price, Matthew E. *Rethinking asylum: History, purpose, and limits*. Cambridge University Press, 2009.
[12] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection
[13] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
[14] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection
[15] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

factors are directly connected with the economic interpretation of the subsidiarity principle, the third one takes a human rights approach.

First, the nature of the refugee crisis is that it transcends borders. This is closely connected with the problem of (negative) externalities (see Chap. III). According to core L&E literature, the protection of refugees is considered an international public good,[16] since it produces non-excludable and indivisible benefits.[17] More concretely, the individual State's choice entails positive or negative externalities for third countries because it directly affects the flow of migration.[18] Analogous application of the current literature[19] suggests that when significant international (negative) externalities exist, there will be some convergence of national laws towards restricting refugee policies. For example, the French asylum reform of 1991 resulted in an increase of asylum seekers moving to Germany.[20] The EU has tried to tackle this problem with the Dublin regulation, which defines the State responsible for examining the application and clarifies the rules governing relations between states.[21]

The second factor is the creation of equal conditions of competition. While this argument has been highly used in competition law,[22] this target has also been advocated for in recent decades in other fields of law, advancing a higher level of compatibility for various kinds of legislation within the EU.[23] For instance, Article 9 of the Asylum Procedures Directive recognises the "Right to remain in the Member State pending the examination of the application," or Article 46 establishes "The right to an effective remedy" for all asylum seekers within Europe. It may be argued that disparity in the recognition of these rights can create unequal conditions for competition between the EU Member States, and may directly or indirectly impact the functioning of the common market negatively.

The third factor is the role of the EU as a *sui generis* organisation protecting HRs.[24] With regard to the protection of HRs, the international system has moved beyond State values towards

[16] Bubb, et al. note 10; Betts, Alexander. "Public goods theory and the provision of refugee protection: The role of the joint-product model in burden-sharing theory." *Journal of Refugee Studies* 16.3 (2003): 274-296.
[17] Thielemann, Eiko. "Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU." *JCMS: Journal of Common Market Studies* 56.1 (2018): 63-82.
[18] Bubb, et al. note 10.
[19] Stewart, Richard B. "Pyramids of sacrifice? Problems of federalism in mandating state implementation of national environmental policy." *The Yale Law Journal* 86.6 (1977): 1196-1272.
[20] Rotte, Ralph, Michael Vogler, and Klaus F. Zimmermann. *Asylum migration and Policy coordination in Europe.* Ludwig-Maximilians-Universität München, 1996.
[21] In hierarchical order, the criteria are: from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly, or regularly. However, in practice, the most used rule is the first country of entry.
[22] Doleys, Thomas J. "Promoting competition policy abroad: European Union efforts in the developing world." *The Antitrust Bulletin* 57.2 (2012): 337-366; Brittan, Leon, and Karel Van Miert. "Towards an international framework of competition rules." International Business Law 24 (1996): 454.
[23] Faure, Michael. "Regulatory Competition vs Harmonization in EU Environmental Law" in Esty, Daniel C., and Damien Geradin. *Regulatory competition and economic integration: comparative perspectives*. Oxford University Press, 2001.
[24] Von Bogdandy, Armin. "European Union as a Human Rights Organization-Human Rights and the Core of the European Union, The." *Common Market Law Review* 37.6 (2000): 1307-1338.

respecting and protecting human values.[25] In other words, this argument deals with HRs reasons. Several EU policies safeguard the protection of HRs. A clear example of this is the Charter of Fundamental Rights of the European Union of 2000, which became legally binding when the Lisbon Treaty came into force on 1 December 2009.

Although this is a HRs factor, some of its L&E effects should be investigated. International HRs affect national policy and norms choice since international HRs treaties impact State behavior. This is connected with the different L&E theories related to the so-called smart sanctions (in terms of the domestic political economy of the targeted State, the smart sanctions are economic coercions that work properly on the main actors of the targeted State). Furthermore, there is a correlation between pro-market reforms and the violation of HRs.

International HRs have become constitutive elements of modern statehood.[26] Indeed the world would be markedly different without international HRs within international treaties.[27] The literature suggests that the international impact on national policies is reached through three different models: two traditional models consisting of the coercion[28] or the persuasion[29] models and the "new" model of acculturation.[30] Although their combination reaps the highest benefits, the traditional models are still the ones most commonly applied.[31]

In addition, the highest impact on State behaviour exists in those cases where States have developed democratic institutions[32] since these institutions are important for the actual implementation of international HRs. For instance, the ECHR has established the "individual justice"

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[25] Henkin, Louis. "International law: politics and values." *Developments in International Law* 18 (1995).

[26] Risse-Kappen, Thomas, et al. *The power of human rights: International norms and domestic change.* Cambridge University Press, 1999. However, it should be mentioned that some types of political, economic, or social systems cannot be subjected to international human rights treaties. Huntington, Samuel. *1996 The Clash of Civilizations and the Remaking of World Order*. Simon & Schuster, 1996.

[27] Heyns, Christof H., and Frans Viljoen. *The impact of the United Nations human rights treaties on the domestic level.* Martinus Nijhoff Publishers, 2002.

[28] Guzman, Andrew T. "A compliance-based theory of international law." *California Law Review* 90 (2002): 1823; Hathaway, Oona A. "Do human rights treaties make a difference?." The Yale Law Journal 111.8 (2002): 1935-2042; Goldsmith, Jack Landman, and Eric A. Posner. "Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective." *U Chicago Law & Economics, Olin Working Paper*108 (2000).

[29]Cleveland, Sarah H. "Norm internalization and US economic sanctions." *Yale Journal of International Law* 26 (2001): 1; Slaughter, Anne-Marie. "Governing the global economy through government networks." *The role of law in international politics: essays in international relations and international law* 177 (2000): 181-204; Franck, Thomas M. *Fairness in international law and institutions.* Oxford University Press, 1998; Franck, Thomas M., and Thomas M. Franck. *The power of legitimacy among nations*. Oxford University Press on Demand, 1990.

[30] This model aims to apply international human rights law as a result of beliefs and behavioral patterns of the surrounding culture. Goodman, Ryan, and Derek Jinks. "How to influence states: Socialization and international human rights law." *Duke Law Journal* 54 (2004): 621.

[31] *Ibrid*.

[32] Hathaway, Oona A. "Why do countries commit to HR treaties?" *Journal of Conflict Resolution* 51.4 (2007): 588-621; Davenport, Christian, and David A. Armstrong. "Democracy and the violation of human rights: A statistical analysis from 1976 to 1996." *American Journal of Political Science* 48.3 (2004): 538-554; Davenport, Christian. "Human rights and the democratic proposition." *Journal of Conflict Resolution* 43.1 (1999): 92-116; Slaughter, Anne-Marie. "International law in a world of liberal states." *European Journal of International Law* 6.1 (1995): 503-538; Henderson, Conway W. "Population pressures and political repression." *Social Science Quarterly* 74.2 (1993): 322-33. However, it must be said that established democratic nations are more incline to not ratify international HR treaties. Democratic institutions facilitate the right to justice and therefore State will have to compensate victims. Moravcsik, Andrew. "The origins of HR regimes: Democratic delegation in postwar Europe." *International Organization* 54.2 (2000): 217-252.

(Article 34). The main goal of Article 34 of the ECHR was to establish an early warning device by which a drift towards authoritarianism could be identified in advance and dealt with by an independent international public body, the ECtHR.[33]

The moment a State violates HRs, after the failure of diplomatic pressure, economic sanctions become a threat. Only after these threats fail to achieve the goal are economic sanctions deployed to the targeted State. Although testing threats for economic sanctions is quite problematic, according to game theory models, if the target country intends to comply with the demand, it will likely do so during the phase of economic sanction threats.[34] On the contrary, if the target country expects future conflicts with the requisitioner, no cooperation will be found since the target country does not want to ruin its international reputation.[35] In general, it should be noted that economic sanction threats are often more effective than those that are deployed[36] since – in general – economic sanctions affect the general population and not the key supporters of the target country.

Focusing on economic sanctions, their use to violate HRs was common in the world during the 1990s with success rates running from 1-2% up to 30%.[37] Within economic sanctions, financial sanctions (i.e. aid cutoffs, asset freezes, and monetary pressures) are more effective than broad-based trade sanctions. This is because financial sanctions are more likely to apply pressure to key supporters of the target country rather than the whole population.[38] Moreover, trade sanctions result in more disproportionate costs on women, who are often the most powerless political actors in the target countries.[39] Furthermore, the literature agrees that broad-based economic sanctions would have minimal effects on authoritarian regimes and more loss for the general population since the target government will allocate rent-seeking opportunities only to their supporters.[40]

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[33] Greer, Steven. *The European Convention on Human Rights: achievements, problems and prospects.* Cambridge university press, 2006.

[34] Lacy, Dean, and Emerson MS Niou. "A theory of economic sanctions and issue linkage: The roles of preferences, information, and threats." *The Journal of Politics* 66.1 (2004): 25-42; Drezner, Daniel W., and Daniel W. Drezner. *The sanctions paradox: Economic statecraft and international relations*. Cambridge University Press, 1999; Morgan, T. Clifton, and Anne C. Miers. "When threats succeed: A formal model of the threat and use of economic sanctions." *Annual Meeting of the American Political Science Association, Atlanta* 264 (1999); Smith, Alastair. "The success and use of economic sanctions." *International Interactions* 21.3 (1995): 229-245.

[35] Drezner, Daniel W. "The hidden hand of economic coercion." *International Organization* 57.3 (2003): 643-659; Drezner, et al. note 34; Drezner, Daniel W. "Conflict expectations and the paradox of economic coercion." *International Studies Quarterly* 42.4 (1998): 709-731; Drezner, Daniel. "Allies, adversaries, and economic coercion: Russian foreign economic policy since 1991." *Security Studies*6.3 (1997): 65-111.

[36] Nevertheless, in the case of the U.S. Economic Sanction Threats Against China, these threats were not effective and in fact, were counter-productive to the goal of securing better human rights in China. Drury, A. Cooper, and Yitan Li. "US economic sanction threats against China: Failing to leverage better human rights." *Foreign Policy Analysis* 2.4 (2006): 307-324.

[37] Elliott, Kimberly Ann. "The sanctions glass: half full or completely empty?." *International Security* 23.1 (1998): 50-65; Pape, Robert A. "Why economic sanctions still do not work." *International Security* 23.1 (1998): 66-77; Pape, Robert A. "Why economic sanctions do not work." *International security* 22.2 (1997): 90-136; Hufbauer, Gary Clyde, Jeffrey J. Schott, and Kimberly Ann Elliott. *Economic sanctions reconsidered: History and current policy*. Peterson Institute, 1990.

[38] Kirshner, Jonathan. "The microfoundations of economic sanctions." *Security Studies* 6.3 (1997): 32-64.

[39] Buck, Lori, Nicole Gallant, and Kim Richard Nossal. "Sanctions as a gendered instrument of statecraft: The case of Iraq." *Review of International Studies* 24.1 (1998): 69-84.

[40] Allen, Susan Hannah. "Political institutions and constrained response to economic sanctions." *Foreign Policy Analysis* 4.3 (2008): 255-274; Allen, Susan Hannah. "The domestic political costs of economic sanctions." *Journal of Conflict Resolution* 52.6 (2008): 916-944; Lektzian, David, and Mark Souva. "An institutional theory of sanctions onset and success." *Journal of Conflict Resolution* 51.6

On the other hand, violations of HRs increase under partial/selective sanctions although they are more effective than extensive sanctions. This is because economic sanctions will bring political and economic instability.[41] Therefore, the government will employ more repression.[42] As a result, the requisitioner will seek the "right" economic sanctions that target the elite who support the authoritarian regimes while minimizing losses in the rest of the population.

The effect of international HRs on national policy will also consider the correlation between free-market reforms and HRs violations since the limited government policy might have an impact on the commitments to secure basic HRs.[43] A free market is one of the four freedoms established in the Rome Treaty of 1957, which have been strengthened in the Lisbon Treaty (Protocol 27 on the Internal Market and Competition). On the other hand, the EU protects HRs (Preamble TEU, article 218 Treaty on the Functioning of the European Union (TFEU), and Protocol 8 Accession of the Union to the European Convention on the Protection of HRs and Fundamental Freedoms). In addition, the Universal Declaration of Human Rights is part of the Stabilization and Association Agreement (SAA) with the EU.[44] The correlation between free-market reforms and HRs violations has been investigated by several scholars; a study that uses data from a panel of 117 countries for the period from 1981–2006 shows that pro-market reforms positively impact HRs.[45] The different levels of protection of rights of vulnerable groups may directly affect the refugees' decision of their final destination country (see Chap. IV) and may create negative externalities for other EU Member States (see Chap. III).

Lastly, the third factor for an asylum legislative action at an EU level is the protection of HRs by the EU. As stated above, although this is a HRs factor, international HRs affect national policy and norms choice since international HRs treaties affect the State's behavior through the so-called smart sanctions too. In addition, pro-market reforms do not negatively affect the protection of HRs.

The EU asylum policy, where the EU has a shared competence, has been stressed through the explicit reference to the subsidiarity principle in the Maastricht Treaty of 1992 and has also been recognised in the Lisbon Treaty. According to article 5(3) TEU, "the Union shall act only if and

(2007): 848-871; Allen, Susan Hannah. "The determinants of economic sanctions success and failure." *International Interactions* 31.2 (2005): 117-138; Brooks, Risa A. "Sanctions and regime type: What works, and when?." *Security Studies* 11.4 (2002): 1-50.

[41] Wood, Reed M. ""A hand upon the throat of the nation": economic sanctions and state repression, 1976–2001." *International Studies Quarterly* 52.3 (2008): 489-513.

[42] Peksen, Dursun. "Better or worse? The effect of economic sanctions on human rights." *Journal of Peace Research* 46.1 (2009): 59-77.

[43] Harvey, Philip. "Human rights and economic policy discourse: Taking economic and social rights seriously." *Columbia Human Rights Law Review* 33 (2001): 363.

[44] For instance, Article 2 of the SAA between the EU and Albania, Bosnia Hercegovina, Macedonia, Montenegro, Serbia or Article 3 of the SAA between the EU and Kosovo underline the importance of the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe.

[45] De Soysa, Indra, and Krishna Chaitanya Vadlammanati. "Do pro-market economic reforms drive human rights violations? An empirical assessment, 1981–2006." *Public choice* 155.1-2 (2013): 163-187. In contrast, neo-Marxists scholars, part of the NGO community, the anti-globalization movement state that pro-market reforms negatively impact on human rights. Root, Hilton L. *Alliance curse: How America lost the third world*. Brookings Institution Press, 2009; Stiglitz, Joseph E. *Globalization and its Discontents.* Norton, 2002.

insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[46]

Although the principle of subsidiarity underlines economic efficiency, it has been criticised for highlighting its political relevance[47] since considerations of "political efficiency" may justify the EU competence in the asylum law. For instance, in the case of the refugee crisis, voter preferences may differ extensively since decisions often require a trade-off between protection of fundamental HRs on the one side and protection of national security or national labour market on the other side. In addition, decentralization may lead to a political disintegration of the Member States.[48] Indeed, judges of the Court of Justice of the European Union (CJEU) interpret the principle of subsidiarity through the willingness to facilitate European integration.[49]

This chapter considers the principle of subsidiarity as an economic demarcation principle regarding the distribution of competencies,[50] examining it as a double-edged concept and considering both increased centralisation and the increase of the lower level of governance.[51] As is already well-established, the principle of subsidiarity might lead to gains as well as losses through diverse consequences with regards to efficiency.[52] Since it is impossible to know *ex-ante* the economic consequences in a particular policy, a logical approach is important.[53] In other words, this contribution further reflects on the empirical studies done regarding this topic.

This chapter does not apply a case-law study regarding the application of the subsidiarity principle by the CJEU. However, this does not mean that the CJEU has not analysed this principle. Indeed, the CJEU has examined this principle with both procedural[54] and substantive[55] meanings, giving more importance to the procedural one.[56]

3. Centralisation or Decentralisation of Asylum Policy

[46] Article 5(3) applies the same words established in Article 3b of the Treaty of Amsterdam.
[47] Portuese, Aurélian. "The principle of subsidiarity as a principle of economic efficiency." *Columbia Journal of European Law* 17 (2010): 231.
[48] Ruta, Michele. "Economic theories of political (dis) integration." *Journal of Economic Surveys* 19.1 (2005): 1-21.
[49] Estella de Noriega, Antonio. *The EU principle of subsidiarity and its critique*. Oxford University Press, 2002.
[50] Van den Bergh, Roger. "Subsidiarity as an economic demarcation principle and the emergence of European private law." *Maastricht Journal of European and Comparative Law* 5.2 (1998): 129-152.
[51] Lenaerts, Koen, and Patrick van Ypersele. "Le principe de subsidiarité et son contexte: étude de l'article 3B du Traité CE." *Cahiers de droit européen* 30.1 (1994): 3-85.
[52] Davies, Garreth. "Subsidiarity: the wrong idea, in the wrong place, at the wrong time." Common Market Law Review 43.1 (2006): 63-84.
[53] Portuese, note 47.
[54] Some of the case-law where the CJEU deals with the subsidiarity principle in the procedural meaning are: T-29/92; C-1 1/95; T 52-53; C-233/94.
[55] Some of the case-law where the ECJ deals with the subsidiarity principle in the substantive meaning are: C-380/03; C-415/93; C-50-76; C-53/80; C-212/97; and C-208/00.
[56] Portuese, note 47.

The advantages or disadvantages of a common EU asylum law will be analysed while taking into consideration the Tiebout argument[57] and the problem of the "race to the bottom," [58] in addition to the prisoner dilemma, the reduction of transaction costs, and the importance of the protection of HRs. Moreover, it reflects on the protection of refugee rights through the implementation of equal treatment within EU Member States.

3.1. The Tiebout Theory and Transboundary Externalities

The Tiebout argument is used to understand the optimal provision of local public goods.[59] His basic premise is that citizens have different preferences. However, individuals with the same preferences will cluster together in small local communities. This leads to competitive legal systems, leading to "allocative efficiency" under certain, restrictive conditions. For instance, if the majority of a group of locals prefer to build a stadium and another group of citizens aims to build a theatre, a stadium will probably be provided in the first community and the second community may fulfil its preference for the arts over sport somewhere else. As a result, well-informed citizens will move from one community to another according to their personal preferences.

In the Tiebout model, information plays an important role since according to information, citizens will move from one legal system to another. In addition, to maximise voter utility and minimise political costs, the literature suggests that the most efficient solution exists at the time when heterogeneous voters' preferences are so varied that they do not overlap.[60] In the case of centralisation of rules, political costs increase since it is impossible to fulfil the heterogeneity of preferences.[61] Thus, the level of the ruling government should be the one "enjoying a comparative advantage in accounting for the diversity of preferences in its choice of service delivery."[62]

Except for the limitation of political costs, decentralisation has three other advantages: evolutionary efficiency, the generation of a learning process, and the acceleration of modifying rules that are considered inefficient. Firstly, competition between legal systems might bring a sort of Darwinian evolution where only the most efficient rules survive.[63] Comparative L&E scholars highlight the importance of evolutionary efficiency as the main argument for the transplantation of

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[57] Tiebout, Charles M. "A pure theory of local expenditures." *Journal of political economy* 64.5 (1956): 416-424.
[58] The race to the bottom is used to describe government deregulation of the business environment, or reduction in tax rates, in order to attract or retain economic activity in their jurisdictions. In the case of refugee law, states compete with each-other in order to attract less persecuted individuals.
[59] Tiebout, note 57.
[60] Cremer, Jacques, Antonio Estache, and Paul Seabright. *The decentralization of public services: lessons from the theory of the firm*. World Bank Publications, 1994.
[61] Ribstein, Larry E., and Bruce H. Kobayashi. "The economics of federalism." U Illinois Law & Economics Research Paper No. LE06-001 (2006): 06-15.
[62] Estache, Antonio. *Decentralizing infrastructure: Advantages and limitations.* The World Bank, 1995, p. 99.
[63] Zywicki, Todd J. "The rise and fall of efficiency in the common law: A supply-side analysis." *Northwestern University Law Review* 97 (2002): 1551.

foreign laws into a national system.[64] Therefore, the most efficient rules will survive in addition to being transplanted into other legal systems. In contrast, if the deciding authority is centralised and voters have heterogeneous preferences, the result of the law will be sub-optimal compared to the decentralised decision-making model.[65]

Secondly, decentralisation hastens innovation in policy-making since it allows agents to choose the legal system that fits their needs.[66] Therefore, economic agents send a message to law-makers[67] through their choices, adding a disciplinary effect or enhancing effectiveness to the regulatory competition between legal orders[68] and pushing the law-maker to discover new rules that might be more efficient than the current local rules.[69]

Additionally, in the case of asymmetric information, competition between legal orders would be even more desirable.[70] This is the case where the "supplier" side has more information than the others. Thus, the disadvantages of asymmetrical information among policymakers and economic agents will somehow be compensated for by regulatory competition between legal orders, since this grants hidden information to lawmakers.[71] According to the literature, the main costs of designing regulations are informational costs.[72] In general, the costs for drafting, controlling, and implementing different policies is higher at the central government than the aggregate sum of the costs incurred by local governments for doing so. This is a direct consequence of the "knowledge problem."[73]

Thirdly, harmonised rules placed by central authorities can be difficult to change since – in general – central systems can suffer from "gigantism." [74] In addition, agreeing on a new decision might be even more difficult since there will be costly negotiations and compromises.[75] The modification becomes harder when the group of members is larger and is characterized by

[64] Smits, Jan M. "How to Predict the Differences in Uniformity between Different Areas of a Future European Private Law? An Evolutionary Approach." *The Economics of Harmonizing European Law*. Edward Elgar Publishing, 2002; Ogus, Anthony. "Competition between national legal systems: a contribution of economic analysis to comparative law." *International & Comparative Law Quarterly* 48.2 (1999): 405-418; Mattei, Ugo. "Efficiency in legal transplants: An essay in comparative law and economics." *International Review of Law and Economics* 14.1 (1994): 3-19; Ogus, Anthony. "Competition between national legal systems: a contribution of economic analysis to comparative law." *International & Comparative Law Quarterly* 48.2 (1999): 405-418.
[65] Breuss, Fritz, and Markus Eller. "The optimal decentralisation of government activity: normative recommendations for the European constitution." *Constitutional Political Economy* 15.1 (2004): 27-76.
[66] Parisi, Francesco, and Larry Ribstein. "Choice of law." *The new Palgrave dictionary of economics and the law* 1 (1998): 236-241; Vihanto, Martti. "Competition between local governments as a discovery procedure." *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft* (1992): 411-436.
[67] Snell, Jukka, and Mads Andenas. "Exploring the Outer Limits-Restrictions on the Free Movement of Goods and Services." *European Business Law Review* 10 (1999): 252.
[68] Portuese, note 47.
[69] Snell and Andenas, note 67.
[70] Majone, Giandomenico. *Deregulation or re-regulation?: regulatory reform in Europe and the United States.* Burns & Oates, 1990.
[71] Oates, Wallace E. "An essay on fiscal federalism." *Journal of economic literature* 37.3 (1999): 1120-1149.
[72] Portuese, note 47.
[73] Hayek, Friedrich August. "The use of knowledge in society." *The American economic review* 35.4 (1945): 519-530.
[74] Woolcock, Stephen. *The single European market: centralization or competition among national rules?*. Royal Institute of International Affairs, 1994; Buxbaum, Richard M., Alain Hirsch, and Klaus J. Hopt, eds. *European business law: Legal and Economic analyses on integration and harmonization.* Walter de Gruyter, 2012.
[75] Pelkmans, Jacques. "Regulation and the single market: An economic perspective." *Journal of Common Market Studies* 33.1 (1995): 67-89.

heterogeneity of preferences.[76] This might be the reason for the non-adoption of a refugee quota system[77] by Eastern European countries which do not receive a high number of applications for asylum protection and were opposed to its implementation.

The Tiebout theory favouring competition between legal systems is constructed under the assumption that the topic to be regulated is an issue or problem that does not exceed the borders of its community. In contrast, when a problem has a cross-border character or the decision of one country impacts others, there might be an economies-of-scale argument. In this case, centralised legislation may provide better results since it decreases or eliminates horizontal externalities.[78] In other words, the authority that has jurisdiction to rule corresponds to the type of topic. Thus, if the subject to be adjudicated crosses the national borders of the regulatory authority, or when there exists negative externalities, the decision should be made at a higher regulatory level.[79]

According to the Tiebout theory, the optimal level of ruling is the decentralized level. Some historians think that it is due to the competition between legal orders within the "old" continent, which was globally dominant in recent centuries.[80] Only when there are important factors (e.g. protection of HRs, negative externalisation, or a "race to the bottom") should decision-making be done by a higher level (supranational or international level). This is known as "bottom-up federalisation,"[81] which is closely connected with the "economies of scale" argument.[82] Therefore, in this case, the ruling should shift to an authority that has jurisdiction in all the territories dealing with or affected by this issue.

Decentralisation delivers gains in efficiency unless economic criteria justify centralisation as a better alternative.[83] In addition, decentralisation should take priority even if centralisation might bring benefits in terms of limiting potential free-riding by national lawmakers.[84] However, the public choice theory suggests that centralisation should be prioritised if social values (i.e. the protection of vulnerable groups such as refugees) are involved,[85] since the competition between legal systems may

[76] Buga, Irina. *The Modification of Treaties by Subsequent Practice: The Implications of Practice Going Beyond the Limits of Treaty Interpretation.* Diss. University Utrecht, 2015.
[77] Zaun, Natascha. "States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System." *JCMS: Journal of Common Market Studies* 56.1 (2018): 44-62; Thielemann, note 17.
[78] Bureau, Dominique, and Paul Champsaur. "Fiscal federalism and European economic unification." *The American Economic Review* (1992): 88-92.
[79] Esty and Geradin, note 23; Ogus, note 64.
[80] Kennedy, Paul. *The rise and fall of the great powers.* Vintage, 2010; Frey, Bruno S., and Reiner Eichenberger. "FOCJ: Creating a single European market for governments." *Constitutional Law and Economics of the European Union, Aldershot, England* (1997): 195-215.
[81] Van den Bergh, note 50.
[82] Fatire, Michael. "Harmonisation of environmental law and market integration: harmonising for the wrong reasons?." *European Energy and Environmental Law Review* 7.6 (1998): 169-175.
[83] Tiebout, note 57.
[84] Esty and Geradin, note 23.
[85] Buxbaum, Richard M., Alain Hirsch, and Klaus J. Hopt. *European business law: Legal and Economic analyses on integration and harmonization.* Walter de Gruyter, 1991; Porter, Michael E. "The competitive advantage of nations." *Competitive Intelligence Review* 1.1 (1990): 14-14.

result in downgrading protection of HRs standards by leading to an elimination of competitive advantages in the longer run.[86]

The notion of competition between legal systems also plays an important role in the case of asylum law. As stated before, the State's individual choice entails positive or negative externalities for third countries because it directly affects the flow of migration.[87] These externalities and the supranational character of the refugee crisis is an important factor for justifying EU competence. As the literature suggests, the competition between legal orders would be entirely inappropriate in the case of cross-border externalities since the costs and benefits of an action fall on different States.[88]

A package of EU asylum law, such as the Reception Conditions Directive and the Qualification Directive, the Asylum Procedures Directive and the Dublin Regulation, fits the economic criterion for community action.[89] Although the supranational characteristic of the refugee crisis is the most important "push" factor for EU competence,[90] this argument should not be pushed so far that all competencies should be centralized at the EU level.[91] Thus, EU-wide cooperation in asylum law may yield positive results; but, this does not mean that there should be a complete homogeneity of legal rules. Indeed, section 4 of this chapter argues that asylum policies that establish minimum standards rather than fixed standards are more beneficial to both refugees as well as host countries.

Moreover, the absence of an EU comprehensive centralized policy may lead to Coasean bargaining between countries that receive a lot of asylum applications and potential relocation countries for persecuted individuals.[92] Ergo, a comparative institutional approach would also take into consideration not only a cost-benefit analysis of alternative legal remedies but, also the feasibility of contractual agreements between Member States. In case of externalities, a supranational body can choose between 1) doing nothing and leaving the issue to the Member States; 2) stimulating agreements between the Member States; and 3) centralization of regulatory powers.

While complete decentralization will bring a political disintegration between the Member States[93] and complete centralization will eliminate the advantages of regulatory competition,[94] under certain conditions, the stimulation of interstate agreements has some comparative advantages.

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[86] Reich, Norbert. "Competition between legal orders: A new paradigm of EC law." *Common Market Law Review* 29 (1992): 861.
[87] Bubb, et al. note 10.
[88] Snell, Jukka. "True proportionality and free movement of goods and services." *European Business Law Review* 11.1 (2000): 50-57.
[89] Asplund, Eva. *A Study of the Development of the Asylum Law and Policy of the European Union with Focus on the Role of Burden-Sharing and Temporary Protection.* Diss. Lund University, 2003.
[90] Guild, Elspeth. "The Europeanisation of Europe's asylum policy." *International Journal of Refugee Law* 18.3-4 (2006): 630-651.
[91] Esty, Daniel C., and Damien Geradin. "Market access, competitiveness, and harmonization: Environmental protection in regional trade agreements." Harvard Environmental Law Review 21 (1997): 265.
[92] Van den Bergh, Roger. "Towards an Institutional Legal Framework for Regulatory Competition in Europe." *Kyklos* 53.4 (2000): 435-466.
[93] Ruta, note 48.
[94]Zywicki, note 63; Smits, note 64; Ogus, note 64; Mattei, note 64; Ogus, note 64.

According to the Coase theorem, if an externality affects only a limited number of countries, negotiations between States may lead to efficient outcomes, under the condition that the property rights have been previously assigned and the risk of strategic behaviour may be mitigated. [95] In this case, a supranational body shall limit itself in organising and supervising the fulfilment of these agreements since total centralisation will lead to internalisation of the border externalities without bringing any compensative advantages. In addition, uniformity will not lead to the total elimination of interstate border externalities or the abolition of the "race to the bottom." Nevertheless, as will be shown in this chapter, minimum harmonization is the most efficient answer to the refugee crisis.

From an economic perspective, the two main transfer systems are north-to-south and south-to-south transfers.[96] In the case of north-to-south transfers, refugees are moved from wealthy countries to poorer host countries; whereas the case of south-to-south transfers, where refugees are moved from poorer countries, requires the cooperation between poorer countries. The south-to-south transfer system expands migration options for refugees.[97] This approach generates positive externalities for third countries, since it eliminates the burden of directly hosting refugees. A complete and detailed investigation has recommended that if the costs of hosting refugees are convex, then it will be more efficient not to host large concentrations of refugees in neighbouring countries. As a result, economic scholars have advocated a south-to-south transfer system since it reduces the total social costs of hosting refugees.[98]

Recently, this transfer system has also been proposed by some authors[99] in the context of the EU relocation system established in 2015[100] which establishes a quota-trading among Member States. Nevertheless, this might lead to some problems. First, refugees may be seen as commodities in inter-state transactions.[101] Second, non-financial trading (e.g. allowing Member States to make resettlement efforts instead of sharing responsibilities) can bring legal and political risks since it undermines the efforts to establish a more effective burden-sharing mechanism for asylum seekers.[102] In particular, the absence of burden-sharing might lead to political disintegration of the Member

[95] Van den Bergh, note 92.
[96] Bubb, et al. note 10.
[97] A concrete example of it is the previous case of compensation of Kenya in 1994. The Kenyan government agreed to accept money compensation in exchange of receiving Rwandan refugees who had fled to Congo.
[98] Bubb, et al. note 10.
[99] Bauböck, Rainer. "Refugee Protection and Burden-Sharing in the European Union." *JCMS: Journal of Common Market Studies*56.1 (2018): 141-156; Fernández-Huertas Moraga, Jesús, and Hillel Rapoport. "Tradable refugee-admission quotas and EU asylum policy." *CESifo Economic Studies* 61.3-4 (2015): 638-672.
[100] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece
[101] Anker, Deborah, Joan Fitzpatrick, and Andrew Shacknove. "Crisis and cure: A reply to Hathaway/Neve and Schuck." *Harvard Human Rights Journal* 11 (1998): 295.
[102] Thielemann, note 17.

States.[103] This will also undermine some of the core principles and achievements of the European integration process in the asylum law;[104] specifically, Article 3(2) TEU and Chapter 2 TFEU.

However, EU competence in asylum law would have not been needed in cases where there had been a "natural" convergence of laws (i.e. a bottom-up convergence). In these cases, the standard would not be formally fixed; it would instead remain flexible and reversible. However, these bottom-up convergences are frequent only in cases of "neutral norms"[105] for instances such as rules on formalities and procedures. In the absence of a "natural" convergence, an EU policy might be a good solution. Moreover, it is important to emphasize that regulatory competition requires a rule of non-discrimination. In other words, mutual recognition must be established.[106]

The EU's institutional framework can provide the legal instruments to enforce these types of agreements and can offer a better picture of the general number of asylum applications. More importantly, the risk of strategic behaviour[107] and the "free-riding" incentive[108] are decreased, since EU Member States are repeat players. Besides, integration becomes the most efficient answer to avoid strategic or non-cooperative behaviour among local law-makers,[109] which in the case of the refugee law, is seen as a shared policy or shared asylum burden.[110] In 2007, the European Commission affirmed the logic of harmonising EU asylum policy as a burden-sharing instrument.[111]

Moreover, the EU approach has achieved better results than all attempts towards bilateral agreements between Member States[112] since the internalisation of externalities through bargaining is unreachable and Pareto optimality cannot be achieved.[113] The absence of free choice between competing parties may lead to the distortion of competition between legal orders.[114]

Lastly, as has already been stated above, according to the Tiebout theory, information plays an important role, and there must be no information deficiencies.[115] Thus, by applying the Tiebout theory, well-informed persecuted individuals will move to the country that provides the local services which are best suited to their personal preferences, increasing their net benefits. However, only one

[103] Ruta, note 48.
[104] Thielemann, note 17.
[105] Ogus, Anthony. "Competition between national legal systems: a contribution of economic analysis to comparative law." *International and Comparative Law Quarterly* 48.02 (1999): 405-418.
[106] Deakin, Simon. "Legal Diversity and Regulatory Competition: Which Model for Europe?." *European Law Journal* 12.4 (2006): 440-454.
[107] Faure note 23.
[108] Andreoni, James. "Why free ride?: Strategies and learning in public goods experiments." *Journal of Public Economics* 37.3 (1988): 291-304.
[109] Portuese, note 47.
[110] Thielemann, note 17.
[111] European Commission. 2007. Green Paper on the Future Common Asylum System.
[112] Faure, note 23. For instance, the case of pollution water provided to Dutch victims by a Belgium firm (Pasques 1996) since the negotiations between the two countries were going longer without having a positive result.
[113] Wittman, Donald. "Why democracies produce efficient results." *Journal of Political Economy* 97.6 (1989): 1395-1424; Ellickson, Robert C. *Public property rights: Vicarious intergovernmental rights and liabilities as a technique for correcting intergovernmental spillovers*. 1979.
[114] Reich, note 86.
[115] Van den Bergh, note 50.

empirical study[116] shows that refugees have information about economic variables and there is clear evidence that economic factors matter in refugee decision making. Another study[117] demonstrates that refugees are well-informed about national asylum policies. In contrast to these two studies, in general, the literature argues that economic variables only *partially* influence refugee decision making for the destination country.[118] In addition, the literature highlights chance as the most important factor[119] since persecuted individuals have limited or no information about refugee policies.[120] Indeed, the majority of the scientific literature suggests that destinations are determined not by personal choices but by the practicalities and demands of the situation that persecuted individuals face *en route* to the destination country.[121]

In summary, the presumptions of the Tiebout theory – that citizens are well informed or that law-makers are free to choose a legal rule without any type of externalities or spill-over effects – are (almost) never met in the real world in the context of asylum law.[122] Taking into account more realistic conditions may justify further centralisation.

3.2. Race to the Bottom

There is an economic argument to regulate asylum law at the EU level due to a risk of a "race to the bottom."

However, the "race to the bottom" argument depends on the magnitude of cross-border effects.[123] This tendency is higher in the domain of laws where moral and religious norms are not involved and between jurisdictions at an equivalent stage of social and economic development.[124] The hypothesis suggests that there is a strong link between the social and economic order and the evolution of European legal principles.[125] Therefore, socio-economic factors impact on lawmakers. In other words, arbiters of legal precepts, such as national parliaments, have a high probability to converge when they have a homogenous goal, which, in the case of the refugee crisis, is to decrease the number of asylum seekers.[126]

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[116] Neumayer, Eric. "Bogus refugees? The determinants of asylum migration to Western Europe." *International Studies Quarterly* 49.3 (2005): 389-410**.**
[117] Rotte, et al. Note 20.
[118] Havinga, Tetty, and Anita Böcker. "Country of asylum by decision making or by chance: Asylum-seekers in Belgium, the Netherlands and the UK." *Journal of Ethnic and Migration Studies* 25.1 (1999): 43-61.
[119] Havinga, Tetty, and Anita Böcker. "Country of asylum by choice or by chance: Asylum-seekers in Belgium, the Netherlands and the UK." *Journal of Ethnic and Migration Studies* 25.1 (1999): 43-61.
[120] Day, Kate, and Paul White. "Decision making or circumstance: The UK as the location of asylum applications by Bosnian and Somali refugees." *GeoJournal* 56.1 (2002): 15-26; Havinga and Böcker, note 118.
[121] Crawley, Heaven. *Chance or choice? Understanding why asylum seekers come to the UK.* Coventry University, 2011.
[122] Van den Bergh, note 50.
[123] Van den Bergh, note 93.
[124] Zweigert, Konrad, et al. *Introduction to comparative law*. Clarendon Press, 1998; Van Gerven, Walter. "Bridging the unbridgeable: community and national tort laws after Francovich and Brasserie." *International & Comparative Law Quarterly* 45.3 (1996): 507-544.
[125] Watson, Alan. *The Evolution of Law.* Johns Hopkins University, 1985.
[126] Mattei, Ugo. *Comparative law and economics*. University of Michigan Press, 1997.

Therefore, to attract less persecuted individuals, Western European countries have introduced restrictive asylum policies which have led to a regulatory "race to the bottom"[127] or policy overspill.[128] More precisely, a prisoner dilemma situation could arise, eventually entailing the absence of efficient legislation in terms of enactment or enforcement.[129] An EU-wide competence, also in asylum law, might avoid such a prisoner dilemma.[130]

The competition between legal orders to create advantages for individual States is an argument that has been used in different fields of law,[131] giving rise to the harmonisation of rules and standards under the guise of "leveling the playing field to avoid distortions of competition."[132] Nevertheless, public choice scholars of federalism have argued that differentiated legal orders can also bring market integration.[133] They have taken into consideration the Swiss[134] and the Canadian[135] models. Therefore, it could be possible to have market integration without having a complete harmonisation of all legal rules and standards.[136] Thus, centralisation is needed when the differences between legal systems might create a destructive environment for competition.

Asylum policies establishing minimum standards rather than fixed standards are more beneficial to both refugees and host countries. The different conditions in the "market" of legal orders may be the result of other factors as well, such as the need for young generation labourers or the ongoing demand for labour force in the market of non-qualified jobs. In general, persecuted individuals are young; according to Eurostat, more than four out of five (82 %) first-time asylum seekers in the EU-28 in 2017 were less than 35 years old.[137] This will decrease the age dependency ratio (people younger than 15 or older than 64 years in relation to the working-age population). Moreover, their young age might affect the labour market of non-qualified jobs,[138] since their employability is closely linked to their exploitability.[139] Additionally, several economic studies have

[127] Barbou des Places, Segolene. Evolution of asylum legislation in the EU: Insights from regulatory competition theory. Robert Schuman Centre for Advanced Studies, 2003.
[128] Suriyakumaran, Anjali, and Yuji Tamura. "Asylum provision: A review of economic theories." International Migration 54.4 (2016): 18-30.
[129] Faure, note 23.
[130] Faure, note 82.
[131] Van den Bergh, note 50.
[132] Faure, note 23.
[133] Frey, Bruno S. "Direct democracy: politico-economic lessons from Swiss experience." The American Economic Review 84.2 (1994): 338-342.
[134] Ibrid.
[135] Boodman, Martin. "The myth of harmonization of laws." *The American Journal of Comparative Law* 39.4 (1991): 699-724.
[136] Revesz, Richard L. "Rehabilitating interstate competition: Rethinking the race-to-the-bottom rationale for federal environmental regulation." NYUL Rev. 67 (1992): 1210.
[137] Eurostat, Asylum statistics, Age and gender of first-time applicants, available on-line: https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#Age_and_gender_of_first-time_applicants accessed on November 30th, 2019.
[138] Legomsky, Stephen H. "Immigration, Federalism, and the Welfare State." *UCLA L. Rev.* 42 (1994): 1453; Taran, Patrick A., and Eduardo Geronimi. *Globalization, labour and migration: Protection is paramount*. International Labour Office, 2003.
[139] Neuman, Gerald L. *Strangers to the constitution: Immigrants, borders, and fundamental law*. Princeton University Press, 2010.

demonstrated that after a few years of residence in the host countries, refugees earn more than "economic migrants."[140]

The analogous application of the L&E literature to environmental law[141] might suppose that the "race to the bottom" poses a problem if it is clear that the total cost of refugees will be different between Member States should an EU competence exist. In other words, the "race to the bottom" argument constitutes a problem if the competition between countries leads to an inefficient result.

This is also supported by one empirical study[142] which states that the French restrictive asylum policy of 1991 led to the amendment of the German constitution of 1993. This resulted in the enactment of a stricter asylum policy of Great Britain in 1994. It might be that this competition can be repeated with the current refugee crisis since in the recent refugee crisis, statistically, there has been an increase of public funds allocated for refugees.[143] For instance, EU budgets for refugees during 2015 and 2016 have increased by more than 200%.[144]

By considering the increase of populism in some European countries such as France,[145] Austria,[146] and recently in Italy,[147] Europe might face a "race to the bottom" since the recent anti-immigration attitude in the political spectrum is the result of the European electorates.[148]

More precisely, in countries with a low level of immigration, the electorate has a more restrictive preference towards migrants, which will be mirrored in the attitudes of the political parties.[149] Additionally, in countries with a high level of immigration, electorates will demand a more restrictive policy if there is a significant increase in the level of asylum applications.[150] While the first

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[140] Cortes, Kalena E. "Are refugees different from economic immigrants? Some empirical evidence on the heterogeneity of immigrant groups in the United States." *Review of Economics and Statistics* 86.2 (2004): 465-480; Dustmann, Christian. "Differences in the labor market behavior between temporary and permanent migrant women." *Labour Economics* 4.1 (1997): 29-46; Rivera-Batiz, Francisco L. "English language proficiency and the economic progress of immigrants." *Economics Letters* 34.3 (1990): 295-300.

[141] Van den Bergh, note 50.

[142] Rotte, et al. note 20.

[143] OECD, Migration Policy Debates, 2017, available on-line: https://www.oecd.org/els/mig/migration-policy-debates-13.pdf accessed on November 30th, 2019.

[144]European Commission. 2016. Eu budged for the Refugee Crisis, available on-line: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/eu_budget_for_the_refugee_crisis_20160210_en.pdf accessed on November 30th, 2019.

[145] Rydgren, Jens. "France: The Front national, ethnonationalism and populism." *Twenty-first century populism*. Palgrave Macmillan, London, 2008. 166-180; Rydgren, Jens. "Meso-level reasons for racism and xenophobia: Some converging and diverging effects of radical right populism in France and Sweden." *European Journal of Social Theory* 6.1 (2003): 45-68; Biorcio, R. "The Rebirth of Populism in France and Italy." (1991). It should be mentioned that on 23 April and 7 May 2017. As no candidate won a majority in the first round on 23 April 2017 Marine Le Pen of the National Front (FN) was the second candidate to win the presidential elections.

[146] Heinisch, Reinhard. "Right-wing populism in Austria: A case for comparison." *Problems of Post-Communism* 55.3 (2008): 40-56; Betz, Hans-Georg. "Exclusionary Populism in Austria, Italy, and Switzerland." *International Journal* 56.3 (2001): 393-420. It should be mentioned that on 15 October 2017, the Austrian People's Party emerged as the largest party in the National Council.

[147]Mammone, Andrea. "The eternal return? Faux populism and contemporarization of neo-fascism across Britain, France and Italy." *Journal of contemporary european studies* 17.2 (2009): 171-192; Betz, note 146; Biorcio, note 145. It should be mentioned that the new Italian government formed in May 2018 is also leaded by one of the populism parties (Lega).

[148] Alonso, Sonia, and Sara Claro da Fonseca. "Immigration, left and right." Party Politics 18.6 (2012): 865-884; Howard, Marc Morjé. "The impact of the far right on citizenship policy in Europe: explaining continuity and change." Journal of Ethnic and Migration Studies 36.5 (2010): 735-751.

[149] Berg, Justin Allen. "White public opinion toward undocumented immigrants: Threat and interpersonal environment." *Sociological Perspectives* 52.1 (2009): 39-58.

[150] Kitschelt, Herbert, and Anthony J. McGann. *The radical right in Western Europe: A comparative analysis*. University of Michigan Press, 1997.

theory includes the current case of the Visegrad countries,[151] the second hypothesis might include countries such as Italy (before the "new" Government Conte-*bis*) and Austria (before the 2019 elections).

However, it might be that some countries, by considering the potential long-term positive impact of refugees in their population, *might* eventually establish a liberal policy, although this puts extra costs on their national budget. Accordingly, empirical studies have shown that after a few years of residence in the host countries, refugees will invest their human and economic capital in the host countries, unlike economic immigrants who will eventually invest their earnings in their countries of origin.[152]

This might have been one of the reasons why, in 2015, Germany opened its borders for Syrian refugees and suspended the application of Dublin III.[153] However, it should be stated that this strategy can also be explained through the public good theory.[154] Although international cooperation is important, this approach can explain why States with high GDP unilaterally accept a large number of asylum seekers into their territories, speeding up the stabilisation of a highly volatile situation. In contrast, smaller States have an incentive to free-ride on the protection efforts of larger States. These smaller States will use the positive externalities/slip-ins led by the non-excludability of the public good (protection of refugee rights).[155] This is also called the exploitation hypothesis: since larger States eventually have more to lose, it derives that they have fewer incentives to free-ride than smaller States.

In summary, in the case of refugee law, the "race to the bottom" theory is an important argument for centralisation. Nevertheless, countries will not always establish a restrictive policy to respond to the unfriendly asylum policies of other countries. Germany is a great example of this, opening its borders to Syrian refugees in 2015.

3.3. Reduction of Transaction Costs

EU competence has also been enshrined by the fact that harmonisation reduces transaction costs.[156] This is particularly emphasised in the case of private law since the diversity of laws increases costs

[151] Zaun, note 77.
[152] Borjas, George J. "Assimilation, changes in cohort quality, and the earnings of immigrants." *Journal of labor Economics* (1985): 463-489; Carliner, Geoffrey. "Wages, earnings and hours of first, second, and third generation American males." *Economic Inquiry* 18.1 (1980): 87-102
[153] It should be stated that in May 2016 a new proposal of the Dublin Regulation has been proposed. COM (2016) 270 final 2016/0133 (COD), Brussels, 4.5.2016 (Dublin +) (European Commission). This proposal aims that when a country receives a disproportionate number of asylum applications (150 per cent over the reference number), the new applications will be relocated across the EU Member States that area below that level.
[154] Thielemann, note 17.
[155] OLSON, JR. "MANCUR; ZECKHAUSER, RICHARD." *An Economic Theory of Alliances, in: Review of Economics and Statistics* 48 (1966): 266-279.
[156] Rose-Ackerman, Susan. Rethinking the progressive agenda. Simon and Schuster, 1993.

for international firms.[157] In public law, some authors have also used the idea of transaction costs,[158] which include not only economic activities but also any kind of social activities involving transaction costs.[159]

The reduction of transaction costs might be considered an important argument by the EU's institutions. According to this model, uniform rules may reduce information costs incurred by their legal systems since this knowledge is no longer required. However, this argument is weak for two main reasons. First, legal uncertainty might not be reduced even if there are uniform rules because EU Member States use different languages. Additionally, judges in different jurisdictions may not conduct a uniform interpretation.[160] Second, there is no supporting empirical evidence that uniform rules decrease transaction costs.[161] Important and large economic agents will not consider the adaptation costs to the new legal system as an important factor to not enter a new market.[162] However, transaction costs are an important factor in the case of natural persons (considered as contrary to legal persons), who will spend time and energy to better understand the differences between legal orders.[163]

The literature of transaction costs does not consider that there are also benefits from the diversity of legal systems, since they are in harmony with the preferences of small groups. Therefore, the balance between these two counter-arguments will determine whether the transaction costs savings of harmonisation are higher than the benefits of differentiated legal rules.[164]

The reduction of transaction costs plays a particular role in the case of the "negative harmonisation" (harmonisation without the need for an international instrument).[165] In the case of asylum law, spontaneous cooperation in international refugee law has been inefficient.[166] This is because spontaneous convergence has more advantages than formal harmonisation. It should be noted that spontaneous convergence occurs only in branches of law where it is economically appropriate;

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[157] Commission on European Contract Law, available on-line: https://www.jus.uio.no/lm/eu.principles.lando.commission/doc.html accessed on November 30th, 2019.
[158] Ruiter, Dick WP. "Is transaction cost economics applicable to public governance?." *European journal of law and economics*20.3 (2005): 287-303; Van Kersbergen, Kees, and Frans Van Waarden. "Shifts in governance: Problems of legitimacy and accountability." *Study for the Dutch Research Council (unpublished)* (2001); Dixit, Avinash K. The making of economic policy: A transaction-cost politics perspective. MIT press, 1998; Moe, Terry M. "The new economics of organization." *American journal of political science* (1984): 739-777; Williamson, Oliver E. "The economics of organization: The transaction cost approach." *American journal of sociology* 87.3 (1981): 548-577.
[159] Ruiter, note 158.
[160] Van den Bergh, note 93.
[161] Van den Bergh, Roger, and Louis Visscher. "The Principles of European Tort Law: The Right Path to Harmonisation?." *German Working Papers in Law and Economics* 2006.1 (2006): 8.
[162] Wagner, Gerhard. "The economics of harmonisation: The case of contract law." *ERA Forum*. Vol. 3. No. 2. Springer-Verlag, 2002.
[163] Siebert, Horst, and Michael J. Koop. "Institutional competition versus centralization: quo vadis Europe?." *Oxford Review of Economic Policy* 9.1 (1993): 15-30.
[164] Faure, note 23.
[165] Aldana, Julio Mario Bonilla. "La armonización del Derecho, concepto y críticas en cuanto a su implementación." *Revista e-mercatoria* 12.2 (2013): 80-139.
[166] Bouteillet-Paquet, Daphné. *L'Europe et le droit d'asile*. Editions L'Harmattan, 2001. Des Places, Ségolène Barbou. *Evolution of asylum legislation in the EU: insights from regulatory competition theory*. No. 16. European University Institute (EUI), Robert Schuman Centre of Advanced Studies (RSCAS), 2003.

in other words, where the benefits of convergence exceed its costs.[167] Nevertheless, in the case of refugee law, although the national refugee policies have adopted similar restrictive policies of other countries,[168] there hasn't been any spontaneous cooperation.

In closing, in a field where transaction costs pose substantial problems in integration, harmonisation is needed.[169] The centralisation of asylum law at an EU level will bring about a decrease in transaction costs for two main reasons. First, transaction costs are an important factor in the case of natural persons,[170] as persecuted individuals are. Second, transaction costs play a particular role in the case of the "negative harmonisation,"[171] as has happened in the case of asylum law in Western European countries in the last few decades.[172]

3.4. Protection of Human Rights

This contribution views the role of the EU as a *sui generis* organisation protecting HRs. Although this is a non-economic argument, some considerations should be specified.

The creation of the EU aimed to unite European countries economically and politically to secure lasting peace.[173] In 1957, the six founding countries, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands, created the European Economic Community or the "Common Market." By the late 1960s, the protection of HRs was also part of the European agenda,[174] which aimed to create a "Europe with a Human Face." This transformation passed through different stages.[175] However, during the first decades, the protection of HRs through EU institutions was possible only through the application of Article 100 of the Treaty of Rome.[176]

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[167] Leebron, David W. *Lying down with Procrustes: An analysis of harmonization claims*. Center for Law and Economic Studies, Columbia University School of Law, 1995.
[168] Rotte, et al. note 20.
[169] Snell and Andenas, note 67.
[170] Siebert, Horst, and Michael J. Koop. "Institutional competition versus centralization: quo vadis Europe?." *Oxford Review of Economic Policy* 9.1 (1993): 15-30.
[171] Aldana, note 165.
[172] Des Places, Ségolène Barbou. *Evolution of asylum legislation in the EU: insights from regulatory competition theory*. No. 16. European University Institute (EUI), Robert Schuman Centre of Advanced Studies (RSCAS), 2003.
[173] European Union, The history of the European Union, available on line: https://europa.eu/european-union/about-eu/history_en accessed on November 30th, 2019.
[174] Von Bogdandy, note 24.
[175] Some good examples of this goal in the early 1970s are: Declaration by the Heads of Government of the Member States meeting in Paris in 1972 (Bull. EC 10-1972: The First Summit Conference of the Enlarged Community 19–20 Oct. 1972). Cf. Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States on the Programme of Action of the European Communities on the Environment O.J. 1973, C 112/1; Council Resolution concerning a social action programme O.J. 1974, C 13/1; Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy O.J. 1975, C 92/1.
[176] Article 100 of the Treaty Establishing the European Community states: 'The Council shall. acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
The Assembly [European Parliament] and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.'

Focusing on refugee management, the asylum cooperation formally started with the Amsterdam Treaty of 1999, which was also a response to the Kosovo refugee crisis.[177] Indeed, Article 73k of the Treaty of Amsterdam directed the Council to adopt, within a period of five years, common minimum standards for the reception of asylum-seekers, asylum procedures, recognition criteria, and temporary protection. The protection of refugee rights has been also part of negotiations with new and prospective EU Member States by incorporating it in the SAA.[178] Before 1999, the role of EU institutions was marginal, and all was done at an intergovernmental level,[179] which might have raised the level of Coasean bargaining between the countries involved.[180]

The current Article 78 of the TFEU states "the Union shall develop a common policy on asylum, subsidiary protection, and temporary protection" by enhancing the EU role in asylum law. In accordance, the EU has switched from a non-binding and voluntary mechanism to the binding mechanism of recent years.[181] Thus, in June 2017, the European Commission launched an infringement procedure against Poland, Hungary and the Czech Republic for non-compliance with their legal obligations on relocation.[182] The relocation refugee programme was based on a formula allocating 40 percent on population size, 40 percent on GDP, 10 percent on average asylum applications, and 10 percent on the unemployment rate.[183]

Still, Hungary, Poland, and the Czech Republic have not complied with the relocation scheme decided by the Council in 2015,[184] which was confirmed by the CJEU in September 2017.[185] While Hungary has not taken any action at all, Poland and the Czech Republic have not complied with the Council Decision respectively since December 2015 and since August 2016. According to the literature, anti-immigration attitudes are the result of the electorates.[186] In these countries, typically with a low level of immigration, the electorate has a more restrictive preference, which will be

[177] Lavenex, Sandra. "The Europeanization of refugee policies: Normative challenges and institutional legacies." *JCMS: Journal of Common Market Studies* 39.5 (2001): 851-874.
[178] The Stabilisation and Association Agreement (SAA) constitutes the framework of relations between the European Union and the Western Balkan countries for implementation of the Stabilisation and Association Process. In this agreement, one article is dedicated to the "Visa, border management, asylum and migration," where the implementation of the 1951 Convention is established. Only focusing on the Stabilisation and Association Agreement with Western European countries, this article is: article 80 SAA (EU-Albania); article 80 (EU-Bosnia and Herzegovina); article 85 (EU-Kosovo); article 75 (EU-FYOM); article 82 (EU-Montenegro); and article 82 (EU-Serbia).
[179] Snyder, Susanna. *Asylum-seeking, migration and church*. Routledge, 2016.
[180] Faure, note 82.
[181] Thielemann, note 17.
[182] European Commission, Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice, available on line: http://europa.eu/rapid/press-release_IP-17-5002_en.htm accessed on November 30th, 2019.
[183] In should be stated that also before the EU has tried to establish a relocation structure. In concrete, in July 1994, draft text about burden-sharing method was published, which took into consideration GDP, size of territory and population size. (Council Document 7773/94 ASIM 124 (Council of the European Union, 1994)). However, the German proposal did not find the support of the Council.
[184] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece
[185] Joined Cases C-643/15 and C-647/15.
[186] Alonso, note 148; Howard, note 148.

matched by the political parties.[187] Nevertheless, their individual preferences cannot prevail since these restrictive policies widely infringe upon the perception of HRs.[188]

In addition to the protections recognised in Article 78 of the TFEU, the role of the EU has not stopped at merely the protection of "refugees" or individuals falling under the category of "subsidiary protection" but has also considered the possibility of harmonising visa issuance for humanitarian reasons. To harmonise this topic, there was a study for the European Commission back in 2002, the Green Paper on Asylum in 2006, the Stockholm Programme of 2009, and a Communication on An Open and Secure Europe in 2014.[189]

To sum up, although cooperation between Member States was a central aim since the creation of a common market, from the late 1960s, the EU institutions aimed to create a "Europe with a Human Face". This has been codified in the Amsterdam Treaty of 1999 and also in the current Article 78 of the TFEU.

4. From "Race to the Bottom" to "Cooperation" in the EU Asylum Policy: the Two Different Types of Harmonisation

In the late 1970s and early 1980s, with the election of right-wing parties in some Western countries, more restrictive immigration policies were introduced.[190] This brought about a legal competition in the refugee field.[191]

Destination countries strived to attract the lowest possible number of refugees since costs for hosting refugees are high. Indeed, a refugee influx increases competition for scarce resources such as health care, housing, education, and employment.[192] Migrants and refugees, particularly with cultural backgrounds drastically different from the host country, also raise the issue of socio-cultural membership.

This section examines the different types of border control and explores some of the empirical studies demonstrating their effectiveness to decrease the number of asylum seekers. Moreover, it shows the two different types of harmonisation by highlighting the fact that although individual countries benefit from neither fixed nor minimum standards of harmonisation, asylum policies that

[187] Berg, note 149.
[188] Ogus, Anthony. "Competition between national legal systems: a contribution of economic analysis to comparative law." *International & Comparative Law Quarterly* 48.2 (1999): 405-418.
[189] However, neither the guidelines nor the coordinated approach have ever materialized.
[190] Bale, Tim. "Turning round the telescope. Centre-right parties and immigration and integration policy in Europe." *Journal of European Public Policy* 15.3 (2008): 315-330.
[191] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." International Review of Law and Economics 23.4 (2003): 345-364.
[192] Milner J. (2000), Sharing the Security Burden : Towards the Convergence of Refugee Protection and State Security, QEH Working Chapter.

establish minimum standards rather than fixed standards are more beneficial to both refugees as well as to the host countries.

4.1. Border Control and Asylum Policy

Border control and asylum policy are examples of the variables that might affect refugee decision making.[193] Different from the other factors that impact on refugee decision making, border control and asylum policy are the only variables that are totally controlled by the governments of the destination countries (also in cases that a State is part of an international or supranational public body – i.e. EU due to a decision by the national Parliament to give up part of their sovereignty). Therefore, the accession in the EU has sovereignty costs since, in the case of the EU competence, national lawmakers renounce the establishment of specific rules according to their best interests.

This is also connected with the decision of Member States to delegate their powers to the EU within their constitutional limits.[194] Although according to public choice theory, politicians aim to maximise their utility,[195] they have sometimes chosen not to decide or to delegate their powers. Their decisions are based on rational behaviour: national legislators will delegate competences to the EU if the costs of the delegation are outweighed by the corresponding benefits to obtain the highest expected net gains. [196]

Considering other reasons to delegate legislative powers to EU institutions, uncertainty might play an important role. In order not to lose political support, lawmakers will delegate the decision to other bodies.[197] Since the 1970s were characterised both by this so-called "Europe with a Human Face"[198] and also with an increase of right-wing parties proposing more restrictive immigration policies,[199] the issue of asylum law became controversial and caused conflict, leading to its delegation by legislators. National governments could subsequently attribute the loss of reputation deriving from restrictive policies to international and supranational agreements and institutions, even if their national policies would have been similar.[200]

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[193] Rotte, et al. note 20.
[194] Salzberger, Eli M., and Stefan Voigt. "On the delegation of powers: with special emphasis on Central and Eastern Europe." *Constitutional Political Economy* 13.1 (2002): 25-52.
[195] Frey, Bruno, and Lawrence J. Lau. "Towards a mathematical model of government behaviour." Zeitschrift für Nationalökonomie 28.3-4 (1968): 355-380.
[196] Voigt, Stefan, and Eli M. Salzberger. "Choosing not to choose: When politicians choose to delegate powers." *Kyklos* 55.2 (2002): 289-310.
[197] Bawn, Kathleen. "Political control versus expertise: Congressional choices about administrative procedures." *American Political Science Review* 89.1 (1995): 62-73.
[198] Von Bogdandy, note 24.
[199] Bale, note 190.
[200] Vink, M. (2001), The limited Europeanization of Domestic Asylum Policy: EU Governments and Two-Level Games, Paper presented at the first YEN Research Meeting on Europeanisation, Workshop IV 'Europeanisation of Domestic Policies', 2-3 November 2001, Siena, on file with the author.

From 1992 to 1994, different European countries (i.e. Austria, Belgium, Denmark, France, Germany, Norway, Portugal, Sweden, Switzerland, the Netherlands, and the UK) introduced more restrictive asylum procedures. Germany, France, Portugal, and Spain among some others even modified their national constitutions.[201] These Western countries introduced restrictive policies although the costs of these policies are higher compared to liberal asylum policies. The human resources involved in the enforcement of restrictive policies raise costs significantly.[202] In addition to the direct costs of stricter asylum laws, such as border control matters as well as costs of thorough asylum examination, there are also higher indirect costs including the training of the administrative and juridical sectors among other things. It should be underlined that the high frequency of changes in asylum policy leads to even higher indirect costs.[203]

Restrictive policies have costs that are not internalized by the host countries *per se*. For instance, due to a more restrictive USA migration policy, the number of deaths of Mexicans during their attempt to illegally enter the USA between 1996 and 2000 increased by 400%.[204] As a result, rational lawmakers opt for restrictive policies only if the costs which cannot be internalised are lower than the socio-economic costs of accepting refugees. In other words, in this case, a rational lawmaker will accept refugees if the costs for their protection are lower than the political costs coming from the increase of deaths of persecuted individuals trying to enter the nation's territory.

The economic literature is divided over the effects of restrictive asylum procedures. Some scholars argue that restrictive asylum laws directly influence the number of applications and the rate of asylum grants.[205] This was particularly true prior to the introduction of the European asylum policy expressed in the Amsterdam Treaty of 1999.[206] On the contrary, other studies argue that restrictive asylum policies do not lead to a reduction in the inflow of refugees or a better selection of asylum seekers.[207] These studies explain the peaks of refugees as consequences of broader historical events rather than as the results of specific asylum policies. For example, the peak of (Eastern European) refugees in 1992 came after the fall of the Berlin Wall and the collapse of the Soviet Union, and the peak in 2001 followed the wars in Rwanda, Kosovo, and Darfur.

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[201] des Places, et al. 191.
[202] Ibrid.
[203] Østergaard-Nielsen, Eva. "Counting the costs: Denmark's changing migration policies." International Journal of Urban and Regional Research 27.2 (2003): 448-454.
[204] Adamson, Fiona B. "Crossing borders: international migration and national security." *International security* 31.1 (2006): 165-199.
[205] Jennissen, Roel, and Leo van Wissen. "The distribution of asylum seekers over Northern and Western European countries, 1985-2005." *Genus* 71.1 (2015), p. 109. Des Places, Ségolène Barbou. *Evolution of asylum legislation in the EU: insights from regulatory competition theory*. No. 16. European University Institute (EUI), Robert Schuman Centre of Advanced Studies (RSCAS), 2003.
[206] Rotte, et al. note 20.
[207] Hatton, Timothy J. "The rise and fall of asylum: What happened and why?." *The Economic Journal* 119.535 (2009): F183-F213; Monheim, Jenny. "Human trafficking and the effectiveness of asylum policies." *German Working Chapters in Law and Economics* 2008.1 (2008): 3.

For a better understanding of the effect of restrictive asylum procedures, it is important to differentiate the types of asylum policies. There are four groups of measures: access restrictions, reforms of the asylum procedure, living conditions, and expulsions.[208] The majority of the literature agrees that legislated access restrictions led to a decrease in the number of asylum claims.[209] Some authors, however, believe that the consequences of such restrictive actions and the results of the studies are limited.[210] In the last decades, several Western countries have reformed their asylum procedures by introducing lists of "safe countries of origin" and "safe countries of transit." Nevertheless, these measures did not have a significant effect on the number of asylum seekers;[211] probably because refugees do not disclose their countries of origin or transit to the authorities.[212]

Reducing social benefits (or in other words, reforming living conditions) has an impact on asylum seekers;[213] however, this is mostly a short-term impact.[214] On the other hand, a study of 2013 demonstrates that policies affecting social benefits exhibit no statistically significant effect.[215] Regarding the last type of restrictive asylum policy, the effect of expulsion is widely discussed in the literature because the probability of being expelled by the State is higher for asylum seekers than for illegal migrants. For example, in the UK, in 2002, 4.7% of illegal migrants caught by the police were expelled while 11% of Iraqis and 55% of Yugoslavs whose asylum claims had been rejected were removed. [216]

In summary, during the 1970s and 1980s, Western European countries established different restrictive immigration policies. Nevertheless, the literature is divided regarding their impact on the reduction of the number of asylum seekers.

4.2. Asylum Law: the "Race to the Bottom" Versus Cooperation

In recent decades, Western European countries have introduced restrictive asylum policies that have led to a regulatory "race to the bottom"[217] or policy overspill.[218]

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[208] Hatton, Timothy J. (2004), "Seeking Asylum in Europe", Economic Policy, 19 (38), 5-62; Efionayi-M¨ader, Denise, Chimienti, Milena, Dahinden, Janine, Piguet, Etienne (2001), Asyldes- tination Europa: Eine Geographie der Asylbewegungen, Zu¨rich, Seismo Verlag.

[209] Ibrid; Zetter, Roger, Griffiths, David, Ferretti, Silva, Pearl, Martyn (2003), "An assessment of the impact of asylum policies in Europe, 1990-2000", Home Office Research Series 259,
available on line: http://www.homeoffice.gov.uk/rds/horspubs1.html accessed on November 30th, 2019.

[210] B¨ocker, Anita, Havinga, Tetty (1997), Asylum migration to the European Union: Patterns of origin and destination, Institute for the Sociology of Law, Nijmegen, 121p.

[211] Hatton, note 208.

[212] B¨ocker, note 210.

[213] Hatton, note 208.

[214] B¨ocker, note 210.

[215] Bell, Brian, Francesco Fasani, and Stephen Machin. "Crime and immigration: Evidence from large immigrant waves." *Review of Economics and statistics* 21.3 (2013): 1278-1290.

[216] Monheim, note 207.

[217] Des Places and Barbou note 205.

[218] Suriyakumaran, Anjali, and Yuji Tamura. "Asylum provision: A review of economic theories." *International Migration* (2015).

Since the 1980s, and especially after the collapse of the communist regimes and the economic crisis of 2008, the main goal of many States has been to have as few refugees as possible. During the 1990s, national governments decided to restrict asylum rather than to enter into cooperative sharing schemes. This dynamic corresponds to the classic Prisoner's Dilemma:[219] the two parties try to save themselves through unilateral action rather than accepting the costs that accompany the benefits of cooperation.

This competition between asylum laws of different destination countries (or the so-called "asylum shopping") has been excessively costly for States.[220] The human resources involved in the enforcement of restrictive policies raise costs significantly.[221] Moreover, the high frequency of changes in the asylum policy leads to even higher indirect costs.[222]

States were convinced that lowering the asylum recognition rate will decrease the number of future applications,[223] just like higher recognition rates, conversely, induced more applications.[224] An empirical study analysing the dynamic relationship between asylum applications and recognition rates in Europe between 1987–2010 confirmed this assumption.[225]

The "race to the bottom" has created negative externalities for other countries. As stated above, according to the competition theory, the creation of non-internalised negative externalities (for instance, political costs at the international level) is a sign of market failure and inefficient competition.[226] However, in asylum law, spontaneous cooperation has been inefficient.[227] This problem exists because it is in the interest of an individual country to free ride at the expense of other members. Although cooperation produces positive-sum benefits, which individual States cannot attain on their own, in the case of higher participants in a number of destination countries, the distribution of costs and benefits in any burden-sharing system is skewed.[228]

During the 1990s, several attempts such as the Schengen Implementation Convention and the Dublin Convention were made to organise cooperation schemes among EU Member States. This was

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[219] Noll, G. (1997), 'The Non-Admission and Return of Protection Seekers in Germany', International Journal of Refugee Law, Vol. 9, No. 3, p. 415

[220] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.

[221] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." International Review of Law and Economics 23.4 (2003): 345-364.

[222] Østergaard-Nielsen, Eva. "Counting the costs: Denmark's changing migration policies." International Journal of Urban and Regional Research 27.2 (2003): 448-454.

[223] Holzer T, Schneider G and Widmer T (2000b) The impact of legislative deterrence measures on the number of asylum applications in Switzerland (1986–1995). International Migration Review 34(4): 1182–1216.

[224] Neumayer E (2004) Asylum destination choice – what makes some West European countries more attractive than others? European Union Politics 5(2): 155–180.

[225] Toshkov, Dimiter Doychinov. "The dynamic relationship between asylum applications and recognition rates in Europe (1987–2010)." *European Union Politics* (2013): 1465116513511710.

[226] Des Places and Barbou note 205.

[227] Bouteillet-Paquet, note 166.

[228] Sandler T. and Hartley K. (2001), Economics of Alliances : the Lessons for Collective Action, Journal of Economic Literature, 39, p. 869-896.

an attempt to centralise the EU's asylum policy. This centralisation aims to avoid unilateral violations of fundamental benchmarks established in TFEU by single Member States.[229]

These policies reflected two main goals: limiting "asylum shopping" and constituting a common position regarding refugees. This common policy was seen as an insurance mechanism to maintain the protection granted to asylum seekers;[230] it avoided peak costs for a single Member State by sharing the financial cost with other EU members,[231] and it ensures greater fairness for asylum seekers.[232] One of the first instances when these policies were applied was during the refugee waves caused by the Yugoslavian war.[233]

Centralised action is a powerful justification for restrictive policies. As stated above, national governments can attribute the loss of a good reputation deriving from restrictive policies to international agreements, even if their national policies would have been similar.[234] This is the case in the constitutional reforms in Spain and France of 1993. National parliaments, by highlighting the necessity to comply with the Schengen Convention, modified their national constitutions regarding asylum rights. However, the Schengen Convention imposed neither the abolition nor even the amendment of the constitutional right of asylum. These States have benefited from acting collectively to achieve migration-related objectives while maintaining their national competence.[235]

Since interests are heterogeneous, the feasibility of cooperation depends on the size of the coalition and the external effects of cooperation on non-co-operators. Smaller groups tend to cooperate more closely and effectively. The larger the group, the more likely it becomes that individual States will prefer all other States to cooperate while they individually prefer to defect and to maximise their utility.[236] This approach, however, becomes politically and especially financially costly for countries that want to defect while the others cooperate. This is further highlighted in cases where cooperation in asylum policy is only part of the international cooperation. This is the case with

[229] Deakin, Simon. "Legal Diversity and Regulatory Competition: Which Model for Europe?" European Law Journal 12.4 (2006): 440-454.
[230] Suhrke, A., (1998), Burden-sharing during Refugee Emergencies: The logic of Collective versus National Action, Journal of Refugee Studies, Vol. 11, No. 4, p. 396.
[231] Noll, G. (2000), Negotiating Asylum, The EU acquis, Extraterritorial Protection and the Common Market of Deflection, Nijhoff.
[232] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.
[233] In September 1995, the Council published a resolution on the distribution of responsibility among Member States (OJ 1995, C262/1/3, 7/10/1995).
[234] Vink, M. (2001), The limited Europeanization of Domestic Asylum Policy: EU Governments and Two-Level Games, Paper presented at the first YEN Research Meeting on Europeanisation, Workshop IV 'Europeanisation of Domestic Policies', 2-3 November 2001, Siena, on file with the author.
[235] Thouez, C. (2000), Towards a common European migration and asylum policy?, UNHCR's New Issues in Refugee research, Working Paper No. 27, available in unhcr.ch
[236] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.

the EU asylum law:[237] by cooperating in other fields as well, EU Member States have fewer net benefits deriving from EU asylum law.

However, restrictive asylum policy is costly.[238] The net benefit for each country is greater under coordinated as opposed to uncoordinated maximisation[239] because in the case of coordination the externalities across the countries are internalised.[240] This is clear in the case of two countries that are very similar in socio-economic and cultural terms. When the countries are sufficiently different from each other, coordination is incentive-incompatible for the country with the lower benefit. In practice, coordination is difficult to be achieved, and the introduction of cross-border transfers may play a role.[241]

A higher degree of cooperation in bigger groups reduces costs. This is why Norway and Switzerland (non-EU Member States) are part of the European asylum policy. The centralisation of asylum law can occur in two different forms: a fixed-standard regime or a minimum standard regime. In the first case, the EU decides the rules and Member States cannot change them. In the second case, although the EU decides the principles, national States can compete by not going below the minimum standard.

From a L&E standpoint, individual countries would benefit from neither fixed nor minimum standard regimes of asylum policy coordination since each State is interested in setting the refugee eligibility standard according to its individual balance between the benefits against the costs of hosting refugees. Quite simply, full harmonization takes the State's individual cost-benefit analysis. In addition, the most popular destinations such as countries that offer the highest social benefits would suffer more from losing discretion.[242] Nevertheless, asylum policies establishing minimum standards rather than fixed standards would offer more benefits to both refugees and individual destination countries. There are three main reasons for this.

All three of these reasons underline the importance of State discretion, in asylum law as well. Firstly, national governments would still have discretion in regulating asylum rules according to their cost-benefit analyses. National governments consider flexibility in asylum policy important.[243]

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[237] Barbou des Places, S (2002a), Burden Sharing in the field of Asylum. Legal motivations and Implications of a Regional Approach, Paper presented for the 3rd Workshop of the UACES Study Group on EU Burden-Sharing 'Internal and External Dimensions of EU Burden- Sharing, 26-27 April 2002, London School of Economics, fothcoming Working Paper, RSC, European University Institute, Florence, on file with the authors.

[238] des Places, Ségolène Barbou, and Bruno Deffains. "Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe." *International Review of Law and Economics* 23.4 (2003): 345-364.

[239] Hatton, note 208.

[240] Facchini, G., O. Lorz, and G. Willmann 2006 "Asylum seekers in Europe: The warm glow of a hot potato", Journal of Population Economics, 19(2): 411–430.

[241] Czaika, M. 2009 "Asylum cooperation among asymmetric countries: The case of the European Union", European Union Politics, 10(1): 89–113.

[242] Monheim-Helstroffer, Jenny, and Marie Obidzinski. "Optimal discretion in asylum lawmaking." *International Review of Law and Economics* 30.1 (2010): 86-97.

[243] Esty and Geradin, note 23.

Secondly, these countries, by maintaining discretion with regard to asylum norms, would increase their total welfare. Thirdly, in the case of a minimum-standard regime, each country still has the opportunity to maximise the sum of its national net benefits.[244] States will still have the chance to assert their national preferences (mainly) according to the national absorption capacity for the new labour market and national security considerations.[245]

Popular countries will often set their standard equal to the common minimum-standard regime. They still will lose utility compared to unilateral decision making, but that loss is still lower compared to a fixed-standard regime. In addition, unpopular countries will benefit more from a minimum-standard regime rather than a fixed-standard regime.

The total number of protected refugees is higher in the case of asylum policies establishing minimum standards since all countries would accept the same number of refugees, in addition to a higher number of accepted refugees in States that have established liberal asylum policies. A flexible standard is always better for refugees compared to a fixed standard asylum regime. This leaves a margin to increase the highest standard, which leads to flexible asylum law harmonisation.[246]

In summary, in recent decades, Western European countries have introduced restrictive policies causing a "race to the bottom." Nevertheless, restrictive national asylum policies in the 1990s were highly costly for governments and created negative externalities for other countries, too. Therefore, EU Member States (plus Norway and Switzerland) have agreed upon a set of common EU asylum regulations. Although the economic analysis of law concludes that individual countries benefit from neither fixed nor minimum standard harmonisation, asylum policies that establish minimum standards rather than fixed standards give more benefits to both refugees and individual countries.

5. Conclusions

This chapter discusses the principle of subsidiarity in asylum law. The intention was to better understand the extent of EU power in asylum law in addition to exposing the advantages and the disadvantages of decentralised decision making by looking at the criteria of economic efficiency.

This contribution considers some of the most important legal reasoning, public choice literature and the economic analysis of legal harmonisation without being comprehensive of all types of economic theories. Its central research question approaches the topic of allocative efficiency

[244] Monheim-Helstroffer, note 242.
[245] In case that host countries are poor or undeveloped countries, other factors – such as costs/benefits of international aid in addition to the political relation with the sending countries – shall also be considered. Jacobsen, Karen. "Factors influencing the policy responses of host governments to mass refugee influxes." International migration review (1996): 655-678.
[246] Monheim-Helstroffer, note 242.

through the economic analysis of the Tiebout theory and the dynamic view of competition between legal orders.

The presumptions of the Tiebout argument in favour of competition between legal orders are: 1) A large number of suppliers of legal rules; 2) No information deficiencies; and 3) No externalities, which also brings problems with economies of scale. While the first requirement in asylum law in the European context might be considered fulfilled, the other two are not. Neither the refugees nor the single States have the information needed to make the decision. In general, the literature argues that asylum seekers know nothing or have little information regarding the final destination country.[247] In addition, States do not perfectly possess all the information about the preferences of all persecuted individuals regarding the decision of the final destination country. Moreover, the individual State's choice entails positive or negative externalities for third countries because it directly affects the flow of migration.[248]

The EU's competence in refugee law has two other advantages. First, the centralisation of law leads to the reduction of transaction costs, which play a particular role in the case of the "negative harmonisation."[249] Indeed, in the case of asylum law, spontaneous cooperation in international refugee law has been inefficient:[250] countries have continuously restricted their national refugee policies by adopting similar restrictive policies of other countries.[251] Second, the EU competence in asylum law aims to bring about equality of protection of refugee rights within EU Member States. This new strategy has been on the EU agenda since the late 1960s.[252]

However, total EU competence in asylum law without legal competition between EU Member States will increase sovereignty costs. Hence, national competencies are fully pre-empted from taking independent action. In addition, given the heterogeneous preferences of different EU Member States, full harmonisation should remain an *ultimum remedium*.[253] Moreover, the results of the dynamic approach to the competition between legal orders should be considered.[254] While the EU institutions shall organise competition between the laws of EU Member States, the sovereignty costs should be limited as much as possible.

A strategy that considers both the advantages and disadvantages of the centralisation of refugee law is the minimum standard harmonisation. In other words, in asylum law, a mixed system where States can still compete but cannot go under a certain level of protection might be a good

[247] Havinga and Böcker, note 118.
[248] Bubb, et al. note 10.
[249] Aldana, note 165.
[250] Bouteillet-Paquet, note 166.
[251] Rotte, et al. note 20.
[252] Von Bogdandy, note 24.
[253] Van den Bergh, note 93.
[254] Van den Bergh, note 50.

solution. Thus, the harmonisation of laws and competition between legal rules are not necessarily mutually exclusive.[255]

The minimum standard harmonisation is in accordance with the evolution of EU law and the principle of subsidiarity established in the Treaty of Amsterdam of 1999, which aimed to increase the Community's competence and offer more autonomy to Member States.[256] The Treaty of Amsterdam codified two important shifts.[257] First, the so-called horizontal expansion,[258] from a supranational organization striving to liberalise trade to one attempting to acquire the power to advance the social and economic rights of all European citizens. Second, it strengthens the community powers "vertically:"[259] from normative uniformity within the EU to harmonisation which also tolerates some degree of competition between legal orders.

The only strategy that includes both these principles, highlighting the principle of subsidiarity, is if EU law establishes the minimum provisions for competition between EU Member States and is allowed to codify policy to ensure the survival of the best rule.[260] Indeed, even the European Commission[261] has accepted that policy harmonisation can only address imbalances due to differences in domestic legislation, but cannot change the main pull-factors (e.g. geography, language, history, or migration network) that attract refugees to some countries rather than to others.[262]

Lastly, when competing with each-other within an EU competence, national States should not have a protectionist intent. Therefore, the suitability and necessity tests are already needed to flesh out intentionally protectionist rules of the Member State.[263] In other words, if the instruments applied are not connected to the ends or if there are equally effective but less restrictive alternatives, a national measure having a restrictive effect is likely to be, in fact, the product of a protectionist intent. [264]

[255] Van den Bergh, note 93.
[256] Reich, note 86.
[257] Dougan, Michael. "Minimum harmonization and the internal market." *Common Market L. Rev.* 37 (2000): 853.
[258] Stuyck, Jules, and Peter Wytinck. "Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, Judgment of 13 November 1990 (Sixth chamber)." *Common Market Law Review* 28.1 (1991): 205-223; Case 152/84, at 749, para 48.
[259] C-103/88; C-125/88.
[260] Reich, note 86.
[261] European Commission, note 111.
[262] Thielemann, note 17.
[263] Bieber, Roland, et al. "One European Market: A Critical Analysis of the Commission's Internal Market Strategy." (1988).
[264] Snell, note 89.

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English Version

Refugee Flow: a Law and Economics Approach

This research aims to analyse refugee flow through a law and economics lens. This study offers a short historical overview of the creation of the United Nations High Commissioner for Refugees by examining some of these events utilizing law and economics methods. In addition, a law and economics model is applied, based on the idea that refugees, as well as national states, *might* aim to maximize their net benefits. Some of the most important variables that impact the refugee decision-making process are then explored as well as the most important "push" factors that impact lawmakers in enacting and modifying refugee laws (e.g. protection of national security and the safeguarding of the national job market). Afterwards, the 1951 Convention Relating to the Status of Refugees is discussed, delving into the main factors for its ratification and compliance by national parliaments by reflecting upon the historical context surrounding its ratification, the importance of the construction of a state based on democratic values, and the fact that this international treaty is considered a non-consequential treaty which also incorporates some of the flexible clauses, such as reservation, denunciation and escape clauses. Then brought forth is a study of the economic advantages and disadvantages of a centralized supernational asylum law (*acquis communautaire*) that may result in the elimination of competition between legal orders in refugee law and the removal of negative externalities caused by "asylum shopping". To reach the goal established in Article 5 of the Treaty on European Union, the need for harmonization of asylum standards is examined through the application of an economic approach. Specifically, the economic methodology is used to investigate the application of the subsidiarity principle by considering some of the most important economic criteria for both centralisation and decentralisation and by applying the findings to the asylum law. In particular, this proposal looks at the Tiebout model, the problem of the "race to the bottom", the reduction of transaction costs, and the importance of the protection of refugee human rights. These theories are commonly used in cases with a transboundary nature, which produces [negative] international externalities. To sum up, international refugee law will be critically analysed through a multidisciplinary approach. The principal goal is to explore the "demand" and "supply" of the "refugee law market" through the lens of the law and economics approach but with the context of human rights. After explaining the evolution of the human rights approach by incorporating law and economics insights, this scientific work elaborates on the main "push" factors that impact on the refugee choice – demand side – and on the public policy – supply side. In the conclusion, some policy suggestions are proposed that considers the national preferences of destination countries and the protection of refugee rights.

Dutch Version

Vluchtelingenstroom: een rechtseconomische benadering

Deze thesis beoogt de vluchtelingenstroom te analyseren door een rechtseconomische lens. Er wordt een kort historisch overzicht gegeven betreffende de instelling van de Hoge Commissaris voor de Vluchtelingen van de Verenigde Naties door het onderzoeken van enkele van deze gebeurtenissen met behulp van rechtseconomische methoden. Daarnaast wordt een rechtseconomisch model toegepast, gebaseerd op het idee dat vluchtelingen, evenals nationale Staten, ernaar *zouden kunnen* streven om hun netto voordelen te maximaliseren. Vervolgens worden een paar van de belangrijkste variabelen die van invloed zijn op het vluchtelingen-besluitvormingsproces onderzocht, evenals de belangrijkste "pushfactoren" die de wetgever beïnvloeden bij de vaststelling en aanpassing van de asielwetgeving (bijv. bescherming van de nationale veiligheid en bescherming van de nationale arbeidsmarkt). Vervolgens wordt het Verdrag betreffende de status van vluchtelingen van 1951 besproken, waarbij wordt ingegaan op de belangrijkste criteria voor zijn ratificatie en naleving door nationale parlementen door een beschrijving van de historische context betreffende zijn ratificatie, het belang van de constructie van een Staat gebaseerd op democratische waarden, en het feit dat dit internationale verdrag wordt aangemerkt als een verdrag zonder rechtstreekse werking waarin ook enkele flexibele artikelen zijn opgenomen zoals voorbehouds-, opzeggings- en ontsnappingsclausules. Vervolgens wordt nader ingegaan op de economische voor- en nadelen van een centrale super-nationale asielwetgeving [binnen het *acquis communautaire*] die kan resulteren in het schrappen van concurrentie tussen rechtsordes betreffende de asielwetgeving en het opheffen van negatieve effecten veroorzaakt door "asielshopping." Om het in artikel 5 van het Verdrag betreffende de Europese Unie vastgestelde doel te bereiken, wordt de noodzaak van harmonisatie van asielnormen onderzocht via de toepassing van een economische benadering. De economische methoden worden met name gebruikt om de toepassing te onderzoeken van het subsidiariteitsbeginsel door afweging van enkele van de belangrijkste economische criteria voor zowel centralisatie als decentralisatie en door toepassing van de bevindingen op de asielwetgeving. Deze thesis kijkt vooral naar het Tiebout-model, het probleem van de "race naar de bodem," de verlaging van transactiekosten en het belang van de bescherming van de mensenrechten van vluchtelingen. Deze theorieën worden doorgaans gebruikt in gevallen met een grensoverschrijdend karakter, leidend tot (negatieve)

externe effecten. Samenvattend, de internationale vluchtelingenwetgeving wordt in wezen geanalyseerd door middel van een multidisciplinaire benadering. De belangrijkste doelstelling is het onderzoeken van “vraag” en “aanbod” van de “vluchtelingenwetgevingsmarkt” door de lens van de rechtseconomische benadering maar binnen de context van de mensenrechten. Na een toelichting op de evolutie van de mensenrechtenbenadering door integratie van juridische en economische inzichten, geeft dit wetenschappelijk werk een uiteenzetting betreffende de belangrijkste “pushfactoren” die van invloed zijn op de “keuze” van vluchtelingen – de vraagzijde – en op het overheidsbeleid – de aanbodzijde. In de conclusie worden enkele beleidssuggesties gedaan, waarbij rekening wordt gehouden met de nationale voorkeuren van de landen van bestemming en de bescherming van vluchtelingenrechten.

Hebrew Version

נחשול פליטים: נקודת המבט של הגישה הכלכלית למשפט

מטרת החיבור היא ניתוח נחשולי פליטים מבעד לעדשת הגישה הכלכלית למשפט. תחילה, מוצעת סקירה היסטורית קצרה באשר להקמת נציבות האו"ם לפליטים, אגב בחינתם של אירועים רלבנטיים, בעזרת שיטות לניתוח כלכלי של המשפט. נוסף על כך, נעשה בחיבור שימוש במודל של ניתוח כלכלי על בסיס הרעיון שהן פליטים והן מדינות עשויים לשאוף להשאת התועלות שלהם. בהמשך לכך, נבחנים משתנים מרכזיים המשפיעים על תהליך קבלת ההחלטות של פליטים, כמו גם גורמי הדחיפה העיקריים המשפיעים על מחוקקים בבואם לחוקק או לתקן חוקי מקלט (לדוגמה: הגנה על ביטחון המדינה או על שוק התעסוקה המקומי).

לאחר מכן, נדונה בחיבור האמנה בדבר מעמדם של פליטים משנת 1951. חלק זה מתמקד בגורמים המרכזיים לאשרור האמנה בפרלמנטים המדינתיים והעמידה בדרישותיה, בחשיבות השתתת מדינה על אדני ערכים דמוקרטיים, ובניתוח של אמנה בין-לאומית זו כאמנה שאינה תוצאתית אשר מכילה מספר הוראות גמישות, כגון הסתייגות (reservation), גינוי (denunciation) וסעיפי מילוט (escape clauses).

להשלמת התמונה, מוצג בחלק הבא מחקר אודות יתרונותיהם וחסרונותיהם של דיני פליטים על-לאומיים ריכוזיים במסגרת המשפט האירופי [כחלק מה-*acquis Communautaire*] , אשר עשויים להביא לסיום התחרות בין שיטות משפט בתחום דיני המקלט ולהסרתן של החצנות שליליות שנגרמות על ידי ברירת מקלט (asylum shopping). הצורך בהרמוניזציה של סטנדרט המקלט כדי להגשים את התכלית שנקבעה בסעיף 5 לאמנת האיחוד האירופי נבחן באמצעות יישום גישה כלכלית. בפרט, נעשה שימוש בשיטות כלכליות כדי לרדת לחקר יישום עקרון הסובסדירות (subsidiarity) באמצעות בחינת אמות מידה כלכליות מרכזיות לריכוז לעומת ביזור ובאמצעות יישום הממצאים בתחום דיני המקלט. התיזה מתמקדת במודל טיבו, בבעיית "המירוץ לתחתית", בהפחתת עלויות העסקה ובחשיבות ההגנה על זכויות האדם של פליטים. תיאוריות אלה משמשות יחדיו במקרים בעלי אופי חוצה-גבולות, אשר יוצרים החצנות בין-לאומיות שליליות.

לסיכום, בחיבור נערכת בחינה ביקורתית של דיני הפליטים הבין-לאומיים בעזרת גישה רב-תחומית. מטרתו המרכזית של ניתוח ביקורתי זה היא חקר "ההיצע" ו"הביקוש" של "שוק דיני הפליטים" מבעד לעדשת הגישה הכלכלית למשפט אך בהקשר של זכויות אדם. לאחר הסבר התפתחותה של גישת זכויות האדם באמצעות תובנות מתחום הניתוח הכלכלי של המשפט, עבודת מחקר זו מרחיבה על גורמי הדחיפה העיקריים המשפיעים על בחירת הפליטים – דהיינו צד הביקוש, וכן על מדיניות ציבורית – קרי צד ההיצע. בפרק הסיכום מוצגות מספר המלצות מדיניות המבוססות על שקילת ההעדפות בדבר מדינות היעד וההגנה על זכויות הפליטים.

German Version

Flüchtlingsströme aus rechtlicher und ökonomischer Sicht

In diesem Forschungsbeitrag werden Flüchtlingsströme aus rechtlicher und ökonomischer Perspektive analysiert. Die Untersuchung bietet zunächst einen kurzen historischen Überblick bezüglich der Einsetzung des UNHCR (United Nations High Commissioner for Refugees). Dabei werden einige der damaligen Vorgänge mittels rechtlicher und ökonomischer Methodik betrachtet. Der Verwendung rechtlicher und ökonomischer Modelle liegt die Annahme zu Grunde, dass Flüchtlinge, ähnlich wie Nationalstaaten, in ihrem Handeln möglicherweise eine Strategie der Nutzenmaximierung verfolgen. Im Folgenden werden einige der wichtigsten Faktoren untersucht, welche die Entscheidungsfindung von Flüchtlingen leiten, sowie die wichtigsten „Push-Faktoren", welche die jeweiligen Gesetzgeber beeinflussen hinsichtlich der Erlassung und Änderung von Gesetzen zur Flüchtlingspolitik (bspw. Fragen der inneren Sicherheit oder des heimischen Arbeitsmarktes). In Anschluss an diese Betrachtungen wird die Flüchtlingskonvention von 1951 erörtert, insbesondere bezüglich ihrer Ratifizierung sowie ihrer Implementierung und Einhaltung durch die jeweiligen nationalen Parlamente. Im Zuge dessen werden der historische Kontext ihrer Ratifizierung betrachtet, die allgemeine Bedeutung eines auf demokratischen Werten basierenden Staatswesens sowie die Tatsache, dass diese Konvention aufgrund von enthaltenen Vorbehalts-, Kündigungs- und Befreiungsklauseln als nicht- bindende Vereinbarung erachtet wird. Daran anschließend folgt eine Untersuchung der ökonomischen Vor- und Nachteile eines zentralen, supranationalen Asylrechts (*acquis communautaire*), welches zu einer Auflösung des Wettstreits bestehender gesetzlicher Bestimmungen zur Flüchtlingspolitik führen könnte sowie zur Eliminierung negativer Externalitäten, die durch das „Asyl-Shopping" verursacht werden. Hinsichtlich des Artikels 5 des Vertrags über die Europäische Union wird der Bedarf nach einer Harmonisierung der Asylgesetzgebung mittels einer ökonomischen Herangehensweise beleuchtet. Mit dieser Methodik wird auch die Anwendung des Subsidiaritätsprinzips untersucht, etwa im Hinblick auf die wirtschaftlichen Argumente die für bzw. gegen eine Zentralisierung sprechen. Die Ergebnisse dieser Betrachtung werden im Anschluss auf die Frage der Asylgesetzgebung angewendet. Die vorliegende Arbeit widmet sich insbesondere dem Tiebout- Modell, dem Problem des „race to the bottom", der Reduzierung der Transaktionskosten sowie der Bedeutung des Schutzes der Menschenrechte der Flüchtlinge. Diese Theorien finden gemeinhin Anwendung in Fällen grenzüberschreitender Art, was zu [negativen] internationalen Externalitäten führt. Zusammenfassend gesagt, wird die internationale Flüchtlingsgesetzgebung mittels einer multidisziplinären Herangehensweise kritisch analysiert. Das hauptsächliche Ziel ist dabei,

„Angebot“ und „Nachfrage“ auf dem „Markt der Flüchtlingsgesetzgebung“ aus rechtlicher und ökonomischer Perspektive zu untersuchen, ohne den Aspekt der Menschenrechte dabei außer Acht zu lassen. Im Anschluss an eine Darstellung der Entstehungsgeschichte der am Prinzip der Menschenrechte ausgerichteten Herangehensweise, die durchaus rechtliche und ökonomische Aspekte beinhaltet, wird die vorliegende Arbeit zum einen die „Push-Faktoren“ untersuchen, welche die Entscheidungsfindung von Flüchtlingen beeinflussen – die Nachfrageseite also –, zum anderen die konkrete Gesetzgebung – die Angebotsseite. In den Schlussfolgerungen werde einige Vorschläge zur Gesetzgebung unterbreitet, die sowohl die Präferenzen der Zielstaaten der Flüchtlingsströme berücksichtigen als auch den Schutz der Rechte der Flüchtlinge.

Italian Version

Il Flusso dei Rifugiati: un approccio economico-giuridico

Questa ricerca ha lo scopo di analizzare il flusso dei rifugiati attraverso un approccio economico-giuridico. Lo studio offre una breve panoramica storica della creazione dell'Alto commissario delle Nazioni Unite per i Rifugiati esaminando alcuni di questi eventi utilizzando metodi legali ed economici. Inoltre, viene applicato un modello economico-giuridico, basato sull'idea che i rifugiati, così come gli Stati, *potrebbero* mirare a massimizzare i loro benefici netti. Vengono quindi esplorate alcune delle variabili più importanti che incidono sul processo decisionale dei rifugiati, nonché i più importanti fattori di "spinta" che incidono sui legislatori nell'emanazione e nella modifica delle leggi sui rifugiati (ad esempio la protezione della sicurezza nazionale e la tutela del mercato del lavoro nazionale). Successivamente, viene discussa la Convenzione relativa allo Status dei Rifugiati del 1951, approfondendo i principali fattori per la sua ratifica e conformità da parte dei parlamenti nazionali riflettendo sul contesto storico che circonda la sua ratifica, l'importanza della costruzione di uno stato basato su valori democratici, e il fatto che questa convenzione internazionale sia considerato un trattato non consequenziale che incorpora anche alcune delle clausole flessibili, come le clausole di riserva, di denuncia e di fuga. Viene quindi presentato uno studio dei vantaggi e degli svantaggi economici di una legge centralizzata in materia di asilo (*acquis comunitario*) che può comportare l'eliminazione della concorrenza tra sistemi giuridici nel diritto dei rifugiati e la rimozione di esternalità negative causate da “asylum shopping”. Per raggiungere l'obiettivo stabilito dall'articolo 5 del Trattato sull'Unione Europea, la necessità di armonizzare le norme in materia di asilo viene esaminata attraverso l'applicazione di un approccio economico. In particolare, il metodo economico viene utilizzato per studiare l'applicazione del principio di sussidiarietà prendendo in considerazione alcuni dei criteri economici più importanti sia per la centralizzazione che per il decentramento e applicando i risultati al diritto dei rifugiati. In particolare, questa tesi esamina il modello di Tiebout, il problema della “race to the bottom”, la riduzione dei costi di transazione e l'importanza della protezione dei diritti umani dei rifugiati. Queste teorie sono comunemente usate in casi di studio di problemi di natura transfrontaliera, che producono esternalità internazionali [negative]. Riassumendo, il diritto internazionale dei rifugiati è analizzato attraverso un approccio multidisciplinare. L'obiettivo principale è quello di esplorare la "domanda" e "offerta" del "mercato dei rifugiati" attraverso un metodo economico-giuridico, ma nel contesto dei diritti umani. Dopo aver spiegato l'evoluzione dei diritti dei rifugiati, incorporando approfondimenti di diritto ed economia, questo lavoro scientifico elabora i principali fattori di "spinta" che incidono sulla scelta dei rifugiati, sul lato della domanda, e sul lato delle politiche

pubbliche, sul lato dell'offerta. In conclusione, vengono proposti alcuni suggerimenti politici che tengono conto delle preferenze nazionali dei paesi di destinazione e della protezione dei diritti dei rifugiati.

European Doctorate in Law & Economics

Curriculum vitae

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Short bio	
Dr. Denard Veshi is the Chair of Jean Monnet EU Center of Excellence at University of New York Tirana (UNYT, Albania) and the Director of the Albanian Advocate School. He has published several papers indexed in Scopus (currently, 14 papers) in English and in Italian, as a single or first author by giving him H-index 4, which is quite high for a young legal scholar. In addition, he has studied and/or conducted research in eight different countries (Albania, Germany, Israel, Italy, Spain, Switzerland, the Netherlands, and Turkey) as a Ph.D. student or visiting fellow. His first PhD thesis (LAST-JD) focussed on medical ethics and law and the second PhD thesis (EDLE) investigates the refugee crisis by also considering law and economics standpoint.	
Education	
PhD in European Doctorate in Law & Economics (EDLE)	2015-2020
PhD in Joint International Doctoral Degree in Law, Science and Technology (LAST-JD)	2012-2015
MA in Insurance, Compulsory and Complementary Welfare, Public and Integrative Health Care (MAPA) at Carlo Cattaneo LIUC, School of Law (Italy)	2011-2012
Single Cycle Degree Programme in Law at University of Bologna, School of Law	2006-2011
Work experience	
Director of the Albanian Advocate School, Tirana, Albania	09.2020
Legal Expert on Migration Law at European Movement Albania, Tirana, Albania	01.2020-05.2020
Chair of Jean Monnet EU Center of Excellence at University of New York Tirana, Tirana, Albania	10.2019-
Lecturer at University of New York Tirana, Tirana, Albania	09.2016-09.2019
Teaching Assistant of International Health Law at University of Bologna, School of Economics, Bologna, Italy	12.2015-03.2016
Tutor of E-Learning at University of Bologna, School of Education, Bologna, Italy	12.2010-11.2011
Tutor of Internationalization at University of Bologna, School of Arts and Literature, Bologna, Italy	03.2009-11.2010
Prizes and awards	
Erasmus+ Jean Monnet Module EU Integration Process and the Promotion of Human Rights in Albania (620226-EPP-1-2020-1-AL-EPPJMO-MODULE) (co-writer & member)	2020
Erasmus+ Jean Monnet Module EU Health Issues 610655-EPP-1-2019-1-AL- EPPJMO-MODULE (writer & leader)	2019

Erasmus+ Jean Monnet EU Center of Excellence "European Union Enlargement for the Western Balkans" 610495-EPP-1-2019-1-AL-EPPJMO-CoE (co-writer and leader)	2019
Erasmus+ Jean Monnet Network "Democratization and Reconciliation in the Western Balkans" 587516-EPP-1-2017-1-AL- EPPJMO-NETWORK (member from October 2019).	2019
Erasmus+ Jean Monnet Module "Refugee Law" 587001-EPP-1-2017-1-AL-EPPJMO-MODULE (writer & leader)	2017
Publications	
Veshi, Denard, 'EU Regulatory Competition in Asylum Law' in Central European Journal of Public Policy	2020
Koka, Enkelejda, and Denard Veshi. "Irregular Migration by Sea: Interception and Rescue Intervention in Light of International Law and the EU Sea Borders Regulation" in European Journal of Migration and Law 21.1 (2019) 26-52.	2019
Others	
Visiting fellow at Sehir University, Istambul, Turkey – Erasmus + ICM program	2019
Visiting fellow at University of Basel, Basel, Switzerland – Visiting fellow Program of the Institute for European Global Studies	2018

European Doctorate in Law & Economics

EDLE PhD Portfolio

Name PhD student : Denard Veshi
PhD-period : Oct. 2015-Nov. 2020
Promoters : Prof. Eli Salzberger & Prof. Michael Faure

Co-promoter : if applicable

PhD training

Bologna courses	***year***
Modeling private law	2015
Experimental economics	2015
Law enforcement and behavioural economics	2015
European competition law	2015
Specific courses	***year***
Seminar 'How to write a PhD'	2016
Academic Writing Skills for PhD students (Rotterdam)	2016
Seminar Series 'Empirical Legal Studies'	2016
The Law & Economic of International Trade Law	2016
The Economics of Terrorism and Counter-terrorism	2016
Introduction to German law	2016
The Economics of Institutions and Organizations	2016
Seminars and workshops	***year***
Bologna November seminar (attendance)	2017
BACT seminar series (attendance)	2018
EGSL lunch seminars (attendance)	2018
Joint Seminar 'The Future of Law and Economics' (attendance)	2018
Rotterdam Fall seminar series (peer feedback)	2017
Rotterdam Winter seminar series (peer feedback)	2017
Presentations	***year***
Bologna March seminar	2016
Hamburg June seminar	2016
Rotterdam Fall seminar series	2017
Rotterdam Winter seminar series	2017
Bologna November seminar	2018
Joint Seminar 'The Future of Law and Economics'	2018
Attendance (international) conferences	***year***
Veshi, Denard, 'The different variables that impact on the refugee decision process' Europe Day 2019 (Haifa, Israel, 2019)	2019

Veshi, Denard, 'EU Regulatory Competition in Asylum Law' in Annual Conference of the German Law & Economics (Hannover, Germany 2019)	2019
Veshi, Denard, 'The definition of refugee in the 1951 Convention: some legal reflections' in the PECSA International Conference "Connecting the European Union of Shared Aims, Freedoms, Values and Responsibilities" (Warsaw, Poland, 2019).	2019
Koka, Enkelejda and Denard Veshi, 'Illicit Return Practices of Irregular Migrants from Greece to Turkey' in the CRRML 2020 : 22th International Conference on Rights of Refugees and Migration Law (Paris, France, 2020).	2020
Teaching	***year***
International Health Law (TA) at Uni-BO	2015
Comparative Public & Constitutional Law at UNYT	2016-18
Refugee Law (Erasmus+ Jean Monnet Module) at UNYT	2017-20
EU Health Issues (Erasmus+ Jean Monnet Module) at UNYT	2019-22
EU Law in the Albanian Legal System (Erasmus+ Jean Monnet EU Center of Excellence) at UNYT	2019-22
Others	***year***
Erasmus+ Jean Monnet Module "Refugee Law" 587001-EPP-1-2017-1-AL-EPPJMO-MODULE (writer & leader) (July 2017).	2017
Visiting fellow at University of Basel, Basel, Switzerland (2018) – Visiting fellow Program of the Institute for European Global Studies	2018
Visiting fellow at Sehir University, Istambul, Turkey (2019) – (financed by) Erasmus + ICM program	2019
Erasmus+ Jean Monnet EU Center of Excellence "European Union Enlargement for the Western Balkans" 610495-EPP-1-2019-1-AL-EPPJMO-CoE (co-writer and leader) (July 2019).	2019
Erasmus+ Jean Monnet Network "Democratization and Reconciliation in the Western Balkans" 587516-EPP-1-2017-1-AL- EPPJMO-NETWORK (member from October 2019).	2019
Erasmus+ Jean Monnet Module EU Health Issues 610655-EPP-1-2019-1-AL- EPPJMO-MODULE (writer & leader) (July 2019).	2019
Erasmus+ Jean Monnet Module EU Integration Process and the Promotion of Human Rights in Albania (620226-EPP-1-2020-1-AL-EPPJMO-MODULE) (co-writer & member)	2020
Publications	***year***
Koka, Enkelejda, and Veshi, Denard. "Irregular Migration by Sea: Interception and Rescue Intervention in Light of International Law and the EU Sea Borders Regulation" in European Journal of Migration and Law 21.1 (2019) 26-52.	2019
Veshi, Denard, 'EU Regulatory Competition in Asylum Law' in Central European Journal of Public Policy	2020